

A RECONSTRUCTION OF RELIGIOUS FREEDOM AND EQUALITY: GAY, LESBIAN AND DE FACTO RIGHTS AND THE RELIGIOUS SCHOOL IN QUEENSLAND

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I INTRODUCTION

Through the later months of 2002, as part of a program to equalise de facto couples' rights and duties with those of married couples, the Queensland Government negotiated the passage of legislation that was intended to harmonise the State's anti-discrimination laws with those of other States.¹ This included the extension of anti-discrimination laws in respect of sexuality and religion, and introducing the protections of the *Anti-Discrimination Act 1991* (Qld) ('*Anti-Discrimination Act*') to transgender and intersex people.² Among the changes planned for the anti-discrimination laws was a narrowing of the freedom of religious schools and hospitals to discriminate. It was inevitable this would raise concerns from the churches - especially when the plan to enhance the rights and duties of de facto couples meant couples of any sexual orientation, and when the protection of homosexual people under the *Anti-Discrimination Act* was being extended. For Christians of a conservative bent have long opposed gay and lesbian rights and attempts to bring, as they see it, a sinful lifestyle into the social mainstream.³ In Queensland, even churches that are not characteristically tagged 'conservative' pressed the Government to let religious schools retain the right to discriminate on the ground of sexuality or marital status. They did not succeed, but bowed to a hastily arranged compromise that, in the long run, may prove unsatisfactory to gay and lesbian groups as well as to the churches and religious schools. In this article, I explain how the extension of gay and lesbian rights in particular impelled a reconstruction of religious freedom and equality in Queensland. The nature of the freedoms left to religious schools is then discussed, as is the extension of religious equality wrought by the 2002 amendments. I

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¹ *Discrimination Law Amendment Act 2002* (Qld). The amendments commenced on 1 April 2003.

² Explanatory Notes, *Discrimination Law Amendment Bill 2002* (Qld) 1 ('Explanatory Notes').

³ R Ahdar, *Worlds Colliding: Conservative Christians and the Law* (Ashgate/Dartmouth, 2001) 219.

conclude with some observations on the political legitimacy of arrangements that, in a negative sense, leave Queenslanders with lesser rights of religious freedom than most other Australians but that, positively, lay more neutral legal groundwork for a secular economic and social life in the State.

II THE *QFG* CASE, AND THE EXTENSION OF GAY AND LESBIAN RIGHTS

The rights of people in de facto relationships did feature in the debate about the freedoms of religious schools,⁴ but the larger motivation for the revision of rights of religious freedom and, in a fashion, religious equality was the basic structural work that the *Anti-Discrimination Act* needed to secure the extension of gay and lesbian rights. In at least two respects, the 2002 amendments broadened the narrow reading of the Act adopted by the Queensland Court of Appeal in 1998 in *JM v QFG*⁵ ('*QFG*'). In that case the court considered legal questions arising from an IVF clinic's refusal to give fertility treatment to a woman who lived in a lesbian relationship with another woman. After the court remitted the case to the Anti-Discrimination Tribunal, the clinic's refusal of treatment was allowed.⁶ The result in *QFG* is actually confirmed by the 2002 amendments, which allow IVF clinics to discriminate on the ground of sexuality and marital status.⁷ However, the amendments revise two structural weaknesses of the *Anti-Discrimination Act* that the *QFG* decision revealed. First, at the time of the *QFG* case the Act prohibited discrimination in relation to the attribute of 'lawful sexual activity'.⁸ The court had to decide whether a lesbian relationship was a 'lawful sexual activity', and concluded that it was not. Lesbianism was lawful but not 'an activity'. '[B]eing in a relationship is not an activity; it is a state'.⁹ Even on this reading,¹⁰ there was an opportunity to argue the *Anti-Discrimination Act*'s protection of a lesbian sexual orientation on the ground that the lesbian 'state' was a characteristic that a person with the attribute of lesbian sexual activity generally has, or is imputed as having.¹¹ Davies JA accepted that it could be imputed that a person who is in an exclusively lesbian relationship has the attribute of lawful lesbian sexual activity, and so could claim the Act's protection.¹² The other two judges in the Court of Appeal, nevertheless, did not even consider this possibility.

⁴ Queensland, *Parliamentary Hansard*, Legislative Assembly, 28-9 November 2002, 5020, 5149 (Lawrence Springborg); 5151 (Michael Horan, Opposition Leader); 5157 (Elizabeth Cunningham) ('*Hansard*').

⁵ [2000] 1 Qd R 373.

⁶ *Morgan v GK* [2001] QADT 10 (22 May 2001).

⁷ *Anti-Discrimination Act 1991* (Qld) s 45A; Discrimination Law Amendment Bill 2002 (Qld) cl 19.

⁸ *Anti-Discrimination Act 1991* (Qld) s 7(1)(l).

⁹ [2000] 1 Qd R 373, 384 (Davies JA); 391 (Pincus JA); 394 (Thomas JA).

¹⁰ At first instance, Ambrose J more explicitly decided that lesbian activity was sexual inactivity, and so not protected: *QFG v JM* (1997) EOC 92-902, 77,422. The Court of Appeal judgments are a little more refined, but effectively recast lesbian sexual activity as heterosexual sexual inactivity, and therefore not protected by the Act. The judgments have received extensive criticism, and deserve it. There is nothing in the general terminology used in the Act that demands the technical gymnastics that are evident in the courts' interpretation of 'lawful sexual activity': see B Statham, '(Re)producing Lesbian Infertility: Discrimination in Access to Assisted Reproductive Technology' (2000) 9 *Griffith Law Review* 12; S Gory, 'Constructing the Heterosexually Inactive Lesbian: Assisted Semination in Queensland' (2002) 16 *Australian Feminist Law Journal* 75.

¹¹ *Anti-Discrimination Act 1991* (Qld) s 8.

¹² [2000] 1 Qd R 373, 385.

The second structural weakness identified in *QFG* had even broader implications for anti-discrimination law in Queensland. The policy of the IVF clinic was to limit treatment to those with ‘medical infertility’, and this effectively amounted to a woman’s failure to conceive after 12 months of heterosexual intercourse without contraception. As the court accepted, the reason for refusing the treatment was not because the complainant was a lesbian. The refusal was because she was *not* engaged in heterosexual sex. Heterosexual sexual activity – like lesbian sexual activity – was a protected attribute under the *Anti-Discrimination Act*, so the Act made it unlawful to discriminate on the ground of heterosexual sex. It did not, however, make it unlawful to discriminate because a person did *not* have that attribute. In other words, the IVF clinic could lawfully withhold fertility treatment from a woman because she was not engaged in heterosexual sex.¹³ As Thomas JA said, ‘[t]he true basis of the doctor’s refusal to provide services to the patient was not because of her lesbian activity but because of her heterosexual inactivity.’¹⁴ The general implication of this aspect of *QFG* was that, while it was unlawful to discriminate on the ground of an attribute, it was permissible to discriminate on the ground that a person did not have an attribute.

The 2002 amendments dealt with the first structural weakness of the anti-discrimination laws revealed by *QFG* by making ‘sexuality’ a protected attribute under the *Anti-Discrimination Act*.¹⁵ This means ‘heterosexuality, homosexuality or bisexuality’.¹⁶ The protection from discrimination therefore concentrates on the sexual orientation or inclinations of a person rather than on his or her sexual practice. In the language of *QFG*, it addresses the individual’s ‘state’.¹⁷ Furthermore, the attribute will probably comprehend any individual who can at least articulate a likely sexual preference – even if that person is virginal, chaste or impotent.¹⁸ The amendments also introduce ‘gender identity’ as an attribute protected from discrimination, specifically to afford protection for transgender and intersex people.¹⁹

The term ‘sexuality’ seems to include all that the ‘lawful sexual activity’ ground of discrimination used to, and more. It is hoped to provide ‘more comprehensive protection for the general community’.²⁰ In form the *Anti-Discrimination Act* retains ‘lawful sexual activity’ as a protected attribute,²¹ but reassigns its meaning. Lawful sexual activity now means ‘a person’s status as a lawfully employed sex worker’.²² So,

¹³ Ibid 385-6 (Davies JA); 391 (Pincus JA); 396 (Thomas JA).

¹⁴ Ibid 396. Thomas JA added that chastity – abstinence from sexual activity – would not be protected as a ‘lawful sexual activity’ under the *Anti-Discrimination Act 1991* (Qld).

¹⁵ *Anti-Discrimination Act 1991* (Qld) s 7(1)(n); Discrimination Law Amendment Bill 2002 (Qld) cl 14.

¹⁶ *Anti-Discrimination Act 1991* (Qld) s 4; Discrimination Law Amendment Bill 2002 (Qld) cl 12.

¹⁷ [2000] 1 Qd R 373, 384 (Davies JA).

¹⁸ Compare with *JM v QFG* [2000] 1 Qd R 373, 396 (Thomas JA). Note the limited reach of the New South Wales laws in comparison, which still only protect people of homosexual orientation: *Anti-Discrimination Act 1977* (NSW) ss 49ZTA.

¹⁹ *Anti-Discrimination Act 1991* (Qld) s 7(1)(m). ‘Gender identity’ means that ‘the person (a) identifies, or has identified, as a member of the opposite sex by living or seeking to live as a member of that sex; or (b) is of indeterminate sex and seeks to live as a member of a particular sex’: *Anti-Discrimination Act 1991* (Qld) s 4.

²⁰ Explanatory Notes, above n 2, 5.

²¹ *Anti-Discrimination Act 1991* (Qld) s 7(1)(l).

²² *Anti-Discrimination Act 1991* (Qld) s 4.

compatibly with the legalisation of prostitution in Queensland it has become unlawful - to a point - to discriminate against paid sex workers. The greater significance of redefining 'lawful sexual activity' nevertheless lies in the rights of employers - especially schools - to refuse work, and in the extension of gay and lesbian rights under the 2002 amendments. From inception, the *Anti-Discrimination Act* has expressly allowed discrimination on the ground of lawful sexual activity when employing people in work that involves the care or instruction of children.²³ The gay and lesbian lobby railed against the stereotyping involved in this exemption,²⁴ but made no ground in getting it removed until the 2002 amendments. However, the redefinition of 'lawful sexual activity' as paid sex work means that it will be lawful to refuse employing sex workers in positions involving childcare or instruction. The controversy may well continue, though, because transgender and intersex people have now also been included in the exemption,²⁵ putting them alongside sex workers and people convicted of child sex offences.²⁶ This is an especially cruel judgment on intersex people, cast in legislation as unsafe examples for children merely because they were born with biological characteristics of both males and females, and may explain why the Intersex Association lobbied parliamentarians for intersex people to be treated separately to transgender people in the *Anti-Discrimination Act*.²⁷

III RELIGIOUS FREEDOM

The 2002 amendments brought a significant narrowing of the nature and scope of religious freedom in Queensland. To a large degree in Australia, religious freedom only takes on real meaning in the extent to which it is lawful for religious groups to discriminate. The value pluralism underlying religious freedom and other liberties of conscience endorses the capacity of sub-groups and sub-cultures to make judgments about the moral significance of factors like sex, gender, sexuality and marital status that society-at-large, through its elected Parliaments, may well judge differently. Evidently, the right to discriminate on religious grounds is essential to the freedom as the group could not exist as a distinctive religious entity without it. The *Anti-Discrimination Act*, like comparable legislation elsewhere in Australia, tacitly endorses that right because membership of a religious group is not even an area of activity that is protected and regulated under the Act. However, reinforcing that is the express exemption from the operation of the *Anti-Discrimination Act* of questions like the education, training, ordination and appointment of priests, ministers and other clergy.²⁸ The selection of

²³ *Anti-Discrimination Act 1991* (Qld) s 28(1).

²⁴ P Cullinane, 'Section 28 of the *Anti-Discrimination Act 1991* (Qld): Warranted Precaution or Legislative Gay Bashing?' [1999] *Australasian Law Students' Association Academic Journal* 59, 60-1. Tahmindjis thought that the exemption in s 28 would have little impact on the employment of homosexuals in schools, as it would be difficult for the employer to show, as required by s 28, that the discrimination was 'reasonably necessary to protect the physical, psychological or emotional well-being of minors': P Tahmindjis, 'The New Queensland Anti-Discrimination Act: An Outline' (1992) 22 *Queensland Law Society Journal* 7, 12.

²⁵ *Anti-Discrimination Act 1991* (Qld) s 28(1); Discrimination Law Amendment Bill 2002 (Qld) cl 16.

²⁶ *Anti-Discrimination Act 1991* (Qld) s 28(2); Discrimination Law Amendment Bill 2002 (Qld) cl 16.

²⁷ *Hansard*, above n 4, 5019 (Lawrence Springborg).

²⁸ *Anti-Discrimination Act 1991* (Qld) s 109. Similar provisions are found in the other State legislation, and the *Sex Discrimination Act 1984* (Cth): R Mortensen, 'Rendering to God and

people to carry out religious observances is similarly removed from the reach of the Act, as are other actions within the religious group that are directed by its doctrines.²⁹ For instance, through the late 1990s the Uniting Church could conduct its debate about the ordination of people who practised homosexual sex on the church's own terms and by reference to its own theologies.³⁰ And while some of those theologies are undoubtedly influenced by the same philosophies and politics that have influenced the rise of the gay and lesbian rights movement, the church debated and decided (or rather decided to suspend debate and decision on) the question without any sense of external government coercion or the need to align church law with State law.³¹ The 2002 amendments wisely, and rightly, leave that freedom untouched.

However, the freedoms of educational and health institutions operated by religious groups have been reined in. These include the traditional field of church and state tugs-of-war – the religious school. Here there was serious contention over the State Government's initial proposals, provoked partly by, what Premier Peter Beattie apologetically admitted was, a failure to consult with the churches, schools or community before submitting the amendments to the Parliament.³² Despite the apology, the process adopted for the proposals was still uncomfortably reminiscent of the legislative railroad of the Bjelke-Petersen era. Negotiations with the churches and schools³³ were hurriedly arranged on the evening before the amendments were to be debated in Parliament, and then gay and lesbian rights organisations³⁴ were consulted. The Islamic Council and Greek Orthodox Church were unable to meet with the Government on short notice. The compromise was tabled in Parliament the next day, without being reviewed for potential infringements of individual rights and liberties by

Caesar: Religion in Australian Discrimination Law' (1995) 18 *University of Queensland Law Journal* 208, 223-4.

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Anti-Discrimination Act 1991 (Qld) ss 109(c), (d); Mortensen, above n 28, 221, 227, 229.

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Uniting Church in Australia, 'Minutes of the Eighth Assembly', 5 July 1997, 97.31.15(f)-(g): <<http://assembly.uca.org.au/assembly97/assembly97.htm>>. Commenting on the divisive 'brouhaha' over the consecration of female bishops in the Episcopal Church of the United States, Carter notes that, '[e]ven though the Episcopal Church has tumbled towards schism as a result of the move to ordain women as priests and bishops – a tumble that has not yet stopped – at least it must be said, for all the divisiveness that the ordination of women caused, it was the work of members of the faith rather than the rule of outsiders, especially that powerful group of outsiders that acts in the name of that great metaphysical abstraction we call the state': S Carter, *The Culture of Disbelief* (Basic Books, 1993) 79-80.

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Ahdar points out that there is no comparable exemption in the New Zealand *Human Rights Act 1993*, and that the parallel debates in the Methodist and Presbyterian Churches in New Zealand were conducted 'with an eye to avoiding litigation and bureaucratic entanglement rather than solely upon the basis of their own assessments of who would best serve their spiritual needs': R Ahdar, 'Religious Group Autonomy, Gay Ordination, and Human Rights Law' in R Adair and A Lewis (eds), *Law and Religion: Current Legal Issues* (Oxford University Press, 2001) 275. See especially at 291.

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Hansard, above n 4, 5005 (Peter Beattie, Premier).

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Including the Anglican Archbishop of Brisbane, the Catholic Archbishop of Brisbane, the Moderator of the Lutheran Church in Queensland, the Moderator of the Presbyterian Church in Queensland, and representatives from the Baptist Union, Churches of Christ, the Salvation Army, the Catholic Education Commission, and the Christian Schools Association: *Ibid* 5007 (Peter Beattie, Premier).

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Including the Australian Transgender Support Association of Queensland; Queensland Pride, the Queensland AIDS Council, Parents and Friends of Lesbians and Gays, and Rainbow Labor: *Ibid* 5008 (Peter Beattie, Premier).

the Scrutiny of Legislation Committee.³⁵ That meant that much of the community comment on the compromise could only be ventilated during the debate in Parliament, which therefore lasted 21 hours.³⁶ Still, the debate began before members were even shown copies of the compromise amendments.³⁷

The *Anti-Discrimination Act* originally allowed schools and hospitals controlled by religious groups the right to discriminate in decisions about employing staff if the religious group's doctrines and sensitivities directed that discrimination.³⁸ The exemption did not cover age, race or impairment discrimination,³⁹ although in practice these have not been live doctrinal issues in religious groups in Australia.⁴⁰ Furthermore, schools could take advantage of the *Anti-Discrimination Act's* recognition that they could, in effect, lawfully discriminate against practising homosexuals where the work involved the care or instruction of children.⁴¹ In making decisions about the enrolment, education and exclusion of students, religious schools could naturally discriminate on the ground of religion.⁴² As all of these were non-State schools, they could also discriminate in educational decisions on any ground except race or impairment.⁴³ These largely paralleled the exemptions still found in federal and most other States' laws. Thus, under the federal *Sex Discrimination Act 1984* (Cth) religious schools can discriminate on the otherwise prohibited grounds of sex, marital status and pregnancy in employment decisions.⁴⁴ The Australian Capital Territory, Victorian and Western Australian laws allow them to discriminate on any ground in employment decisions,⁴⁵ and the New South Wales laws on any ground but race.⁴⁶ The Northern Territory and South Australian laws are narrower, but do allow religious schools to discriminate on the ground of sexuality in employment decisions.⁴⁷ The Tasmanian laws are the narrowest in the country, and only allow religious schools to discriminate in employment decisions in respect of gender and religious belief, affiliation or activity.⁴⁸

The initial proposal in the 2002 amendments was the removal of all of the exemptions in the Queensland *Anti-Discrimination Act* that religious schools and hospitals had,⁴⁹

³⁵ Ibid 5132 (Warren Pitt). In considering the proposals as they were before the compromise was made the Committee noted that they did raise questions about the freedoms of religious schools, but left them to Parliament to decide: Queensland, Scrutiny of Legislation Committee, *Alert Digest No 11 of 2002*, 26 November 2002, 4.

³⁶ *Hansard*, above n 4, 4995-5112, 5132-77.

³⁷ Ibid 5001-2 (Anna Bligh, Education Minister; Stuart Copeland; Joan Sheldon).

³⁸ *Anti-Discrimination Act 1991* (Qld) s 29(1).

³⁹ *Anti-Discrimination Act 1991* (Qld) s 29(2).

⁴⁰ Mortensen, above n 28, 221-3.

⁴¹ *Anti-Discrimination Act 1991* (Qld) s 28.

⁴² *Anti-Discrimination Act 1991* (Qld) s 41(a).

⁴³ *Anti-Discrimination Act 1991* (Qld) s 42.

⁴⁴ *Sex Discrimination Act 1984* (Cth) s 38.

⁴⁵ *Discrimination Act 1991* (ACT) s 33; *Equal Opportunity Act 1995* (Vic) s 76; *Equal Opportunity Act 1984* (WA) s 73.

⁴⁶ *Anti-Discrimination Act 1977* (NSW) ss 38K(3), 46A(3), 49L(3), 49ZO(3), 49ZYL(3).

⁴⁷ *Anti-Discrimination Act* (NT) s 37; *Equal Opportunity Act 1984* (SA) s 50(2).

⁴⁸ *Anti-Discrimination Act 1998* (Tas) ss 27(1)(b), 51. The compatibility of Tasmania's *Anti-Discrimination Act's* few concessions to religious freedom with the overriding religious freedom guarantee in *Constitution Act 1934* (Tas) s 46 is an open question.

⁴⁹ Discrimination Law Amendment Bill 2002 (Qld) cll 17-18.

except their capacity to limit access to - or prefer - children of that religion.⁵⁰ As the amendments would also reassign the definition of 'lawful sexual activity' to sex workers, the power to deny employment to gays and lesbians in positions where the care or instruction of children was involved would also be lost. In return, the religious schools would get a statement in the *Anti-Discrimination Act* that a genuine occupational requirement for a position would, for example, include 'employing persons of a particular religion to teach in a school established for students of the particular religion'.⁵¹

For religious schools concerned about controlling the moral character of the educational environment they provide for their students, being limited to discriminating merely on the ground of religious adherence was insufficient. It would be especially difficult for the larger churches, which run more schools, and which (because of higher nominalism among adherents) have less moral influence over the behaviour of people who claim to belong to them. The churches' main objection was to teachers 'flaunting sexuality in a classroom', although it also appears that they still preferred not to have teachers known to be in de facto relationships in the classroom. The Premier agreed: 'I do not believe that any teacher, whether they are heterosexual or in a de facto relationship of whatever kind, should in any way act inappropriately in front of a class'.⁵² As a consequence, religious schools and other religious groups won a further exemption. If a religious school wants it, it can still set religious adherence as a genuine occupational requirement for a teaching position in the school.⁵³ However, it can also demand, as a genuine occupational requirement, that any school employee not openly act in a way that is inconsistent with the religious beliefs on which the school is founded. This makes it lawful to discriminate in employment decisions if the employee knows, or ought reasonably to know, that his or her behaviour offends those religious beliefs.⁵⁴ It nevertheless remains unlawful, even in these cases, to discriminate on the ground of age, race or impairment.⁵⁵ According to the Premier, the 'heart' of this freedom was that:⁵⁶

If the person was gay and that person openly acted in a way that was not consistent with the religious view, then the church has the right to discriminate against that person. That is what it means. This is what the churches asked us for.

⁵⁰ *Anti-Discrimination Act 1991* (Qld) s 41(a).

⁵¹ It is lawful to discriminate in employment decisions if that is needed to give effect to a genuine occupational requirement: *Anti-Discrimination Act 1991* (Qld) ss 24, 25. See *Discrimination Law Amendment Bill 2002* (Qld) cl 15. In Queensland, an example given in a section is an operative part of the legislation, and so this statement would recognise that religious schools could limit the employment of teachers to adherents of that religion: *Acts Interpretation Act 1954* (Qld) s 14(3). The exemption will have limited effect, as only a few religious schools can fill all teaching positions with qualified adherents.

⁵² *Hansard*, above n 4, 5010.

⁵³ *Anti-Discrimination Act 1991* (Qld) s 25(1); *Discrimination Law Amendment Bill 2002* (Qld) cl 15.

⁵⁴ *Anti-Discrimination Act 1991* (Qld) s 25(3); *Discrimination Law Amendment Bill 2002* (Qld) cl 15.

⁵⁵ *Anti-Discrimination Act 1991* (Qld) s 25(6); *Discrimination Law Amendment Bill 2002* (Qld) cl 15.

⁵⁶ *Hansard*, above n 4, 5010.

The compromise therefore gives religious schools the freedom to demand that employees *appear* to conform to the religion's moral doctrine. The schools can require nothing more, and become subject to the laws prohibiting discrimination on the ground of sexuality and marital status so long as there is no overt expression of a sexuality or intimate relationship that the religious group believes is immoral. Attorney-General Rod Welford thought that 'open defiance' of the school's religious basis would be needed before action could be taken against a teacher.⁵⁷ Apparently, some church leaders later denied that the agreed compromise included the requirement that an employee 'openly act' against the school's religious beliefs before adverse action could be taken.⁵⁸ However, if the compromise had included this requirement, a 'don't ask, don't tell' bargain was struck between the major churches and gay and lesbian groups. That conclusion is reinforced by the fact that, under the compromise, it is unlawful for religious schools to ask for information about a potential employee's sexuality or marital status in job advertisements or interviews.⁵⁹

Religious schools still have the freedom effectively to refuse employment to transgender and intersex people, sex workers, and people convicted of sex offences involving children.⁶⁰

IV RELIGIOUS EQUALITY

The protection of religion in the anti-discrimination laws is recast by the 2002 amendments as the protection of 'religious belief or activity'.⁶¹ This includes 'holding or not holding a religious belief' and 'engaging in, not engaging in or refusing to engage in a lawful religious activity'.⁶² So far as the secular character of economic and social life in Queensland goes, this refinement brings a profound change. It reforms that second structural limitation in the *Anti-Discrimination Act* revealed by the decision in *QFG*: that the Act only made it unlawful to discriminate on the ground of an attribute but that it allowed discrimination against a person who did *not* have an attribute. In relation to religious discrimination laws this allowed discrimination against those who did not have a religion, and probably allowed much discrimination motivated by religion.

No doubt in keeping with the plain-English drafting of the *Anti-Discrimination Act*, the Act previously made it unlawful to discriminate on the ground of 'religion' – expressed as such and with no further definition.⁶³ Inevitably, this imported the definition of religion given by the High Court in the *Scientology* case, where the court held that it was stating the meaning of religion for the purposes of Australian law.⁶⁴ While three separate definitions of religion were given in *Scientology*, the narrowest definition

⁵⁷ Ibid 5154, 5158, 5159.

⁵⁸ Ibid 5028 (Peter Wellington); 5152 (Fiona Simpson).

⁵⁹ *Anti-Discrimination Act 1991* (Qld) ss 25(4), 124; Discrimination Law Amendment Bill 2002 (Qld) cl 15.

⁶⁰ *Anti-Discrimination Act 1991* (Qld) s 28; Discrimination Law Amendment Bill 2002 (Qld) cl 16.

⁶¹ *Anti-Discrimination Act 1991* (Qld) s 7(1)(i); Discrimination Law Amendment Bill 2002 (Qld) cl 14.

⁶² *Anti-Discrimination Act 1991* (Qld) s 4; Discrimination Law Amendment Bill 2002 (Qld) cl 12.

⁶³ *Anti-Discrimination Act 1991* (Qld) s 7(1)(i).

⁶⁴ *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130 (Mason ACJ and Brennan J).

offered by Mason ACJ and Brennan J had the tacit endorsement of the whole court. This was that ‘for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief.’⁶⁵ Wilson and Deane JJ also accepted that, to be religious, a system had to involve ‘belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception beyond the senses’.⁶⁶ The result of importing the *Scientology* approach to religion was that the *Anti-Discrimination Act* prohibited discrimination on the ground that an individual held a belief in something beyond the empirical and accepted that this belief carried moral imperatives for the believer, or for people generally. So, according to reported claims made under the Queensland religious discrimination and vilification laws, this has included Seventh-Day Adventists,⁶⁷ Jehovah’s Witnesses,⁶⁸ Muslims,⁶⁹ Spiritual Science Jews,⁷⁰ and Hindus.⁷¹ However, the *QFG* approach to the *Anti-Discrimination Act* would mean that it only prohibited discrimination against an individual because of that person’s religion. It would be permissible to discriminate because a person did not have a religion, and it would be permissible to discriminate because a person did not have a particular religion.

The way that the 2002 amendments set firmer legal groundwork for a secular public life is illustrated by the Victorian case of *Ciciulla v Curwen-Walker*⁷² (*‘Ciciulla’*). The complainant in *Ciciulla* was a 20 year-old Catholic, although over the years she had become less frequent in her religious observance. She was certainly less vehement and assertive in her beliefs than her employers, a Pentecostal couple, were in theirs. The complainant worked as a sales assistant with children’s clothing suppliers. In work

⁶⁵ Ibid 120, 136.

⁶⁶ Ibid 120, 174.

⁶⁷ Anti-Discrimination Commission Queensland, ‘Case Studies – Religion’ <<http://www.adcq.qld.gov.au/main/casestudies.html#religion>>.

⁶⁸ *Ozarko v Tan* [2001] QADT 3 (2 May 2001) was a complaint by a Jehovah’s Witness against a surgeon who refused to operate on him because of the risk that he might subsequently need a blood transfusion, and who also refused to refer him to another surgeon. This complaint was time-barred.

⁶⁹ *Abo El Wafa v England and Kennedy Taylor (Qld) Pty Ltd* [1997] QADT 27 (16 December 1997) was a complaint that employment had been terminated because of the employee’s race and his religion, Islam. There had been comments from a co-worker about the Crusades and adverse remarks about Muslim fundamentalists, Ramadan and abstinence from alcohol and sex, but these were not regarded as a cause of the employee’s loss of work. In *Deen v Lamb* [2001] QADT 20 (8 November 2001) religious vilification of Muslims was established when it was shown that the respondent had, when campaigning in a federal election, published material that imputed that Muslims were ‘prone to disobey the law of Australia when those laws conflict with the teaching of the Koran, to the extent of being prepared to commit murder’: see at 4 (Sofronoff QC, President). The respondent showed, however, that the publication was made in good faith and the public interest, as it was made in the course of an election campaign.

⁷⁰ Anti-Discrimination Commission Queensland, ‘Case Studies – Religion’ <<http://www.adcq.qld.gov.au/main/casestudies.html#religion>>.

⁷¹ *R v McK* [1999] QADT 8 (12 August 1999) was a complaint of religious vilification under (the now repealed) *Anti-Discrimination Act 1991* (Qld) s 126 for allegedly mentioning, in the workplace, that a Hindu employee’s shrine was ridiculous. This was dismissed as lacking substance because, even if the comment had been made, it could not have incited anyone to religious hatred. At its highest, it could only be ‘regarded as critical of a perceived conservative religious practice’: see at 6 (CE Holmes, Member).

⁷² (1998) EOC 92-934.

time, the employers regularly pressed her to attend their church; told her that smoking, caffeine and alcohol were addictions induced by the devil; constantly discussed their and her religious beliefs; and allowed their pastor, a frequent visitor to the shop, to give her religious literature and repeatedly invite the complainant to attend the church. She went to the employers' church once to honour a 'deal' with them, but was distressed by seeing people speaking in tongues and became ill. Two days later she resigned, saying she 'could not take it anymore' and that she 'did not want to be harassed about religion'.⁷³

The Victorian Anti-Discrimination Tribunal held that unlawful discrimination was proved, and damages were awarded because the discrimination denied the complainant quiet enjoyment of her work. '[T]he Complainant was pressured to attend Church and was treated in her employment differently to the way that an employee who conformed to the respondents' lifestyle and religious practices would have been treated.'⁷⁴ However, the interesting aspect of the discrimination in *Ciciulla* was that it did not occur on the ground of the complainant's religion. It was not because of her Catholicism that the complainant was denied quiet enjoyment in the workplace, but because she was *not* a Pentecostal. The discrimination was motivated by religion - a faith that impelled evangelism in the workplace - and occurred because the complainant did not adhere to the employer's religion. That was unlawful in Victoria, as the religious discrimination laws prohibited discrimination against a person for not holding a religious belief, or for not engaging in or refusing to engage in a religious activity.⁷⁵ The Tasmanian religious discrimination laws have the same effect.⁷⁶

The approach of *Ciciulla* means that the Tasmanian and Victorian religious discrimination laws make an individual's religion irrelevant to any question as to whether he or she should have access to significant areas of economic and social activity. However, this was not so under the previous Queensland laws. At least when applied to the religious discrimination laws, the effect of *QFG* was that religion and religious individuals were privileged in the protected areas of activity covered by the *Anti-Discrimination Act*. In fact, the previous religious discrimination laws could have allowed religion to be used as both a shield and a sword. They prohibited discrimination against a religionist because of that person's religion. They equally allowed the religionist to discriminate on the ground that a person did not have a religion, or did not have the discriminator's religion. The law might have a limited capacity to see it realised, but it did allow the opportunity for religion to be prominent in economic and social life. In adopting, in effect, the Tasmanian and Victorian approach to religious discrimination laws, the 2002 amendments now make it unlawful to discriminate on the ground that a person does not have a religion, does not have a particular religion, or refuses to engage in religious practices. The sword has now been taken from the believer's hand. It can therefore be said with some confidence that religion is now legally irrelevant in decisions about access to areas of activity protected under the *Anti-Discrimination Act*. Accordingly, the changes have enhanced the secularisation of economic and social life in the State and, if respected in practice, should further promote the privatisation of its religious life.

⁷³ Ibid 78,220 (Y Klempfner, Member).

⁷⁴ Ibid.

⁷⁵ *Equal Opportunity Act 1995* (Vic) s 4.

⁷⁶ *Anti-Discrimination Act 1998* (Tas) s 4.

V LEGISLATING MORAL SCHIZOPHRENIA

The collision of gay, lesbian and de facto rights with the rights of religious schools in the amendments to the Queensland *Anti-Discrimination Act* begs for an account of how to prioritise them. The State Opposition plainly characterised the religious schools' right to discriminate against gays, lesbians and people in de facto relationships as a question of religious freedom,⁷⁷ and several Government, One Nation and independent members agreed with this.⁷⁸ A typical liberal analysis of this collision would demand that the claims of gays, lesbians and people in de facto relationships to equal opportunity in employment be displaced by the religious groups' rights to give effect to their beliefs about moral behaviour. Whereas equal opportunity rights are claims made against other citizens for the enjoyment of economic and social goods, the rights of religious groups are political claims made against government for the exercise of moral autonomy and the recognition of value pluralism.⁷⁹ On this understanding, as a preferred political arrangement the religious schools should be entitled to a larger freedom to discriminate - if their beliefs direct that - on the ground of sexual orientation or inclination (although it should be recognised that the major churches do not regard sexual orientation *per se* as a moral question).⁸⁰ That is a freedom that religious schools have everywhere else in the nation, except Tasmania.

Sexuality and marital status discrimination laws in the other States, and exemptions for them, plainly differ in reach and breadth. Accordingly, despite an initial rationale for the 2002 amendments to the *Anti-Discrimination Act* being the harmonisation of Queensland's laws with those elsewhere in Australia,⁸¹ that rationale could not be maintained. Attorney-General Rod Welford abandoned it in Parliament.⁸² The only other secular public reason offered for the narrowing of the religious schools' exemption was that exemptions to anti-discrimination laws across Australia were disappearing as the principle of equal opportunity gained its own momentum.⁸³ Again, as the exemptions available in other States show, this is patently false. A surprising number of Christians in the Government presented theologically informed reasons for the application of sexuality and marital status discrimination laws to employment decisions in religious schools. They appealed to the principles of tolerance taught by Christ, the place of free will in the biblical tradition, the moral insignificance of sexual

⁷⁷ *Hansard*, above n 4, 5003, 5032-3, 5152, 5165 (Michael Horan, Opposition Leader); 5014, 5016, 5020-1, 5148 (Lawrence Springborg); 5042, 5044, 5163-4 (Fiona Simpson); 5053 (Vincent Lester); 5061 (Vaughan Johnson); 5081 (Raymond Hopper).

⁷⁸ *Ibid* 5055 (Bill Flynn, ONP); 5063 (Dolly Pratt, Ind); 5078-80 (Philip Reeves, ALP); 5084 (Elisa Roberts, Ind); 5103-5 (Julie Attwood, ALP); 5111-12 (Terry Sullivan, ALP); 5168 (Elizabeth Cunningham, Ind).

⁷⁹ For example, a Rawlsian analysis classifies religious freedom as a basic liberty, which under the first principle of justice has priority over claims to fair equality of opportunity: J Rawls, *A Theory of Justice* (Clarendon Press, 1972) 243-4; J Rawls, *Political Liberalism* (Columbia University Press, 1993) 6, 291.

⁸⁰ *Catechism of the Catholic Church* (1994) 505 [2358]-[2359]; Uniting Church in Australia, 'Current policy on homosexuality' <http://assembly.uca.org.au/assembly97/current_policy.htm>.

⁸¹ Explanatory Notes, above n 2, 1.

⁸² *Hansard*, above n 4, 5158-9.

⁸³ *Ibid* 5050 (Linda Lavarch).

conduct, the malleability of Christian morals, and the need for churches to modernise.⁸⁴ These may well be good and true principles, but if parliamentarians want their churches, or church schools, to exemplify them then they should take efforts to do so through the appropriate Synod, congregational meeting or school council. It is not proper for Christian parliamentarians, inactive or uninfluential in their own churches' forums, to exploit the privileged position they have in Parliament, and try to realise their religious beliefs by use of the coercive powers of government. Legislators exercising a public trust are not free to rely on their own religious convictions when crafting legislation for the State as a whole, especially when those convictions do not represent a strong mandate of the people they represent.⁸⁵ In Parliament, these reasons were as illegitimate as those given by Christians among the independents who wished that the law would maintain traditional Christian morals.⁸⁶ Christians on both sides of the Parliament risked turning gospel into law.

A deeper analysis of the position of religious schools shows that it may be a simplification to regard the collision as *merely* one between religious freedom and equal opportunity. Once account is taken of the fact that most religious schools in Australia are major recipients of government funding, the issue can be seen to involve questions of distributive justice. And, continuing a typical liberal analysis of the collision of rights, the redistribution of wealth by government through taxation and education funding is often regarded as being legitimately subject to conditions of fair equality of opportunity.⁸⁷ In these circumstances, it would have been open to the Queensland Parliament to have demanded equal opportunity in employment for gays, lesbians and people in de facto relationships in all schools – State and non-State – which receive government funding. It would only require that government be satisfied that – as with equal opportunity in the politically older questions of race, sex and religion – sexuality and marital status should be treated as irrelevant to a person's right of access to economic goods provided by government through wealth redistribution. Furthermore, where equal opportunity is attached to the voluntary receipt of government funding no question of religious freedom arises. The school that wished to retain the freedom to discriminate on the ground of sexuality or marital status could do so by refusing funding, and the school that accepted funding would, in a legal sense, freely choose to do so on conditions of equal opportunity.⁸⁸

⁸⁴ Ibid 5033-4 (Karen Struthers); 5081 (Philip Reeves); 5082 (Christine Smith); 5086 (Robert Poole); 5088, 5089-90 (Michael Choi); 5097, 5098-9 (Desley Scott); 5102, 5103 (Timothy Mulherin); 5110 (Neil Roberts); and compare with 5136 (Rod Welford AG).

⁸⁵ This accepts the view that, for decision-making in public institutions, only secular public reasons that are accessible to all citizens generally are legitimately available: R Audi, 'The Separation of Church and State and the Obligation of Citizenship' (1989) 18 *Philosophy and Public Affairs* 259; R Audi, 'Religious Commitment and Secular Reason: A Reply to Professor Weithmann' (1991) 20 *Philosophy and Public Affairs* 66; Rawls, *Political Liberalism*, above n 79, 220-7. Even Greenawalt, who allows more latitude in the use of religious reasons in the public square, suggests that 'the legislator should eschew reliance on religious premises insofar as he can': K Greenawalt, *Religious Convictions and Political Choice* (Oxford University Press, 1988) 237. Fiona Simpson MLA effectively endorsed the requirements of public reason when she expressed concern about parliamentarians' efforts to legislate their theological 'constructs' in the amendments to the Queensland *Anti-Discrimination Act: Hansard*, above n 4, 5163-4.

⁸⁶ Ibid 5076, 5078 (Elizabeth Cunningham); 5083 (Elisa Roberts).

⁸⁷ Rawls, *A Theory of Justice*, above n 79, 79; Rawls, *Political Liberalism*, above n 79, 291.

⁸⁸ I interpret the position of church agencies in the Federal Government's Jobs Network scheme the same way. No question of religious freedom is involved if equal opportunity conditions are

The terms of the 2002 compromise nevertheless reach beyond the State Government's obligation to distribute public money under conditions of equal opportunity, as the sexuality and marital status discrimination laws apply to religious schools whether or not they receive government funding.⁸⁹ The legitimacy of the compromise is itself compromised until it is legally tagged to the school's receipt of state aid.⁹⁰ If there are religious schools that are entirely dependent on private sources of income, the 'don't ask, don't tell' law amounts to a demand of religious groups' accountability⁹¹ to government in a way that belies liberty of conscience, and cannot be excused politically.

The liberal account presented naturally draws a sharp distinction between public and private life, and the moral standards possible for them. After *QFG v JM*⁹² unearthed weaknesses in the *Anti-Discrimination Act*, the reform of sexuality and religious discrimination laws for economic and social life in Queensland was overdue, and is welcome. However, the value pluralism embodied in a stronger expression of the anti-discrimination principle in sexuality, intimate relationships and religion itself demands limits to that principle: an area of preferred autonomy where religious groups can experiment with, and live out, different values.⁹³ The critics of the private-public distinction, with some justification, argue that spacious areas of private life where discrimination is allowed make it more difficult to realise the objectives of anti-discrimination principles in public life.⁹⁴ Liberals admittedly demand that this moral segmentation of people's lives is to be accepted,⁹⁵ along with the weakness that this segmentation brings to government-sponsored moral standards in public life. Still, the new 'don't ask, don't tell' law in Queensland is worse, and encourages a moral schizophrenia in individuals. As a cost of employment in the religious school gays, lesbians and people in de facto relationships are legally encouraged to suppress knowledge within the school of their private lives. Furthermore, the religionists in the school are legally required to endorse that, so long as it falls short of open defiance of the beliefs they espouse. Religious groups and schools had already expressed dissatisfaction with the compromise by the time it was debated in Parliament,⁹⁶ and it is hard to see that gays, lesbians and people in de facto relationships will remain happy with an arrangement that preserves their most intimate relationships as a love that dares not speak its name.

attached to funding through the Jobs Network, as the agencies have the choice not to be involved: compare with Human Rights and Equal Opportunity Commission, *The Human Rights and Equal Opportunity Commission Act 1986 (Cth): Its Application to Religious Freedom and the Rights to Non-Discrimination in Employment*, Issues Paper (4 August 2000) <[http://www.hreoc.gov.au/human rights/religion/index.html#title](http://www.hreoc.gov.au/human%20rights/religion/index.html#title)>.

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Compare with *Anti-Discrimination Act 1991 (Qld)* ss 25(2)-(3).

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Compare with Sex Discrimination Commissioner, *Report on Review of Permanent Exemptions of the Sex Discrimination Act 1984* (1992) 73, where government funding for religious schools was given as a reason for suggesting the repeal of *Sex Discrimination Act 1984 (Cth)* s 38, by which federal law allows marital status discrimination by religious schools in employment questions.

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The term used by Rod Welford AG: *Hansard*, above n 4, 5148, 5165, 5166.

92

(1997) EOC 92-902, 77,422.

93

Mortensen, above n 28, 231-2.

94

K Magarey, 'Discrimination and the Church' (1991) 62 *Reform* 101.

95

Rawls, *A Theory of Justice*, above n 79, 554; compare with A MacIntyre, *Whose Justice, Which Rationality?* (University of Notre Dame Press, 1988) 337.

96

Hansard, above n 4, 5028 (Peter Wellington); 5053 (Vincent Lester); 5062-3 (Dolly Pratt); 5079-80 (Philip Reeves); 5089 (Michael Choi); 5151 (Michael Horan, Opposition Leader); 5152 (Fiona Simpson); 5152 (Elizabeth Cunningham).