The *New Hope Case*: An Australian Perspective

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I. The scope of Australia's constitutional provisions

Two features of Australian law relating to the free exercise of religion and religious establishments mark it off from the jurisprudence of most other liberal democracies. First, although the Australian Constitution contains in sec. 116 a set of religion clauses in terms almost identical to those of the Constitution of the United States (and thus of Carolingia), the Australian provision operates in the absence of a general bill or charter of rights operating at a national level. As a consequence, the Australian High Court's jurisprudence in relation to the religion clauses has not developed in the context of a wider rights jurisprudence, founded upon a national bill of rights.[1] Second, the religion clauses in their terms bind only the Commonwealth Parliament. In the absence of any subsequent amendments to the Constitution of effect similar to that which has been attributed to the 14th Amendment to the U.S. Constitution, the religion clauses have been held not to apply to the legislative powers of the Australian states.[2]

Only two Australian states, Tasmania and Victoria, have legal provisions that provide a measure of protection for freedom of religion. The Tasmanian provision, which appears in the state Constitution Act,[3] is of limited effect because under Australian state constitutional law the state constitutions can be amended by the state legislatures by ordinary statute,[4] except in those cases where the provision is effectively entrenched by manner and form procedures.[5] Although the law relating to manner and form is complex and to an extent uncertain, it appears that the Tasmanian provision is not effectively entrenched and could be amended explicitly by an ordinary statute, if not also indirectly by a law that is simply inconsistent with it. The Victorian Charter of Human Rights and Freedoms, which includes a right to freedom of religion,[6] does not directly prohibit the state Parliament from making laws contrary to freedom of religion, but rather requires the courts to interpret state laws so far as

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[1] Although note the implied freedom of political communication in *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[2] *Grace Bible Church v Reedman* (1984) 36 SASR 376; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.
[3] Section 46 of the *Constitution Act 1934* (Tas) provides: '(1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen. (2) No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office.'
[4] *McCawley v The King* (1920) 28 CLR 106.
[5] *A-G (NSW) v Trethowan* (1931) 44 CLR 394; *A-G (WA) v Marquet* (2003) 217 CLR 545.
[6] *Charter of Human Rights and Responsibilities Act 2006* (Vic.), sec. 14. See the similar provision in the *Human Rights Act 2004* (A.C.T.), sec. 14, enacted by the Australian Capital Territory.

possible in a manner compatible with human rights,[7] or else make public declarations of inconsistent interpretation.[8]

Laws regulating the adoption of children in Australia fall within the plenary legislative powers of the state legislatures. As a consequence, the short answer to the question posed by the New Hope case is that if the matter arose in an Australian state other than Victoria, the courts would have no ground upon which to scrutinise the Equality Law on constitutional or human rights grounds. The Equality Law would be a validly enacted law and apply fully according to its terms. Only if it was enacted in Victoria would the courts be required to interpret the law in a manner compatible with the right to freedom of religion.

In these circumstances, the balance of this paper will proceed on the basis of two alternative hypotheses. The first is that, contrary the New Hope scenario, the Equality Law is enacted by the federal Parliament and thus the guarantee of freedom of religion contained in the federal Constitution applies. The second hypothesis is that the Equality Law is enacted by the Parliament of Victoria and is therefore subject to the Charter of Human Rights and Responsibilities. The paper will deal with each of these hypotheses in turn. It will be seen that both hypotheses could lead to a situation where a court is required to undertake a proportionality analysis of the Equality Law.

II. Freedom of religion under the federal Constitution

There have been relatively few litigated cases that have tested the meaning of the religion clauses contained in the federal Constitution, and for this reason the High Court's jurisprudence on the topic remains relatively rudimentary. Moreover, most of these decisions were brought down several decades ago, and it is possible (although perhaps not likely) that prevailing judicial attitudes at this present time could produce significantly different results. Nonetheless, the decided cases have established several fundamental principles concerning the meaning and application of the religion clauses, and on the basis of these principles it is possible at least to speculate about the High Court's likely response to the New Hope case (on the counter-factual assumption, of course, that the Equality Law was enacted by the federal Parliament).

Section 116 of the federal Constitution provides:

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

Although this provision was closely modelled on the relevant clauses of Art. VI, sec. 3 and the First Amendment of the U.S. Constitution, there are several apparently minor verbal differences which, along with the different histories and purposes of the two constitutions, have given the High Court of Australia ground for adopting a significantly different interpretive approach compared to that adopted by the Supreme Court of the United States.

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[7] Victorian Charter, sec. 32.
[8] Victorian Charter, sec. 36.

1. Definition of religion

Unlike the First Amendment, sec. 116 protects '*any* religion' rather than just 'religion' in general. This wording has fortified the Court in adopting a relatively wide definition of protected religion. It is not necessary to discuss this matter in much detail as the Roman Catholic faith clearly satisfies the criteria that have been established in the cases, but for completeness it may be worth outlining the approach that has been adopted by the High Court. In the leading case on the topic, two justices said that a protected religion would necessarily have to involve (1) belief in a supernatural Being, Thing or Principle and (2) the acceptance of canons of conduct to give effect to that belief.[9] However in that case three other justices said that no formal set of criteria should be prescribed by the Court. Two of them laid down the following indicia or guiding principles: (1) a particular collection of ideas and/or practices involving belief in the supernatural; (2) ideas that relate to the nature and place of humanity in the universe and the relation of humanity to things supernatural; (3) ideas accepted by adherents requiring or encouraging the observation of particular standards or codes of conduct or participation in specific practices having supernatural significance; and (4) adherents constituting an identifiable group or identifiable groups, regardless how loosely knit and varying in beliefs and practices these may be, the adherents themselves seeing their collective set of ideas and/or practices as constituting a religion.[10] The other justice agreed that belief in a supernatural Being, Thing or Principle was not essential and considered that any organisation which claims to be a religious organisation and which offers a way to find meaning and purpose in life is a religious organisation for the purposes of the guarantee.[11]

2. The purpose of the statute

Again unlike the U.S. First Amendment, the Australian clauses prohibit the Commonwealth from making 'any law *for* establishing any religion … or *for* prohibiting the free exercise of any religion'.[12] The use of the word 'for' has led the High Court to hold that in order to contravene sec. 116, a law must be enacted for the *purpose* of establishing any religion[13] or prohibiting the free exercise thereof.[14] It would appear that it is not enough that a law merely interferes with religiously motivated activities in the course of pursuing some other objective; it must have as its purpose an establishment of religion or the prohibition of its exercise.

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[9] *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 136 (Mason A.C.J. and Brennan J.).
[10] Ibid, 174 (Wilson and Deane JJ.).
[11] Ibid, 150-51 (Murphy J.). See, similarly, *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116, 123-4 (Latham C.J.).
[12] The First Amendment prohibits the making of a law '*respecting* an establishment of religion, or prohibiting the free exercise thereof' (emphasis added).
[13] *Attorney-General (Victoria); Ex rel Black v Commonwealth* (1981) 146 CLR 559, 653 (Wilson J.).
[14] *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116, 132 (Latham C.J.); *Kruger v Commonwealth* (1997) 190 CLR 1, 138 (Brennan C.J.), 202, 210-12 (Gaudron J.), 173 (Toohey J.).

3. Early decisions

In early cases before the Court, the scope of the freedom was applied very narrowly. An argument that a law was contrary to sec. 116 which required individuals to engage in compulsory peacetime military training (but which allowed those with religious objections to military training to be allotted non-combatant duties) was given very short shrift by the Court in 1912 on the basis that the law simply had nothing to do with religion.[15] Some decades later, the *National Security (Subversive Associations) Regulations 1940*, which in the context of the Second World War authorised the dissolution of the Adelaide Company of Jehovah's Witnesses and the forfeiture of its property, were held to be invalid as beyond the federal Parliament's power to make laws with respect to 'defence',[16] but were at the same time held not to infringe the free exercise clause of sec. 116.[17] The leading judgment, delivered by Chief Justice John Latham, denied that the freedom of religion clause would enable a person to avoid the application of the ordinary law on the ground that he 'believed and practised a religion which was inconsistent with the provisions of the law'.[18] Although in the Jehovah's Witnesses case the Court said that its task was one of determining whether the freedom of religion had been unduly infringed by the regulations,[19] or whether the regulations were reasonably necessary for the protection of the community,[20] the assessment as to whether the law was reasonably appropriate or adapted to achieve such an objective only occurred in relation to the question whether the law fell within the federal Parliament's power to make laws with respect to defence.[21] The regulation authorising the dissolution of the Jehovah's Witnesses was held not to infringe the free exercise clause simply on the ground that it could be justified as a measure necessary to protect the very existence of the community itself, without which there would be no Constitution, no High Court and no right to freedom of religion in the first place.[22]

4. The current approach

It is an open question how likely it would be for the Court today to find a way to get beyond the threshold question of whether a law is for the purpose of prohibiting the free exercise of religion and engage in the further question whether the law's interference with religious activity is proportionate to a legitimate objective. It is true that the Court has now adopted balancing tests in several areas of constitutional law.[23] However, in the most recent case in which the free exercise clause was squarely raised in argument, only one judge articulated a way in which, in principle, the case might have gotten beyond the threshold question as to the

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[15] *Krygger v Williams* (1912) 15 CLR 366, 369-70 (Griffith C.J.), 372-3 (Barton J.).
[16] Australian Constitution, sec. 51(vi).
[17] *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116.
[18] Ibid, 130 (Latham C.J.).
[19] Ibid, 131 (Latham C.J.).
[20] Ibid, 155 (Starke J.).
[21] Compare Leslie Zines, *The High Court and the Constitution*, 4th ed. (Sydney: Butterworths, 1997), 403.
[22] Ibid, 131-2, 147 (Latham C.J.); see also at 150 (Rich J.), 155 (Starke J.).
[23] H.P. Lee, 'Proportionality in Australian Constitutional Adjudication' in Geoffrey Lindell (ed.), *Future Directions in Australian Constitutional Law* (Sydney: Federation Press, 1994), 126-149.

purpose of the law and thereby open up the proportionality issue.[24] In that case, *Kruger v Commonwealth*, it was argued that a Northern Territory Ordinance which provided for the forced removal of aboriginal children from their families was invalid under sec. 116 as a law prohibiting the free exercise of religion. However, at least four (if not five) of the judges considered the free exercise argument to be ill-founded. Two of them held that sec. 116 was simply inapplicable to Territory legislation[25] and at least two (if not three) of them held that the Ordinance simply could not be characterised as a law that had the purpose of prohibiting the free exercise of religion.[26]

The one judge in *Kruger* who found it necessary to address the freedom of religion argument at length was Justice Mary Gaudron. Her Honour proposed three things about the free exercise clause. First, the clause is not limited to prohibiting laws that impose an outright 'ban' on the free exercise of religion, but extends to laws that 'prevent' the free exercise of religion or authorise acts having that effect.[27] While her Honour's language was not entirely clear, it seems that she here meant that the free exercise clause would apply to laws that somehow *interfere* with the free exercise of religion even if they do not ban it altogether. Second, Gaudron J. pointed out that although the cases have held that the prohibition is limited to laws that have the purpose of prohibiting the free exercise of religion, it is possible that a law may have several purposes, and that a particular purpose (ie, to prohibit the free exercise of religion by aboriginal children within their families and tribes) may be subsumed within a larger or more general purpose (ie, to remove aboriginal children from their families and tribal culture, ostensibly for their own good).[28] Third, her Honour said that if the issue had been raised in the pleadings (which it had not), then it would be necessary for the Court to assess whether the interference with religious freedom (this being an incidental side-effect of the law) could be justified because the law was nonetheless appropriate and adapted (or reasonably proportionate) to achieving that legitimate objective.[29]

5. What is the purpose of the Equality Law?

The Equality Law is primarily directed to the prohibition of discrimination on the basis of sexual orientation and is not explicitly directed to interference with religious practices. Could it be argued that subsumed within this purpose was a secondary objective of prohibiting the free exercise of religion by New Hope Catholic Services? The argument might run as follows: (1) one of the reasons why certain people are not prepared to support at least some kinds of gay rights (such as the right to adopt children) is that as a matter of religious conviction they regard homosexuality as morally wrong; (2) the legislature must have contemplated this when prohibiting discrimination on the basis of sexual orientation; thus, (3)

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[24] *Kruger v Commonwealth* (1997) 190 CLR 1.
[25] *Kruger v Commonwealth* (1997) 190 CLR 1, 138 (Brennan C.J.), 233 (Gummow J.).
[26] *Kruger v Commonwealth* (1997) 190 CLR 1, 153 (Dawson J., McHugh J. agreeing), 173-4 (Toohey J.).
[27] *Kruger v Commonwealth* (1997) 190 CLR 1, 209-10 (Gaudron J.).
[28] *Kruger v Commonwealth* (1997) 190 CLR 1, 210-11 (Gaudron J.).
[29] *Kruger v Commonwealth* (1997) 190 CLR 1, 212 (Gaudron J.). Gaudron J.'s conclusion was that, apart from the state of the pleadings, there was insufficient evidence before the Court to enable it to undertake this assessment.

it was a subsidiary purpose of the legislation to prevent such persons from acting on their religious beliefs in this respect.

Such an argument is analogous to the argument proposed by Gaudron J. in *Kruger*, and is not without merit, but it would be unlikely to succeed before the High Court. Only Gaudron J. considered the possibility of subsidiary purposes within wider or more general purposes; the other judges simply read the purpose of the statute from its explicit language and concluded that its objectives had nothing to do with the prohibition of freedom of religion. It is likely that a majority of judges today would read the Equality Law similarly – as a law whose purpose is simply to prohibit discrimination on the basis of sexual orientation, a purpose that has nothing to do with the free exercise of religion.

6. Is the Equality Law disproportionate?

Could it be argued that although it is not one of the purposes of the Equality Law to interfere with freedom of religion the law does in fact have this practical effect and that this interference makes the law disproportionate to the achievement of the objective of eliminating discrimination on the basis of sexual orientation? Even though in *Kruger* only Gaudron J. thought that a proportionality analysis might be required under the free exercise clause, a majority of the Court in the *Jehovah's Witnesses* case struck down the law on the ground that it was disproportionate to the objective of protecting the country from subversive elements under the defence power. A similar analysis is possible in the New Hope case.

The most likely head of power pursuant to which the federal Parliament could enact the Equality Law is the external affairs power,[30] a power that has been held to give the Parliament power to make laws that implement international treaties, including international human rights conventions.[31] In such cases it is necessary for the federal government to show that the law is reasonably proportionate and adapted to implementing its obligations under the relevant treaty.[32] Assuming the existence of a relevant treaty, the issue here would be whether the interference with the free exercise of religion caused by the Equality Law renders it disproportionate to the objective of preventing discrimination on the basis of sexual orientation.[33]

Before turning to this last question, however, it is convenient to now consider the second hypothesis, namely that the Equality Law was enacted within the State of Victoria and is therefore subject to the Victorian Charter of Human Rights and Responsibilities. It will be seen that a question of reasonable proportionality arises also under the Victorian Charter.

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[30] Australian Constitution, sec. 51(xxix).
[31] *Commonwealth v Tasmania* (1983) 158 CLR 1.
[32] Ibid.
[33] On analogy with *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, in which a law ostensibly directed to the protection of the reputation of the Commonwealth Industrial Relations Commission was held to be disproportionate to this objective because it unjustifiably interfered with freedom of political communication.

III. Freedom of religion under the Victorian Charter

1. The right to freedom of religion, compatible interpretation and justifiable limitation

Section 14 of the Victorian Charter of Human Rights and Responsibilities provides:

> (1) Every person has the right to freedom of thought, conscience, religion and belief, including—
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> (a) the freedom to have or to adopt a religion or belief of his or her choice; and
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> (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.
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> (2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

Section 32(1) of the Victorian Charter directs courts to interpret all statutory provisions 'so far as it is possible to do so consistently with their purpose in a way that is compatible with human rights'.[34] The Charter defines the 'human rights' by reference to the specifically enumerated list of civil and political rights set out in Part 2,[35] including the freedom of 'thought, conscience, religion and belief' in sec. 14.[36] Section 7(2) of the Charter however also states:

> A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
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> (a) the nature of the right; and
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> (b) the importance of the purpose of the limitation; and
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> (c) the nature and extent of the limitation; and
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> (d) the relationship between the limitation and its purpose; and
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> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.[37]

The drafting of the Charter produces some confusion at this point, as the direction in sec. 32(1) refers to compatibility with 'human rights' (as defined in sec. 3) without any explicit reference to the qualifications set out in sec. 7(2).[38] It is therefore unclear whether the interpretive duty under sec. 32(1) is to be read with sec. 7(2).[39] It is most likely, however, that the courts will remedy this drafting defect by reading the two provisions together, thus interpreting statutes in a manner compatible with human rights under sec. 32(1), but understanding the scope of those rights to be justifiably limited in accordance with sec. 7(2).[40] Accordingly, a state law will be interpreted so far as possible in a way compatible with

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[34] Victorian Charter, sec. 32(1).
[35] Victorian Charter, sec. 3.
[36] Victorian Charter, sec. 14.
[37] Victorian Charter, sec. 7(2).
[38] James Allan, 'The Victorian *Charter of Human Rights and Responsibilities*: Exegesis and Criticism' (2006) 30(3) *Melbourne University Law Review* 906, 917-20.
[39] There are as yet no decided cases on the Charter.
[40] Such a reading would be consistent with the general principle that the right to manifest one's religion is not an absolute right, but is subject to justifiable limitations. See the cases discussed in *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, para [22].

the freedom of religion protected by sec. 14 as justifiably limited in a manner consistent with sec. 7(2).

The Charter also states that 'International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.[41] While the direction to interpret state laws compatibly with the specified rights in Part 2 is mandatory, the consideration of other international and foreign sources of human rights law is permissive. However, the rights contained in the Charter in many respects follow the provisions the International Covenant on Civil and Political Rights (ICCPR) and related international instruments.[42] In particular, the Charter right to freedom of religion closely follows Article 18(1) and (2) of the ICCPR. In practice, therefore, it is to be expected that litigants will draw on international and foreign sources of law such as the ICCPR, especially where it is in their interests to do so, and judges will have to address those arguments.

2. The scope of religious freedom in practice

It is arguably a substantial weakness in the Charter that the particular kinds of manifestation of religious belief specified in sec. 14 are practices that can be read as having a primarily 'cultic', 'internal' and 'personal' meaning, rather than a meaning that embraces 'non-cultic', 'external' and 'inter-personal' interaction with people outside the religion. This is most clearly so in 'worship', but also on a certain reading, in relation to 'observance', 'teaching' and 'practice'.[43] Relatedly, it has also been suggested by recent commentators that the freedom to demonstrate one's religion encompasses acts that are an 'expression' of the religion or belief but not acts that are 'merely influenced or motivated' by it.[44] However, three compelling arguments are available against a narrow reading of the freedom in these respects.[45] First, the freedom to 'practice' religion is a freedom to 'demonstrate' that religion, and it is a freedom to demonstrate that religion 'in public'.[46] The demonstration of religion in public suggests that the practice of religion extends to non-cultic, external interaction with people outside the religion. Second, the freedom concerns the religion of a person's free 'choice', and thus extends to whatever public practices a person's religion of choice may happen to involve. As it happens, some religions call on their adherents to undertake charitable works and to pursue 'everyday activities' in accordance with particular canons of

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[41] Victorian Charter, sec. 32(2).
[42] George Williams, 'The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope' (2006) 30(3) *Melbourne University Law Review* 880, 895.
[43] See the examples given in para. 4 of the ICCPR Human Rights Committee, 'General Comment No. 22' on Art. 18 of the ICCPR (CCPR/C/21/Rev.1/Add.4).
[44] Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (Lawbook Co, 2008), 118-19.
[45] See Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2005), 246, emphasising the 'broad range of acts' included within the right to 'manifest' religion or belief under the ICCPR.
[46] Compare *Kokkinakis v Greece* (1993) 17 EHRR 397, para [31] (holding that the freedom to 'manifest' religion under Art. 9 of the European Convention on Human Rights extends to 'the right to try to convince one's neighbour' of the truth of one's religious beliefs).

conduct, and such works and activities are regarded by such religions as the way in which the religion ought to be practiced. Third, the Charter refers to a corollary right not to be coerced or restrained 'in any way' that limits the freedom to practice the religion in this way.

The folk at New Hope see their work as a public manifestation of their religious beliefs. Not all religions call upon their adherents to works of charity of this kind, and not all religions teach their adherents that 'all homosexual activity is intrinsically immoral' and that 'gay couples' can never be 'fit parents' on the ground that gay adoption means 'doing violence' to the children involved. However, the Charter refers to the freedom to demonstrate one's religion in practice, as part of a community, and in public, and this is what New Hope is doing. It follows that the adoption services provided by New Hope is a 'demonstration' of religious beliefs within the meaning of sec. 14(1)(b).

3. Interpretation of the Equality Law in a manner compatible with religious freedom

Under sec. 32(1) the Equality Law must be interpreted so far as possible in a manner compatible with the right of the New Hope Catholic Services to provide adoption services according to their own lights. Is it possible to interpret the Equality Law in a way that enables New Hope to continue to discriminate against gay couples in accordance with their religious convictions? Courts in other jurisdictions have certainly been willing to rewrite statutes quite extensively in order to read statutes compatibly with human rights standards.[47] However, two problems emerge. The first is that the purpose of the Equality Law seems to be entirely inconsistent with discrimination against gay couples in the provision of adoption services, making it difficult to interpret the Equality Law as allowing such discrimination to occur in order to make room for the religious freedom of New Hope. The second problem is that it is open to argue that under sec. 7(2) the Equality Law justifiably limits religious freedom because it pursues a legitimate objective in a proportionate manner. If the compatible interpretation obligation placed on courts under sec. 32(1) is qualified by this possible justification under sec. 7(2), then there is very little scope for interpreting the Equality Law in a manner that would enable New Hope to continue to discriminate.

In the remainder of this section, I will address the first of these problems, the problem of interpreting the Equality Law in a manner consistent with its purpose of eradicating discrimination on the ground of sexual orientation. Then, as foreshadowed, I will turn to the proportionality question, both in terms of the Victorian Charter and the free exercise clause in the federal Constitution.

The Equality Law makes it an offence for a DSS contractor in employment practices or the provision of goods and services to discriminate directly or indirectly on the ground of sexual orientation. There appear to be no exceptions to this rule. It therefore appears that the purpose of the law is to prohibit all instances of discrimination on the basis of sexual orientation by DSS contractors. Can the law nonetheless be interpreted in a manner compatible with the

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[47] Eg, *Ghaidan v Godin-Mendoza* [2004] UKHL 30; *SI by his next friend CC v KS by his next friend IS* [2005] ACTSC 125 (2 December 2005); *R v DA* [2008] ACTSC 26 (31 March 2008).

freedom of New Hope to continue to discriminate? The existence of both direct and indirect discrimination depend on there not being any 'material difference in the relevant circumstances' justifying different treatment or placing persons of a particular sexual orientation at a disadvantage compared to others. The requirement that there be no material difference in relevant circumstances could conceivably be interpreted as embracing the Roman Catholic view that the sexuality of a prospective couple wishing to adopt a child can indeed make a 'material difference' in a decision about whether adoption services should be provided to that couple. Such an interpretation might certainly be attractive to a person sharing the views of the Roman Catholic Church in this matter. It is difficult, however, to argue that such an interpretation is consistent with the purpose of the Equality Law. The Equality Law proceeds on the view that discrimination on the basis of sexuality is morally wrong. It would be directly inconsistent with this view to accept that sexuality might be a legitimately material consideration in deciding whether to provide services to a particular person. The Equality Law proceeds on the assumption that the factors that might make for 'material differences in relevant circumstances' are factors other than sexuality.

It seems, therefore, that there is little ground for interpreting the Equality Law consistently with its purpose in a manner compatible with the right, claimed by New Hope, to provide adoption services in a manner that discriminates against gay couples. It may therefore be unnecessary to inquire whether the right to freedom of religion as justifiably limited under sec. 7(2) would protect New Hope's provision of adoption services in a manner that discriminates against gay couples. For the sake of completeness, though, I shall now address that question. As noted earlier, a similar inquiry would be required on the hypothesis that the Equality Law was enacted by the federal Parliament and subject to scrutiny for its proportionality to some head of legislative power, such as the external affairs power.

IV. Is the Equality Law reasonably proportionate?

Sec. 7(2) of the Victorian Charter calls for an assessment of whether the law can be 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom', taking into account 'all relevant factors', including several specified matters that must be taken into consideration. The structure of the parallel inquiry under the federal Constitution is not stipulated, but is rather the result of judicial interpretation. The question here is whether, having regard to its incidental effect on freedom of religion, the Equality Law is a reasonably appropriate and adapted means of implementing Australia's obligation to prohibit discrimination on the basis of sexual orientation pursuant to its international obligations under some relevant human rights convention.

While both assessments do not simply entail an 'all things considered' judgment of the merits of the Equality Law and of the practice of discriminating on the basis of sexuality on the ground of religious conviction, they are not far from that. Sec. 7(2) asks whether the law can be 'demonstrably justified', suggesting perhaps that at least some margin of appreciation is to be given to the legislature, the question being whether the decision made by the legislature is one that could reasonably have been made. But how much of a margin is appropriate? Sec.

7(2) also shapes the inquiry by asking whether the law could be justified in a democratic society based on human dignity, equality and freedom. But democracy can mean many things (procedural majoritarianism? reasoned deliberation? equal concern and respect?), and the New Hope case poses for our consideration a situation in which there are contending conceptions of human dignity, equality and freedom at stake.

In cases applying proportionality tests in other areas of Australian law, very similar considerations have arisen, and therefore could be expected to arise, similarly, in any inquiry into the constitutionality of the Equality Law under the federal Constitution. Each of the competing conceptions of the values at issue in such cases suggests very different weights to be given to such factors as 'the nature of the right' and 'the importance of the purpose of the limitation'. A judge's answer to these questions will be shaped, by his or her moral commitments either way. If there is a 'correct' answer, it will necessarily involve a judgment about which underlying conception is itself correct. If we are to predict what the judges are likely to decide, we will need to consider (if we can) the personal values of the individual judges making the decision.

My own view is that the strongest argument lies on the side of those who would find the Equality Law incompatible with freedom of religion. My main reason concerns the particular aspects of the rights that are in question. New Hope is one among many providers of adoption services, but unlike perhaps many other providers, it provides these services as an expression of the faith and practice of a particular religious community. There is no evidence that New Hope has anything like a dominant market position as regards the provision of adoption services, let alone a monopoly. Prospective couples, regardless of their sexuality, are free to approach any adoption agency in the hope of adopting a child. It may be conceded that discrimination in the provision of goods and services is, in general principle, morally reprehensible. Where such discrimination is widespread enough to have a material impact on the welfare of particular minorities, laws against discrimination may be warranted. However, where specific acts of discrimination in the provision of goods and services are rare and isolated, and where there are alternative service providers, the right of particular service providers to provide their services in a manner consistent with their religious convictions is a paramount consideration.

In the language of proportionality: an outright prohibition upon the folk at New Hope from providing adoption services in accordance with their religious convictions outweighs the inconvenience caused to gay couples forced to turn to alternative service providers in order to seek to adopt a child. The degree of interference with the right of gay couples to adopt children is very minor, whereas if the Equality Law is upheld, the people at New Hope are entirely deprived of the right to provide adoption services in a manner consistent with their religious convictions. Moreover, the Equality Law could easily be tailored to accommodate the free exercise rights of New Hope by the addition of an exemption where goods or services are provided by a person or organization as a manifestation of their religious beliefs.

V. Conclusions

Three alternative conclusions are thus indicated.

First, on the hypothesis that the Equality Law was enacted by a state Parliament other than the Parliament of Victoria, there is no ground upon which the law can be challenged constitutionally. It will operate according to its tenor to prohibit New Hope from holding a license to provide adoption services in a manner that discriminates against gay couples.

Second, on the hypothesis that the Equality Law was enacted by the federal Parliament, while it is unlikely that the Court will find it unconstitutional under sec. 116 directly, it is in my view at least arguable, if not strongly arguable, that the law is by virtue of its interference with freedom of religion disproportionate to the objective of implementing Australia's obligations under some relevant international human rights convention relating to sexuality discrimination.

Third, on the hypothesis that the Equality Law was enacted by the Victorian Parliament, it would not be possible for a court to interpret the law in a way that renders it compatible with freedom of religion. This is so because the purpose of the Equality Law is simply inconsistent with the retention by New Hope of a capacity to discriminate on sexuality grounds. If this conclusion is sound, it follows that in any case heard by the Supreme Court of Victoria, the Court would have to decide whether to make a declaration of inconsistent interpretation under sec. 36 of the Charter. If such a declaration was made, the responsible Minister would then have to issue a written response to the declaration under sec. 37. However, the declaration would have no effect on the validity or effect of the law. The Equality Law would continue to operate according to its terms, rendering it unlawful for New Hope to discriminate on the ground of sexuality. As compliance with the Equality Law is a condition of holding a license to provide adoption services, New Hope would have to cease discriminating against gay couples if it wishes to continue to provide adoption services.