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**From:** Australian Law Reform Commission

**Subject:** Online submission to IP46

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Freedom of Speech | Question 2–1

All public conduct of the Parliament and the public service should be available to scrutinised, transformed and re-communicated. In principle the end product communicated should not attempt to deceive the recipient as to think a different truth was actually communicated by a person. The right to communicate satire should be preserved.

The general ability to re-use content under copyright in ways substantially recreate new works without license would greatly enhance the rights of free speech particularly in a political context.

The ability for people with disabilities to acquire accessible content without license.

The ability for orphaned works to be revitalised and commercialised is preferable to having works abandoned and lost forever.

Question 2–2

Parliamentary Proceedings Broadcasting Act 1946 (PBBA). The use of this act to create limitations such as the current conditions for excepts (<http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Broadcasting_of_Parliamentary_Proceedings/Conditions_for_excerpts>), restricts the communication of government and political matters. While communications can be live there are standing orders (<http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jcbpp/reports/2013/2013report.pdf>) that prevent retransmission of questions.

With the availability of modern communication mechanisms the credibility of quoted political discourse without a sometimes prohibited audio/visual retransmission is authenticity is significantly diminished.

The ability to direct PBBA 4(3) a national broadcaster to cover some events and not others is restricting the coverage of the political process and indeed. The required permission to undertake a visual recording under PBBA 13A(2A) restricts disclosure of political events and 13A(5) has an implicit destruction of recordings. Section 14 gives the a parliamentary subcommittee total control over rebroadcasting which is excessive especially when aided by the section 17 regulations.

Copyright Act 1968 – recommendations as per ALRC Report 122 is particularly important for the creation of fair use criteria. Other recommendations are also important to give balance to the use of copyright material a social contribution in some circumstances rather than an exclusive rights holder authority over content.

Freedom of Religion | Question 3–1

Assessing laws should always ensure the positive religious liberty exists to not “prohibit the free exercise of religion” (Constitution s116) and the ICCPR 18(1,2,4) articles apply the same principles.

In consideration of negative religious liberty (or restrictions on positive religious liberty), laws that inhibits religion needs to specificity address the ICCPR 18(3) criteria such that the encroachment of religion on others is as narrow as possible.

* ICCPR 18(3)“Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”

The fundamental rights and freedoms should consider the rest of the ICCPR and other human rights conventions that Australia has signed up to and commonly held Australian morals and values. In the context of ICCPR 18(3), the “others” here needs to refer to the wider Australian society rather than those religious leaders or followers. These limitations also need to push back to what is required to manifest one's religion/beliefs rather than submitting to any religious objection that they desire. The Attorney-General's Department guidance on Permissible Limitations (<http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/Permissiblelimitations.aspx>) words this as:

“those means must be no more restrictive than required to achieve the purpose of the limitation.”

For example, a religious doctrine on an anti-homosexual existence shouldn't prevent the a church employment of a lesbian estate manager, accountant or bus driver because any employment cannot materially interfere with the manifestation of one's religion. The wider Australian value that homophobia and discrimination generally is objectionable should prevail.

Capturing the essence of what is the manifestation of one's religion will obviously need to consult religious leaders however an appreciation needs to be made that they are a biased provider of advice when discussing appropriate legal boundaries that apply to them.

A law interfering with religion should state with a broadness that is practically understood the limitations of ICCPR 18(3) and apply to all religions equally even though only a few religions will be affected by this restriction. An example of this could be noise limit in residential areas in specified hours in order to preserve the moral right to sleep in, or generally lack of interference while at home. The Attorney-General's Department guidance on Permissible Limitations summaries this as:

“a law authorising a limitation of rights must not confer unfettered discretions on those charged with its execution. Discretionary powers must be appropriately circumscribed and include adequate safeguards to prevent the risk of abuse or arbitrary exercise of the discretion.”

In assessing any limitations to a religious human rights, applying the principles of <http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/practice_notes/practice_note_1/practice_note_1.pdf> is a reasonable start.

“1. whether and how the limitation is aimed at achieving a legitimate objective;

2. whether and how there is a rational connection between the limitation and the objective; and

3. whether and how the limitation is proportionate to that objective”

With these principles, the legitimate objective is defined the ICCP 18(3), preserving the minimal manifestation of one's religion/beliefs, and also preserving the broader rights of human right and Australian morals. The rational connection need to be very explicit in defining which limitation is applying to which objective. Quasi statements of limitations like “religious freedom” isn't specific enough to determine rational connection. Measuring proportionate needs to materially measure the consequences of each party likely to be affected by such a law individually and make a great ethical choice on the matter which I don't pretend will always be easy. In an example of Sex Discrimination Act for religious education providers to expel students of objectionable pregnancy status would need to consider the impact socially of a 17 year old being forced from their social school network against the impacts on a teacher attempting to communicate the moral negative of pre-marriage child birth when a student is actually present. The rational connection between expulsion to preserve a teacher's ability to effectively communicate a teaching is plausible to justify the law however considering the proportionality it becomes obvious that has a more profound impact on the 17 year old than the authoritarian position of a teacher in a classroom.

Unfortunately this level of analysis isn't always being provided by departments (including the Attorney-General's department) putting forward human rights compatibility statements in a much more broadly considered approach (as per the APS code of conduct). Rather the current approach limited seems to avoid controversial areas to push though legislation advocated by the government of the day. As such considering statements of human right compatibility to legislation without considering the responses of the Joint Parliamentary Committee on Human Rights reports and potentially parliamentary submissions is accepting a potentially biased view, especially on controversial topics.

Question 3–2

Sex Discrimination Act (SDA) 1984 - Section 38 Educational institutions established for religious purposes, sub section 3.

**38  Educational institutions established for religious purposes**

             (3)  Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person’s sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first‑mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

The ALRC issues paper (3.28) seeks submissions for not justified laws. The Joint Parliamentary Committee on Human Rights and the Senate Legal and Constitutional Affairs Committee conduced this was insufficiently justified.

From: <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2013/2013/62013/~/media/Committees/Senate/committee/humanrights_ctte/reports/2013/6_2013/pdf/c12.ashx>

“1.227 In its submission to the Senate Legal and Constitutional Affairs Committee, the committee expressed its disappointment that the government had not provided any proper justification for the provision of similarly broad exemptions for religious organisations in the exposure draft bill. Nor does the statement of compatibility for this bill justify extending the equally broad religious exemptions in the SDA to the new grounds introduced in the bill.”

In the Sex Discrimination Act 1984 38(1,2,3) criteria “discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed” this seems to consider only the morals of those in religious authority. It also goes go far enough to assess the minimal impact on the manifestation of one's religion or the broader social morals.

The ICCPR was used to the justify the religious exemptions in section 38 of the Sex Discrimination Act (referencing ICCPR article 18) in the explanatory memoranda for Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, however rather than conforming to the ICCPR, section 38 actually violates it.

The ICCPR article 18(1) allows for the freedom to choose religion in particular “the right ... to adopt a religion of his choice ... and in a community with others ... [participate] in teaching”.

The Sex Discrimination Act in section 38 effectively denies the participation to teach in 38(1 and 2) and the right to be taught in section 38(3) to the prescribed groups of people.

Article 18(2) of the ICCPR says “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”.

SDA section 38(3) does grant a religious education organisation the permission to impair the adoption of a religion by those in the prescribed groups and therefore is in contravention of the ICCPR article 18(2).

Article 18(3) of the ICCPR describes the only limit that a State may prescribe from the freedom of religion. This limitation is not mentioned in the explanatory memoranda because the limitations allows by law require the SDA section 38 apply “limit[s] [..that] are necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others”.

A diversity of “sexual orientation, gender identity, marital or relationship status or pregnancy” in an education facility is unlikely to cause a classroom riot (public safety), disagreements in option in a classroom (public order) are unlikely to be substantially affected by additional diversity when competent teaching staff are engaged and any such expression of opinion is a protected right according to article 19 of ICCPR. Health cannot reasonably be considered an issue.”

The moral objection to sharing an education with a diverse group of people is not a moral that currently exists in the diverse multicultural Australian society. The gender based education facilities that exist as per of SDA(21) is about the extent of allowed socially accepted discrimination. Religious education (excluding exemptions in section 37) has hardly had a history of limiting who they choose to educate to their ideals as they have forced their ideals on Aborigines and Torres Straight Islanders, orphans and anyone they had the ability to control over the last few hundred years. The exemption of section 38 cannot be considered on the basis of conforming to old doctrine.

The existence of religious teachers and administrators who would rather see a classroom of heterosexual, not married, non-pregnant students with a gender identity equal to their birth sex cannot be denied however for the most part, a much more tolerant and accepting group of religious Australians exist and this more common definition of morality precludes the exemptions of section 38. A students status and identity, particularly in vulnerable teenage years, aren't always consistent or public and over the course of an education. As such the proportionality tests to see if its fair to exclude the students at a vulnerable time in their social life is a major detriment compared to the inconvenience of a teacher teaching morals that are objectionable in very personal way to some students.

18(4) is particularly relevant and was not considered in the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013. Article 18(4) of the ICCPR is as follows “The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”. The same text is repeated in article 13(2)(3) of the International Covenant on Economic, Social and Cultural Right 1976 to which Australia is a signatory.

This requires that parents/guardians have a religious education available to the children and implicitly this right is regardless of the child's gender identity, sexual orientation, relationship status, or pregnancy status. As such the section 38(3) exemption on religious education providers is not conforming to the ICCPR article 18(4).

Considering the 'free exercise of religion' in the Constitution could reasonably include obtaining a education in it (as indicated in the issues paper 3.4), and laws allow deferring the prohibition of education to those of the religious institutions by the Commonwealth to be an act of the Commonwealth, then these provisions of the SDA aren't consistent with the 116 section of the Constitution either because of their impact on positive religious liberty.

Freedom of Association | Question 4–1

As per the briefing paper any association can only be limited by as prescribed by law and ICCPR 22(2) also describes fair limitations.

There are two limitations at play here, the limitation of a person and the limitation of an association however due to enforcement limitation of non-registered associations these can legally come down to constrain a person. Conceptually there are two different concepts however.

Constraints on a person (individually) comes down to:

* Members of police ICCPR 22(2);
* Members of armed forces ICCPR 22(2); and
* Association with criminal or suspected criminal organisations/associations.

Restrictions on police dealing with criminal or suspected criminal organisations/associations is expected to be there and a lower level of proof should be defined as to which organisations those should be. The right of association in ICCPR 22(1) still applies as employment in the police is still voluntary. The police should posses the ability to be a member of a employment representation association. All other restrictions on police association should be no different from the general public. These provisions in the ICCPR 22 seems to be very broad in regards to police and military and there to appease signatory states where the absolute control over police was much more expected these permitted restrictions should only be enforced in limited ways in Australia.

Enforcing any other prohibition of association on police members is an unrealistic restriction on their freedoms, and in creating a prohibition, creating vulnerabilities in people that could be exploited in their personal life to affect their professional life.

Restrictions on members of armed forces needs to meet a legitimate objective. Like the principles that apply to the police members this should be strictly focused about managing conflicts of interest. With the broadness of activities of the defence force, members conflicts of interest need to be managed on unit/individual bases rather than as a whole to preserve as much as possible the freedom to associate. There needs to be a fair and independent avenue of appeal against any prohibition accessible at a senior level with the ADF to ensure that decisions aren't unilateral.

The restrictions on the ADF from participating in any from of trade union or collective bargaining is an unnecessary restriction that suits the government's agenda significantly over the ADF member.

Association with criminal organisation by members of the public is a fair prohibition. Any conviction of association with a criminal organisation, the prosecution will need to prove that the organisation is criminal and that knowledge was reasonably known the the defendant.

The restrictions of an association to exists consists of ICCPR(2):

* national security;
* or public safety;
* public order (ordrepublic);
* the protection of public health;
* or morals; or
* the protection of the rights and freedoms of others.

In reverse order the protection of the rights and freedoms of others need only reflect back on the rest of the ICCPR, the laws implemented in consideration of that agreement, and any other law/agreement that grants rights and freedoms. There is however a scenario where an organisation has been allowed to accept members because of their freedoms, however the member's objective is to disrupt the organisation. A right to expel members based on vexatious membership to preserve the freedoms of existing member however this needs to relate to the primary objective of an organization with proof intent that disruption is the intent. As this is rather a large power to limit freedom of association exercised with some discretion it should be exercised by secret vote of the association in fair and just ways if such a law is ever needed to be enacted.

Morals needs to reflect the Australian society generally but it should also be sufficient to prevent the existence of associations that exist to promote or enact violence, intimidation or limiting the rights and freedoms of others.

Protection of public health must have the majority support from many relevant professional medical bodies for an enforcement to exist.

Public order should be read as the rights and freedoms of others. Seeing peaceful protest groups abolished because they disturb the public order slightly in the expression of their rights and freedoms wouldn't be the right outcome here.

Public safety is a necessary freedom here that restricts the behaviour of protest groups and the rights to be protected from violence mentioned previously.

The abundant use of National Security to justify laws needs to be scoped significantly more when any justification is made. The activities of a nations to conduct economic power, diplomacy, power projection and political power, economic security, energy security, and environmental security (Wikipedia:National Security) should never prevent any association from existing to observe (within legal limits) and take any legal action based on observations including disclosure and reporting. Such associations are effectively a representation on political communication.

In assessing the objections the current Attorney-General's guidance for Permissible Limitations to Human Rights (<http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/Permissiblelimitations.aspx> ) criteria of limitations must have:

* must be necessary to achieve a legitimate objective;
* adopt a means that is rationally connected to that objective;
* those means must be no more restrictive than required to achieve the purpose of the limitation.; [and ....]
* a law authorising a limitation of rights must not confer unfettered discretions on those charged with its execution. Discretionary powers must be appropriately circumscribed and include adequate safeguards to prevent the risk of abuse or arbitrary exercise of the discretion.

I think the ALRC has a great opportunity to provide summaries from the part 1 of these two part questions questions to extent the Attorney-General's framework on rights and considerations that need to be made.

Question 4–2

The Sex Discrimination Act 1984 SDA(39) provides the following exemptions for voluntary bodies

“Nothing in Division 1 or 2 renders it unlawful for a voluntary body to discriminate against a person, on the ground of the person’s sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, breastfeeding or family responsibilities, in connection with:

(a) the admission of persons as members of the body; or

(b) the provision of benefits, facilities or services to members of the body.”

The Joint Parliamentary Committee on Human Rights assess these provisions in

<http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2013/2013/62013/~/media/Committees/Senate/committee/humanrights_ctte/reports/2013/6_2013/pdf/c12.ashx> 1.231-1.233. The summary of lack of justification from 1.232 is as follows:

1.232 The statement of compatibility states that ‘this exemption recognises that rights may be limited by other rights, with the right to equality and nondiscrimination limited by the right to freedom of association’, although it is not apparent what this means. The statement then goes on to discuss a separate requirement under the SDA which prohibits public clubs from discriminating and concludes that this latter prohibition is consistent with the right to freedom of association in article 22 of the ICCPR because ‘the limited terms of the prohibition on discrimination, namely to ‘public’ rather than ‘private’ clubs, is a proportionate means of achieving this objective exemption and is therefore permissible’. No justification is, however, provided for the exemption permitting voluntary bodies to discriminate or the impact this may have on a person’s right to freedom of association.

Further mode in consideration of the ICCPR article 22 I consider the SDA(39) exemptions unjustified.

As “sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, breastfeeding or family responsibilities” have no implication to national security, public safety, public order, health or morals “the protection of the rights and freedoms of the others” is the only remaining exemption criteria on which section 39 can be based.

There is no right or freedom in Australia to be isolated from persons of a “sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, breastfeeding or family responsibilities” different to another person so the section 39 exemption has no legal or moral basis on the ICCPR.

The provision of a membership of a voluntary body is the same as the membership of a club in SDA section 25 and the provision of services of a voluntary body is also the same as section SDA 22 and perhaps section 23.

Voluntary bodies consist of members who are employed, deliver goods and services, accommodation as part of their other lives and daily apply the principles of the Sex Discrimination Act consciously or otherwise. There should always be a significant membership in a voluntary body that can apply the basic principles of sexual non-discrimination within the voluntary body.

Freedom of Movement | Question 5–1

Question 5–2

Property Rights | Question 6–1

Question 6–2

Tim Wilson talked about the property rights of Aboriginal Australians in <http://www.npc.org.au/speakerarchive/tim-wilson.html> and I was appauld at the limitations of rights holder to use their land and the impacts of tax limiting its impacts.

Available on iview: <http://iview.abc.net.au/programs/national-press-club-address/NC1506C003S00>

Retrospective Laws | Question 7–1

Question 7–2

Fair Trial | Question 8–1

Question 8–2

Burden of Proof | Question 9–1

Question 9–2

Privilege against Self-incrimination | Question 10–1

Question 10–2

Client Legal Privilege | Question 11–1

Legal privilege shouldn't be recorded by the government. Any interception must justify to the court that the legal practitioner is committing a serious offence.

Client legal privilege should extend to tribunals.

Question 11–2

Telecommunications Intercept 1978, Intelligence Services Act 2001 and any other law that permits recording of communication, in any form, or ASIO related computer intrusions, should statutory exclude interception of client / legal communications or the services on which they communicate.

Tribunals like the AAT should have client legal privilege applicable.

Advisory Report on the National Security Legislation Amendment Bill (No. 1) 2014 (<http://www.aph.gov.au/~/media/02%20Parliamentary%20Business/24%20Committees/244%20Joint%20Committees/PJCIS/National%20Security%20Legislation%20Bill/Final%20Report%2017_09_2014.pdf>) recommendation 11 failed to make it to the Act illegal to seek use client legal privilege on a special intelligence operation.

Strict and Absolute Liability | Question 12–1

Question 12–2

Report on the National Security Legislation Amendment Bill (No. 1) 2014 (<http://www.aph.gov.au/~/media/02%20Parliamentary%20Business/24%20Committees/244%20Joint%20Committees/PJCIS/National%20Security%20Legislation%20Bill/Final%20Report%2017_09_2014.pdf>), recommendation 13 on National Security Legislation Amendment Bill (No. 1) 2014, regarding section 35P need to be addressed as the passed bill didn't consider this recommendation.

Appeal from Acquittal | Question 13–1

Question 13–2

Procedural Fairness | Question 14–1

Question 14–2

Delegating Legislative Power | Question 15–1

Question 15–2

Authorising what would otherwise be a Tort | Question 16–1

Serious breaches of privacy.

Question 16–2

Recommendations from ALRC Report 123.

Executive Immunities | Question 17–1

Question 17–2

Judicial Review | Question 18–1

Question 18–2

Others Rights, Freedoms and Privilege | Question 19–1

Combining the concepts of free political speech, journalism (UN’s Human Rights Committee as per 2.15 in issues paper), an almost implicit right to have a parliament free from corruption I think that transparency of government is emerging common law right that needs to be protected. Australia has had a FOI act from 1982.

As such I think the Hawke review of the Freedom of Information Act 1982 in 2013 has some valuable recommendations to enhancing the transparency of government that need to be addressed.

The FOI could be extended to parts of the parliamentary departments however as they point out (<http://www.ag.gov.au/Consultations/Documents/ReviewofFOIlaws/Department%20of%20the%20Senate%20-%20Department%20of%20the%20House%20of%20Representatives%20and%20Department%20of%20Parliamentary%20Services.pdf>) there are significant conflicts that need resolving.

Requiring departments publish incoming government briefs before the election will also be useful instrument in public accountability by an impartial public service.

To have FOI appeals processed in a reasonable time the Freedom of Information Amendment (New Arrangements) Bill 2014 should not proceed and Dr Hawke's review should be considered.

As the publishing of national security special intelligence operations was introduction in the National Security Amendment Bill No 1 2014 have been introduced, the public needs more accountability from the IGIS that these are being conducted in a proper manner. From the Advisory Report on the National Security Legislation Amendment Bill (No. 1) 2014 (<http://www.aph.gov.au/~/media/02%20Parliamentary%20Business/24%20Committees/244%20Joint%20Committees/PJCIS/National%20Security%20Legislation%20Bill/Final%20Report%2017_09_2014.pdf>), relevant to the IGIS's oversight is recommendations 6, 7, 8, 10, 11, 14 and 15.

For the public to have confidence that reckless operations aren't conducted by ASIO and their disclosure kept secret by 35P, recommendation 12 that “the Commonwealth Director of Public Prosecution must take into account the public interest, including the public interest in publication, before initiating a prosecution for the disclosure of a special intelligence operation”.

Other comments?

The Parliamentary Joint Committee on Human Rights ( <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights> ) frequenty reports on inadequitely justified legislation. The unaddressed deficiencies of legislation of these reports needs to be address in terms of this enquiry, even if just an annex summary. After all, if we have successive parliaments that pass legislation that is known to be defective before it is passed, is there still value is the doing this report to try to fix all past mistakes?

File 1

File 2