

**University of Notre Dame, Sydney**  
**Ninth Annual Religious Liberty Lecture and Conference**  
**February 23 & 24, 2023**

**The Importance of Conscience**  
Feb 24, Session Three: 1:30pm-3pm

**“Whose conscience deserves protection in Australia?”**

Associate Professor Neil Foster<sup>1</sup>

The answer to the question posed by the topic of our session seems, of course, obvious. I should be able to say “everyone” and sit down! But as it turns out there are important nuances to the answer to this question, and differing answers offered by our country, many of which hinge on those two key words “conscience”, and “protection”. In short, there are significant questions as to what it means for someone to act in accordance with their moral perceptions, and the limits of such action where it is said to interfere with the moral perceptions of others, or the rights of others. We also need to work out what it means to give “protection” to conscience in these circumstances.

So, for example, what does it mean for a politician in public office to claim a right to behave in accordance with their conscience? We have seen a fascinating example of this play out in NSW recently, with allegations that the Premier was unduly influenced by his Roman Catholic beliefs on questions around regulation of poker machines. Or to take another area which is the subject of consideration by the US Supreme Court at the moment: will our community support the right of a small business owner who offers services for sale to the public, to define the scope of those services (or, perhaps, the class of members of the public who will be served) in accordance with their religious beliefs? Or should someone who has been appointed CEO of a large sporting organisation be summarily dismissed on account of the religiously based views of their church? This brief paper will address these examples as a way of opening up some of the complexities of what may seem to be an obvious question.

## Conscience

What are we referring to when we speak about “conscience”? In an article dealing with these issues (which as it turns out is based on a lecture the author gave as part of the religious liberty program at UND Sydney), Ahdar notes that the word “conscience” has undergone a shift in meaning.<sup>2</sup> In particular, while its historical usage concerned behaviour that was perceived to be morally good and in accordance with external moral standards, the modern usage has seen the term “subjectivised”.

In modern usage, the notion of conscience is a truncated or distorted one. It retains the idea of an inner voice. But the inner voice is not an infallible, unerring one, and the speaker is not articulating the principles of morality, the universal basic moral law, the natural law—or, more simply—the speaker is not God. Rather, the inner judge is really the autonomous self’s best grasp of the good and right, an individual’s ‘culturally influenced, personally generated, subjectively held moral opinions’.<sup>3</sup>

---

<sup>1</sup> Associate Professor of Law, Newcastle School of Law and Justice, University of Newcastle, NSW; [neil.foster@newcastle.edu.au](mailto:neil.foster@newcastle.edu.au). Views expressed here are of course my own and not those of my institution.

<sup>2</sup> Rex Ahdar, “Is Freedom of Conscience Superior to Freedom of Religion?”, (2018) 7/1 *Oxford Journal of Law and Religion* 124–142.

<sup>3</sup> *Ibid*, at 131.

Another important point Ahdar makes is that “conscience”, contrary to some popular usage, does not simply concern one’s internal moral perceptions. Rather, when we speak of people’s consciences, we are referring to external *actions* they take which are motivated by those internal perceptions. In that sense, then, when we speak of someone’s conscience being “protected”, the sense is that we will allow them to act, or perhaps not to act, in accordance with those moral protections.

## Protection

This is the second key concept- the idea of “protection”. The notion of protection is generally around not imposing obligations on someone acting in accordance with their moral judgment on some matter. For many years, even in times of war, Western societies have accepted the idea of “conscientious objection” to refer to those who have such a strong moral objection to war and killing that they do not want to be forced to join the armed forces. Until recently it was also generally accepted that medical professionals who had a conscientious objection to participating in the termination of pregnancies (abortion) would be accommodated by not being required to do so.

Sometimes those objections would be based on religious grounds; sometimes not. It was usually recognised that moral objections in these areas would be accommodated because the action being required in each of these situations was the act of taking away a human life, and this has always been seen as raising serious moral qualms.

In recent years we have seen other examples of conscientious objection. The complexities of the debates have partly been generated by disagreement about some important questions. What type of moral objection will be accepted? If the actor concerned is not being required to terminate a human life, at what point do we demand that they put aside their concerns and carry out some obligation which has been imposed on them? Do we need to take into account whether the actor is “respected” and a “role model” in the community, and does this give them more, or less, freedom to act in accordance with conscience? Does it matter whether the obligation has arisen under some general community norm (mostly, under legislation), or has instead been assumed by private contract? If the obligation they are under causes some form of harm to other members of the community, what sorts of harm are required to overcome a conscientious objection? What form of harm is occasioned **to** someone who is required to act contrary to conscience? Is it possible to weigh up these different forms of harm (to the actor, and to other members of the community), in order to come up a decision as to whether the actor will be required to act contrary to conscience?

## What sort of moral objections will be recognised?

Putting aside for the moment life-terminating actions, what sort of moral objections should we as a community recognise as requiring accommodation? (By “accommodation”, I mean that we are prepared to allow someone not to be obliged to act, when the general rules would require some form of action.)

Not all such objections come from the “right” of the political spectrum. For example, we have seen situations where doctors who were sent to care for patients in asylum detention, who were notionally under contractual obligations not to speak about the conditions they observed, broke those obligations in the interest of speaking out and improving the conditions of those detained. The classic “whistle blower” example is someone who has worked for big business and later breaches what are arguably obligations of confidentiality to report harmful or immoral practices (such as those who spoke up about the impacts of tobacco, for example.)

But there are many examples from the more conservative end of politics in recent years. A fertile ground for conscientious objections has been the “Pride” movement, the aim of which

is broadly expressed to be the welfare of LGBTQI people, but which has been seen as having a broader ideological aim of opposing any expression of the moral view that homosexual activity is sinful, or that sexual identity is binary (either male or female) and immutable after birth.

Here the claim of conscientious objection may be made on the basis that the actor does not want to be required to express support for activity that they see as contrary to God's will; or there may be a non-religious objection on scientific grounds to an attempt to redefine sexual identity in a way that does not reflect the truth of biology. In each case the actor is not *only* concerned that they are being required to affirm something that is not true (though that can be seen as a genuine harm); but also, that those in the community engaged in the activity they see as wrong, will actually suffer harm from doing so. For the religious person, the harm may be long-term (even if it is restricted to eternal harm suffered a day of judgment in the future), or it may simply be that ignoring God's purposes for humanity will lead in different ways to detriments in this life. The secular objections to "gender ideology" may include the increasing evidence that allowing young persons to "socially transition" accompanied by medical treatment such as hormones and puberty blockers, can be seen to have well-documented physical harms.

We have seen some examples of moral objections to "Pride" among sportsmen and sportswomen who are part of a team where a decision has been made to celebrate homosexuality and "gender identity" issues. The high-profile case of footballer Israel Folau provided an example of this a few years ago,<sup>4</sup> but the phenomenon has arisen again more recently. Mr Folau posted comments on social media noting that homosexual activity was condemned by the Bible, which then led to his dismissal from the Australian Rugby team and a court case which was ultimately settled. Since then we have seen a Muslim woman AFL player, Haneen Zreika, cause controversy by declining to play for her team in a "Pride" round of the game.<sup>5</sup> The phenomenon of the "Pride" round in sports then led to a number of male Rugby League players declining to play in a significant game in their sport, a decision which was said to have contributed to their team not making the finals.<sup>6</sup> In the United States, Ivan Provorov, a player for major hockey team Philadelphia Flyers, generated controversy for declining on the basis of his religious beliefs to take part in an event celebrating "Pride" earlier this year.<sup>7</sup>

Apart from Mr Folau's case, none of these events have generated litigation. But the public outrage from many quarters suggests that there is an intolerance for the rights of those who are elite sports players to have a say in what causes they are seen to support. The assumption is that refusing to take part in a "Pride" celebration causes some form of harm to members of the LBGTO community. Perhaps we can agree that some emotional harm is caused when your "identity" choices are not whole-heartedly supported by others. But there seems to be a real absence of consideration of the harm caused to religious believers who are forced to take part in events celebrating activities that they believe (along with many of their co-religionists) are contrary to God's will.

---

<sup>4</sup> For comment on this case see my blog post of June 2, 2019 <https://lawandreligionaustralia.blog/2019/06/02/further-reflections-on-the-israel-folau-affair/>, which has links to earlier coverage.

<sup>5</sup> "Muslim AFLW player refuses to wear pride jumper, sits out game" (Jan 28, 2022) <https://www.news.com.au/sport/afl/muslim-aflw-player-refuses-to-wear-pride-jumper-sits-out-game/news-story/84be8e6d534fd9a4143b6f9488b6b661>.

<sup>6</sup> The July 2022 incident even has its own Wikipedia entry: "Manly pride jersey player boycott" [https://en.wikipedia.org/wiki/Manly\\_pride\\_jersey\\_player\\_boycott](https://en.wikipedia.org/wiki/Manly_pride_jersey_player_boycott).

<sup>7</sup> "Philadelphia Flyers' Ivan Provorov cites religion for boycott of team's Pride night" (18 Jan 2023) <https://www.theguardian.com/sport/2023/jan/18/ivan-provorov-pride-night-boycott-philadelphia-flyers>.

Sometimes the response is made that “Pride” events are signals of support for LGBTQ persons, as opposed to their sexual activities. But this argument does not seem plausible. Making a distinction between a person’s sexual orientation on the one hand, and their active engagement in homosexual sexual activity, has been consistently rejected by the courts.<sup>8</sup> The general aim of “Pride” events seems clearly to be to celebrate and normalise, not simply “identity”, but identity as expressed in homosexual sexual activity. Where a religious tradition has a clear and long-standing view that such activity is contrary to God’s purposes for humanity, requiring believers to support and celebrate such activity is a clear infringement of their religious freedom.

We see a similar phenomenon when we come to examples of demands for support for LGBTQ activity from small business owners whose businesses involve production of wedding cakes or items. These cases from the US and the UK are fairly well known, but it may be helpful to refer to a situation that has recently been reported in Australia.

In general terms the “wedding cake” cases in the US have found against the business owners, but these issues have still not been ruled on by the US Supreme Court. The Court did not resolve the issue in its decision in *Masterpiece Cakeshop, Ltd v Colorado Civil Rights Commission*, 584 U. S. \_\_\_\_ (2018) (see my comments on that case [here](#)), but interestingly it has now heard argument on a more recent case which will probably address the issues. In *303 Creative LLC v Elenis* (argued on Dec 5, 2022) a Christian who provides web-design services for weddings, Lorie Smith, is seeking a ruling that she would not be required to provide this service for same-sex weddings.

The argument that is made by the business owners is that they do not discriminate against homosexual persons, but they do object to being required to produce and disseminate a message of support for homosexuality which they believe is contrary to their faith.

This argument assumes that one can distinguish between declining to provide a service of printing because of the sexual orientation of the *customer* and declining to provide this service on the basis of the *message* designed to be conveyed by the customer. And as it turns out, an important decision of the UK Supreme Court holds that this is a perfectly valid distinction.

In *Lee v Ashers Baking Company Ltd* [2018] UKSC 49 the court ruled that a Northern Ireland baking firm, Ashers, run by a Christian couple, who had declined to provide a custom cake featuring Ernie and Bert from Sesame Street, arguing for the introduction of same sex marriage, were not guilty of sexual orientation discrimination. Lady Hale, giving the judgment for the court, commented:

[22] The District Judge did *not* find that the bakery refused to fulfil the order because of Mr Lee’s actual or perceived sexual orientation. She found that they “cancelled this order because they oppose same sex marriage for the reason that they regard it as sinful and contrary to their genuinely held religious beliefs” (para 43). As the Court of Appeal pointed out, she did not take issue with the submission that the bakery would have supplied Mr Lee with a cake without the message “support gay marriage” and that they would also have refused to supply a cake with the message requested to a hetero-sexual customer (para 11). The objection was to the message, not the messenger.<sup>9</sup>

The situation that has arisen in Australia involves, not a cake maker, but a printer. Press reports record that a local franchisee of company “Kwik Kopy” declined a request to print posters for an event associated with the “World Pride” events happening in Sydney at the moment- see [this report](#) from Nine News. The World Pride events are in effect an extension of the Sydney “Gay and Lesbian Mardi Gras” parade which has been running for many years,

---

<sup>8</sup> See *Christian Legal Society v Martinez* 561 US 661 (2010) at 689; *Bull & Bull v Hall & Preddy* [2013] UKSC 73 (27 November 2013) at [52]; *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014) at [57]

<sup>9</sup> A fuller account of this case can be read in [this previous blog post](#).

although extended over 17 days. Their [website](#) refers to it as “a glittering celebration for the global LGBTQIA+ community”.

Mr Wing Khong, a Christian man who runs the Sydney CBD franchise of Kwik Kopy, declined to accept an order from Skater Leo Bunch, who emailed to ask for a quote to print “roller derby” flyers with a World Pride theme. Mr Khong commented:

“There was no offence meant. Everyone is entitled to their own position. I don’t believe it was discrimination, rather I was just obeying the Word of God.”

The news report linked above contains video comments from the reporter and also Anna Brown, from Equality Australia, that Mr Khong’s action was “clearly unlawful”. With respect, I beg to differ, and would like to explain why.

It is true that the *Sex Discrimination Act 1984* (Cth) does make it unlawful to deny provision of goods or services on the basis of a potential customer’s sexual orientation:

#### SEX DISCRIMINATION ACT 1984 – SECT 22

##### **Goods, services and facilities**

It is unlawful for a person who, whether for payment or not, provides goods or [services](#)... to discriminate against another person on the ground of the other person’s ... [sexual orientation](#):

- (a) by refusing to provide the other person with those goods or [services](#)...

The SDA in s 5A(1) says that “discrimination” occurs when the alleged discriminator “treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different [sexual orientation](#).”

Here the question arises, then: would the printer have treated another customer differently in “circumstances that are the same”? I have no personal knowledge of the parties involved in this case, but let’s assume that the printer, if approached by someone who was heterosexual who also wanted a Pride poster, would *also* have declined to provide one, on the basis that the poster expresses support for sexual activity that is contrary to the Bible. On that basis, then there is at least a plausible argument that the printer’s action has not been unlawful. At least this could be argued if the distinction between decisions based on orientation, as opposed to a message being conveyed, as in the *Ashers* case, was accepted.

There is even a decision from Canada which deals with events somewhat similar to this incident: [Ontario \(Human Rights Commission\) v Brockie](#) (2003) 222 DLR (4th) 174, a decision of a 3-member bench of the Ontario Superior Court of Justice (Divisional Court). The court upheld a decision of a lower Board that Mr Brockie was guilty of sexual orientation discrimination by declining (on religious grounds) to provide letterhead and business cards to a gay and lesbian support group. But the judges, considering rights of religious freedom protected under Canadian law, held that the order requiring him to provide printing services should be carefully drawn up so as not to require him to print publicity for events that would contradict his beliefs. They said:

[56] The objectives under the anti-discrimination provisions of the Code must be balanced against Mr. Brockie’s right to freedom of religion and conscience. A few hypothetical situations may serve to illustrate the tensions between competing rights. If any particular printing project ordered by Mr. Brockie ( or any gay or lesbian person, or organization/entity comprising gay or lesbian persons) contained material that **conveyed a message proselytizing and promoting the gay and lesbian lifestyle** or ridiculed his religious beliefs, such material might reasonably be held to be in direct conflict with the core elements of Mr. Brockie’s religious beliefs. On the other hand, if the particular printing object contained a directory of goods and services that might be of interest to the gay and lesbian community, that material might reasonably be held not to be in direct conflict with the core elements of Mr. Brockie’s religious beliefs.

These examples are but illustrations of the balancing process that is indicated in this case. There can be no appropriate balance if the protection of one right means the total disregard of another. (emphasis added)

In this context, it would not be unreasonable to see the whole purpose of “World Pride” as “promoting the gay and lesbian lifestyle”.

It seems clear that the rights of religious freedom enjoyed by a small business owner, are no less than those that ought to be enjoyed by sport celebrities. In each case the law should not endorse ignoring religious freedom, especially when the claim of “harm” relates to the indirect harm of knowing that some people in the community do not support your sexual choices.

## Does the community status of the objector matter?

Do things change when we are dealing with senior politicians and leaders? In the course of a heated debate about introducing some safeguards for those using poker machines, a representative of the clubs’ lobby resisting these changes accused the Premier of NSW of acting in accordance with his “Catholic gut”.<sup>10</sup> The comments were condemned from all sides of politics as a personal attack on the Premier’s Catholic faith.

Yet it is interesting that, when interviewed by ABC News not long after, the Premier conceded that his faith played a role in his actions.

Over the past few days, the premier has been reflecting on how his Catholic faith influences his policy decisions during a bruising debate on gambling reforms.

He now says he was wrong to say that it does not have an impact on how he forms his views.

"The more I thought about it, I was wrong, what I said," he said.

"Certainly my upbringing and my faith has had an impact."...

Now that the dust has settled, he says the drive that comes from his faith is "a good thing, not a bad thing".

"It has developed in me a sense of social justice, looking after vulnerable people," he said.

"I don't think that is something I should be ashamed of."<sup>11</sup>

Obviously there are many issues around when it is appropriate for a political leader to act on their religious views, but the Premier’s point seems valid: when we elect someone who is known to hold a faith commitment, we expect them to act in accordance with the general principles taught by their faith. In other words, even politicians are allowed to have a conscience!<sup>12</sup>

## Does the source of the obligation to act matter?

Does it matter that someone has an obligation to act arising from a contract? In the issues surrounding Israel Folau it was sometimes suggested that he should have not posted on religious beliefs because of his contractual obligations. But the fact is that in our society we do not automatically allow contracts to over-ride human rights!

There is a broad general principle that a contract which is contrary to public policy may be void. So, for example, in the High Court in *Westfield Management Limited v AMP Capital Property Nominees Limited* [2012] HCA 54 per French CJ, Crennan, Kiefel and Bell JJ:

<sup>10</sup> See eg “‘Catholic gut’ attack cheap, offensive and a serious strategic miscalculation” (Jan 31, 2023) <https://www.smh.com.au/politics/nsw/catholic-gut-attack-cheap-offensive-and-a-serious-strategic-miscalculation-20230131-p5c9qf.html> .

<sup>11</sup> “‘I was wrong’: NSW Premier Dominic Perrottet says Catholic faith did play a role in gambling reform” (7 Feb 2023) <https://www.abc.net.au/news/2023-02-07/nsw-pokie-reform-shaped-by-catholicism-dominic-perrottet-says/101936600> .

<sup>12</sup> For similar issues being discussed in Scotland at the moment, see “Kate Forbes’ religious beliefs could stall her bid to succeed Sturgeon” *The Guardian* (17 Feb 2023) <https://www.theguardian.com/politics/2023/feb/16/kate-forbes-sturgeon-successor-religious-beliefs> .

[46] It is the policy of the law that contractual arrangements will not be enforced where they operate to defeat or circumvent a statutory purpose or policy according to which statutory rights are conferred in the public interest, rather than for the benefit of an individual alone. The courts will treat such arrangements as ineffective or void, even in the absence of a breach of a norm of conduct or other requirement expressed or necessarily implicit in the statutory text.

Later their Honours added:

[50] ... Some statutes may, by their nature and purpose, more readily suggest inconsistency with an individual's liberty to forego statutory rights. Some statutes which have a regulatory and protective purpose may fall into this category.

And earlier, Gleeson CJ and Handley JA in *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26 had said that:

It is clear that persons affected by discriminatory practices prohibited by the Act are not free to bargain away in advance their rights to seek relief under the Act. The Act forbids those practices and seeks to eradicate them from the life of the State. The evident policy of the statute is that such practices should cease. Contracting out of the statute in advance would be directly contrary to this policy. (at 31)

So simply intoning “the contract, the contract” does not resolve the issue. In the example of the printer asked to print a Pride poster, even if the franchisor had a “code of conduct” that could be interpreted to require the printing, there would be a question as to whether this code would over-ride a right to freedom of religion. (Of course, in NSW at the moment there is no general right not to be treated detrimentally on the grounds of one’s religion, but certainly this would be a live issue in other places where such a right existed.)

## What sort of harm to others will justify over-riding conscience?

In the end, the key issue behind many of these debates will be to define what kind of harm will justify interfering with religious freedom, or free speech? We can all concede that causing physical violence to someone should not be protected. But at the other end of a somewhat fuzzy spectrum, do we have a right not to be upset that other people disapprove of our sexual behaviour? Is it different if we have decided to make our sexual orientation a defining feature of our identity?

## Conclusion

In many ways the topic we are considering, “whose conscience should be protected?”, is a question that takes us down the wrong path. As we have seen, we need to dig into issue around “protected in what way?”, and in particular “what sort of actions should be protected?” Imposing violence on others should be rejected, no matter how strong a conscientious or religious view lies behind it. But when it comes to living in a truly diverse, multi-cultural and pluralistic society, allowing differences of opinion, even on matters that we feel deeply about, seems to be the right way to go.