*Simon Rice**

FROM THE LORDS SPIRITUAL TO 'RELIGIOUS FREEDOM': THE TRUE PURPOSE OF THE EXCEPTION FOR RELIGIOUS SUSCEPTIBILITIES IN AUSTRALIAN ANTI-DISCRIMINATION LAW

Abstract

A commonly occurring statutory exception in Australia allows religious bodies to discriminate in deference to adherents' 'religious susceptibilities'. This exception was introduced to Australian law, in many different forms, from a precedent in the United Kingdom that had the very particular purpose of accommodating doctrinal dissenters in the Church of England on the issue of sex discrimination when ordaining priests. That very particular purpose was never identified in Australia, and the religious susceptibilities limb went unexplained for many years, until Christian churches attributed to it the purpose of guaranteeing an undefined form of religious freedom. The religious susceptibilities limb has rarely arisen in reported discrimination cases, suggesting that complaints are not made or pursued because of the apparent religious freedom that religious bodies are given by the exception. Adopting the original purpose of the exception — to accommodate the views of doctrinal dissenters — would define and focus the exception for religious susceptibilities on accommodating doctrinal dissent.

I Introduction

In Australian anti-discrimination laws, religious bodies have the benefit of an exception that has two limbs, allowing a religious body to discriminate when religious doctrine requires, and/or when necessary to avoid injury to adherents' 'religious susceptibilities'. What does this mean? Why is reference to religious

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doctrine not all that is needed to allow discrimination? In going further than doctrinal requirements, is the religious susceptibilities limb actually — as it is claimed to be — a guarantee of religious freedom?

In this article, I investigate the religious susceptibilities limb of the religious bodies exception, and answer these questions in light of the origins and intended purpose of the provision in the United Kingdom ('UK') Parliament in 1975. That purpose, lost in the adoption and adaptation of the provision throughout Australia, helps make sense of what the religious susceptibilities limb means, both in its own terms and as a complement to an exception for conformity with religious doctrine. In transporting the religious susceptibilities bodies from the UK to Australia, the loss of the intended purpose of the religious susceptibilities limb has created a confusion of drafting, and an opportunity to attribute to it a 'religious freedom' purpose.

In fact, it is rare that parliaments in Australia have ever enacted the religious susceptibilities limb for a religious freedom purpose. Rather, it is religious institutions that characterise such an exception 'as critical for the purposes of religious freedom'.[1] The existence of the religious susceptibilities limb, and its promotion as a 'religious freedom' measure, matter; as Carolyn Evans says, 'the implications of the relatively wide exemptions for religious bodies are significant'.[2] Australia is very reliant 'on religious organisations to provide community services, including social welfare, healthcare, aged care, social housing and education'; Eleni Poulos cites research that shows that religious organisations deliver over 50% of these services.[3] Evans points out that religious run service providers 'are huge employers … and provide services to hundreds of thousands of people. In some areas, for example, in regional communities, the local church may be the only provider of these services'.[4] As a result, religious bodies exceptions 'apply to huge swathes of the workforce and service provision'.[5]

The combined effect of the prevalence of religious organisations in providing community services, and an exception for religious susceptibilities that allows freedom to discriminate, is far reaching, notably for LGBTQIA+ communities.[6]

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1 Carolyn Evans, 'Religious Freedom, Religious Discrimination and the Role of Law' (Current Legal Issues Lecture, Queensland Bar Association and the TC Beirne School of Law, 13 October 2022) 8.

2 Ibid.

3 Eleni Poulos, 'Three Discourses of Religious Freedom: How and Why Political Talk about Religious Freedom in Australia has Changed Religions' (2023) 14(5) *Religions* 1, 3.

4 Evans (n 1) 8.

5 Ibid.

6 In this article I use the term 'LGBTIQA+' for 'people who have identified themselves as lesbian, gay, bisexual, transgender, intersex, or questioning' (Queensland Human Rights Commission <https://www.qhrc.qld.gov.au/your-rights/for-lgbtiq-people/lgbtiq-terminology>) but when another term is used by a quoted source, I use that other term.

It can mean, for example, that 'people identifying as LGBTI do not seek access to emergency services, as these have been outsourced to [faith-based organisations] that vocally oppose non-normative sexual orientations'.[7] Such vocal opposition was apparent in the submission of the Anglican Church Diocese of Sydney to the *Religious Freedom Review* 'that all its community services must be offered conditionally, consistently with its teaching that "heterosexual … marriage is both the norm and ideal"',[8] and in the submission of the Australian Christian Lobby and Human Rights Law Alliance that 'commercial businesses operated by Christians … should have a right to discriminate against LGBTQ+ clients and staff'.[9]

There are many examples of what a religious freedom to discriminate allows: a long-time and highly respected teacher was dismissed from a Christian school for being lesbian;[10] gay students at an independent religious school were bullied and vilified without protection;[11] LGBTIQ+ people 'might not get the medical assistance which is required',[12] and 'many LGBTQ+ people … have left Christianity, or changed denominations or congregations due to experiences of discrimination'.[13]

To understand how the religious susceptibilities limb actually works in Australia — for whose benefit, and in what circumstances — I explain in Part II the various ways it is has been drafted. This informs a generalised version of the religious bodies exception that I use in this article.

In Part III — to understand how a religious freedom purpose has been attributed the religious susceptibilities limb in Australia — I go back to the beginning, to debates

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7 Cameron Parsell et al, 'Created in the Image of God? Progressive Social Services and Faith-Based Organizations' (2021) 36(3) *Journal of Contemporary Religion* 471, 466, citing Dale Dominey-Howes, Andrew Gorman-Murray and Scott McKinnon, 'Emergency Management Response and Recovery Plans in Relation to Sexual and Gender Minorities in New South Wales, Australia' (2016) 16 *International Journal of Disaster Risk Reduction* 1, 8.

8 Douglas Ezzy et al, 'LGBTQ+ Non-Discrimination and Religious Freedom in the Context of Government-Funded Faith-Based Education, Social Welfare, Health Care, and Aged Care' (2023) 59(4) *Journal of Sociology* 931, 935, quoting Anglican Church Diocese of Sydney, Submission No 7482 to Expert Panel on Religious Freedom, *Religious Freedom Review* (13 February 2018) [4.3.2].

9 Ibid 935, citing Australian Christian Lobby and Human Rights Law Alliance, Submission No 14932 to Expert Panel on Religious Freedom, *Religious Freedom Review* (14 February 2018).

10 Bronwyn Fielder, Douglas Ezzy and Angela Dwyer, 'Educators' Hands are Tied: The Impact of Heteronormative and Cisnormative Discourses on Students in Faith-based Schools in Australia' (2024) 60(2) *Journal of Sociology* 458, 464.

11 Ibid 465.

12 Douglas Ezzy et al, *LGBTIQ+ Employees in Tasmanian Workplaces Report: Findings from a Survey 2019–2020* (Report 14 July 2021) 58.

13 Douglas Ezzy, Bronwyn Fielder and Angus McLeay, 'LGBTQ+ Christians in Australia' (2024) 71(2) *Social Compass* 326, 338.

in 1975 in the UK House of Lords. That history reveals that the religious susceptibilities limb had a very particular and narrow purpose: to protect the decision of the Church of England to continue to discriminate against women despite there being no doctrinal imperative.

I recount in Part IV how the religious susceptibilities limb was brought from the UK to South Australia ('SA'), and then replicated around Australia with the drafting variations I set out in Part II. In that process of replication, the origins of the religious susceptibilities limb were lost, and it was simply accepted as a part of the religious bodies exception.

This context for the religious susceptibilities limb — its original purpose, forgotten in the translation to Australia — has resulted in the attribution of a 'religious freedom' purpose. In Part V, I look at this phenomenon and argue that not only was the religious susceptibilities limb in Australia not enacted for a 'religious freedom' purpose, but that, as an exception to a discrimination prohibition, it cannot actually have this purpose. Rather, it conditionally permits conduct that would otherwise be prohibited, and only to that extent does it allow some freedom to discriminate. The conditions attaching to the exception therefore become critical to understanding when discrimination in the name of religion is permissible, and meeting those conditions requires evidence.

In Part VI, I review the cases where the religious susceptibilities limb has been relied on, almost always unsuccessfully for want of evidence, and consider how the outcome might have been different under the original purpose of the exception.

I conclude with a reflection on how regard to that original purpose would alter the approach of courts and the nature of public debate on religious discrimination, being specific about the purpose of the religious susceptibilities limb as one that accommodates doctrinal dissent.

II Parsing the Religious Bodies Exception

Discrimination, on the basis of a number of personal attributes in a wide range of circumstances, is unlawful in all Australian jurisdictions. The prohibitions in anti-discrimination legislation are subject to exceptions (also called exemptions), which, in the case of religious bodies, allows discrimination that would otherwise be unlawful — the 'religious bodies exception'.[14] In some jurisdictions, the religious

14 *Sex Discrimination Act 1984* (Cth) s 37(1); *Age Discrimination Act 2004* (Cth) s 35; *Discrimination Act 1991* (ACT) ss 32(1)(d)(i), 32(1)(e)(i), 32(1)(g)(i); *Anti-Discrimination Act 1977* (NSW) s 56; *Anti-Discrimination Act 1992* (NT) s 40(3); *Anti-Discrimination Act 1991* (Qld) s 109; *Equal Opportunity Act 1984* (SA) s 50; *Anti-Discrimination Act 1998* (Tas) s 52; *Equal Opportunity Act 2010* (Vic) ss 82, 82B; *Equal Opportunity Act 1984* (WA) s 72.

bodies exception extends to religious educational institutions,[15] and to control over places of cultural or religious significance,[16] and the particular terms of the religious susceptibilities limb occur in other legislation for other purposes.[17]

Scholars have described the religious bodies exception in varying degrees of detail;[18] in particular, Sarah Moulds helpfully categorises the different approaches in Australian jurisdictions as 'narrow', broad', 'novel', and distinctive to each of the Commonwealth and Victoria,[19] and Liam Elphick usefully outlines, in a table, the various ways that Australian jurisdictions have structured the religious bodies exception.[20] The following account both updates earlier accounts and provides a deeper analysis of the differences in drafting and their implications.

A bewildering variety of terms are used across nine jurisdictions to say much the same thing. This is the more bewildering for the fact that the enactments came one after the other, over many years, each largely copying the previous one but each introducing a new variation on the terms previously used. In some instances, there may be what Elphick calls 'terminological' differences that are 'largely immaterial',[21] but in others the differences appear to be substantial, as I discuss below. When trying to make sense of these provisions it must be assumed that 'where the parliament could have used the same word but chooses to use a different word, the

15 *Sex Discrimination Act 1984* (Cth) s 38; *Equal Opportunity Act 1984* (WA) s 73; *Anti-Discrimination Act 1991* (Qld) s 25(2); *Anti-Discrimination Act 1998* (Tas) s 51A.

16 *Anti-Discrimination Act 1992* (NT) s 43(1); *Anti-Discrimination Act 1991* (Qld) ss 48, 80; *Anti-Discrimination Act 1998* (Tas) s 42; *Equal Opportunity Act 2010* (Vic) s 83.

17 *Australian Human Rights Commission Act 1986* (Cth) s 3 (definition of 'discrimination' for some purposes); *Fair Work Act 2009* (Cth) s 153 in relation to terms of an industrial award, s 195 in relation to terms of an enterprise agreement, s 351(2) in relation to adverse action, s 772(2)(b) in relation to terminating employment; *Marriage Act 1961* (Cth) ss 47(3), 47B(1), 81(2) in relation to refusing to solemnise a marriage; *Industrial Relations Act 2016* (Qld) s 295(2) in relation to adverse action.

18 See, e.g.: Greg Walsh, 'An Opt-In Approach to Regulating the Employment Decisions of Religious Schools' (2014) 14 *Macquarie Law Journal* 163; Carolyn Evans and Leilani Ujvari, 'Non-discrimination Laws and Religious Schools in Australia' (2009) 30(1) *Adelaide Law Review* 31; Carolyn Evans and Beth Gaze, 'Discrimination by Religious Schools: Views from the Coal Face' (2010) 34(2) *Melbourne University Law Review* 392.

19 Sarah Moulds, 'Drawing the Boundaries: The Scope of the Religious Bodies Exemptions in Australian Anti-discrimination Law and Implications for Reform' (2020) 47 *University of Western Australia Law Review* 11.

20 Liam Elphick, 'Sexual Orientation and "Gay Wedding Cake" Cases Under Australian Anti-Discrimination Legislation: A Fuller Approach to Religious Exemptions' (2017) 38(1) *Adelaide Law Review* 149, 161.

21 Ibid 159.

intention is to change the meaning'.[22] It is never clear what different meaning the parliament intended.

A *The Coverage of the Exception*

The religious bodies exception usually attaches to any conduct that is covered by the anti-discrimination statute; a typical provision is to the effect that 'nothing in this Act applies' to the prescribed conduct of a religious body.[23] In some jurisdictions, however, the religious bodies exception is available only in particular circumstances. For example, in the Northern Territory ('NT') it applies only for restricting access to land, a building or place of cultural or religious significance, and in relation to religious accommodation;[24] in Tasmania it applies only when the discrimination is on the basis of religious belief or affiliation or religious activity;[25] and in SA it applies only when the discrimination is on the basis of sex, sexual orientation or gender identity.[26]

B *The Structure of the Religious Bodies Exception*

The religious bodies exception has two limbs:[27] (1) an exception for when discrimination is necessary to conform with doctrine (the 'doctrinal conformity limb'); and (2) an exception for when discrimination is necessary to avoid injury to religious susceptibilities of adherents (the 'religious susceptibilities limb'). But there is an important qualification on the way that these two limbs are part of the religious bodies exception: in different jurisdictions they operate either disjunctively or conjunctively.

In Australia's earlier anti-discrimination laws — in SA, New South Wales ('NSW'), Victoria,[28] Western Australia ('WA') and in the *Sex Discrimination Act 1984* (Cth) ('*SDA*') and the later *Age Discrimination Act 2004* (Cth) ('*ADA*')[29] — the religious bodies exception allows discrimination if it is necessary *either* to conform with doctrine *or* to avoid injury to religious susceptibilities. In the later laws — in the

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22 Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis, 10th ed, 2024) 74 [4.13]; Perry Herzfeld and Thomas Prince, *Interpretation* (Thomson Reuters, 3rd ed, 2024) 166–7 [4.13].

23 See e.g.: *Anti-Discrimination Act 1977* (NSW) s 56; *Equal Opportunity Act 2010* (Vic) s 82(1).

24 *Anti-Discrimination Act 1992* (NT) ss 40(3), 43(1).

25 *Anti-Discrimination Act 1998* (Tas) ss 42, 52.

26 *Equal Opportunity Act 1984* (SA) s 50. A limited religious bodies exception is also available for discrimination on the basis of marital or domestic partnership status: s 85ZM.

27 Elphick (n 20) 159.

28 The *Equal Opportunity Act 2010* (Vic) is the most recent successor to the original anti-discrimination law in Victoria, the *Equal Opportunity Act 1977* (Vic).

29 Neither the *Racial Discrimination Act 1975* (Cth) nor the *Disability Discrimination Act 1992* (Cth) makes an exception for religious bodies.

Australian Capital Territory ('ACT'), the NT, Tasmania and Queensland — the two limbs were from the outset separated by the conjunctive 'and' (although in Tasmania the limbs in an earlier 1978 Bill had been drafted disjunctively).[30] As a result, in what I call the 'conjunctive jurisdictions', it is not enough that discrimination is necessary to conform with doctrine, it must *also* be necessary to avoid injuring adherents' religious susceptibilities.

For a religious body to discriminate lawfully in the conjunctive jurisdictions, satisfying the requirements of doctrinal conformity is necessary but not sufficient, and the requirements of the religious susceptibilities limb must also be satisfied. On the other hand, for a religious body to discriminate lawfully in the disjunctive jurisdictions, satisfying the requirements of the doctrinal conformity limb is sufficient, but it is not necessary if, instead, the requirements of the religious susceptibilities limb are satisfied. As I discuss below, the disjunctive structure of the religious bodies exception is the same structure that Australian anti-discrimination law initially copied from the UK in 1975.

In the conjunctive jurisdictions, there is no avoiding the usual meaning of the word 'and' when it occurs.[31] To understand why the word 'or' in existing laws was replaced by the word 'and' in new laws, it must be assumed that the intention was to change the meaning,[32] but we can only guess at the policy decision that led to the drafting choice. The drafting went unremarked when enacted in the ACT,[33] and in Tasmania.[34] In Queensland the drafting was explicitly acknowledged but went unexplained: 'The discrimination is only permitted if the two tests set out in the clause are met. The discrimination must be in accordance with the doctrine of the religion and be necessary to avoid offending the religious sensitivities of people of that religion'.[35] WA is the only jurisdiction to consider and explain a policy rationale for the conjunctive approach, in a law reform recommendation that has not been acted on, saying that 'there is no principled reason for giving religious bodies the ability to discriminate more broadly' than in conformity with doctrines, tenets or beliefs.[36]

30 Anti-Discrimination Bill 1978 (Tas) cl 31.

31 Pearce (n 22) 75 [2.52]; Herzfeld and Prince (n 22) 136 [5.270].

32 Pearce (n 22) 166–7 [4.13].

33 Explanatory Statement, Human Rights and Equal Opportunity Bill 1991 (ACT), 11.

34 Tasmania, *Parliamentary Debates,* House of Assembly, 20 May 1998, 63–102 (Raymond Groom); Tasmania, *Anti-Discrimination Bill 1998* (Facts Sheet, tabled 20 May 1998).

35 Explanatory Notes, Anti-Discrimination Bill 1991 (Qld), 8.

36 Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Final Report, Project 111, May 2022) 173–8 [4.5.4.4], recommendation 77.

C *The Terms of the Religious Bodies Exception*

Because of the variety of approaches taken by Australia's nine different legislatures, the terms used in the religious bodies exception require clarification. To start with, I use the term 'religious bodies' in this article to identify to whom the religious bodies exception is available, although different terms are used in the legislation: 'religious bodies' in the ACT and Victoria;[37] 'a body established for religious purposes' under the *SDA* and *ADA* (Cth) and in Queensland, SA and WA;[38] a body 'established to propagate religion' in NSW;[39] and 'a person' in certain circumstances in the NT and Tasmania.[40]

An exception in much the same terms as the religious bodies exception is available in some jurisdictions for a specific type of religious body: a religious educational institution in Victoria; an educational institution established for religious purposes under the *SDA* and in WA;[41] an educational institution under the direction or control of a body established for religious purposes in Queensland;[42] and an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion in Tasmania.[43] The exception for a religious educational institution in the ACT is more limited than the usual religious bodies exception and does not have the religious susceptibilities limb.[44]

These many terms to describe much the same thing can of course have different meanings, leading to what Evans politely calls 'a lack of clarity or consistency'.[45] For example, a 'body established for religious purposes' is not necessarily 'a religious institution',[46] and it is unclear whether a body 'established to propagate religion' could include a religious school.[47] When considering the term 'established to propagate religion', the NSW Court of Appeal said that the term 'invites the questions

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37 *Discrimination Act 1991* (ACT) s 32; *Equal Opportunity Act 2010* (Vic) ss 82, 82B, 83.

38 *Sex Discrimination Act 1984* (Cth) s 37; *Age Discrimination Act 2004* (Cth) s 35; *Anti-Discrimination Act 1991* (Qld) s 109; *Equal Opportunity Act 1984* (SA) s 50; *Equal Opportunity Act 1984* (WA) s 72.

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

40 *Anti-Discrimination Act 1992* (NT) ss 40(3), 43(1); *Anti-Discrimination Act* (Tas) 1998 ss 42, 52.

41 *Sex Discrimination Act 1984* (Cth) s 38; *Equal Opportunity Act 1984* (WA) s 73.

42 *Anti-Discrimination Act 1991* (Qld) s 25(2).

43 *Anti-Discrimination Act 1998* (Tas) s 51A.

44 *Discrimination Act 1991* (ACT) s 46.

45 Carolyn Evans, *Legal Aspects of the Protection of Religious Freedom in Australia* (Report, Centre for Comparative Constitutional Studies Melbourne, June 2009) 36 [4.4.1].

46 *Re Pamas Foundation (Inc) v Deputy Commissioner of Taxation* (1992) 35 FCR 117, 119.

47 Evans and Ujvari (n 18) 50.

"established by whom" and "to propagate what religion"',[48] and commented that '[t]he answers to those questions will, of course, be a matter of fact in the circumstances of the particular case'.[49]

In a NSW tribunal case, for example, the evidence did not establish that a body established to 'educate the general public about Islam' was 'established to propagate a religion'.[50] In Victoria, the Court of Appeal upheld the view at first instance that the body in question was not 'a body established for religious purposes';[51] rather, it was an incorporated body run by the Christian Brethren conducting activities at an adventure resort that 'do not involve the spread or strengthening of spiritual teaching, the maintenance of the doctrines of the Christian Brethren religion or of the observances that promote or manifest it'.[52] It was found that '[t]he purposes of [the body], are not directly and immediately religious. They relate to the conduct of camping for both secular and religious groups'.[53] As these cases illustrate, there is indeed a 'lack of clarity or consistency' in the terms of the religious bodies exception from one jurisdiction to another.

D *The Terms of the Doctrinal Conformity Limb*

The terms of the doctrinal conformity limb will matter in the conjunctive jurisdictions, and may matter in the disjunctive jurisdictions. The doctrinal conformity limb refers to 'doctrines, tenets or beliefs' in s 37 of the *SDA* (for religious bodies), in the *ADA* , and in the ACT and WA;[54] to 'doctrines, tenets, beliefs or teachings' in s 38 of the *SDA* (for religious educational institutions); to 'religious doctrines, beliefs or principles' in Victoria;[55] to 'doctrines' in NSW;[56] to 'precepts' in SA;[57] and to 'doctrine' in NT.[58]

As I describe below, in its original form in the UK the doctrinal conformity limb was in fact the doctrinal *compliance* exception. It is a doctrinal *conformity* limb throughout Australia except in Queensland, where conduct must be 'in accordance

48 *OV and OW v Members of the Board of the Wesley Mission Council* (2010) 79 NSWLR 606, [33] ('*OV and OW (CA)*').

49 Ibid. See also, *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, 312–13 [223] ('*Cobaw*'), quoting *Federal Commissioner of Taxation v Word Investments* (2008) 236 CLR 204, 216–17 [17], 224 [34].

50 *Bevege v Hizb ut-Tahrir Australia* [2016] NSWCATAD 44, [18], [97] ('*Bevege*').

51 *Cobaw* (n 49) 306–20 [199]–[260].

52 Ibid 311 [218].

53 Ibid.

54 *Sex Discrimination Act 1984* (Cth) s 37; *Age Discrimination Act 2004* (Cth) s 35; *Discrimination Act 1991* (ACT) s 32; *Equal Opportunity Act 1984* (WA) s 72.

55 *Equal Opportunity Act 2010* (Vic) ss 82, 82B, 83.

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

57 *Equal Opportunity Act 1984* (SA) s 50.

58 *Anti-Discrimination Act 1992* (NT) s 43(1)(a).

with' doctrine.[59] A requirement to conform — perhaps having much the same meaning as 'in accordance with' — seems more generous than a requirement to comply.[60] A NSW Tribunal described the requirement to conform as a 'singularly undemanding' test,[61] but Maxwell P in the Victorian Court of Appeal, did not agree that the phrase 'conforms with' means no more than 'complies with, or is in accord or harmony with', deciding that, in context, the phrase 'conforms with' means 'requires, obliges or dictates'.[62] To refine the terms further, the Law Reform Commission of WA considered that 'conforms with' imposes a higher standard than the phrase 'in conformity with'.[63]

E *The Terms of the Religious Susceptibilities Limb*

As all but four jurisdictions do, I use the term 'religious susceptibilities' for discussion in this article to identify the phenomenon with which the exception is concerned; the term that is used in the *ADA*, the NT, Queensland, and Victoria is 'religious sensitivities'. Variations in terms can happen even in the one jurisdiction; Victoria changed from 'susceptibilities' in the *Equal Opportunity Act 1984* (Vic) to 'sensitivities' in the *Equal Opportunity Act 1995* (Vic), and the Commonwealth uses 'susceptibilities' in the *SDA* but 'sensitivities' in the *ADA*. When quoting legislation or commentary, I use the cognate terms they use, such as 'sensitivities' or 'sensibilities' for susceptibilities.

The Victorian Anti-Discrimination Tribunal said that 'the sensitivities must have some connection with the religion itself. It is not enough that for some reason unconnected with their religion, the adherents of a religion find conduct embarrassing or unacceptable.'[64] Against this, a NSW tribunal found the religious susceptibilities limb was made out merely on the basis of conduct that would be unacceptable.[65] But even if 'unacceptability' is sufficient, it must be 'religiously' unacceptable — the exception is for religious susceptibilities, not for mere susceptibilities.

Those who hold the religious susceptibilities are usually referred to as 'adherents' of the religion, which is the term I use for discussion in this article, but in the NT and Queensland the term is 'people' of the religion, and in Tasmania it is 'any person' of the religion. Again, Victoria decided to change terms, from 'people' in the *Equal*

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59 *Anti-Discrimination Act 1991* (Qld) s 109(1)(d).

60 See, e.g.: the way the two terms are used in *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, and *Newcrest Mining* (WA) *Ltd v Commonwealth* (1997) 190 CLR 513.

61 *OW and OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293, [35] ('*OW and OV (ADT)*').

62 *Cobaw* (n 49) 326 [286]–[287].

63 Law Reform Commission of WA (n 36) 177 [4.5.4.4.3].

64 *Jubber v Revival Centres International and Lovelock* [1998] VADT 62, 8 ('*Jubber*').

65 *OW and OV (ADT)* (n 61) [22], accepting the statement made in paragraph 62 of Dr Garner's affidavit.

Opportunity Act 1984 (Vic) and the *Equal Opportunity Act 1995* (Vic) to 'adherents' in the *Equal Opportunity Act 2010* (Vic).

The concern of the religious susceptibilities limb is usually 'to avoid injury' and that is the term I use, but in the NT and Queensland the concern is 'to avoid offending' which is, probably unknowingly, a reversion to the terms of the original UK provision that is the source of the religious susceptibilities limb, as I discuss below. The Victorian Court of Appeal considered the term 'injury', deciding that 'in this particular statutory context' injury must be 'significant' and 'unavoidable', and the harm caused must be 'real harm'.[66]

The discriminatory conduct must be 'necessary' at the relevant time to avoid injury to the religious susceptibilities, except in Victoria where the conduct must be 'reasonably necessary'.[67] The Victorian Court of Appeal agreed with the Victorian Civil and Administrative Tribunal ('VCAT') that 'necessary' means 'more than convenient or reasonable',[68] and said that 'for conduct to be exempted, there must have been no alternative to engaging in the conduct if "injury to religious sensitivities" was to be avoided'.[69] On the unique 'reasonably necessary' variation in Victoria, it was submitted to VCAT that this qualification 'alters the test to become one of convenience or reasonableness, rather than one of significance and unavoidability',[70] but the Tribunal did not have to decide the issue and it has not arisen since.

In WA and under the *SDA*, for discriminatory conduct by an educational institution established for religious purposes to engage the religious susceptibilities limb, it must be done 'in good faith',[71] with evidentiary implications that I note in Part VI below.

F *A Generalised Expression of the Religious Bodies Exception*

In summary, the generalised version of the religious bodies exception that I use for purposes of discussion in this article is this: it allows discrimination by a religious body when necessary to conform with the doctrines of that religion, and/or to avoid injury to the religious susceptibilities of the adherents of that religion.

III Context and Purpose of the Religious Susceptibilities Limb

The religious susceptibilities limb has been copied-and-pasted in every new anti-discrimination statute around Australia without scrutiny or thought, and with

66 *Cobaw* (n 49) 330 [299]–[301].

67 See e.g., *Equal Opportunity Act 2010* (Vic) ss 82(2)(b), 82B(1)(d), 83(2)(b).

68 Cobaw (n 49) 328 [291].

69 *Cobaw* (n 49) 328 [291].

70 *Trkulja v Dobrijevic* [2013] VCAT 925, [55].

71 *Sex Discrimination Act 1984* (Cth) s 38; *Equal Opportunity Act 1984* (WA) s 73.

parliaments rarely explaining its purpose. It appeared, for example, in cl 67(d) of the Anti-Discrimination Bill 1976 (NSW) that was introduced into the Parliament with an Explanatory Note that referred merely to 'a number of general exceptions … [that] relate to … the practice of religious bodies'.[72] The Bill was said to be 'along the lines of the bill[s] and of legislation that [had] already been introduced in the United Kingdom and SA'.[73] Similarly in Victoria, the religious susceptibilities limb of the religious bodies exception was cl 32(c) of the Equal Opportunity Bill 1977 (Vic), merely as one of 'a number of exemptions … [that] include certain practices of a religious order'.[74] The religious bodies exception with its religious susceptibilities limb has been in all other anti-discrimination bills, as presented to the respective parliaments, that were then enacted.[75]

The persistent absence of a stated purpose for the religious susceptibilities limb has opened the way for a 'religious freedom' purpose to be attributed to it. But the religious susceptibilities limb has a history that is instructive, telling us what its explicitly intended purpose and scope was.

A *The Origins of the Religious Susceptibilities Limb*

The religious bodies exception first appeared in Australia in the *Sex Discrimination Act 1975* (SA), Australia's first civil law statute prohibiting discrimination.[76] In March 1975 the South Australian Premier, Don Dunstan, delayed introducing a sex discrimination bill on the basis, he said, that a similar bill in the UK Parliament 'contains many provisions I believe the South Australian Parliament should examine because they could be usefully incorporated into the original proposal which has come to this House from a Select Committee'.[77]

The UK's Sex Discrimination Bill 1975 had a religious bodies exception that was specifically for 'employment for purposes of an organised religion where the employment is not limited to one sex'.[78] It was available in two alternative

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72 Explanatory Note, Anti-Discrimination Bill 1976 (NSW) 2.

73 New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 November 1976, 3194 (Sir Eric Willis).

74 Victoria, *Parliamentary Debates*, Legislative Council, 19 April 1977, 7477–8 (Haddon Storey).

75 Sex Discrimination Bill 1981 (Cth) cl 112(c); Sex Discrimination Bill 1983 (Cth) cl 37(d); Age Discrimination Bill 2003 (Cth) cl 35(b); Human Rights and Equal Opportunity Bill 1991 (ACT) cl 32(d); Anti-Discrimination Bill 1992 (NT) cl 51(d)(ii); Anti-Discrimination Bill 1991 (Qld) cl 109(d); Anti-Discrimination Bill (No 3) 1998 (Tas) cl 52(d); Equal Opportunity Bill 1984 (WA) cl 72(d).

76 The *Racial Discrimination Act 1976* (SA) criminalised racial discrimination in limited circumstances.

77 South Australia, *Parliamentary Debates*, Legislative Assembly, 25 March 1975, 3170 (Don Dunstan).

78 Sex Discrimination Bill 1975, cl 19, as introduced to the House of Commons, 12 March 1975.

circumstances: 'so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of any of its followers'.[79] The religious susceptibilities limb of the exception was strongly opposed in the House of Commons but, despite motions in the Commons to delete it,[80] the Bill went to the House of Lords with the religious susceptibilities limb intact. There was further opposition to the religious susceptibilities limb on its arrival in the House of Lords,[81] but it was saved by the unique composition of the House of Lords, and the serendipitous timing of the debate.

The unique composition of the House of Lords is that 26 places are reserved for archbishops and bishops of the Church of England, referred to collectively as the 'Lords Spiritual'.[82] The serendipitous timing of the debate was the occurrence, two days after the Bill was introduced into the House of Lords on 1 July 1975, of a meeting of the General Synod of the Church of England. On 3 July 1975, while the Bill was in the House of Lords, each of the three Houses of the General Synod — the House of Bishops, the House of Clergy and the House of Laity — resolved '[t]hat this Synod considers that there are no fundamental objections to the ordination of women to the priesthood'.[83]

It is important to an understanding of the purpose of the religious susceptibilities limb to know that the Synod's vote that there was no doctrinal barrier to the ordination of women was not overwhelming: there were 255 in favour and 180 against.[84] In deference to that 'very large minority' the Synod then voted 'by 226 votes to 184, with one abstention, not to proceed to [allow] the ordination of women in the Church of England'.[85] Thus the position on and after 3 July 1975 was that there was no doctrinal impediment to the Church of England's ordaining women as ministers but — because this view was opposed by 42% of the Synod — the Church decided to continue to not ordain women for the time being.

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79 Ibid.

80 United Kingdom, House of Commons, Wednesday 26 March 1975, vol 889 col 600 (Maureen Colquhoun); United Kingdom, House of Commons, 18 June 1975 vol 883 col 1536 (Ivor Clemitson).

81 See, e.g., United Kingdom, House of Lords, 1 July 1975, vol 362 col 113 (Baroness Vickers).

82 See Mark Hatcher, 'Bishops in the House of Lords: Fit for the Future?' (2024) 26(2) *Ecclesiastical Law Journal* 147, 153, citing the *Bishopric of Manchester Act 1847* (UK) 10 & 11 Vict, c 108 also known as the *Ecclesiastical Commissioners Act 1847* (UK).

83 Judith-Ann Mackenzie, 'Sex Discrimination and the Church of England' (1979) 4(2) *Poly Law Review* 33, 34; G H Newsom, 'The Ordination of Women' (1984) 87(717) *Theology* 180, 184; House of Bishops' Working Party on Women in the Episcopate, *Women Bishops in the Church of England?* (The Archbishops' Council, London, 2004) 4.2.36.

84 Mackenzie (n 83) 34. The Lord Bishop of Southwell gives slightly different figures: see United Kingdom, House of Lords, Tuesday 15 July 1975, vol 362 col 1118.

85 United Kingdom, House of Lords (n 84) col 1119. See also Mackenzie (n 83) 35.

The doctrinal decision of the Great Synod on 3 July 1975 changed the course of the debate in the House of Lords. The religious susceptibilities limb became vital to the Church of England because the doctrinal conformity limb was not enough to save the Church from engaging in unlawful discrimination if it refused to ordain women. Nevertheless, opposition to the religious susceptibilities limb persisted. Baroness Seear, aware that the Church of England was 'agreed that there are no reasons of doctrine why women should not be ordained',[86] moved an amendment to omit the religious susceptibilities limb,[87] with extensive support.[88] Lord Beaumont of Whitley (an Anglican priest) stated clearly a principled position opposing the religious susceptibilities limb, differentiating it from the doctrinal conformity limb:

> In the religious field we quite rightly say that we can find an exception; that where a Church or a religion of any kind has doctrines on this matter we must not legislate against those doctrines. But it is an entirely different matter when we are dealing with something which is considerably less than doctrine and concerns a particular case.[89]

Against this, the Lords Spiritual and other Lords defended the religious susceptibilities limb for a number of reasons, all of which were premised on its purpose being to relieve the Church of England from having to ordain women.[90] In the debates, it is apparent that what was being argued for in retaining the religious susceptibilities limb was not an exception for just any religious view, but for a dissenting view on doctrine that was strongly held by a large minority. Had the Great Synod's view been supported by a very large majority there would have been little reason for a religious susceptibilities limb, but that wasn't the case — 42% dissented from the Great Synod's statement of doctrine.

B *The Purpose of the Religious Susceptibilities Limb*

The Church of England's opposition to the ordination of women, despite there being no doctrinal barrier, was explicitly justified on the basis that a very large minority of the General Synod was in dissent;[91] the Church's decision to defer ordination was to avoid being 'so insensitive as to overrule tender conscience', and 'it would hurt the Church of England greatly if at this time we were to proceed in the face of that expression of contrary opinion'.[92] Speaking 'more or less officially on behalf of the Church of England',[93] the Lords Spiritual were exhorting the Lords to respect the religious susceptibilities of a great many adherents at a time when doctrinal views on the role of women in the Church were in a state of flux and contest.

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86 United Kingdom, House of Lords (n 84) col 1116.

87 Ibid col 1115.

88 See, e.g., ibid col 1129–30 (Lord Gardiner), col 1131 (Viscount Colville of Culcross).

89 Ibid col 1126.

90 See, e.g., ibid col 1118–21, col 1130 (Viscount Gage), col 1130 (Baroness Berkeley).

91 Ibid col 1118 (The Lord Bishop of Southwell).

92 Ibid col 1119.

93 United Kingdom, House of Lords, (n 81) col 134 (The Lord Bishop of Leicester).

Because the justification for the religious susceptibilities limb was the need to accommodate the religious susceptibilities of a significant minority, a criterion that considered merely '*any* followers' was inapt. This issue was raised in both the House of Commons[94] and the House of Lords,[95] and the religious susceptibilities limb was amended by replacing 'any' of its followers with 'a significant number' of its followers.[96] With this amendment, the pleas of the Lords Spiritual prevailed, and the *Sex Discrimination Act 1975* (UK) was enacted with both limbs of the religious bodies exception:

> 19 **Ministers of religion etc.**
>
> (1) Nothing in this Part applies to employment for purposes of an organised religion where the employment is limited to one sex so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers.[97]

Two aspects of the religious bodies exception in the UK are noteworthy; it was enacted: (1) for the limited purpose of protecting 'employment for purposes of an organised religion where the employment is limited to one sex', and (2) to accommodate the many adherents of the Church of England who dissented from the newly-arrived at and strongly opposed doctrinal position that women could be ordained as priests. The religious susceptibilities limb of the religious bodies exception was thus a provision designed for the explicit and confined purpose of avoiding 'consequences for the Church of England [that] at this time would be immense' if it were to discriminate against women in ordaining ministers, because to do so would be unlawful.[98] Essentially, the purpose of the religious susceptibilities limb was to accommodate doctrinal dissent.

IV Transportation to Australia

None of this context or purpose accompanied the religious bodies exception and its religious susceptibilities limb into the parliamentary debates on the South Australian Sex Discrimination Bill. The first bill that the Premier introduced lapsed on the proroguing of Parliament, but in the next Parliament the Premier introduced an identical Bill.[99] In the Second Reading Speech on both occasions the Premier noted a 'religious bodies' exception,[100] but the exception otherwise went unremarked in

94 United Kingdom, House of Commons, 18 June 1975 col 1537 (Ivor Clemitson).

95 United Kingdom, House of Lords (n 84) col 1124 (Lord Clitheroe).

96 Ibid col 1241 (Lord Harris of Greenwich).

97 *Sex Discrimination Act 1975* (UK) s 19(1).

98 United Kingdom, House of Lords (n 84) col 1118 (The Lord Bishop of Southwell).

99 South Australia, *Parliamentary Debate*, Legislative Assembly, 19 August 1975, 348 (Don Dunstan).

100 Ibid 349; South Australia, *Parliamentary Debate*, Legislative Assembly, 11 June 1975, 3298.

both houses. The *Sex Discrimination Act 1975* (SA) was assented to on 4 December 1975 with a religious bodies exception that provided that the Act did not apply to:

> (a) the ordination or appointment of priests, ministers of religion or members of any religious order;
> (b) the training or education of persons seeking, ordination or appointment as priests, ministers of religion, or members of a religious order; or
> (c) any other practice of a body established to propagate religion that conforms with the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.[101]

In this way, the religious bodies exception travelled from the UK to SA with amendments that significantly expanded its scope, without explanation. Where the UK's exception was for 'an organised religion', South Australia's was for 'a body established to propagate religion'; where the UK's exception was for 'where the employment is limited to one sex', South Australia's was for 'any other practice' apart from ordination and training of ministers; where the first limb of the UK's exception was for employment 'so as to comply with' the doctrines of that religion, South Australia's was for a practice 'that conforms with' the doctrines of the religion; where the UK's second limb was for employment 'so as to … avoid offending the religious susceptibilities of a significant number of its followers', South Australia's was for a practice 'necessary to avoid injury to the religious susceptibilities of the adherents of that religion'. I illustrate these changes in the following figure.

Figure 1: Comparison between UK and SA's Sex Discrimination Acts

***Sex Discrimination Act 1975* (UK)**		***Sex Discrimination Act 1975* (SA)**
an organised religion		a body established to propagate religion
where the employment is limited to one sex		any other practice apart from ordination and training of ministers
so as to comply with the doctrines of that religion		that conforms with the doctrines of the religion
so as to ... avoid offending the religious susceptibilities		necessary to avoid injury to the religious susceptibilities
of a significant number of its followers		of the adherents of that religion

101 *Sex Discrimination Act 1975* (SA) s 36.

SA's religious bodies exception was copied throughout Australia, in every state and territory anti-discrimination law, and in the *SDA* and *ADA*,[102] in varying terms and with the shift into the conjunctive in some jurisdictions, as I describe above in Part II.

Ignorance of the origins of the religious bodies exception helps to explain the many different ways it has been drafted throughout Australia, taking it well away from its original purpose and scope. Where it occurs, the conjunctive 'and' between the two limbs quite simply negates the original purpose of religious susceptibilities limb. The original exception was drafted in the UK with the disjunctive 'or' precisely to accommodate conduct that does not conform with doctrine but that does accord with a widely held dissenting view of doctrine.

This ignorance of the religious bodies exception's origins is apparent not only in legislative drafting; it is also apparent among parliaments, commentators, law reform bodies, courts and tribunals. An early example is the NSW Law Reform Commission's 1999 review of the *Anti-Discrimination Act 1977* (NSW), where the Commission said:

> [I]t is not clear what the [religious susceptibilities limb] is intended to achieve: if the employment of a woman in a particular position does not contravene the doctrines of the religion or creed, it is not clear in what way it could legitimately affect 'religious susceptibilities' of followers of those doctrines.[103]

It *is* clear, when the origins of the provision are known. What the NSW Law Reform Commission describes was precisely the situation in the UK: the 'particular position' of ordaining women did not contravene the doctrines of the Church of England, but *was* seen to legitimately affect religious susceptibilities of followers because of the high degree of dissent from that doctrinal position.

The Law Reform Commission of WA, in its own reasoning to explain the religious susceptibilities limb, came close to identifying its original purpose, saying 'it is appropriate in order to recognise the differences in beliefs of adherents to the same religion'.[104] But mere recognition of differences in belief falls short of the high degree of dissent that was the reason for the religious susceptibilities limb in the first place. The Australian Law Reform Commission ('ALRC'), in its review of discrimination exceptions in the *SDA* as they relate to religious educational institutions,[105] discusses the religious bodies exception, and the religious susceptibilities limb in particular, without examining its history, purpose or meaning, and without referring to accounts

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102 See above n 14.

103 New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report No 92, November 1999) [4.126].

104 Law Reform Commission of Western Australia (n 36) 177 [4.5.4.4.3].

105 Australian Law Reform Commission ('ALRC'), *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (Report No 142, December 2023).

of its origins in the *SDA*.[106] Commentators are similarly unaware of the origins of the religious bodies exception. One reference to the religious susceptibilities limb in the UK has the story back-to-front: Greg Walsh has written that '[a] similar approach to a religious sensitivities test [in Australia] has been adopted in the United Kingdom under the *Equality Act 2010* (UK)',[107] but the converse is the case. Australia adopted the approach of the *Sex Discrimination Act 1975* (UK), and the provisions of the *Equality Act 2010* (UK) are the successor provisions to those of 1975.[108]

The religious susceptibilities limb's loss of connection with its UK origins has left its purpose open to speculation and assertion. The rationale that has increasingly been attributed to it is that of preserving or guaranteeing religious freedom.

V A 'Religious Freedom' Purpose?

At the outset I note that the discussion here of 'religious freedom' is not necessarily a discussion about the international human right set out in art 18 of the *International Covenant on Civil and Political Rights* ('*ICCPR*'). As I discuss below, reliance on 'religious freedom' in the context of the religious bodies exception is often unreferenced and undefined, presented as a general assertion rather than a reasoned argument.

Before looking at how a 'religious freedom' purpose has been attributed to the religious susceptibilities limb, I consider reasons that have been proposed for the religious bodies exception as a whole.

Chris Ronalds made two early forays into this void left by the loss of connection with UK origins. In the first, she offered a public/private rationale for the exception, saying that it is 'part of a philosophy that anti-discrimination legislation is designed to regulate people's public life, and that religion is a private matter which should not be intruded on by such types of legislation'.[109] Similarly, the Victorian Attorney-General, when introducing the bill for the *Equal Opportunity Act 1995* (Vic), identified as a factor in exceptions 'the desire to infringe as little as possible on private spheres of activity'.[110] More closely aligned to the UK

106 See, e.g.: Chris Ronalds, *Affirmative Action and Sex Discrimination: A Handbook on Legal Rights for Women* (Pluto Press, 1987) 124, 154 ('*Affirmative Action*'); Chris Ronalds, *Anti-Discrimination Legislation in Australia* (Butterworths, 1979) 92 ('*Anti-Discrimination Legislation*'); Human Rights and Equal Opportunity Commission ('HREOC'), *Report of Review of Permanent Exemptions under the Sex Discrimination Act 1984* (Parliamentary Report No 216, 1992) ch 4.

107 Walsh (n 18) 165.

108 See, e.g., *Equality Act 2010* (UK) sch 3, pt 1, para 29(1)(c); sch 9, pt 1, para 2(6); sch 23, para 9(a).

109 Ronalds, *Anti-Discrimination Legislation* (n 106) 92.

110 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 1995, 1252 (Jan Wade, Attorney-General).

origins of the religious bodies exception, Ronalds later suggested that the religious bodies exception in the *SDA* was 'recognition of the political difficulties that would arise with the major churches if the *SDA* was to apply the appointment of clergy', pointing to the 'controversy which surrounds the appointment of women clergy in the Church of England'.[111] This latter argument — the politics of dealing with the major churches — is borne out by the well documented history of the enactment of the religious bodies exception in the *SDA*.[112]

A *The Religious Bodies Exception in the* SDA

At the time of the debates on the *SDA*, the religious bodies exception merely replicated one that already existed at the time in the anti-discrimination laws in SA, NSW and Victoria.[113] Explaining the exceptions in the Sex Discrimination Bill 1983 — including those for religious bodies — the Prime Minister, Bob Hawke, said that they were 'done in order to have the legislation widely accepted within the community as fair and reasonable'.[114] A review of the *SDA* exceptions by the Human Rights and Equal Opportunity Commission ('HREOC') reported that '[i]t is widely believed that the exemptions in the *SDA* reflect the political compromises that were necessary to secure the passage of the Act'.[115] HREOC reported that the exception for religious educational institutions 'was the culmination of extensive consultation between the Federal Government and church lobby groups'.[116]

Nevertheless, Neil Foster credits parliament with a 'freedom of religious' purpose in enacting the religious bodies exception in the *SDA*:

> Clearly, in the most basic sense, the decision to include these provisions was a 'deliberate legislative choice' — the words did not just magically appear. The question is, what was the reason for the choice? Were these provisions just inserted as temporary measures designed to be soon repealed? I suggest, rather, that the reason these provisions were included in the *SDA* is that the legislation does not only aim to protect one human right (the right not to be subject to discrimination). Instead, the Parliament was recognising, in adding these sections, that Australia's obligations to protect human rights *also* included the right to religious freedom.[117]

111 Ronalds, *Affirmative Action* (n 106) 154.

112 Ibid 124, 154; HREOC (n 106) ch 4.

113 See above n 14.

114 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives 5 March 1984, 481, cited in HREOC (n 106) [2.24].

115 HREOC (n 106) 42 [2.57].

116 Ibid 63 [4.25]

117 Neil Foster, 'Religious Freedom, the Sex Discrimination Act, and Section 109: A Surrejoinder to Butler' (2024) 5 *Australian Journal of Law and Religion* 14, 17 (emphasis in original).

Foster is right to ask 'what was the reason for the choice?'.[118] The answer lies in the legislative history of the provisions that I describe above which, contrary to Foster's assertion, shows that in 1983 the government of the day was not thinking about religious freedom but was negotiating a political deal to get its legislation through. More formally, the Explanatory Memorandum for the Sex Discrimination Bill 1983 offered no explanation for the exceptions for religious bodies and religious schools, and nor did the Minister's second reading speech.[119] In the extensive, combative and at times hostile parliamentary debates on the Bill,[120] the exception for religious schools was 'highly contentious',[121] and was 'probably the area that … provoked the most controversial responses'.[122] In the debates, the exception was characterised in many ways: allowing 'a school or like institution to insist on standards of sexual behaviour on the part of its employees or students';[123] going 'some way to protect the integrity of independent schools';[124] and addressing a fear 'that something is going to be imposed in some way from the outside'.[125]

In short, 'religious freedom' did not feature as a reason for the government's legislating a religious bodies exception in the *SDA*. The government had copied the religious bodies exception that already existed elsewhere, and was negotiating to get its legislation through against hostile opposition and making the necessary political compromises 'to placate the opposition by Church groups'.[126] If the church lobby groups had a sense of 'religious freedom', they never made it explicit when they sought to expand exceptions that were already in the Bill.

So how has a religious freedom purpose been attributed to the religious bodies exception, and to the religious susceptibilities limb in particular? For context, in all the debates in the UK Parliament in 1975, a single reference was made to 'religious freedom'; in the House of Commons, Miss Janet Fookes was disappointed with the religious bodies exception but conceded that the sex discrimination prohibition would otherwise 'have conflicted with the idea of religious freedom'.[127]

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118 Ibid.

119 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 28 February 1984, 68 (Michael Young).

120 See Margaret Thornton and Trish Luker, 'The Sex Discrimination Act and its Rocky Rite of Passage' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU Press, 2010) 25.

121 Commonwealth of Australia, *Parliamentary Debates*, Senate, 16 December 1983, 3990 (Kathryn Martin).

122 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 1 March 1984, 362 (Ronald Edwards).

123 Ibid 348 (Peter Drummond).

124 Ibid.

125 Commonwealth of Australia, *Parliamentary Debates* (n 119).

126 Ronalds, *Affirmative Action* (n 106) 124.

127 United Kingdom, House of Commons, 26 March 1975, vol 889, col 560 (Janet Fookes).

Perhaps because a religious freedom purpose has been attributed by different people at different times, and not in a central or formal way such as through the stated intent of the legislature, it can be unclear whether an attribution is for the whole of the religious bodies exception or only for the religious susceptibilities limb. It probably amounts to the same thing, as there is little argument that the first limb allows a religious body freedom to act in conformity with its doctrine; the real question is whether some type of religious freedom is being attributed to the religious susceptibilities limb.

B *The Intention of the Legislature*

Looking first at the legislatures in Australia, the religious bodies exception has rarely been enacted explicitly for a religious freedom purpose. The exception was copied by SA from the UK, and copied from there around Australia, without thought or comment. The usual sources of a stated purpose for legislation — such as parliamentary debates and the executive's explanatory statements — are silent on a provision that has simply been replicated. Even when the terms of the exception have been changed, as they have consistently, parliaments have rarely offered an explanation.

Submissions of church lobby groups to the 1992 review of the exceptions in the *SDA* were an early organised effort to attribute a religious freedom rationale to the religious bodies exception; submissions on the religious bodies exception as it related to schools 'stressed the need for religious liberty as a dominant right'.[128] All of the Australian Catholic Bishops Conference, the Anglican General Synod, the Seventh Day Adventist Church, the National Catholic Education Commission and the Australian Association of Christian Schools argued for the exception in the name of religious freedom, in some cases referring to art 18 of the *ICCPR*.[129] The review recommended[130] — as did the ALRC over 30 years later[131] — that the religious bodies exception for religious schools be removed from the Act, but the recommendations have not been acted on.

A relationship between the religious bodies exception and religious freedom rarely arose in the legislature. It was referred to in a second reading speech when Victoria re-enacted the religious bodies exception in the *Equal Opportunity Act 1995* (Vic),[132] and it came up briefly in Queensland in 2002, when, in parliamentary debates on amendments to the *Anti-Discrimination Act 1991* (Qld), many of the arguments

128 HREOC (n 106) 69 [4.44].

129 Ibid 76 [4.61].

130 Ibid 82 [4.76].

131 ALRC (n 105) recommendation 1. See also Alastair Lawrie, 'Déjà vu for LGBTQ Students and Teachers in Religious Schools' (2024) 30(3) *Australian Journal of Human Rights* 466.

132 Victoria, *Parliamentary Debates* (n 112) 1249 (Jan Wade, Attorney-General).

in defence of the religious bodies exception were framed in terms of protecting religious freedom.[133]

The issue of discrimination and religious freedom really came into the legislature with the proposed Commonwealth Religious Discrimination Bills in 2019–22, which were bold in their attempt to legislate a religious freedom to discriminate. The context for those Bills was that there had been increasing claims for legal recognition of religious freedom in Australian society from around 2011, 'when the campaign for marriage equality began to gain increasing traction in public debate … [and] the Australian Human Rights Commission released its first report on LGBT+ discrimination'.[134] The 'Yes' vote in the 2017 Marriage Equality plebiscite precipitated a strong conservative Christian outcry on loss of religious freedom. Then treasurer Scott Morrison, a conservative Christian himself,[135] said to Parliament 'There are almost five million Australians who voted no in this survey who are now coming to terms with the fact that they are in the minority. That did not used to be the case … They have concerns that their broader views and beliefs are … therefore under threat'.[136]

The Government's *Religious Freedom Review* followed soon after,[137] a chapter of which 'focusses entirely on issues that relate to the freedom of organisations, especially schools, and individuals (freedom of conscience) to discriminate against others on the basis of sexual orientation, gender identity and relationship status'.[138] In its submission to the review, the Australian Catholic Bishops Conference was explicit in describing discrimination exceptions as central to religious freedom: 'One of the principal ways religious freedom is recognised in Australia is in exceptions or exemptions to anti-discrimination'.[139] In its submission to the same review, the Anglican Church Diocese of Sydney describes discrimination exceptions as 'necessary for Christian institutions to "participate in national life as Christians", suggesting that without them Christian bodies could not be Christian or be involved in public life'.[140]

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133 See, e.g., Queensland, *Parliamentary Debates*, Legislative Assembly, 29 November 2002, 5032 and 5164 (Michael Horan), 5163 (Fiona Simpson).

134 Louise Richardson-Self, Elenie Poulos and Sharri Lembryk, 'The Debate about Religious Discrimination is Back, So Why Do We Keep Hearing About Religious "Freedom?"', *The Conversation* (online, 19 November 2021). See Poulos (n 3) on the emergence of the 'freedom of belief' discourse from 2015.

135 Mark Jennings, 'Explainer: What is Pentecostalism, and How Might it Influence Scott Morrison's Politics?', *The Conversation* (online, 1 October 2018).

136 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 4 December 2017, 12348, quoted in Richardson-Self, Poulos and Lembryk (n 134).

137 Expert Panel, *Religious Freedom Review* (Report, 18 May 2018).

138 Eleni Poulos, 'Constructing the Problem of Religious Freedom: An Analysis of Australian Government Inquiries into Religious Freedom' (2019) 10(10) *Religions* 583, 594.

139 *Religious Freedom Review* (n 139) quoted in Ezzy et al (n 8) 947 n 2.

140 Ibid 934–5.

After two exposure drafts,[141] and purporting to give effect to recommendations of the *Religious Freedom Review*,[142] the Commonwealth Government introduced a final Religious Discrimination Bill in 2022. The religious bodies exception in the Bill was identified as a 'religious freedom' provision; the Explanatory Memorandum for the Bill stated that its drafting 'promotes the right to freedom of religion'.[143] Apart from controversial provisions that promoted a religious freedom to discriminate,[144] the Bill would have enacted a religious bodies exception with significantly lower thresholds: conduct necessary to conform with doctrine became conduct 'that a person of the same religion as the religious body could reasonably consider to be in accordance with' doctrine,[145] and the requirement of necessity was removed for conduct engaged in to avoid injury to religious susceptibilities.[146] The Government withdrew the Bill 'when it became clear it faced defeat in the Senate'.[147]

C *Deliberation by the Courts and in Law Reform*

The courts have turned to 'religious freedom' when they have had difficulty in understanding the purpose of the religious susceptibilities limb. As Maxwell P observed in the Victorian Court of Appeal, 'injury to religious sensitivities' is 'not a phrase in ordinary parlance', and it 'presents obvious difficulties of interpretation'.[148] Evans and Ujvari see the religious susceptibilities limb as 'rather vague'; they question not only its 'legal clarity', but also 'the principled justification supporting it'.[149] This vagueness, unfamiliarity and legal clarity invites interpretation, for which it is essential to understand context and purpose.[150]

In the absence of any stated parliamentary intention, courts and tribunals have readily attributed to the religious susceptibilities limb a religious freedom purpose.

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141 Luke Beck, 'Third Time Lucky? What has Changed in the Latest Draft of the Religious Discrimination Bill?', *The Conversation* (online, 19 November 2021).

142 Replacement Explanatory Memorandum, Religious Discrimination Bill 2021 (Cth) [2].

143 Ibid [20].

144 See Religious Discrimination Bill 2022 (Cth) cl 12. See also Kate Gleeson and Elenie Poulos, 'Religion and Politics After Marriage Equality in Australia: Contemporary Challenges in the Politics of Religious Freedom' (2024) 59(1) *Australian Journal of Political Science* 72; David Betts and James Bennett, 'Resurgent Prejudice: Responses to Marriage Equality in Australia' (2023) 58(4) *Australian Journal of Social Issues* 732; Adam Possamai and Rachel Sharples, 'Freedom of Religion and Fortress Christianity in Australia' in Olga Breskaya, Roger Finke and Guiseppe Giordan (eds), *Religion Between Governance and Freedoms. Boundaries of Religious Freedom: Regulating Religion in Diverse Societies* (Springer, 2024) 47.

145 Religious Discrimination Bill 2022 (Cth) cl 7(2).

146 Ibid cl 7(4).

147 Gleeson and Poulos (n 144) 74.

148 *Cobaw* (n 49) 329 [296].

149 Evans and Ujvari (n 18) 53.

150 Pearce (n 22) 40 [2.1], 46 [2.9]; Herzfeld and Prince (n 22) 107–10 [5.10]–[5.20].

This was, for example, 'accepted' by a NSW tribunal without reference to a source,[151] although the observation was not repeated in any of the subsequent related litigation.[152] President Maxwell stated, similarly without reference to a source, that the whole religious bodies exception is 'directed at protecting freedom of religion',[153] and in the same case Redlich J referred to the religious bodies exception 'the freedom of religion exemption',[154] and saw the provision as 'protect[ing] aspects of what may be described as the 'right to religious freedom'.[155]

Law reform bodies consistently attribute a religious freedom purpose to the religious bodies exception. As early as 1999, the NSW Law Reform Commission saw the general exception for religious bodies as 'guarantee[ing] the right of religious groups to practise their beliefs'.[156] Much the same has been said in subsequent law reform reports,[157] where religious freedom is readily asserted to be the reason for

151 *OV v QZ (No 2)* [2008] NSWADT 115, [116] ('*OV v QZ*').

152 *OV and OW (CA)* (n 48); *OW and OV (ADT)* (n 61).

153 *Cobaw* (n 49) 314 [229].

154 Ibid 381 [489].

155 Ibid 378 [475], 389 [514], 395 [538], 399 [548].

156 NSW Law Reform Commission (n 103) [6.71].

157 ALRC (n 105) recommendation 1, [4.28], [4.44], [4.80], [4.108]; Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Report No 129, 23 December 2015) 15 [130]; Senate Legal and Constitutional Affairs Legislation Committee, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (Report, February 2013) 13 [2.17], 56–7 [5.20], 58 [5.23], 93 [7.65]–[7.66]; Senate Legal and Constitutional Affairs Legislation Committee, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 [Provisions]* (Report, June 2013) additional comments by the Australian Greens, 37–8 [1.7]; Rosalind Croucher et al, *Religious Freedom Review* (Report, 18 May 2018) 37 [1.97]–[1.101], table C1; ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)* (Report, 18 March 2015) 104–5; ACT Justice and Community Safety Directorate, *Inclusive, Progressive, Equal: Discrimination Law Reform, Discussion Paper 1: Extending the Protections of Discrimination Law* (Discussion Paper, 22 October 2021) 19–20; Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, *Inquiry into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (Report, March 2021); Queensland Human Rights Commission, *Building belonging: Review of Queensland's Anti-Discrimination Act 1991* (Report, July 2022) 367; South Australian Law Reform Institute, *'Lawful Discrimination': Exceptions Under the Equal Opportunity Act 1984 (SA) to Unlawful Discrimination on the Grounds of Gender Identity, Sexual Orientation and Intersex Status* (Report, June 2016) 58 [6.1.7]; Scrutiny of Acts and Regulations Committee, *Exceptions and Exemptions to the Equal Opportunity Act 1995* (Final Report, 2009) 60, Minority Report 116; Law Reform Commission of WA (n 36) 174 [4.5.4.4]. See also the survey of 'Religious Freedom Inquiry Reports' in Poulos (n 138) 5 (table 1).

the religious bodies exception, often reflecting submissions made to that effect. Commentators make the same attribution.[158]

D *An Undefined 'Religious Freedom'*

The post-hoc attribution of a 'religious freedom' purpose for the religious bodies exception — and with it the religious susceptibilities limb — is now well established in Australia, born out of persistent extra-parliamentary claims and assertions to that effect. But this religious freedom is undefined; Maxwell P refers to it as 'an abstract concept, of uncertain scope',[159] and use of the term 'religious freedom' rarely refers to its nature or source.

It is common to say that the religious bodies exception is intended to guarantee the freedom to manifest one's religion or beliefs set out in art 18(3) of the *ICCPR*. An early example is in the churches' submissions to the 1992 review of the *SDA* exceptions;[160] a more recent one is in the Australian Law Reform Commission's 2023 report, where proposed reforms to the religious bodies exception in the *SDA* were discussed unquestioningly in terms of justifiable limits on human rights under international law.[161] It is, however, not clear that Australian parliaments enacted the religious bodies exception to recognise the international human right of freedom of religion in art 18 of the *ICCPR*; for example, Foster's claims for the *SDA* assert, against the evidence, an unsourced and undefined 'religious freedom', and the Explanatory Memorandum for the Commonwealth's Religious Discrimination Bill makes no reference to art 18.[162]

An exception may be in Victoria where, as I note above, the Attorney-General said when introducing the bill for the *Equal Opportunity Act 1995* (Vic) that the religious bodies exception 'aims to strike a balance between two very important and sometimes conflicting rights — the right of freedom of religion and the right to be free from discrimination'.[163] As Maxwell P observed in *Christian Youth Camps*

158 See, e.g.: Evans (n 45) 30 [4.4.1]; Elphick (n 20); Moulds (n 19) 116; Joel Harrison and Patrick Parkinson, 'Freedom beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society' (2014) 40(2) *Monash University Law* Review 413, 414; Evans and Ujvari (n 18) 54; Evans and Gaze (n 18) 396; Anthony Gray, 'The Reconciliation of Freedom of Religion with Anti-Discrimination Rights' (2016) 42(1) *Monash University Law Review* 72; Foster (n 117); Patrick Parkinson, 'Adolescent Gender Identity and the *Sex Discrimination Act*: The Case for Religious Exemptions' (2022) 1 *Australian Journal of Law and Religion* 76, 80; Beth Gaze and Belinda Smith, *Equality and Anti-Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 158 [57].

159 *Cobaw* (n 49) 306 [198].

160 HREOC (n 106) 69 [4.44].

161 See, e.g., ALRC (n 105) recommendation 1, [4.28], [4.44], [4.80], [4.108].

162 Replacement Explanatory Memorandum, Religious Discrimination Bill 2021 (Cth).

163 Victoria, *Parliamentary Debates* (n 110).

Ltd v Cobaw Community Health Services Ltd ('*Cobaw*'),[164] this is a reference to the right of freedom of religion 'without elaboration',[165] and a necessary elaboration — if there was genuinely an intention to accommodate two human rights — would be a proportionality analysis to establish justifiable limits on the rights.[166]

There is much more that can be said about freedom of religion and its relationship with the religious bodies exception and its religious susceptibilities limb.[167] The point I make here is that the attribution of a religious freedom purposes arises not because it was intended by parliaments, but because parliaments have been largely silent on their intention, and the UK origins have never been recognised.

VI It's Just an Exception

An exception to a prohibition is not a statement of freedom. The religious bodies exception conditionally negatives a legislative prohibition on discrimination. As a number of submissions to a NSW Parliamentary committee pointed out, 'a right to freedom of religion is distinct from anti-discrimination law, as it creates rights or privileges, rather than prohibiting discrimination against individuals with a particular attribute'.[168] Indeed, Nicholas Aroney and Patrick Parkinson are impatient with the characterisation of the religious bodies exception as a religious freedom guarantee, pointing out that the exception for religious educational institutions in s 38 of the *SDA* makes 'no mention … of the rights of religious educational institutions to freedom of religion or freedom of association'.[169]

Close attention to the ALRC's analysis illustrates the technical mechanisms behind the religious bodies exception. For the ALRC — as for anyone considering the operation of an anti-discrimination statute — the starting position is that

164 *Cobaw* (n 49).

165 Ibid 305–6 [198].

166 See, e.g., ALRC (n 105) 119–21 table 4.1: Proportionality of the recommended limitation on the freedom to manifest religion or belief.

167 See e.g.: ALRC (n 105); *Cobaw* (n 49) 304–6 [189]–[198].

168 Joint Select Committee, *Inquiry into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (Report, March 2021) 1.61, citing submissions from Anti-Discrimination NSW, Public Interest Advocacy Centre, Kingsford Legal Centre, The Law Society of NSW and the Australian Discrimination Law Experts Group. See the analysis of exceptions, for purposes of a constitutional inconsistency argument, in Nicholas Butler, 'May Australian States Impose Sexual Orientation and Gender Identity Non-Discrimination Obligations on Religious Schools? A Rejoinder to Foster' (2023) 2 *Australian Journal of Law and Religion* 1.

169 Nicholas Aroney and Patrick Parkinson, 'Associational Freedom, Anti-Discrimination Law and the New Multiculturalism' (2019) 44 *Australian Journal of Legal Philosophy* 1, 23. Note that the ALRC has recommended the repeal of s 38 of the SDA: ALRC (n 105) recommendation 1.

discrimination is prohibited.[170] An exception to that prohibition allows discrimination only to the extent that is allowed by the criteria for the exception. The religious bodies exception is merely a particular instance of the way that exceptions work generally. The effect of an anti-discrimination prohibition is to 'render prima facie unlawful any discrimination' in the identified conduct.[171] That prima facie unlawfulness prevails 'unless the [respondent] could affirmatively establish that the relevant discrimination … came within the exception'.[172] In this way, discriminatory conduct is 'cleansed of fault' by the operation of an exception.[173] This is why the religious bodies exception in anti-discrimination laws does not — cannot — give a right to religious bodies. The exception cannot found a cause of action; rather, it relieves religious bodies of a prohibition against discriminating — it cleanses them of fault.

Justice of Appeal Basten and Handley AJA state it clearly in *OV & OW*, in relation to the religious susceptibilities limb in particular: the provision 'does not accept [sic] all acts and practices by bodies established to propagate religion … a religious body which discriminated … would need to justify its act' within the terms of the religious susceptibilities limb.[174] This exercise in justification is, as Allsop P points out, a matter of evidence: 'The question will be a factual one and likely be answered in an objective sense — the avoidance of injury to the religious susceptibilities of people who are adherents of that religion'.[175]

A *A Matter of Evidence*

OV and OW, and *Cobaw* are the two superior court cases that have considered the issue of proof of the religious susceptibilities limb. The Court in *OV and OW* addressed the issue of how many adherents have to be shown to have the religious susceptibilities that would be injured — exactly the issue that was debated by the UK Parliament, which decided that what is required is 'a significant number'. But, as I note above in Part III, that quantification has been omitted in every enactment of the religious susceptibilities limb in Australia. In NSW the religious susceptibilities limb requires proof of the religious susceptibilities only of 'the adherents', and Allsop P said:

> I doubt that it is correct to read the word 'the' … as meaning every single adherent of the religion such that if the 'susceptibilities' of one adherent were not likely to be 'injured' the provision could not be satisfied … It is a mistake to identify quantity or number, beyond saying that 'the adherents' must be a significant proportion of the

170 ALRC (n 105) [2.13]; *OV and OW (CA)* (n 48) [72].

171 *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330, 339.

172 Ibid.

173 *Jamal v Department of Health* (1988) 14 NSWLR 252, 265.

174 *OV and OW (CA)* (n 48) [72].

175 Ibid (n 61) [12]. See also Law Reform Commission of Western Australia (n 36) 175 [4.5.4.4]: 'These are matters about which the parties may need to call evidence from theological experts'.

> group, such that the phrase as a matter of fact is satisfied: that it was necessary to avoid injury to the religious susceptibilities of the adherents of that religion.[176]

In saying this, Allsop P read into the religious susceptibilities limb the same test for adherents — a 'significant' number or proportion — that was in the original exception in the UK. In the UK, Ian Gilmour MP asked for 'some indication of what "a significant number" means', to which Shirley Summerskill MP replied 'It would be for the courts to decide in a particular case.'[177]

On the same issue, Basten JA and Handley JA appeared to criticise the approach of the Tribunal at first instance:

> [The Tribunal] expressly accepted that the source of the susceptibility need not be a doctrine or practice to which members of the religion universally adhered. However, it concluded that it was not sufficient that the practice was necessary to avoid injury to 'some' or 'an unknown proportion of' the adherents of the religion. It appears to have approached that question on the basis that there was evidence of 'diversity of views' amongst adherents of both the Christian religion and, more specifically, of the Uniting Church, 'on the issue of homosexuality.'[178]

Before the Tribunal at first instance it was 'common ground' that there was a 'diversity of views' among adherents of the Christian religion about homosexuality,[179] and that 'members of the Uniting Church hold a range of views on the issue of homosexuality'.[180] This is just the scenario that the drafting of the original religious bodies exception in the UK was intended to address: adherents held a dissenting view that, contrary to the doctrinal position, potential adoptive parents should be discriminated against on the basis of their homosexuality. Having to make sense of the failure of the religious susceptibilities limb to specify a relevant number or proportion of adherents, the Tribunal's approach, apparently unwittingly, was consistent with the original purpose of the religious susceptibilities limb in the UK in 1975, to a point.

The Tribunal acknowledged that members of a religion may not universally adhere to a doctrine, which was actually the case in the UK. The Tribunal considered that it was not sufficient that the practice was necessary to avoid injury to 'some' or 'an unknown proportion of' adherents;[181] again, this was the view that the UK Parliament came to in agreeing on the terms of the religious susceptibilities limb. And the Tribunal accepted that there was a diversity of views among adherents on

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176 Ibid.

177 United Kingdom, *Parliamentary Debates*, House of Commons, 16 August 1975, vol 897, col 1619–20.

178 *OV and OW (CA)* (n 48) [46].

179 *OV v QZ* (n 151) [127].

180 Ibid [140].

181 Ibid [141].

the issue of homosexuality,[182] just as the UK parliament accepted that there was a diversity of views among adherents on the issue of appointing women as priests. In the UK, this led to specifying in the religious susceptibilities limb 'a significant number' of followers, while no quantification is specified in the terms of the Act in NSW (or in any other Australian jurisdiction). This forced the Tribunal away from the UK approach; it had to decide what to do with evidence of the views merely of a diversity of adherents, and felt that it could not read the religious susceptibilities limb 'to mean "some" or "an unknown proportion" of the adherents of the [relevant] religion. The use of the definite article, "the", makes this clear'.[183] The Tribunal therefore decided that '[g]iven the diversity of views among adherents … the [discrimination] cannot be said to be necessary to avoid injury to the religious susceptibilities of the adherents'.[184]

When a differently constituted tribunal reconsidered the matter after it was remitted back from the Court of Appeal,[185] its approach to the religious susceptibilities limb was cursory. It found that the exception was established because, on the affidavit evidence of an ordained minister, '[i]f Wesley Mission was required to appoint homosexual foster carers, this would make our provision of foster care services unacceptable to those who support the ethos of Wesley Mission'.[186] This evidence fails to establish the religious susceptibilities limb in two respects: the Tribunal heard evidence of what would be 'acceptable', not of what would injure religious susceptibilities, and it did not hear evidence that accords with Allsop P's view that evidence must establish the religious susceptibilities of a 'significant proportion' of adherents.

In Victoria there is, again, no statement in the religious susceptibilities limb of the necessary number or proportion of adherents whose 'sensitivities' have to be established. The Court of Appeal in *Cobaw* did not directly address the issue[187] (nor did the Tribunal at first instance[188]) and appeared content to accept evidence generally of the sensitivities of people of the religion. The Court observed that 'the question of necessity was intended to be judged objectively',[189] and upheld the finding of the Tribunal at first instance;[190] the Tribunal had found that the evidence given by some members of the Christian Brethren failed to show that discrimination against same sex attracted people, or against people who engaged in sexual activity outside

182 Ibid [142].

183 Ibid [139].

184 Ibid [142].

185 *OW and OV (ADT)* (n 61).

186 Ibid [34].

187 *Cobaw* (n 49).

188 *Cobaw Community Health Services v Christian Youth Camps Ltd* [2010] VCAT 1613 [344] ('*Cobaw (VCAT)*').

189 *Cobaw* (n 49) [292].

190 Ibid [303]–[304], referring to *Cobaw (VCAT)* (n 188).

marriage, was necessary to avoid injury to 'the sensitivities *common to* adherents of the religion'.[191]

At first instance,[192] the complaint was that Christian Youth Camps Ltd, operated by the Christian Brethren, had discriminated against potential hirers of its facilities on the basis of their (same sex) sexual orientation. An attempt to rely on the religious bodies exception failed because the Tribunal found that Christian Youth Camps Ltd was not a religious body. Although the Tribunal noted that it was 'unnecessary' to do so,[193] it nevertheless considered whether the facts supported the religious bodies exception.

The Tribunal heard evidence of the beliefs on homosexuality held by some members of the Christian Brethren, but was 'not satisfied those beliefs constitute a doctrine of the religion of the Christian Brethren'.[194] The Tribunal then considered the alternative, the religious susceptibilities limb. Evidence of previous hiring out of the facilities satisfied the Tribunal that to refuse bookings to same sex attracted people 'was not necessary to avoid injury to the religious sensitivities of the Christian Brethren'[195] so the exception under the religious susceptibilities limb was not made out. It is arguable whether an inference based on evidence of previous practice is enough to show that no adherents' religious susceptibilities that were offended. There was clear evidence that the religious susceptibilities of some adherents were offended; the Tribunal's approach may again have followed from the absence of any legislatively prescribed quantification of relevant adherents in the legislation.

There are few other reported cases when a religious body has relied on the religious susceptibilities limb; Elphick notes that relevant case law 'is sparse due to the expense of litigation, the resolving of most matters through private conciliation, and the under-reporting of discrimination'.[196] To these I would add obstacles such as: (1) obtaining legal advice and representation; (2) the inherent challenges of running proceedings as a self-represented litigant; (3) well-resourced and 'repeat player' respondents; (4) risks of orders for security for costs and adverse costs; and (5) a likely low level of damages awards.[197]

Apart from *OV and OW*, in only one case was the religious susceptibilities limb successfully relied on, but the digested report is difficult to make sense of. It seems that Dr Hazan complained that his expulsion from a centre run by religious body

191 *Cobaw (VCAT)* (n 188) [259], [329] (emphasis added).

192 *Cobaw (VCAT)* (n 188).

193 Ibid [255].

194 Ibid [307].

195 Ibid [344].

196 Elphick (n 20) 161.

197 See Dominique Allen, 'Remedying Discrimination: The Limits of the Law and the Need for a Systemic Approach' (2010) 29(2) *University of Tasmania Law Review* 83; Gaze and Smith (n 158) 57–8 [35]–[39], 176–7 [8]–[10], 182 [22], 196–9 [60]–[67].

was an act of victimisation for his having made a discrimination complaint against the centre. It is hard to say what evidence was led to support reliance on the religious susceptibilities; the digest reports only that 'it was clear on the evidence that the expulsion … was necessary to avoid injury to the religious susceptibilities of the particular religion'.[198]

In the remaining few cases, the religious body has repeatedly failed to discharge its burden of proof. Two strike-out cases show, in different ways, that evidence is required to establish the religious susceptibilities limb. In one case it was argued that a discrimination claim should be struck out on that basis that the religious susceptibilities limb clearly applied. The Tribunal declined to strike out, because:

> No evidence was led by the respondent as to the sensitivities of people of the Roman Catholic religion which would be injured [by the conduct] or of whether to avoid injuring any such sensitivities, [the conduct] was necessary rather than merely convenient or desirable …[199]

In another strike-out application, the Tribunal decided that whether the discrimination was reasonably necessary to avoid injury to the religious sensitivities of the members of the Serbian Orthodox Church was a matter for evidence at a full hearing.[200]

When led, evidence can fail to establish the necessary facts to engage the religious susceptibilities limb. In a case where a man was excluded from a religious body for wearing an earring, contrary to a code of conduct, the Tribunal said:

> On the evidence, we are not satisfied that the Respondents [sic] conduct in relation to Jacob was necessary to avoid injury to the religious sensitivities of those who attend the RCI Churches … There is no evidence before us as to what the religious sensitivities of the adherence [sic] of RCI are, or of whether the wearing of earrings in church by males would injure those sensitivities, or as to whether the banning of males who wear earrings from Church is necessary to avoid injury to those sensitivities.[201]

In another case, evidence in a complaint of sexual orientation discrimination showed that the Catholic doctrinal view was that 'a chaste homosexual person' can teach in Catholic schools.[202] Evidence also showed that any injury to adherents' religious susceptibilities caused by employing a gay teacher was based an assumption 'that a person who acknowledges his or her homosexual orientation is sexually active …

198 *Hazan v Victorian Jewish Board of Deputies* (1990) EOC 92–298.

199 *Tassone v Monsignor Francis Hickey* [2001] VCAT 47, [47].

200 *Trkulja v Dobrijevic* [2013] VCAT 925, [69].

201 *Jubber* (n 64) 74.

202 Human Rights and Equal Opportunity Commission, *Inquiry into a Complaint of Discrimination in Employment and Occupation: Discrimination on the Ground of Sexual Preference* (Report No 6, March 1998) 22, digested in *Griffin v Catholic Education Office* (1998) EOC 92–928.

[which] is contrary to Catholic teaching'.[203] It followed that 'any injury to the pupils and parents of the school … would not be an injury to their religious susceptibilities 'but an injury to their prejudices'.[204]

In two other cases where evidence was led, reliance on the religious susceptibilities limb failed because the party relying on it was not a religious body. However, in both cases the Tribunal went on to say that, in any event, the evidence failed to show that the discrimination was necessary to avoid injury to the religious susceptibilities of adherents. In one case, the evidence showed that separate seating for men and women at a public lecture 'was not necessary in order to avoid injury to the religious susceptibilities of adherents to the Islamic faith who were also attending the lecture', but was a matter of choice.[205] In another case the evidence showed that refusal to let a home unit to an unmarried couple was the imposition of a belief rather than an act done to avoid injury to the susceptibilities.[206]

Evidence of whether the discrimination is 'necessary' to avoid injury to religious susceptibilities is a common issue in these cases. That evidence may not be required, however, when the discrimination must be done 'in good faith', as is the case in WA and under the *SDA*.[207] The religious susceptibilities limb in the *Fair Work Act 2009* (Cth) also has the good faith requirement,[208] and it has been held that 'to satisfy the conditions of the exemption …[a religious body] need only demonstrate that the decision … was made in good faith for the purpose of avoiding injury to the religious susceptibilities of its adherents'.[209]

VII Conclusion

The original purpose of the religious susceptibilities limb of the religious bodies exception was to accommodate a significant number of dissenters when the Church of England resolved that its doctrine did not prevent the ordination of women as priests. That exception then embarked on a long journey: from the House of Lords in 1975 to the ALRC review in 2023, by way of SA then all other states and territories, through law reform reviews, parliamentary debates, academic articles, and legal decisions. Along the way the religious susceptibilities limb lost its original purpose, adopted many different forms, and was eventually attributed with a new purpose.

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203 Ibid.

204 Ibid.

205 *Bevege* (n 50) [98].

206 *Burke v Tralaggan* [1986] EOC 92–161.

207 *Sex Discrimination Act 1984* (Cth) s 38; *Equal Opportunity Act 1984* (WA) s 73.

208 *Fair Work Act 2009* (Cth) s 772(2)(b). See previously *Workplace Relations Act 1996* (Cth) s 659(4), *Industrial Relations Act 1988* (Cth) s 170DF(3).

209 *Hozack v Church of Jesus Christ of Latter-Day Saints* (1997) 79 FCR 441, 444. See also *Lainie Chait v Church of Ubuntu Inc* [2024] FWC 703, [55]–[68].

The attribution of a religious freedom purpose may never had happened had Don Dunstan in SA in 1975 understood what he was doing when he examined the *Sex Discrimination Act 1975* (UK) to see what 'could be usefully incorporated' into the South Australian legislation. He might have said, 'we are enacting a religious bodies exception with two alternative limbs: one that allows discrimination that is necessary so as to comply with doctrine, and one that allows discrimination in circumstances where discrimination is not necessary to conform with doctrine, but a significant minority of adherents of the religion disagree with the doctrinal position'. But he did not say that, or anything like it. Neither then nor in subsequent enactments in Australia was a reason given for the religious susceptibilities limb, until an idea of religious freedom began to emerge.

The original purpose of the religious susceptibilities limb was much narrower than has developed in Australia. Its purpose was to deal with religious doctrine in a state of flux; when, although discrimination is not required to conform with doctrine, there is a widely-held dissenting view on that issue. That was so in both *OV and OW* and *Cobaw*, where there was no doctrinal need to discriminate on the basis of sexual orientation; they would have been apt cases for taking a narrow approach to the religious susceptibilities limb, one that accorded with its original purpose.

Cases that turn on the religious susceptibilities limb are rare, however, and in half of the few that have been reported, reliance on the religious susceptibilities limb failed because the entity was not a religious body. This suggests that the work the religious susceptibilities limb does occurs well before a discrimination complaint is litigated: the contemporary understanding of the religious susceptibilities limb is so broad — allowing religious freedom to discriminate — that discrimination complaints may simply not be made, or may be quickly disposed of in the mandatory conciliation phase. It has been pointed out that even though 'faith-based Christian institutions may not intend to discriminate, *the possibility that they can and that they demand the right to*, may leave LGBTI people uncertain and cautious in seeking assistance'.[210] The religious susceptibilities limb presents this possibility.

The mere existence of the religious bodies exception — especially under a heading, as is usually the case, 'Exceptions: religious bodies' — may be effective in deterring complaints against religious bodies of discrimination. As for all acts of discrimination, we simply do not know how many discriminatory acts are not complained of or why. When a complaint *is* made, the mere assertion of the exception by a religious body may lead to withdrawal of the complaint; we rarely know how complaints are resolved as the process is hidden behind a private mandatory conciliation process, usually conducted confidentially.[211]

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210 Parsell et al (n 7) 466, quoting Dale Dominey-Howes, Andrew Gorman-Murray and Scott McKinnon, 'Emergency Management Response and Recovery Plans in Relation to Sexual and Gender Minorities in New South Wales, Australia' (2016) 16 *International Journal of Disaster Risk Reduction* 1, 8 (emphasis added).

211 See Dominique Allen and Alysia Blackham, 'Using Empirical Research to Advance Workplace Equality Law Scholarship: Benefits, Pitfalls and Challenges' (2018) 27(3) *Griffith Law Review* 337, 347–50; Gaze and Smith (n 158) 187 [32].

More generally than the religious susceptibilities limb's deterrence effect in relation to complaints, the broad 'religious freedom' claim that it enables is defining public debate on the place of religious bodies in public life. The absence of a stated purpose for the religious susceptibilities limb has enabled church lobby groups, since at least the early 1990s, to assert a religious right to discriminate unbounded by the confined original purpose of the exception. This assertion reached its peak in the failed Religious Discrimination Bill (Cth) 2022, with its aggressive and unprecedented approach to promote a religious freedom to discriminate.

Both the deterrence effect of the religious susceptibilities limb on complaints, and its use as a basis for arguing in public debate for a broad religious freedom to discrimination, would be limited if its intended purpose was understood as accommodating widely held doctrinal dissent on the issue of discrimination. In 1975 in the UK there was widely held doctrinal dissent on the issue of sex discrimination in the ordination of woman as priests in the Church of England; in 2025 in Australia there is widely held doctrinal dissent on the issue of sexual orientation discrimination in faith-based employment and the provision of goods and services; and in the future there will no doubt be widely held doctrinal dissent on other issues of religious doctrine. That — and not a broad licence to discriminate — is what the religious susceptibilities limb was intended to address. It would help, too, if the many ways that the religious bodies exception is drafted around Australia could transcend federal divisions and — achieving the art of the impossible[212] — be drafted with national uniformity!

212 Guzyal Hill, 'Categories of the "Art of the Impossible": Achieving Sustainable Uniformity in Harmonised Legislation in the Australian Federation' (2020) 48(3) *Federal Law Review* 350.