

Submission

on

Traditional Rights and Freedoms— Encroachments by Commonwealth Laws

to the

Australian Law Reform Commission

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1. Introduction

On 19 May 2014 Senator the Hon George Brandis QC referred a review of Commonwealth laws for consistency with traditional rights, freedoms and privileges to the Australian Law Reform Commission (ALRC).

FamilyVoice Australia is a national Christian voice – promoting true family values for the benefit of all Australians. Our vision is to see strong families at the heart of a healthy society: where marriage is honoured, human life is respected, families can flourish, Australia’s Christian heritage is valued, and fundamental freedoms are enjoyed.

We work with people from all major Christian denominations. We engage with parliamentarians of all political persuasions and are independent of all political parties. We have full-time FamilyVoice representatives in all states.

FamilyVoice has had a longstanding interest in constitutional government and the rule of law in Australia. We have made numerous submissions to inquiries touching on rights and freedoms, particularly in relation to antidiscrimination and antivivification laws and proposals for bills or charters of rights.

In this submission we focus on rights and freedoms related to speech, religion, association, property and the burden of proof. The Commonwealth laws we consider are those Acts for which the Australian Human Rights Commission (AHRC) has statutory responsibilities, namely those relating to age, disability, racial and sex discrimination, and to the Commission itself.

2. Terms of Reference

This inquiry by the Australian Law Reform Commission, initiated by Senator Brandis, has the following terms of reference:

the identification of Commonwealth laws that encroach upon traditional rights, freedoms and privileges; and

a critical examination of those laws to determine whether the encroachment upon those traditional rights, freedoms and privileges is appropriately justified.

For the purpose of the inquiry ‘laws that encroach upon traditional rights, freedoms and privileges’ are to be understood as laws that:

- *reverse or shift the burden of proof;*
- *deny procedural fairness to persons affected by the exercise of public power;*
- *exclude the right to claim the privilege against self-incrimination;*
- *abrogate client legal privilege;*
- *apply strict or absolute liability to all physical elements of a criminal offence;*
- *interfere with freedom of speech;*
- *interfere with freedom of religion;*
- *interfere with vested property rights;*

- *interfere with freedom of association;*
- *interfere with freedom of movement;*
- *disregard common law protection of personal reputation;*
- *authorise the commission of a tort;*
- *inappropriately delegate legislative power to the Executive;*
- *give executive immunities a wide application;*
- *retrospectively change legal rights and obligations;*
- *create offences with retrospective application;*
- *alter criminal law practices based on the principle of a fair trial;*
- *permit an appeal from an acquittal;*
- *restrict access to the courts; and*
- *interfere with any other similar legal right, freedom or privilege.*

Scope of the reference

In undertaking this reference, the ALRC should include consideration of Commonwealth laws in the areas of, but not limited to:

- *commercial and corporate regulation;*
- *environmental regulation; and*
- *workplace relations.*

In considering what, if any, changes to Commonwealth law should be made, the ALRC should consider:

- *how laws are drafted, implemented and operate in practice; and*
- *any safeguards provided in the laws, such as rights of review or other accountability mechanisms.*

In conducting this inquiry, the ALRC should also have regard to other inquiries and reviews that it considers relevant.¹

3. Freedom of Speech

One of the most significant characteristics of the human race is our capacity for speech. Through speech people are able to share ideas, discover truth, form communities and develop nations. Human history, including the development of civilisation, owes much to the knowledge, inventions and culture made possible by the capacity of the human species for elaborate speech.

In Judaeo-Christian understanding, the human capacity for speech is a consequence of mankind being made in the image of the God. The Bible portrays God as one who speaks – to Adam and Eve in the Garden of Eden, to Job in his distress, and through Jesus when he walked on earth. Through prayer, man has the privilege of speaking to God.

Professor Paul Eidelberg, president of the Jerusalem-based think tank Foundation for Constitutional Democracy, traces the concept of freedom of speech to being made in the image of God:

Recall the patriarch Abraham's questioning God's decision to destroy Sodom: "What if there should be fifty righteous people in the midst of the city? Would you still stamp it out rather than spare the place for the sake of the fifty righteous people within it? It would be sacrilege to You to do such a thing, to bring death upon the righteous along with the wicked; ... Shall the Judge of all the earth not do justice?" (Genesis 18:23-25.)

God permits Abraham to question Him...

Abraham's dialogue with God means that God is not only a God of justice, but also of reason.

This tells us what it means to be created in the image of God. It tells us about man's unique power to speak and communicate with others. It needs to be stressed, however, that Abraham's dialogue with God reveals the ultimate object of speech—Truth.²

Debate over the merits of freedom of speech were recorded as early as in ancient Greece:

Over time, opposing forces arose: the need to express ideas and opinions in written form, and the desire by some to control free expression. Thus, the Greek epic poet Homer (ninth or eighth century BC) supported free expression, but Solon (630–560 BC), the first great lawmaker of Athens, banned "speaking evil against the living and the dead." Pericles, the leader of democratic Athens, extolled freedom of speech as the defining distinction between the rival city-states of Athens and Sparta. Nonetheless, after the Peloponnesian Wars, the Athenian Assembly ordered Socrates to drink poison as punishment for lecturing about unrecognized gods and corrupting youth by encouraging them to question authority.³

In the development of modern democratic societies, freedom of speech is seen as a *natural right* arising from the intrinsic nature of humanity and beyond the authority of governments. This is in contrast with *legal rights* that are bestowed by governments.

Democratic society considers freedom of speech or expression to be one of our most cherished freedoms. The essence of freedom of speech is not merely the freedom to express ideas, but the freedom to disagree, dispute or cause controversy – an idea often witnessed in our political arena. Indeed, a right not to be offended would stifle legitimate debate and limit political freedom – an important concept in a functioning democracy. Speech also includes expression of personal beliefs which might not be supported by evidence, and may be controversial, leading to robust debate.

While freedom of expression is understood as a *natural right* beyond the authority of governments, it is not an absolute right. Free speech has purposes: the pursuit of truth and the common good. Most of the debate about freedom of speech centres on identifying legitimate limitations.

3.1. Question 2–1 Criteria for limitations

Question 2–1 What general principles or criteria should be applied to help determine whether a law that interferes with freedom of speech is justified?

3.1.1. Justifiable limitations

The primary justifiable limitation on freedom of expression is harm to other individuals or society, generally known as the *harm principle*.

The English philosopher John Stuart Mill addressed the relationship between authority and liberty in his seminal work *On Liberty*, published in 1859. There he proposed that the only legitimate limitation on free expression is that now usually described as the *harm principle*:

*the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.*⁴

Application of this principle to freedom of expression requires clarification of two concepts:

- the nature of the *harm* envisaged and
- identification of the *others* in consideration.

Given the importance of freedom of expression as a natural right flowing from being human, only serious *harms* would justify limiting this freedom, such as serious risks to life, health or property. The *others* who might be harmed should include both individuals and society and a whole.

Reasonable restrictions on freedom of speech are articulated well in the International Covenant on Civil and Political Rights (ICCPR), Article 19:

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

These limitations helpfully address harms both to individuals and to society.

Personal reputation

Respect for the reputation of others is a legitimate restriction on speech freedom. As the ALRC Issues Paper 46 observes:

*The common law tort of defamation has long protected personal reputation from untruthful attacks.*⁵

Since the pursuit of truth is an underlying purpose of freedom of speech, defamation laws should only limit *untruthful* speech, in accord with the common law tort. Since the introduction of uniform defamation laws throughout Australia, “substantial truth” is rightly a complete defence against a complaint of defamation.

National security

Since the first priority of government is defence of the realm, a serious threat to national security constitutes the crime of treason.⁶ Violent overthrow of the Australian government, either by an external enemy or by internal civil war, would probably result in the loss of many lives. For this reason, a limitation on speech that threatens national security is justifiable.

Historically, however, some governments have imposed overly harsh restrictions of freedom of speech on national security grounds. To establish clear boundaries for limitations on fundamental freedoms, a group of 31 experts in international law at a 1984 conference in Siracusa, Italy, drafted the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*.⁷

The Siracusa Principles, as they are usually known, provide the following reasonable guidelines for national security limitations:

vi. “national security”

29. National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.

30. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.

31. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse.

32. The systematic violation of human rights undermines true national security and may jeopardize international peace and security. A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.⁸

Public order

Protection of public order is essential to preserve civilised society. In Australia a law against “urging violence and advocating terrorism” (formerly known as sedition) provides this protection.⁹ Importantly, the law defines the crime in terms of *action*, such as urging the overthrow of the government or urging violence within the community. This action is *irrespective of whether associated with race, religion, nationality or political opinion*.¹⁰ So the actions, rather the protected attributes, are primary.

The *Classification Act 1995* section 9A outlines that publications, films and computer games “must be classified RC” if they “advocate the doing of a terrorist act”. This does not include an item that is “merely as part of public discussion or debate or as entertainment or satire”.¹¹ Such a limit is justifiable on national security grounds.

The *Siracusa Principles* provide the following guidelines for constraining limitations to fundamental freedoms on the basis of public safety (or order):

vii. “public safety”

33. Public safety means protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property.

34. The need to protect public safety can justify limitations provided by law. It cannot be used for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.¹²

Public health

Limiting speech because of public health concerns reflects a high value on dignity of human life. For instance, banning advertisements for cigarette smoking may be justified to protect the health of the public.

Australian law prohibits the use of any carriage service (including the Internet) to “directly or indirectly counsel or incite committing or attempting to commit suicide” or that “promotes a particular method of committing suicide; or to provide instruction on a particular method of committing suicide”.¹³

The *Siracusa Principles* again give helpful guidance for this limit:

iv. “public health”

25. Public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.

26. Due regard shall be had to the international health regulations of the World Health Organization.¹⁴

Public morals

Some immoral behaviour is so grotesque that restricting related communication is justified. For example, child pornography material. Under Australian law, the production, possession or distribution of such material is prohibited.¹⁵

The Organisation for Security and Cooperation in Europe Office for Democratic Institutions and Human Rights (ODIHR) elaborates:

*Measures purporting to safeguard public morals must, therefore, be tested against an objective standard of whether they meet a pressing social need and comply with the principle of proportionality. Indeed, it is not sufficient for the behaviour in question merely to offend morality – it must be behaviour that is deemed criminal and has been defined in law as such.*¹⁶

The *Siracusa Principles* provide the following guidelines:

v. “public morals”

27. Since public morality varies over time and from one culture to another, a state which invokes public morality as a ground for restricting human rights, while enjoying a certain margin of discretion, shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community.

28. The margin of discretion left to states does not apply to the rule of non-discrimination as defined in the Covenant.

3.1.2. Unjustifiable limitations

In recent decades, Australia has experienced a growing assault on freedom of expression through the imposition of “political correctness”.

Associate Professor Robert Sparrow of Murdoch University wrote in 2002:

*Over the last seven years or so the expression “political correctness” has entered the political lexicon across the English speaking world. Hundreds of opinion pieces in newspaper and magazines have been written about political correctness as well of scores of academic articles about it and the debates in which the expression gained its currency. It is close to being received opinion in Anglo-American popular culture that a coalition of feminists, ethnic minorities, socialists and homosexuals have achieved such hegemony in the public sphere as to make possible their censorship, or at least the effective silencing, of views which differ from a supposed “politically correct” orthodoxy.*¹⁷

Sparrow then proceeds to criticise this silencing. Yet the term “political correctness” has gained currency precisely because its stifling pressure on freedom of speech is so pervasive and palpable.

Senator Cory Bernardi expressed a widespread view when he addressed the question: exactly what is political correctness?

Some people claim that political correctness is about being nice to people, being tolerant and treating others with respect. But that's just good manners.

Political correctness is designed to undermine free speech, common sense and debate in the public arena. It is an instrument of the Left, who use it to push their ideas onto society.

Political correctness is not a concept that came about overnight. It has slowly been infiltrating our society and undermining our culture. And therefore we often fail to recognise the change that has occurred.

Let me just give you a few examples of the extremes of PC that our society already has to put up with:

- *Santa was banned from saying "Ho ho ho", for fear of offending women.*
- *Sea World re-named fairy penguins "little penguins" to avoid offending the gay community (and even the gay community thought that was a bit over the top).*
- *A member of parliament's maiden speech is now called their "first speech".*
- *We have "chairperson" instead of chairman, and "female actor" instead of "actress".*
- *We shy away from saying "blackboard" and use "chalkboard" instead.*

The list goes on...¹⁸

Initially, pejorative terms such as "sexist", "racist" and "homophobic" were invented as rhetorical devices for *ad hominem* attacks on opponents. Uttering these epithets often had the effect of stifling discussion and preventing an opposing viewpoint from being heard, much like dozens of people blowing whistles at a public meeting to prevent the speaker from being heard.

More recently, political correctness has been given the force of law through antidiscrimination, antivilification or anti-hate-speech laws. Professor James Allan of the Queensland University challenged such laws in a *Sydney Morning Herald* column, saying they erode democracy:

You need to ask yourself what you expect hate-speech laws to accomplish if you support them. There are only three possibilities. One is that you want to hide from the victims of such nasty speech how the speakers honestly feel about them. It's a sort of "give them a false sense of security" goal.

Another is you hope to reform the speaker. You know, fine them and lock them up and maybe they'll see the errors of their ways.

But both those supposed good outcomes of hate speech laws are patent nonsense. So that leaves a third possibility, one I believe almost all proponents of these laws implicitly suppose justifies their illiberal position. The goal of hate speech laws is to stop listeners who hear nasty words from being convinced by such speech...

In other words, it is plain distrust of the abilities of one's fellow citizens to see through the rantings...

If there was a polite way to express my disdain for that sort of elitist bull, I would use it. But there isn't. So I will just say it is wholly misconceived.¹⁹

An egregious example of hate speech laws curtailing free expression on important public policy matters is the prosecution of *Herald Sun* columnist Andrew Bolt. In two columns published in 2009, he commented on scholarships and prizes intended to help disadvantaged indigenous people. He

questioned the propriety of giving such awards to fair-skinned people with minority indigenous heritage who had suffered no apparent disadvantage.²⁰

When charged under section 18C of the *Racial Discrimination Act 1975*, Andrew Bolt claimed his comments were part of a robust democratic debate – to no avail. He was found guilty in 2011 after a million dollar trial.

The huge cost of such cases, out of all proportion to the alleged hurt, has a “chilling” on free speech. Editors self-censor reports because they do not want to risk time, money and stress. Truth is the biggest casualty.

Jeremy Sammut, research fellow at The Centre for Independent Studies, feels that his freedom to address significant public policy questions is seriously constrained as a result of the Bolt case:

In the wake of the Andrew Bolt case, Section 18C will silence the important debates and discussions we should be having about Indigenous affairs.

The fear of potential legal action under the [Racial Discrimination Act] also means the nation will debate the question of recognising Indigenous people in the constitution with its tongue tied.

Academic Anthony Dillon has written that after the Bolt case, as a part-Indigenous man he can say, and not get sued for saying, statements about Indigenous identity that a non-Indigenous person would be highly likely to be sued for saying.

With this advice ringing in my ears, Section 18C means I self-censor. I don't go as hard on the question of the [Aboriginal Child Placement Principle] and Indigenous identity as I might, because of what might happen if I push too hard.

This is what critics of Section 18C mean when they talk about the silencing effect of so-called 'hate speech' laws. Free speech is stifled to avoid running the legal gauntlet, and public debate is the worse for it.²¹

3.2. Question 2–2 Commonwealth law interferences

Question 2–2 Which Commonwealth laws unjustifiably interfere with freedom of speech, and why are these laws unjustified?

3.2.1. Racial Discrimination Act 1975

The *Racial Discrimination Act 1975*, section 18C deals with “Offensive behaviour because of race, colour or national or ethnic origin”. This section creates an offence of performing an act that:

- communicates words, sounds, images or writing in public – s18C(2)(a);
- is likely to offend, insult, humiliate or intimidate another person or group – s18C(1)(a); and
- is done because of the race, colour or national or ethnic origin of the other person or – s18C(1)(b).

Unjustified limitation

Section 18C imposes an explicit limitation on freedom of expression, since it concerns the communication of words, sounds or image in public. However the limitation does not fall within the justifiable limitations of protecting personal reputation, national security, public order, public health or public morals. It therefore constitutes an unjustifiable limitation on freedom of speech.

A person or group that is aggrieved because words, sounds or images have harmed their personal reputation can initiate defamation action against the person responsible under state laws. Since justifiable limitations on offensive speech are already available under state defamation laws, the provisions of section 18C are superfluous. To the extent that the provisions of section 18C are not covered by state defamation laws, they are unjustifiable limitations.

Breaches legal certainty

An internationally recognised principle for the rule of law is *legal certainty*. Professor Cameron Stewart, Pro Dean at Sydney Law School, explains that (emphasis added):

*the rule of law principle requires that the legal system comply with minimum standards of **certainty, generality and equality**. The rule of law is a fundamental ideological principle of modern Western democracies...*²²

The opportunity for a citizen to know *in advance* whether an intended action is lawful or not, is crucial for a free society. Arbitrary law, which leaves citizens uncertain about the legality of their actions, is the device exploited by tyrants to impose a reign of terror. At its core, legal certainty recognises the importance of human dignity and enables citizens to live autonomous lives in a community with mutual trust.²³

The action, defined in section 18C as unlawful, relies largely on the *feelings* of the listener (or reader), not the *intentions* of the speaker (or writer). The definition is therefore uncertain, not only because it relies on the feelings of the listener, but also because there is no “reasonable person” test.

A speaker can know his own intentions but not necessarily the reactions of listeners. Entertainment reporter Michael Lotto comments:

*It is worth remembering that offence is taken, not given. Hurt feelings are often a healthy by-product of free speech. If you declare that you’re offended, that should not signal the end of a debate. It should be the start.*²⁴

Since the actions of a speaker under the current wording are legally uncertain, section 18C breaches a fundamental requirement for the rule of law.

Breaches generality

As noted above, another fundamental principle for the rule of law is *generality*. Laws should apply to equally to everyone, not to segments of society.

Section 18C defines the unlawful actions in terms that are not general. A component of a complaint must be that “the act is done because of the race, colour or national or ethnic origin of the other person”.²⁵ This emphasis on race is reinforced in section 18B, which ensures that a complaint can be made under this provision even if race is only a minor factor.²⁶ Emphasising racial divisions in society is unhelpful and divisive.

If it is unlawful “to offend, insult, humiliate or intimidate another person or a group” on the basis of race, why is it not unlawful in other cases? What about people who feel offended by remarks about their weight, height, appearance, wealth, poverty, social status, etc.?

If such a law is needed at all, it should be completely general, applying to actions adversely affecting any other person or group. Race, colour or national or ethnic origin should not be mentioned. Such

a provision should not be in the Racial Discrimination Act at all. It should instead be in the Criminal Code Act – if needed at all.

Answer to question 2-2

Section 18C of the Racial Discrimination Act 1975 unjustly interferes with freedom of speech and should be repealed, together with related sections. Instead, the Criminal Code Act should be amended, if necessary, to prohibit actions adversely affecting any other person or group, without any mention of race, colour, or national or ethnic origin.

4. Freedom of Religion

The concept of *freedom of religion* arises from the capacity of humans to order their lives by thought, belief and reason, rather than by instinct. Governments acknowledging the humanity of their citizens will recognise their inalienable right to freedom of thought, belief and opinion, including the right to change religion or belief.

Christians understand the capacity of humans for thought, belief and reason to arise from being made in the image of God. As the Stanford Encyclopedia of Philosophy explains:

One of the chief features of the divine image in human beings, then, is the ability to form beliefs and to acquire knowledge. As Thomas Aquinas puts it, “Since human beings are said to be in the image of God in virtue of their having a nature that includes an intellect, such a nature is most in the image of God in virtue of being most able to imitate God”.²⁷

Freedom of religion includes three distinct elements:

- the freedom to form, hold and change opinions and beliefs without government interference;
- the freedom to manifest those beliefs and opinions in public or private through speech and actions;
- the freedom of parents to raise their children in accordance with their opinions, beliefs and practices.

The ICCPR recognises these rights in Article 18:

1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
2. *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
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.*
4. *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 Australian Constitution, section 116, enshrines the principle of non-interference by government in religious belief or practice:

*The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.*²⁸

Consequently, the Commonwealth Parliament:

- cannot establish a State church;²⁹
- cannot enforce religious observance;^{30, 31, 32}
- cannot prohibit religious observance;³³ and
- cannot impose a religious test for public office.³⁴

The High Court of Australia has confirmed, in its judgement on the “Scientology case”, that the legal definition of religion involves both belief and conduct.³⁵ Justices Mason and Brennan held that “for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief...”³⁶ Consequently, freedom of religion in Australia involves both freedom of belief and freedom of conduct giving effect to that belief.

The most pressing human rights issues associated with freedom of religion in Australia today are the increasing denial of religious conscience and religious practice. This denial of religious freedom is often due to the application of antidiscrimination laws.

Many parts of antidiscrimination laws represent a direct assault on religious freedom by prohibiting some conduct that may be required to give effect to religious beliefs. Religious beliefs generally make moral distinctions between right and wrong, between good and bad, whereas antidiscrimination laws may declare conduct giving effect to such moral distinctions to be unlawful.

4.1. Question 3–1 Criteria for limitations

Question 3–1 What general principles or criteria should be applied to help determine whether a law that interferes with freedom of religion is justified?

4.1.1. Justifiable limitations

Given that thought, belief and opinion are such a fundamental parts of being human, freedom of belief, conscience or religion can be justifiably limited only to prohibit *serious* harm to other individuals or society.

The ICCPR recognises this when it states in Article 18(3) that limitations are justifiable only “to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”

Religiously motivated violence, such as the siege of the Lindt Café in Sydney by Man Haron Monis,³⁷ that threatens public safety and order, is clearly unacceptable and may be justifiably prohibited. Even in the face of harsh mockery, such violence is never justified, as political commentator John Stonestreet aptly noted:

*What happened in Paris [with Charlie Hebdo] was despicable. No matter how offensive the magazine’s cartoons might have been, nothing justifies murder.*³⁸

Limitations are also justified to protect individuals from serious harm. For example, in some parts of the world, abhorrent religious practices occur. Ritual child sacrifice, perpetrated by animistic witchdoctors on behalf of some people seeking fame and fortune, is still known in parts of sub-Saharan Africa.^{39,40} Female genital mutilation is practised in some Islamic countries and promoted by some Islamic authorities.^{41,42} With increasing migration from countries where these practices are known to occur, Australia must be vigilant prohibiting these harms to individuals.

4.1.2. Unjustifiable limitations

Unjust restrictions on religious organisations

Government-imposed conditions on religious organisations, that prevent them from operating in accordance with their values, limit their freedom of conscience unjustifiably.

Cardinal George Pell put it this way:

Neither the government nor anyone else has the right to say to religious agencies “we like your work with vulnerable women; we just need you to offer them abortion as well” or “we really like your schools, but we can’t allow you to teach that marriage between a man and a woman is better or truer than other expressions of love and sexuality.” Our agencies are there for everyone without discrimination, but provide distinctive teachings and operations. In a wealthy, sophisticated country like Australia, leaving space for religious agencies should not be difficult.⁴³

Consider a hospital that is committed to respecting human life from “womb to tomb”, in accordance with its religious values. Forcing it to offer vulnerable women abortions denies its freedom to act in accordance with its religious beliefs. Furthermore, since other hospitals that offer abortions are available, women seeking abortions are not denied the opportunity to obtain an abortion.

Likewise, consider a school committed to teaching its students that marriage is the union of a man and a woman, and that homosexual behaviour is immoral. Requiring a school to include contrary values in its curriculum would deny the freedom of the school to act in accordance with its beliefs.

Any Commonwealth law used to impose such conditions would be arguably contrary to s 116 of the Australian Constitution: “The Commonwealth shall not make any law for ... prohibiting the free exercise of any religion...”

Inadequate recognition of religious conscience

Antidiscrimination laws commonly include exceptions or exemptions for religious beliefs, practices or organisations. However such exemptions have often proved to be inadequate and have denied people the right to act according to their conscience informed by their beliefs.

A recent example is the case of *Christian Youth Camps v Cobaw Community Health (Cobaw)* in the Victorian Court of Appeal.⁴⁴ A brief summary of the case from the Queensland University of Technology follows:

This case involved a consideration of the interaction of the rights to freedom from discrimination and freedom of religion. The respondent (Cobaw) is an organisation concerned with the prevention of youth suicide. The appellant (CYC) had a camp facility established by the Christian Brethren Trust, connected with a church known as the Christian Brethren. The Christian Brethren are opposed to homosexual activity as being against biblical teaching.

Cobaw wished to hire a camp facility from the appellants for the use of same sex attracted young people. CYC (by its camp manager) refused.

It was held in the Victorian Civil and Administrative Tribunal (VCAT) that the refusal amounted to unlawful discrimination on the basis of the sexual orientation of those who would be attending the proposed camp. Before the Tribunal, CYC contended that if, contrary to their principal submission, the refusal would otherwise have constituted unlawful discrimination, the exemption provisions in the Equal Opportunity Act 1995 (Vic) (the EO Act) concerning religious freedom were applicable, such that there had been no contravention. These exemptions apply to conduct 'by a body established for religious purposes' (section 75(2)) and to discrimination by a person which is necessary for that person 'to comply with the person's genuine religious beliefs or principles' (section 77). The Tribunal held that neither exemption was applicable.

On appeal to the Court of Appeal, CYC disputed the finding that its refusal was unlawful discrimination, maintaining that there was a fundamental distinction between an objection to 'the syllabus' to be taught at the proposed camp — that is, to beliefs or opinions which would be expressed by Cobaw to those attending the camp — and discrimination on the basis of the sexual orientation of those attending. The Tribunal's decision was upheld by a majority of the Court of Appeal in this judgment.⁴⁵

The Cobaw case, and other similar cases both in Australia and overseas, amount to a conflict between two systems of belief. The complainant, namely the person who initiated the discrimination complaint, considered certain behaviour morally acceptable. The respondent, against whom the complaint was made, believed that behaviour to be morally unacceptable. The effect of the Tribunal's decision, upheld by the Appeal Court, was to impose the complainant's belief system on the respondent, thereby denying the latter's freedom of conscience.

Since the Cobaw organisation was able to book an alternative venue for its camp, its freedom to act in accordance with its beliefs was not compromised by the decision of CYC camp manager to decline the Cobaw organisation's request.

The supposed exemptions for religious beliefs and religious organisations, in this case and most other similar cases, proved to be inadequate and ineffective. They have failed to protect the freedom of conscience of the respondent. Instead, the law has enabled the complainant to trample on the freedom of religion of the respondent.

How can mutually contradictory systems of belief be given equal respect in society? The solution is free and voluntary exchange. Former Nobel Prize winner Milton Friedman argued that:

freedom of exchange ... enables people to co-operate voluntarily in complex tasks without any individual being in a position to interfere with any other... It provides for co-operation without coercion; it prevents one person from interfering with another.⁴⁶

The current law, as interpreted by the Tribunal and the Appeal Court, empowers one person to interfere with another. It has the deleterious effect of enabling the buyer of a service to coerce the seller of the service. The outcome undermines cooperation, breeds disharmony and resentment, and is socially counterproductive.

This Act, and similar legislation in other jurisdictions, should be amended to require free and voluntary exchange in situations involving a conflict of beliefs between the provider and recipient of goods and services.

4.2. Question 3–2 Commonwealth law interferences

Question 3–2 Which Commonwealth laws unjustifiably interfere with freedom of religion, and why are these laws unjustified?

4.2.1. Sex Discrimination Act 1984

Some of the grounds on which discrimination is prohibited in the *Sex Discrimination Act 1984* directly contradict moral values of the Christian faith and other faiths.

In particular, sections 5A, 5B and 6 prohibit discrimination on the grounds of *sexual orientation*, *gender identity* and *marital or relationship status* respectively. Yet all of these matters are highly controversial, with different sections of the community having strongly held mutually contradictory beliefs about their moral acceptability or otherwise.

Sexual orientation

The ground of *sexual orientation* raises the question of the morality of *homosexual behaviour*. This matter is addressed in the following definitive statement by the Catholic Church:

The community of faith today, in unbroken continuity with the Jewish and Christian communities within which the ancient Scriptures were written, continues to be nourished by those same Scriptures...

Providing a basic plan for understanding this entire discussion of homosexuality is the theology of creation we find in Genesis. God, in his infinite wisdom and love, brings into existence all of reality as a reflection of his goodness. He fashions mankind, male and female, in his own image and likeness. Human beings, therefore, are nothing less than the work of God himself; and in the complementarity of the sexes, they are called to reflect the inner unity of the Creator. They do this in a striking way in their cooperation with him in the transmission of life by a mutual donation of the self to the other...

The Church, obedient to the Lord who founded her and gave to her the sacramental life, celebrates the divine plan of the loving and live-giving union of men and women in the sacrament of marriage. It is only in the marital relationship that the use of the sexual faculty can be morally good. A person engaging in homosexual behaviour therefore acts immorally.⁴⁷

Many Protestant leaders express similar views. For example, Matt Slick, president and founder of the Christian Apologetics and Research Ministry (CARM), writes:

Homosexuality is clearly condemned in the Bible. It undermines God's created order where He made Adam and Eve, a man and a woman, to carry out his command to fill and subdue the earth (Gen. 1:28). Homosexuality cannot carry out that mandate. In addition, it undermines the basic family unit of husband and wife which is the God-ordained means of procreation. And, believe it or not, it is also dangerous to society.⁴⁸

Gender identity

The ground of *gender identity* raises questions about gender dysphoria (or gender identity disorder) and “sex change” operations.

The reality is that “sex change” is a myth. Neither hormone treatment nor surgery can actually change a person's sex. Australian resident Alan Finch, who decided at age 19 years to transition

from male to female and had genital surgery in his 20s, later regretted this action which he described as “genital mutilation”. At age 36, he told the *Guardian* newspaper in 2004:

transsexualism was invented by psychiatrists... You fundamentally can't change sex ... the surgery doesn't alter you genetically. It's genital mutilation. My 'vagina' was just the bag of my scrotum. It's like a pouch, like a kangaroo. What's scary is you still feel like you have a penis when you're sexually aroused. It's like phantom limb syndrome. It's all been a terrible misadventure. I've never been a woman, just Alan ... the analogy I use about giving surgery to someone desperate to change sex is it's a bit like offering liposuction to an anorexic.⁴⁹

The degree of regret among those who have had “sex-change” surgery is largely hidden, as commentator Stella Morabito explains:

The transgender lobby actively polices and suppresses discussion of sex-change regret, and claims it's rare (no more than “5 percent.”) However, if you do decide to “de-transition” to once again identify with the sex in your DNA, talking about it will get you targeted by trans activists...

Finch went on to sue the Australian gender identity clinic at Melbourne's Monash Medical Center for misdiagnosis. He also was involved in starting an outreach to others called “Gender Menders.” The reaction from the transgender community was fast, furious, and abusive...⁵⁰

Not only is “sex-change” delusional, both Catholic and Protestant theologians consider it immoral. CARM president Matt Slick comments on sex-change operations as follows:

The Bible does not address this issue because it was not around at the time. But, no, sex change operations are not okay. God created people as male and female (Gen. 1:27)... Therefore, to change the gender of a person through an operation is a violation of the natural birth gender that God has ordained for the person. It also violates the distinction of those attributes which designate a male from a female.⁵¹

Regius Professor of Moral and Pastoral Theology at the University of Oxford, theologian Oliver O'Donovan, has argued:

“If I claim to have a ‘real sex’, which may be at war with the sex of my body and is at least in a rather uncertain relationship to it, I am shrinking from the glad acceptance of myself as a physical as well as a spiritual being, and seeking self-knowledge in a kind of Gnostic withdrawal from material creation.”⁵²

Marital or relationship status

The ground of *marital or relationship status* raises the question of the moral status of homosexual unions, which is addressed in the following statement by the Catholic Church:

Society owes its continued survival to the family, founded on marriage. The inevitable consequence of legal recognition of homosexual unions would be the redefinition of marriage, which would become, in its legal status, an institution devoid of essential reference to factors linked to heterosexuality; for example, procreation and raising children. If, from the legal standpoint, marriage between a man and a woman were to be considered just one possible form of marriage, the concept of marriage would undergo a radical transformation, with grave detriment to the common good. By putting homosexual unions on a legal plane analogous to that of marriage and the family, the State acts arbitrarily and in contradiction with its duties.

The principles of respect and non-discrimination cannot be invoked to support legal recognition of homosexual unions. Differentiating between persons or refusing social recognition or benefits is unacceptable only when it is contrary to justice. The denial of the

*social and legal status of marriage to forms of cohabitation that are not and cannot be marital is not opposed to justice; on the contrary, justice requires it.*⁵³

Matt Slick asks: “Would Jesus okay same sex marriage?” His answer is:

*No, Jesus would not approve of same sex marriage. He taught about marriage being between a man and a woman, never anything else. You just can’t read into his words a pro-homosexual interpretation. Homosexuality was known to him, particularly since it’s clearly condemned in the Old Testament (Leviticus 18:22; 20:13).*⁵⁴

The fact that many Christians, as well as adherents of other faith traditions, hold strong beliefs that are antithetical to these protected attributes means that conflict over these attributes is almost inevitable. The effect of the Act is to empower those who have espoused one value system to impose their beliefs on those with contrary beliefs. Far from fostering social harmony, the Act is likely to exacerbate social divisions.

Religious exemptions

The religious exemptions set out in sections 37 and 38 of the Act are completely inadequate. Section 37 applies only to religious bodies on limited matters such as the selection, training or appointment of priests, ministers or members of religious orders. Section 38 applies only to educational institutions established for religious purposes on limited matters related to the employment of teachers or the provision of educational services.

The exemptions generally apply only in relation to “an act or practice that conforms to the doctrines, tenets or beliefs of that religion”. The consequence of this provision is that antidiscrimination tribunals and courts are required to determine the “religion” in question and its “doctrines, tenets or beliefs”, which may be understood by adherents but not carefully defined in writing.

Moreover, the exemptions are further restricted to actions done “in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed”. The “doctrines, tenets or beliefs” of a religion and the “susceptibilities of adherents” are matters more theological than judicial. Courts, tribunals and judges are ill-equipped to determine such matters, as Justice Nettle observed in his *Catch the Fire* judgement: “In my view it was calculated to lead to error for a secular tribunal to attempt to assess the theological propriety of what was asserted at the Seminar.”⁵⁵

Antidiscrimination tribunals have an appalling record of determining such things as “religion”, “doctrines, tenets or beliefs” and “susceptibilities of adherents”. In the *Catch the Fire* case in the Victorian Court of Appeal, Justice Nettle determined that the Victorian Civil and Administrative Tribunal had erred in nineteen findings.⁵⁶ In the *OV & OW v Wesley Mission* case, the NSW Supreme Court found that the NSW Antidiscrimination Tribunal had wrongly identified the “religion” (at 41), wrongly determined the question of “doctrinal conformity” (at 45) and was wrong about “religious susceptibilities” (at 46).⁵⁷ The huge costs incurred by respondents in seeking to defend their religious freedom are grossly unjust.

Courts and tribunals should not be asked to determine such things as the “doctrines, tenets or beliefs” or “injury to the religious susceptibilities of adherents” of a religion or creed. Indeed, the Australian Constitution s 116 provides that: “The Commonwealth shall not make any law ... for prohibiting the free exercise of any religion...” To comply with the Australian Constitution, the *Sex Discrimination Act* should not prohibit the free exercise of religion.

No exemptions are provided for other corporate bodies or natural persons who adhere to religious beliefs and practices. This is a flagrant failure to take religious belief seriously. Religious exemptions

should be recognised for any legal person – natural or corporate – who holds a genuine and conscientious belief that some of the protected attributes are morally unacceptable.

A general religious exemption from provisions of the Act should be modelled on the provision in the *Defence Act* for exemption from military service:

- (1) *The following persons are exempt from service in the Defence Force in time of war...*
- (h) *persons whose conscientious beliefs do not allow them to participate in war or warlike operations;*
 - (i) *persons whose conscientious beliefs do not allow them to participate in a particular war or particular warlike operations;*⁵⁸

Sections 37 and 38 should be replaced by a simple provision for exemption from the Act for persons, natural or corporate, whose conscientious beliefs do not allow them to comply with the Act, or with particular provisions of the Act.

In the case of a complaint, the role of a tribunal or court would then be limited to determining whether the person held conscientious beliefs that did not allow them to comply with the Act.

Answer to question 3-2: Sex Discrimination Act

The Sex Discrimination Act 1984 unjustly interferes with freedom of religion. It should be amended by replacing sections 37 and 38 with a simple provision for exemption from the Act for persons, natural or corporate, whose conscientious beliefs do not allow them to comply with the Act, or with particular provisions of the Act.

4.2.2. Age Discrimination Act 2004

The *Age Discrimination Act 2004* provides in section 35 an exemption for bodies “established for religious purposes”, which is more general than the provisions in the *Sex Discrimination Act* (sections 37 and 38) that apply only to priests, ministers and members of religious orders, and to educational institutions.

Nevertheless, the limitation to bodies “established for religious purposes” is still too narrow. The exemption should be extended to any person whose conscientious beliefs do not allow them to comply with the Act, or with particular provisions of the Act.

Answer to question 3-2: Age Discrimination Act 2004

The Age Discrimination Act 2004 unjustly interferes with freedom of religion. A simple provision should be added for exemption from the Act for persons whose conscientious beliefs do not allow them to comply with the Act, or with particular provisions of the Act.

5. Freedom of Association

Human beings are, as Aristotle observed, “*zoon koinonikon*”, social or communal animals.⁵⁹

... so even when men have no need of assistance from each other they none the less desire to live together. At the same time they are also brought together by common interest, so far as

*each achieves a share of the good life. The good life then is the chief aim of society, both collectively for all its members and individually ...*⁶⁰

The right of voluntary association is a natural right, arising from man's nature and deep need to live in society – not a privilege endowed by the state.⁶¹ This fundamental democratic right was recognised as early as ancient Greece.

The Athenians under Solon's rule seem to have been free to institute such societies as they pleased, so long as their action did not conflict with the public law. The multitude of societies and public gatherings for the celebration of religious festivals and the carrying on of games or other forms of public recreation and pleasure, which flourished for so many centuries throughout ancient Greece, indicates that a considerable measure of freedom of association was quite general in that country.⁶²

The Roman authorities were more restrictive: no private association could be formed without a special decree of the senate or the emperor. Yet numerous voluntary societies, or *collegia*, were approved for such activities as religion, entertainment, politics, cemeteries and trades.⁶³

In the centuries following the fall of the Roman Empire, numerous voluntary associations emerged: religious, charitable, educational and industrial. Many of the great religious orders and universities originated during this period. These voluntary associations constituted a considerable restraint on the exercise of arbitrary power by sovereigns and secured a significant degree of social peace.⁶⁴

Throughout history and across cultures, humans have lived in communities. Aristotle acknowledged this in the fourth century BC. Long beforehand, around the twentieth century BC, Abraham received a vision of his descendants becoming a great community – a nation.⁶⁵ The code of Hammurabi, from the eighteenth century BC, provided laws to guide living in community. In ancient China, Confucius taught the basic principles of *ren*, an obligation of altruism towards others, and *yi*, a moral disposition to do good, as the foundations of good community life.⁶⁶ Jesus Christ reminded his followers of the second greatest commandment: "Love your neighbour as yourself,"⁶⁷ – included around 1500 years earlier in the Law of Moses.⁶⁸

This natural right has long been recognised in common law countries such as Australia, where voluntary societies could be established without legal authorisation to pursue any aim whatsoever, provided their members did not engage in conspiracy or acts violating public order.

The right to freedom of association is recognised in Article 22 of the *International Covenant on Civil and Political Rights*.⁶⁹ It is ultimately a recognition that human beings are by very nature associational.

Karl Josef Partsch, a German expert in international law and human rights, has explained the breadth of the right to freedom of association, as Dutch legal expert Sharon Detrick explains:

*According to Partsch, the right to freedom of association includes the right to come together with one or more other persons for social or cultural as well as for economic or political purposes. It includes association with only one person as well as group assembly, casual as well as formal, single and temporary as well as organized and continuing association. Furthermore the freedom of association implies the right to decide whether to associate and also the freedom not to associate.*⁷⁰

American judge and political commentator, Andrew Napolitana, stresses that the **freedom not to associate** is as important and the freedom to associate:

The freedom to associate is based on mutual consent – each person must agree to associate with the other person. For example, when A and B agree to associate with one another, both A and B have that freedom. But if A wants to associate with B and B does not want to associate with A but is required to do so then B is not legally free to reject that association with A. Rather he is being forced to associate with A. This concept is called forced association. Forced association is completely counter to our natural rights as free individuals ...⁷¹

Deciding whom to employ, whom to offer a service to or offer goods for sale to, whom to enter into a partnership with, whom to let accommodation to, whom to admit to a club and so forth are all social activities involving an association of some kind between persons.

5.1. Question 4–1 Criteria for limitations

Question 4–1 What general principles or criteria should be applied to help determine whether a law that interferes with freedom of association is justified?

5.1.1. Justifiable limitations

As with freedom of speech (section 3.1.1 above), the primary justifiable limitation on freedom of association is governed by the *harm principle* - the avoidance of *harm* to others or to society.

Article 22 of the ICCPR, to which Australia is a signatory, recognises that the right to freedom of association is limited by what amounts to an expression of the harm principle:

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

These limitations foster the common good by seeking to protect both society and individuals from harmful forms of association.

The Commonwealth Attorney-General's department explains that such limitations must be "proportionate":

In all cases, restrictions must be provided for by legislation (or imposed in conformity with legislation), must be necessary to achieve the desired purpose and must be proportionate to the need on which the limitation is based. The phrase 'necessary in a democratic society' incorporates the notion of proportionality.⁷²

National security and public safety

In recent decades, the world has seen militant terrorist organisations threaten national governments, such as the Taliban in Afghanistan, Al-Qaeda in Somalia and Yemen, the Islamic State in Syria and Iraq, and Boko Haram in Nigeria. National governments have a responsibility to protect their peoples from insurgent attacks of this kind and can justifiably limit associations formed for the purpose of violent insurrection.

The Australian Attorney-General's department provides the example of criminalising association with terrorists as a justifiable limitation:

the Criminal Code criminalises associating with a member of a terrorist organisation and thereby providing support to it, if the person intends that the support assist the organisation. This restriction is applied on the grounds of national security and public safety.⁷³

Public order

Governments also have a responsibility to ensure public order and safety. The growth in recent decades of Outlaw Motorcycle Gangs (OMCGs), such as the Bandidos, Hells Angels and Gypsy Jokers, has become an increasing concern of governments. Such gangs have become one of the most identifiable components of Australia's criminal landscape, as the Australian Crime Commission explains:

OMCG chapters pose a serious risk to public safety because they are liable to react violently to attempts by rival OMCGs to poach members or encroach on their "territory". In these circumstances, OMCG members have on a number of occasions (notably on the Gold Coast and at Sydney Airport) paid scant regard to the safety of innocent bystanders.⁷⁴

Two inquiries conducted by the Commonwealth Parliamentary Joint Committee on the Australian Crime Commission between 2006 and 2009 have provided evidence that:

criminal gangs had diversified their activities across illicit drug trafficking, illegal firearms, money laundering, fraud, stock market manipulation, extortion and protection rackets, counterfeiting, and vehicle rebirthing; that groups were working collaboratively, flexibly and across state borders; and that the annual cost to the Australian economy was \$10 billion. Motorcycle gangs were specifically labelled as being linked to most forms of serious organised crime.⁷⁵

Australian state governments have responded to this growing menace to public safety and order in several ways. One approach has been to strengthen laws against consorting with criminals, which have a long legal history as explained by Sydney University law lecturer Andrew McLeod.⁷⁶ However, South Australian and New South Wales laws of this kind have been significantly constrained by two High Court decisions.

The South Australian *Serious and Organised Crime (Control) Act 2008* breached the vitally important separation of powers doctrine embedded in Chapter III of the Australian Constitution. The High Court declared the Act invalid because it intended to require:

the Magistrates Court to make a decision largely pre-ordained by an executive declaration for which no reasons need be given, the merits of which cannot be questioned in that Court and which is based on executive determinations of criminal conduct committed by persons who may not be before the Court.⁷⁷

The New South Wales *Crimes (Criminal Organisations Control) Act 2009* also breached the separation of powers doctrine, but in a different way. The High Court declared this Act invalid because it purported to "confer upon judges of a State court administrative functions which substantially impair its essential and defining characteristics as a court."⁷⁸

Any limitation on freedom of association intended for the protection of public safety and order must be subject to proper judicial process.

Public health

The current serious Ebola outbreak in West Africa has generated renewed debate about mandatory human quarantine for public health reasons and whether it is a justifiable limitation on freedom of association.

In the USA, the governors of New York, New Jersey and Illinois imposed 21-day mandatory quarantine for all travellers arriving from West Africa who had been in contact with the Ebola virus.⁷⁹

The Australian government suspended the program for humanitarian immigration from Ebola-affected West African nations and imposed on permanent visa holders a mandatory 21-day quarantine period before their departure for Australia.⁸⁰

An earlier generation of Australians was familiar with mandatory quarantine for tuberculosis patients before the advent of antibiotic treatments. The Waterfall Sanatorium near the Royal National Park south of Sydney, which operated from 1909 to 1958, was one of many such hospitals around Australia. Isolation limited the spread of infection in the public interest and recovery depended largely on an environment of fresh air and sunshine.⁸¹

Mandatory quarantine of tuberculosis patients continues today with a small number of patients. A 2004 paper reported the situation at that time:

*Pulmonary tuberculosis is a highly contagious disease that accounted for 58% of the 1028 tuberculosis (TB) notifications in 2002 in Australia. Most patients complete therapy successfully. A study in San Francisco confirmed through DNA fingerprinting that a single non-compliant TB patient could infect large numbers of people. In Australia, non-compliant patients can be detained under coercive powers available to all states and territories. To our knowledge, 10 public health detention orders for TB carriers have been issued in Australia within the past 5 years. In New South Wales, there have been two recent cases in which this power was used.*⁸²

Restrictions of this kind for the common good are justifiable limitations on freedom of association.

Public morals

Public nudity and lewd behaviour can be offensive and disrupt social harmony.

Controversy over such behaviour occurred recently at the Mornington Peninsula Shire Council in Victoria. A resident close to Sunnyside North – one of four “clothing optional” beaches in Melbourne – complained that the area “had become a notorious pick-up spot for homosexuals, who created ‘love nests’ among foreshore vegetation.”⁸³ Similar complaints have been made about other “optional clothing” beaches, such as Maslin Beach in South Australia.⁸⁴

These examples illustrate the tension between the **freedom to associate** and the **freedom not to associate**. Some beach-goers may want to bathe nude in the company of others similarly unclad. Other beach-goers may want the freedom to enjoy the beach without naked people nearby. Satisfying both freedoms is achievable if nude bathing is confined to private areas, such as those associated with the Australian Nativist Federation.

Limitations on freedom of association for the protection of public morals are justifiable if both freedom to associate and freedom from forced association are respected.

Freedoms of others

Freedom of assembly and freedom of association are often considered together as cognate freedoms, since members of associations usually assemble and assemblies of people are usually associated for a purpose.

An assembly of people advancing a cause can provide an opportunity for opponents of the cause to form a counter-assembly. This situation brings into sharp focus the need for the freedom of association and assembly to take into consideration potential conflict with the freedoms of others.

For example, when the leader of the Party for Freedom in the Dutch House of Representatives, Geert Wilders, visited Australia in February 2013, an Australian association booked venues where he could speak and many people wanted to assemble to hear him.⁸⁵ However, other people assembled outside the venue to protest against his visit and created a human blockade at the entrance in an attempt to prevent those who had bought tickets from entering – as a newspaper reported:

“Trevor” had attempted to break through the protesters’ picket line to hear the controversial Dutchman speak. The school teacher from Adelaide was pictured grappling with protesters and being shoved to the ground.

“It is a freedom of speech thing,” he said.

“They pulled me down and ripped my jacket when all I was doing was listening to a speech. All the while screaming scum at me.

“They say they are arguing for tolerance but it is them being intolerant to opposing views.”⁸⁶

A justifiable limitation of freedom of association and assembly is a requirement for the respect of others to associate and assemble for a contrary purpose. The Organisation for Security and Cooperation in Europe Office for Democratic Institutions and Human Rights (ODIHR) describes the necessary balance in the following terms:

That balance should ensure that other activities taking place in the same space may also proceed if they themselves do not impose unreasonable burdens. Temporary disruption of vehicular or pedestrian traffic is not, of itself, a reason to impose restrictions on an assembly. Nor is opposition to an assembly sufficient, of itself, to justify prior limitations. Given the need for tolerance in a democratic society, a high threshold will need to be overcome before it can be established that a public assembly will unreasonably infringe upon the rights and freedoms of others. This is particularly so given that freedom of assembly, by definition, constitutes only a temporary interference with these other rights.⁸⁷

5.1.2. Unjustifiable limitations

The development of voluntary associations in Australia today is hindered by the unnecessary, intrusive and counterproductive constraints imposed on voluntary associations by antidiscrimination laws.

Scouting

For example, before the enactment of antidiscrimination laws, the Scouting movement fostered the social development of boys and the Guiding movement mentored girls in a similar way. Now, while Guiding remains a girls-only movement, Scouting has become mixed gender. The prohibition of “discrimination” on the ground of sex has ended the availability of a boys-only movement to encourage boys to grow into responsible men.

One former Scout laments the demise of the boys-only Scouting movement in these words:

Aside from the practical considerations of mixed Scouting (e.g., having to take an extra tent, ensure the presence of a female leader, etc.), there are very good reasons to keep Scouting exclusively for boys (to paraphrase [Baden-Powell’s] book).

Despite what trendy sociologists tell us, gender is not a social construct. Boys have unique interests, goals and needs. B-P clearly saw this. Good role models are one such need — and I personally believe Australia’s streets would be much safer, and our unemployment rate lower, if more boys had experienced things like Scouting.

Let's face it, boys don't always want to play with girls either — and one wonders whether the introduction of mixed Scouting has played a role in reducing overall Scout numbers commensurate with the decline in altar boys and priestly vocations once girls appeared on the scene.

These reflections came about recently when, at my son's third birthday party, some of the mothers present were expressing concern about finding a good outlet for their boys. I knew exactly what they meant because I share their concerns.

As if searching for a good school were not challenge enough, I'm now on the lookout for something good to steer my boys towards when they're old enough. Cadets may be an option, although it starts at an older age, doesn't include the Christian ethos once prevalent in Scouting, and may not be quite as much fun.

Perhaps the only alternative is to start our own groups. I do not say this to knock the no doubt well-intentioned contemporary Scout leaders; but the organisation does not appear to be what it once was, nor what I believe Australian boys so sorely need now.

And what do they ultimately need? I close with some words from B-P's final public letter:

"... I have had a most happy life and I want each one of you to have a happy life too. I believe that God put us in this jolly world to be happy and enjoy life. Happiness does not come from being rich, nor merely being successful in your career, nor by self-indulgence. One step towards happiness is to make yourself healthy and strong while you are a boy, so that you can be useful and so you can enjoy life when you are a man."⁸⁸

Lawn bowls

Sporting organisations have also been adversely affected through heavy-handed intervention by antidiscrimination bodies. Bowls SA has run gender-based competitions for many years, to the satisfaction of most members. However, the South Australian Equal Opportunity Tribunal ruled in 2012 that separate male and female competitions had to be abolished within 18 months.⁸⁹

Bowls SA general manager Benjamin Scales said it would lobby the State Government to change legislation, as had happened in Victoria, to allow the sport to keep running separate male and female competitions.

He said lawn bowls was a special case because although it was played to a high level internationally, it did not qualify for equal opportunity exemption like some sports, such as AFL, because selection was not determined by "physique, strength and stamina"...

The issue has divided the state's 17,000-strong bowls community for five years. The Advertiser understands only a small percentage want to abolish male and female competitions.⁹⁰

Harkaway Hall

The small Victorian community of Harkaway suffered from doctrinaire intervention by the Victorian Civil and Administrative Tribunal in 2011, over the hire of its community hall.

For a century the Harkaway Hall had hosted just about every big local event, including weddings, dances and public meetings. After experiencing problems with 18th and 21st birthday parties involving drunkenness, wilful damage and assaults, the hall committee decided in 1998 to refuse 18th and 21st celebrations unless the organisers were able to satisfy strict security conditions.

In case the ban might be considered discriminatory, the committee applied every three years for an exemption from the state's *Equal Opportunity Act* to allow it to "lawfully discriminate" against 17- to 22-year-olds. Harkaway community enjoyed peace and quiet for many years – until 2011.

In that year, the hall committee was told its request would have to be referred to the Victorian Equal Opportunity and Human Rights Commission.

No complaint had been received, but the commission said the ban was in breach of the Equal Opportunity Act, the Charter of Human Rights and Responsibilities Act, and High Court and Supreme Court rulings...

In Harkaway, a bewildered Mr Wild told The Australian: "I just feel that it's a situation where a government department is trying to fix something that is not broken, which works extremely well."⁹¹

A protracted and expensive legal battle followed, during which time the hall could not be hired out. Eventually, the Victorian Civil and Administrative Tribunal allowed the hall committee to discriminate on the basis of age, and ban parties for people under 22.⁹²

Although common sense and sanity ultimately prevailed in this case, it was achieved only after the Harkaway community was subjected to considerable trouble, disruption and cost. The intervention by the Victorian Equal Opportunity and Human Rights Commission, in the absence of any complaint, was an inappropriate denial of freedom of association.

Discussion

These are only a few of the numerous examples of interference by antidiscrimination bodies to prevent Australians from being free to associate with others in accordance with their wishes, for social, cultural, sporting or other purposes. Such intervention to enforce an ideologically-driven "utopia" is more characteristic of despotism than democracy.

Antidiscrimination laws should be either abolished or amended so that restrictions are limited to the protection of national security or public safety, order, health or morals, or the freedom of association of others, as provided in Article 22 of the International Covenant on Civil and Political Rights.

5.2. Question 4–2 Commonwealth law interferences

Question 4–2 Which Commonwealth laws unjustifiably interfere with freedom of association, and why are these laws unjustified?

5.2.1. Equality before the law

All four Commonwealth discrimination acts (dealing with age, disability, racial and sex discrimination) include among their objects the promotion of *equality before the law*. For example, the *Age Discrimination Act* states:

The objects of this Act are ... (b) to ensure, as far as practicable, that everyone has the same rights to equality before the law, regardless of age, as the rest of the community...⁹³

The concept of *equality before the law* has ancient origins. As early as 431 BC, the Athenian leader Pericles said in his funeral oration:

If we look to the laws, they afford equal justice to all in their private differences; if no social standing, advancement in public life falls to reputation for capacity, class considerations not being allowed to interfere with merit; nor again does poverty bar the way.⁹⁴

In the Judaeo-Christian tradition, the concept of *equality before the law* arises from mankind being made in the image of God:

So God created mankind in his own image, in the image of God he created them; male and female he created them.⁹⁵

The *equality before the law* concept is explicit in such commands as: “There shall be one law for the native and for the stranger who sojourns among you.”⁹⁶

Professor Geoffrey Walker, in his book *The Rule of Law*, writes that one of the fundamental requirements for the rule of law is the trilogy: certainty, generality and equality.⁹⁷ Regarding the latter, he writes:

The equality principle is the main basis for protecting the general interest against inroads by pressure groups and other special interests. It restrains, or should restrain, a legislature from enacting bills of attainder or other laws which unilaterally benefit or injure particular individuals or groups... People are much more likely to comply with a legal precept if they know it is the same for everybody.⁹⁸

This principle is the rock on which all antidiscrimination laws stumble, because they all grant benefits to particular groups – defined, for example, by age, race or sex. A serious problem with “group rights” is that they are antithetical to individual rights:

When we give rights to individuals, we provide them with moral shields that protect them from the excesses of power, including the excesses of collective power. But, if we ascribe rights to groups as well as to individuals, we might find that the rights of individuals are met and overtaken by those of groups, so that rights lose their potency as safeguards for individuals.⁹⁹

That is precisely the problem with all Commonwealth discrimination acts: they elevate so-called “group rights” above individual rights. Some individuals find their fundamental rights, such as freedom of association, crushed by others belonging to a group with protected attributes. The perverse result is that antidiscrimination laws sabotage equality before the law, not strengthen it.

5.2.2. Exemptions

All four Commonwealth discrimination acts include exemptions, some of which provide limited protection of freedom of association.

Sex Discrimination Act 1984

The *Sex Discrimination Act 1984* includes exemptions for the widest range of associations:

- Charities: s 36,
- Clubs: s 25(3),
- Educational institutions established for religious purposes: s 38,
- Religious bodies: s 37,
- Sporting associations: s 42 and

- Voluntary associations: s 39.

In addition, s 30 provides a general exemption that allows discrimination on the ground of sex “in connection with a ... position in relation to which it is a genuine occupational qualification”. In addition to this general exemption, this section lists numerous types of position that are declared exempt from the antidiscrimination provisions of the Act.

The exemptions allowing discrimination on the ground of sex and related attributes are so numerous that its conceptual basis must be questioned. The sexual division of the human race into male and female is an inescapable biological reality, as fundamental as the physical reality of the force of gravity. This differentiation has been marked culturally by a corresponding division of roles, norms, practices, dress and behaviour. An attempt to obliterate these differences by legislative fiat is as futile as King Canute commanding the tide to stop.¹⁰⁰

The Act is commonly interpreted to give freedom from discrimination a wide scope but only a narrow scope to exemptions. The result is that freedom of association and other fundamental freedoms are suppressed.

Racial Discrimination Act 1975

The *Racial Discrimination Act 1975*, unlike the *Sex Discrimination Act*, has very few exemptions. In fact it has essentially only one exception: for charities. Section 8(2) allows “a provision ... of the governing rules ... of a registered charity, if the provision ... confers benefits for charitable purposes ... on persons of a particular race, colour or national or ethnic origin”.

This exception, for example, would permit the scholarship program of the Australian Indigenous Education Foundation. The AIEF website says the scholarship program “opens doors for marginalised Indigenous students to access high-quality education in culturally inclusive environments”.¹⁰¹ This raises the definitional question of what is meant by “Indigenous”? Could an unsuccessful full-blood Aboriginal applicant for a scholarship complain of racial discrimination if a scholarship was awarded to someone of mostly European descent but with a distant Indigenous ancestor?

Then there is the question of how narrowly could race or ethnicity be defined by a charity and still come within the exception? For example, could a Caledonian charity be established to award scholarships to people of Scottish descent? What about scholarships for Highland Scots? Or even descendants of the Campbell Clan?

Why does the *Racial Discrimination Act 1975* allow an exception only for charities and not for clubs, educational institutions, religious organisations, sporting bodies or voluntary associations, when the *Sex Discrimination Act* allows exemptions for all these entities?

- A Croatian Club wanting to exclude Serbs from membership would be in breach of the Act.
- The WA Football Commission runs an Aboriginal Football Program that “provides programs and events to increase involvement of Aboriginal people and communities in all facets of the football industry.”¹⁰² However no exception is allowed for race-based sporting bodies under the Act.
- The Australian Sikh Association would have no religious exemption under the Act for restricting membership to ethnic Sikhs.
- The Queensland Maori Society, as a voluntary association, would not have an exemption under the Act for restricting membership to those of Maori descent.

Other Acts

Similarly inconsistent and inadequate exemptions are included in the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*.

5.2.3. Recommendation

The Commonwealth discrimination acts (dealing with age, disability, racial and sex discrimination) should be amended to affirm the priority of freedom of association over constraints on discrimination. Laws prohibiting discrimination, that impact on freedom of association, should apply only when needed for the protection of national security or public safety, order, health or morals, or the freedom of association of others.

6. Property Rights

Property rights are a long-established principle of common law. Ownership, use, and disposal of property, among other rights, have traditionally been held as so inalienable that any encroachment is not to be undertaken lightly – and then only according to law.

As William Pitt the Elder stated:

*The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail – its roof may shake – the wind may blow through it – the storm may enter – the rain may enter – but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement!*¹⁰³

He also said:

*There are many things a parliament cannot do... It cannot take any man's property, even that of the meanest cottager, as in the case of enclosures, without his being heard.*¹⁰⁴

Any dispossession of property for the common good may only be made by competent authorities, acting lawfully, with due regard to compensation. We find this principle reflected in the Australian Constitution:

Section 51: *The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-*

(xxxi) *The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.*¹⁰⁵

Indeed, these principles are so deeply ingrained in the collective Australian consciousness as to have been made the subject of a popular movie – *The Castle* (1997).

The concept of “property” includes both “real” and “personal” property, as the ALRC Issues Paper 46 observes:

*“Real” property encompasses interests in land and fixtures or structures upon the land. “Personal” property encompasses both tangible things – chattels or goods – and certain intangible legal rights, such as copyright and other intellectual property rights, shares in a corporation, beneficial rights in trust property, rights in superannuation and some contractual rights, including, for example, many debts.*¹⁰⁶

In law, the term “property” refers to a “bundle” of rights, explained succinctly in a judgement of the High Court:

*“Property” does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of “property” may be elusive. Usually it is treated as a “bundle of rights”.*¹⁰⁷

The rights associated with property include:

*the right to use or enjoy the property, the right to exclude others, and the right to sell or give away.*¹⁰⁸

The sale of property is effected by means of a contract, which is a binding agreement between two parties satisfying certain conditions including an offer and acceptance, and a (financial) consideration.¹⁰⁹

Freedom of contract

A longstanding freedom often associated with property rights – although it also overlaps with other areas – is that of contract. Freedom of contract has been defined as:

*The freedom of individuals and groups (such as corporations) to form contracts without government restrictions... Through freedom of contract, individuals entail a general freedom to choose with whom to contract, whether or not to contract, and on what terms to contract.*¹¹⁰

While guided by legislation such as the *Competition and Consumer Act 2010* (Cth) and various state acts, Australian contract law finds its origins, as with the broader “bundle” of property rights, in the inherited English common law.¹¹¹

Of particular relevance to this submission are two key manifestations of the freedom to contract: (1) trade in goods and services and (2) employment.

Trade in goods and services

Freedom of contract relates, for example, to a private school’s ability to set reasonable terms under which it will educate children. Private schools commonly offer their services to all, but with the natural expectation that students, through the assent of their family or guardian, will comply with particular school requirements.

These might include acceptance of a uniform policy, standards of behaviour, or of an ethos, particularly when the school is faith-based in nature (be it Christian, Jewish, Islamic or otherwise).

That students or their families would enrol in a school whose beliefs stand in marked contrast with their own seems odd – particularly considering diversity of choice. It should simply be a case of a contract between the school and students/parents/guardians.

As evidence shows, however, freedom of private schools to set their terms of service and maintain their preferred teaching environment is being eroded. Consequently, the ability of parents to choose a school which matches their own values and standards is also infringed.

Recently, a Brisbane Anglican school faced a potential anti-discrimination complaint in regard to its Year 12 formal. On being queried by a male student, the Anglican Church Grammar School encouraged him to bring a female partner, pointing to its traditions and guidelines. It did not

actually impose this policy, rather noting that, on a practical level for an all-boys school, the occasion would provide a “social and educational opportunity” to interact with the opposite sex.¹¹²

Despite this, media comment by Queensland Anti-Discrimination Commissioner Kevin Cocks suggests that schools adhering to such a policy “could be open to a complaint of discrimination”.¹¹³

Freedom of contract is clearly threatened, both in fact and potential, by anti-discrimination laws.

Similar experiences have been had in countries whose anti-discrimination laws mirror those of Australia.

In the United Kingdom, for example, an infamous 2008 case saw a couple penalised for declining a booking for their guesthouse from a same-sex couple. Hazelmary and Peter Bull, of Chymorvah House in Cornwall, declined the request for accommodation on the basis of a “religiously-informed judgement of conscience”.¹¹⁴

Mr & Mrs Bull lost cases at county court level, the Court of Appeal, and finally at the UK Supreme Court, despite their stated opposition to any sexual relations outside marriage (i.e. not merely same-sex relationships). The courts also ignored the fact that the Bulls were providing accommodation under their own roof, with damages awarded in favour of the same-sex couple.

Following a hearing, Mrs Bull said of the case:

*Our B&B is not just our business, it's our home. All we have ever tried to do is live according to our own values, under our own roof.*¹¹⁵

With a direct correlation of terminology in Australian anti-discrimination law, the Bulls had argued that theirs was a case of “indirect discrimination”, permissible under their rights to “manifest their religion” under the European Convention on Human Rights.

The UK Supreme Court ruled otherwise – and the current status of Australian anti-discrimination law (to say nothing of the Australian example provided by the Cobaw case – discussed elsewhere in this submission) has created an environment where similar cases are increasingly likely to occur here.

Employment

Freedom of contract also relates to the terms by which parties enter into an employer/employee relationship. A contract which finds its basis in common law, employment is also heavily regulated by a raft of industrial legislation. That such parameters exist is reasonable when considering potentially uneven bargaining power between employer and employee.

This form of regulation aside – the extent of which is the topic of perennial debate – the ability of individuals and organisations to freely contract with regard to employment has also been severely encroached upon by anti-discrimination legislation.

In late 2014, a Hobart men’s refuge suffered a complaint of discrimination from the Australian Services Union for its employment of men only. This was despite the shelter, Bethlehem House Men’s Assistance Centre Inc., having an exemption from the Tasmanian anti-discrimination commissioner which allowed “for Bethlehem House Men’s Assistance Centre Inc. to recruit for and employ men only in those positions that have primary tasks that involve client liaison that may include entering the rooms of male residents, male toilets and shower facilities”.¹¹⁶

The union argued that Bethlehem House had exceeded the intention of the exemption by hiring only men for all roles, ultimately lodging a formal complaint with the commissioner. Bethlehem House was obliged to negotiate a new exemption with the union, mandating a male to female staff ratio.

It is worth noting that, at the time, only two Tasmanian organisations had received an exemption to employ male staff only: Bethlehem House and the Hutchins School (in order to have male teachers' assistants provide personal and pastoral care to disabled students). In contrast, twelve organisations had exemptions for female staff only, including several women's shelters and the Hobart Women's Health Centre.¹¹⁷

As a further example, in 1998 the Catholic Education Office (CEO) of the Archdiocese of Sydney refused an applicant classification as a teacher because of her "high profile as a co-convenor of the Gay and Lesbian Teachers and Students Association and her public statements on lesbian lifestyles".¹¹⁸

The CEO claimed a religious exemption under the *Sex Discrimination Act 1984* on the basis that homosexual behaviour ran contrary to the "doctrines, tenets, beliefs and teachings of the Church", which a teacher would be required to uphold. The matter was decided by the Australian Human Rights Commission (at that time the Human Rights and Equal Opportunity Commission).

The AHRC found against the CEO, not only acting as arbiter of what constituted Catholic teaching, but ruling that Catholic beliefs ran in favour of the complainant, Jacqui Griffin. In its ruling, the AHRC went so far as to say:

*If the employment of Ms Griffin would injure the religious susceptibilities of these students and their parents, the injury would be founded on a misconception. Indeed it would be not an injury to their religious susceptibilities but an injury to their prejudices.*¹¹⁹

There is obviously, in this case, an overlap with freedom of religion, but such arbitrary use of anti-discrimination provisions demonstrates how severely restricted freedom of contract has become. Even bodies which supposedly merit exemptions under the law have clearly been impacted.

Conclusion

The inquiry's questions pertaining to property rights (6-1 and 6-2) refer specifically to the question of interference with vested property rights. Given this and the fact this submission has referred largely to an associated right – freedom of contract – we conclude this section by responding to question 19-1 of the terms of reference:

Question 19–1 Which Commonwealth laws unjustifiably encroach on other common law rights, freedoms and privileges, and why are these laws unjustified?

As these examples above demonstrate, freedom of contract has been severely restricted by numerous provisions of anti-discrimination legislation. Unjustified restrictions on the ability to freely contract – or not contract – stand in marked contrast to the ideal:

*In a legal order built on private autonomy, contracts are an important tool in achieving the satisfaction of the needs of a private individual. Consequently, private autonomy means first and foremost freedom of contract. A private individual must have the possibility to decide freely whether he or she concludes a contract and with who [sic] he or she does it (freedom to conclude a contract) and what the content of the contract shall be (freedom to determine the content of contract).*¹²⁰

Consequently, the following Commonwealth laws are proposed as unjustly interfering with freedom of contract and warranting reform.

As discussed at length in an earlier section, the basis on which some discrimination is prohibited by the *Sex Discrimination Act 1984* directly contradicts moral values of numerous faiths and genuinely held moral convictions.

In particular, sections 5A, 5B and 6 prohibit discrimination on the grounds of *sexual orientation*, *gender identity* and *marital or relationship status* respectively. All of these matters are highly controversial, with different sections of the community having strongly held mutually contradictory beliefs about their moral acceptability or otherwise.

It is simply unjustifiable to force the contract of goods, services, and employment on the basis of one party's convictions without reference to the other's. Free and voluntary exchange must be the guiding principle – and this can be achieved by amending the *Sex Discrimination Act 1984*.

Answer to question 19-1: Sex Discrimination Act 1984

The Sex Discrimination Act 1984 unjustly interferes with freedom of contract. It should be amended by replacing sections 37 and 38 with a simple provision for exemption from the Act for persons, natural or corporate, whose conscientious beliefs do not allow them to comply with the Act, or with particular provisions of the Act.

Likewise, the *Age Discrimination Act 2004*, also referenced elsewhere in this submission, places unnecessary restrictions on the ability of individuals and bodies to determine their own transactions. The previously explored case of the Harkaway Hall being unable to refuse certain bookings demonstrates the overbearing nature of the Act, which should be amended.

Answer to question 19-1: Age Discrimination Act 2004

The Age Discrimination Act 2004 unjustly interferes with freedom of contract. A simple provision should be added for exemption from the Act for persons whose conscientious beliefs do not allow them to comply with the Act, or with particular provisions of the Act.

7. Burden of Proof

An accepted philosophical principle is that when a person makes an assertion, the responsibility for proving its validity rests with the person. In law, this is particularly important. The results of assertions made against citizens can involve infringements on personal liberty. The effect of a false allegation could mean that innocents will suffer. To prevent this, the common law makes a considered decision to preference the belief that a respondent is “innocent until proven guilty”. This principle has existed in our system of law since at least the late eighteenth Century. William Blackstone said, “it is the maxim of English law that it is better that ten guilty men should escape than that one innocent man should suffer”.¹²¹

A fair trial

The Australian Constitution embodies the principle implicitly in Chapter III, by setting up a fair judicial system. The High Court of Australia accepted this in *Dietrich v The Queen* (1992), in which

the court interpreted Chapter III as a broad assumption of the right to a fair trial.¹²² Justice Kirby also included the presumption of innocence as a necessary part of a fair trial.¹²³ The court further highlighted the importance of this presumption by insisting that interpretation of Commonwealth Law must not unnecessarily undermine it.¹²⁴

The ICCPR also recognises its broad acceptance by affirming that “[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”.¹²⁵

The law applies this principle through the intimately related ideas of the “burden of proof” and the “presumption of innocence”. In the criminal trial *Momcilovic v The Queen* (2011), Chief Justice French of the High Court confirms that:

“The presumption of innocence has not generally been regarded as logically distinct from the requirement that the prosecution must prove the guilt of an accused person beyond reasonable doubt.”¹²⁶

Both work together to ensure that an accuser must prove his or her claims before the defendant must respond to them.

For this reason, a party bringing an accusation during legal proceedings has four key responsibilities:

- to establish a *prima facie* case,
- to accept the overall legal burden of proof,
- to satisfy the required standard of proof and
- to meet the evidential burden of proof.

Prima facie case

Before the court will hear a matter, a party must convince the court the matter has *prima facie* merit. To protect the presumption of innocence, this responsibility usually rests on the prosecution in criminal cases and on the plaintiff in civil matters. The responsible party must show there is enough evidence to at least consider the truth of the claim. The standard for this early proof is low and the party need not “prove” facts fully before the case can be heard. It is a “common sense” burden, so the judge can simply see the case is not unfounded. Once the party has satisfied this *prima facie* burden, the court then needs that party to meet a higher legal burden of proof to decide the case.

Legal burden of proof

The *legal burden of proof* is the duty placed on a party to prove or disprove a disputed fact through presenting convincing evidence.¹²⁷ In criminal trials, the legal burden of proof also falls on the prosecution – for the same reasons outlined above. Former Chief Justice Gibbs of the High Court called placing this legal burden on the prosecution a “cardinal principle of our system of justice”.¹²⁸ The prosecutor must present a case that proves the accused is guilty to a suitable standard before a judge or jury may convict him or her. In civil cases, the plaintiff usually carries the burden of proof. To satisfy this burden, the party responsible must present evidence that proves the alleged facts to a suitable standard of proof.

Standard of proof

The *standard of proof* is the threshold to which a party must establish a disputed fact through evidence – to persuade the fact finder that their assertion is true. As mentioned above, in criminal

cases, the prosecution must prove a defendant is guilty to a specific standard, that is, guilty “beyond a reasonable doubt”.¹²⁹ This means the evidence presented must offer no other reasonable explanation for events as they occurred but those which the prosecution has showed. This is a much higher standard than the court expects of a plaintiff in a civil matter, that facts be established on a “balance of probabilities”.¹³⁰ In this case, the party must simply prove that the events are most likely to have occurred as described.

Evidential burden of proof

There are cases, however, where a defendant or accused must assert their own facts. In these cases, the burden of proof for a specific set of facts can shift by the nature of the case. For example, if an accused wishes to claim a defence as a part of their case, it is clear the accused is then making a new assertion among the disputed facts. In such a case, the accused must prove that new assertion and the burden of that proof shifts temporarily. This is the *evidential burden of proof*, as it applies directly to a limited set of facts within the larger matter and needs further evidence. It is also an example of an explicit reversal of the burden of proof in the case – a technical shift based on the changing source of the assertion.

Thus, reversals of the burden of proof are not rare and the legislature has enabled the court to enforce a shift in the burden of proof. In fact, in *Kuczborski v Queensland*, the majority of the High Court found that “[i]t has long been established that it is within the competence of the legislature to regulate the incidence of the burden of proof”.¹³¹ Such legislation, however, must recognise the broader purpose of the burden. The law must uphold the presumption of innocence. It must show the importance of substantiated assertions. Both of these are key pillars that protect and uphold our system of law.

7.1. Question 9–1 Justifiable reversals

Question 9–1 What general principles or criteria should be applied to help determine whether a law that reverses or shifts the burden of proof is justified?

7.1.1. Justifiable reversals or shifts

Evidential burden of proof – technical and explicit shifts

When considering the legislative competence to regulate the burden of proof, the principle for a justifiable reversal is a simple one. A reversal of the burden of proof is justifiable when an accused or a defendant makes an assertion that the prosecution or plaintiff contests. This holds to the underpinning principle that a person who makes an assertion must necessarily prove it. These are technical or explicit reversals.

A prime example of this, as mentioned above, is that of criminal defences. An accused person, who wishes to rely on a defence, asserts that a specific set of circumstances existed when the alleged crime took place. This is an assertion outside the prosecution’s assertion that the accused carried out the crime. So the accused needs to present evidence proving those circumstances existed. In this case the reversal arises out of the natural carriage of justice.

It is important to recognise that the shift of this burden of proof is limited to the *evidential burden*. It does not shift the *legal burden* of proof onto the accused, either explicitly or effectively. It exists only as a mechanism to require that any new assertions are proved by their source and not placed unfairly on those bringing the matter before the court. These circumstances are justifiable since they uphold the philosophy that underpins the burden of proof.

7.1.2. Unjustifiable reversals or shifts

Evidential burden of proof – effective and implicit shifts

An unjustifiable reversal of the burden of proof is one that perverts the underlying principle – an administrative change that cannot show its grounding in a natural carriage of justice. An example of an unjustifiable shift is one that claims merely to shift the evidential burden, but effectively reverses the legal burden of proof. This is an effective or implicit shift in the burden of proof.

For example, suppose legislation allows a court to accept a signed statement as evidence, without the need to call witnesses with first-hand knowledge of the matters. This has the effect of allowing the plaintiff or prosecutor to meet a very low standard of proof to satisfy the legal burden of proof. This, in turn, effectively places the legal burden of proof on the accused or defendant. It asks them to refute claims that have not been substantiated to the necessary standard of proof. Unless there are clear links to new claims made by the defendant or accused, this violates the principle of substantiated assertions and undermines the presumption of innocence.

The dangers of this are clear. Undermining the principles of substantiated assertions and the presumption of innocence allows vexatious litigation in civil cases. The ramifications for criminal trials are even more concerning.

Criminal trials have very serious repercussions for the accused. The resources of the state in bringing charges against its citizens are considerable. By effectively undermining the higher standard of proof, there is a real danger of overturning Blackstone's key principle. The liberty of an innocent citizen could easily be at risk.

Another important element of common law is that the higher standard of proof – of beyond reasonable doubt – in criminal cases restrains state authority. So does the presumption of innocence. Not only is the presumption of innocence upheld to protect innocents against unfounded claims, but also to prevent the abuse of state power in restricting a citizen's liberty. This element is of particular interest when considering any shift in the burden of proof.

State power and the dangers of unpicking the presumption of innocence

A classic example of a reversal that does not follow the technical dynamics of a case is asking a defendant to provide evidence of the circumstances surrounding an alleged offence, on the basis that the defendant is more likely than the plaintiff to have the information. However this shifts the burden of proof from the source of the claim to another party.

In a criminal trial, this argument is clearly problematic. It suggests the accused ought to present the evidence of their innocence, because they are the party most easily able to access that evidence. While this may seem a practical approach, it undermines the principle of substantiated assertions. Proving an allegation may be difficult in some cases, but reversing the burden of proof shifts this difficulty onto the respondent. The common law system intentionally places this responsibility on the state, which controls extensive resources.

A system that allows unsubstantiated charges places the liberty of citizens at risk. By allowing reversals of the burden of proof that do not uphold the principle of substantiated allegations, one risks allowing the state to abuse its power and resources.

Close policing of reversals of the burden of proof are needed for maintaining proper checks and balances between the three arms of government and ensuring a robust separation of powers. If the

legislature can undermine the core elements of a fair trial, the judiciary is unable to function to safeguard a citizen against a tyrannical state. Thus, any reversal of the burden of proof that does not uphold the principle of substantiated assertions cannot be justifiable.

7.2. Question 9–2 Commonwealth law reversals

Question 9–2 Which Commonwealth laws unjustifiably reverse or shift the burden of proof, and why are these laws unjustified?

An increasing number of examples of unjustifiable implicit shifts in the burden of proof are identifiable within Australia’s antidiscrimination legislation. Problematic shifts in the burden of proof have enabled complainants to make their claims more easily but have denied the right of respondents to presumption of innocence. A particular concern is the administrative shift in the onus of proof on the basis that the defendant has better access to evidence.

7.2.1. Sex Discrimination Act 1984

This act aims to eliminate discrimination based on the grounds of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, and family responsibilities.

In 1995, Keating Government added section 7B which provides a defence based on a “reasonableness test”. The test allows a person to defend discriminatory conditions or practices on the ground that they were “reasonable in the circumstances”.

Section 7C, however, reverses the burden of proof for 7B:

7C Burden of Proof

*In a proceeding under this Act, the burden of proving that an act does not constitute discrimination because of section 7B lies on the person who did the act.*¹³²

As the Institute of Public Affairs point out:

*This is deeply problematic. All that remains for the claimant to prove is that the alleged act occurred, which is potentially a very low threshold to cross.*¹³³

In this instance, a person merely has to lodge a complaint that discrimination has occurred, with proof that the event in question did occur. The subsequent shift of the evidential burden effectively relieves any further legal burden of proof on the complainant. This standard, however, is more akin to making of a *prima facie* case, rather than the more rigorous standard of the balance of probabilities. It is usually used to determine whether a case should be given a hearing at all. It should not to decide a matter conclusively. As such, this administrative change not only reverses the evidential burden, but also the legal burden effectively. Thus, it is an example of an implicit reversal of the legal burden of proof. It fails to meet the appropriate standard of proof that should be expected of an initiating party.

To further the point, the defendant is required to gather a persuasive case on three fronts, as described in section 7B(2):

(2) The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:

(a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and

- (b) *the feasibility of overcoming or mitigating the disadvantage; and*
- (c) *whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.*¹³⁴

Section 7C does not explicitly require the defendant to bear the evidential burden of proof. It effectively presumes, however, the party is guilty until they can prove their “reasonableness”.

Senior Law Lecturer at Deakin University Dr Dominique Allen argues that reversing the burden of proof is justifiable – after a *prima facie* case has been made. This is because:

*Complainants face an arduous task in attempting to establish that they were subject to unlawful discrimination.*¹³⁵

However, the fact that it is sometimes hard for a complainant to make a case of discrimination is not a good reason. We must return to Blackstone’s principle about suffering innocents. Our freedom is best protected by placing the weight of this responsibility on the source of the claim. This intends to protect the innocent citizen from arbitrary and tyrannical authority or vexatious litigation. To overturn this principle is fundamentally to overturn a time-tested and honoured principle of our legal system, and is unjustifiable on the reasons given above.

Answer to question 9–2 Commonwealth law reversals

The Sex Discrimination Act 1984 unjustifiably reverses the burden of proof in section 7C. This reversal violates long-held principles that protect the innocent from suffering.

7.2.2. Other Acts

Similar incidences occur in other antidiscrimination legislation, which work almost identically to the *Sex Discrimination Act 1984* at s 7C. As such, the following provisions are also unjustifiable reversals of the burden of proof. The use of the word “discriminator” in the following also implies wrongdoing. In today’s vernacular, the word carries a heavy bias. It should instead refer to the parties involved as the “complainant” and the “respondent” as in other discrimination legislation.

The Age Discrimination Act 2004

Section 15(2) of the *Age Discrimination Act 2004* explicitly reverses the burden of proof. It requires the “discriminator” to prove that their discrimination was “reasonable in the circumstances”.

Section 15 states:

Discrimination on the ground of age--indirect discrimination

(1) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the age of the aggrieved person if:

(a) the discriminator imposes, or proposes to impose, a condition, requirement or practice; and

(b) the condition, requirement or practice is not reasonable in the circumstances; and

(c) the condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons of the same age as the aggrieved person.

*(2) For the purposes of paragraph (1)(b), the burden of proving that the condition, requirement or practice is reasonable in the circumstances lies on the discriminator.*¹³⁶

The Australian Human Rights Commission regards this reversal as “logical”:

*Placing the onus on the respondent is logical as information concerning the reasonableness of the particular condition, requirement or practice would generally be in the possession of the respondent.*¹³⁷

Dr Dominique Allen explains the reversal as justifiable from international law:

*The United Kingdom Court of Appeal said that the reason for the shift to the respondent is that “a complainant can be expected to know how he or she has been treated by the respondent whereas the respondent can be expected to explain why the complainant has been so treated.”*¹³⁸

This is the problematic application of an administrative reversal argued against in conjunction with the potential abuse of state power. While it might be logical that the defendant would have access to the appropriate evidence, the law does not exist to make it easy to claim under its provisions. In fact, in enforcing Blackstone’s principle, our legal system has actively chosen to place this responsibility on the source of the claim. One cannot simply reverse this decision for the ease of administration, or one risks the dangers to the innocent citizen that the presumption of innocence protects against.

Disability Discrimination Act 1992

Section 6(4) of the *Disability Discrimination Act 1992* similarly reverses the evidential burden of proof. It requires the “discriminator” to prove that their discrimination was “reasonable”, implicitly reversing the legal burden of proof as argued above.

Section 6 states:

Indirect disability discrimination

(1) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:

- (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and*
- (b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and*
- (c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.*

(2) For the purposes of this Act, a person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:

- (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and*
- (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and*
- (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.*

(3) Subsection (1) or (2) does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case.

(4) For the purposes of subsection (3), the burden of proving that the requirement or condition is reasonable, having regard to the circumstances of the case, lies on the person who requires, or proposes to require, the person with the disability to comply with the requirement or condition.¹³⁹

Consequently, this reversal is also unjustifiable.

7.2.3. Conclusion

The principle of requiring assertions to be supported by evidence is protected by the presumption of innocence and a properly assigned burden of proof. It has underpinned Australian law since the birth of the Commonwealth. The law has actively striven to protect against the suffering of the innocent. It has deliberately placed the burden of proof on the prosecution or plaintiff. This conscious decision, while at the expense of the plaintiff or the state, is necessary to uphold liberty as a core value of our society. To upend this principle is to make a fundamental choice to alter the fabric of our legal system. Therefore, it is inappropriate for the legislature to undercut the significant element of a fair trial. The legislature should not be able to wield its power to regulate the incidences of the burden of proof contrary to its founding principle.

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