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# With that ring, I thee judge: why the law should not allow exceptions on marriage equality

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In the US and Ireland there have been headline court cases of bakers refusing to make cakes for same-sex weddings. Shutterstock

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In July 2012, Charlie Craig and David Mullins went into Masterpiece Cakeshop in Lakewood, Colorado, to order a cake for their wedding. Jack Phillips, the owner of the shop, responded by informing them he would not make a cake for a same-sex wedding. Craig and Mullins immediately got up and left. Later they sued Phillips for discrimination.

What if this happened in Australia?

While Phillips' conduct may have been lawful here until 2012, in 2013 the Sex Discrimination Act was amended to explicitly include sexual orientation as a prohibited ground of discrimination. As a result, it is now unlawful for most employers and service providers to deny equal treatment to anyone on the basis of their sexual orientation.

This amendment has been contentious, particularly in light of the current push to legislate for marriage equality. It has been argued by some religious groups that it could result in a breach of their religious freedom by forcing them to provide services to LGBTI people.

This is exactly what did happen in Colorado. Craig and Mullins were successful in their legal action and Phillips was ordered to:

> *… [c]ease and desist from discriminating against … same-sex couples by refusing to sell them wedding cakes or any other product [they] would provide to heterosexual couples.*

In his judgment, Justice Spencer observed:

> *At first blush, it may seem reasonable that a private business should be able to refuse service to anyone it chooses. This view, however, fails to take into account the cost to society and the hurt caused to persons who are denied service simply because of who they are.*

He went on to explain that US law has interpreted religious freedom narrowly to primarily cover:

> *… activities fundamental to the individual's religious belief, that do not adversely affect the rights of others, and that are not outweighed by the state's legitimate interests in promoting health, safety and general welfare.*

In dismissing Phillips' religious freedom arguments, Justice Spencer emphasised that:

> *… [t]o excuse all religiously motivated conduct from state control would permit every citizen to become a law unto himself.*

He noted that:

> *… [c]onceptually, [Phillips'] refusal to serve a same-sex couple due to religious objection to same-sex weddings is no different from refusing to serve a biracial couple because of religious objection to biracial marriage.*

Some Australian religious groups have expressed concern about this shift towards the stronger protection of the rights of LGBTI people. Archbishop Anthony Fisher, for example, argues this protection risks excessively reducing the space for religious liberty and "licences [the] vilification of people's conscientious beliefs".

However, such arguments privilege the status quo under which a narrow segment of society have been allowed to assert their rights and freedoms at the expense of the rights and freedoms of others.

Discrimination is rife in Australia. People are regularly denied equal access to both employment on the grounds of race, parental status, and disability.

They are also denied access to services, demonstrated by taxi drivers leaving Indigenous Australians stranded on the street, employers declining to interview people with "ethnic-sounding names",

breastfeeding mothers being asked to leave swimming pools and food courts, and real estate agents refusing housing to Indigenous Australians.

Anti-discrimination legislation is a legal response to this ongoing cultural problem. Its gradual expansion in Australia reflects international human rights law and a vision for a more equal society – one in which everyone can have equal access to employment and services, and no-one will be subjected to the dehumanising experience of being denied equal treatment.

Nonetheless, the federal government is reported to be considering the inclusion of "appropriate protections for religious freedom and conscientious objections" alongside any amendments to the Marriage Act.

While it is unclear what these protections might include, the proposal sounds similar to a proposed exemption in Northern Ireland that would allow businesses to refuse service in situations where someone feels they are required to "endorse a same-sex sexual relationship in violation of his/her faith identity".

The Northern Ireland amendment came after Daniel and Amy McArthur, owners of Ashers Bakery in Belfast, were fined for refusing to provide a cake with a pro-marriage equality slogan. While this case does raise some questions around freedom of political expression, the proposed exemption has been criticised for effectively providing carte blanche to all forms of discrimination against LGBTI people.

In finding an appropriate balance between the right to equality and the right to religious freedom, Australia could draw inspiration from US law. It focuses protection on:

> *... activities fundamental to the individual's religious belief, that do not adversely affect the rights of others, and that are not outweighed by the state's legitimate interests in promoting health, safety and general welfare.*

The right to discriminate against others does not fit this criterion.

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*Cristy Clark will be online for an Author Q&A between 1 and 2pm AEDT on Thursday, October 6, 2016. Post your questions in the comments below.*

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