Traditional Rights and Freedoms — Encroachments by Commonwealth Laws

Submission in response to Issues Paper

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I Introduction

This is an important Inquiry, which is the first of its kind in Australia. There has been a great deal of attention given in recent years to the issue of human rights; it is the new lingua franca of public policy. Usually arguments about rights are expressed in positive terms as claims upon the government for action. Liberty rights are the poor cousin of such rights. They require nothing more than that the government restrain itself from interfering with the liberties of its citizens. That ought not to be too difficult for government to do; but parliamentarians earn their living by passing laws, and public servants are often asked to generate proposals for legislation. Passing laws can give the appearance of action to solve a problem even if law is not the best means of so doing. There is a inherent dynamic in the system towards more regulation.

A century or more ago, life in Australia was replete with liberties, as it was in many other countries which share the Western legal tradition. However, as government has expanded more and more, the scope for liberty has been much reduced. Indeed, the biggest threat to liberty is from a belief in some quarters that legislation is an appropriate vehicle for all kinds of social engineering. Too rarely is the question asked: why should we interfere with people's liberties or impose upon them yet more obligations, by passing more regulation?

This submission will focus on just a few areas of the Inquiry. In particular, freedom of speech, freedom of religion, freedom of association, freedom of movement and protection from interference with property rights.

II Freedom of speech

This freedom has been thrust to the centre of attention in Australian public life by three events. First, there was the attempt by the previous federal government, in its draft bill to consolidate anti-discrimination laws,[1] to make insulting and offending somebody a form of discrimination, if the insult or offence concerned one of eighteen different 'protected attributes'. This led to a significant debate on freedom of speech, initiated by the former Chief Justice of New South Wales, the Hon. James Spigelman.

[1] Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012.

The second event was the consultation in 2014 around amendments to section 18C of the *Racial Discrimination Act* 1975. The Attorney-General, Senator George Brandis QC, proposed for discussion certain amendments to the act in the name of promoting freedom of speech. Eventually those proposals were withdrawn, although a private members bill to amend section 18C is currently before Parliament. The third event occurred in Paris just a few weeks ago, with the shocking murders of editorial staff at the French magazine Charlie Hebdo. Initially there was an outpouring of support for freedom of speech, epitomised by the Twitter hashtag 'Je suis Charlie'. Further reflection led many people to the view that perhaps they were not 'Charlie' after all, given their support for restraints upon freedom of speech, restraints which would have prevented Charlie Hebdo from publishing some of its more offensive cartoons and articles in Australia.

It is perhaps unsurprising that the Issues Paper skates over this difficult issue given the political controversies. However, and with respect, it is incorrect to say that s.18C only prohibits speech which incites discrimination (para 2.24). Section 18C is in much broader terms than Article 20 of the ICCPR. It is not confined, as Article 20 is, to "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence." It should be.

The need for a principled approach

These questions really have to be addressed at the level of principle. There are now numerous laws in Australia which predicate legal sanctions on the basis that someone has offended someone else or has behaved in an offensive manner. There are many good reasons that could be given for restricting freedom of speech. No right-thinking person surely can support anti-Semitic speech or other forms of racist discourse. However, there is a fundamental issue about the proper reach of government. The view that 'there ought to be a law against it' is a common view amongst people with the best of motives; but the law is only one means of social ordering and it is often a heavy-handed one. The language of 'hate speech' is frequently used in this debate as if all offensive speech is motivated by hatred; but speech that offends, insults or humiliates may or may not be motivated by hatred. The offensive or insulting speech may be due to drunken stupidity, or insensitivity, or an expression of a genuinely held point of view on an issue that involves race, however much people may deplore such an opinion. Allowing one person to drag another off to court – whatever the result of the case – is a draconian solution to the problem of causing offence. It can have a chilling effect on free speech.

There are other ways to encourage decency and respect for others. This Inquiry offers an opportunity to address the issue of freedom of speech on the basis of principle, where the debate is not confined to the difficult issues involved in racially offensive speech.

The freedom not to be offended

The principle ought to be that contained in the major international human rights treaties and covenants, and subject only to such restrictions as are contained therein. 'Je suis Charlie'

even if I would disapprove strongly of much of its content. I am free not to buy it. I am free not to read it. I am free not to be enraged by it. Another person's freedom should not be restricted by my choice to read something that offends me, or to react to it with indignation.

III Freedom of religion

At present, there are few significant encroachments upon religious freedom within the law of the Commonwealth of Australia.[2] There are issues however about the balance to be struck between rights of religious organisations to conduct their affairs in accordance with their own beliefs and values and general non-discrimination principles in the community. As I have argued in an article which is forthcoming in the Monash University Law Review, co-authored with Dr Joel Harrison, the best way to resolve the tension is to have a clear understanding of what are 'the commons' within which non-discrimination principles ought to apply, and what is the zone that ought to be free from government interference. This is fundamental to any question of religious liberty.

This article is our extended answer to the question of when restraints upon freedom of religion are justified in the context of anti-discrimination law. Churches and other religious communities, like other free associations of people, are outside the commons. Freedom of religion and freedom of association are closely intertwined. The law should accord with John Rawls' idea of the neutrality of the State:[3]

> The State can favour no particular religion and no penalties or disabilities may be attached to religious affiliation or lack thereof. The notion of a confessional state is rejected. Instead, particular associations may be freely organized as their members wish, and they may have their own internal life and discipline subject to the restriction that their members have a real choice of whether to continue their affiliation.

In Australia we have a long tradition of successful pluralism and sensitive multicultural accommodation. That depends on an approach to difference which involves 'living and letting live', and being tolerant of people who hold different views to our own. As I have argued elsewhere, one of the key reforms which is needed is to end the practice of defining religious freedom by way of exceptions to generally applicable laws. Faith-based organisations have a right to select staff who fit with the values and mission of the organisation, just as political parties, environmental groups and LBGT organisations do. To select on the basis of 'mission fit' is not discrimination. Rather it is essential to the right of freedom of association.

For that reason, Prof. Nicholas Aroney and I have advocated for a new definition of what discrimination is, and is not, across the spectrum of Commonwealth anti-discrimination

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[2] I have previously made a submission, with Ghena Krayem, on an aspect of the Marriage Act 1961 which restricts freedom to conduct religious marriage ceremonies without a clear policy justification in an age when de facto relationships are given an equivalent status to marriage.

[3] John Rawls, *A Theory of Justice* (Harvard UP, Boston, 1971), p 212.

laws.[4]

IV Freedom of association

One of the major tensions, in terms of freedom of association, is between the right of people to form associations of various kinds and the claims of advocates for an expansion in the reach of anti-discrimination law. Having an association inevitably means creating either explicit or implicit rules of membership. Those rules both include and exclude.

Potential conflicts with non-discrimination principles

Little problem is encountered if the basis for inclusion is, say, interest in chess or stamp collecting; but what if the basis for inclusion and exclusion is ethnicity or gender? Around the country there are many organisations that provide social and recreational activities for communities based upon ethnicity. These are an important source of social capital and community support. Consider, for example, an organisation, in NSW, which represents people with an intellectual or physical disability of Indian/South Asian background. It organises recreational activities for families caring for a person with a disability. No doubt, such an organisation bring great benefits to the community it serves; yet such organisations may fall foul of well-intentioned but ill-conceived laws designed to prevent 'discrimination'.

In November 2012, the federal government released the ill-fated Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012. The Bill gained huge support from human rights groups, with the thrust of submissions being in favour of further extension of the law's reach, the reduction or elimination of exceptions and the addition of further protected attributes. However, the proposed law also attracted intense opposition on a variety of grounds from other quarters. The Government eventually decided not to proceed with it – instead enacting legislation dealing just with discrimination on the basis of sexuality.[5]

While the Bill itself is unlikely to resurface in anything like its previous form, the treatment of freedom of association in the Bill raises issues of wider concern about how moves to expand the reach of anti-discrimination law, in the name of equality, can threaten other human rights even if this is unintended. In particular, in any redraft of consolidated anti-discrimination legislation at the federal level, a principled approach needs to be found to balancing anti-discrimination norms with freedom of association.

The young Korean single women who like books

The problems in the Exposure Draft of the Human Rights and Anti-Discrimination Bill may be illustrated by a hypothetical situation of a social club the membership of which is restricted not only to one gender, but also by reference to age, ethnicity and relationship

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[4] Patrick Parkinson and Nicholas Aroney, Submission on the Consolidation of Commonwealth anti-discrimination laws (2011) p.5, available at http://www.freedom4faith.org.au/reading.aspx.

[5] *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013.*

status. Suppose that there is a social club restricted to single Korean-Australian women under 30. The club meets once per week at a community centre and organises a range of literary and cultural activities which allow young Korean women to meet, interact and enjoy their shared culture.

The social value of such a group cannot be doubted. Indeed, the human rights lawyer might recognise that individual members of such a group would be exercising the right, "in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language" (Article 27, ICCPR). Yet it is difficult to see how such a club could have maintained the restrictions on its membership had the Human Rights and Anti-Discrimination Bill been enacted with the relevant provisions unamended. The Bill sought to regulate all clubs if they satisfied the following definition:

> ***club or member-based association*** means an association (whether incorporated or unincorporated) of people associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that provides and maintains its facilities, in whole or in part, from the funds of the association.

This is the same definition as in the Disability Discrimination Act 1992, but it is much broader than the definition in the Sex Discrimination Act 1984, which is limited to clubs for 30 members or more that sell liquor. The definition in the draft Bill included unincorporated associations, and thus any informal grouping of people was covered by the definition of 'club' or member-based association in the Bill. The only qualification was that the group must have funds which are used to provide and maintain 'facilities'. 'Facilities' is a word of wider meaning than 'premises'. The primary meaning given by the Macquarie Dictionary is "something that makes possible the easier performance of any action", for example, transport facilities.

Arguably, if the club rents a local school hall, or a room in a community centre or church, for its meetings, then it has premises, albeit not ones which it occupies exclusively. 'Facilities' might go further, to include a library of books maintained for the use of the members, together with other things they need such as cups, saucers and plates, even if the group does not formally rent premises.

The Bill would therefore have applied anti-discrimination prohibitions to this informal book club for young, single, Korean women provided it had funds to maintain 'facilities'. Sensibly enough, there were exceptions to the provision on clubs in the draft Bill. Clause 35(2) provided:

> The exception in this section applies in relation to a club or member-based association:[6]

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[6] If the exception applied, clause 35(4) provided that the club may discriminate against a person who is not in the target group if the discrimination consists of excluding the person from membership of the club or association; or restricting (whether wholly or partly) the person's access to benefits or services provided by the club or association; and the discrimination is not on the ground of another protected attribute, or a combination of attributes that includes another protected attribute.

(a) if membership of the club or association is restricted wholly or primarily to people (the *target group*) who have a particular protected attribute, or a particular combination of 2 or more protected attributes; and

(b) restricting membership to the target group is consistent with the objects of this Act.

If the book club were just a women's group with no other limitations, it would have been deemed to be consistent with the objects of the Act because the draft legislation specifically said so. Clause 35(3) provided:

If the target group is restricted wholly or primarily to people of one sex, that restriction is taken, for the purpose of paragraph (2)(b), to be consistent with the objects of this Act. However, this does not affect how paragraph (2)(b) applies in relation to any other protected attributes.

The problem, in this hypothetical situation, is that the restrictions are multiple, including limitations on the basis of age, ethnicity and relationship status as well as gender. For such a group to avoid unlawful discrimination, "restricting membership to the target group' would need to be consistent with the objects of the proposed Act (clause 35(1)(b) of the Exposure Draft). The objects of the proposed Act were, inter alia, to "eliminate discrimination" and to "promote recognition and respect within the community for:

(i) the principle of equality (including both formal and substantive equality); and

(ii) the inherent dignity of all people.

The club would, by its membership rules, be refusing participation by men, by anyone except Koreans, by married women or those in a de facto relationship, and by anyone over 30. It could not possibly be said that "restricting membership to the target group is consistent with the objects of this Act" for the aim of the legislation, had it been enacted, would have been to eliminate the very discrimination which is promoted by restricting membership to the target group. The group may promote friendship and literacy; its activities may even be consistent with Article 27 of the ICCPR, but it does not seem as if the restrictions on the membership of the group have much to do with eliminating discrimination or promoting recognition and respect for the principle of equality.

Nor could it be defended as a special measure for "advancing or achieving substantive equality for people, or a class of people, who have a particular protected attribute" (draft Bill clause 21) since the most that could be said is that the organisation is one which involves people with protected attributes. A social club can hardly be classified as an affirmative action program and nor is there any particular form of inequality experienced by single Korean women under 30 to which it could be seen as a remedy.

This does not appear to have been an accidental or unintended consequence of the draft legislation. The Bill was clearly intended to enact severe restrictions on the right of any club

or association to restrict its membership in a way which discriminates against people on the basis of a protected attribute – and in the Bill, there was a large number of such attributes.

This illustrates how vulnerable is the right of freedom of association in the wake of a massive expansion in the scope of anti-discrimination laws. It also leads to a fundamental question which is central to the ALRC's concerns with freedoms. Why regulate? That is not a question that is asked nearly often enough. The anti-discrimination lawyer often seems to ask why someone should be exempted from legislation - hence the concern about exceptions and exemptions. It is important first to ask a prior question. Why should this person or group be included in the legislation in the first place? To regulate by prohibiting something, and then to have to work out the exceptions to the prohibition that are considered justified, adds greatly to the complexity of the law and of our communal life, and involves significant compliance costs. It also risks prohibiting perfectly sensible and beneficial activities because someone has not thought of all the permutations where an exception is justified. Anti-discrimination laws ought to be confined to the 'commons' where the gender, ethnicity, age, disability or other attribute ought to be irrelevant to participation.

Freedom of association needs to be protected from the new fundamentalism about 'equality'.

V Freedom of movement

There is an important issue concerning the use by the federal government of Departure Prohibition Orders to restrain people who are residents and nationals of foreign countries from returning to their countries of origin, as a means to try to compel them to pay debts that the government says are owed to it. Such Orders are issued even when there is a serious dispute about the debt. The issue arises in relation to child support debts (which are a debt to the Commonwealth if the Department of Human Services is tasked with collection in that particular case). A similar issue may arise in relation to taxation.

Departure Prohibition Orders and foreign residents

A DPO is one of the remedies available to the Child Support Registrar to ensure the payment of outstanding child support debts. The DPO prevents a person from leaving the country unless and until he or she has satisfied the debt or at least as much of the debt as is negotiated with the Child Support officers as a condition for the lifting of the DPO. It is an administrative order. It does not require application to a Court and there is therefore no judicial oversight before making an Order that can interfere with the liberty of an individual. This in itself is troubling.

The relevant legislative provision is s.72D of the *Child Support (Registration and Collection) Act* 1988, the opening words of which provide:

> The Registrar may make an order (a departure prohibition order) prohibiting a person from departing from Australia for a foreign country if:
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> (a) the person has a child support liability; and

(b) the person has not made arrangements satisfactory to the Registrar for the child support liability to be wholly discharged.

The legislation does not specify that the person against whom the DPO is issued needs to be domiciled or habitually resident in Australia nor that he or she be an Australian taxpayer.

The problem with liable parents who reside overseas

The problem is that DPOs have been issued in situations where a person is merely visiting Australia and lives permanently overseas. I have known two examples of this kind which raise very significant issues of public policy and human rights in the course of my part-time work as a practising lawyer with Watts McCray in Sydney.

In the first case, my client is English. Mr & Mrs Jenkins[7] had reached an agreement on property division and child support in England at a time when they both lived there. There were orders of the English Court in relation to child support. Mrs Jenkins then married again and wanted to move with her husband to Australia. Mr Jenkins reluctantly agreed on the basis that he would pay little or no child support and the money instead would go into airfares for him to see his children in Australia. Unfortunately this agreement was never put into writing, so formally, the English orders remained in force between them. When Mrs Jenkins, who by this time was called Mrs Matthews, came to Australia she applied for child support under the Australian system. Mr Jenkins countered that there were already Orders made by the English Court and wanted to pay no more than was required under those Orders (which was very much less than the Australian assessment).

There were many aspects of this case which were disturbing, but one of them was that when Mr Jenkins came to Australia to visit his children he was met with a DPO which prevented him returning to his full time employment in the United Kingdom until he had settled some of the alleged debt in Australia. Mr Jenkins' position on this was that he had no valid and enforceable obligation under Australian law. Rather, he had an obligation to abide by the judgment of the English Court. It was essentially a conflict of laws problem. At no stage had the Child Support Agency ever taken steps to enforce the Australian child support debt in England, no doubt because the English court would uphold the English order in preference to the Australian assessment.

It seemed extraordinary that a DPO would have been issued to prevent an English citizen returning to England to his full time employment in the name of collecting child support. We don't imprison people for debt any more. He was essentially blackmailed into paying some part of the claimed debt which he disputed. In the course of representing Mr Jenkins, I tried to get an undertaking from the Child Support Agency that it would not issue a DPO if he were to come to Australia again to visit his children. The Agency declined to give such an undertaking, which meant Mr Jenkins could not risk travelling to Australia to see his children.

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7 A pseudonym.

The second case was one where I was consulted recently by telephone. As the story was told to me, a father and his new partner had flown over from New Zealand, apparently at the request of the New South Wales child protection authorities. There were issues concerning the safety and wellbeing of his child. According to his second wife's report, when he was at Sydney airport ready to return to New Zealand he was prevented from boarding the flight because of a DPO. This meant he could not return to his job in New Zealand. When he rang the Child Support officer, he was told that he would need to find a job here in Sydney and new accommodation in order to meet his debt before he would be allowed to leave the country.

Again the issue in this case was an argument about what the father justifiably owed, because in situations where the delegates of the Child Support Registrar have no record of the income of a father, they will utilise an estimated or default income under the legislation. This was the situation in this case. It is not uncommon with overseas' residents that the CSA does not have recent information about taxable income and so uses an estimated or default income which is artificially high. If that sum is not paid (and sometimes it cannot be paid), then the debt increases exponentially with penalties and interest. In my experience it is quite often the case that when the true facts are known it turns out that the father was unemployed for a period or had an income much lower than the default income. Given that information, the Agency will normally then adjust the previous assessments and the real debt will be much lower, but until that communication occurs, the Agency may insist on trying to enforce the artificially inflated debt.

These two cases illustrate a significant problem with the Registrar's power to issue a DPO in relation to a non-resident of Australia. In both cases, in my view, the decision to issue a DPO was improper, but not illegal. I understand the officers are only doing their job, often in difficult circumstances, but it is clear that there needs to be some control by the Government and Parliament over the misuse of DPOs, particularly in situations where the alleged child support debt is seriously contested or arises from the conflict of laws between residents of different countries.

For these reasons I recommend amendments to the legislation on DPOs in order to ensure that such an Order can only be issued against a person who is domiciled in, or habitually resident in, or a taxpayer of Australia.

VI Protection of property rights

The chapter of the Issues Paper is understandably concerned with protection of property rights from government interference. This protection from interference with property rights reflects some of the most basic principles of the common law.

After careful reflection, I have concluded that there is another form of encroachment upon property rights which needs urgently to be considered by the Parliament. This is how the Family Court and Federal Circuit Court exercise judicial power to alter property rights on the breakdown of intimate personal relationships in relation to assets (including superannuation

entitlements) acquired before the relationship began, inheritances, damages awards, and property acquired long after separation.

In short, my view is that there are so few rules that govern the exercise of the court's wide discretion, and so much confusion in the law arising from conflicting decisions of the Full Court of the Family Court over many years, that the current law effectively authorises judges to interfere with property rights in a manner which is arbitrary and capricious. The state of the law as it now stands gives courts a width of discretion that represents an unjustified encroachment on vested property rights. While the problem may seem to be in the exercise of the discretion rather than in the law that governs it, the vagueness of the law, at least as interpreted in some decisions of the Full Court of the Family Court, is at the heart of the problem.

This view requires some explanation. It is a legitimate, and indeed important function of the courts to adjust property rights where needed, and/or to award maintenance, in order to bring fairly to an end the financial partnership of couples whose economic affairs have been intertwined in the course of a sometimes long domestic partnership. The power to alter property rights contained in s.79 of the Family Law Act is particularly important in circumstances where one party to the marriage, almost invariably the woman, has withdrawn from workforce participation in order to care for children. The same body of law, in effect, applies to de facto relationships which have lasted for two years or where there is a child (Part VIIIAB, *Family Law Act* 1975 as amended in 2008).

Around the western world, the most common matrimonial property regime is what the French call a 'community of acquests'. That is, the fruits of the marital partnership are treated as jointly owned whatever the role division in the marriage. Property acquired before the marriage, or received subsequently by inheritance, is treated as separate property which is not shared with the other partner, unless some mingling of assets has occurred. The detailed rules on this vary from one jurisdiction to another. Spousal maintenance may be awarded in addition to the division of community property in order to meet needs.

The Family Law Act has not adopted a community property approach, and in a series of decisions, the latest of which is *Stanford v Stanford*,[8] the High Court has consistently emphasised that a community property approach is not to be inferred as a matter of judicial discretion. Instead, the Court is required to assess 'contributions' to the acquisition, maintenance and improvement of property and as a homemaker and parent. It must also consider numerous other factors, mostly of a prospective nature, which are listed in the section of the Act dealing with awards of spousal maintenance. It must not alter property rights unless it is just and equitable to do so, but that expression, 'just and equitable' has been given little substantive content in the decisions of the Full Court of the Family Court.

How then is the Court to assess disparate contributions, and in particular, how is it to put a value on contributions as a homemaker and parent? What might at first seem like a difficult

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8 (2012) 247 CLR 108.

issue in the abstract is not so problematic if the 'mischief' which led to the enactment of the 1975 legislation is properly understood. The purpose of assessing the homemaker contribution was to recognise its significance in the overall socio-economic partnership, ensuring that women were not disadvantaged by their role specialisation. Parliament recognised that women's most substantial contribution to the marriage partnership may not be in terms of earnings from paid work. The homemaker contribution was understood as having a relationship to the earnings of the other spouse because it freed that person to concentrate on earning activities. This was explained by Evatt CJ in her judgment in *Rolfe and Rolfe*:[9]

> The purpose of s. 79(4)(b), in my opinion, is to ensure just and equitable treatment of a wife who has not earned income during the marriage, but who has contributed as a homemaker and parent to the property. A husband and father is free to earn income, purchase property and pay off the mortgage so long as his wife assumes the responsibility for the home and the children. Because of that responsibility she may earn no income or have only small earnings, but provided she makes her contribution to the home and to the family the Act clearly intends that her contribution should be recognized not in a token way but in a substantial way. While the parties reside together, the one earning and the other fulfilling responsibilities in the home, there is no reason to attach greater value to the contribution of one than to that of the other. This is the way they arrange their affairs and the contribution of each should be given equal value.

The homemaker contribution is thereby given a comparator which guides the quantification of the parties' respective 'contributions'. There is nothing in the Family Law Act to suggest that the homemaker contribution could be evaluated by means other than one of comparison with the income-earning efforts of the other party in the context of a role-divided marriage.

Typically, courts reach the conclusion that the contributions of the parties to the marriage have been equal in situations where neither has significant pre-marriage property or receives an inheritance. That extends to assessing contributions to superannuation. The equal division of the fruits of the marriage partnership is entirely consistent with international norms. It is also appropriate that there should be some adjustment to those shares to recognise the impact on women's earning capacity where they have withdrawn from the workforce to care for children, and to adjust for future needs and other such factors.

The difficulties arise in how courts should deal with assets (including superannuation entitlements) acquired before the relationship began, inheritances, damages awards, and property acquired long after separation. These are usually not fruits of the marriage partnership. The legislation is silent on this, other than requiring the court to consider contributions to the acquisition, maintenance and improvement of the assets generally. The difficulty arises in particular because the Full Court of the Family Court has given such a broad meaning to the idea of a contribution as a homemaker and parent that the assessment of that contribution and its quantification in terms of the property division is, like beauty, largely in the eye of the beholder. It has held recently, for example, that a wife's homemaker contribution can justify a substantial share of an inheritance received by the husband after separation, even though there is no connection between the two. That is, the homemaker

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[9] *In the Marriage of Rolfe* (1977) 34 FLR 518, 519 (Evatt CJ).

contribution is not just given a value equal to paid work, but is given a value as a percentage of a windfall gain acquired after separation which is assessed on an entirely arbitrary basis.[10] Yet there are decisions which say that no contribution is made by one party to a marriage to an asset acquired after separation by the other in these circumstances.[11] There are irreconcilable views on the applicable law at the appellate level, and this leads to wildly different approaches and outcomes in essentially similar factual situations.[12]

That has led to great confusion as to what the law is. For example, the authorities differ on whether one spouse is entitled, on the basis of contributions to the marriage partnership over many years, to a share in increases in the value of property brought into the relationship by the other which are purely the result of inflation in property values. If a man brings into the marriage an unimproved block of land, and at the end of the marriage he still owns it and it is still unimproved, has the other spouse made any contribution to it, and if so, to what extent?[13] Is a house which was worth $200,000 at the commencement of a relationship and which is worth $850,000 at the time of trial due mainly to an increase in property prices, a contribution of $200,000 or a contribution of a house which has a present value of $850,000? How should the value attributed to that contribution be assessed in relation to other contributions?[14] Does it make a difference if it is the woman who brings the property into the marriage or receives it by inheritance rather than the man?[15] If so, why, and how does the law then apply in relation to same-sex couples?

There is also no clear methodology for how to quantify contributions to superannuation entitlements,[16] and in particular, how to deal with that portion of a superannuation fund that is attributable to the period before the relationship began. Can the other spouse make a 'contribution' to that portion of the superannuation which was accumulated before the couple met, and which has grown over time through the superannuation fund's investments? Put differently, does one partner to a marriage have a right to share –equally or otherwise - in the increase in value of that part of the fund which was accumulated before marriage? If not, then what methodology should be utilised to distinguish contributions to superannuation made in the course of the marriage partnership from the value which would probably be attributable to that fund if the couple had never lived together? To most of these questions, there are no answers. It is seen as a matter of the trial judge's discretion.

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[10] *Singerson & Joans* [2014] FamCAFC 238.

[11] Compare *Singerson & Joans* with *Wall and Wall* (2002) FLC ¶93-110.

[12] Compare for example, the treatment of the wife's post-separation lottery win in *Eufrosin and Eufrosin* [2014] FamCAFC 191 (2 October 2014) with *Farmer and Bramley* (2000) FLC ¶93-060 per Kay J.

[13] See *Bremner and Bremner* (1995) FLC 92-560; but see *Cabbell and Cabbell* [2009] FamCAFC 205.

[14] See *Kardos v Sarbutt* (2006) 34 Fam LR 550, discussed in *Williams and Williams* [2007] FamCA 313.

[15] See e.g. *In Marriage of Shewring* (1988) FLC 91-926; *Cook and Langford* [2008] FLC 93-374; *Agius and Agius* [2010] FamCAFC 143.

[16] Compare for example the guidance given in *Coghlan* with the guidance about an approach which was deemed to be incorrect by a differently constituted Full Court in *M v M*.

The inconsistency of approach in relation to initial contributions, inheritances, damages awards and post-separation windfalls all flow from the same fundamental disagreement about how contributions of these kinds are to be assessed within the framework of the legislation. The level of disagreement between different trial judges and appeal courts may not always be apparent in those cases where little explanation is offered for the outcome. The appeal to discretion tends to mask the theoretical arguments; but the results of the cases themselves demonstrate the profound inconsistency and disagreement.

In other jurisdictions, all these questions have answers based upon legal principles, whether the statutory regime is one of full community of property on marriage, community of acquests, deferred community, or equitable distribution of separate property.[17] There ought to be a clear answer, based upon legal principles in this country also. The trial judge certainly has a wide discretion, but it is a discretion to apply the law, not to determine what law to apply.

The plurality of the High Court emphasised in *Stanford v Stanford*[18] that while s 79 of the Act confers a broad power to make a property settlement order, "it is not a power that is to be exercised according to an unguided judicial discretion." Their Honours repeated the observations of four members of the Court in *R v Watson; Ex parte Armstrong*[19] that the judge exercising jurisdiction in relation to property and maintenance is not entitled to do 'palm tree justice'. The judge must exercise his or her wide discretion in accordance with legal principles. Yet there are no legal principles which guide the trial judge in quantifying the parties' contributions in relation to pre-marriage assets, inheritances, damages awards and assets acquired after separation nor in assessing how to quantify the prospective factors known as the s.75(2) factors. As the Full Court emphasised afresh recently, "each case in this jurisdiction will depend on its own facts or circumstances".[20] The Court has indicated that it will not look at the outcomes of cases involving similar circumstances as a guide to decision-making in order to achieve some consistency of approach.[21]

This raises issues concerning the application of the principle of legality and the need for statutory reform. The importance of respect for property rights is particularly significant in relation to de facto relationships, for many of these relationships are relatively short-term and it is common for parties to keep their finances separate. The power to make major alterations to vested property rights on the basis of a wide discretion which is not informed by principles of quantification, and without giving reasons that explain how the outcome in the case has

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[17] For an analysis of the law in different European countries, see Jens Scherpe, "A comparative overview of the treatment of non-matrimonial assets, indexation and value increases" [2013] *Child and Family Law Quarterly* 61.

[18] (2012) 247 CLR 108.

[19] (1976) 136 CLR 248 at 257.

[20] *Bishop & Bishop* [2013] FamCAFC 138 at [28].

[21] *Daymond & Daymond* [2014] FamCAFC 212.

been reached, is arguably inconsistent with the nature of federal judicial power. This power "must not be of an arbitrary kind and must be governed or bounded by some ascertainable tests or standards."[22]

A further problematic issue is in relation to the position of third party creditors of one or other partner to a marriage or de facto relationship. Where the amount of a debt is a quantified one, the chose in action is a vested property right which is capable of assignment even if it is not secured. There is a power in Part VIIIAA to affect the interests of third parties, but the law has been conservatively interpreted[23] and does not, in my view, represent an unjustified encroachment on vested property rights. However, what is more problematic is that there is no clarity on how the law should treat liabilities to third parties in working out what is the asset pool available for division between husband and wife. The law seemed to be clear as a result of the 1995 decision of the Full Court in *Biltoft and Biltoft*,[24] but was thrown into confusion again by two inconsistent decisions of the Full Court in *Federal Commissioner of Taxation v Worsnop*[25] and *Trustee of the Property of Lemnos v Lemnos*.[26]

The questions to which these cases give rise is whether the Court should deal with the net assets of the parties or their gross assets. If one spouse has $5 million in assets and $10 million in personal, quantified debts, does the Court have the power to transfer much or even all of that $5 million to the other spouse after the breakdown of the marriage, leaving the creditor in effect unable to recover? This is in practice an interference with third party property rights even if it is not direct. Given the uncertain state of the law, it is not possible to answer this question authoritatively.

The area is long overdue for reform. The ALRC made sensible proposals for reform in 1988, but these were never enacted.

VII Conclusion

The Inquiry has required careful consideration of a range of issues which have not previously been viewed necessarily through the lens that the ALRC is now using. Although not every section of this submission deals with problems where there are current encroachments, there is certainly a threat of future encroachments from changes to the law that have quite vocal and active constituencies advocating reform.

A principled approach must be taken, and one which treats the freedom rights seriously. That involves also understanding better what laws can and cannot do, in building a better society.

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[22] *R v Spicer; ex parte Waterside Workers' Federation of Australia* (1957) 100 CLR 312 at 317 (per Dixon C.J., Williams, Kitto and Taylor JJ).

[23] See e.g. *Hunt and Hunt* (2006) 36 Fam LR 64; *Rand and Rand* [2008] FamCAFC 50.

[24] [1995] FLC 92-614.

[25] (2009) 40 Fam LR 552.

[26] (2009) 223 FLR 53.