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SEXUAL ORIENTATION AND ‘GAY WEDDING CAKE’ CASES UNDER AUSTRALIAN ANTI-DISCRIMINATION LEGISLATION: A FULLER APPROACH TO RELIGIOUS EXEMPTIONS

ABSTRACT

Freedom from discrimination and religious freedom have long clashed in the context of religious exemptions to anti-discrimination legislation. Historically rooted in debates over gender and race, this legal battleground has largely turned to sexual orientation in recent years. This has been particularly borne out in various ‘gay wedding cake’ disputes in overseas jurisdictions, where bakery owners have been sued for refusing to bake a cake for a same-sex wedding on religious grounds. Though the continued definition of marriage as being between a man and a woman has so far precluded these cases from arising in Australia, an in-depth examination of how such gay wedding cake cases would be decided under Australia’s varying anti-discrimination laws remains lacking. Furthermore, existing approaches have tended to focus on the external morality of law and human rights, facing the difficult task of balancing freedom from discrimination with religious freedom. To avoid the uncertainty typical of external morality debates this article suggests an alternative approach, arguing that an application of Lon L Fuller’s natural law theory, and in particular his eight ‘excellencies’ of law making, could provide a path forward for this debate in the pursuance of the *internal* morality of law. This approach would suggest an expansion of the current definitions of sexual orientation in Australian anti-discrimination legislation, the application of religious exemptions to religious organisations and religiously-affiliated bodies but not to individuals, and a shift to a quasi-subjective test to determine religious beliefs under such exemptions. This would provide a clearer path forward for lawmakers and judicial decision makers in an area of law rife with uncertainty and inconsistency.

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I INTRODUCTION

In July 2012, David Mullins and Charlie Craig visited the Masterpiece Cakeshop near Denver, Colorado to order a wedding cake. The owner of the store, Jack Phillips, informed the couple that because of his religious beliefs the store would not provide a cake for a same-sex couple’s wedding. In reliance on Colorado’s anti-discrimination legislation, which prohibits refusal of service on the ground of sexual orientation, Mullins and Craig filed complaints with the Colorado Civil Rights Division (‘CCRD’). The CCRD ruled that Phillips had illegally discriminated against the couple — a verdict subsequently upheld by the Colorado State Supreme Court.¹ This decision ignited a vitriolic public debate over the role of religion in secular Western societies, with the LGBTI+ community² advocating for freedom from discrimination, and religious adherents advocating for the right to freely exercise their beliefs.³ This infamous ‘gay wedding cake’ incident, which the U.S. Supreme Court has now agreed to hear on appeal,⁴ also became the catalyst

¹ See *Craig v Masterpiece Inc* 370 P 3d 272 (Colo Ct App, 2015); American Civil Liberties Union, *Colorado Supreme Court Refuses to Hear Case of Bakery That Turned Away Gay Couple* (25 April 2016) <<http://aclu-co.org/colorado-supreme-court-refuses-hear-case-bakery-turned-away-gay-couple/>>.

² The term ‘LGBTI+’ is used throughout this article, and stands for lesbian (women attracted to women), gay (men attracted to men), bisexual (individuals attracted to both men and women), transgender (individuals who do not identify with their biological sex, or who are beyond the boundaries of gender expression), intersex (a person who is born with a reproductive or sexual anatomy that does not fit the typical definitions of being either female or male), + (any other persons who may question their sexual orientation or gender identity or do not fall within traditional concepts of either, including pansexual persons, asexual persons and queer persons). The term ‘queer’ is used interchangeably to broadly refer to LGBTI+ persons and/or those who prefer not to use labels but who identify somewhere along the LGBTI+ spectrum. For example, many LGB people (approximately 30.5% of young persons according to the Youth Affairs Council of Victoria) refer to themselves as ‘same-sex attracted’ rather than ‘homosexual’, ‘gay’ or ‘lesbian’: see Australian Human Rights Commission, ‘Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination’ (Consultation Report, 2011) 23 <https://www.humanrights.gov.au/sites/default/files/document/publication/SGI_2011.pdf>. For more on the ‘queer’ umbrella term, see Samantha Hardy, Olivia Rundle and Damien W Riggs, *Sex, Gender, Sexuality and the Law* (Thomson Reuters, 2016) 20. As this article is about the prohibited ground of sexual orientation, it is explicitly acknowledged that transgender and/or intersex persons may indeed be heterosexual, however they are included in the LGBTI+ acronym for completeness — especially as many transgender and/or intersex persons may identify with a diverse sexual orientation.

³ See, eg, James D Esseks, ‘Another Day, Another Victory: Courts are Weighing Religious Claims to Discriminate and Finding Them Wanting’ on James D Esseks, *HuffPost: The Blog* (13 August 2015) <http://www.huffingtonpost.com/james-d-esseks/another-day-another-victo_b_7984736.html>.

⁴ At the time of writing, this case had not yet been heard: see Adam Liptak, ‘Justices to Hear Case on Religious Objections to Same-Sex Marriage’, *The New York Times* (online), 26 June 2017 <<https://www.nytimes.com/2017/06/26/us/politics/supreme-court-wedding-cake-gay-couple-masterpiece-cakeshop.html>>.

for other similar disputes in overseas jurisdictions.⁵ Such cases subvert any claims that marriage will be the last remaining bastion of conflict between religious rights and LGBTI+ rights,⁶ and suggest that the focus of the same-sex marriage debate in Australia will eventually turn to anti-discrimination laws.

Recent discourse indicates that this pivot has already begun. The Victorian Government, for instance, rejected calls to allow religious exemptions under new adoption laws that would have allowed organisations to refuse to place children in the care of same-sex couples.⁷ By contrast, the Tasmanian Government has proposed a new anti-discrimination exemption for public acts done for religious purposes.⁸ The federal government's plan for a plebiscite on same-sex marriage would also have expanded religious exemptions in anti-discrimination legislation to 'conscientious objectors',⁹ potentially causing significant constitutional law problems.¹⁰ This plan

⁵ See, eg, *Lee v McArthur* [2017] IRLR 69 (Northern Ireland Court of Appeal); *Lee v Ashers Baking Co Ltd* [2015] NICTy 2 (Northern Ireland County Court); *Eweida v United Kingdom* [2013] I Eur Court HR 37; *Elane Photography LLC v Willock*, 309 P 3d 53 (NM, 2013); *Bull v Hall* [2014] HRLR 4 (Supreme Court of the United Kingdom); Henry McDonald, "'Gay Cake" Row: Born-Again Christian Bakers Lose Court Appeal', *The Guardian* (online), 24 October 2016 <<https://www.theguardian.com/uk-news/2016/oct/24/born-again-christian-ashers-bakery-lose-court-appeal-in-gay-cake-row>>.

⁶ See generally Kristen Walker, 'The Same-Sex Marriage Debate in Australia' (2007) 11 *International Journal of Human Rights* 109; Elizabeth Keogh, 'The Practical Implications of Marriage Inequality' (2015) 27(3) *Legaldate* 2.

⁷ Farrah Tomazin, 'Gay Adoption Could be Hindered over Push for Religious Exemptions', *The Age* (online), 13 September 2015 <<http://www.theage.com.au/victoria/gay-adoption-could-be-hindered-over-push-for-religious-exemptions-20150912-gjl2jz.html>>.

⁸ Richard Baines, 'Tasmania Seeks to Protect "Freedom of Religion" Ahead of Gay Marriage Debate', *ABC News* (online), 17 August 2016 <<http://www.abc.net.au/news/2016-08-17/revamp-flagged-for-discrimination-act-ahead-of-gay-marriage-vote/7751322>>; Anti-Discrimination Amendment Bill 2016 (Tas) cl 4.

⁹ George Brandis, (Attorney-General for Australia), Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill (10 October 2016) sch 1, pt 1 <<https://www.attorneygeneral.gov.au/MediaReleases/Documents/Exposure-Draft-Marriage-Amendment.pdf>>; Paul Karp, 'Marriage Equality: Law Would Protect "Conscientious Objectors" Who Reject Same-Sex Weddings', *The Guardian* (online), 14 September 2016 <<https://www.theguardian.com/australia-news/2016/sep/14/marriage-equality-law-would-protect-conscientious-objectors-who-reject-gay-weddings>>.

¹⁰ These exemptions were to be contained in the *Marriage Act 1961* (Cth) rather than in anti-discrimination legislation. An additional proposed amendment to the *Sex Discrimination Act 1984* (Cth) was to ensure that actions undertaken in reliance on these 'conscientious objector' clauses would be exempt from prohibitions against discrimination on the ground of sexual orientation. However, state and territory anti-discrimination legislation would continue to apply, which could create inconsistency that may be resolved by section 109 of the *Australian Constitution*. The operation of section 109 is, intriguingly, limited in regards to state and territory anti-discrimination laws: see *Sex Discrimination Act 1984* (Cth) s 10(3); *Marriage*

drew the support of Australian Christian Lobby director Lyle Shelton, who argued, in a nod to the gay wedding cake cases that, ‘[p]eople should be free to live out your beliefs — not just if you’re a minister but also if you’re [a] photographer or own a wedding reception venue.’¹¹

While high rates of discrimination against LGBTI+ persons are reported in Australia,¹² the current definition of Australian marriage accommodating only opposite-sex couples has meant that ‘gay wedding cake’ cases have yet to arise.¹³ In moving forward, the following question is therefore crucial to law makers at federal, state and territory levels: to what extent should religious exemptions to anti-discrimination legislation apply to the ground of sexual orientation?¹⁴ This article applies a natural law ‘internal morality’ framework to provide recommendations that may help lawmakers in resolving this question, and proceeds in three parts.

Part II will examine in detail Australia’s federal, state and territory anti-discrimination laws to determine how LGBTI+ individuals are protected from discrimination and how religious exemptions operate to exclude liability for such discrimination. This Part will posit that current legal approaches to this issue in Australia have created inconsistency, ambiguity and uncertainty. While various commentators have already undertaken international comparative approaches,¹⁵ and scrutinised overseas

Act 1961 (Cth) s 6. For an example of how these inconsistencies may play out in a state or territory jurisdiction, see Equal Opportunity Act 1984 (WA) s 69(1)(a); Interpretation Act 1984 (WA) s 5.

¹¹ Karp, above n 9.

¹² See, eg, Ian Smith, Lindsay Oades and Grace McCarthy, ‘The Australian Corporate Closet, Why it’s Still so Full: a Review of Incidence Rates for Sexual Orientation Discrimination and Gender Identity Discrimination in the Workplace’ (2013) 9 *Gay and Lesbian Issues and Psychology Review* 51; Human Rights and Equal Opportunity Commission, ‘Stories of Discrimination Experienced by the Gay, Lesbian, Bisexual, Transgender and Intersex Community’ (Inquiry Report, October 2007) <<https://www.humanrights.gov.au/publications/stories-discrimination>>.

¹³ At the time of writing, marriage in Australia is still defined as being exclusively between a man and a woman, however changes to incorporate same-sex marriage appear imminent: see Joe Kelly and Rachel Baxendale, ‘Gay Marriage “Imminent”, Say Advocates’, *The Australian* (online), 10 July 2017 <<http://www.theaustralian.com.au/national-affairs/gay-marriage-imminent-say-advocates/news-story/fd7c6b7b41c5341aaaf62076e6be29c8>>.

¹⁴ While gender identity has also become a prominent point of contention between LGBTI+ activists and religious advocates, the focus of this article will be on sexual orientation. On gender identity debates, see, eg, Hadley Malcolm, ‘More than 700 000 Pledge to Boycott Target over Transgender Bathroom Policy’, *USA Today* (online), 28 April 2016 <<http://www.usatoday.com/story/money/2016/04/25/conservative-christian-group-boycotting-target-transgender-bathroom-policy/83491396/>>.

¹⁵ See, eg, Neil Foster, ‘Freedom of Religion and Balancing Clauses in Discrimination Legislation’ (2016) 5 *Oxford Journal of Law and Religion* 385; Anthony Gray, ‘The Reconciliation of Freedom of Religion with Anti-Discrimination Rights’ (2016)

domestic laws in depth,¹⁶ a comprehensive examination and comparison of Australia's anti-discrimination laws and religious exemptions is lacking.

Part III will outline and interpret Lon L Fuller's internal morality approach to law,¹⁷ particularly in regards to Fuller's eight 'excellencies' of generality, promulgation, non-retroactivity, clarity, avoidance of contradiction, avoidance of laws requiring the impossible, constancy of law, and congruence between official action and declared rule. These excellencies provide a way to strive towards good law making. It will be argued that Fuller's internal morality approach could provide a different perspective to a debate that has largely focused on the external morality of law, in particular human rights.¹⁸ These external morality approaches will be outlined to understand how a Fullerian internal morality analysis can provide a viable and alternative path forward for religious exemptions. While Fuller makes many claims about the intersections between morality and law, this article will focus on his eight excellencies. Indeed, though others have critiqued Fuller's theory,¹⁹ it is not the task of this article to defend his claims,²⁰ but rather to interpret and apply them.

In Part IV, Fuller's treatise will be applied to religious exemptions to sexual orientation under anti-discrimination legislation to consider an ideal approach to

42 *Monash University Law Review* 72, 77-90; Reid Mortensen, 'Rendering to God and Caesar: Religion in Australian Discrimination Law' (1995) 18 *University of Queensland Law Journal* 208.

¹⁶ See, eg, Thomas C Berg, 'What Same-Sex Marriage Claims and Religious Liberty Claims Have in Common' (2010) 5 *Northwestern Journal of Law and Social Policy* 206; Douglas NeJaime, 'Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination' (2012) 100 *California Law Review* 1169; Roger Severino, 'Or for Poorer: How Same-Sex Marriage Threatens Religious Liberty' (2006) 30 *Harvard Journal of Law and Public Policy* 939.

¹⁷ Premised upon Lon L Fuller, *The Morality of Law* (Yale University Press, revised ed, 1969).

¹⁸ See, eg, Gray, above n 15; Nicholas Aroney, 'The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation' (2006) 34 *Federal Law Review* 287; Julia Crandell, *Freedom to Discriminate: Finding the Balance Between Freedom of Religion and Non-discrimination in the Provision of Services by Religious Bodies and Individuals to LGBTI Service Users in Australia* (Honours Thesis, University of Western Australia, 2015).

¹⁹ See, eg, H L A Hart, 'Book Review: The Morality of Law' (1965) 78 *Harvard Law Review* 1281; Peter P Nicholson, 'The Internal Morality of Law: Fuller and His Critics' (1974) 84 *Ethics* 307; Nicola Lacey, 'Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate' (2008) 83 *New York University Law Review* 1059; David Luban, 'The Rule of Law and Human Dignity: Re-Examining Fuller's Canons' (2010) 2 *Hague Journal on the Rule of Law* 29.

²⁰ Many others have done this: see, eg, Dan Priel, 'Reconstructing Fuller's Argument against Legal Positivism' (2013) 26 *Canadian Journal of Law and Jurisprudence* 399; Kristen Ann Rundle, 'Fuller's Internal Morality of Law' (2016) 11 *Philosophy Compass* 499, 500.

help minimise inconsistency and uncertainty in the Australian context. Applying a theoretical perspective focusing on internal characteristics of law, rather than existing rights-based approaches focusing on external characteristics, could forge a different path for socio-legal debates on this issue. Though Fuller’s internal morality cannot formulate an ideal phrasing for religious exemptions,²¹ this framework can be used to provide key recommendations in moving the debate forward in Australia. This application of Fuller’s eight ideal characteristics of excellent law leads to three key recommendations: broadening the prohibited ground of sexual orientation; allowing religiously-affiliated bodies to rely on exemptions but not individuals; and shifting the requisite belief test from an objective standard to a quasi-subjective standard. These recommendations provide clear guidance for future jurisprudence.

II SEXUAL ORIENTATION AND RELIGIOUS EXEMPTIONS UNDER AUSTRALIAN ANTI-DISCRIMINATION LEGISLATION

Religion has historically held an important place in law. The origins of contemporary Western legal tradition can be traced back to the Roman Catholic Church first establishing its legal unity nearly a millennium ago.²² The common law tradition partly arose from the collection and interpretation of rules applied from a range of churches into one ‘common’ place.²³ In this regard, many elements of Western legal tradition are rooted in Judeo-Christian religious and moral beliefs.²⁴ Indeed, since Australia’s inception, the Commonwealth has been constitutionally proscribed from making any law to prohibit the free exercise of religion.²⁵ In more recent years, religious exemptions have formed a key part of anti-discrimination laws. Discourse around such exemptions has historically focused on race and gender, but has turned to sexual orientation in recent years,²⁶ perhaps due to the increasingly controversial relationship between religiosity and sexuality.²⁷

²¹ Cf Luban, above n 19, 33–9.

²² Harold J Berman, ‘Religious Foundations of Law in the West: An Historical Perspective’ (1983) 1 *Journal of Law and Religion* 3, 5.

²³ Gray, above n 15, 72–3.

²⁴ Berman, above n 22, 3.

²⁵ Or to establish a religion or impose religious observance: see *Australian Constitution* s 116.

²⁶ Contrasting, for example, Mortensen, above n 15, 221–7 with Gray, above n 15. At 232, Mortensen noted that: ‘The ... application of sex discrimination laws in questions like the ordination of Catholic priests or Presbyterian ministers would be an extremely serious attempt to destroy the internal life of religious groups that do not accept gender equality without qualification.’

²⁷ The relatively modern addition of sexual orientation as a universally prohibited ground in anti-discrimination legislation in Australia may also be relevant, as the Commonwealth only added this prohibited ground in 2013: see *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth).

Religious exemptions under Australia's anti-discrimination laws on the ground of sexual orientation have only been considered peripherally,²⁸ with little examination of the variations between federal, state and territory laws. This Part explains the current state of these laws and concludes with three key questions that must be answered in order to clarify the ideal scope of religious exemptions: who should be protected by the sexual orientation prohibited ground; to whom should religious exemptions apply; and how should the requisite religious beliefs be tested? Owing both to a dearth of relevant case law and the Fullerian emphasis on written law, legislation will be the focus.

A Defining Discrimination

Before ascertaining how religious exemptions apply to sexual orientation, the idea of discrimination itself must first be understood. The nine federal, state and territory anti-discrimination laws pertinent to sexual orientation operate nearly identically in defining discrimination. Direct discrimination occurs when a person (Person A) treats another person (Person B) less favourably than they would have treated a different person (Person C) in the same circumstances because of a characteristic of Person B (prohibited ground) that Person C does not possess.²⁹ Indirect discrimination occurs when Person A imposes a condition on Person B that is likely to disadvantage Person B because of the characteristic(s) that they possess.³⁰ While a range of

²⁸ With public discussions on LGBTI+ issues largely focused on the same-sex marriage debate or the Safe Schools program: see, eg, Michael Safi, 'Alan Jones Rejects Potentially "Divisive" Same-Sex Marriage Plebiscite', *The Guardian* (online), 8 March 2016 <<http://www.theguardian.com/australia-news/2016/mar/08/alan-jones-rejects-same-sex-marriage-plebiscite>>; Craig Cook, 'Outspoken Senator Cory Bernardi Says Safe Schools Program Bullies Heterosexual Children', *The Advertiser* (online), 28 February 2016 <<http://www.adelaidenow.com.au/news/south-australia/outspoken-senator-cory-bernardi-says-safe-schools-program-bullies-heterosexual-children/news-story/083a86ba9c4b3d63fa3d8e0e6903f39a>>.

²⁹ *Sex Discrimination Act 1984* (Cth) s 5A(1); *Discrimination Act 1991* (ACT) s (2); *Anti-Discrimination Act 1977* (NSW) s 49ZG(1)(a); *Anti-Discrimination Act 1992* (NT) s 20(2)(a); *Anti-Discrimination Act 1991* (Qld) s 10(1); *Equal Opportunity Act 1984* (SA) s 29(2)(a); *Anti-Discrimination Act 1998* (Tas) s 14; *Equal Opportunity Act 2010* (Vic) s 8; *Equal Opportunity Act 1984* (WA) s 35O(1). For further interpretation of the requirements for direct discrimination, see *JM v QFG* [2000] 1 Qd R 373; *Bates v BDG Properties Pty Ltd* [2013] NSWADT 285.

³⁰ *Sex Discrimination Act 1984* (Cth) s 5A(2); *Discrimination Act 1991* (ACT) s 8(3); *Anti-Discrimination Act 1977* (NSW) s 49ZG(1)(b); *Anti-Discrimination Act 1991* (Qld) s 11(1); *Equal Opportunity Act 1984* (SA) s 29(2)(b); *Anti-Discrimination Act 1998* (Tas) s 15; *Equal Opportunity Act 2010* (Vic) s 9; *Equal Opportunity Act 1984* (WA) s 35O(3). The Northern Territory does not have a specific provision dealing with direct discrimination. For further interpretation of the requirements for indirect discrimination, see *Li v Edith Cowan University (No 3)* [2013] WASCA 277; *Lindisfarne R & SLA Sub-Branch v Buchanan* [2004] TASSC 73; *Garriock v Football Federation Australia* [2016] NSWCATAD 63. Unfavourable treatment because of a

prohibited grounds are protected, including race, religion and age, the focus of this article is on sexual orientation.³¹

The prohibition of sexual orientation discrimination also encompasses discrimination on the ground of any characteristics that generally appertain to or are imputed to persons of a particular sexual orientation.³² As such, discrimination against any person due to their ‘sexual attraction’ or sexual acts would inescapably fall under the sexual orientation prohibited ground.³³ The areas in which discrimination is prohibited ordinarily include employment, health services, education, accommodation, goods and services, insurance, superannuation, and governmental programs.³⁴

B Defining Sexual Orientation

All nine jurisdictions now protect some form of sexual orientation from discrimination. The Australian Capital Territory, Victoria and Western Australia each define ‘sexual orientation’ or ‘sexuality’ as ‘heterosexuality, homosexuality, lesbianism or bisexuality’.³⁵ Queensland legislation protects only heterosexual, homosexual and bisexual persons, with no explicit mention of lesbian persons,³⁶ while the Tasmanian legislation contains the same list but leaves it open-ended.³⁷ Until last year, South Australia similarly defined ‘sexuality’ — but now protects ‘sexual orientation’ without

relative who possesses a prohibited ground is also considered discrimination in some jurisdictions: *Anti-Discrimination Act 1977* (NSW) s 49ZG(1)(a); *Equal Opportunity Act 1984* (SA) s 29(2)(d); *Equal Opportunity Act 1984* (WA) s 35O(2).

³¹ Some anti-discrimination laws contain a specific prohibition on discrimination on the ground of sexual orientation: see, eg, *Sex Discrimination Act 1984* (Cth) s 5A. Others contain a general prohibition of discrimination on any prohibited grounds (which includes sexual orientation by definition): see, eg, *Anti-Discrimination Act 1998* (Tas) ss 14, 15. These differences in construction are trivial and in practice they operate in the same way.

³² *Sex Discrimination Act 1984* (Cth) ss 5A(1)(b), (c); *Discrimination Act 1991* (ACT) s 7(2); *Anti-Discrimination Act 1977* (NSW) s 49ZG(2); *Anti-Discrimination Act 1992* (NT) ss 20(2)(b), (c); *Anti-Discrimination Act 1991* (Qld) s 8; *Equal Opportunity Act 1984* (SA) s 29(2)(c); *Anti-Discrimination Act 1998* (Tas) s 14(2); *Equal Opportunity Act 1984* (WA) ss 35O(1)(b), (c).

³³ *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615, 630–31 (Maxwell P) (‘*Christian Youth Camps*’).

³⁴ See, eg, *Anti-Discrimination Act 1977* (NSW) ss 49ZH–ZR; *Anti-Discrimination Act 1992* (NT) ss 28–49; *Equal Opportunity Act 1984* (SA) ss 30–40.

³⁵ Western Australia expands this beyond actual sexual orientation to also include imputed sexual orientation: *Discrimination Act 1991* (ACT) Dictionary (definition of ‘sexuality’); *Equal Opportunity Act 2010* (Vic) s 4 (definition of ‘sexual orientation’); *Equal Opportunity Act 1984* (WA) s 4 (definition of ‘sexual orientation’).

³⁶ *Anti-Discrimination Act 1991* (Qld) s 4 (definition of ‘sexuality’).

³⁷ Due to the use of the word ‘includes’: *Anti-Discrimination Act 1998* (Tas) s 3 (definition of ‘sexual orientation’).

a legislative definition of this ground.³⁸ The Northern Territory defines ‘sexuality’ as meaning ‘the sexual characteristics or imputed sexual characteristics of heterosexuality, homosexuality, bisexuality or transsexuality’.³⁹ New South Wales provides protection only to ‘homosexuals’.⁴⁰ Though defined in the New South Wales legislation as ‘male or female homosexuals’,⁴¹ the term ‘homosexuality’ has previously been considered to mean only male same-sex attraction.⁴² It has been read more expansively in recent times to include bisexual persons where such persons identify as being same-sex attracted.⁴³ Of course, not all bisexual persons will identify this way so strictly,⁴⁴ and as such New South Wales’ definition remains the narrowest.

The Commonwealth legislation defines ‘sexual orientation’ as meaning a person’s sexual orientation towards: persons of the same sex; persons of a different sex; or persons of the same sex and persons of different sex.⁴⁵ This is theoretically broader than state and territory definitions since the Commonwealth legislation refers to ‘a different sex’ rather than ‘the opposite sex’. This could, under an expansive reading, include any person that feels sexual attraction regardless of gender identity or sexuality.⁴⁶ The avoidance of labels thus captures for instance men who have sex with men but who do not identify as being homosexual,⁴⁷ and broadens the scope of the prohibited ground. Indeed, it was explicitly recognised in the relevant explanatory memorandum that the use of ‘different’ rather than ‘opposite’ was a deliberate attempt to expand the scope of the provision.⁴⁸

³⁸ Equal Opportunity Act 1984 (SA) pt 3; Statutes Amendment (Gender Identity and Equality) Act 2016 (SA) s 14(3).

³⁹ Despite ‘transsexuality’ more accurately being described as a gender identity than a sexual orientation: *Anti-Discrimination Act 1992* (NT) s 4 (definition of ‘sexuality’).

⁴⁰ *Anti-Discrimination Act 1977* (NSW) s 49ZF.

⁴¹ *Ibid* s 4.

⁴² See generally Anna Chapman, ‘Australian Anti-Discrimination Law and Sexual Orientation: Some Observations on Terminology and Scope’ (1996) 3 *Murdoch University Electronic Journal of Law* 21.

⁴³ *Owen v Menzies* [2013] 2 Qd R 327, 333 [5] (de Jersey CJ), 355 [86] (McMurdo P), 357 [101] (Muir JA). McMurdo P noted that ‘an essential aspect of bisexuality is a sexual feeling for a person of the same sex, that is, homosexuality. It follows that vilification of homosexuals is also vilification of bisexuals at least where, like [the appellant], the bisexual person identifies with homosexuals’: at 355 [86].

⁴⁴ See Juliet Richters et al, ‘Sexual Identity, Sexual Attraction and Sexual Experience: the Second Australian Study of Health and Relationships’ (2014) 11 *Sexual Health* 451, 454.

⁴⁵ *Sex Discrimination Act 1984* (Cth) s 4 (definition of ‘sexual orientation’).

⁴⁶ Cf *Bunning v Centacare* (2015) 293 FLR 37, as will be discussed in Part IV.

⁴⁷ See Theodore Bennett, ‘Orientations and “Deviations”’: Sexuality in Anti-Discrimination Law’ (2016) 42 *Monash University Law Review* 15, 26.

⁴⁸ Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) cl 14.

These definitions could therefore be placed into three categories in reference to their prohibited ground of sexual orientation or sexuality, which are set out in table 1.⁴⁹

Table 1: A categorisation of the protection of ‘sexual orientation’ or ‘sexuality’ in Australian anti-discrimination legislation, excluding South Australia as it does not legislatively define ‘sexual orientation’.

Jurisdiction	Ground of protection	Categorisation
NSW	Homosexuality	Narrow
ACT, NT, Qld, Tas, Vic, WA	Heterosexuality, homosexuality (whether explicitly or impliedly including lesbianism), bisexuality	Moderate
Cth	A person’s sexual orientation towards persons of either the same sex, or a different sex, or persons of the same sex or different sex	Broad

C General Religious Exemptions

Though discrimination on the ground of sexual orientation is prohibited in all jurisdictions in Australia, some exceptions to this prohibition apply, including, pertinently, religious exemptions. These provisions operate to exclude liability for discriminatory acts if certain criteria are met.⁵⁰ Religious exemptions are structured somewhat similarly across federal, state and territory anti-discrimination legislation, and could broadly be categorised in the following three ways: specific religious exemptions, educational religious exemptions, and general religious exemptions. Specific religious exemptions apply for the appointment and training of priests and ministers and attract little attention in regards to sexual orientation,⁵¹ while

⁴⁹ As already noted, the additional ‘transsexual’ protection in the NT’s definition of ‘sexual orientation’ is more accurately described as gender identity and is therefore not pertinent to this article.

⁵⁰ While it must be noted that religious exemption provisions usually operate broadly to all prohibited grounds, the focus of this article is on discriminatory acts on the ground of sexual orientation. As such, religious exemptions will only be examined to the extent they that apply to this prohibited ground.

⁵¹ Subject to very minor syntactical differences, similar specific exemptions are found in all jurisdictions in Australia: *Sex Discrimination Act 1984* (Cth) s 37(1); *Discrimination Act 1991* (ACT) s 32; *Anti-Discrimination Act 1977* (NSW) s 56; *Anti-Discrimination Act 1992* (NT) s 53; *Anti-Discrimination Act 1991* (Qld) s 90; *Equal Opportunity Act 1984* (SA) s 50; *Anti-Discrimination Act 1998* (Tas) s 52; *Equal Opportunity Act 2010* (Vic) s 82(1); *Equal Opportunity Act 1984* (WA) s 72. The SA legislation has one slight variation, adding an exemption for the ‘administration’ of bodies established for religious purposes: *Equal Opportunity Act 1984* (SA) s 50(ba).

educational religious exemptions apply to religiously-affiliated schools.⁵² The focus of this article, however, is on general religious exemptions.

All Australian anti-discrimination laws contain a general religious exemption, which remains the greatest source of disagreement and debate. This general religious exemption excludes liability for discrimination on the ground of sexual orientation in all jurisdictions except for Tasmania.⁵³ This two-limbed exemption typically requires that any other act or practice of a body established for religious purposes either:

- 1 conforms to the doctrines, tenets or beliefs of the religion; or
- 2 is necessary to avoid injury to the religious susceptibilities of adherents of that religion.⁵⁴

Therefore, the typical 'baseline' test only requires that one of these two limbs be satisfied. Some variants exist in the legislation: for example, South Australian legislation refers to religious 'precepts',⁵⁵ while Victorian legislation refers to 'principles'.⁵⁶ These differences are terminological and largely immaterial. However, more critical differences in the legislation create substantial inconsistencies. Victoria, for example, adds the requirement that the necessity to avoid injury to religious susceptibilities be 'reasonable',⁵⁷ enshrining a more rigid objective test. Victoria and Tasmania also provide a general religious exemption to individuals, utilising the same two-limb test.⁵⁸ Tasmania's individual religious exemption does not, however,

⁵² *Sex Discrimination Act 1984* (Cth) s 38; *Discrimination Act 1991* (ACT) s 33; *Equal Opportunity Act 1984* (WA) s 73. Broader exemptions apply in Victoria and NSW: *Anti-Discrimination Act 1977* (NSW) ss 4, 49ZO(3); *Equal Opportunity Act 2010* (Vic) s 83(1). Narrower exemptions apply in SA and the NT: *Anti-Discrimination Act 1992* (NT) s 37A; *Equal Opportunity Act 1984* (SA) s 34(3). Tasmania and Queensland do not have educational religious exemptions: see *Anti-Discrimination Act 1991* (Qld) s 109(2); *Anti-Discrimination Act 1998* (Tas) ss 16(o), (p), 52. See generally Carolyn Evans and Beth Gaze, 'Discrimination by Religious Schools: Views from the Coal Face' (2010) 34 *Melbourne University Law Review* 392; 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' (2011) 36 *Monash University Law Review* 16.

⁵³ *Anti-Discrimination Act 1998* (Tas) s 52(d).

⁵⁴ *Sex Discrimination Act 1984* (Cth) s 37(1)(d); *Anti-Discrimination Act 1977* (NSW) s 56(d); *Equal Opportunity Act 1984* (SA) s 50(1)(c); *Anti-Discrimination Act 1998* (Tas) s 52(d); *Equal Opportunity Act 1984* (WA) s 72(d).

⁵⁵ *Equal Opportunity Act 1984* (SA) s 50(1)(c).

⁵⁶ *Equal Opportunity Act 2010* (Vic) s 82(2)(a). Beyond this, Tasmanian legislation exempts actions that are 'carried out in accordance with the doctrine of a particular religion' and are 'necessary to avoid offending the religious sensitivities of any person of that religion': *Anti-Discrimination Act 1998* (Tas) s 52(d) (emphasis added).

⁵⁷ *Equal Opportunity Act 2010* (Vic) s 82(2)(b).

⁵⁸ *Ibid* s 84; *Anti-Discrimination Act 1998* (Tas) s 52.

apply to sexual orientation.⁵⁹ New South Wales requires that the body be ‘established to propagate religion’,⁶⁰ which is more narrow than the usual requirement. Contrastingly, the Northern Territory exemption is broader, requiring only that the act is done ‘as part of any religious observance or practice’.⁶¹ Tasmania, the Australian Capital Territory and Queensland require that an act both conforms to the beliefs of the religion *and* is necessary to avoid injury to the religious susceptibilities of adherents,⁶² rather than only requiring one of these two limbs. Finally, Queensland’s exemption does not apply in regards to employment or education,⁶³ while the Commonwealth’s exemption does not apply to Commonwealth-funded aged care facilities.⁶⁴ These variants are outlined in table 2, with the minor variations at the top increasing gradually to the major variations at the bottom:

In addition to this patchwork of inconsistencies across jurisdictions, the vagueness of the key phrase ‘avoid injury to the religious susceptibilities of adherents’ is problematic. Carolyn Evans and Leilani Ujvari argue that ‘this type of exemption is questionable both in terms of legal clarity and the principled justification supporting it.’⁶⁵ Case law seems to confirm this, especially where religious adherents may be divided on an issue — such as their support of or opposition towards same-sex attraction.⁶⁶ Though it is apparent that this second limb is an objective test,⁶⁷ it is unclear whether the first limb is subjective or objective in nature.

⁵⁹ The individual religious exemption applies only to discrimination on the grounds of religious belief or affiliation, or religious activity. Tasmanian legislation does not provide a separate exemption to bodies established for religious purposes, though they are likely encapsulated by the phrasing of ‘person’ in the individual exemption: see *Anti-Discrimination Act 1998* (Tas) s 52.

⁶⁰ *Anti-Discrimination Act 1977* (NSW) s 56(d).

⁶¹ *Anti-Discrimination Act 1992* (NT) s 51(d).

⁶² *Discrimination Act 1991* (ACT) s 32(d); *Anti-Discrimination Act 1991* (Qld) s 109(1)(d); *Anti-Discrimination Act 1998* (Tas) ss 52(d)(i)–(ii).

⁶³ This explains why Queensland has no educational religious exemption, as religious exemptions are excluded from the broad field of education whether the school is religiously-affiliated or not. See *Anti-Discrimination Act 1991* (Qld) s 109(2).

⁶⁴ Excluding the employment of persons to provide such care: *Sex Discrimination Act 1984* (Cth) s 37.

⁶⁵ Carolyn Evans and Leilani Ujvari, ‘Non-discrimination Laws and Religious Schools in Australia’ (2009) 30 *Adelaide Law Review* 31, 53.

⁶⁶ See the discussion directly below; see especially *Christian Youth Camps* (2014) 308 ALR 615, 672–73.

⁶⁷ See Chris Sidoti, ‘Report of Inquiry into a Complaint of Discrimination in Employment and Occupation: Discrimination on the Ground of Sexual Preference’ (HRC Report No 6, Australian Human Rights Commission, March 1998) 22–3.

Table 2: An outline of the variation of religious exemption clauses in Australian anti-discrimination legislation from the typical two-limbed test outlined above.

Jurisdiction	Variation(s) from typical two-limbed test	Area of variation (scope of exemption; first limb; second limb; requiring both limbs)
WA, SA	None	None
Cth	Excludes the exemption from Commonwealth-funded aged care facilities	Scope of exemption
NSW	Applies religious exemptions only to bodies 'established to propagate religion'	Scope of exemption
NT	Requires only that the act is done 'as part of any religious observance or practice'	First limb and second limb
ACT	Requires that both limbs be satisfied	Requiring both limbs
Qld	Requires that both limbs be satisfied, and excludes the exemption from employment and education	Scope of exemption and requiring both limbs
Vic	Adds a further objective requirement to the second limb, and provides a general religious exemption to individuals	Scope of exemption and second limb
Tas	Requires that both limbs be satisfied, provides a general religious exemption to individuals, and does not apply the exemption to sexual orientation	Scope of exemption and requiring both limbs

D Case Law on Religious Exemptions: Sparse and Inconsistent

While the various federal, state and territory anti-discrimination legislation displays inconsistency across jurisdictions, the case law demonstrates further discrepancies within jurisdictions. The case law considering either religious exemptions to anti-discrimination legislation and/or the prohibited ground of sexual orientation is sparse due to the expense of litigation, the resolving of most matters through private conciliation, and the under-reporting of discrimination.⁶⁸ Earlier discrimination cases tended to focus on how a person could establish that they were homosexual,⁶⁹ or whether anti-discrimination protections should be extended to industrial awards.⁷⁰

⁶⁸ Hardy, Rundle and Riggs, above n 2, 130; see, eg an allegation of discrimination on the ground of sexual orientation in employment was dismissed in *Thomson v KPMG* [2015] FWC 1212 due to the lateness of the relevant application.

⁶⁹ See, eg, *Hope v NIB Health Funds Ltd* (1995) EOC 92–716; *Wilson v Qantas Airways Ltd* (1985) EOC 92–141.

⁷⁰ See, eg, *Review of Principles for Approval of Enterprise Agreements* (2000) 101 IR 332; *State Personal/Carer's Leave Case* (1998) 84 IR 416.

More recently, many decisions of the various tribunals that exercise original jurisdiction over anti-discrimination legislation are not reported. Of those decisions reported, nearly all concern matters of procedure or evidence and do not substantively discuss discrimination.⁷¹ It is therefore very difficult to find contemporary case law concerning the specific application of religious exemptions to a particular prohibited ground. However, the seminal case law that does exist in this area reflects growing inconsistencies and differences in applying anti-discrimination legislation. While some commentators have contended that religious exemptions have been applied very narrowly,⁷² others have levelled the criticism that the exemptions are unbounded in their breadth.⁷³ In reality, the jurisprudence fits somewhere between these two polar views.

Only two seminal cases provide an in-depth examination of general religious exemptions on the ground of sexual orientation in contemporary anti-discrimination legislation. By far the most cited case is the *Christian Youth Camps* decision in 2014.⁷⁴

1 *Christian Youth Camps*

This decision concerned the refusal of operators of a youth camp to allow the campsite to be hired by a youth suicide prevention group that focused particularly on same-sex attracted youth. The youth camp was associated with the Christian Brethren Church, and thus it was argued that they fell under both of Victoria’s ‘religious body’ and ‘individual’ general religious exemptions to anti-discrimination law. The Victorian Court of Appeal majority (2:1), with Neave JA agreeing with Maxwell P’s findings,⁷⁵ upheld the Victorian Civil and Administrative Tribunal’s decision that the youth camp was not a ‘body established for religious purposes’, because the purpose of the youth camp was to provide camping facilities for the community.⁷⁶ The fact that the camp

⁷¹ This is the case both at the tribunal level and at the appellate court level: See, eg, *Owen v Menzies* [2010] QCA 137; *ACT Human Rights Commission v Raytheon Australia Pty Ltd* [2009] ACTSC 55; *Hehir v Smith* [2002] QSC 092; *Hesford v Integrated Group Ltd* [2008] WASAT 22; *Bates v BDG Properties Pty Ltd* [2013] NSWADT 285; *Campagnolo v Bonnie Doon Football Club Inc* [2010] VCAT 647; *Hecimovic v Victoria Police* [2005] VCAT 870; *Garcia v Miles* [2012] VCAT 262. Other cases were summarily dismissed or dismissed on appeal: see, eg, *Forrester v Aims Corp* [2004] VSC 506; *Loizou v University of Melbourne* [2000] VSC 1.

⁷² Charlotte Baines, ‘A Delicate Balance: Religious Autonomy Rights and LGBTI Rights in Australia’ (2015) 10 *Religion & Human Rights* 45, 59; see also Gray, above n 15, 108.

⁷³ See, eg, Alastair Lawrie, ‘What’s Wrong with Western Australia’s Equal Opportunity Act 1984’ on *Alastair Lawrie* (23 October 2016) <<https://alastairlawrie.net/2016/10/23/whats-wrong-with-western-australias-equal-opportunity-act-1984/>>.

⁷⁴ *Christian Youth Camps* (2014) 308 ALR 615; Hardy, Rundle and Riggs, above n 2, 114; Gray, above n 15.

⁷⁵ Agreeing to all the major points that will be discussed in this article: *Christian Youth Camps* (2014) 308 ALR 615, 691 (Neave JA).

⁷⁶ *Ibid* 666–9 (Maxwell P).

operators aspired for the facilities to be managed in a Christian spirit did not render it a religious body.⁷⁷ President Maxwell noted that an activity that is secular does not become religious purely because it is done for a religious purpose; the purpose behind the act must ‘have an essentially religious character’.⁷⁸

Turning, in any case, to apply the general two-limb religious exemption test noted above, the majority found that the camp failed to satisfy either of these limbs. President Maxwell held that the camp could not rely on passages in the Bible as establishing a religious belief that sexual activity between members of the same sex is against God’s will, as the applicability of this doctrine was variable and changeable over time.⁷⁹ In particular, it was noted that many religious adherents accepted the non-literal and historical nature of various Bible passages.⁸⁰ According to his Honour, any act falling under the first limb must be of an ‘intrinsically religious character’ and be based upon a ‘fundamental doctrine’ of the religion, such that it gives ‘the person no alternative but to act (or refrain from acting) in the particular way’ that they did.⁸¹ Though the sincerity of the camp operators’ belief that homosexuality was prohibited by Christian scripture was not doubted,⁸² disagreement amongst religious adherents as to the prohibition of homosexuality meant this could not be considered a ‘religious doctrine’.⁸³ Thus, it is clear that an objective test was applied to the first limb in this instance.⁸⁴

His Honour also found the discriminatory act failed to fall under the second limb. Assessed objectively, this requires that not doing the discriminatory act in question ‘would be an affront to the reasonable expectation of adherents that the body be able to conduct itself in accordance with the doctrines to which they subscribed’.⁸⁵ As there was no evidence the camp had asked any previous renters if they were homosexual, Maxwell P held that the discrimination did not have a ‘real and direct impact on the religious sensitivities’ of religious adherents nor ‘caus[ed] real harm’ to their religious sensitivities.⁸⁶ Due to the failure to fall under either of these two

⁷⁷ Especially as nothing the youth camp distributed or published online restricted who could book their facilities: *ibid* 669 (Maxwell P).

⁷⁸ See *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 132 (Dixon J), quoted in *ibid* 665 (Maxwell P).

⁷⁹ *Christian Youth Camps* (2014) 308 ALR 615, 673–74.

⁸⁰ *Ibid*.

⁸¹ *Ibid* 671, 673, 675.

⁸² *Ibid* 673, quoting *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd* [2010] VCAT 1613, [307] (Hampel J).

⁸³ *Christian Youth Camps* (2014) 308 ALR 615, 674–75 (Maxwell P).

⁸⁴ Even if it were a religious doctrine, Maxwell P held that there was no evidence that an obligation to interfere with another person’s sexual orientation was required in order for religious adherents to act ‘in conformity’ with such a doctrine: *ibid* 675.

⁸⁵ *Ibid* 678–79.

⁸⁶ *Ibid* 678, quoting *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd* (Anti-Discrimination) [2010] VCAT 1613 [332] (Hampel J) (emphasis altered).

limbs, the camp could not rely on Victoria’s individual general religious exemption either.

Considering the criticism levelled at the majority decision,⁸⁷ the dissenting judgment in this case is worth considering. While agreeing that the camp was not a body established for religious purposes,⁸⁸ Redlich JA employed a subjective test to what was considered necessary to conform to religious beliefs and thereby found, contrary to the majority decision, that the individual general religious exemption was in fact applicable.⁸⁹ This test required an ‘action which a person of faith undertakes in order to maintain consistency with the canons of conduct associated with their religious beliefs’.⁹⁰ While his Honour conceded that at times there may be a clear religious prescription for how an adherent should act, in its absence the varied individual interpretations of religious teachings should not be excluded from the general religious exemption.⁹¹ Thus, as the adherents in this case genuinely believed that refusing the booking was necessary to comply with their own religious doctrines, this fell within the first limb of the exemption.⁹² It was irrelevant whether the adherents had ‘properly interpreted’ such religious beliefs.⁹³ Though the youth camp appealed the decision, the High Court refused special leave.⁹⁴ Thus, it is clear there are significant divides even within jurisdictions in applying general religious exemption provisions.

2 *OW and OV*

A seminal New South Wales case also occurred at a similar time but attracted far less academic attention. In *OW and OV*, a same-sex couple contacted a foster care facility, Wesley Dalmar Child and Family Care (‘Wesley Dalmar’), to enquire about becoming foster carers of children.⁹⁵ Wesley Dalmar informed the couple they could not become foster carers through their organisation due to their homosexuality.⁹⁶ At first instance the Equal Opportunities Division of the New South Wales Administrative

⁸⁷ See, eg, Neil J Foster, *Australia: Christian Youth Camp Liable for Declining Booking From Gay Support Group* (24 April 2014) Law and Religion UK <<http://www.lawandreligionuk.com/2014/04/24/australia-christian-youth-camp-liable-for-declining-booking-from-gay-support-group/>>.

⁸⁸ *Christian Youth Camps* (2014) 308 ALR 615, 713 (Redlich JA).

⁸⁹ *Ibid* 733.

⁹⁰ *Ibid* 732.

⁹¹ *Ibid* 733.

⁹² *Ibid* 744–45.

⁹³ *Ibid* 744.

⁹⁴ See High Court of Australia, *Results of Applications for Special Leave to Appeal: Melbourne* (12 December 2014) <<http://www.hcourt.gov.au/assets/registry/special-leave-results/2014/12-12-14MelbRes.pdf>>.

⁹⁵ *OW v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010) [4].

⁹⁶ *Ibid*.

Decisions Tribunal ('EOD') held that the general religious exemption did not apply,⁹⁷ but the Appeal Panel then set aside this decision.⁹⁸ OW and OV then appealed to the New South Wales Court of Appeal, who set aside the Appeal Panel decision and remitted the matter back to the EOD with guidance.⁹⁹ Adopting this guidance, the EOD found that Wesley Dalmar did in fact fall within the general religious exemption, freeing them from liability for discrimination.¹⁰⁰ Pertinently, the Tribunal held that compliance with a belief of the particular Wesley Mission ('the Mission') to which this foster care organisation was attached was sufficient.¹⁰¹ Compliance with a belief of the overarching Uniting Church was not required to fall under this exemption.¹⁰² This was in accordance with the Court of Appeal guidance that beliefs practiced by only particular denominations of a church still fall within the scope of the exemption.¹⁰³ This appears to apply a much lower threshold than the *Christian Youth Camps* decision, which required broader doctrinal agreement on the belief across the religion,¹⁰⁴ though this test still seems to be quasi-objective in nature. Therefore, despite some disagreement as to the Mission's views on homosexuality, it was sufficient to establish that the Mission believed monogamous heterosexual partnerships to be the norm of human sexuality and that allowing same-sex couples to foster children would conflict with this.¹⁰⁵

The second limb — that the discriminatory act was necessary to avoid injuring the religious susceptibilities of adherents — was also satisfied, through an affidavit of the CEO of the Board of the Wesley Mission Council. This affidavit stated that if the Mission were required to appoint homosexual foster carers, this would make the Mission's provision of foster care services 'unacceptable to those who support the ethos of Wesley Mission.'¹⁰⁶ This suggests the application of a subjective test. Indeed, the earlier Court of Appeal decision noted that a numerical assessment of how many adherents must be affected is inappropriate; rather it must be a 'significant

⁹⁷ *OV v WZ* [No 2] [2008] NSWADT 115 (1 April 2008).

⁹⁸ *Members of the Board of the Wesley Mission Council v OV* [No 2] [2009] NSWADTAP 57 (1 October 2009).

⁹⁹ See *OV v Members of the Board of the Wesley Mission Council* (2010) 79 NSWLR 606.

¹⁰⁰ *OW v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010).

¹⁰¹ *Ibid* [33]–[34].

¹⁰² *Ibid* [32]–[35].

¹⁰³ *OV v Members of the Board of the Wesley Mission Council* (2010) 79 NSWLR 606, 618 [41].

¹⁰⁴ Indeed, it should be noted that the Tribunal in *OW v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010) decided not to have regard to the *Christian Youth Camps* case at the time as it was subject to appeal (and indeed was later appealed): at [36].

¹⁰⁵ *OW v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010) [18], [34]–[35].

¹⁰⁶ *Ibid* [18], [34].

proportion’ of the religion’s adherents whose religious susceptibilities are injured.¹⁰⁷ Therefore, even without any further breadth of jurisprudence available, the vast judicial disagreement and inconsistency in interpreting then-similar general religious exemption provisions in Victoria and New South Wales is evident.

E Legal Inconsistencies

Using a hypothetical scenario in Australia where same-sex marriage is legalised, it is clear to see how such inconsistencies would cause significant legal and practical problems. If, for example, a same-sex couple wanted to marry in Victoria, they may wish to use a civil celebrant. This civil celebrant would be legally permitted to refuse them service on the ground of their sexuality if it can be established objectively that this refusal was reasonably necessary to comply with their own religion or was reasonably necessary to avoid offending the religious sensitivities of adherents of that religion. However, if the couple wished to conduct this ceremony in New South Wales instead, the celebrant would be legally barred from refusing service on the ground of sexuality since New South Wales contains no individual religious exemption. The purchase of a wedding cake from a bakery that is owned by a church may encounter the same inconsistencies. In Victoria, such a bakery may be established for religious purposes, but in New South Wales a bakery surely cannot be established to *propagate* religion.¹⁰⁸ A bakery in Queensland would need to comply with both limbs of the test, rather than only one limb in Victoria or New South Wales. Considering this uncertainty, how could everyday citizens understand their rights under anti-discrimination laws when it comes to religious exemptions and sexual orientation?¹⁰⁹

Beyond the same-sex marriage hypothetical, consider if today a church decides to impose a policy that it will only hire cleaners who are heterosexual. If this was found to be necessary to avoid injury to the religious susceptibilities of its adherents but was not necessary to adhere to the church’s religious beliefs, the church would be acting legally in Western Australia, South Australia, New South Wales and perhaps Victoria,¹¹⁰ but would be acting illegally in Queensland, Tasmania, Northern Territory and the Australian Capital Territory. It is apparent therefore that the current inconsistencies in federal, state and territory religious exemptions can, and do, cause

¹⁰⁷ *OV v Members of the Board of the Wesley Mission Council* (2010) 79 NSWLR 606, 611 [12].

¹⁰⁸ Though it should be noted that the foster care facility that was established by and part of the Wesley Mission was deemed to be a body established to propagate religion in *OW v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010), [17].

¹⁰⁹ If there was an ordering of services across jurisdictional boundaries, extra-territorial application of anti-discrimination legislation may also be problematic: see *Litynski v Ansett International Ltd* [1996] EoTribNSW 109/95 (20 December 1996).

¹¹⁰ Whether this practice was legal in Victoria would depend upon a more objective test than that applied in the other seven state and territory jurisdictions, as discussed above.

complex legal and practical problems such that the outcome in any given dispute may be determined not by the merits of the case at hand but by its geographical location.

Thus it is clear that three key questions require far greater clarification, and remain inconsistently answered across Australia:

- 1 Who should be protected under the ‘sexual orientation’ prohibited ground?
- 2 To whom should general religious exemptions apply?
- 3 How should the requisite religious beliefs be tested?

III EXTERNAL MORALITY, INTERNAL MORALITY AND THE EIGHT EXCELLENCIES

An application of Fuller’s internal morality approach to law to these three key questions first requires an understanding and interpretation of his theory. This Part will begin by examining external morality approaches to law that have been applied to the issue of religious exemptions towards sexual orientation to foreshadow the merits of an internal morality approach. It will then proceed to a detailed interpretation of Fuller’s internal morality and his eight excellencies.

A External Morality and Religious Exemptions

External morality of law refers to the substance or moral ends of law. This framework is most often considered in law reform: for example where reform is suggested to better protect the rights of a certain group of people. Indeed, rarely is the internal morality approach to law considered. This approach entails an intrinsic examination of whether the law itself complies with procedural and functional elements. Put simply, external morality refers to the human consequences of law and the rights that are affected by law, whereas internal morality refers to the procedural and functional operation of laws such that the quality of the law-making and legislative construction is the focus.¹¹¹

Whether explicitly or not,¹¹² almost all scholars who have examined religious exemptions to sexual orientation ground their approach in external morality — in particular, utilising a human rights framework. This external morality literature can be categorised in three ways: those who advocate for a balanced case-by-case approach; those who believe religious freedom trumps freedom from discrimination; and those who believe freedom from discrimination trumps religious freedom. Despite such approaches creating greater transparency and discussion, the difficulty in objectively determining which of these rights should prevail over the other has led to an impasse

¹¹¹ See generally Rundle, above n 20, 500; Luban, above n 19, 29–30.

¹¹² And even where they apply broader theoretical frameworks such as liberalism: see Gray, above n 15.

in resolving this issue through an external morality approach. Conversely, a pivot towards internal morality would provide an entirely different set of principles to ground this analysis, and thereby offer an alternative way to consider the issue and guide lawmakers in future.

1 ‘Case-by-Case’ Balanced Approaches

There is a heavy focus in anti-discrimination literature on human rights;¹¹³ expectedly so, considering the two have long been intrinsically linked.¹¹⁴ Many scholars confine the issue to the question of whether religious freedom or freedom from discrimination should triumph in the circumstances of a specific case or law, thus attempting to avoid advocating for the prevailing strength of one over the other in all circumstances. Most recently and prominently, Anthony Gray adopted a modernist liberal approach in considering sexual orientation discrimination in regards to the provision of accommodation in Australia, Europe and North America.¹¹⁵ He notes that statutory interpretation rules in Australia require that where a provision is ambiguous, it is generally presumed not to undermine fundamental human rights under relevant treaties and legislation.¹¹⁶ This then requires an intricate balancing of the right to religious freedom with the right to freedom from discrimination.¹¹⁷ Indeed, Gray contends, this is why ‘the people assign to their democratically elected representatives [this] difficult task’.¹¹⁸

Leslie Samuels similarly construes the issue as a balancing of competing human rights, on a case-by-case basis, particularly with regard to human rights treaties.¹¹⁹

¹¹³ With the notable exception of Cooper, who utilises a post-structural feminist examination of the features of the ‘body politic’ around anti-discrimination law: see Davina Cooper, ‘Bringing the State Up Conceptually: Forging a Body Politics through Anti-Gay Christian Refusal’ (2015) 16 *Feminist Theory* 87.

¹¹⁴ See generally Dimitrina Petrova, ‘Implementing Anti-Discrimination Law and the Human Rights Movement’ (2006) 17 *Helsinki Monitor* 19; Walter Tarnopolsky, ‘Legislative Jurisdiction with Respect to Anti-Discrimination (Human Rights) Legislation in Canada’ (1980) 12 *Ottawa Law Review* 1.

¹¹⁵ See Gray, above n 15, 105–7.

¹¹⁶ Such as the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), and the Victorian and ACT human rights legislation: see *Charter of Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT). See also *ibid* 94.

¹¹⁷ See especially Gray, above n 15, 107–8.

¹¹⁸ *Ibid* 102. Gray also notes later in his article that human rights treaties confer freedom from discrimination as an absolute right, while the right to freely exercise religious beliefs is subject to other human rights, and therefore this may provide an alternative way to balance the two rights: at 107. However, the lack of binding force of these treaties in Australia’s dualist system is problematic: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–87 (Mason CJ and Deane J).

¹¹⁹ Leslie Samuels, ‘Sexual Orientation Discrimination and the Church: Balancing Competing Human Rights’ (2005) 8 *Ecclesiastical Law Journal* 74.

Carolyn Evans and Leilani Ujvari also contend that the balancing of religious freedom and freedom of equality remains the key determinant of religious exemptions in Australia.¹²⁰ Julia Crandell further argues for the application of a principled, case-by-case determination of how religious freedom and freedom from discrimination should be balanced in the provision of service to LGBTI+ individuals,¹²¹ positing that it is easier for courts to determine harms occurring to particular individuals rather than weighing the two rights in an abstract sense.¹²² Under this proportionality framework, a list of principles, such as harm suffered to the LGBTI+ person or religious adherent in question and whether the service is religious or secular, is to be weighed up in each case.¹²³ Christopher McCrudden has advocated for a similar approach.¹²⁴ This type of framework is often supported by proponents of religious exemptions, who argue that, more often than not, this strikes the appropriate balance between the two rights.¹²⁵

However even within the balanced case-by-case approaches there is disagreement, with scholars such as Gray advocating for legislatures to determine where the balance ought to be struck,¹²⁶ while others, such as Crandell and McCrudden, would grant this power to the courts.¹²⁷ Regardless of which arm of government is preferred, this difficult balancing task has not yet resolved uncertainty and inconsistency in this area. Shelley Wessels similarly contends that:

The conflict between the two principles has frustrated courts, religious groups, and non-discrimination proponents. What should courts do when religious groups cry foul at a law that says their free exercise rights do not extend to their religious beliefs requiring discrimination? Or, conversely, what should courts do when other groups cry foul at a law exempting religious groups from non-discrimination requirements that they must meet?¹²⁸

¹²⁰ Though it should be noted that they posit other pragmatic arguments on the availability of non-religious private schools and the use of religious exemptions to create communities of common interests, and they also focused on educational religious exemptions rather than general religious exemptions: Evans and Ujvari, above n 65, 52–6.

¹²¹ See Crandell, above n 18, 39–49.

¹²² *Ibid* 39.

¹²³ *Ibid* 39–48.

¹²⁴ See, eg, Christopher McCrudden, ‘Dignity and Religion’ in Robin Griffith-Jones (ed), *Islam and English Law* (Cambridge University Press, 2013) 94, 103.

¹²⁵ See Carl F Stychin, ‘Closet Cases: “Conscientious Objectors” to Lesbian and Gay Legal Equality’ (2009) 18 *Griffith Law Review* 17, 24–5, 34.

¹²⁶ Gray, above n 15, 107–8.

¹²⁷ Crandell, above n 18.

¹²⁸ Evans and Ujvari, above n 65, 54, quoting Shelley K Wessels, ‘The Collision of Religious Exercise and Governmental Nondiscrimination Policies’ (1989) 41 *Stanford Law Review* 1201, 1203.

2 *Religious Freedom Approaches*

Other scholars have focused on this issue from a religious viewpoint to ensure that religious individuals and organisations can live out their faith in a meaningful way.¹²⁹ Nicholas Aroney argues that religious freedoms should be expansively considered as collective rights in addition to individual rights, which would strengthen their exemption from anti-discrimination prohibitions.¹³⁰ Similar arguments raised are that the application of anti-discrimination legislation to the internal affairs of religious groups significantly erodes their religious autonomy,¹³¹ and that the absolutist nature of anti-discrimination law and the narrow operation of religious exemptions unduly undermines freedom of religion in Australia.¹³² Reid Mortensen also argues that ‘the conformity [anti-discrimination legislation] can demand sits uneasily with the pluralism and individualism rights of religious liberty preserve and ... has the potential to marginalise some religious beliefs’.¹³³ Mortensen has perhaps been the staunchest advocate of religious freedom in this area, remarking that anti-discrimination laws present a ‘threat’ to the protection of religious freedom, and that any such laws requiring uniformity are ‘brutal’.¹³⁴ A similar point is made by Kirsty Magarey that interfering in the private religious sphere can reduce the effectiveness of anti-discrimination legislation in the public sphere, because the two spheres are inherently linked and inequalities in either affect the other.¹³⁵ Some

¹²⁹ See generally Carolyn Maree Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012); Augusto Zimmermann, ‘The Unconstitutionality of Religious Vilification Laws in Australia: Why Religious Vilification Laws Are Contrary to the Implied Freedom of Political Communication Affirmed in the Australian Constitution’ [2013] (3) *Bringham Young University Law Review* 457; Foster, above n 15.

¹³⁰ Nicholas Aroney, ‘Freedom of Religion as an Associational Right’ (2014) 33 *University of Queensland Law Journal* 153, 182–85.

¹³¹ Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 338; William Johnson Everett, ‘Human Rights in the Church’ in John Witte and Johan D van der Vyver (eds), *Religious Human Rights in Global Perspective* (Martinus Nijhoff, 1996) 121, 128–9. See also Archbishop Anthony Fisher, ‘Should Bakers be Required to Bake Gay Wedding Cakes? Democracy and Religious Liberty in Australia’, *ABC Religion and Ethics* (online), 15 October 2015 <<http://www.abc.net.au/religion/articles/2015/10/15/4331899.htm>>.

¹³² Baines, above n 72; 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.

¹³³ Mortensen, above n 15, 219.

¹³⁴ *Ibid* 231–2; see also Reid Mortensen, ‘A Reconstruction of Religious Freedom and Equality — Gay, Lesbian and De Facto Rights and the Religious Schools in Queensland’ (2003) 3 *Queensland University of Technology Law and Justice Journal* 320.

¹³⁵ Kirsty Magarey, ‘Discrimination and the Church’ (1991) 62 *Reform* 101.

also argue that s 116 of the *Australian Constitution* requires that religious liberty be preferred to anti-discrimination standards.¹³⁶

3 *Freedom from Discrimination Approaches*

By contrast, various Australian human rights bodies have argued against absolutist religious exemptions in anti-discrimination legislation. The Discrimination Law Experts' Group, Human Rights Law Resource Centre, and Public Interest Law Clearing House have argued that the freedoms enjoyed by religious bodies participating in public sphere activities must be restricted where such activities would undermine freedom from discrimination.¹³⁷ Though speaking from an American context, Maureen E Markey contends that the right to exercise religious beliefs is permissible only to the extent that it does not contradict other fundamental human rights such as freedom from discrimination,¹³⁸ while James Oleske argues that the right of same-sex couples to equal protection should be prioritised over religious freedom.¹³⁹ Traditional liberalist viewpoints also tend to limit religious freedoms in order to ensure that other rights, such as freedom from discrimination, are protected.¹⁴⁰

B *Fuller's Internal Morality*

It is therefore apparent that commentators employing the external morality approach to religious exemptions in the context of sexual orientation value religious freedom and freedom from discrimination to varying levels, and under this approach there remains no way to objectively measure which should prevail. An alternative approach — Lon L Fuller's internal morality theory of law, outlined in *The Morality of Law* — can be applied to this issue to seek a different route forward.¹⁴¹

¹³⁶ Mortensen, above n 15, 231; Aroney, above n 18.

¹³⁷ Discrimination Law Experts' Group, Submission to the Senate Legal and Constitutional Affairs Committee, *Consolidation of Commonwealth Anti-Discrimination Laws*, 13 December 2011; Public Interest Law Clearing House and Human Rights Law Resource Centre, *Eliminating Discrimination and Ensuring Substantive Equality: Joint Submission to the Scrutiny of Acts and Regulations Committee on its Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act 1995 (Vic)* (July 2009) Human Rights Law Centre <https://www.parliament.vic.gov.au/archive/sarc/EOA_exempt_except/submissions/676%20-%20PILCH%20&%20HRLRC%20-%2010.07.09.pdf>.

¹³⁸ See Maureen E Markey, 'The Landlord/Tenant Free Exercise Conflict in a Post-RFRA World' (1998) 29 *Rutgers Law Journal* 487, 537–39.

¹³⁹ See James Oleske, 'The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages' (2015) 50 *Harvard Civil Rights — Civil Liberties Law Review* 99.

¹⁴⁰ Aroney, above n 130, makes reference of this at 183; see also Paul Marshall, 'Liberalism, Pluralism and Christianity: A Reconceptualization' (1989) 21 *Fides et Historia* 4; Stephen Macedo, 'Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism' (1998) 26 *Political Theory* 56.

¹⁴¹ Fuller, above n 17.

Before being able to apply the internal morality of law to religious exemptions in Part IV, Fuller’s general treatise must firstly be set out. Fuller principally asserts that law has an inner morality, such that regardless of any legal system’s substantive purpose it is bound to comply with certain procedural requirements.¹⁴² In the absence of such compliance, a legal system could be regarded as an illegitimate exercise of state coercion.¹⁴³ In this regard, Fuller’s natural law theory is often considered to grant rich theoretical content to the rule of law in regards to the form and framework of law.¹⁴⁴ In doing so, Fuller utilises the principle of reciprocity, requiring that if lawmakers create laws that respect internal morality, then citizens are bound to abide by them.¹⁴⁵ Kristen Rundle interprets this as meaning that a ‘legal subject’s obligation to obey law only arises in the first place in response to, or in anticipation of, a *corresponding effort* on the part of the lawgiver.’¹⁴⁶ In order to explain this concept, Fuller outlines the allegory of King Rex, a monarch who takes to the throne and attempts in good faith to reform the archaic legal system he oversees. The following is a summary from *The Morality of Law*.¹⁴⁷

King Rex begins his law reform process by immediately repealing all existing laws and announces that he will act as judge in any disputes. However, following hundreds of decisions, no pattern could be detected in King Rex’s opinions and thus no general rules were applied consistently. Responding to criticisms and for the sake of ease, King Rex then created a new legal code that was kept secret from the public, and then a revised code that applied retrospectively. After his subjects responded that ‘they needed to know [the rules] *in advance* so they could act on them’,¹⁴⁸ King Rex published a revised code that applied to future conduct. However it became clear that this code was ‘truly a masterpiece of obscurity’,¹⁴⁹ and could not be understood by any citizens.

This code was revised and clarified, with the now clear expression bringing to light the various contradictions contained within its text. King Rex became angered by his subjects’ constant negativity in response to his attempts to create a sound legal system, and thus punished them by creating impossible requirements in the law.¹⁵⁰ After some time the King saw the error of his ways and made a further revision that was clear, consistent, did not demand impossibility, and was published freely and widely. However, many significant events had occurred during the constant revision of the King’s code, requiring it to be subjected to daily amendments. King Rex then

¹⁴² Ibid 33–46.

¹⁴³ Ibid 38–41.

¹⁴⁴ See, eg, Rundle, above n 20, 500; Luban, above n 19, 29–30.

¹⁴⁵ See generally Fuller, above n 17, 19–27, 39–41.

¹⁴⁶ Rundle, above n 20, 500 (emphasis in original).

¹⁴⁷ See Fuller, above n 17, 34–41.

¹⁴⁸ Ibid 35 (emphasis in original).

¹⁴⁹ Ibid 36.

¹⁵⁰ Such as requiring citizens summoned to the throne to report within 10 seconds: see *ibid*.

decided to take an active role in creating a long line of precedent, however it was discovered that this precedent was incongruent with the existing legal code. Soon after, King Rex died, with his reign characterised by a legal system that failed time and time again.

This allegory, Fuller explains, details at least eight key ways a legal system can fail and which thereby means that citizens would not have a moral obligation to obey such laws (the eight ‘failures’):¹⁵¹

- 1 Failure to have rules;
- 2 Failure to publicise rules;
- 3 Abuse of retroactive rules;
- 4 Failure to make rules understandable;
- 5 Enactment of contradictory rules;
- 6 Enactment of rules requiring the impossible;
- 7 Excessively frequent changes in rules; and
- 8 Failure of rules to match their application.

Famously, Fuller declared that, ‘[a] total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly a legal system at all’.¹⁵² The King Rex allegory therefore outlined failures that must be avoided to create a successful legal system.¹⁵³

C The Eight Excellencies

Fuller’s eight excellencies to strive towards in making law are the inverse of his eight ‘failures’. These eight excellencies comprise Fuller’s internal morality of law:¹⁵⁴

- 1 Generality;
- 2 Promulgation;
- 3 Non-retroactivity;

¹⁵¹ Ibid 39.

¹⁵² Ibid.

¹⁵³ Ibid 89.

¹⁵⁴ Ibid 41.

- 4 Clarity;
- 5 Avoidance of contradiction;
- 6 Avoidance of laws requiring the impossible;
- 7 Constancy of law; and
- 8 Congruence between official action and declared rule.

Fuller explains that a law perfectly adhering to these eight excellencies would be a utopia that is difficult to achieve. However, he notes that striving towards their distinct standards is a way in which excellence in legality can be tested.¹⁵⁵ Fuller posits that endeavouring towards the eight excellencies is therefore a morality of aspiration rather than duty.¹⁵⁶ The morality of duty provides the ‘basic rules without which an ordered society is possible’, while the morality of aspiration details qualities of human potential.¹⁵⁷ This renders the excellencies as canons to strive towards, rather than obligatory conditions of law. In this regard, legislatures and courts need only ‘save us from the abyss’ for law to be valid, but their adherence to the excellences will, naturally, increase their ‘excellence’.¹⁵⁸ The eight excellencies must now be considered in turn.

1 *Generality*

Rundle argues that Fuller’s first excellency is implicitly ranked higher than the other excellencies.¹⁵⁹ This excellency requires that there must firstly be rules, and secondly that these rules must be of general, rather than particular, application.¹⁶⁰ Though little context is provided beyond this in Fuller’s original text, his reply several years later, which was included in a revised edition of *The Morality of Law*, sheds some further light on this excellency. In his reply, Fuller notes that rules must take the form of general declarations rather than specific directions.¹⁶¹ These general rules must express the principle that ‘like cases should be given like treatment’.¹⁶²

¹⁵⁵ Ibid 41–2.

¹⁵⁶ With the exception of ‘promulgation’ which, Fuller argues, lawmakers are under a duty to adhere to: see *ibid* 43–4.

¹⁵⁷ Ibid 5–6.

¹⁵⁸ Ibid 44.

¹⁵⁹ See Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller* (Bloomsbury Publishing, 2012) 128–29, 138–39, 152.

¹⁶⁰ Fuller, above n 17, 46–9.

¹⁶¹ Ibid 210–11.

¹⁶² Ibid 211.

2 *Promulgation*

As the only excellency that Fuller argues is a duty rather than aspiration, promulgation requires that law must be made publicly known and accessible.¹⁶³ All citizens are entitled to know law's content, though this does not extend as far as educating every citizen on the full meaning of every law that may apply to them.¹⁶⁴ Rather, they must simply be given an opportunity to be able to observe and critique laws.

3 *Non-Retroactivity*

Fuller argues that 'a retroactive law is truly a monstrosity.'¹⁶⁵ He staunchly opposes and labels as 'blank prose' the governing of past conduct by future rules.¹⁶⁶ However, an absolute prohibition on retroactive laws is not necessarily appropriate under Fuller's theory.¹⁶⁷ At times, a curative retroactive measure to save laws that have deeply failed other excellencies 'may actually be essential to advance the cause of legality.'¹⁶⁸ This, however, is a rarity.¹⁶⁹

4 *Clarity*

The need for clarity is 'one of the most essential ingredients of legality', and appears to largely rest on legislators, rather than judges, as Fuller emphasises the desire to minimise the task of interpretation in courts and tribunals.¹⁷⁰ In this regard, 'obscure and incoherent legislation can make legality unattainable by anyone'.¹⁷¹ This legislative obligation does not necessitate the removal of general legal standards such as 'good faith' or 'due care'; Fuller notes that the incorporation of such standards may at times be the best way to achieve clarity in the law.¹⁷² Regardless, clearly stated rules must be the end result.

¹⁶³ Ibid 49–51.

¹⁶⁴ Ibid 49, 51.

¹⁶⁵ Ibid 53.

¹⁶⁶ Ibid.

¹⁶⁷ Rundle, above n 159, 91.

¹⁶⁸ Fuller, above n 17, 53.

¹⁶⁹ One example given is a law voiding all marriage certificates issued after its commencement that do not have a valid stamp, provided by the state. Were the state to run out of stamps to distribute and thereby not adequately promulgate the law to those who are wishing to get married, a retroactive law conferring validity on those marriages voided due to the absence of such stamps would best serve the ends of legality. See *ibid* 53–4.

¹⁷⁰ Ibid 634; Rundle, above n 159, 90–1.

¹⁷¹ Fuller, above n 17, 63.

¹⁷² Ibid 64.

5 Avoidance of Contradiction

Fuller’s main example of a law that is contradictory is where in a single statute, one provision requires the automobile owner to install new license plates on 1 January, and a second provision makes it a crime to perform any labour on that date.¹⁷³ Punishing a person for doing what they were ordered, or had a legal right, to do is a contradiction under Fuller’s treatise and must therefore be avoided.¹⁷⁴

6 Avoidance of Laws Requiring the Impossible

Laws requiring the impossible do not include laws that are difficult to follow due to their failure to be clear or their failure to be promulgated.¹⁷⁵ Rather, they are laws that fall outside the other seven excellencies, and by their ‘brutal pointlessness may let the subject know that there is nothing that may not be demanded of him and that he should keep himself ready to jump in any direction.’¹⁷⁶ Fuller distinguishes this from the example of a teacher who asks more of their pupils than they may be capable of giving.¹⁷⁷ A failure to reach such heights does not render the pupil at odds with the law and its many serious punishments. However, laws that are harsh and unfair on certain persons may not be impossible but may still fail to reach perfection under this excellency.¹⁷⁸ As Fuller notes, ‘no hard and fast line can be drawn between extreme difficulty and impossibility.’¹⁷⁹

7 Constancy of Law

Noting similarities to the excellency of non-retroactivity, Fuller argues that laws should not be changed too frequently otherwise citizens may be unable to know which laws apply to them at any point in time.¹⁸⁰ However Fuller notes elsewhere, in explaining a conflict between the internal morality and external morality of law, that, ‘changes in circumstances, or changes in men’s consciences, may demand changes in the substantive aims of law ... [such that] we are often condemned to steer a wavering middle course between too frequent change and no change at all’.¹⁸¹ As Fuller further states that this excellency is least suited to formalisation in a constitutional-type restriction,¹⁸² this ideal middle course is apparent. Therefore the title of ‘constancy of law’ could instead perhaps be rephrased as ‘avoidance of unnecessary changes of law’.

¹⁷³ Ibid 65–6.

¹⁷⁴ Ibid 66.

¹⁷⁵ Ibid 70.

¹⁷⁶ Ibid 71.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid 79.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid 79–81.

¹⁸¹ Ibid 44–5.

¹⁸² Ibid 79–80.

8 *Congruence between Official Action and Declared Rule*

This excellency is arguably the most distinct, being targeted towards judges rather than lawmakers,¹⁸³ which the other seven excellencies focus on. Fuller views this excellency as one of the most important.¹⁸⁴ At a minimum, this excellency requires the exercising of procedural due process, such as the right to counsel.¹⁸⁵ At its more idealistic core, however, lies the task of interpretation. Specifically, '[I]legality requires that judges and other officials apply statutory law, not according to their fancy or with crabbed literalness, but in accordance with principles of interpretation that are appropriate to their position in the whole legal order.'¹⁸⁶ This, Fuller explains, requires that those applying the law seek to interpret any ambiguities in adherence with the original intention of the statute.¹⁸⁷ Though Fuller's *The Morality of Law* predates statutory interpretation legislation, his consistent reference to the 'mischief' that statutes intend to prevent and on legislative intention strongly suggests that Fuller meant that judges should apply statutory interpretation rules to any legislative ambiguities.¹⁸⁸ Fuller's reference to *Heydon's Case* supports this construction.¹⁸⁹

D Requirements of a Legal System, or a Good Legal System?

Joseph Raz and other positivists have criticised Fuller for attempting to put forward the requirements of a legal system but instead confusing these with the requirements of a *good* legal system.¹⁹⁰ It is apparent from Fuller's own words, however, that his eight excellencies were always intended to be aspirations of *good* legal systems, not absolutist conditions required for the existence of *any* legal system. Fuller did, of course, note that a total failure under any of his eight failures, the reverse of his eight excellencies, would mean there is no law at all which citizens are obligated to comply with.¹⁹¹ However, there is significant scope for a law to fall between a total failure to make a law and an excellency in lawmaking. A law that fails to adhere perfectly to

¹⁸³ Luban, above n 19, 33.

¹⁸⁴ Fuller, above n 17, 91; Rundle, above n 159, 90–1.

¹⁸⁵ Fuller, above n 17, 81.

¹⁸⁶ *Ibid* 82.

¹⁸⁷ *Ibid* 83–7.

¹⁸⁸ See especially *ibid* 82–7.

¹⁸⁹ This case is usually considered the beginning of the purposive or mischief rule of statutory interpretation and an important early precursor to statutory interpretation legislation: *Heydon's Case* (1584) 3 Co Rep 7, 76 ER 637, quoted in *ibid* 82.

¹⁹⁰ See Joseph Raz, 'The Rule of Law and Its Virtue' (1977) 93 *Law Quarterly Review* 195. See also, Luban, above n 19, 32. Intriguingly, Luban also seems to interpret Fuller's theory as focusing on the conditions that would allow rules to succeed, rather than determining their existence: 'Fuller inquires into the moral and practical relationships between lawgivers and citizens that allow the enterprise of subjecting human conduct to rules succeed.' Luban also notes that the existence of rules is only challenged if they 'deviate *too much*' from the eight excellencies: see Luban, above n 19, 30–1 (emphasis added).

¹⁹¹ Fuller, above n 17, 39.

all eight excellencies can still remain a valid law under Fuller’s approach so long as it avoids chronic failures. For example, a law on accounting standards may use a trade meaning that renders the law understandable to accountants but not to other citizens. This law has not totally failed to be understandable, but it has not achieved perfect excellence in clarity either. It is a law, but not an ‘excellent’ law; a law will become more ideal the more it adheres to these eight excellencies, maximising the potential of each excellency whilst minimising any undermining of the other excellencies.¹⁹² While Fuller’s eight failures may be understood as conditions for any legal system, his eight excellencies cannot be understood as anything but aspirations for a *good* legal system.¹⁹³ This invites a more nuanced analysis than ticking eight items off a checklist.¹⁹⁴

Fuller’s eight excellencies are the standard that should be strived towards for religious exemptions to sexual orientation under Australian anti-discrimination laws. Importantly it must be noted that Fuller’s treatise — as one of internal morality of law and not external morality — cannot provide a specifically worded provision to utilise in the future. This approach can, however, be used to provide broader thematic recommendations and guidance on a path forward for this issue.

IV FULLER’S INTERNAL MORALITY OF LAW: AN ‘EXCELLENT’ APPROACH TO RELIGIOUS EXEMPTIONS

Fuller’s internal morality of law theory has recently undergone a scholarly revival among legal theorists.¹⁹⁵ However, while the application of a natural law theory to interpret a real-life legal problem or hypothetical scenario is not a new concept,¹⁹⁶ an internal morality approach has not yet been applied to anti-discrimination laws. Thus, a Fullerian examination of religious exemptions on the prohibited ground of

¹⁹² See generally *ibid* 41–2; Rundle, above n 159, 92.

¹⁹³ With the exception of promulgation, which as discussed above was deemed to be a morality of ‘duty’, rather than ‘aspiration’, by Fuller.

¹⁹⁴ Rundle, above n 159, 92.

¹⁹⁵ See, eg, Willem J Witteveen and Wibren van der Burg (eds), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (University of Chicago Press, 1999); Rundle, above n 20; Rundle, above n 159; Mehmet Ruhi Demiray, ‘Natural Law Theory, Legal Positivism, and the Normativity of Law’ (2015) 20 *The European Legacy* 807; Priel, above n 20; Luban, above n 19.

¹⁹⁶ See, eg, Peter Atudiwe Atupare, *Constitutional Justice in Africa: An Examination of Constitutional Positivism, Fundamental Law and Rights in Ghana and Nigeria* (PhD Thesis, Queen’s University (Canada), 2011); Don S Browning, ‘A Natural Law Theory of Marriage’ (2011) 26 *Zygon* 733; Larry A DiMatteo, ‘The History of Natural Law Theory: Transforming Embedded Influences Into a Fuller Understanding of Modern Contract Law’ (1999) 60 *University of Pittsburgh Law Review* 839; Timothy Hsiao, ‘Consenting Adults, Sex, and Natural Law Theory’ (2016) 44 *Philosophia* 509. Indeed such an application has been focused heavily upon in legal theory with the famous ‘vehicle in the park’ hypothetical: see Frederick Schauer, ‘A Critical Guide to Vehicles in the Park’ (2008) 83 *New York University Law Review* 1109.

sexual orientation will add a unique perspective to a growing, but external morality-focused, body of Australian literature. This can provide an alternative path forward to seek to resolve the uncertainty and inconsistency currently witnessed across Australia's nine relevant anti-discrimination laws.

In particular, this Part will provide suggested 'internally moral' answers to the three key questions raised in Part II: as to who should be protected under the sexual orientation prohibited ground; to whom general religious exemptions should apply; and how the requisite religious beliefs should be tested. An application of Fuller's eight excellencies will suggest that the prohibited ground of sexual orientation be expanded, that religious exemptions apply to religiously-affiliated bodies but not to individuals, and that the type of test to assess the requisite beliefs should be quasi-subjective.

Firstly, it should be noted that two excellencies are arguably achieved to their fullest in Australian anti-discrimination laws and therefore do not require in-depth analysis. It is apparent that all Australian laws are published widely and are publicly available for all citizens,¹⁹⁷ and such laws rarely, if ever, apply retroactively; indeed the purpose of anti-discrimination legislation is inherently forward-looking and preventative. One other excellency appears unnecessary to examine in detail: congruence between official action and declared rule. This requires that judges utilise relevant rules of statutory interpretation when applying legislation in cases. All decision makers in both seminal cases discussed in Part II applied clear rules of statutory interpretation and appeared to come to reasoned, albeit disparate, interpretations of the relevant legislation.¹⁹⁸ In the absence of any clear weakness in this excellency in other relevant case law, it appears imprudent to consider this issue in depth here. The ambiguity of the English language and statutory interpretation rules themselves would further render this an immense exercise in itself.¹⁹⁹ This, then, leaves the other five excellencies as requiring an in-depth application to religious exemptions.

A Who Should be Protected Under the 'Sexual Orientation' Prohibited Ground?

Under Fuller's excellency of generality, a rule increases in excellence as it becomes more general in scope. The general rule under anti-discrimination legislation is to

¹⁹⁷ A Federal Register of Legislation was created by the *Acts and Instruments (Framework Reform) Act 2015* (Cth) pt 2. Similar provisions exist at state levels: See, eg, Department of Premier and Cabinet, *State Law Publisher*, Government of Western Australia <<https://www.slp.wa.gov.au/Index.html>>.

¹⁹⁸ See, eg, *Christian Youth Camps* (2014) 308 ALR 615, 671–75 (Maxwell P), 727–32 (Redlich JA); *OW v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010) [30]. See also *Owen v Menzies* (2012) 293 ALR 571, 594–95; *Menzies v Waycott* [2001] VCAT 415 [225]–[236].

¹⁹⁹ See, eg, *Stock v Jones (Tipton) Ltd* [1978] 1 WLR 231, 236 (Simon L); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 382, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

prohibit discrimination against persons on certain prohibited grounds.²⁰⁰ As such, it is apparent that the more general this prohibition is, the better the law will be under a Fullerian approach. This would appear to necessitate an expansive definition of sexual orientation, as a prohibited ground upon which discrimination is not permitted. The more expansively ‘sexual orientation’ is defined, the more general this prohibition will be and the greater it will protect people from discrimination. If this definition was confined to the narrow New South Wales prohibited ground of ‘homosexuality’, this would exclude from the protection of anti-discrimination laws persons identifying as any other sexual orientation, including heterosexuality. The moderate ground, utilised in all other states and territories except for South Australia, would extend this protection to heterosexuals and bisexuals but no other persons. It is therefore apparent that a consideration of other sexual orientations that may warrant protection — in particular pansexual, asexual and queer persons²⁰¹ — could assist lawmakers in drawing the appropriate line.

Despite the assertion in Part II that the Commonwealth legislative definition of sexual orientation could bear an expansive interpretation that may include pansexuality at the very least, the most prominent case interpreting the Commonwealth definition read its operation restrictively, albeit in a different context. In *Bunning v Centacare*, Vasta J held that polyamory was best described as a sexual behaviour that is a manifestation of sexual orientation, rather than a sexual orientation of itself.²⁰² As such, polyamory was not protected under the prohibited ground of ‘sexual orientation’ under federal anti-discrimination legislation. In obiter, Vasta J noted that he would also exclude ‘somasochists’, ‘coprophiliacs’ and ‘urophiliacs’ from the scope of ‘sexual orientation’.²⁰³ Though polyamory and somasochism refer more to ‘erotic intimacy’ or ‘erotic experiences’ than sexual orientations,²⁰⁴ it is evident

²⁰⁰ Indeed the objects clause of many of these Acts explicitly states this. For example, one of the objects of the *Sex Discrimination Act 1984* (Cth) is ‘to eliminate, so far as is possible, discrimination against persons on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy or breastfeeding in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs’: at s 3(b).

²⁰¹ A pansexual person is a person who feels sexual attraction towards persons regardless of their sexual orientation, gender identity or intersex status, while an asexual person feels no sexual attraction to any persons. This is entirely different to celibacy, as celibacy is a deliberate choice to suppress sexual attraction or conduct, while asexual persons have not made a decision to feel no attraction to other people but rather simply feel this way: see Elizabeth F Emens, ‘Compulsory Sexuality’ (2014) 66 *Stanford Law Review* 303, 316–19.

²⁰² *Bunning v Centacare* (2015) 293 FLR 37, 47–8.

²⁰³ Bennett, above n 47, 19, quoting *ibid* 47.

²⁰⁴ See generally Christian Klesse, ‘Polyamory: Intimate Practice, Identity or Sexual Orientation?’ (2014) 17 *Sexualities* 81.

that the Commonwealth's definition is not unbound in its breadth.²⁰⁵ This may mean that, while it has the potential to bear an expansive interpretation, courts continue to construe the provision narrowly. Indeed, Hardy, Rundle and Riggs have interpreted the Commonwealth definition of sexual orientation as not including pansexuality or asexuality.²⁰⁶ This provision does, however, remain the broadest and most general of Australia's nine jurisdictions.

By contrast, the Australian Human Rights Commission ('AHRC') defines sexual orientation more expansively as: 'a person's emotional or sexual attraction to another person, including, amongst others, the following identities: heterosexual, gay, lesbian, bisexual, pansexual, asexual or same-sex attracted.'²⁰⁷ The generality of this type of definition is ideal under a Fullerian viewpoint: it encompasses persons who exclusively identify as pansexual or asexual,²⁰⁸ who are not currently considered under any of the other labels used in the moderate construction of 'sexual orientation' under six state and territory anti-discrimination laws in Australia. Whilst the AHRC

²⁰⁵ As polyamory and sadomasochism are not characteristics that define *who* a person is attracted to, they are perhaps better excluded from 'sexual orientation' for the sake of clarity. Furthermore under the excellency of generality, it is apparent that if polyamorous persons or sadomasochists are covered under the AHRC definition above, then they are perhaps not in need of even further protection under a 'sexual orientation' prohibited ground. Weiss has provided convincing ethnographic evidence that polyamorous persons and sadomasochists ordinarily define themselves as having a sexual orientation beyond their sexual practice of polyamory or sadomasochism — such as identifying themselves as heterosexual or bisexual: see Margot Weiss, *Techniques of Pleasure: BDSM and the Circuits of Sexuality* (Duke University Press, 2011) 11. Cf Bennett, above n 47, 24–39.

²⁰⁶ Hardy, Rundle and Riggs, above n 2, 113.

²⁰⁷ Australian Human Rights Commission, above n 2, 5; Australian Human Rights Commission, 'Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights' (Consultation Report, 2015) 5 <https://www.humanrights.gov.au/sites/default/files/document/publication/SOGII%20Rights%20Report%202015_Web_Version.pdf>.

²⁰⁸ In a survey of 'LGBT' students at the University of Western Australia, 7 per cent of all respondents identified as asexual, while 8.5 per cent identified as 'other' with 'pansexual' among those listed under this category: see Duc Dau and Penelope Strauss, 'The Experience of Lesbian, Gay, Bisexual, and Trans Students at The University of Western Australia' (Research Report, Equity and Diversity, University of Western Australia, 2016) 12–3. See also April Scarlette Callis, 'Bisexual, Pansexual, Queer: Non-Binary Identities and the Sexual Borderlands' (2014) 17(1) *Sexualities* 63; Pádraig MacNeela and Aisling Murphy, 'Freedom, Invisibility, and Community: A Qualitative Study of Self-Identification with Asexuality' (2015) 44(3) *Archives of Sexual Behavior* 799; Richters et al, above n 44. Approximately 5 per cent of all respondents to a nation-wide survey in the United Kingdom in 2015 did not identify as being straight or 'LGB', and thereby may also fall within definitions of pansexuality, asexuality or queer: see Office for National Statistics, 'Sexual Identity, UK: 2015' (Statistical Bulletin Report, United Kingdom, 2016) <<https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/sexuality/bulletins/sexualidentityuk/2015>>.

definition of sexual orientation is more ideal than any of the comparable constructions in Australian anti-discrimination laws, it is worth noting that a significant proportion of LGBTI+ people also identify as ‘queer’ or ‘questioning’.²⁰⁹ To exclude them from protection under ‘sexual orientation’ would undermine the generality of anti-discrimination laws. Relying on Fuller’s excellency of generality to identify who should be protected by the ground of sexual orientation would therefore provide a more robust protection of all individuals against discrimination.

Furthermore, the excellency of clarity promotes laws that are clear, coherent and accessible. It appears entirely unclear as to why a person who feels attraction towards all persons regardless of their sexual or gender identities, a person who does not feel sexual attraction, or a person who is fluid or unlabelled in their sexual attraction would not be considered to have a sexual orientation worthy of protection from discrimination. The diversity of human sexuality must inherently be recognised in a clear way.²¹⁰ Indeed, construing sexual orientation to exclude pansexual, asexual or queer persons would require such individuals to force themselves to have a sexual orientation with which they do not identify if they wish to be protected by a law that protects nearly all other persons. This would arguably be a law requiring the impossible and should therefore be avoided.

Finally, the constancy of law through time excellency, requiring that laws are not unnecessarily or constantly changed, should be considered. The sexual orientation prohibited ground was contained in the original version of current anti-discrimination legislation in South Australia (1984), the Australian Capital Territory (1991), the Northern Territory (1992), and Tasmania (1998).²¹¹ Protection of sexual orientation or sexuality was added through a subsequent amending Act by New South Wales (1982),²¹² Victoria (2000),²¹³ Queensland (2002),²¹⁴ Western Australia (2002),²¹⁵ and finally the Commonwealth (2013).²¹⁶ Aside from these amendments to add the prohibited ground itself and South Australia’s definitional amendment last year, the definition of this prohibited ground has never changed in any of these jurisdictions. As the circumstances surrounding the recent amendment to the Commonwealth

²⁰⁹ 22.9 per cent of students reporting to the University of Western Australia survey of LGBT students self-identified as ‘queer’ or ‘questioning’: Dau and Strauss, above n 208, 12–3.

²¹⁰ On the breadth of human sexuality, see generally Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press, 2nd ed, 2008) 22.

²¹¹ Tasmania has made one change, removing ‘transsexuality’ from this definition in 2013: *Anti-Discrimination Amendment Act 2013* (Tas) s 4(f).

²¹² *Anti-Discrimination (Amendment) Act 1982* (NSW) sch 2. This was amended slightly linguistically in 1994: see *Anti-Discrimination (Amendment) Act 1994* (NSW) sch 3(17).

²¹³ *Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000* (Vic) s 5.

²¹⁴ *Discrimination Law Amendment Act 2002* (Qld) ss 12, 14.

²¹⁵ *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA) ss 48, 52.

²¹⁶ *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) ss 12, 17.

laws do not appear to have changed,²¹⁷ a further amendment of the Commonwealth laws may be unnecessary and therefore undermine this excellency. This may also be the case in South Australia. However, changes in any of the other jurisdictions will not be problematic in this regard. Indeed, it may well be that the Commonwealth's definition does not need to be changed legislatively but instead must be interpreted more broadly by courts. Since Fuller notes that 'changes in circumstances, or changes in men's consciences, may demand changes in the substantive aims of law' which actually maximise this excellency,²¹⁸ significant contemporary changes in the way society views human sexuality clearly justify a more expansive protection of those identifying with a diverse sexual orientation.²¹⁹

Therefore, a broader interpretation or expansion of the Commonwealth definition of sexual orientation to include pansexual, asexual and queer persons would seem appropriate under a Fullerian approach.²²⁰ Of course, regardless of the breadth of defining sexual orientation, this protection cannot extend to persons who feel sexual attraction to minors,²²¹ deceased persons,²²² or animals,²²³ as each of these acts are illegal throughout Australia.²²⁴ To legislate otherwise in the absence of amending such criminal laws would significantly undermine Fuller's desideratum of avoiding contradiction.

²¹⁷ See generally Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth).

²¹⁸ Fuller, above n 17, 44–5.

²¹⁹ See, eg, Hardy, Rundle and Riggs, above n 2, 18–23; Paul Rishworth, 'Changing Times, Changing Minds, Changing Laws: Sexual Orientation and New Zealand Law, 1960 to 2005' (2007) 11 *International Journal of Human Rights* 85; Zhana Vrangalova and Ritch Savin-Williams, 'Mostly Heterosexual and Mostly Gay/Lesbian: Evidence for New Sexual Orientation Identities' (2012) 41 *Archives of Sexual Behaviour* 85.

²²⁰ A broader interpretation may be all that is necessary, since anti-discrimination legislation also prohibits discrimination on the ground of any 'characteristics' that generally appertain to or are imputed to persons of a particular sexual orientation: *Sex Discrimination Act 1984* (Cth); *Discrimination Act 1991* (ACT) s 7(2); *Anti-Discrimination Act 1977* (NSW) s 49ZG(2); *Anti-Discrimination Act 1992* (NT) ss 20(2)(b), (c); *Anti-Discrimination Act 1991* (Qld) s 8; *Equal Opportunity Act 1984* (SA) s 29(2)(c); *Anti-Discrimination Act 1998* (Tas) s 14(2); *Equal Opportunity Act 1984* (WA) ss 35O(1)(b), (c); ss 5A(1)(b), (c). Queer persons in particular may possess such characteristics without identifying under a 'sexual orientation' label.

²²¹ See, eg, *Crimes Act 1900* (NSW) ss 66A, 66B, 66C, 66D; *Crimes Act 1958* (Vic) ss 45, 47, 47A; *Criminal Code Act Compilation Act 1913* (WA) ss 320, 321, 321A.

²²² See, eg, *Crimes Act 1900* (NSW) s 81C; *Crimes Act 1958* (Vic) s 34B; *Criminal Code Act Compilation Act 1913* (WA) ss 214, 215.

²²³ See, eg, *Crimes Act 1900* (NSW) ss 79, 80; *Crimes Act 1958* (Vic) s 59; *Criminal Code Act Compilation Act 1913* (WA) s 181.

²²⁴ Sadomasochists may be further excluded by this definition of sexual orientation depending upon the relevant criminal laws on assault and the defence of consent applying in each jurisdiction: see generally Theodore Bennett, 'Persecution or Play? Law and the Ethical Significance of Sadomasochism' (2015) 24 *Social & Legal Studies* 89.

As a final aside, the use of the term ‘sexual orientation’ seems ideal as a prohibited ground, rather than ‘sexuality’, as it is apparent from submissions to the AHRC that most people support the use of the term ‘sexual orientation’ due to its breadth and inclusiveness.²²⁵ This would appear to fit well with Fuller’s excellency of generality.

B To Whom Should General Religious Exemptions Apply?

Four options present as feasible answers to the question of to whom general religious exemptions should apply: applying religious exemptions to narrowly-defined religious bodies (such as a church); to broadly-defined religiously-affiliated bodies (expanding the definition to include, for example, a bakery owned by a church); to all individuals; or removing religious exemptions entirely. Firstly, as Fuller notes, ‘a total failure to achieve anything like a general rule is rare.’²²⁶ Under the relevant anti-discrimination laws, clearly the general *rule* is that discrimination is prohibited when it is based on a person’s sexual orientation. However, religious exemptions challenge this rule, as they allow for certain people to avoid liability for breaching the general rule, therefore weakening its generality. Fuller does not explicitly note that exemptions to prohibitions undermine the excellency of generality. Indeed, he posits that a rule applying particularly to one individual may well still be a law.²²⁷ This, however, does not appear to strive towards ‘excellence’ in lawmaking. As Fuller notes that rules should be general declarations applied similarly across like cases, it could be argued that discrimination against a person on the ground of sexual orientation should be treated the same regardless of the perpetrator’s religious beliefs. Since the general rule is the prohibition of discrimination, cases of discrimination are alike if the acts of discrimination are themselves alike — not if the personal motivations for the discrimination are the same. An interpretation of this excellency could therefore be that there should not be one disposition for Person A and a different one for Person B if their actions and breach of a general rule are the same. If Fuller’s theory does indeed provide content to the rule of law,²²⁸ requiring that all persons be bound equally to obey the law,²²⁹ this would support such an interpretation. Indeed, Tasmanian Anti-Discrimination Commissioner Robin Banks responded to proposed amendments to expand religious exemptions in Tasmanian anti-discrimination laws by stating that:

To privilege religious speech also suggests that the rule of law — the principle that every person and organisation, including the government, is subject to the same law — is not seen to apply where a religious purpose can be argued. This is

²²⁵ Australian Human Rights Commission, above n 2, 22–3.

²²⁶ Fuller, above n 17, 48.

²²⁷ Ibid 47–8.

²²⁸ As discussed in Part III: see Rundle, above n 20, 500; Luban, above n 19, 29–30.

²²⁹ See also Fuller, above n 17, 210–12.

most likely to apply to people of religion and religious organisations. To displace the rule of law to privilege religion in a secular state is a serious step indeed.²³⁰

Of course, allowing such exemptions would not render anti-discrimination laws invalid under Fuller's approach because the underlying general prohibition against discrimination would remain — but it would weaken their excellence. Taking generality to its end point in striving for perfection may actually suggest that religious exemptions should be removed entirely from the general prohibition against discrimination. While excellence may still be achieved, albeit to a lesser degree, by limiting the exemptions to only narrowly defined religious bodies or even broadly defined religiously-affiliated bodies, a broad interpretation that would allow all individuals a general religious exemption would excessively undermine the generality of anti-discrimination laws.

The avoidance of contradiction excellency provides further guidance. Section 116 of the *Australian Constitution* specifies that, '[t]he Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion'.²³¹ While this restriction appears broad, this section has been read very narrowly by the High Court.²³² In all three cases in which it has considered s 116, the High Court has not yet found a violation of this clause and has restricted its operation only to laws that have the purpose of explicitly restricting the free exercise of religion.²³³ Though this renders s 116 less relevant to religious exemptions under anti-discrimination law, it is pertinent that removing all protection for acts exercised on the basis of religious beliefs would seem to contradict this Australian constitutional provision. Even a narrow interpretation of s 116 would therefore imply that religious exemptions should not be removed entirely. A moderate interpretation could be that such exemptions should apply to religiously-affiliated bodies. Though s 116 applies only to Commonwealth anti-discrimination legislation, reliance on the excellency of clarity suggests that consistency across federal, state and territory legislation would be ideal, owing to the

²³⁰ Equal Opportunity Tasmania, *Anti-Discrimination Amendment Bill 2016 Released for Consultation on 29 August 2016: Response of the Anti-Discrimination Commissioner (Tas)* (September 2016) 24, <http://equalopportunity.tas.gov.au/__data/assets/pdf_file/0009/356382/16.09-ADC_response_to_the_AD_Amendment_Bill_2016.pdf>.

²³¹ *Australian Constitution* s 116.

²³² See generally Stephen McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116' (1992) 18 *Monash University Law Review* 207; Neville Rochow, "'Speak Now or Forever Hold Your Peace": The Influence of Constitutional Argument on Same-Sex Marriage Legislation Debates in Australia' (2013) 3 *Brigham Young University Law Review* 521, 528.

²³³ *Kruger v Commonwealth* (1997) 190 CLR 1; *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116; *Krygger v Williams* (1912) 15 CLR 366.

potential for constitutional issues and the practical problems raised by inconsistent approaches.²³⁴ A consistent approach would be far clearer.

The constancy of law excellency must also be considered. As explored below, few significant changes have been made to the scope of religious exemptions in Australian jurisdictions. Two relevant changes are worth noting. Firstly, Victoria repealed its separate exemption applying to the employment of any persons by a religious body in 2011.²³⁵ Secondly, the Commonwealth excluded its general religious exemption from the provision of Commonwealth funded aged care in 2013.²³⁶ These two changes are minor in scope; any further amendment would not appear to be a ‘constant’ change. Therefore, since all Australian jurisdictions have consistently applied the exemption to both religious bodies and individuals (Victoria and Tasmania) or only to religious bodies (all other jurisdictions), it is apparent that any change here would not be unnecessary and would not thereby weaken this excellency.

While the excellency of generality may well be maximised by requiring that such bodies be defined as narrowly as possible to not include religiously-affiliated bodies and to broaden the general prohibition against discrimination, as occurred in *Christian Youth Camps*, other excellencies suggest otherwise. The extreme spiritual and practical difficulties faced by many religiously-affiliated bodies in attempting to comply with some aspects of anti-discrimination law may require that the definition of religious body be broadened to encompass such bodies,²³⁷ in order to avoid laws requiring the impossible. This suggests that, in contrast to *Christian Youth Camps*, a body engaging in largely commercial activities should be classified as a religious body if their activities are motivated by religious beliefs or if they have connections to a religious body and would find it spiritually impossible to act in defiance of their faith.²³⁸ Indeed, the decision in *OW and OV* shows that this would be a far clearer test to apply through its lower threshold and more definitive evidentiary burden, compared to the strict test applied in *Christian Youth Camps* that required significant and complex evidence to establish. This would maximise the excellency of clarity.

Fuller notes that at times the excellencies may come into conflict with each other, and that the best way to resolve this is to pursue a balanced middle course that

²³⁴ As discussed in Parts I and II, respectively. The constitutional issue is complicated further by the federal government having exclusive power to legislate with respect to marriage, and their ability to legislate for anti-discrimination falling under a different power entirely (the external affairs power): see *Australian Constitution* ss 51(xx), (xxix); *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441; *Commonwealth v Tasmania* (1983) 158 CLR 1; *Richardson v Forestry Commission* (1988) 164 CLR 261.

²³⁵ *Equal Opportunity Amendment Act 2011* (Vic) s 18.

²³⁶ *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) s 49B.

²³⁷ This is explored in greater detail below, in Section C.

²³⁸ Cf *Christian Youth Camps* (2014) 308 ALR 615, 668.

involves partial fulfilment of each conflicting excellency.²³⁹ Generality would be maximised by removing religious exemptions, but could still be ‘excellent’ if applied to narrowly defined religious bodies or broadly defined religiously-affiliated bodies. The avoidance of laws requiring the impossible would support either definition of religious body, while clarity and avoidance of laws requiring the impossible would be maximised by the broadly defined religiously-affiliated bodies. Therefore, allowing general religious exemptions for broadly defined religiously-affiliated bodies, but not for individuals, may be the best path forward to maximise these four excellencies. Of course, this balancing of excellencies is similar to the unresolved balancing of contradicting human rights seen in external morality approaches to this issue. Since the internal characteristics of anti-discrimination laws remain largely unexamined, however, this approach can still add significant value as an alternative path forward.

C How Should the Requisite Religious Beliefs be Tested?

While Fuller’s excellencies cannot provide an answer for the legislative phrasing of the requisite beliefs that activate religious exemptions, they can be used to make broader recommendations for this issue. In particular, Fuller’s analysis can assist in determining whether religious beliefs should be tested subjectively or objectively. A subjective test would clearly broaden the operation of religious exemptions, while an objective test narrows their scope. Whether such beliefs should then be ‘reasonable’, ‘necessary’ or some other standard would become a question for lawmakers.

Two preliminary points should be made. Firstly, any changes to the two-limb general religious exemption test should not contradict provisions in existing human rights legislation under the avoidance of contradiction excellency.²⁴⁰ Secondly, it should be noted that the constancy of law through time excellency will likely not be undermined through any new changes. Religious exemptions were included in the first versions of all relevant anti-discrimination legislation currently in force. Despite inconsistency in the application of general religious exemptions, no substantive changes have ever been made to their legislative construction in New South Wales,²⁴¹ South Australia,²⁴²

²³⁹ Fuller, above n 17, 45.

²⁴⁰ See, eg, *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

²⁴¹ The only change made was to insert ‘act’ in addition to ‘practice’ in 1994: *Anti-Discrimination (Amendment) Act 1994* (NSW) sch 4 cl 24.

²⁴² Only one change was made, in 2009, to extend the exemption to the administration of a body established for religious purposes in accordance with the precepts of that religion and to shift the educational religious exemption to a different section and redefine it: see *Equal Opportunity (Miscellaneous) Amendment Act 2009* (SA) ss 19, 26.

Western Australia, the Australian Capital Territory,²⁴³ Queensland,²⁴⁴ Tasmania, or the Commonwealth. Two exceptions therefore remain: in 2004 the Northern Territory expanded and simplified its general religious exemption provision,²⁴⁵ while Victoria passed new anti-discrimination legislation in 2010, which added a ‘reasonableness’ test to the second limb of its general religious exemption.²⁴⁶ Victoria’s individual religious exemption test was also altered from requiring that beliefs be ‘genuinely’ held, to requiring that the discrimination be ‘reasonably necessary’ for the person to comply with their beliefs.²⁴⁷ If the reasons for shifting to a strict objective test are still applicable, a further change in Victoria may be unnecessary and avoidable. However, amendments in any other jurisdiction, considering their lack of substantive changes, would not undermine this excellency. Indeed, the dearth of changes made in this area may, as Fuller notes, maximise this excellency by better reflecting contemporary society.²⁴⁸

Turning to the main aspect of this question, the avoidance of laws requiring the impossible can assist in determining whether the religious beliefs test should be subjective or objective. Though Fuller spends much of his explanation of this excellency detailing practical and physical impossibilities, he also outlines the potential for spiritual impossibilities. Fuller’s final observation of this excellency contends that, ‘our notions of what is in fact impossible may be determined by presuppositions about the nature of man and the universe’.²⁴⁹ Fuller relies on Thomas Jefferson’s view that laws compelling certain religious beliefs may well require the impossible.²⁵⁰ Fuller then questions whether ‘there is not in [Jefferson’s] conception a profounder respect both for truth and for human powers than there is in our own.’²⁵¹ Hence, laws compelling one to ignore their own religious beliefs may well fail to achieve ‘excellence’ in avoiding the impossible. Indeed, the bakery owner in a prominent UK gay wedding cake case publicly stated that, ‘[t]his has never been about the customer. It has been about a message promoting a cause that

²⁴³ Purely syntactical changes were made in 2000 and 2003: *Justice and Community Safety Legislation Amendment Act 2000 [No 2]* (ACT); *Statute Law Amendment Act 2003* (ACT) sch 3, pt 3.7.

²⁴⁴ One change was made to exclude the exemption from work-related and education areas: *Discrimination Law Amendment Act 2002* (Qld) s 20.

²⁴⁵ Changing to the current requirement that ‘the act is done as part of any religious observance or practice’: *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT) s 24.

²⁴⁶ *Equal Opportunity Act 2010* (Vic) s 82(2); *Equal Opportunity Act 1995* (Vic) s 75(2).

²⁴⁷ *Equal Opportunity Act 2010* (Vic) s 84; *Equal Opportunity Act 1995* (Vic) s 77.

²⁴⁸ See generally Fuller, above n 17, 44–5, and the discussion in Part III on this excellency.

²⁴⁹ *Ibid* 79.

²⁵⁰ *Ibid*; see also at 70, where Fuller seems to note that moral incompatibilities may also weaken the ‘excellency’ of a law, albeit under the avoidance of contradiction excellency.

²⁵¹ *Ibid* 79.

contradicts the Bible.²⁵² This lends support to the application of a subjective test to the requirement of religiously held beliefs.

Another aspect of this excellency reinforces this view. As much of Fuller's explanation of this excellency relates to strict liability, which is not imposed under anti-discrimination laws, few examples are provided as to how a person's beliefs or mental intricacies may impact upon the requiring of the impossible. One clear example is given, though: that of a person suffering from a mental illness who steals a purse from someone else. Fuller notes that this person's mental illness may make it impossible for them to understand or obey the laws of private property.²⁵³ However, rather than rendering the law invalid, this would simply provide a defence to not send the person to jail; this person is not entitled to keep the purse and the purse must still be returned to its owner.²⁵⁴ While of course holding religious beliefs cannot be equated to suffering from a mental illness, this example may shed light on how Fuller would approach religious exemptions. It seems apparent that should a person believe they are unable to perform a task, whether due to their beliefs or through illness, then they are entitled to an exemption to the law requiring this 'impossible' task. However the law remains good law. Were subjective intention to be the required test under religious exemptions, this would fit the analogy well. One may argue, though, that mental illness is more akin to a physical injury that renders a person unable to perform a task, whereas a belief simply renders that person unwilling to perform the task, but still physically capable.

Could the reverse situation apply? Though discrimination can undoubtedly be harmful and dehumanising,²⁵⁵ it would rarely require LGBTI+ persons to perform an impossible act. Requiring an LGBTI+ couple to choose another store to bake their wedding cake would not require them to do the impossible. The case law examined in this area shows that the burden of impossibility weighs far more heavily on religious adherents than LGBTI+ persons.²⁵⁶

The excellency of clarity is also relevant. The use of standards such as 'reasonable' beliefs under an objective test would not inherently undermine Fuller's desideratum of clarity, as he notes that objective community standards can at times provide a clear path forward.²⁵⁷ This should not be confused, however, with delegating a legislative task to the judiciary. Fuller strongly argues that it is a serious oversight if a legislator

²⁵² See McDonald, above n 6.

²⁵³ Fuller, above n 17, 73.

²⁵⁴ Ibid.

²⁵⁵ Cristy Clark, 'With that Ring, I Thee Judge: Why the Law Should Not Allow Exceptions on Marriage Equality', *The Conversation* (online), 6 October 2016 <<https://theconversation.com/with-that-ring-i-thee-judge-why-the-law-should-not-allow-exceptions-on-marriage-equality-66482>>.

²⁵⁶ Cf Ben Winsor, 'Comment: Yes, You Do Have to Bake my Damn Gay Wedding Cake', *SBS* (online), 4 October 2016 <<http://www.sbs.com.au/topics/sexuality/agenda/article/2016/10/04/comment-yes-you-do-have-bake-my-damn-gay-wedding-cake>>.

²⁵⁷ Fuller, above n 17, 64.

cannot convert their objective test into clearly stated rules.²⁵⁸ Indeed, ‘it would be a mistake to conclude from this that all human conflicts can be neatly contained by rules derived, case by case, from the standard of fairness.’²⁵⁹ To adopt a policy of social experimentation, by hoping that judicial precedent develops clear standards in applying a broad test to difficult legal problems, appears optimistic and undesirable under a Fullerian approach. This suggests that a test falling somewhere between being strictly objective and strictly subjective may even be ideal.

Judicial discussions in anti-discrimination case law would appear to support a subjective test to maximise clarity in decision-making. In *OW and OV*, the CEO of the Board of the Wesley Mission Council noted that each local church and parish under the Uniting Church ‘carries out its mission ... according to the guidance of God as it perceives it ... Accordingly, within our own Synod, and the Sydney Presbytery in particular, it is well known that there exists a great deal of diversity on many issues.’²⁶⁰ The CEO contended that local parishes would be bound by doctrinal determinations made by the Uniting Church, but ‘because the Uniting Church has decided not to make a doctrinal determination on the issue of homosexuality ... whether to appoint a homosexual leader is an issue that local congregations can determine on the basis of their own conscience’.²⁶¹ Indeed the New South Wales Court of Appeal noted in *Sunol v Collier* that while assumptions over the rightness or wrongness of certain sexualities ‘may have been settled for many, if not most, in our community some years ago, [this] cannot deny the existence of social and political debate about these issues.’²⁶²

Other practical examples display how an objective test would undermine the excellency of clarity, due to the difficulty in establishing uniformly held religious beliefs. In 2012, a motion on human sexuality passed with majority support in both lower houses of the Synod of the Anglican Diocese of Perth. This motion, inter alia, recognised diversity in sexual identities and supported committed same-sex couples being able to register their relationships as ‘civil unions’.²⁶³ However, this motion was rejected twice at higher levels of the Anglican religious hierarchy: first by the Anglican Archbishop of Perth,²⁶⁴ and then unanimously by all three houses of the Provincial Council.²⁶⁵ As a

²⁵⁸ Ibid.

²⁵⁹ Ibid.

²⁶⁰ *OW v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010) [18].

²⁶¹ Ibid.

²⁶² *Sunol v Collier [No 2]* [2012] NSWCA 44 [65] (Allsop P).

²⁶³ Roger Herft, *Circular: Members of Synod (Synod Resolution 58/12: Human Sexuality)* (1 November 2012) Anglican Diocese of Perth <<http://www.perth.anglican.org/wp-content/uploads/2015/11/2012-Synod-motion-58.12-Presidents-decision.pdf>>.

²⁶⁴ Ibid.

²⁶⁵ ‘WA Provincial Council Votes against Human Sexuality Resolution’, *Anglican Church League* (online), 15 November 2013 <<http://acl.asn.au/wa-provincial-council-votes-against-human-sexuality-resolution/>>.

result, it did not pass. If an anti-discrimination case was brought where the defendant argues an exemption based on an Anglican belief that same-sex couples cannot legally recognise their relationships as ‘civil unions’, how would this be decided? Would a requisite consensus to pass an objective test be established by the two lower houses of Synod agreeing with this motion? Or would the dissent of the Archbishop and the Provincial Council render this issue too divisive to establish this as a belief conforming to the Anglican faith? Based on the various objective tests and requirements applied in anti-discrimination case law to date, there could not possibly be a clear answer to this question. It is apparent, therefore, that the objective test provides significant issues for striving towards clarity. This is especially the case since, as noted in *Christian Youth Camps*, ‘[t]he question as to when a religion requires that a person behave in a certain way is a vast and contentious one. Religions vary widely in the degree to which they prescribe certain behaviours’.²⁶⁶ Indeed, the lack of a uniform position within Christian churches on same-sex attraction has been noted on various occasions.²⁶⁷

However, Gray’s suggestion that, ‘[t]here must be some basis in the religious text, or religious doctrine from an objective source, linking the claimant’s belief with religion’ also seems appropriate in seeking clarity.²⁶⁸ It would be incoherent to not require any objective evidence of a religious doctrine to activate a religious exemption. A court must be guided towards a verifiable religion and doctrines that may fall within its ambit. It seems, therefore, that Fuller’s excellency of avoiding laws requiring the impossible would significantly favour a more subjective test while the excellency of clarity would favour a quasi-subjective test grounded on some objectivity. As the excellency of generality would be undermined to a greater degree by an exclusively subjective test, considering this would broaden the exemption to the general prohibition against discrimination, a quasi-subjective test may be the best path forward. This could require that subjectively established beliefs be grounded on an objectively verifiable religion that can be interpreted to bear such beliefs, regardless of the merits of this religious interpretation. As noted by Redlich JA in *Christian Youth Camps*, a court is ‘neither equipped nor required to evaluate [any person’s theological] moral calculus.’²⁶⁹ In pursuing such a quasi-subjective test, reliance could be placed on the findings of the Human Rights and Equal Opportunity Commission in a 1998 inquiry into a complaint of discrimination:

Religious institutions can claim quite properly a margin of appreciation or discretion in making distinctions under [general religious exemptions]. Religious believers have the right to determine what are or are not the doctrines ... of their religion. The state and state institutions have no entitlement or authority in human rights law or domestic law to define those. But in applying laws that

²⁶⁶ *Christian Youth Camps* (2014) 308 ALR 615, 732 (Redlich JA).

²⁶⁷ Harrison and Parkinson, above n 132, 418; Chai R Feldblum, ‘Moral Conflict and Liberty: Gay Rights and Religion’ (2006) 72 *Brooklyn Law Review* 61; Douglas Laycock, ‘Religious Liberty and the Culture Wars’ (2014) 3 *University of Illinois Law Review* 839.

²⁶⁸ Gray, above n 15, 95.

²⁶⁹ *Christian Youth Camps* (2014) 308 ALR 615, 733.

recognise the doctrines, tenets, beliefs or teachings of a religion the state and state institutions are entitled to rely upon what religious believers say are their doctrines ... Indeed they have no option but to do so.²⁷⁰

V CONCLUSION: THE PATH FORWARD

Discourse around the external morality of law has led to important discussions about the ambitions of law and the outcomes it seeks to achieve. These accounts often draw from human rights, and in doing so seek to ensure the greatest protection of individual rights such as equality, expression, association and liberty. However, these rights-based external morality accounts have struggled to resolve conflicts between religious freedom and freedom from discrimination — two rights that inherently come into conflict with each other. This is particularly the case when considering the issue of religious exemptions to Australian anti-discrimination laws on the ground of sexual orientation. The entrenched sides to this debate have been well rehearsed in recent years and have not yet been able to find a way to resolve the substantial inconsistencies and uncertainty seen in the interpretation and application of Australian religious exemption provisions.

As such, a pivot towards the internal morality of law would provide an alternative path forward for scholars, advocates and lawmakers. This approach would recommend expanding the ‘sexual orientation’ prohibited ground, extending religious exemptions to religiously-affiliated bodies but excluding them from individuals, and shifting towards a quasi-subjective test in order to determine the requisite beliefs to activate such exemptions.²⁷¹ Adopting these three recommendations would help to resolve the inconsistent legislative approaches to this issue across Australia, in addition to providing a clearer judicial barometer that could minimise the unpredictable decision making seen thus far in the case law. An internal morality approach could also be used in interpreting religious exemptions to gender identity, intersex status and other prohibited grounds.

What would the three recommendations mean for future ‘gay wedding cake’ cases? It is apparent that any same-sex couple suffering discrimination would undoubtedly be covered by a broader conception of ‘sexual orientation’, while the requisite religious beliefs would likely be established so long as the religious adherent/s in question could point to a connected religious source for their views. Such cases would likely, then, be decided by the status of the religious adherent/s’ organisation. If the bakery was owned by a religious institution such as a church, they would likely be able to legally refuse to bake a cake for a same-sex wedding. However, individuals

²⁷⁰ Sidoti, above n 67, 23.

²⁷¹ This would, in the end, result in broader anti-discrimination laws and broader exemptions, as was suggested under New York’s anti-discrimination law in David Wexelblat, ‘Trojan Horse or Much Ado About Nothing? Analyzing the Religious Exemptions in New York’s Marriage Equality Act’ (2012) 20 *American University Journal of Gender, Social Policy & the Law* 961, 987–88.

and privately-owned bakeries with no institutional affiliations with religious bodies would be unable to rely on these exemptions and would therefore be prohibited from discriminating against same-sex couples due to their sexual orientation.

As recently stated by Robert Wintemute, a prominent human rights scholar, ‘religious exemptions to anti-discrimination legislation will be the next key battleground in the clash between religious freedom and freedom from discrimination in Australia.’²⁷² A recognition that, despite its merits, external morality may not be the only path forward could open this battleground to alternative and promising debates. An internal morality perspective, which advocates for a more ‘excellent’ form and process of lawmaking, could provide a fuller approach to religious exemptions that would allow lawmakers to indeed have their cake and eat it too.

²⁷² Robert Wintemute, ‘Same-Sex Marriage: Should a Court, Legislature or Plebiscite Introduce it, and Should Religious Individuals be Granted Exemptions?’ (Speech delivered at the Law School Research Seminar Series, University of Western Australia, 3 November 2016).

