Legislating Morality; The Case of Anti-Discrimination Laws

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Introduction

A 1997 decision of the Queensland Anti-Discrimination Tribunal awarding damages to a lesbian who had been refused fertility treatment at a Brisbane clinic was reported widely in the media. A few weeks later, a decision in which two Victorian hospitals were ordered to pay compensation to women who had been refused IVF treatment because they were not married received similar attention.

In Queensland, the Minister for Health, Mike Horan, promised to amend the *Anti-Discrimination Act* so as to enable a clinic to reject lesbian applicants on ethical grounds.[1] Mr Horan's remarks, on their face, suggest that the amending legislation will give a fertility clinic proprietor who has ethical or moral objections to the treatment of lesbians the opportunity to refuse to treat these persons without the fear of becoming involved in proceedings before the Anti-Discrimination Tribunal. Yet Mr Horan has also been quoted as saying that he and the other members of the National Party believed that "a child should have the opportunity to have both a mother and a father".[2] Should this statement be taken to suggest that legislation to forbid fertility clinics from treating lesbians is also on the agenda? Actual legislation of this nature has been enacted in Victoria but was ineffectual in preventing a finding of discrimination against two Victorian hospitals.[3]

Statements by Mr Horan and other public figures to the effect that IVF resources should not be accessible to lesbian couples serve only to obscure an issue of greater concern to those interested in the preservation of a free society. That issue is whether lesbian couples or any other persons ought to be able to demand that a particular provider of fertility treatment provide them with that treatment, notwithstanding that the provider has objections to the provision of the treatment on moral or ethical grounds.

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1. "MP to cut off clinics from lesbians", *The Australian*, 14 February 1997.
2. Id.
3. See "Unwed women win IVF compo", *The Australian*, 12 March 1997.

The Queensland Case

The matter before the Queensland Anti-Discrimination Tribunal involved a lesbian who had been refused artificial insemination at a Brisbane fertility clinic. The privately-owned clinic claimed that it had refused treatment on the basis that "there was no medical cause for the woman's infertility and that it would have been unethical to treat someone who did not have a medical condition".[4] Section 46 of the *Anti-Discrimination Act* 1991 (Qld) provides that a person who supplies goods or services must not discriminate against another person by, among other things, failing to supply the goods or services. Section 7 of the Act prohibits discrimination on the basis of lawful sexual activity. The Tribunal found that the clinic was guilty of "indirect discrimination" within the meaning of s 11 of the Act. This discrimination consisted of the imposition of a requirement that patients complete a form which contained a space for the name of the patient's husband and that the form be signed by the patient's husband. Clearly, the complainant in the case before the Tribunal was unable to comply with this requirement. The Tribunal awarded the applicant damages in respect of the "humiliation and offence"[5] she suffered as a result of being refused treatment. The bottom line is that, if the Tribunal's decision is correct, the *Anti-Discrimination Act* 1991 (Qld) prohibits the refusal of fertility treatment to lesbians even if the provider of the treatment has moral or ethical objections to providing fertility treatment to a lesbian.

This decision has been set aside by the Supreme Court.[6] The essence of the opinion of Ambrose J is that the real reason for the refusal of treatment in this case was not any antipathy towards lesbians on the part of the clinic proprietor, but the fact that the complainant did not have a medical condition which required treatment. The Tribunal's decision had been that the complainant had been discriminated against on the basis of her lawful sexual activity. Ambrose J observed:

> On the evidence however it seems clear that had the respondent also engaged in lawful heterosexual activities at the time she was engaging in lawful homosexual activities the second appellant would have had no policy or

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4. M Saunders, "Lesbian secures equal rights to donor sperm", *The Weekend Australian*, 1-2 February 1997, p 3.
5. Id.
6. *QFG and GK v JM* (Ambrose J, Supreme Court of Qld, 24 October 1997).

> practice which would have resulted in his refusal to give her the medical artificial insemination service which she sought.[7]

In other words, since the clinic's policy excluded both homosexual and heterosexual women who had not attempted to conceive in the usual way, there could be no finding of direct discrimination.[8] On the matter of whether the requirement that a form be signed by the patient's husband amounted to indirect discrimination, Ambrose J observed that the Tribunal had not addressed properly the question as to whether the clinic's practice with respect to women not engaged in a heterosexual relationship was a reasonable one for it to adopt in the circumstances.[9] The matter was remitted to the Tribunal for further consideration of this matter.

While the clinic may avoid liability in this particular case, the case provides a good illustration of the potential that a provision like s 46 has to restrict the freedom of service providers to rely upon their own moral and ethical judgments in deciding whether to provide a particular service to a particular person. Pearn,[10] having noted that the small amount of literature on the matter does not point to any unequivocal evidence that homosexual couples are either better or worse parents than heterosexual couples or that a person's sexual orientation is explained by the sexual orientation of his or her parents or custodians, expresses concern about the prospect of doctors being bound by legislation to provide services which they might feel bound to refuse to provide on moral or ethical grounds.[11] Pearn argues that doctors should not be forced to provide services which they find "morally repugnant":[12]

> This is because in the complex ethics of many medical decisions the doctor is another participant with individual rights to be respected. These rights are not to be disregarded just because the patient has rights. Nor are individual doctors simply mechanistic agents of State policy, forced to act proactively

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7. Ibid at 13.
8. Ibid at 19.
9. Ibid at 25-26.
10. J Pearn "Gatekeeping and assisted reproductive technology. The ethical rights and responsibilities of doctors" (1997) 167 *Medical Journal of Australia* 318.
11. Ibid at 319.
12. Ibid at 320.

> in the provision of elective services against their professional judgement or their moral beliefs.[13]

While Pearn confines his remarks to the effect of the Tribunal's decision on the medical profession, the author believes that his critique remains valid when placed in a broader context. The fact that the matter ever came before the Tribunal and the Tribunal saw fit to make the decision that it did, point to the existence of a body of opinion which regards individual service providers not as free agents, who may draw upon their moral, ethical and religious beliefs in making decisions about whom they will contract with and what they will contract to do, but as slaves who, having chosen a particular trade or profession, are not free to decide how to practise it.

Moral and Ethical Freedom

Let us suppose that the Federal Parliament passes legislation which provides that all persons aged between 18 and 21 years, without exception, would be obliged to attend several weeks of military training each year. Persons who do not comply would face substantial fines and imprisonment. Let us place ourselves in the position of a devout member of the Society of Friends, ie a Quaker. The Quaker interpretation of the Christian faith emphasizes non-violence. It is unlikely that a Quaker would be prepared to engage voluntarily in an activity which involves the acquisition of skills for use in warfare. Since the Quaker who refuses to comply with the legislation will be liable to a significant penalty, it cannot be said that Quakers are free to follow the dictates of their faith. Indeed, this may provide some basis for the law to be challenged under s 116 of the Constitution (Cth).

Just as the fictitious law concerning compulsory military training would force Quakers to submit to a penalty in exchange for the privilege of making that choice which they consider to be correct in a moral sense, the *Anti-Discrimination Act* 1991 (Qld) was used in the fertility clinic case to penalise people for making a choice which they perceived to be correct according to the ethical requirements of their profession. The effect of the Act is to impose a form of conscription upon the fertility clinic management and staff. While the actual Commonwealth legislation relating to military service provides for the making of determinations that a person

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13. Id.

is a conscientious objector,[14] and is, therefore, exempt from any compulsory military service, the Queensland Anti-Discrimination legislation does not provide any analogous escape route.[15] The fertility clinic case highlights the extent to which it is possible for legislators to restrict individual autonomy on matters of morality and ethics. The imposition of restrictions of this type is, in itself, a form of discrimination. The legislature has decided that some ethical points of view are more worthy of protection than others. While s 116 of the Constitution (Cth) provides some scope for challenging Federal legislation which places burdens on the free exercise of religion, the State legislatures are not restricted in this way. In any event, not all beliefs of a moral or ethical nature which people rely upon as a guide to their conduct are encompassed by the notion of religion as that notion has been interpreted by the courts.[16]

A defender of s 46 of the *Anti-Discrimination Act* (Qld) might argue, first, that the law does not restrict a person's freedom to the same extent as a law imposing an obligation to participate in military training or military service and, secondly, that the law affects a person's freedom of *action* rather than his or her freedom of *belief.*

If one wishes to draw a distinction between the two situations on the basis of the extent of the invasion of freedom, one may well point to the fact that performing an IVF procedure, unlike engaging in military training or military service, is not likely to involve risk of injury to life or limb. Nevertheless, conscientious pacifists do not object to compulsory military service because it is dangerous but because they believe that the use of military force is immoral. They are objecting to a legislative injunction on the same ground as doctors who do not wish to provide fertility treatment to lesbians are – namely, that the legislature is not entitled to interfere with their ability to choose their actions on the basis of their own moral and ethical preferences.

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14. *Defence Act* 1903 (Cth) ss 61CA – 61CZE .

15. The only exemption from liability for discrimination in the supply of goods and services relates to refusal to admit persons to particular sites or buildings on religious or cultural grounds: *Anti-Discrimination Act* 1991 (Qld) s 48.

16. The meaning of the term "religion" was discussed by the High Court in *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120, particularly 172-174 per Wilson and Deane JJ.

The second argument is also flawed. A person who espouses strong views of a moral, ethical or religious nature would find little solace in the protection of his or her freedom to subscribe to particular beliefs if those beliefs cannot be used as a basis for determining how he or she ought to act.

In the *Declaration on Religious Freedom* promulgated in 1965, Pope Paul VI said:

> It is in accordance with their dignity as persons – that is, beings endowed with reason and free will and therefore privileged to bear personal responsibility – that all men should be at once impelled by nature and also bound by a moral obligation to seek the truth, especially religious truth. They are also bound to adhere to the truth, once it is known, and to order their whole lives in accord with the demands of truth. However, men cannot discharge these obligations in a manner in keeping with their own nature unless they enjoy immunity from external coercion as well as psychological freedom.[17]

Pope John Paul II sought to reinforce this position in the following terms:

> ... religious freedom is expressed not only by internal and exclusively individual acts, since human beings think, act and communicate in relationship with others. "Professing" and "practicing"(sic) a religious faith is expressed through a series of visible acts, whether individual or collective, private or public, producing communion with persons of the same faith, and establishing a bond through which the believer belongs to an organic religious community. That bond may have different degrees or intensities according to the nature and the precepts of the faith or conviction one holds.[18]

The proposition that religion involves both belief and action has not escaped the attention of the High Court of Australia. In *The Church of the New Faith v The Commissioner for Payroll Tax,*[19] Mason ACJ and Brennan J said:

> What man feels constrained to do or to abstain from doing because of his faith in the supernatural is prima facie within the area of legal immunity, for

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17. Pope Paul VI, *Dignitatis Humanae*, 7 December 1965, Internet, <http://www.christusrex.org/wwwl/CDHN/ v10.html>.

18. Pope John Paul II, *The Freedom of Conscience and Religion*, 1 September 1980, Internet, <http://litserv.american.edu/catholic/church/papal/jp.ii/jp2freed.txt>.

19. (1983) 57 ALJR 785.

> his freedom to believe would be impaired by restriction upon conduct in which he engages in giving effect to that belief. The canons of conduct which he accepts as valid for himself in order to give effect to his belief in the supernatural are no less a part of his religion than the belief itself.[20]

While their Honours acknowledge that not all conduct inspired by a religious injunction is immune from legislative interference, they appear to deny the proposition that the protection of religious freedom consists merely of the protection of beliefs.

According to Paul VI, John Paul II, Mason ACJ and Brennan J, religious freedom and, by analogy, moral and ethical freedom, is more than a matter of being free to give intellectual assent to certain ideas. For them, the search for truth through faith is futile unless that truth can be the impetus for concrete action. Yet the impetus for concrete action applies to the conduct of the individual rather than the organization of society as a whole. Far from providing an imprimatur for the restructuring of human society according to the dictates of Christian morality, the views expressed by Paul VI and John Paul II are wholly consistent with the notion of a free society. They are not making a claim that Christian people be assured of *outcomes* which accord with their moral and ethical preferences. Their claim is that people should have some assurance that the government will not interfere unduly with their ability to choose between alternative courses of *action* on the basis of their own moral and ethical preferences.

While the remarks of Mason ACJ and Brennan J appear to be a rejection of the notion that it is possible to make a distinction between freedom of belief and freedom of action so as to allow government restriction of the latter freedom, Moens has observed that this action-belief dichotomy remains alive in Australia.[21] Moens cites the example of a 1986 decision of the New South Wales Equal Opportunity Tribunal in which the owners of a home unit who refused to let it to an unmarried couple on the ground that this offended their religious beliefs were ordered to pay damages to the couple. Moens' interpretation of the decision is that:

> ... the Tribunal, without actually referring to the action-belief dichotomy, applied the dichotomy in order to favour the right to be free from discrimination on the ground of marital status over the right to exercise one's

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20. Ibid at 787.

21. G Moens, "The Action-Belief Dichotomy and Freedom of Religion" (1989) 12 *Sydney Law Review* 195, 213.

> religion (and, as the owners of the unit might say, their right to enjoy and dispose of their property as they see fit). Even if the Tribunal's judgment were correct from a legal point of view, it would still have the effect of entrenching one right while degrading another.[22]

In other words, the Tribunal's decision was that the unmarried couple's right to be allowed to engage in what is regarded by some as immoral cohabitation in the location of their choice was a right of a higher order than the right of the owners to refuse to engage in a commercial transaction which was offensive to their religious beliefs. The decision secured a desired material *outcome* for the unmarried couple at the expense of the owners' freedom to determine their *actions* with reference to their own moral preferences. Likewise, the Queensland fertility clinic case had the effect of presenting the lesbian couple with their desired *outcome* but infringed the proprietor's freedom of *action*. In both cases, the restriction upon freedom of action could only be justified in so far as the Tribunal could point to a concrete hierarchy of values which dictates that the security of one party's desired outcome prevails over the other's freedom of action. The legislative prohibition upon refusal to provide services to people on the basis of their lawful sexual activity provided this hierarchy of values. The question which remains is whether, in a society in which there is much disagreement on moral issues, the government should use the legislative process to impose a hierarchy of values in respect of those moral questions with regard to which there is no agreement.

Freedom and Common Good

The challenge of reconciling Christian conceptions of what is good with a society founded upon moral freedom has been taken up by Michael Novak. Novak draws a distinction between tribal societies and modern societies. He says that in the tribal society the common good is "collective" while in modern societies the common good "must leave space for the personal definitions of the good cherished by free persons?"[23] A tribal society can have a collective common good because it has recognizable collective goals. What sets a large modern society apart from a small tribal society is that the former, except in the case of war or national

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22. Ibid at 214.

23. M Novak, *Free Persons and the Common Good* (Lanham, Madison Books, 1989) pp 81-82.

emergency, is characterized by the presence of a variety of concrete goals among its individual members.[24]

Novak is not alone in making this distinction. John Finnis refers to the existence of a complete community the purpose of which is "to secure the whole ensemble of material and other conditions, including forms of collaboration, that tend to favour, facilitate, and foster the realization by each individual of his or her personal development".[25] Finnis suggests that the common good of the complete community does not depend upon collective aims. Its common good is defined with reference to "a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community".[26]

According to both Novak and Finnis, the society of free persons is one in which individual persons may form their own judgments as to what is good in terms of concrete outcomes and act upon those judgments. Yet if no limitations are placed upon this freedom, the more vocal or powerful members of that society will use that freedom to advance their notions of what is good at the expense of other notions of what is good. The society ceases to be a free society. Therefore, it is appropriate that organisations which provide services under the protection of a legislative monopoly be prohibited from discriminating between persons in the provision of services. People should not be the subject of official persecution on the basis of their membership of particular social groups. The extension of anti-discrimination laws so as to prohibit private sector service providers from the exercise of discretions as to whom they shall provide those services, on the other hand, is an example of a particular conception of what is good, defined in terms of material outcomes, being forced upon the community at the expense of other conceptions of what is good.

Novak proposes a two-part solution to this problem:

> First, one must shake the concept of the common good free from the image of the concrete good expressed in a particular state of affairs. Collectivist societies can bend every individual will to collective purposes, defined by command and announced as the collective good. Societies of free persons

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24. Id.

25. J Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford, 1980) p 147.

26. Ibid at 155.

> cannot. What free societies can do, however, is to establish general rules designed to bring to all the benefits of human cooperation, and to nourish the habits and institutions that promote cooperation. ...
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> Second, one must also shake the tribal notion of the common good free from conscious intentions, aims and purposes. ... What makes a person free is a capacity to form his own life purposes, his immediate and ultimate aims, and his personal motivations and intentions. It does not follow, however, that free persons cannot cooperate with one another, cannot give loyalty to common laws and rules, and cannot achieve dynamic societies that manifestly improve the lot of all.[27]

The freedom of persons from the dictates of moral choices made by others lies in the promulgation of rules of conduct binding upon all persons. It appears that, on this matter, Novak has been influenced by the work of F A Hayek. Hayek speaks of the free society being governed by rules of just conduct which determine "an abstract order which enables its members to derive from the particulars known to them expectations that have a good chance of being correct".[28] Hayek describes the basis for this abstract order in the following terms:

> Such a condition can evidently be achieved only by protecting some and not all expectations, and the central problem is which expectations must be assured in order to maximize the possibility of expectations in general being fulfilled. This implies a distinction between such 'legitimate' expectations which the law must protect and others which it must allow to be disappointed. And the only method yet discovered of defining a range of expectations which will be thus protected, and thereby reducing the mutual interference of people's actions with each other's intentions, is to demarcate for every individual a range of permitted actions by designating (or rather making recognizable by the application of rules to the concrete facts) ranges of objects over which only particular individuals are allowed to dispose and from the control of which all others are excluded. The range of actions in which each will be secured against the interference of others can be determined by rules equally applicable to all only if these rules make it possible to ascertain which particular objects each may command for his purposes. In other words, rules are required which make it possible to ascertain which particular objects each may command for his purposes. In other words, rules are required which make it possible to ascertain the

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27. Novak op cit, p 82.

28. F A Hayek, *Law, Legislation and Liberty,* vol 1, *Rules and Order* (London, Routledge & Kegan Paul, 1982) p 106.

> boundary of the protected domain of each and thus to distinguish between the *meum* and the *tuum*.[29]

Hayek recognizes that the fact that a rule of a society is of general application does not of itself make it a law appropriate to a free society. A law which provides that two male persons may not engage in the act of sexual intercourse together is a law of general application. Everyone is bound to observe it although its enforcement is likely to affect some persons more than others. Yet the repeal of laws of this type in most Australian states and territories is a recognition that a law of this type, far from being consistent with freedom, imposes moral choices made by some persons in the community upon others. Likewise, the rule embodied in the *Anti-Discrimination Act* 1991 (Qld) that a private sector provider of a service cannot refuse to provide the service to lesbians is a rule of general application, ie it applies to anyone who at any time offers to provide services to members of the public, but it imposes a moral choice made by others upon the provider of the service. If we were to adopt Novak's terminology, we would say that it does not "nourish the habits and institutions that promote cooperation" but compels cooperation between certain types of persons in certain situations.

Cooperation in the commercial sphere is nourished, generally speaking, by rules relating to the enforceability of contracts. Contracts are made because each party to a contract perceives that there is a gain to be made by entering into contractual relations. Each party acquires a reasonable assurance of making that gain because there is a general rule that contracts cannot be broken. A rule which requires that certain persons shall enter into certain contracts is a creature of a different kind. It does not nourish the habits and institutions that promote cooperation. Instead it forces cooperation between two persons who otherwise would not have any reason to cooperate. The object of forcing the cooperation to take place is an alteration in the distribution of benefits among members of a community. In the first case the common good promoted by the rule is voluntary cooperation between the members of a community, while in the second case the common good promoted consists of a pattern of distribution of benefits which some members of the community perceive to be desirable.

A prohibition upon refusal to provide a service to particular classes of persons, which is really a positive stipulation that the service is to be provided, is a rule which forces cooperation to the end of securing a particular pattern of distribution

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29. Ibid at 107.

of benefits. The promulgation of a rule of this type must involve the legislature in stating a preference between two differing views as to what is a desirable pattern of distribution.

The conflict in the fertility clinic cases was between two competing visions of what is good, ie between the vision of the lesbian couple that they be able to procreate using donor sperm and the vision of the clinic proprietor that IVF treatment using donor sperm be provided only to women who suffer from a medical condition which prevents them from conceiving naturally. In a free society, the legislature should not choose between these competing visions of what is good. The imposition of the rule places a limitation upon the clinic proprietor's moral and ethical freedom. It is not the place of the legislature to tell the clinic proprietor that he or she has made the wrong moral choice.

The writer does not wish to impugn the motives of sponsors of anti-discrimination legislation. They are probably motivated not so much by a desire to control the moral choices of others as a desire to ensure that certain groups in the community are not subjected to social disadvantages because of their racial, cultural or religious background or sex or sexual preference. This argument is of the same type as the one cited by Mortensen as a commonly-used justification for laws prohibiting blasphemy. The argument is that laws prohibiting ridicule of particular religious beliefs are "needed to preserve religious autonomy, because they immunise the religious from the liabilities of criticism and verbal harassment".[30] Mortensen dismisses this argument, saying that the rights of autonomy of the religious carry a correlative responsibility that they endure certain burdens such as criticism by others, and that they should not enlist the coercive power of government for the purpose of silencing these critics and ensuring their own survival.[31] In a free society, a religious group or any other group which is characterised by a shared moral or ethical vision is entitled to autonomy in the sense that the government should not interfere unduly with its *actions*, but the group cannot make a claim to autonomy in the sense that it is assured of particular *outcomes* in relation to the flourishing of the group or individuals within the group. The latter claim cannot be granted without the government performing a subtraction from the freedom of action of other groups or individuals.

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30. R Mortensen, "Blasphemy in a Secular State: A Pardonable Sin?" (1994) 17 *University of New South Wales Law Journal* 409, 427.

31. Ibid at 428.

Anti-discrimination laws can have the same effect. The statutes have been found to operate so as to coerce service providers into making their resources available to others in order to bring about the preferred outcomes of those others. The application of the statutes, in these cases, resulted in a considerable diminution of the service providers' freedom to act according to their own moral, ethical or religious views.

Conclusion

The moral of this story is not that all legislative attempts to reduce discrimination on the basis of race, culture, sex or sexual preference are bad. In a free society the government, when acting as a monopolistic service provider, should not discriminate between members of different social groups in the provision of those services or the offering of employment opportunities. On the other hand, the maintenance of an even hand between different social groups and opinions as to what constitutes the good life requires that individuals and groups be allowed to act according to their own opinions as to what is good, in so far as they can do so without commandeering the resources of others. Anti-discrimination laws which bind private individuals are an attempt to ensure that particular opinions as to what constitutes a good life are shielded from competition from other opinions. This is not freedom. These laws will inevitably interfere with the ability of some people to act in accordance with their beliefs. What is being imposed is not evenhandedness between different moral, ethical and religious beliefs but a hierarchy of values under which certain opinions are allowed to flourish at the expense of others.