

ORIENTATIONS AND ‘DEVIATIONS’: SEXUALITY IN ANTI-DISCRIMINATION LAW

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*In 2013 the Sex Discrimination Act 1984 (Cth) was amended in order to include the new ground of ‘sexual orientation’. This amendment was specifically intended to extend federal anti-discrimination protections to cover gay men, lesbian women and bisexual people for the first time. However, in the case of *Bunning v Centacare* (2015) 293 FLR 37 the Federal Circuit Court was asked to decide whether, as a matter of law, polyamory constituted a ‘sexual orientation’ under this new ground. This case highlights the questions that a number of academic commentators have raised in recent years about whether anti-discrimination protections around sexuality should cover a broader scope than simply homosexuality, bisexuality and heterosexuality. Drawing on this recent commentary and these new federal legal developments, this article critically analyses the problematic way in which anti-discrimination laws differentially protect some types of sexuality and not others. This article argues that such laws should cover a broader range of sexuality, including minority sexualities such as polyamory, asexuality, and sadomasochism.*

I INTRODUCTION

In 2013 the Commonwealth Parliament made a number of amendments to the *Sex Discrimination Act 1984* (Cth), including the extension of anti-discrimination protections to cover the new ground of ‘sexual orientation’.¹ This extension was considered by the Senate Legal and Constitutional Affairs Legislation Committee to be ‘long overdue’,² as although this was the first time that ‘sexual orientation’ had been protected at the federal level, similar legal protections had already existed for a number of years at the state/territory level.³ The second reading speech for the amending Act makes clear that this legislative change was intended to address the ‘high levels of discrimination’ faced by gay men, lesbians and

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1 *Sex Discrimination Act 1984* (Cth) s 5A, as inserted by *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) sch 1 item 17.

2 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Report on the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 [Provisions]* (2013) 29.

3 Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (Federation Press, 2008) 378–80; Australian Human Rights Commission, *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination: Consultation Report* (2011) 22. See, eg, *Equal Opportunity Act 2010* (Vic) s 6(p).

bisexual people,⁴ and, as such, undoubtedly marks another key symbolic step forward in Australia's ongoing 'journey of enlightenment' towards '[t]he end of unfair discrimination' in relation to sexuality.⁵ But what about other sexual minorities?⁶ A number of commentators in recent years have raised questions about whether anti-discrimination protections around sexuality could or should cover a wider ambit, possibly including polyamory,⁷ asexuality,⁸ and sadomasochism.⁹ The practical relevance of these kinds of questions was recently demonstrated by the case of *Bunning v Centacare*,¹⁰ in which the scope of the new federal 'sexual orientation' ground was judicially considered in the context of whether or not it included polyamory. The judicial reasoning in this case, including the ultimate decision to exclude polyamory from this ground, highlights the complexities and controversies involved in formulating anti-discrimination law around the wide variety of human sexuality.

This article uses these new federal legal developments as the specific lens through which to address the problematic way in which anti-discrimination law selectively recognises and protects some types of sexuality and not others. It argues that the law should protect a broader range of minority sexualities than it currently does. This analysis is developed in the next two parts. Part II charts the current limits of the new 'sexual orientation' ground under federal anti-discrimination law by setting out the relevant statutory sections and the reasoning and decision from the case of *Bunning*. Part III moves beyond the current law's narrow focus on the sex-directedness of 'sexual orientation' by demonstrating that purported distinctions

4 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2013, 2894 (Mark Dreyfus, Attorney-General).

5 Michael Kirby, 'Sexuality and Australian Law' (2005) 48(3–4) *Journal of Homosexuality* 31, 45. Although, of course, anti-discrimination 'legislation (and law generally) [is] wholly inadequate in itself to bring about the type of social transformation necessary for a positive valuing of sexuality diversity': Anna Chapman, 'Australian Anti-Discrimination Law and Sexual Orientation: Some Observations on Terminology and Scope' (1996) 3 *Murdoch University Electronic Journal of Law* [2]. More fully addressing 'unjust discrimination' around sexuality and gender instead 'requires a variety of responses federally and at the state and territory level. This includes law reform, changes to policy and practice, the prioritisation of research and ... diversity training in professional settings': Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights: National Consultation Report* (2015) 2.

6 Heinze uses the term 'sexual minority' to refer to groups of people who 'on the basis of lifestyles, intimate associations, or other forms of self-identification or expression' can be 'regarded as derogating from what in contemporary, statist societies has become the widespread dominance of normative-heterosexual models of social organization': Eric Heinze, *Sexual Orientation: A Human Right* (Martinus Nijhoff Publishers, 1995) 12–13 (citations omitted). For the purposes of this article, I will adopt this definition but will broaden its scope by dropping the limiting qualifier 'hetero' in order to include all those who derogate from normative *sexual* models of social organisation.

7 Ann E Tweedy, 'Polyamory as a Sexual Orientation' (2011) 79 *University of Cincinnati Law Review* 1461. See also Elizabeth F Emens, 'Monogamy's Law: Compulsory Monogamy and Polyamorous Existence' (2004–2005) 29 *New York University Review of Law & Social Change* 277.

8 Elizabeth F Emens, 'Compulsory Sexuality' (2014) 66 *Stanford Law Review* 303. See also Australian Human Rights Commission, *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination*, above n 3, 5; Australian Human Rights Commission, *Resilient Individuals*, above n 5, 5; Heinze, above n 6, 47 n 89; Zachary A Kramer, 'Heterosexuality and Title VII' (2009) 103 *Northwestern University Law Review* 205, 208 n 20.

9 Evelyn Ellis and Philippa Watson, *EU Anti-Discrimination Law* (Oxford University Press, 2nd ed, 2012) 42.

10 (2015) 293 FLR 37 ('*Bunning*').

between identities and actions, arguments about the risks of actual discrimination and concerns about legal over-breadth do not provide compelling justifications for the exclusion of other types of non-harmful, non-criminal sexual minorities from anti-discrimination protection.

The three particular minority sexualities that will be focused on here are polyamory, asexuality and sadomasochism, and before this paper can proceed it is necessary to define what these terms mean for the purposes of the analysis. Firstly, polyamory can be broadly understood as 'an arrangement of intimate partnerships between one person and multiple partners'.¹¹ Polyamory is characterised as 'ethical nonmonogamy' in the sense that these multiple relationships are negotiated openly, consensually and transparently between the partners,¹² and this distinguishes polyamory from other nonmonogamous practices such as 'cheating'. Polyamory is also generally understood as being distinct from religious nonmonogamous practices, such as the polygynous relationships engaged in by members of some Mormon and Islamic communities. This is because it offers 'another model' of nonmonogamy, one that 'eschews' patriarchal and other hierarchies, 'encompasses various models of intimate relationships of more than two people' (including polyandry and same-sex relationships),¹³ and is based on a set of values including 'self-knowledge, radical honesty, consent, self-possession, and privileging love and sex over other emotions and activities such as jealousy.'¹⁴ Whilst some religious polygamists may 'ascribe to the basic definition of polyamory, adhere to the values associated with polyamory, and identify themselves as polyamorists', and thus may 'fall within the scope of polyamory',¹⁵ this article will focus on polyamory rather than religious polygamy. Secondly, an asexual person is someone who identifies as experiencing little or no sexual attraction to others. Asexuality is distinguishable from celibacy, which is the deliberate choice to suppress sexual desires or abstain from sexual conduct, as 'asexuals have not *decided* to avoid sex despite sexual attraction. They simply do not feel attracted to other people.'¹⁶ Thirdly, sadomasochism is a broad umbrella term that refers to a range of consensual sexual practices that can involve dominance and submission, the infliction of pain, physical restraint and/or the role-playing of power imbalances between participants.¹⁷ This could include activities such as whipping, cutting of the skin, tying up with rope, the application of hot wax, master/slave roleplay, etc.

11 Angela Campbell, *Sister Wives, Surrogates and Sex Workers: Outlaws by Choice?* (Ashgate Publishing, first published 2013, 2014 ebook ed) 49.

12 Emens, 'Monogamy's Law', above n 7, 283.

13 Ibid 282.

14 Ibid 283.

15 Tweedy, above n 7, 1481 (citations omitted).

16 Emens, 'Compulsory Sexuality', above n 8, 318, 316–19 (emphasis in original).

17 See generally Martin S Weinberg, Colin J Williams and Charles Moser, 'The Social Constituents of Sadomasochism' (1983–1984) 31 *Social Problems* 379.

II FEDERAL LAW

As a result of the amendments contained in the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth), the *Sex Discrimination Act 1984* (Cth) ('the Act') currently covers a wide variety of grounds, including sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, and family responsibilities.¹⁸ It prohibits discrimination on these grounds in various areas of public life, including work, education, accommodation and the provision of goods and services.¹⁹ 'Sexual orientation' is statutorily defined in s 4 of the Act, which reads:

sexual orientation means a person's sexual orientation towards:

- (a) persons of the same sex; or
- (b) persons of a different sex; or
- (c) persons of the same sex and persons of a different sex.

The scope of the 'sexual orientation' ground was judicially considered in detail in the case of *Bunning*. The factual background to this case involved a woman, Susan Bunning, who was dismissed from her job as a Family Support Co-ordinator at Centacare, a service provider run by the Catholic Church, after it came to the attention of her superiors that her name and contact details as a Centacare counsellor were published online on a website for a local polyamory group.²⁰ Centacare maintained that Bunning was dismissed because her conduct in this regard amounted to 'gross misconduct'.²¹ However, Bunning believed that she was dismissed because she was polyamorous and she made a claim to the Federal Circuit Court alleging inter alia that Centacare had breached the Act by unlawfully discriminating against her on the basis of her polyamorous 'sexual orientation'.²² Centacare applied for summary dismissal of Bunning's claim and the Court was left to decide whether, as a matter of law, polyamory constituted a 'sexual orientation' under the Act.

Judge Vasta, the sole judge in this case, regarded this issue as being a 'pure question of statutory interpretation'.²³ He turned to the statutory definition of 'sexual orientation' set out in the Act (extracted above) and supplemented the wording of the statute with the relevant dictionary definition of 'orientation', which was 'attraction to' or 'inclination towards'.²⁴ On this basis, Vasta J concluded that 'sexual orientation' was defined by the Act as a 'state of being' towards

18 *Sex Discrimination Act 1984* (Cth) ss 5, 5A, 5B, 5C, 6, 7, 7AA, 7A.

19 *Ibid* pt II divs 1–3. There are, however, a number of exemptions to these protections, including certain exemptions for charities and religious organisations: pt II div 4.

20 The 'Brisbane Poly Group': *Bunning* (2015) 293 FLR 37, 40 [7].

21 *Ibid* 44 [18].

22 *Ibid* 46 [26].

23 *Ibid*.

24 *Ibid* 46 [27]–[28].

people of the same and/or different sex,²⁵ that is, the state of being attracted to or inclined towards them. He then drew a distinction between 'sexual orientation' and 'sexual behaviour', the latter of which comes in 'many forms' and is how a person 'manifests' their sexual orientation.²⁶ Applying this division to the case at hand, Vasta J concluded that polyamory was a 'sexual behaviour' because he understood polyamory to be the pattern or practice of having multiple concurrent sexual relationships and thus 'one has to behave in a polyamorous way to be, in fact, polyamorous'.²⁷ Because polyamory was a sexual behaviour and 'not a state of being existing in and of itself', polyamory therefore was 'not a "sexual orientation"' under the Act.²⁸ As a result, there were no reasonable prospects of success for Bunning's claim of unlawful discrimination.²⁹

Although the case of *Bunning* was primarily concerned with polyamory, its implications are much broader. In the course of his judgment, Vasta J also specifically mentioned a number of other types of sexuality that he considered would not legally constitute sexual orientations. Alongside polyamorists, he also explicitly excluded 'sado-masochists', 'coprophiliacs' and 'urophiliacs' from the scope of the Act's protections, and expressed his further concern that if these 'sexual behaviours' were to be recognised as sexual orientations then it could open the door for 'illegal activities' such as 'paedophilia and necrophilia' to also then be protected under the Act.³⁰ Whilst he specifically excluded certain types of sexuality from anti-discrimination protection, Vasta J did not make clear what types of sexuality were covered by the Act. Although the words 'homosexuality', 'lesbianism', 'heterosexuality' and 'bisexuality' are not used within the Act's definition of sexual orientation, it was the explicit intention of Parliament that 'each of these sexual orientations' were to be protected by the Act and as such this is very likely how the Act will be interpreted in the future.³¹ This position is

25 Ibid 46 [29].

26 Ibid.

27 Ibid 47–8 [40]–[42].

28 Ibid 48 [42]–[43].

29 Ibid 48 [44].

30 Ibid 47 [34].

31 Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) 14. Interestingly, the Act's definition of 'sexual orientation' contains the potential to cover more than just these specified categories of sexual orientation. Subsections (a), (b) seem to neatly cover homosexuality/lesbianism and heterosexuality, respectively. Subsection (c) clearly covers bisexuality but may also go somewhat further. The prefix 'bi' in bisexuality embeds a binary model of sex; bisexuality has typically been understood as being attracted to both the same and the 'opposite' sex, ie both males and females. However, the Act uses the term 'different' sex rather than 'opposite' sex in sub-ss (b), (c). This was the result of a deliberate choice made by the legislators to 'recognise ... that a person may be, or identify as, neither male nor female': at 14. In contrast to the binary idea of sex and gender presupposed by bisexuality, a pansexual person is someone who is sexually attracted towards other people regardless of their sex identity and the term pansexuality also includes sexual attraction towards people with non-binary sex identities such as 'intersex', 'androgynous', etc. Given the specific wording of the Act's definition, pansexuality may also be covered by sub-s (c). It should be noted here that the Australian Human Rights Commission has consistently recognised pansexuality as a sexual orientation within its recent reports: Australian Human Rights Commission, *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination*, above n 3, 5; Australian Human Rights Commission, *Resilient Individuals*, above n 5, 5.

reinforced by the history behind the 2013 amendments, which were prefaced and prompted by the Australian Human Rights Commission's ('AHRC') 2011 report on *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination* which was itself part of a broader 'consultation regarding the human rights of lesbian, gay, bisexual, trans and intersex (LGBTI) people in Australia'.³² This interpretation of the scope of the Act's 'sexual orientation' protections would also mean that the federal law was broadly in line with the various anti-discrimination laws at the state/territory level, which cover the ground of sexuality typically only to the extent of protecting homosexuality (including lesbianism), heterosexuality and bisexuality.³³

III BEYOND SEX-DIRECTED 'SEXUAL ORIENTATION'

It is clear that federal anti-discrimination law in this area provides legal protection for certain types of sexuality and not others. The term 'sexual orientation' takes on sociopolitical importance in both the Act and in *Bunning* as a tool for elevating some sexualities above others and legitimising the differences in their level of legal protection. What is not clear, however, is the basis on which these divisions between different types of sexuality are made.

At the level of language, the boundaries of the term 'sexual orientation' are not well-defined. As Heinze notes, the exact meaning of the term 'sexual orientation' is 'anything but obvious',³⁴ and it is this lack of clarity that gives the term the potential for a very wide scope of meaning. According to the Macquarie Dictionary, 'orientation' and its associated words such as 'orientate', 'orientated', 'orientating', etc, are relevantly defined in terms of direction, facing or positioning, particularly in relation to the surroundings and the circumstances.³⁵ If all that was required for a person's sexual desires or attractions to constitute a sexual orientation was that they be directed in a certain way or towards a certain kind of person/thing, then the scope of the term would be broad indeed. Accordingly, it has been suggested that the term 'sexual orientation', on its face value, 'could encompass any sexual attraction'³⁶ or 'just about any sexual preference' that was sufficiently settled or abiding.³⁷

32 Australian Human Rights Commission, *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination*, above n 3, 1.

33 Rees, Lindsay and Rice, above n 3, 378–80. Whilst '[a]ll states and territories have laws that prohibit discrimination on the basis of sexual orientation' they utilise a 'wide range of terminology to describe the prohibited grounds of discrimination', with some including the broad term 'sexual orientation' and others enumerating a series of more specific terms such as 'heterosexuality', 'homosexuality', 'bisexuality', 'lesbianism', etc: Australian Human Rights Commission, *Resilient Individuals*, above n 5, 71–3 (citations omitted).

34 Heinze, above n 6, 31.

35 *Orientation* (2015) Macquarie Dictionary <https://www.macquariedictionary.com.au/features/word/search/?word=orientation&search_word_type=Dictionary>.

36 Heinze, above n 6, 46.

37 Tweedy, above n 7, 1474.

The theoretical capacity for breadth in this term, however, is not characteristic of how it is usually used. Instead, the term is typically employed in both law and wider society in a way that 'projects a core understanding of "sexual orientation" as simply an erotic feeling or desire that is oriented toward particular sex-defined directions',³⁸ that is, it is something that is oriented towards males, females, etc. The term 'orientation' is thus restricted in its directedness, so that a person's sexual orientation is something that is understood in terms of how it is directed 'toward people of the same or different sexes'³⁹ but not in terms of how it is or could be directed towards something other than a person's biological sex. This narrower and more restrictive meaning of sexual orientation is how the term is 'almost universally understood',⁴⁰ how it is 'frequently used',⁴¹ and what is 'usually ... intended' in legislation and other legal instruments.⁴² This is not the same, however, as saying that this is how the term 'sexual orientation' must or should always be used. As discussed above, the natural and ordinary meaning of the words themselves are capable of a much broader interpretation if the interpreter were so inclined. However, in its use as a legal term 'sexual orientation' becomes a purposive tool for achieving certain legal ends. Within federal law the term 'sexual orientation' does more than merely 'point to, and to help us discuss more precisely, an aspect of sexual experience that carries a particular social and political significance',⁴³ instead it functions to differentially recognise and protect certain types of sexuality and not others. The term 'sexual orientation' is used by law here to embed sex-directedness as the only aspect of human sexuality that is worthy of anti-discrimination protection.

Whilst it is undoubtedly the case that sex-directedness is an important part of many people's sexuality, it is also undoubtedly the case that sex-directedness is not the only important part, the most important part or even an important part, of all people's sexuality. As Glazer notes: 'Sex, one might say, is the essential characteristic on the basis of which individuals choose to associate intimately. For many ... this is simply not true'.⁴⁴ For example, sex may not hold much relevance for asexuals, whose sexuality is characterised by the fact that they 'simply do not feel attracted to other people' regardless of their sex.⁴⁵ For sadomasochists, an additional organising principle of their sexuality alongside sex-directedness

38 Francisco Valdes, 'Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society' (1995) 83 *California Law Review* 1, 135.

39 Anne-Marie Mooney Cotter, *Ask No Questions: An International Legal Analysis on Sexual Orientation Discrimination* (Ashgate Publishing, 2010) 7.

40 Tweedy, above n 7, 1463.

41 Heinze, above n 6, 46.

42 Helmut Graupner, 'Sexuality and Human Rights in Europe' (2005) 48(3-4) *Journal of Homosexuality* 107, 109-110.

43 Heinze, above n 6, 45.

44 Elizabeth M Glazer, 'Sexual Reorientation' (2012) 100 *Georgetown Law Journal* 997, 1035.

45 Emens, 'Compulsory Sexuality', above n 8, 318. Though some asexuals may form non-sexual romantic bonds selectively with people of a certain sex, and thus could be described as having a form of 'romantic orientation': at 321.

may be the kinds of roles they play during sadomasochistic activities.⁴⁶ For those fetishists whose sexuality is focused towards and invested in objects or non-genital parts of the human body, the sex of other people may also be less important. Furthermore, even though bisexuality is typically socially and legally defined in terms of its bilateral sex-directedness, this may be an inappropriate way to describe it because ‘sex matters less’ for bisexuals.⁴⁷ Yoshino identifies that some bisexuals consider themselves to be ‘sex-blind’, in that they do ‘not take sex into account in choosing erotic partners’ and purport to ‘fall in love with a person rather than with a sex’.⁴⁸ Most bisexuals, however, are not ‘blind’ in this way to the sex of their partner but they nevertheless still background the importance of sex because they do ‘not presumptively eliminate one sex from their fields of erotic possibility’.⁴⁹

The epistemological problem here is the use of ‘inconceivably coarse axes of categorization’ to deal with the ‘self-evident fact’ that ‘[p]eople are different from each other’.⁵⁰ Human sexuality is incredibly diverse and law’s attribution of sole and central importance to sex-directedness is symptomatic of a crude and simplistic way of ‘thinking about sexuality’ and sexual difference.⁵¹ Sedgwick offers an illuminating thought-experiment by setting out a nuanced series of alternative taxonomies that we could use to classify and organise the various sexual differences between people:

- Some people spend a lot of time thinking about sex, others little.
- Some people like to have a lot of sex, others little or none ...
- For some people, it is important that sex be embedded in contexts resonant with meaning, narrative, and connectedness with other aspects of their life; for other people, it is important that they not be; to others it doesn’t occur that they might be.
- For some people, the preference for a certain sexual object, act, role, zone, or scenario is so immemorial and durable that it can only be experienced as innate; for others, it appears to come late or to feel aleatory or discretionary ...
- Some people’s sexual orientation is intensely marked by autoerotic pleasures and histories — sometimes more so than by any aspect of alloerotic object

46 Weiss describes sadomasochists as having ‘SM orientations’, with people in her ethnographic study describing themselves in terms such as ‘I’m a het, sensual top’ (ie a heterosexual person who identifies with the dominant role in sadomasochistic activities) and ‘I’m a bi poly switch’ (ie a bisexual person who identifies with both dominant and submissive roles in sadomasochistic activities and who is also polyamorous): Margot Weiss, *Techniques of Pleasure: BDSM and the Circuits of Sexuality* (Duke University Press, 2011) 11.

47 Kenji Yoshino, ‘The Epistemic Contract of Bisexual Erasure’ (2000) 52 *Stanford Law Review* 353, 412.

48 Ibid 411 (citations omitted), 411 n 314.

49 Ibid 412.

50 Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press, 2nd revised ed, 2008) 22.

51 Ibid 25.

choice. For others the autoerotic possibility seems secondary or fragile, if it exists at all.⁵²

Despite the dizzying variety that Sedgwick gestures towards, a far more restrictive understanding of human sexuality has long been embedded within the law and within notions of state power and belonging. As Cossman has identified, from the ancient Greeks to contemporary systems of government '[m]embership in the public sphere, whether envisioned as rights, political participation, or broader practices of belonging, [has] been conditional upon a set of sexual norms and practices'.⁵³ In particular, these sexual norms and practices have traditionally operated in a heterosexist way to exclude gay men, lesbian women and bisexual people, such as through the criminalisation of homosexual sexuality in sodomy laws and 'the legal condonation of discrimination'.⁵⁴ However, as the legal restrictions placed on homosexuality have begun to be dismantled and as '[m]ore and more sexual practices have become visible within the public sphere' in recent decades, various other types of minority sexuality have also been revealed as being excluded from the public sphere and have become the 'subject of political contestation and cultural representation'.⁵⁵ As such, it has been argued that the state should recognise a broader conception of 'sexual citizenship', one that accommodates rather than excludes a wide variety of sexualities and one that legitimates the existence of these sexualities in law.⁵⁶

It is evident, however, that Australian federal anti-discrimination law does not accommodate a wide variety of sexualities in that it selectively elevates and protects the sex-directed aspects of human sexuality above all others. It thus reflects a narrow and reductive model of sexual citizenship. But is it wrong to do so? The purpose of anti-discrimination law is not to eliminate all forms of discrimination on the basis of any characteristic that a person could have or any activity that they could engage in. There are, and should be, principled limits to the scope of anti-discrimination law. As such, it has been argued that the legitimate scope of anti-discrimination law is the elimination of 'morally unacceptable' discrimination, that is discrimination which relies on 'morally irrelevant' considerations about a person.⁵⁷ Anti-discrimination law thus should protect against irrational actions that are 'based on prejudice' and that result 'in unfair treatment of people', such as 'making a distinction in favor of or against a person or thing based on the group, class or category to which that person or thing belongs rather than on individual merit'.⁵⁸ Similarly, if anti-discrimination law were to be overly broad in the kind

52 Ibid 25–6.

53 Brenda Cossman, 'Sexual Citizens: Freedom, Vibrators, and Belonging' in Linda C McClain and Joanna L Grossman (eds), *Gender Equality: Dimensions of Women's Equal Citizenship* (Cambridge University Press, 2009) 289, 291.

54 Ibid.

55 Ibid.

56 Brenda Cossman, 'Sexing Citizenship, Privatizing Sex' (2002) 6 *Citizenship Studies* 483; Bela Bonita Chatterjee, 'Pay v UK, the Probation Service and Consensual BDSM Sexual Citizenship' (2012) 15 *Sexualities* 739.

57 Ellis and Watson, above n 9, 2–3 quoting David Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford University Press, 2nd ed, 2002) 135.

58 Cotter, above n 39, 8.

of protection it provides then it ‘could effectively stultify decision-making’.⁵⁹ Thus it has been argued that anti-discrimination law should only operate within certain ‘aspects of “public life”’,⁶⁰ such as employment.

Whilst Australian law has now recognised in every single jurisdiction that a person’s sexuality does fall within the legitimate scope of anti-discrimination law, the resulting legal protections have only been extended to homosexuality, lesbianism, heterosexuality and bisexuality as sex-directed ‘sexual orientations’. In this Part it will be argued that there is a clear case for further extending these anti-discrimination protections to cover other sexual minorities — namely polyamory, asexuality and sadomasochism — and that there is no compelling justification for refusing to do so. To establish this, this Part will address considerations of identity and action, risk of discrimination and concerns of over-breadth, all of which play a role in the recent decision in *Bunning*.⁶¹

A Identity and Action

At the core of Vasta J’s decision in *Bunning* is the understanding that certain aspects of our sexuality constitute a state of being that defines who we are (our sexual orientation), and that other aspects of our sexuality are merely things that we do (our sexual behaviours).⁶² This maps more broadly onto a conceptual schema under which some types of sexuality are understood as constituting an identity whilst others are conceptualised as being actions. This kind of division has strong resonance within law in this area, as the ‘foundational ... categories’ of anti-discrimination protection have typically centred around ‘immutable’ characteristics, ‘such as race’,⁶³ or identity categories that are ‘integral to an individual’s personal identity’,⁶⁴ such as religion. If polyamory and sadomasochism are conceived of as contingent sexual activities that one may choose to engage in whereas homosexuality and heterosexuality are conceived of as intrinsic and immutable identities that are central parts of the person, then there is a principled justification for affording anti-discrimination protection to the latter and not the former. However, drawing this kind of purported division between sexual identities and sexual actions is problematic for a number of reasons.

Firstly, the idea that the excluded types of sexuality are merely actions and not identities does not match up with the lived experience of many members of sexual minorities. Many polyamorists, asexuals and sadomasochists strongly identify with their sexuality and experience it as being deeply ‘embedded’ in their sense of self and their lives.⁶⁵ Emens, for example, documents claims made by asexual

59 Ellis and Watson, above n 9, 2.

60 Ibid 4.

61 (2015) 293 FLR 37.

62 Ibid.

63 Emens, ‘Compulsory Sexuality’, above n 8, 375.

64 Tweedy, above n 7, 1482.

65 I borrow the notion of ‘embeddedness’ here from Tweedy, who uses it to refer to aspects of identity that are ‘more likely ... to manifest as strong and consistent ... or settled and repeated’: *ibid* 1482–3.

advocacy groups that their asexuality is not a 'choice' but is rather an immutable and intrinsic characteristic of asexuals.⁶⁶ Furthermore, Tweedy identifies that a number of polyamorists 'describe themselves as having been poly since early adolescence or even earlier' and claim that their polyamory is an essential, or 'hardwired', part of who they are.⁶⁷ The logic that a person's sex-directed 'sexual orientation' is more strongly embedded than all other aspects of their sexuality is also not universally accepted as a truth. This logic has been directly refuted by prominent sadomasochistic advocate Pat Califia, who has personally claimed that: 'I identify more strongly as a sadomasochist than as a lesbian ... If I had a choice between being shipwrecked on a desert island with a vanilla lesbian and a hot male masochist, I'd pick the boy.'⁶⁸ The argument here is not that all members of these sexual minorities experience these aspects of their sexuality as being immutable or as being more strongly embedded than their sex-directed 'sexual orientation'. Indeed, it is clear that this is not the case; as Tweedy notes, many polyamorists experience this part of their sexuality as being fluid and freely chosen.⁶⁹ Despite this, the point remains that there are undoubtedly some people who experience these aspects of their sexuality as integral and embedded parts of their sexual identity and not merely actions.

Secondly, the notion that a person's sex-directed 'sexual orientation' is a 'state of being' is placed under pressure by the complex lived realities of sexuality. This notion of sexuality does not seem to leave room for the possibility that an individual 'is not even sure of his or her own sexual orientation, or is in the process of working this through'.⁷⁰ A person's sexual orientation may be more of a state of confusion than a state of being. This notion is also troubled by the recognition that a person's sexuality may have social or relational components rather than solely being a personal, individual characteristic. Lau has argued that 'the couple and the community are two types of social collectives that shape an individual's sense' of their sexual self.⁷¹ This is because our '[s]exual interests define whom we want to date, before whom we feel comfortable appearing nude, whom we view as potential life partners, even whom we wish to twirl and dip on the ballroom dance floor', and the 'interpersonal bonds that arise from one's sexual interests' are thus integral to how we understand and negotiate our sexuality.⁷² In an even broader sense, sociological perspectives on sexuality understand it 'in terms of social analysis and historical understanding', and as being a social construct

66 Emens, 'Compulsory Sexuality', above n 8, 318–19.

67 Tweedy, above n 7, 1483–5.

68 Pat Califia, *Public Sex: The Culture of Radical Sex* (Cleis Press, 2nd ed, 2000) 159. The term 'vanilla' refers to non-sadomasochistic sexual expression or activity. Califia does recognise that she does not 'represent' all 'S/M lesbians'. However, in an ethnographic study of the sadomasochistic subculture, Newmahr found that many sadomasochists do believe that their 'SM proclivities are innate' and regard them as akin to an 'orientation': Staci Newmahr, *Playing on the Edge: Sadomasochism, Risk, and Intimacy* (Indiana University Press, 2011) 48.

69 Tweedy, above n 7, 1496–7.

70 Hazel Oliver, 'Sexual Orientation Discrimination: Perceptions, Definitions and Genuine Occupational Requirements' (2004) 33 *Industrial Law Journal* 1, 18.

71 Holning Lau, 'Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law' (2006) 94 *California Law Review* 1271, 1273.

72 *Ibid* 1286.

rather than a ‘biological phenomenon or an aspect of individual psychology’.⁷³ To treat sexual orientation as an individual’s ‘state of being’ is thus to fail to properly account for the external processes of enculturation and socialisation that construct and maintain certain models of sexuality. But even if we were to accept the notion that sexual orientation is some kind of individual ‘state of being’, how could a court determine what that state is? As Kramer recognises, within anti-discrimination law ‘sexual orientation is different than other identity traits like race and sex that are, in most cases, noticeable by casual observation’, as it ‘cannot be observed by the naked eye’ and is effectively ‘invisible’.⁷⁴ It is also not always static, as a person’s sexual orientation may ‘change over time, as people try out different sexual experiences’.⁷⁵ Indeed, this ‘state of being’ may be contingent upon external factors. For example, some people engage in same-sex sexual conduct only under certain conditions or within specific contexts and not otherwise, such as in the ‘situational bisexuality’ that occurs in prisons when different-sex sexual contact is unavailable.⁷⁶ However, it is also not something that is necessarily reflected in a person’s choice of sexual partners or experiences. For example, a significant population of men engage in same-sex sexual conduct without self-identifying as being homosexual or ‘bisexual’ — this group is referred to by ‘public-health researchers’ as ‘MSM: “men who have sex with men”’.⁷⁷ Thus if ‘sexual orientation’ is a state of being then it is one that cannot be externally observed, that may (for some people) develop over time, that may be open to influence by external context, and that is potentially severable from sexual behaviour. The only remaining viable source of a person’s sexual ‘state of being’ is their claimed self-identity. And yet, the dismissal by the Federal Circuit Court of Bunning’s own claim to a polyamorous ‘sexual orientation’ demonstrates that there are limits on the kinds of self-identities that can be legally articulated: law only recognises a narrow band of sex-directed types of sexuality as constituting a ‘state of being’.

Thirdly, the conceptualisation of certain minority sexualities as actions rather than identities enacts an insidious form of erasure. Writing about the phenomenon of ‘bisexual erasure’, Yoshino identifies erasure as occurring when ‘the existence of the entire bisexual category’ is denied either explicitly (such as through claims that ‘all self-identified bisexuals [are] actually homosexuals’) or implicitly (such as through ‘the use of the straight/gay binary as a complete means of describing all individuals’).⁷⁸ Yoshino also describes ‘[a] more subtle strategy’ of erasure through which bisexuality is ‘made visible as a phase, fashion, or fad’ so that ‘its appearance is inscribed with its imminent disappearance’.⁷⁹ A similar process

73 Gayle S Rubin, ‘Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality’ in Richard Parker and Peter Aggleton (eds) *Culture, Society and Sexuality: A Reader* (Routledge, 2nd ed, 2007) 150, 157.

74 Kramer, above n 8, 227.

75 Oliver, above n 70, 18.

76 Marjorie Garber, *Bisexuality and the Eroticism of Everyday Life* (Taylor & Francis, first published 2000, 2013 ebook ed) 30.

77 Jessica A Clarke, ‘Inferring Desire’ (2013) 63 *Duke Law Journal* 525, 545–6.

78 Yoshino, above n 47, 395 (emphasis altered).

79 Ibid 396 (citations omitted).

of subtle erasure is at work in *Bunning* within the purported division between sexual orientations and sexual behaviours. By defining polyamory as the pattern or practice of having multiple concurrent sexual relationships and concluding that 'one has to behave in a polyamorous way to be, in fact, polyamorous',⁸⁰ Vasta J forecloses the capacity for polyamory to constitute a meaningful sexual identity. If a 'polyamorist' is nothing more than someone who is currently engaged in polyamory, then it is not a personal characteristic that defines a class of persons but is simply an emergent description appropriate for a participant in an external activity. Heterosexuality and other 'sexual orientations', by contrast, are treated as stable internal identities that persist despite even the absence of participation in sexual actions. Thus Vasta J recognises that the 'many religious persons [who] take a vow of chastity and do not behave sexually at all ... still can have a sexual orientation ... because their behaviour does not define their orientation'.⁸¹ On this kind of account, the virgin homosexual, the chaste heterosexual, the single lesbian and the monogamous bisexual can all presumably legitimately claim a sexual identity in line with their currently dormant 'sexual orientation'. However, neither the virgin urolagniac, the chaste sadomasochist nor the single/coupled polyamorist (even if they were currently actively seeking more partners) can presumably claim a sexual identity in line with the type of sexuality with which they may personally identify. By treating these latter types of sexuality as extrinsic actions rather than intrinsic identities, their 'appearance is inscribed with [their] imminent disappearance'⁸² because they become contingent on sustaining contemporary and continuous iteration.

The division between acts and identities is a conceptual schema that is also familiar to various other intersections between law and sexuality. For example, in order to credibly establish a gay, lesbian or bisexual identity it has been observed that asylum seekers and refugees have had to provide evidence to legal decision-makers that they have performed certain acts that somehow signal these identities, such as having sex with other people, reading or listening to the work of gay icons and frequenting 'gay bars'.⁸³ This troubled division has also previously arisen in discrimination law where it has been argued that there is a legally important difference between discrimination on the basis of 'sexual orientation' and discrimination on the basis of certain kinds of related acts. For example, in the recent case of *Christian Youth Camps v Cobaw Community Health Services* it was argued, ultimately unsuccessfully, that the refusal of accommodation services to a planned weekend camp for same-sex attracted youth did not constitute discrimination on the basis of the sexual orientation of those who would attend the camp because the refusal was made on the alternative

80 *Bunning* (2015) 293 FLR 37, 48 [42].

81 *Ibid* 47 [35].

82 Yoshino, above n 47, 396.

83 Thomas Spijkerboer, 'Sexual Identity, Normativity and Asylum' in Thomas Spijkerboer (ed), *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Routledge, 2013) 217, 225; Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13 *International Journal of Human Rights* 391, 398–402.

basis of what was proposed to be taught at the camp, namely awareness-raising about and acceptance of same-sex attracted sexualities.⁸⁴ However, this recurring division between acts and identities is leveraged to do even more work in the case of minority sexualities such as polyamory, asexuality and sadomasochism. Rather than legally requiring certain acts in order to establish certain identities, and rather than trying to legally separate certain acts from related identities, *Bunning* uses this division to legally construct these minority sexualities as wholly reducible to acts rather than identities.⁸⁵ In this way, these minority sexualities are improperly excluded from anti-discrimination protections because as mere ‘acts’ they are too ontologically unstable to slot in beside those stable ‘foundational ... categories’ of identity currently covered by anti-discrimination law.⁸⁶

B Risk of Discrimination

Even if it were to be accepted that the sexuality of polyamorists, asexuals and sadomasochists was an immutable characteristic or a deeply-embedded aspect of their individual identity, this still may not be enough to justify their protection under anti-discrimination legislation. It seems tautological to state that anti-discrimination laws exist in order to protect people from discrimination: this *prima facie* seems to be the primary motivation behind the implementation of such laws and the key rationale for their continued operation. Anti-discrimination laws have been regarded as a recognition and response to the fact that the ‘fundamental norm’ of ‘equality between all citizens’ is something that ‘is only imperfectly realised’ within society,⁸⁷ and needs to be addressed. As such, as McColgan notes, the existing ‘protected grounds’ of anti-discrimination law ‘have not been plucked out of the air’ but rather follow on from ‘the recognition of disadvantage suffered by women, ethnic and religious minorities, disabled people, gay men, lesbians, bisexual and transgendered people’.⁸⁸ Discrimination operates ‘as a legal category ... [that] sticks to groups who suffer’.⁸⁹ The particular kind of discrimination that anti-discrimination law protects against has been argued to be that which is ‘systemic’ in nature, that is, the discrimination is not of an individual or isolated nature but rather is, ‘in one form or another, repeated with some frequency, reflecting political or social hostility towards a group’.⁹⁰ Accordingly, ‘it could well be argued that only those’ types of innate or deeply embedded sexualities ‘that are likely to be the basis for discrimination should be protected by anti-discrimination law’.⁹¹ Homosexuality, lesbianism and bisexuality would

84 (2014) 308 ALR 615.

85 (2015) 293 FLR 37.

86 Emens, ‘Compulsory Sexuality’, above n 8, 375.

87 Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 1.

88 Aileen McColgan, *Discrimination Law: Text, Cases and Materials* (Hart Publishing, 2nd ed, 2005) 24.

89 Davina Cooper, ‘Reading the State as a Multi-Identity Formation: The Touch and Feel of Equality Governance’ (2011) 19 *Feminist Legal Studies* 3, 11 (emphasis altered).

90 Heinze, above n 6, 227 (emphasis in original).

91 Tweedy, above n 7, 1476 (citations omitted).

easily fulfil this kind of threshold test for protection. It is manifestly clear that gay men, lesbians and bisexual people in Australia have been and continue to be subjected to pervasive, harmful and unjustifiable discrimination because of their sexuality,⁹² and anti-discrimination protections are one key part of formulating an effective response to this problem. However, in the context of other types of minority sexuality the relevance of arguments around the risk of discrimination is potentially more contestable.

At the outset it is important to note that '[t]he policy goals of Australian anti-discrimination law are not particularly clear',⁹³ and the law does not simply identify and respond to actual systemic discrimination against particular categories of people with marked histories of discrimination. This is because Australian anti-discrimination laws, like the United Kingdom laws in Oliver's analysis, largely subscribe to 'a principle of formal equality'.⁹⁴ That is, not only are members of minority groups protected under anti-discrimination laws but rather 'members of all ... groups are protected equally'.⁹⁵ Thus, Australian anti-discrimination laws around sexuality typically protect heterosexual people from discrimination alongside homosexual, lesbian and bisexual people, even though it cannot be said that heterosexuals in Australia have been subject to any form of substantial systemic discrimination on the basis of their heterosexual sexual orientation.⁹⁶ This focus on protecting all groups within society from discrimination, rather than just minority groups with histories of oppression, is reflected more broadly in Australian anti-discrimination laws around sex and race which are not formally restricted in their application to certain sexes or certain races.⁹⁷ As a result, the inability to demonstrate a substantial risk of actual discrimination has not been a bar to legal protection from discrimination within the Australian context.

In any event, there is evidence that demonstrates that sexual minorities experience discrimination. The National Coalition for Sexual Freedom ('NCSF') is an American-based advocacy group formed in 1997 that represents the interests of sadomasochistic and polyamorous people. The NCSF's Incident Reporting and Response Program — which was 'created to provide assistance to individuals and groups within [the alternative sexual expression communities] ... [who] are being persecuted or discriminated against' because of their sexuality — received more

92 Australian Human Rights Commission, *Addressing Sexual Orientation Discrimination and Sex and/or Gender Identity Discrimination*, above n 3, 9–16; Australian Human Rights Commission, *Resilient Individuals*, above n 5, ch 5.

93 Rees, Lindsay and Rice, above n 3, 3.

94 Oliver, above n 70, 3.

95 Ibid.

96 Indeed, '[h]eterosexual people are rarely discriminated against on the ground of their heterosexuality': Chapman, above n 5, [12] (citations omitted). It should be noted that during the community consultation stages that preceded and led up to the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) there was contestation amongst public submissions about 'whether anti-discrimination laws should cover heterosexuality': Australian Human Rights Commission, *Addressing Sexual Orientation Discrimination and Sex and/or Gender Identity Discrimination*, above n 3, 23.

97 See, eg, *Sex Discrimination Act 1984* (Cth) s 5; *Racial Discrimination Act 1975* (Cth) s 9.

than 500 requests for help every year from 2002 to 2011.⁹⁸ These requests involved a wide variety of matters ranging from employment discrimination through to child custody and divorce issues.⁹⁹ Furthermore, it is clear that members of certain sexual minorities believe that they are being treated negatively or unfairly as a result of their sexuality and are actively seeking out the protection of the law. There have been at least two legal cases involving sexual minorities who have claimed that their employment has been terminated because of their sexuality, including Susan Bunning's claim of discrimination because of her polyamory in *Bunning*,¹⁰⁰ and Laurence Pay's human rights claims around his sadomasochistic activities in *Pay v United Kingdom*.¹⁰¹

The rationale for anti-discrimination laws can also be argued to be much broader than the singular goal of redressing histories of discrimination. As was recognised in the Explanatory Memorandum to the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth), in addition to addressing 'historical disadvantage ... anti-discrimination protections are crucial to enable all Australians to participate fully in public life ... and promote social cohesion'.¹⁰² This is because '[d]iscriminatory practices ... can facilitate a culture of intolerance' in which members of the groups discriminated against 'are marginalised, feel excluded, face harassment and experience violence'.¹⁰³ In addition to providing avenues of recourse for specific instances of discrimination, anti-discrimination laws perform the additional function of sending powerful messages of equality to the community and they contain within them the potential for sparking change away from a culture of intolerance and towards a culture of acceptance.¹⁰⁴ As Emens has argued with regard to asexuality, legal recognition of sexual minorities carries with it a series of 'potential gains', including 'publicity, legitimation, and innovation'.¹⁰⁵ Publicity can 'help draw attention' to the wide range of 'human variations' in sexuality, legitimation can help remove 'some of the stigma and shame' from being a member of a sexual minority, and the innovative 'relationship forms' that some sexual minorities adopt would enjoy more 'attention and public support'.¹⁰⁶ Extending anti-discrimination protections to a wider range of sexualities would thus help law in this area more broadly fulfil its goals of equality, open social participation and community cohesion.

Conversely, if the law in this area is seen to explicitly exclude certain sexualities from protection then it will instead promote the opposite. Clear legal statements

98 Susan Wright, *What is Incident Reporting & Response* (2015) National Coalition for Sexual Freedom <<https://nscsfreedom.org/key-programs/incident-response/incident-response.html>>.

99 Ibid.

100 (2015) 293 FLR 37.

101 (2009) 48 EHRR SE 2.

102 Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) 24 (Attachment A).

103 Australian Human Rights Commission, *Resilient Individuals*, above n 5, 14.

104 Australian Human Rights Commission, *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination*, above n 3, 17–18.

105 Emens, 'Compulsory Sexuality', above n 8, 370.

106 Ibid.

such as the refusal to protect polyamory in *Bunning*¹⁰⁷ — which was widely reported in the news media¹⁰⁸ — send the message to the community that certain sexual minorities are not deserving of legal protection and that it is 'fair game' to discriminate against them. The message that 'general society is legally entitled to treat sadomasochists', and other sexual minority members, 'unfavourably as a result of their sexual identification'¹⁰⁹ is self-evidently socially divisive rather than cohesive. It will inevitably have a chilling effect on sexual minorities, with people less likely to 'come out' about their sexuality and less likely to be able to participate fully and openly in public life as a result. Thus, in addition to protecting sexual minorities from the risks of actual discrimination that they may face, it is also important for anti-discrimination law to cover a wider range of sexualities for symbolic reasons.

C Over-Breadth

A number of possible concerns could be raised in response to any proposal for opening up the scope of anti-discrimination law around sexuality. At a general level, 'some proponents of antidiscrimination law may worry that adding new categories to existing protections will water down the impact of the law in this area'.¹¹⁰ That is, if anti-discrimination law were to move beyond its 'targeted focus on foundational or immutable categories, such as race', it runs the risk of losing public confidence and legitimacy, and would be forced to spread its 'scarce resources' too thin.¹¹¹ However, the idea that there is or should only be a finite amount of legal protection for equality is thoroughly problematic. If anything, it would be the over-narrowness rather than the over-breadth of law that is more likely to be a 'potential cost' here;¹¹² anti-discrimination law runs a much more substantive risk of losing public confidence and legitimacy by *not* providing protection to deserving groups of people. Moreover, this kind of concern is not peculiar to the protection of sexuality and could be made in regard to proposals to expand anti-discrimination law protection in any area and on any ground. This Part will address some of the more specific issues around broadening the scope of anti-discrimination protection around sexuality that were articulated in *Bunning*,¹¹³ including the negative characterisation of minority sexualities

107 (2015) 293 FLR 37.

108 See, eg, Kay Dibben, 'Polyamorous Woman Says Catholic Support Service Sacked Her Because She Believes in Having Multiple Sexual Partners', *The Courier Mail* (online), 18 February 2015 <<http://www.couriermail.com.au/news/queensland/polyamorous-woman-says-catholic-support-service-sacked-her-because-she-believes-in-having-multiple-sexual-partners/story-fnn8dlfs-1227222753745>>; Heather McNab, 'Woman "Sacked for Having Too Many Sexual Partners": Catholic Church Defends Decision after Employee Joined "Polyamorous" Website', *Daily Mail Australia* (online), 17 February 2015 <<http://www.dailymail.co.uk/news/article-2956453/Woman-openly-promoted-lifestyle-having-multiple-sexual-partners-refused-compensation-sacked-Catholic-Church-job.html>>.

109 Theodore Bennett, 'A Polyvocal (Re)Modelling of the Jurisprudence of Sadomasochism' (2012) 36(1) *University of Western Australia Law Review* 199, 214.

110 Emens, 'Compulsory Sexuality', above n 8, 375.

111 Ibid.

112 Ibid 376.

113 (2015) 293 FLR 37.

as sexual ‘deviations’ and the concern of a slippery slope descent into the legal protection of harmful/criminal types of sexuality. Nevertheless, this Part will also address the more general theoretical issue of how, exactly, to draw a principled limit around legal claims for equality from minority groups.

When explaining the difference between sexual orientation and sexual behaviour in *Bunning*, Vasta J observed that the ‘standard behaviour may be seen as the monogamous relationship with someone of a compatible sexual orientation, but there are many deviations from that standard’.¹¹⁴ Drawing on the typology utilised within the current fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (*DSM*),¹¹⁵ Vasta J labelled these ‘deviations as paraphilias’, noting that the ‘prefix “para” is instructive, as it connotes something beyond the norm’.¹¹⁶ It is difficult to see why these observations are relevant to the legal question at hand, given that the sexual orientation protections under the Act are not couched in terms that either restrict their application to ‘standard’ or normative sexuality nor exclude ‘deviations’ or non-normative sexuality from their scope. Concerns that sexual minorities are ‘deviations’ or are somehow ‘beyond the norm’ are not persuasive justifications for refusing to extend anti-discrimination protections. In the same way that if freedom of speech laws only protected majority opinions but not controversial speech, so too if discrimination laws around sexuality were to only protect the ‘standard’ or the ‘normative’ types of sexuality then they would be hollow laws indeed. Anti-discrimination laws become more, not less, relevant and necessary when working closer towards the social margins than the social centre. The division that Vasta J draws between ‘standard’ sexuality and ‘deviations’ does, however, have a broader resonance in relation to what Rubin has termed the ‘moral hierarchy of sexual activities’.¹¹⁷ This ‘moral hierarchy’ idea reflects the sociocultural assignation of different levels of value to different types of sexuality, under which monogamous, married and heterosexual types of sexuality have traditionally been accorded higher social status, and sadomasochistic, polyamorous and homosexual types of sexuality have traditionally been accorded lower social status.¹¹⁸ This lower social status has been reflected within ‘[p]opular culture [which] is permeated with ideas that erotic variety is dangerous, unhealthy, depraved, and a menace to everything from small children to national security’,¹¹⁹ a conceptualisation of sexuality that is non-reflective of the predominantly benign nature of much human sexual variation.

The lower social status accorded to certain types of sexuality has been partly (re)produced within medical discourse and treatment, under which ‘[l]ow-status

114 Ibid 46 [30].

115 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Publishing, 5th ed, 2013) (*DSM-V*). The *DSM-V* is authored by the American Psychiatric Association, which is ‘perhaps the world’s most powerful professional organization of psychiatrists’, and ‘the leading clinical diagnostic manual worldwide’: Andreas de Block and Pieter R Adriaens, ‘Pathologizing Sexual Deviance: A History’ (2013) 50 *Journal of Sex Research* 276, 284.

116 *Bunning* (2015) 293 FLR 37, 46 (emphasis added).

117 Rubin, above n 73, 159.

118 Ibid.

119 Ibid.

sex practices' have historically been 'vilified as mental diseases or symptoms of defective personality integration'.¹²⁰ Asexuality, for example, has been pathologised throughout various iterations of the *DSM*, being labelled first under the category of 'Inhibited Sexual Desire'¹²¹ and then 'Hypoactive Sexual Desire Disorder'.¹²² The treatment of sadomasochism under the *DSM* has also historically been marked by pathologisation under the categories 'Sexual Sadism' and 'Sexual Masochism'.¹²³ However, concerns that anti-discrimination protections should not be extended to these sexualities because they may constitute a mental 'disorder' lack weight. The *DSM* is by no means a purely objective document that can be referred to uncritically for legal guidance: the diagnostic criteria and disorders that it contains are thoroughly inflected by the broader sociopolitical context in which it is produced.¹²⁴ This is especially true with regards to its treatment of sexuality. For example, homosexuality was classified as a disorder within the *DSM* until 1973.¹²⁵ Even if we were to still refer to the *DSM* for legal guidance here, the most recent edition of the *DSM* has shifted away from always and necessarily recognising various sexual minorities as constituting 'disorders'. As of the fifth edition of the *DSM* released in 2013, 'self-identified asexuality' has been recognised as a 'nonclinical alternative to a diagnosis of a desire disorder'.¹²⁶ So too, sadomasochism has been recognised as something that does not necessitate a diagnosis or automatically require treatment.¹²⁷ Rubin's comment on the removal of homosexuality from the *DSM* is remarkably prescient in its relevance to the present day: 'Sexualities keep marching out of the *Diagnostic and Statistical Manual* and on to the pages of social history.'¹²⁸

If it were to be accepted that anti-discrimination law should protect a wider range of minority sexualities or 'deviations' than it currently does, there remains a concern that certain types of criminal sexualities would still need to be properly

120 Ibid.

121 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Publishing, 3rd ed, 1980) 278–9.

122 Emens, 'Compulsory Sexuality', above n 8, 309–10; American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Publishing, 4th ed, 1994) 496–8; American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Publishing, 4th ed, text revision, 2000) 539–41.

123 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Publishing, 3rd ed, 1980) 273–5; American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Publishing, 4th ed, 1994) 529–30; American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Publishing, 4th ed, text revision, 2000) 572–4.

124 See generally de Block and Adriaens, above n 115; J Paul Fedoroff, Lisha Di Gioacchino and Lisa Murphy, 'Problems with Paraphilias in the DSM-5' (2013) 15 *Current Psychiatry Reports* 363.

125 See generally de Block and Adriaens, above n 115, 287–9. Though 'ego-dystonic homosexuality' persisted as a recognised disorder until as late as 1987: at 288 n 4.

126 Emens, above n 8, 312 (citations omitted); American Psychiatric Association, *DSM-IV*, above n 115, 434, 443.

127 American Psychiatric Association, *DSM-IV*, above n 115, 694–7.

128 Rubin, above n 73, 164.

excluded from this protection.¹²⁹ In *Bunning*, one of the reasons that Vasta J rejected the proposition that polyamorists and sadomasochists should be able claim that their sexual ‘behaviours’ constituted ‘sexual orientations’ was that ‘[i]f the contention were correct, then the illegal activities of paedophilia and necrophilia may have the protection of the *Sex Discrimination Act 1984* (Cth). Such a result would be an absurdity’.¹³⁰ Whilst Vasta J’s concern here was specifically about the operation of the current provisions of the Act, this point does raise the broader question of whether or not anti-discrimination protections around sexuality could be made more expansive without being made too expansive. Indeed, it could be argued that restricting anti-discrimination protections to the sex-directed aspects of ‘sexual orientation’ provides a clear break-point in what could otherwise be a slippery-slope descent into protecting all types of sexuality, no matter how repugnant. Whilst it is beyond the scope of this article to set out in exacting detail how this could be done, it is my contention that there are a number of viable options for selectively expanding anti-discrimination protections around sexuality whilst maintaining the legal exclusion of certain criminal types of sexuality. In particular, this article will argue that the creation of an additional ‘sexuality’ ground of anti-discrimination protection is the most satisfactory of these options.

One option would be the gradual and incremental opening up the scope of the legal definition of ‘sexual orientation’ to extend it, on a case-by-case basis, to encompass types of sexuality that are similar to those types that are already covered. Tweedy has argued, for example, that because ‘polyamory shares some of the important attributes of sexual orientation as traditionally understood ... it makes conceptual sense for polyamory to be viewed as part of sexual orientation’.¹³¹ On this model of legal change, slippery-slope concerns are foreclosed by the dissimilarity between the already protected category of ‘sexual orientation’ and criminal types of sexuality, the latter of which may be differentially characterised by harm, the involvement of children, animals or dead bodies, and/or lack of consent. However, this model of legal change seems to fit uneasily within the current Australian context. The Australian Federal Government made its intentions very clear with regard to the specifically sex-directed scope of the ‘sexual orientation’ protection that it created,¹³² and it would be unlikely for a court to interpret the ‘sexual orientation’ protections in a manner that was inconsistent with these intentions. Furthermore, it is symbolically important for anti-discrimination law to explicitly and specifically address discrimination on the basis of sex-directed ‘sexual orientation’. The discrimination suffered by gay men, lesbian women and bisexual people is discrimination of a particular kind, ie homophobia, and carries

129 Interestingly, as Thornton notes, in New South Wales ‘when the *Anti-Discrimination Act* was amended in 1982 to proscribe discrimination on the ground of homosexuality, consensual homosexual activity between adult males was still an offence’, and the resulting ‘anomaly’ was only resolved in 1984 when this offence was abolished: Thornton, above n 87, 84.

130 *Bunning* (2015) 293 FLR 37, 47.

131 Tweedy, above n 7, 1514.

132 Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013.

with it a particular history and sociopolitical importance. Any discrimination suffered by other sexual minorities should still be recognised and condemned as a form of discrimination based on sexuality, but it may be more appropriate for it to be addressed under a separate category in order to reflect this difference. Acknowledging the important differences that can exist between seemingly related kinds of discrimination is something that is familiar to anti-discrimination law, for example 'sex' and 'gender identity' are separate grounds of discrimination,¹³³ as are 'race' and 'colour'.¹³⁴

Another way to expand anti-discrimination law around sexuality would be the creation of additional, specific grounds of protection to sit alongside 'sexual orientation'. In order to avoid the risk of over-breadth this could come in the form of new grounds limited to certain types of sexualities, such as the creation of the ground of 'polyamory', 'asexuality' or 'sodomasochism'. However, this individualistic approach towards discrete anti-discrimination protections may not be consistent with the trend within Australian anti-discrimination law towards formal equality and the broad and equal protection of members of all relevant groups (discussed above), as it would not also seem to protect the monogamous (ie non-polyamorous) or the vanilla (ie non-sodomasochistic).

A potentially more inclusive and less piecemeal approach may already be modelled in existing state anti-discrimination legislation. In Queensland, Tasmania and Victoria, 'lawful sexual activity' is a protected ground under anti-discrimination law.¹³⁵ On a commonsense understanding of the term 'lawful sexual activity' this ground would appear to protect sexual minorities such as polyamorists and sadomasochists as well as people who are monogamous or 'vanilla',¹³⁶ whilst also instituting the principled break-point of lawfulness in order to exclude criminal types of sexuality. However, statutory and case law definitions of 'lawful sexual activity', such as in Queensland, have typically reduced the scope of this ground to lawful commercial sex work.¹³⁷ Even if this kind of ground was to be more broadly defined, protecting sexual minorities on the basis that they constitute 'lawful sexual activity' is problematic for the reasons discussed above around the purported distinction between sexual identities and actions. During the AHRC's community consultation in 2010–11 about the then future extension of federal anti-discrimination law to cover LGBTI people, the possibility of incorporating a new protected ground of 'lawful sexual activity' was suggested by a number of

133 *Sex Discrimination Act 1984* (Cth) ss 5, 5B.

134 *Racial Discrimination Act 1975* (Cth) s 9.

135 Rees, Lindsay and Rice, above n 3, 362. See *Anti-Discrimination Act 1991* (Qld) s 7(l); *Anti-Discrimination Act 1998* (Tas) s 16(d); *Equal Opportunity Act 2010* (Vic) s 6(g).

136 Questions can be raised about the lawfulness of those particular sadomasochistic activities that result in injuries amounting to bodily harm. See, eg, *R v Brown* [1994] 1 AC 212. Nevertheless, sadomasochistic activities that simply involve role-playing, physical restraint and/or the infliction of pain without injury (such as spanking) are clearly lawful.

137 Rees, Lindsay and Rice, above n 3, 362. See *Anti-Discrimination Act 1991* (Qld) s 4; *Cassidy v Leader Associated Newspapers Pty Ltd* [2002] VCAT 1656 (21 November 2002); *Dovedeen Pty Ltd v GK* [2013] QCA 194.

participants.¹³⁸ The AHRC reported, though, that ‘[s]ome participants ... were offended by the reference to lawful sexual activity because they felt it has the effect “of reducing lesbian and gay people to ‘sexual acts’, excluding broader notions of identity and community”’.¹³⁹ These exact considerations also apply to the broader range of sexual minorities considered in this article as well.

An alternative way to open up the scope of anti-discrimination law to encompass deserving sexual minorities would be to recognise a new broad-based ground of ‘sexuality’ alongside the existing ground of ‘sexual orientation’. As with Drobac’s proposed model of ‘pansexuality’, a generalised ground of ‘sexuality’ could conceivably cover a broad ‘panoply of sexual traits and legal sexual practices’ without necessarily leading ‘to the conclusion that all [sexual] subsets (such as pedophilia, bestiality, or sexual violence) deserve protection’.¹⁴⁰ It could do this through the selective paring back of the scope of this protection in order to exclude criminal types of sexuality. This could be accomplished by legally defining this ‘sexuality’ ground as encompassing both a person’s desire, preference or attraction towards lawful sexual activities (including the lack of any such desire, preference or attraction) as well as their engagement in lawful sexual activities. Such an approach would allow for the protection of certain deserving minority sexualities such as polyamory, asexuality and sadomasochism whilst preserving the clear principled break-point of lawfulness that excludes undeserving others. It would preserve the particularity of the existing ‘sexual orientation’ ground by sitting alongside this ground, and it would do so in a way that provides formal equality by also protecting people whose sexuality is monogamous or ‘vanilla’ in nature. Significantly, whilst such a ground would recognise the importance of distinguishing between lawful and criminal sexual activities, it does not offer legal protection to sexual minorities on the ontologically reductive basis that these sexualities are simply activities. Rather, it recognises that sexuality may be an embedded or internal aspect of the person. The viability of this ‘sexuality’ ground demonstrates that any concerns about potential over-breadth that may arise from opening up anti-discrimination protections around sexuality can be addressed by careful legal planning and drafting, and do not provide a compelling justification for excluding non-criminal but non-normative sexualities from such protection.

Moving past the specific issue of how to set a clear limit for the selective legal protection of non-harmful sexualities, it is also necessary to engage with the broader issue of how to set a clear limit for the recognition of the validity of equality claims made by minority groups. Cooper identifies that in contemporary society many different kinds of groups have adopted equality rhetoric to defend their practices and identities and to portray themselves as oppressed minorities,

138 Australian Human Rights Commission, *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination*, above n 3, 23.

139 Ibid. See also Chapman, above n 5, [13].

140 Jennifer Ann Drobac, ‘Pansexuality and the Law’ (1999) 5 *William & Mary Journal of Women and the Law* 297, 307. It is important to note here that Drobac’s definition of the word ‘pansexuality’ as broadly describing ‘all kinds of sexuality’: at 300, is at odds with contemporary popular usage: see above n 30.

including smokers, recreational hunters and various Christian groups.¹⁴¹ Multiple different kinds of 'unfashionable' groups such as these 'have argued for rights to counter what they claimed were experiences of marginality, discrimination and oppression' and have 'sought to challenge the current distribution ... of minority status and entitlements'.¹⁴² But if we accept that the state is entitled to treat different groups differently and that not all and every activity or identity should be able to claim legal protection for equality (including anti-discrimination protections), then the question becomes how to determine which group's claims should be treated as legitimate.

Cooper has argued that there are two major types of response to determining this question of 'which discriminations are invalid'.¹⁴³ The first type of response, which Cooper describes as being 'more liberal' in nature,¹⁴⁴ places 'practices, groups and identities at the analytical and critical centre'.¹⁴⁵ This response focuses on the minority group in question, 'distinguishes between immutable and mutable differences', evaluates whether 'equality-oriented reforms are possible and just' and is concerned with the notion of harm and 'who, if anyone, does the minority practice injure or offend'.¹⁴⁶ This article has so far been concerned with establishing just this kind of liberal response. It has focused primarily on the sexual minority groupings of polyamory, asexuality and sadomasochism, and has argued that these sexual minorities could be understood as immutable or at least strongly embedded identities, that extending discrimination protections to these groups is justified on both a practical and symbolic basis, and that such benign sexual variations can be protected without legally legitimising other, harmful forms of sexuality. However, Cooper also identifies a second type of response, which she characterises as 'more critical or radical' in nature.¹⁴⁷ This approach is focused at the structural or systemic level rather than the individual or group level and is concerned primarily with the ways in which 'discriminations constitute structured inequalities'.¹⁴⁸ On this account, it is not enough to argue simply that a minority group may constitute an immutable or embedded identity and may suffer from actual disadvantage or discrimination. In order to establish that this discrimination is invalid, and thus to legitimately invoke equality claims, Cooper argues that it must 'shape other dimensions of the social' and thus 'significantly impact on social dynamics such as the intimate/impersonal, capitalism and

141 Davina Cooper, *Challenging Diversity: Rethinking Equality and the Value of Difference* (Cambridge University Press, 2004). See, eg, the recent 'discrimination' claims made by various Christian individuals who have been sanctioned after they refused to provide goods or services to homosexual people: Davina Cooper and Didi Herman, 'Up against the Property Logic of Equality Law: Conservative Christian Accommodation Claims and Gay Rights' (2013) 21 *Feminist Legal Studies* 61.

142 Cooper, *Challenging Diversity*, above n 141, 60.

143 Davina Cooper, 'Theorising Nudist Equality: An Encounter between Political Fantasy and Public Appearance' (2011) 43 *Antipode* 326, 332.

144 Ibid.

145 Cooper, *Challenging Diversity*, above n 141, 194.

146 Cooper, 'Theorising Nudist Equality', above n 143, 332–3.

147 Ibid 333.

148 Ibid.

community boundary maintenance'.¹⁴⁹ That is, discrimination against a group is illegitimate where it operates as part of an organising principle of inequality that 'structure[s], in significant ways, social relations and practices' and 'generate[s] extensive, multi-layered forms of difference: at a metaphorical, economic, cultural, and social level'.¹⁵⁰ Race, sex, gender and other familiar protected grounds under anti-discrimination law clearly fulfil this criterion because inequalities on these grounds do operate in broad, socially patterned ways.

The relevant issue for this paper then becomes whether sexual minorities such as polyamorists, asexuals and sadomasochists are merely 'unpopular' and maybe 'unfashionable' minority groups who, like smokers or recreational hunters, experience a form of social and legal marginalisation that is legitimate and that does not necessitate state intervention because it is not patterned on a broader organising principle of inequality. This is clearly not the case. Cooper herself treats 'as found' the notion that 'sexuality within modern Western societies' does indeed 'operat[e] as a structural form of social inequality'.¹⁵¹ Whilst she predominantly focuses on how divisions between heterosexuality and homosexuality have operated as part of sexuality's organising principle of inequality,¹⁵² it is also evident that other aspects of sexuality structure our broad social relations and practices in ways that embed inequalities. Emens utilises the term 'compulsory sexuality' to refer to the 'pervasive cultural assumption ... that everyone is defined by some kind of sexual attraction',¹⁵³ which structures social understandings of interpersonal dynamics, the legal recognition and benefits afforded to couples and various types of cultural texts. Similarly, it has been argued that Western culture and society is characterised by 'mononormativity', that is the set of 'dominant assumptions of the normalcy and naturalness of monogamy' that 'tend to present monogamous coupledness as the only natural and/or morally correct form of human relating'.¹⁵⁴ The broader structured nature of the inequalities faced by sexual minorities is also particularly evident in their histories of pathologisation discussed above. Indeed, the conceptualisation of sadomasochism as a mental disorder rather than a sexual identity is also part of a broader set of embedded inequalities that is patterned across other important areas. For example, human rights claims to privacy protections have been denied to sadomasochists through the re-patterning of the public/private divide around sexuality to cast sadomasochism as an issue of social rather than personal concern.¹⁵⁵

149 Cooper, *Challenging Diversity*, above n 141, 195.

150 Davina Cooper, "'And You Can't Find Me Nowhere'": Relocating Identity and Structure within Equality Jurisprudence' (2000) 27 *Journal of Law and Society* 249, 262.

151 Cooper, *Challenging Diversity*, above n 141, 194.

152 Though in earlier work she has engaged with the issue of state regulation of sadomasochism: Davina Cooper, 'An Engaged State: Sexuality, Governance, and the Potential for Change' (1993) 20 *Journal of Law and Society* 257.

153 Emens, 'Compulsory Sexuality', above n 8, 306 n 6.

154 Meg Barker and Darren Langdridge, 'Whatever Happened to Non-Monogamies? Critical Reflections on Recent Research and Theory' (2010) 13 *Sexualities* 748, 750 (citations omitted).

155 See, eg, *Laskey v United Kingdom* [1997] 24 Eur Court HR 39.

If sexuality does operate as a broad organising principle of inequality that disadvantages a variety of sexual minorities in a patterned way across multiple social and legal institutions, then the equality claims made by the polyamorist, the asexual and the sadomasochist are not akin to the equality claims made by smokers or recreational hunters. Recognising these sexual minorities within anti-discrimination law does not therefore create a concern of legal over-breadth as the law is not obliged to offer anti-discrimination protection to any and every different kind of minority practice or grouping. Instead, the law can in a principled way selectively legitimate those equality claims which relate to discrimination suffered on the basis of organising principles of inequality such as race, sex, gender and, importantly for this article, sexuality.

IV CONCLUSION

The extension of federal anti-discrimination protections to cover the ground of 'sexual orientation' is a very important and laudable change insofar as it addresses the historical and ongoing discrimination suffered by gay men, lesbian women and bisexual people in Australia. This extension, however, seems to do nothing for the other sexual minorities that exist within Australia, minorities that, as demonstrated in *Bunning*, are actively seeking the protection of the law. Sexuality lies at the 'core of human dignity, identity and personhood ... [it] is fundamental to individual existence; or, more simply, it is fundamental to existence, to human existence'.¹⁵⁶ Whilst sex-directed sexual orientation is an integral part of many people's sexuality, this singular axis does not exhaustively characterise the entire range of human sexuality. It simply cannot be the case that out of the extraordinarily wide variety of desires, fantasies, actions and identities that exist within human sexuality that the only aspect worthy of protection by anti-discrimination law is that which orients it towards the biological sex of others. Law's reductive focus on sex-directed sexual orientation reflects a crudely simplistic model of human sexuality, and with such simplicity 'comes the loss of complexity — complexity in our erotic lives, in the way we understand and organize our very subjectivity'.¹⁵⁷

Anti-discrimination law cannot and should not protect every conceivable human variation, including sexual variation. However, certain minority sexualities, such as polyamory, asexuality and sadomasochism, should be protected. For some people these types of sexuality constitute deeply embedded or immutable aspects of their identity, and cannot be dismissed or erased as simply being merely actions. Protecting these sexualities would not only address the real risk of actual discrimination faced by sexual minority members but would also help promote anti-discrimination law's symbolic commitment to equality and social cohesion. Through the careful drafting of future legal developments in

¹⁵⁶ Heinze, above n 6, 157–8.

¹⁵⁷ Naomi Mezey, 'Response: The Death of the Bisexual Saboteur' (2012) 100 *Georgetown Law Journal* 1093, 1103.

this area this can be accomplished without incidentally providing protection to criminal sexual behaviour, and the creation of an additional anti-discrimination ground of ‘sexuality’ to sit alongside ‘sexual orientation’ is the optimal way to do this. Furthermore, because sexuality operates as a key organising principle of inequality within society, opening up anti-discrimination law in this way does not also commit law to recognising as legitimate every conceivable claim for equality protection made by a minority group that purports to have a core identity and an experience of discrimination.

Whilst the recent federal developments in anti-discrimination law may be a key symbolic step forward in Australia’s ongoing ‘journey of enlightenment’ towards the ‘end of unfair discrimination’ in relation to sexuality,¹⁵⁸ by no means do these developments mark the end of this journey. Further legal steps still need to be taken, and these steps should include the extension of anti-discrimination protections to polyamory, asexuality and sadomasochism. Obviously, if such protections were to actually be extended then there would be a number of additional issues that would also need to be worked through that have not been addressed in this article. For example, it would need to be determined if any exemptions (including religious exemptions) should apply to these protections and the scope of any resulting exemptions would also need to be appropriately calibrated. However, in order to engage in a specific discussion like this about how exactly such protections could be implemented, it is first necessary to establish the general proposition that such protections should be implemented. To this end, this article has argued that there is a clear principled case for extending anti-discrimination protections to cover a broader range of sexual minorities.

158 Kirby, above n 5, 45.