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Religious anti-discrimination legislation and the negotiation of difference in Victoria, Australia

Douglas Ezzy [a], Rebecca Banham [a] and Lori G. Beaman [b]

[a]School of Social Sciences, University of Tasmania, Hobart, Australia; [b]Department of Classics and Religious Studies, Canada Research Chair, Religious Diversity and Social Change, University of Ottawa, Ottawa, ON, Canada

ABSTRACT

This article examines the role of anti-discrimination legislation in the negotiation of religious difference in the Australian state of Victoria. We argue for the importance of a relational conceptualisation of the negotiation of religious diversity that draws on concepts of etiquette and limitations, deep equality, and substantive equality. The Victorian legislation allows the Victorian Civil and Administrative Tribunal (VCAT) to 'mediate' the relationships between the people and groups that come before it. VCAT mediates relationships in three ways: 1. Providing a forum for constructive intervention in cases of problematic tension between groups, and in doing so facilitating the development of an 'etiquette' for the negotiation of power dynamics, typically between (historically) empowered and disempowered groups in Australia. 2. Providing a forum for making transparent examples of latent and covert discrimination and exclusion, encouraging participants to engage in reflection upon potential future courses of action. 3. The provision (or refusal) of exemptions to the Equal Opportunity Act, providing guidance about the management of religious difference in the public sphere.

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Introduction

This article examines the role of anti-discrimination legislation in the negotiation of religious difference in the Australian state of Victoria. Australia has anti-discrimination legislation at both federal and state/territory levels, but the laws across these jurisdictions are inconsistent and provide a patchwork of protection (Gelber 2011; Ezzy, Banham, and Beaman 2021). Victoria has the nation's most sophisticated legislation in the Racial and Religious Tolerance Act 2001(Vic), and the Equal Opportunity Act 1995/2010 (Vic) (Sarre 2020). This article examines how this Victorian legislation has changed the way that religious conflict is negotiated through an analysis of cases that have come before the Victorian Civil and Administrative Tribunal (VCAT). We argue that the Victorian legislation mediates conflictual relationships between religious people and groups in three ways: 1) intervention; 2) transparency; and 3) the management of difference in the public sphere.

CONTACT Douglas Ezzy Douglas.Ezzy@utas.edu.au School of Social Sciences, University of Tasmania, Hobart, Australia

Victoria's legislation facilitates productive and respectful negotiation of religious diversity in Australia through producing egalitarian outcomes and shaping the etiquette and practice of negotiating conflict between religious protagonists.

In this article we argue for a relational conceptualisation of the negotiation of religious diversity that draws on concepts of etiquette and limitations, deep equality, and substantive equality. These processes play out in the relationships between protagonists in cases drawing on Victoria's anti-discrimination legislation. As we have argued elsewhere, 'authority can be a source of respect and equality when it prevents extremes of religious vilification and discrimination [. . .] However, it can also be problematic if it is used to enforce "sameness" that erases difference' (Ezzy et al. 2020, n.p.). As such, we argue that VCAT and Victoria's associated legislation contribute to the respectful negotiation of religious diversity. This involves both imposing limits where necessary for the protection of marginalised and stigmatised groups, and fostering more egalitarian relationships grounded in the respectful understanding of difference (Beaman 2017). In administering legislation, VCAT has the potential to do this through mediating the relationships of the people and groups that come before it, interrupting the status quo of power dynamics in Australia.

When the Racial and Religious Tolerance Act 2001 (RRT Act) was introduced into the Victorian parliament, the bill's aim was described by S. M. Nguyen as: 'to prevent racial and religious vilification damaging the cohesion and harmony of Victoria's culturally diverse community' (Parliament of Victoria 2001, 1484). He went on to point out that freedom of speech is being used to create hatred and the bill addresses this issue. In the parliamentary debate one reason for opposing the legislation was that 'we already have adequate laws' to address vilification and discrimination (Bowden in Parliament of Victoria 2001, 1497). In contrast, we argue the legislation has important features that were absent from previous legislation through providing interventions, creating transparency, and the management of difference in the public sphere. The Equal Opportunity Act 2010 (EO Act) is explicitly normative, aiming 'to eliminate discrimination, sexual harassment and victimisation, to the greatest possible extent [. . . and] to promote and facilitate the progressive realisation of equality, as far as reasonably practicable' (s. 3(a)-(d)).[1] This combination of the RRT Act and the EO Act makes Victoria an interesting case study for understanding the impact of legislation upon the negotiation of religious diversity. Both the RRT Act and EO Act are concerned with a broader range of attributes than religion, but they are key in shaping how conflicts concerning religious difference are approached, arbitrated, and communicated in Victoria. Alleged breaches of these Acts are heard at VCAT.[2]

VCAT is a tribunal, not a court, and the cases described in this article are typically civil disputes that have been brought before VCAT. There are some distinctive features of both the RRT Act and VCAT that encourage negotiated outcomes in ways that are not as explicit as in judicial courts. VCAT (2019, 4) aims to 'serve the community by resolving disputes in a timely, cost-effective and efficient way'. As part of this commitment to cost-effectiveness and efficiency, the RRT Act and VCAT strongly encourage negotiated outcomes (Douglas and Batagol 2014). Mediation processes are part of a broader commitment to alternative dispute resolution: 'The main processes of ADR [alternative dispute resolution] include negotiation, early neutral evaluation, mediation, conciliation, expert appraisal and arbitration' (Noone and Ojelabi 2020, 109). Of the 2,533 cases that were listed for mediation or compulsory conference at VCAT in 2017–2018, 55% were resolved through this mediation (VCAT 2019, 7).

Unfortunately, cases that were resolved through mediation do not have a public record and there is no indication of how many of these cases resolved through mediation involved religion as an issue. The analysis below focuses on cases in which the mediation did not resolve the case and the case went to a Tribunal hearing, and as a consequence, there is a public record of the case. Another aspect of the Tribunal process is that 'legal representation at VCAT is only permitted at the discretion of Tribunal Members in limited circumstances' (Douglas and Batagol 2014, 771). As a result, most parties represent themselves. MacDermott (2020, 253) argues that the participatory nature of tribunals, in which the parties involved present their concerns to an independent decision maker, facilitates a sense of self-respect. Moreover, such tribunals 'enhance the perceived legitimacy of legal institutions and foster compliance'.

Further, Tribunal processes and evidence criteria are quite different to that of a court (Cane 2010), which is illustrated by the process of 'merits review'. As Cane (2010, 426, 432) explains, while 'the main function of judicial review is to examine the decision for defects and to invalidate the decision if it is defective, the main function of merits review is to bring about the correct or preferable decision'. The cases considered in this article relate to civic disputes, rather than administrative review of decisions. Nonetheless, these different criteria still shape the Tribunal processes. Creyke (2006, 26) suggests that a tribunal's role is 'not simply to [. . .] act as an adversarial umpire'. The tribunal is required to reach 'the "correct or preferable" decision after "informing itself in any manner it thinks fit"'. This flexible and pragmatic focus of VCAT is explicit in the legislation and Tribunal processes.

Victoria's anti-discrimination and anti-vilification legislation is both a product of, and a response to, the tensions that arise as a result of Australia's increasing religiously diverse social landscape. Australian culture has been significantly shaped by Christianity (Fozdar 2011). However, while Christian organisations have enjoyed a 'privileged status [. . .] in Australia for many years' (Poulos 2018, 118), this cultural hegemony is in decline. This loss of Christian hegemony is particularly pronounced in Melbourne, Victoria, where at the 2016 Census 46% of the Melbourne population identified as Christian compared with 52% nationally, 4.2% (vs 2.6% nationally) of Victorians identified as Muslims, 3.8% (vs 2.4%) as Buddhists, and 2.9% (vs 1.9%) as Hindu (Bouma et al. 2021). Some Christians feel threatened by this diversity and have resisted more pluralistic approaches that seek to 'find new forms of public discourse that respect diversity' (Ezzy, Banham, and Beaman 2021, 5).

Australia does not have a formal separation of church and state, nor a state church. This leaves a great deal of room for ambiguity and flexibility in relation to state responses to religion. Nonetheless, the historical dominance of Christianity means there is a religious establishment of sorts that impacts minority religious groups and the conceptualisation of religious freedom more broadly (see Maddox and Smith 2019; Beaman and Sullivan 2016). Australia is highly unusual in also lacking a bill of rights (although Victoria does have its own Charter of Human Rights and Responsibilities Act 2006).

Beyond the resolution of specific disputes, we argue that anti-discrimination and anti-vilification laws shape public opinion and practices associated with the negotiation of difference in the broader community. There is some evidence of these effects in the VCAT cases discussed below. A thorough examination of this issue would require data about broader social responses to the cases that come before the tribunal (see Ezzy, Banham, and Beaman 2021). Here we draw on theories about the 'shadow of the law', or the ways in which law indirectly shapes people's actions in everyday life (Birks 2012, 79–80; Fokas

2019), providing a backdrop against which social actors interact (Crowe et al. 2018, 321; see also MacDermott 2018). We argue that Victoria's legislation and its radiating effects offers a means of productive and respectful negotiation of religious diversity in Australia.

Much of the literature examining anti-discrimination legislation in Australia approaches the issue either from a legal perspective – discussing details of specific cases, decisions, or processes (e.g. Murphy 2016) – or from the perspective of examining whether legislation is effective in shaping behaviour (e.g. Hebl et al. 2016). Instead, we are interested in how the decisions made by the Tribunal reflect ways of negotiating religious difference and conflict that encourages 'living with' the 'other', rather than seeking to exclude, constrain, integrate, or convert the 'other'. That is to say, tribunals, and possibly courts as well, can be understood as venues for expressing, responding to, and learning to live with communal fears, religious difference, and the renegotiation of values and relationships that religious diversity requires.

For example, in the case of *Eatock v Bolt*, Aboriginal woman Pat Eatock, with support from eight others, successfully argued that commentator Andrew Bolt had breached racial vilification laws. Gelber and McNamara (2013) note that while the group could have pursued a defamation allegation, they chose to pursue claims of racial vilification. As Anita Heiss (a member of the complainant group) explains:

> I saw the RDA [Racial Discrimination Act] as being the best forum to deal with an issue such as ours that affected a broader group of peoples. The defamation laws are largely based on the 'harm' done to the reputation of individuals, and *this was not just about my reputation* (Heiss 2012, cited in Gelber and McNamara 2013, 473–4; emphasis added).

Heiss is explicitly arguing that she chose the RDA and VCAT as a forum to pursue the case because of its significance for the broader community. Similarly, we argue that the long-running case between the Islamic Council of Victoria and the evangelical Christian group Catch the Fire Ministries (discussed further below) was as much about setting standards regarding public speech about Muslims as it was about the specific incident and individuals involved.

Previous research has highlighted how anti-discrimination legislation plays a role in framing contests about religion and religious diversity. Ezzy (2013, 2018), for example, argues that legislation, tribunal hearings, and associated processes provide a framework, or form of etiquette, for negotiating rising tensions between groups, providing people with a way of dealing with the religiously different 'other' without exacerbating potentially harmful situations. Similarly, arguments about the 'shadow of the law' describe legislation as shaping public interactions by acting as a 'background measure' of 'acceptable' behaviour (Fokas 2019).

Beaman (2017), however, differentiates between legal equality and 'deep equality', arguing that everyday interactions are more fundamental to experiences of equality, respect, and substantive equality. While there are various perspectives regarding substantive equality (Schiek 2018, 85), Fredman (2016, 712) offers a useful account of the aims of substantive equality:

> to redress disadvantage; to address stigma, stereotyping, prejudice and violence; to enhance voice and participation; and to accommodate difference and achieve structural change [reflecting] the basic principle that the right to equality should be located in the social context, responsive to those who are disadvantaged, demeaned, excluded, or ignored.

Anti-discrimination legislation, tribunals, and courts function beyond their ostensible purpose of arbitrating the legal legitimacy of individual cases. Various people and groups face challenges, stigmas, and historical mistreatments, and anti-discrimination legislation can be conceptualised as both a social response to, and a shaper of, this wider social context (Richardson 2013).

Religion at the Victorian Civil and Administrative Tribunal

To examine how the legal process mediates relationships, we reviewed all publicly available cases heard at VCAT from 2001 until June 2018 that deal substantially with religion.[3] The cases were identified through a search of the WestlawAU and AUSTLII databases on the terms 'anti-discrimination' and 'religion'. From the results of this search, 55 cases were identified as dealing substantially with religion that had been heard under the RRT Act and/or EO Act. Some cases initially identified through the search were excluded from the analysis because although they mentioned religion, on examination of the case, the mention of religion was not a key aspect of the case. Fifteen related to the Racial and Religious Tolerance Act and 46 to the Equal Opportunity Act, with six cases relating to both acts. Only cases that dealt with religion in significant or substantive ways were included in the analysis. Some cases relating to religious diversity are resolved under the Planning and Environment Act 1987(Vic), for example *Hoskin v Greater Bendigo CC and Anor* (2015). While such cases are relevant to the negotiation of religious diversity in Australia, they are not discussed here as our particular focus is on the impact of anti-discrimination and anti-vilification legislation. Cases were thematically analysed.

We argue that the Victorian legislation allows VCAT to 'mediate' the relationships between the people and groups that come before it. VCAT mediates relationships in three ways:

- Providing a forum for constructive intervention in cases of problematic tension between groups. In doing so it facilitates the development of an 'etiquette' for the negotiation of power dynamics, typically between (historically) empowered and disempowered groups in Australia.
- Providing a forum for making transparent examples of latent and covert discrimination and exclusion, encouraging participants to engage in reflection upon potential future courses of action.
- The provision (or refusal) of exemptions to the EO Act, providing guidance about the management of religious difference in the public sphere.

These three themes are not mutually exclusive, and elements of each were found in some cases. However, noting this fluidity of classification, there were ten cases in which 'intervention' was the dominant theme, four cases in which 'transparency' was dominant, and 21 cases in which the provision of 'exemptions' was the focus.

Intervention and 'privilege etiquette'

Ten cases that have come before VCAT are primarily concerned with public vilification. While these cases often do not result in a finding of the RRT Act being violated (e.g. *Bennett v Dingle*), there have been occasional examples of VCAT ruling in favour of

complainants (e.g. *Ordo Templi Orientis v Legg*). These cases are characterised by respondents being confronted by the harms caused by their actions, even though they may remain unconvinced of these harms. VCAT provides a forum for both parties to express often intense and deeply held views. What is particularly significant here is that both parties' views are heard and considered in a context with mutually agreed rules for the exchange of views, and the Tribunal makes an assessment of what is appropriate conduct.

The most publicised of these has been the long-running case between the Islamic Council of Victoria and the evangelical Christian group Catch the Fire Ministries (*Islamic Council of Victoria Inc v Catch the Fire Ministries Inc*, and the subsequent appeal: *Catch the Fire Ministries Inc and Ors v Islamic Council of Victoria Inc and Anor*). In this case, the Islamic Council of Victoria alleged that Catch the Fire Ministries violated the RRT Act, claiming that statements made at a Catch the Fire seminar and in two of their publications vilified Islam. The accusation was that Catch the Fire claimed that Muslims were violent and liars, and also suggested 'that Muslims planned to overthrow western democracy' (Gelber 2011, 103). VCAT heard evidence from expert witnesses arguing that the Catch the Fire pastors had portrayed Islam inaccurately, such as Father Patrick McInerney's statement: 'I do not regard that this seminar gave a true, accurate and representative view of Islam' (at para. 88). VCAT ruled that the Act was violated. While Catch the Fire subsequently won a Supreme Court of Victoria appeal, the case was eventually settled through mediation (Turnbull 2007). Releasing a joint statement, both parties

> affirmed and recognized 'the dignity and worth of every human being, irrespective of their faith', 'the rights of . . . all persons to . . . express their own religious beliefs', 'the rights of . . . all persons, within the limits provided for by the law, to robustly debate religion, including the right to criticize the religious belief of another, in a free, open and democratic society', and 'the value of friendship, respect and cooperation between Christians, Muslims and all people of other faiths' (Gelber 2011, 13).

The motivations for Catch the Fire's inflammatory language are probably multiple, but include a strategy to use the fear of Islam to encourage people to convert to Christianity, and to financially support the work of Catch the Fire (Deen 2008, 160). To some extent, Catch the Fire can be described as seeking to defend the historical privilege of Christianity as the dominant religion in Australia through generating fear about Muslims. This case is inextricably linked to a broader cultural context of rising Islamophobia and conservative backlash against Islam, with some evangelical Christians 'arguing that Australia is a Christian country and Islam poses a serious threat to this foundational value' (Bouma 2011, 437).

In hearing such cases, VCAT provides an intervention into this public Islamophobic rhetoric, 'interrupting' and potentially preventing dangerous interactions between groups (Ezzy 2018). This creates a form of 'public etiquette' – a set of rules about how groups publicly express their opinions about one another. The 'public etiquette' is at least partly a product of the formal rules, procedures, and decisions of VCAT. As Deen (2008, 266) notes in relation to the way local Muslims responded to these incidents:

> they didn't write anonymous death threats or start a riot, they didn't complain to their local imam and ask him to preach a blazing sermon against Catch the Fire Inc. Instead, after attempts at conciliation collapsed, they went to the courts choosing a modern secular route to modify behaviour they believed was dangerous and against the law.

Similarly, as noted in the quote from Gelber above, Catch the Fire agreed to be bound by 'mutual boundaries of tolerance, decency, and respect, acknowledging that people must stay within the limits of the law and a recognition that the Racial and Religious Tolerance Act forms part of the law of Victoria' (Deen 2008, 264). This is a substantial retreat from the initial position of Catch the Fire who were 'determined to damage Islam in Australia [. . . and] perceived Christianity in Australia to be under siege and any legislation that provided protection to non-Christians – or dared propose equal rights – as a threat to Australia and Christians generally' (Deen 2008, 263). The case was much more than a process to resolve a disagreement between two parties. In one sense this involves a commitment to the rule of law in which 'citizens are bound by and act consistent with the law' (Tamanaha 2007, 3). But, beyond that, it involves setting standards of practice for the etiquette of the public negotiation of religious difference.

Some criticise this function of VCAT and the legislation as impeding freedom of speech (Durie 2005). It is inevitable that groups will disagree, dislike, even hate one another. However, we argue that to facilitate respectful relationships, the constraint on freedom of speech is justified. This is particularly crucial in cases of entrenched power dynamics, where the criticism of, or expression of hatred towards, one group by another is already both formally and informally legitimated by historical systems of inequality. The Victorian legislation creates a non-violent forum and etiquette for the negotiation of religious difference that allows the participants to continue to disagree, sometimes passionately and vehemently. Most importantly, it facilitates non-violent ways of expressing, resisting, and learning to live with such intense disagreement.

This establishment of an etiquette for the public negotiation of diversity is clearest in cases involving vilification, but is also present in cases involving discrimination. An anti-discrimination case that illustrates this theme is *Cobaw Community Health Services v Christian Youth Camps Ltd*, and subsequent appeal (*Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors)*. In *Cobaw*, an LGBT+ youth organisation (the WayOut project) alleged that their booking for the Phillip Island Adventure Resort was denied due to the sexual orientation of attendees. Operating the resort was Christian Youth Camps (CYC), a group established by trustees of the Christian Brethren Trust. While CYC claimed they had not discriminated against the proposed attendees, VCAT found that they had engaged in discrimination on the basis of sexual orientation. CYC went on to argue that in such a case, discrimination may be allowable as the WayOut project's message was 'contrary to the beliefs of the respondents and the Christian Brethren religion' (at para. 206). VCAT disagreed, finding the CYC in breach of the EO Act as 'neither of the exemptions directed at preserving religious freedom applied in the circumstances of the case' (*Christian Youth Camps*, at para. 11(b)). The Court of Appeals dismissed CYC's appeal (Murphy 2016), establishing clear etiquette regarding the invocation of religious beliefs to discriminate against others in the public sphere:

> Even if it were accepted that the wrongfulness of homosexual sexual activity was a doctrine of the Christian Brethren, it would not follow that a refusal to provide accommodation in circumstances such as these 'conformed' with that doctrine [. . .] It was not suggested by any of the expert witnesses that the prohibition on homosexual sexual activity carried with it an obligation to interfere with, or obstruct, or discourage, the expression by other persons of their sexual preferences (at paras. 280–284).

In both *Catch the Fire* and *Cobaw* VCAT's decisions mean that disempowered groups have an opportunity to have their case heard in a public forum and conducted in a structured way that is facilitated by the Tribunal processes. Proponents were able to express their fears and understandings, and the associated harms (both real and anticipated), and have these heard and considered, both by their opponents and by an impartial third party. This demonstrates how tribunals and legislation provide important, mediated opportunities for the expression of opinions and differences.

More generally, as the quote above illustrates, these cases establish an etiquette for broader public debate. They establish acceptable practices and limits on what groups can or cannot not say about one another in public. The effect of the *Catch the Fire* case, for example, has been to give pause to those who may have publicly engaged in Islamophobic rhetoric (Deen 2008). That is to say, it has constrained the expression of hatred and vilifying language in public.

It is highly likely that Catch the Fire retain their Islamophobic views and that the Christian Brethren continue to consider it unacceptable that a group using their campsite endorses homosexuality. These outcomes do not generate the 'agonistic respect, recognition of similarity, and a concomitant acceptance of difference, creation of community, and neighbourliness' characteristic of deep equality (Beaman 2017 loc 357). Rather, the outcomes establish an etiquette for the negotiation of substantive equality (Fredman 2016) in the context of passionately held prejudicial and harmful beliefs. The outcomes of these cases before VCAT establish etiquettes that require these Christian groups to learn to live with their prejudicial attitudes in ways that minimise the stigma and violence they cause.

Transparency and reflection

VCAT's relationship mediation also facilitates reflective self-understanding and constructive social change. This can occur through cases in which latent discriminations, exclusions, and othering are made visible and explicit. These cases create an opportunity for groups engaged in exclusionary practices to reflect upon their motivations and the outcomes of their actions. *Arora v Melton Christian College* provides the best example of this process. In March 2016, the Sikh Arora family wished to enrol their five-year-old son Sidhak at Melton Christian College (MCC), a non-denominational Christian school. Following traditional Sikh practices, Sidhak had uncut hair (*kesh*) and wore a *patka*. MCC informed the Aroras that Sidhak would need to comply with the school's uniform policy, which required boys to have short hair, and refrain from wearing 'any head coverings related to a non-Christian faith' (para. 4). Sidhak's parents argued that this requirement constituted discrimination against Sidhak. VCAT agreed with this argument, finding that MCC had contravened the EO Act.

A particularly interesting aspect of this case is the way in which MCC's internal processes, which had remained largely out of view, were rendered visible and thus subject to scrutiny. Sidhak was excluded not because he was a non-Christian student, but because he *looked* like a non-Christian student. During the hearing, one of the founders of the school agreed that 'it was ok for a student not [to] be Christian, so long as the student did not look like they were not a Christian' (para. 66.w.). However, as J. Grainger, who presided over the case outlined, such a uniform policy 'could be

described as "openly discriminatory"' (para. 89), and 'it is not reasonable to accept enrolment applications from students from non-Christian faiths only on condition that they do not look like they practice a non-Christian religion' (para. 6(e)v.). Such exclusionary policies are unlikely to present an issue for many students who, regardless of whether they do or do not identify as Christian, could 'pass' as such. The presentation of Sidhak's case before VCAT ensured that both the exclusion, and the latent discrimination underlying it, were made explicit.

Further, VCAT's approach to resolving this issue was oriented towards the future, addressing the discriminatory exclusion, rather than adopting a punitive approach. J. Grainger stated that 'allowing Sidhak to wear a patka in the same colour of the school uniform is a [. . .] reasonable accommodation' (para. 102). Following this, MCC amended its uniform policy and Sidhak was able to enrol at MCC, with the school expressing that it 'regret[ted] the difficulties that took place with respect to the enrolment' (Grewal 2018). As such, VCAT promoted reflexivity on the part of a historically privileged institution. The school justified this change in policy with reference to its commitment to being an 'inclusive school'. This suggests that the change in enrolment policy was a product of a change in self-understanding about what it meant to be 'inclusive'. These sorts of self-reflexive practices are evidence of the impact of VCAT and the legislation beyond the particular case, encouraging a form of 'neighbourliness' characteristic of deep equality (Beaman 2017 loc 357).

Another example of this process can be seen in *Rocca v St Columba's College Ltd & Rogers*, in which St Columba's College had denied enrolment to 11-year-old Carina Rocca – baptised Greek Orthodox – due to an enrolment policy prioritising the enrolment of Catholic students. However, the VCAT hearing revealed that this enrolment policy had been changed to emphasise the prioritisation of Catholic students *after* the Rocca family had seen a different copy which did not include this clause. The College was subsequently ordered to reserve an enrolment position for Carina. Although the hearing did not result in a change to the College's enrolment procedures, it did ensure that people who apply to the school are explicitly informed of their policies. This case is notable because discrimination is permitted: Catholic schools are permitted to prioritise Catholic students and St Columba's College (2020) is now explicit about the prioritisation of Catholic students (as per EO Act 2010, s. 39). What is now required as a result of the *Rocca* case is that this policy be open, public, and explicit. Whether it is the removal of policies that result in latent discrimination, or the making explicit of policies that result in legally acceptable forms of discrimination, the legislation encourages a form of open and public debate about policies and practices that impact on religious, and nonreligious, stakeholders. These practices have some similarities to Halafoff's (2013) description of Habermasian cosmopolitanism in the Interfaith movement, which begins with a recognition of the interdependence of all life. It also combines a respect for diversity with an emphasis on equal rights. The overarching theme is radical reflexivity.

The reflexivity encouraged by the *Arora* VCAT process could be understood as resulting in a form of deep equality that included an 'acceptance of difference, creation of community, and neighbourliness' (Beaman 2017 loc 357). This seems to be less the case for *Rocca*: Catholic privilege is retained, even if the etiquette for practising this privilege is made more explicit.

Managing religious difference in the public sphere

A third theme of relationship mediation is observed in the granting of temporary exemptions to the EO Act. These exemptions allow organisations to legally discriminate if VCAT is satisfied that to do so would further the aims of the Act. There were 21 of these exemptions in our sample of cases. Exemptions are typically justified as accommodating (religious) difference in the public sphere. Where an individual's religiosity requires a space or event to be exclusive or discriminatory in some way, this religious requirement is accommodated within social services that are assumed to be non-religious. The rationale for this is explained in one such decision:

> The granting of the exemption is consistent with that objective of the EO Act which is directed to the promotion and recognition of everyone's right to equality of opportunity [. . .] Those purposes are respectively the protection of public health, and providing services or facilities to meet the special needs of those with a particular attribute or to redress or reduce disadvantage suffered by them in specified areas of activity (*Ascot Vale*, at para. 17).

There are two main types of cases relating to this theme: exemption cases resulting in 'simple' outcomes, and exemption cases resulting in more complex outcomes. Simple exemption cases follow a similar structure: typically, a business or organisation applies for a temporary exemption to the EO Act, which is granted by VCAT with little controversy. For example, in *YMCA – Ascot Vale Leisure Centre*, Ascot Vale Leisure Centre applied for an exemption to allow the centre to run women-only swimming sessions for two hours a week, which would be staffed exclusively by women. The application notes that Ascot Vale is a multicultural area, with an identified need for women-only sessions, particularly for Muslim women. J. McKenzie allowed the exemption, stating that the women-only sessions:

> would provide physical exercise for these women, with consequent improvements in health and well-being. They would give the women a chance to socialise, with other women from many different backgrounds, and would provide opportunities for social connectedness, making friendships, and increasing understanding of and tolerance for others from different cultural or religious backgrounds (para. 12).

Similar justifications are common in simple exemption cases, suggesting that VCAT supports the promotion of values such as 'tolerance', encouraging 'cohesion', and facilitating participation in the public sphere, particularly by those who are at a higher risk of isolation.

The acknowledgement of religious requirements (for example for Muslims) points to an assumption of Australian civic society as nonreligious. The argument generally considers the needs of religiously diverse people that must be accounted for and accommodated in these nonreligious civic spaces, suggesting that it is only with the full social participation of religious minorities that misunderstandings and unfamiliarity may be broken down. While this has the potential to reaffirm uncritical conceptions of social cohesion (Ezzy et al. 2020) and tolerance (Beaman 2017), these exemptions (and the reasoning behind them) can be understood as well-intentioned efforts to facilitate everyday experiences of equality and respect. The EO Act aims 'to promote the recognition and acceptance of equality of opportunity [in order to] correct an imbalance or to address a disadvantage' (*Mornington Baptist* para. 38). While this 'does not guarantee that more [marginalised

groups will] take advantage of those opportunities' (Fredman 2016, 723), it facilitates the respectful management of religious difference in the Australian public sphere through encouraging everyday interaction grounded in equality. Rather than erasing differences, the granting of these exemptions acknowledges and supports difference as a fundamental part of living well together (Beaman 2017).

The *Mornington Baptist* case exemplifies a 'complex' exemption outcome, which are much rarer than simple exemption outcomes. In *Mornington Baptist*, a Church requested an exemption to only hire Christians in their Church-run welfare organisation. However, VCAT ruled that the organisation's welfare work was not strictly religious (similar to reasoning seen in *Cobaw*), and as such there was no need for employees to be Christian that would justify such an exemption. Further, Deputy President McKenzie suggested that 'diversity of beliefs among those who provide the services [. . .] may well be beneficial for those who receive those services. It will reflect the diversity of the Mornington community' (para. 36). Mornington Baptist's application was not rejected outright, with McKenzie stating, 'I would be willing, if the association applied, to grant an exemption in a more limited form' (para. 39). In Australia, many religious organisations access government funds to carry out social services. Cases like *Mornington Baptist* relate importantly to debates about public funding of religious organisations, and the employment of non-religious people, and the provision of services to nonreligious people.

Mornington Baptist relates to debates about the role of a religious organisations in the public sphere, the process of acknowledging and accommodating religious diversity, and the negotiation of difference by recognising and facilitating practices that enhance equality. The contrast between the granting of 'simple' exemptions, and the denial of an exemption in *Mornington Baptist*, highlights the complex interweaving of historical Christian privilege with an assumed nonreligious civic sphere. VCAT provides a forum in which these debates can be articulated and considered.

Discussion and conclusions

Victorian anti-discrimination and anti-vilification legislation, and the Tribunal processes associated with VCAT hearing civil cases, are more than just tools to deal with individual cases of religious conflict. In addition, they provide an etiquette for the productive negotiation of religious diversity and difference. The legislation functions to mediate relationships and provide guidance about respectful participation in the public sphere, without simply reaffirming the status quo.

First, we argue that the legislation and the VCAT process draws people into 'a moral etiquette for relating to' otherness by imposing limits that protect people's right to live free from vilification and discrimination (Ezzy 2018, 279). This effect of the legislation does not seek to prevent or change religiously motivated attitudes that might be hateful, discriminatory, or profoundly offensive. Rather, it constrains such attitudes, restricting their public expression. Mouffe (1999, 753) distinguishes antagonism and agonism between adversaries in democracies: 'antagonism [. . .] presupposes that the "other" is [. . .] seen as an enemy to be destroyed'. In contrast 'agonism' conceives of the other as an '"adversary", i.e. somebody with whose ideas we are going to struggle but whose right to defend those ideas we will not put into question'. Mouffe argues this is distinct from the Habermasian vision of 'deliberative democracy' which seeks to

eliminate the impact of power on social relationships. Agonistic relationships in Mouffe's sense do not seek to eliminate power, so much as to constrain the powerful and establish etiquettes for negotiating difference. This form of agonism is not the *agonistic respect* of deep equality described by Beaman (2017). Rather, it could be descripted as a form of *legal agonism*, in which the participants retain their discriminatory attitudes, but are constrained in their expression because of a commitment to the rule of law as expressed through the VCAT decisions. VCAT is a forum for negotiating religious difference that creates agonistic relationships through processes such as mediation and restrictions on legal representation. Participants are required to accept the right of the 'other' to present their positions and to be treated with respect, even if they vehemently disagree with them.

Some cases also act as important examples of what 'counts' as discrimination or vilification, as:

> [d]iscrimination will only be addressed if the individual recognises that the treatment that they were subject to was unlawful discrimination and decides to lodge a complaint at [. . .] VCAT. In many instances people will choose not to do anything, preferring to find another job, use another service or go to another school (Allen 2019, 19).

These cases provide public definitions of discrimination and may inspire other groups to come forward with claims of their own. In cases such as *Arora* and *Rocca* in which discrimination and exclusion have been able to go largely unnoticed, VCAT provides a non-punitive etiquette for respectful, transparent interactions in clearly labelling such actions as discriminatory.

Second, sometimes the decisions and outcomes are concerned with offering opportunities to foster respect through recognising similarities (not necessarily sameness) and sometimes facilitating everyday experiences of equality (Beaman 2017). VCAT pursues both these qualities by interrupting the status quo of interactions in Australia: it interrupts tension and imposes etiquette, it provides transparency around latent discriminations and inequalities, and it aims to promote social interaction and understanding by removing barriers to inclusion in everyday life. Of fundamental value here is that VCAT facilitates the expression of varied and marginalised voices and provides a safe forum for individuals to defend their interests against historically privileged individuals and groups.

Third, the exemption cases discussed above demonstrate that anti-discrimination legislation can also facilitate everyday practices of equality and respect. Here the legislation is less significant than the way such cases indicate a broader context of acceptance of diversity. For example, the granting of exemptions for women-only swimming sessions, and the relative lack of controversy surrounding such decisions, contrasts sharply with slippery slope arguments seen in international contexts (for example, see Heirwegh and Van de Graaf's [2019] discussion of Muslim women wearing 'burkinis' in Belgian public swimming pools). Further, in at least some of these exemption cases, the applications were made following requests made by minority groups. This reflects commendable examples of VCAT hearing marginalised voices, and seriously considering the requests articulated by these groups. Allen (2019, 21) recommends that 'VCAT should be armed with the tools to address discrimination in the community', and exemptions can play an important role in this.

The cases of *Mornington Baptist, Rocca*, and *Cobaw* illustrate the role of the state in creating and policing the boundary between acceptable and unacceptable reasons for engaging in religiously motivated discriminatory practices. The Christian Brethren in *Cobaw* were required to treat a nonreligious group equally in the provision of an accommodation service that was available to the general public. VCAT judged that the accommodation services they were providing to not have a clear religious purpose. In contrast, the Catholic school in *Rocca* was allowed to discriminate against a member of a religious minority, but was required to be explicit about its discriminatory policies in the provision of an educational service largely funded by government. Although anyone, including nonreligious students, can apply to attend a Catholic school, Catholic schools have a clearly articulated religious purpose with a long history of public debate about their place in education in Australia (Cranston et al. 2010). Finally, the Mornington Baptist Church, who were not allowed to engage in discriminatory employment policies, were utilising some government funding to provide a service to the general public. While the Church saw themselves as engaged in an activity with a religious purpose that justified discrimination, the Tribunal did not agree.

There are some problematic aspects of VCAT hearings and associated legislation. The process is inherently oppositional. For example, cases such as *Cobaw* entail a 'balancing act between the right to freedom of religion and the right to be free from discrimination [requiring] both sides to argue that their interest in protection or liberty respectively should be given the greater weight' (Murphy 2016, 597). By placing the onus on marginalised groups to come forward with their complaints, Victoria's legislation has the potential to (re)produce existing power hierarchies (see Allen 2009; Murphy 2016) and potentially 'overprotect' respondents (Mortimer 2004). This model may dissuade people from bringing forward their claims (see also Barras's [2016] 'discourse of request'). To make a claim and pursue it to its outcome requires considerable resources of time, money, and knowledge (MacDermott 2011, 188). This can place individuals at a disadvantage compared to well-resourced organisations (Allen 2019).

Reflecting on the experience of bringing a case to VCAT, Sue Hackney (the complainant of *Cobaw*) explains:

> Over the subsequent years of going through the Equal Opportunity Commission and VCAT, proceedings became increasingly complex, demanding and stressful. At times I had grave doubts about whether we had made the right decision [. . .] It was difficult to keep spirits up when the only tangible evidence of progress was more reams of paperwork or yet another directions hearing (Hackney 2014).

VCAT acknowledged these difficulties during *Cobaw*, with Judge Hampel noting that it would be difficult for some people (in this case, young, potentially underage, same-sex-attracted people) to bring actions against a 'large, well-resourced organisation. That in itself creates a power imbalance' (at para. 56). These obstacles make it likely that many members of minority groups in Victoria would find it difficult to initiate and/or sustain a complaint. Further, anti-discrimination legislation cannot be relied upon to redress structural disadvantage (Fredman 2016; Gaze 2000). The relatively low number of cases coming before VCAT does not necessarily indicate low levels of discrimination in broader society.

Public responses to anti-discrimination legislation also pose potential problems to respectful interactions. Tribunal cases inform wider discussion about public speech in Australia, and this is particularly clear in the case of *Catch the Fire*. For example, prominent conservative commentator Andrew Bolt (mentioned above in relation to *Eatock v Bolt*) wrote about the case, 'It's unfair and it's dangerous – not only to our right to speak our mind, but to our right to demand reform of a religion that needs a frank debate' (Bolt 2004). According to Gelber and McNamara (2013, 472), *Catch the Fire* saw an uptick in the questioning of 'the legitimacy of racial vilification laws', with 'the rhetoric that dominated public discourse in the aftermath of "the Bolt case" strengthen[ing] a libertarian conception of freedom of speech that tends towards absolutism'. Such responses indicate the potential for resistance to the legislation to become translated into resistance to the claims of minority groups using the legislation (see Gelber and McNamara 2013).

New forms of religious conflict have arisen as Australia has become substantially more multicultural and multi-faith in recent decades (Bouma et al. 2021). Victoria's religious anti-discrimination and anti-vilification legislation is one forum in which protagonists can publicly debate the sometimes passionate disagreements and conflicts that have arisen as a product of these social changes. One key aspect of this legislation, and the associated Tribunal, is that it draws protagonists into a process in which they subscribe to the legitimacy of the state as an independent arbiter, and to rules for the respectful performance of disagreement. This process has the potential to reinforce state-sanctioned historical privilege, as illustrated by the endorsement of Catholic schools' ability to legally discriminate in the *Rocca* case. However, it also enables the successful imposition of constraints on potentially dangerous practices, such as the Islamophobia expressed by the Christians in the *Catch the Fire* case, and in some cases leads protagonists into reflective self-understanding and respect of difference, as in the *Arora* case. Beyond the resolution of particular conflicts, the legislation provides an etiquette for the negotiation of religious diversity that is evidence of the impact of the 'shadow' of the law (Fokas 2019; Ezzy, Banham, and Beaman 2021). As such, these laws are a substantial advance on previously existing legislation.

Notes

1. In this article 'EO Act' refers to both the earlier Equal Opportunities Act 1995 and the current, updated Equal Opportunities Act 2010. The update replaced the 1995 Act and features some changed definitions and procedural elements, but both Acts apply to the same personal characteristics against which it is unlawful to discriminate (VEOHRC n.d.).
2. There has also been one successfully prosecuted case of 'serious vilification', which is charged under the RRT Act as a criminal offence (VEOHRC 2019). As a criminal matter, this case was not heard at VCAT and is outside the scope of this article's focus on legislation operating within the civil tribunal setting.
3. The data on which this article is based comes from publicly accessible legal case reports. As such, approval by an ethics board is not required or appropriate.

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Notes on contributors

Douglas Ezzy is Professor of Sociology at the University of Tasmania, Australia. His research is driven by a fascination with how people make meaningful and dignified lives and includes studies of religious diversity, religion and the law, nonreligion, contemporary Paganisms, and Christianity. He is lead investigator of the Australian Research Council Discovery projects 'Religious Diversity in Australia' and the 'Religious freedom, LGBT+ workers and the right to discriminate'. His books include *LGBT Christians* (2017, with Bronwyn Fielder), *Reinventing Church* (2016, with Helen and James Collins), *Sex, Death and Witchcraft* (2014), *Teenage Witches* (2007, with Helen Berger), and *Qualitative Analysis* (2002).

Rebecca Banham is a Research Fellow at the University of Tasmania. Rebecca's doctoral research explored the emotional and ontological connections that people form with Tasmanian forests, and she is particularly interested in the ways that emotion, ontology and experiences of vulnerability and relationship shape how people relate to both other people and to the nonhuman world. Rebecca's research has been primarily within the field of environmental sociology, and she has a keen interest in the intersections between religion and the environment. Her chapter 'Empathetic Positionality and the Forest Other' has been accepted for the forthcoming *Routledge Handbook of Ecocultural Identity*.

Lori G. Beaman is the Canada Research Chair in Religious Diversity and Social Change, Professor in the Department of Classics and Religious Studies at the University of Ottawa, and Director of the 'Nonreligion in a Complex Future' project (nonreligionproject.ca). She directed the 'Religion and Diversity Project' (religionanddiversity.ca). Her publications include *The Transition of Religion to Culture in Law and Public Discourse* (Routledge 2020), *Deep Equality in an Era of Religious Diversity* (Oxford University Press 2017) and 'Living Well Together in a (non)Religious Future' *Sociology of Religion* 78(1): 9–32. Her research areas include religious diversity, nonreligion, equality, religion and law.

ORCID

Douglas Ezzy http://orcid.org/0000-0002-5078-2288
Rebecca Banham http://orcid.org/0000-0001-8182-4017
Lori G. Beaman http://orcid.org/0000-0002-0424-8586

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