Submission

on the

Interim Report on Traditional Rights and Freedoms—Encroachments by Commonwealth Laws

to the

Australian Law Reform Commission

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21 September 2015

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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 made a submission to this inquiry.[1]

In July 2015 the ALRC handed down, and invited further submissions on, its Interim Report. This submission is a response to the Interim Report.

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 antivilification laws and proposals for bills or charters of rights.

The closing date for submissions to this Interim Report is **21 September 2015.**

2. Terms of Reference

The ALRC has called for submissions on which laws that limit traditional rights deserve further review.[2]

FamilyVoice Australia has identified the following Acts as warranting closer scrutiny:

- *Racial Discrimination Act 1975*
- *Sex Discrimination Act 1984*
- *Age Discrimination Act 2004*
- *Disability Discrimination Act 1992*
- *Fair Work Act 2009*

These Acts are scrutinised in our submission under each of five traditional freedom categories:

1. Freedom of Speech
2. Freedom of Religion
3. Freedom of Association
4. Property Rights
5. Burden of Proof

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 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.

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.*[3]

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 as 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.

3.1. Racial Discrimination Act

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 – 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…*[4]

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.[5]

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.*[6]

Since the actions of a speaker under the current wording are legally uncertain, section 18C breaches a fundamental requirement of 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".[7] 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.[8] 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.

Protection from Statutory Encroachment

The Interim Report touches on the law with respect to protections from statutory encroachment.

> *Beginning with a series of cases in 1992, the High Court has recognised that freedom of political communication is implied in the Australian Constitution. This freedom 'enables the people to exercise a free and informed choice as electors'. The Constitution has not been found to protect free speech more broadly. The Constitution does not protect a personal right, but rather, the freedom acts as a restraint on the exercise of legislative power by the Commonwealth.*
>
> > *The freedom is to be understood as addressed to legislative power, not rights, and as effecting a restriction on that power. Thus the question is not whether a person is limited in the way that he or she can express himself or herself, although identification of that limiting effect may be necessary to an understanding of the operation of a statutory provision upon the freedom more generally. The central question is: how does the impugned law affect the freedom?*
>
> *The freedom is not absolute. For one thing, it only protects some types of speech—political communication. In Lange v Australian Broadcasting Corporation it was held that the freedom is 'limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution'.*[9]

The Report goes on to lay out the two step test:

> *In Lange, the High Court formulated a two-step test to determine whether a law burdens the implied freedom. As modified in Coleman v Power, the test involves asking two questions:*
>
> > *1. Does the law, in its terms, operation or effect, effectively burden freedom of communication about government or political matters?*
> >
> > *2. If the law effectively burdens that freedom, is the law nevertheless reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government, and the procedure prescribed by*

> *s 128 of the Constitution for submitting a proposed amendment of the Constitution to the informed decision of the people?*[10]

The prosecution of *Herald Sun* columnist Andrew Bolt is a useful case study. In two columns published in 2009, Bolt 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.[11]

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.

As to part one of the test, the Bolt case highlights that section 18C in its terms, operation or effect, effectively burdens freedom of communication about government or political matters.

With respect to the second part of the test, it cannot be said that section 18C is nevertheless reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government, and the procedure prescribed by s 128 of the Constitution for submitting a proposed amendment of the Constitution to the informed decision of the people.

That is because, as Jeremy Sammut, research fellow at The Centre for Independent Studies, has stated:

> *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.* [12]

How can Australians have a debate about recognition of Indigenous Australians in the Constitution if they cannot have a corresponding discussion about who is and isn't Indigenous for fear of offending? Australians need to know who is being recognised.

The conflict between section 18C and the freedom of political communication implied in the Australian Constitution is well expressed in these statements quoted in the Interim Report:

> *The Church and Nation Committee submitted that the state 'cannot legislate against offence and insult without doing serious damage to wide-ranging freedom of speech'. The Wilberforce Foundation stated that s 18C is flawed because it 'essentially makes speech and acts unlawful as a result of a subjective response of another or a group or others'. The flaw, it said, is compounded by s 18D, which does not make truth a defence.*[13]

The claim is sometimes made that the right to freedom of expression, enunciated for example in the ICCPR art 19, is subservient to an asserted right to protection from discrimination:

> *Restrictions on freedom of speech under anti-discrimination laws may also be justified under the ICCPR as necessary to respect the rights or reputations of others, including the right to effective protection against discrimination, as provided by art 26.*[14]

This proposition is spurious for two reasons. Firstly, as previously outlined, defamation laws already provide adequate reputation protection. Secondly, speech is so fundamental to being human that freedom of expression has been recognised for centuries as foundational for human culture and civilisation. It must take precedence over protection from discrimination.

Article 26 of the ICCPR states:

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Rather than provide equal protection under the law to all persons, Australia's antidiscrimination laws are themselves discriminatory and provide certain groups with a protected status at the expense of others, resulting in the law entrenching discrimination against certain people.

Conclusion

The Interim Report concludes that antidiscrimination laws and, in particular, s 18C are areas of particular concern for freedom of speech.[15] Instead of simply being reviewed this law should be repealed.

Recommendation 1:

Section 18C of the Racial Discrimination Act 1975 unjustly interferes with freedom of speech and should be repealed, together with related sections.

3.2. Sex Discrimination Act

The *Sex Discrimination Act 1984* from section 5 to 7AA inclusive prohibits discrimination on a number of grounds, including: sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding and family responsibilities.[16] The areas covered by the Act are laid out in sections 14 – 27 and include work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs.[17]

Sections 7B and 7D of the Act provide exceptions. Section 7B creates an exception where the discrimination is "reasonable in the circumstances."[18] Section 7D creates an exception for "special measures" which are "intended to achieve equality."[19]

The Interim Report acknowledges the fact that conduct prohibited by antidiscrimination laws may include speech or other forms of expression.[20]

The Interim Report suggests that antidiscrimination *laws may protect freedom of speech, by preventing a person from being victimised or* discriminated against by reason of expressing, for example, certain political or religious views.[21]

However, it is fallacious to suggest that free speech is protected by restricting speech. Antidiscrimination laws such as those contained in the *Sex Discrimination Act 1984* discriminate against people who have certain beliefs by preventing them being expressed. The result is that the law creates privileged groups of people when it comes to speech rights.

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 *Sex Discrimination Act 1984* curtails freedom of speech beyond preventing serious harms and is therefore not justified.

An example of the way in which the Act unnecessarily restricts freedom of speech is contained in section 86:

Advertisement

> *(1) A person shall not publish or display an advertisement or notice that indicates, or could reasonably be understood as indicating, an intention to do an act that is unlawful by reason of a provision of Part II.*
>
> *Penalty: 10 penalty units.*

Part 2 of section 86 states that an advertisement includes publishing a notice in a newspaper.

The recruitment website Seek's *Advertising Terms of Use* evidences the restriction of free speech by antidiscrimination legislation. It states that advertisements will not be published unless they comply with:

> *all anti-discrimination and equal opportunity legislation applicable in the State or Territory in which you do business.*[22]

Seek has a section on its website titled "Law-abiding recruitment ads." It lists a number of unlawful grounds of discrimination including: sex; marital status; pregnancy and potential pregnancy; and sexuality.[23]

Further, the guide has a section within it called "Useful Words" which refers to the Victorian Equal Opportunity Commission advertising guideline "Making Your Message a Fair One." This Orwellian guide indicates how antidiscrimination legislation is creating a culture in which certain words are banned.

avoid	***substitute***
Girl Friday	*Personal Office Assistant*
Cleaning Lady	*Cleaner*
Foreman	*Supervisor*

No one may want to use these terms but that is not the point. Why should an employer be denied the freedom to use them?

The restriction on advertising covers all the antidiscrimination provisions, not just those relating to employment. For example, in the case of accommodation (section 23), the advertising prohibition prevents anyone advertising the availability of commercial accommodation for female students who do not wish to reside with males.[24]

Section 86 does not restrict speech for the protection of national security, public order or of public health or morals, nor damage to reputation. It is therefore an unjustifiable restriction.

Recommendation 2:

Section 86 of the Sex Discrimination Act unjustly interferes with freedom of speech and should be repealed

3.3. Age Discrimination Act

Sections 18 – 32 of the *Age Discrimination Act 2004* makes it unlawful to discriminate on the ground of age in employment and certain other areas, including education, accommodation and the provision of goods and services generally.[25] As with the other discrimination Acts, the prohibited conduct includes speech.[26] For example, section 50 prohibits certain advertisements. Advertisement is defined very broadly and includes newspaper, radio, film and television or publishing.

Again, the Seek website evidences how freedom of speech is restricted by antidiscrimination laws such as the *Age Discrimination Act* in regards to publishing a job advertisement:

> *all anti-discrimination and equal opportunity legislation applicable in the State or Territory in which you do business.*[27]

Seek lists age as a ground on which it is unlawful to discriminate in its "Law-abiding recruitment ads" section.[28] Further, its "Useful Words" guide indicates certain words which are effectively blacklisted.

avoid	***substitute***
Mature	*Possessing initiative/responsible/capable*
Years of experience	*Successful track record/proven experience*
Office junior	*Office assistant*

A business may have many reasons for hiring a youthful or mature worker. A business may seek to take on a younger employee because they want longevity, or an older employee because of life experience. A business is in the best position to determine the most suitable candidate for a role and it should be free to advertise accordingly, but section 50 prevents this. The section does not come within the permissible exceptions laid out in the ICCPR. It does not restrict speech for the protection of national security, public order or of public health or morals, nor damage to reputation. It is therefore an unjustifiable restriction.

Recommendation 3:

Since section 50 of the Age Discrimination Act unjustly interferes with freedom of speech, it should be repealed.

3.4. Disability Discrimination Act

The *Disability Discrimination Act 1992* outlaws direct and indirect discrimination against disabled persons in section 5 & 6. The areas covered are laid out in sections 15 – 30 and include:[29]

- work, accommodation, education, access to premises, clubs and sport;
- the provision of goods, facilities, services and land; and
- the administration of Commonwealth laws and programs.

A definition of disability is defined in section 4 to include (emphasis added):

> a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in **disturbed behaviour**.[30]

The definition further states that it includes a disability which presently exists; or previously existed but no longer exists; or may exist in the future (including because of a genetic predisposition to that disability); or is imputed to a person. [31]

An example of the way in which the Act restricts free speech is contained in section 44. That section makes it an offence to publish an advertisement or notice that is in contravention of the aforementioned sections. For instance, the Seek website states that job advertisements must comply with legislation such as this Act.[32]

For example, an advertisement from a gun shop seeking a candidate with no present or past mental health issues, due to concerns about workplace and public safety, would therefore be in breach of the Act.

The ability of businesses to hire the candidate of their choice is hampered by this legislation through restrictions placed on the types of terms that can be used when advertising positions. Businesses are in the best position to determine who is and is not a suitable candidate and what attributes are important for a role, not government.

Clearly, the legislation restricts speech in seeking out an ideal employee. The *Act* is not directed at preventing speech which comes within the ICCPR permissible exceptions of national security, public order or public health or morals, or damage to reputation. It therefore unjustifiably restricts freedom of speech.

Recommendation 4:

Since section 44 of the Disability Discrimination Act unjustly interferes with freedom of speech, it should be repealed.

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 Philisophy* 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".*[33]

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.*[34]

Consequently, the Commonwealth Parliament:

- cannot establish a State church;[35]
- cannot enforce religious observance;[36, 37, 38]
- cannot prohibit religious observance;[39] and
- cannot impose a religious test for public office.[40]

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.[41] 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…"[42] 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.

Given that thought, belief and opinion are such a fundamental part 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,[43] 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.*[44]

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.[45,46] Female genital mutilation is practised in some Islamic countries and promoted by some Islamic authorities.[47,48] With increasing migration from countries where these practices are known to occur, Australia must be vigilant prohibiting these harms to individuals.

The Interim Report states that:

> *Generally speaking, Australians are not constrained in the exercise of religious freedom. There are only a few provisions in Commonwealth laws that interfere with religious freedom.*[49]

However, this assertion fails to recognise that numerous Commonwealth law provisions interfere with freedom of religion, as the following sections show. In any event, it is not the number of provisions but their effect. Even a single law that goes directly to the heart of what a religion stands for can have an extremely stifling impact.

4.1. Sex Discrimination Act

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.*[50]

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.*[51]

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.*[52]

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...*[53]

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.*[54]

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."*[55]

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.*[56]

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).*[57]

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."[58]

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.[59] 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).[60] 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;*[61]

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.

Recommendation 5:

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. Age Discrimination Act

The *Age Discrimination Act 2004* outlaws discrimination on the grounds of age in a number of areas detailed from section 18 – 30 and including: employment; education; the provision of goods, services and facilities; and accommodation.

The Act provides an exemption in section 35 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.

However, the exemption only applies if an act or practice conforms to the doctrines, tenets or beliefs of the religion or is necessary to avoid injury to the religious sensitivities of the adherents.[62]

The Catholic Church has rules governing the age of bishops and priests. Clause 1031 of the Church's *Code of Canon Law* stipulates that the minimum age of a deacon is 23 years and a priest 25 years,[63] while clause 538 requires that a priest submit his resignation at the age of 75 to the local bishop for consideration.[64]

Are these matters "doctrines, tenets or beliefs", or are they policy matters? Arguably, in the case of the Catholic Church, given the age requirements are stipulated in its *Code of Canon Law*, they can be considered to come within the exception. But what of a religion which places such restrictions but that does not have such an explicit Code? Would it be covered? Does it make a difference if the decision is made by a lay parish council as opposed to a council of clerics?

Clearly, the exception for bodies "established for religious purposes" is too narrow and the test may result in inconsistent outcomes for different religions. Further, the test requires courts to consider what are "doctrines, tenets and beliefs" of a particular religion. But courts may be ill equipped to make sound judgements about such theological matters. A solution is to extend the exemption to any person whose conscientious beliefs do not allow them to comply with the Act, or with particular provisions of the Act.

Recommendation 6:

The Age Discrimination Act 2004 unjustly interferes with freedom of religion. A simple provision should be added for an 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.

4.3. Disability Discrimination Act

The *Disability Discrimination Act 1992* prohibits discrimination on the grounds of disability in a number of areas laid out in sections 15 - 29, including: employment; access to premises; goods, services and facilities; and accommodation.

The definition of disability is defined broadly in section 4 and includes (emphasis added):

> a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in **disturbed behaviour**.[65]

Division 5 of the Act lists a number of exemptions, including for some charitable activities, however, there is **no religious exemption**.

Priests and ministers exercise important positions of authority within a Church. For very good reasons a religion may not wish to engage a person who has a mental illness and displays disturbed behaviour. Such behaviour would adversely affect a Church service, which is sacred in nature.

Providing counselling to parishioners is also a large part of the role of a religious leader and that person must be respected, otherwise they will not be sought out for advice. While there

are exemptions in the Act for inherent requirements (section 21A) and unjustifiable hardship (section21B), they are not broad enough. A person who displays disturbed behaviour may still be able to perform the inherent requirements of the role and there may not be "sufficient hardship." Such a concept, in any event, is vague and subjective.

Recommendation 7:

The Disability Discrimination Act 2004 unjustly interferes with freedom of religion. A simple provision should be added for an 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.

4.4. Fair Work Act

The Interim Report lists a number of provisions in the *Fair Work Act 2009* which interfere with freedom of religion:[66]

> - *section 153, which provides that a modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin;*
> - *section 195(1), which lists discriminatory terms in enterprise agreements including those terms that discriminate against an employee on the basis of their religion and other personal characteristics;*
> - *section 351(1), which relates to the General Protections division of the Act and provides that any adverse action taken against an employee on the basis of a protected attribute or characteristic is prohibited; and*
> - *section 772(1)(f), which provides that a person's employment may not be terminated on the basis of a protected attribute, subject to exceptions in s 772(2)(b).*

These provisions are as problematic as other antidiscrimination laws because, as the Interim Report states, they "may affect the employment practices of religious organisations that may wish to select staff who conform to the beliefs of that organisation."[67] Each of these sections contain an almost identical religious exemption, however, each is too narrow and subjective. For example, the exemption in section 153 relating to awards states:

> *(2) A term of a modern award does not discriminate against an employee:*
> *(a) if the reason for the discrimination is the inherent requirements of the particular position held by the employee; or*
> *(b) merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:*
> *(i) in good faith; and*
> *(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.*

But what is a "doctrine, tenet or belief"? Do they need to be in writing? Is it enough that they are understood by some rather than all of the adherents of a religion? And what is a religious susceptibility? Courts are not in a position to make sound judgments about such matters.

Recommendation 8:

The Fair Work Act 2009 unjustly interferes with freedom of religion. The religious exemptions in the Act contained in sections 153, 195, 351 & 772 should be replaced with a single 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.[68]

> *… 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 …*[69]

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.[70] 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.[71]

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.[72]

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.[73]

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.[74] 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.[75] Jesus Christ reminded his followers of the second greatest commandment: "Love your neighbour as yourself,"[76] – included around 1500 years earlier in the Law of Moses.[77]

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*.[78] 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.*[79]

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 …*[80]

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.

Justifiable limitations

As with freedom of speech, 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.*[81]

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.*[82]

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.*[83]

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.*[84]

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.[85] 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.*[86]

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."[87]

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.[88] 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.[89]

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.[90]

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.*[91]

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."[92] Similar complaints have been made about other "optional clothing" beaches, such as Maslin Beach in South Australia.[93]

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 Naturist 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.[94] 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."*[95]

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.*[96]

5.1. Racial Discrimination Act

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".[97] 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 Clan Campbell?

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."[98] 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.

Recommendation 9:

The Race Discrimination Act 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.

5.2. Sex Discrimination Act

Sections 5 – 6 of the *Sex Discrimination Act 1984* prohibits discrimination on a number of grounds including: sex, sexual orientation, gender identity and marital status.[99] The prohibitions cover a number of areas which adversely affect freedom of association:

- Education: s 21,
- Goods, services and facilities: s 22,
- Accommodation: s 23 and
- Clubs: s 25.

The Act 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.

Lawn bowls

An example of the way in which sporting organisations have been adversely affected through heavy-handed intervention by antidiscrimination bodies is Bowls SA. The organisation 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.[101]

> *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.*[102]

The Commonwealth legislation also prohibits such competition because while the *Sex Discrimination Act* in section 25[103] permits clubs to be composed of one sex, the exemption for competitive sport only applies where the "strength, stamina or physique of competitors is relevant."[104] Further, the sports' exemption does not apply to umpiring or coaches.[105]

- An all girls' swimming club is permissible but it cannot discriminate against a male coach, defeating the purpose of having an exemption in the first place.
- An all-male bowling club is permitted but it cannot hold male only bowling competitions, again, defeating the purpose of the exemption.

Recommendation 10:

Sections 21, 22, 23 & 25of the Sex Discrimination Act 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.

5.3. Age Discrimination Act

Discrimination on the ground of age is prohibited in a number of areas by the *Age Discrimination Act 2004,* including: partnerships (s 21); education (s 26); access to premises (s 27); goods, services and facilities (s 28); and accommodation (s 29).[106]

The *Age Discrimination Act 2004* includes a number of exemptions for various types of associations, including:

- Charities: s 34,
- Religious bodies: s 35,
- Voluntary bodies: 36,

Section 33 provides an exemption for positive discrimination intended to address disadvantage suffered by a particular age group. Further, section 44 enables applications to be made for an exemption.

Although there are exemptions that relate to freedom of association, they are far too narrow. For example, the religious bodies' exemption only applies to an act or practice of a body established for religious purposes which either:

- conforms to the doctrines, tenets or beliefs of that religion; or
- is necessary to avoid injury to the religious sensitivities of adherents of that religion.

It is not clear why the term "religious sensitivities" is used in this Act, whereas the term "religious susceptibilities"[107] is used in the *Sex Discrimination Act 1984* and whether one test is broader than the other. Whatever the reason for the difference, courts are not in a position to make sound judgements about what are doctrines, tenets and beliefs of a religion or about "religious sensitivities" – or "religious susceptibilities", for that matter.

The exemptions contained in the *Age Discrimination Act 2004* are much more limited than those contained in the *Sex Discrimination Act 1984*. For example, while there is an exemption for military combat roles in relation to sex discrimination, there is no corresponding exemption for age, despite there being equally good reasons for such an exemption. [108]

Section 21 prohibits 6 or more persons excluding another from the formation of a partnership on the basis of age.[109] But why it is acceptable for 5 people to do so but not 6?[110]

Harkaway Hall

Although it is a Victorian example, the doctrinaire intervention by the Victorian Civil and Administrative Tribunal in 2011 against the community of Harkaway over the hire of its community hall is an example of the unjust impact of age discrimination legislation.

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.*[111]

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.[112]

While 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.

Recommendation 11:

Sections 21, 26, 27, 28 & 29 of the Age Discrimination Act 2004 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.

5.4. Disability Discrimination Act

Whereas in some other antidiscrimination legislation there is an exemption for voluntary associations, however narrow they may be[113], section 27 of the *Disability Discrimination Act 1992* explicitly makes it unlawful for a club or incorporated association to refuse to grant membership to a person on the grounds of disability.[114]

Section 28 prohibits discrimination in sport unless a disabled person "is not reasonably capable of performing the actions reasonably required".[115]

Disability is defined broadly and includes an illness or disorder which results in disturbed behaviour. The illness or disorder can presently exist or have previously existed.[116]

- Sections 27 and 28 would therefore prohibit a gun club from refusing membership, or participation in shooting activities, to a person who suffers, or has previously suffered mental health issues, such as post-traumatic stress disorder.

In this example the "unjustifiable hardship" exemption would not be applicable as the hardship is hypothetical and not tangible.

Recommendation 12:

Sections 27 & 28 of the Disability Discrimination Act 1992 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!*[117]

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.*[118]

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.*[119]

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 Interim Report observes:

> *'Real' property encompasses interests in land and fixtures or structures upon the land. 'Personal' property encompasses tangible or 'corporeal' things—chattels or goods. It also includes certain intangible or 'incorporeal' legal rights, also known in law as 'choses in action', 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.*[120]

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".*[121]

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.*[122]

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.[123]

Freedom of contract

While the Interim Report focuses largely on the unjust acquisition of property, a longstanding freedom often associated with property rights 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.*[124]

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.[125]

6.1. Sex Discrimination Act

The *Sex Discrimination Act 1984* makes it unlawful to discriminate on the grounds of sex, gender identity and marital status on a number of grounds including:

- Employment, commission agents & contract workers: ss 14 – 16,
- Partnerships: s 17,
- Employment agencies: s 20,
- Education: s 21,
- Goods, services & facilities: s 22
- Accommodation: s 23
- Land: s 24 and,
- Clubs: s 25.[126]

There is an exemption for religious bodies (s 37) and educational institutions established for religious purposes (s 38), but these exemptions are too narrow. For example, section 38 provides an exemption for conduct consistent with the "doctrines, tenets, beliefs or teachings" of the religion where the conduct is done "to avoid injury to religious susceptibilities".[127]

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 antidiscrimination 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.[128]

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".[129]

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".[130]

The CEO claimed a religious exemption under the *Sex Discrimination Act 1984* on the basis that homosexual behaviour ran contrary 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.*[131]

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

Freedom of contract is clearly threatened, both in fact and potential, by antidiscrimination laws like the *Sex Discrimination Act 1984.*

Similar experiences have been had in countries whose antidiscrimination 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".[132]

Mr and Mrs Bull lost cases at county court level, the Court of Appeal, and finally at the UK Supreme Court, despite their stated opposition to <u>any</u> 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.*[133]

With a direct correlation of terminology in Australian antidiscrimination 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 antidiscrimination 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.

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*.

Recommendation 13:

Sections 14 – 16, 17, & 20 – 25 of The Sex Discrimination Act 1984 should be amended to affirm the priority of freedom of contract over constraints on discrimination.

6.2. Age Discrimination Act

Discrimination on the ground of age is prohibited in a number of areas by the *Age Discrimination Act 2004,* including:

- Employment, commission agents & contract workers (ss 18 - 20);
- partnerships (s 21);
- education (s 26);
- access to premises (s 27);
- goods, services and facilities (s 28);
- accommodation (s 29); and
- land (s 30).[134]

Freedom to contract is adversely impacted by the Act. For example, take the prohibition on age discrimination in the provision of accommodation in section 29.[135] Accommodation is defined broadly in the Act to include residential accommodation[136] and there is a general exemption only if:

> *(a) the person who provides or proposes to provide the accommodation or a near relative of that person resides, and intends to continue to reside on those premises; and*
> *(b) the accommodation provided in those premises is for no more than 3 persons other than a person mentioned in paragraph (a) or near relatives of such a person.*[137]

- A person in their twenties who resided at a property would therefore be in breach of the Act if they sought out and reached contractual agreements with four other housemates in their twenties and in the process discriminated against a person in their thirties or forties.

Recommendation 14:

Sections 18 – 21 & 26 – 30 of the Age Discrimination Act 2004 should be amended to affirm the priority of freedom of contract over constraints on discrimination.

6.3. Disability Discrimination Act

Discrimination on the ground of disability is prohibited by the *Disability Discrimination Act 1992* in a number of areas, including[138]:

- Employment, commission agents and contracts workers: ss 15 - 17
- Partnerships: s 18,
- Education: s 22,
- Access to premises: s 23,
- Goods, services and facilities: s 24,
- Accommodation: s 25,
- Land: s 26 and,
- Clubs and incorporated associations: s 27.

The case of *Catholic Education Office v Clarke* highlights how freedom of contract is infringed by the Act.[139] In this case, the Federal Court of Australia considered an allegation of disability discrimination in education, covered by section 22.[140] The facts are that a school sent a letter offering enrolment to a deaf student conditional on the acceptance of support that excluded the provision of Auslan (Australian Sign Language) interpreting services. Despite the offer of additional support to the child (positive discrimination), concerns being raised about the ability to source an interpreter, and the school being openly willing to accept disabled students, the complaint was upheld.

Recommendation 15:

Sections 15 – 18 & 22 – 27 of the Disability Discrimination Act 1992 should be amended to affirm the priority of freedom of contract over constraints on discrimination.

6.4. Fair Work Act

Freedom of contract also relates to the terms by which parties enter into an employer-employee relationship. While employment is a contract that finds its basis in common law, it 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 limited by antidiscrimination legislation.

There are a number of antidiscrimination sections in the *Fair Work Act 2009* which restrict freedom of contract in relation to employment. These include sections 153, 195, 351 and 772.[141]

Although it is a Tasmanian rather than Commonwealth example, the case of a Hobart men's refuge, is an example of the adverse impact of antidiscrimination laws upon freedom to contract in employment. In late 2014, the 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 antidiscrimination 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".[142]

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.[143]

Recommendation 16:

Sections 153, 195, 351 & 772 of the Fair Work Act 2009 should be amended to affirm the priority of freedom of contract over constraints on discrimination.

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".[144]

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.[145] Justice Kirby also included the presumption of innocence as a necessary part of a fair trial.[146] The court further highlighted the importance of this presumption by insisting that interpretation of Commonwealth Law must not unnecessarily undermine it.[147]

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".[148]

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 confirmed 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."[149]

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.[150] 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".[151] 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".[152] 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".[153] 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".[154] 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.

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.

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.

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.

7.1. Sex Discrimination Act

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, the 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.*[155]

As the Institute of Public Affairs points 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.*[156]

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 faci*e 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.*[157]

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".

The Interim Report states that the Australian Council of Trade Unions (ACTU) argued the reversal of the burden of proof in antidiscrimination legislation is justified because, among other reasons it is "notoriously difficult" for complainants to prove indirect discrimination has occurred.[158]

However, as the report later states:

> *The Institute of Public Affairs submitted that difficulties associated with proof are not a sufficient justification for a reversal of the burden of proof, stating that '[t]he common law legal system is ideal not for the ease with which it allows for prosecutions, but for the protections it offers against an overbearing state'.*[159]

The fact that it is sometimes hard for a complainant to make a case of discrimination is not a good reason to reverse the burden of proof. 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. Overturning this principle breaches a time-tested and honoured principle of our legal system and is unjustifiable on the reasons given above.

Recommendation 17:

The Sex Discrimination Act 1984 unjustifiably impinges upon liberty by reversing the burden of proof in section 7C and should be repealed or amended.

7.2. Age Discrimination Act

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.*[160]

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.*[161]

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 <u>how</u> he or she has been treated by the respondent whereas the respondent can be expected to explain <u>why</u> the complainant has been so treated."*[162]

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.

Recommendation 18:

Section 15 of the The Age Discrimination Act 2004, which unjustifiably impinges upon liberty by reversing the burden of proof, should be repealed.

7.3. Disability Discrimination Act

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.*[163]

Consequently, this reversal is also unjustifiable.

> ***Recommendation 19:***
>
> ***Section 6 of the Disability Discrimination Act 1992, which unjustifiably impinges upon liberty by reversing the burden of proof, should be repealed.***

8. Endnotes

[1] FamilyVoice Australia, *Submission 73* (13 March 2015)

[2] ALRC Interim Report, paras 1.87 – 1.98 & 1.96

[3] "Freedom of Speech", *Stanford Encyclopedia of Philosophy* (1 July 2012).

[4] Cameron Stewart, "The Rule of Law and the Tinkerbell Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law", *Macquarie Law Journal* (2004), Vol 4, 135-164.

[5] Erik Claes, Wouter Devroe and Bert Keirsbilck, *Facing the Limits of the Law*, Springer Science & Business Media (21 Apr 2009), 104.

[6] Michael Lallo, "2015 New Year's resolution: Let's wean ourselves off the Twitter outrage", *Sydney Morning Herald*, Entertainment (31 December 2014).

[7] *Racial Discrimination Act 1975* (Cth), s 18C(1)(b).

[8] *Racial Discrimination Act 1975* (Cth), s 18B(b).

[9] Interim Report, Freedom of Speech, paras 3.8 – 3.10

[10] Interim Report, Freedom of Speech, para 3.13

[11] David Phillips, "Truth and freedom: the importance of robust debate", *VoxPoint* (August 2011), pp A-D.

[12] J. Sammut, "18C makes us all tongue-tied", *The Centre for Independent Studies* (20 Jan 2015): http://www.cis.org.au/media-information/opinion-pieces/article/5446-18c-makes-us-all-tongue-tied

[13] Interim Reprt, Freedom of Speech, para 3.112

[14] Interim Report, Freedom of Speech, para 3.176

[15] Interim Report, Freedom of Speech, para 3.189

[16] *Sex Discrimination Act 1984 (Cth),* s 5, 5A, 5B, 5C, 6, 7, 7AA, 7A

[17] *Sex Discrimination Act,* s 14 - 27

[18] *Sex Discrimination Act,* s 7B(1)

[19] *Sex Discrimination Act,* s 7D

[20] Interim Report, Freedom of Speech, para 3.103

[21] Interim Report, Freedom of Speech, para 3.100

[22] Seek, Advertising Terms of Use, section 33(f)

[23] Seek, *Law abiding recruitment ads,* https://advertiser.seek.com.au/advertisers/resources/e0805_ad_guidelines.ascx

[24] *Sex Discrimination Act,* s 23

[25] *Age Discrimination Act 2004* (Cth), ss 18 - 32

[26] Interim Report, Freedom of Speech, para 3.103

[27] Seek, Advertising Terms of Use, section 33(f)

[28] Seek, *Law abiding recruitment ads,* https://advertiser.seek.com.au/advertisers/resources/e0805_ad_guidelines.ascx

[29] *Disability Discrimination Act 1992*, s 3

[30] *Disability Discrimination Act 1992*, s 4(g)

[31] *Disability Discrimination Act 1992*, s 4(h) – (k)

[32] Seek, Advertising Terms of Use, section 33(f)

[33] "Religion and Science", 3.1 Concord, *Stanford Encyclopedia of Philosophy* (27 May 2010).

[34] *Commonwealth of Australia Constitution Act 1900*, Sec. 116.

[35] Countries that have established a religion include: the Church of England in UK, the Lutheran Church in Denmark, the Eastern Orthodox Church in Greece and the Roman Catholic Church in Malta.

[36] Religious observance is enforced in Saudi Arabia, including five daily prayers, fasting during Ramadan and the modesty of women's dress under *sharia* law by the religious police, or *mutawwiin*; see "Saudi Arabia Law Enforcement", *Encyclopedia of the Nations* (Illinois: Advameg, 2007–2013).

[37] Religious observance is enforced in the West Bank: Eric Westervelt, "Police Enforce Ramadan Fasting Rules in West Bank", *NPR* (Washington, DC, 11 October 2007).

[38] Religious observance is enforced in parts of Indonesia: Jane Perlez,"Spread of Islamic Law in Indonesia Takes Toll on Women", *The New York Times* (New York, 27 June 2006).

[39] Prohibition of religious observance in house churches in the People's Republic of China has been reported. See "China—Son of Christian Leader Beaten Unconscious", *Barnabas Fund Prayer Focus* Update, No 145 (November 2008).

[40] A religious test for public office in Pakistan was imposed on Pakistan-born Daniel Scot, who had to pass an exam on Islam before gaining a lectureship in mathematics at the University of Punjab. See Roslyn Phillips, "Religious Vilification: The Daniel Scot Decision", resource paper in *Light* (Adelaide, May 2005), 8–11.

[41] Church of the New Faith v Commissioner of Pay-Roll Tax (Vic) [1983] HCA 40; (1983) 154 CLR 120.

[42] Ibid., para 17; their judgement was qualified by also holding that "though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion."

[43] Dan Box, "Sydney siege inquest: Lindt Cafe deaths investigated", *The Australian* (29 January 2015): http://www.theaustralian.com.au/in-depth/sydney-siege/sydney-siege-inquest-lindt-cafe-deaths-investigated/story-fnqxbywy-1227200443586

[44] J. Stonestreet, "We Aren't Charlie: The Decline of Satire and Culture", *Breakpoint* (16 Jan 2015), http://www.breakpoint.org/bpcommentaries/entry/13/26699.

[45] Sadio Kante, "Mali's human sacrifice - myth or reality?", *BBC News* (20 September 2004).

[46] Amy Fallon and Amy Corderoy, "Tortured by a witch doctor, saved by Australian surgeons", *Sydney Morning Herald* (12 May 2012).

[47] Janet Fife-Yeomans and Matthew Benns, "Peddling pages of barbaric savagery: Islamic shops still selling female mutilation books", *Daily Telegraph* (17 November 2014): http://www.dailytelegraph.com.au/news/national/peddling-pages-of-barbaric-savagery-islamic-shops-still-selling-female-mutilation-books/story-fnpn0zn5-1227125017909

[48] "Iraq crisis: Islamic State militants order genital mutilation for females in Mosul, says United Nations", *ABC News* (15 September 2014): http://www.abc.net.au/news/2014-07-25/militants-order-female-genital-mutilation-in-iraq/5622826

[49] Interim Report, Freedom of Religion, para 4.115

[50] "Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons", Congregation for the Doctrine of the Faith (1 October 1986), paras 5 and 6: http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19861001_homosexual-persons_en.html

[51] Matt Slick, "What does the Bible say about homosexuality?", Christian Apologetics and Research Ministry (CARM): https://carm.org/bible-homosexuality (accessed 26 February 2015).

[52] David Batty, "Mistaken identity", *The Guardian* (31 July 2004): http://www.theguardian.com/society/2004/jul/31/health.socialcare

[53] Stella Morabito, "Trouble in Transtopia: Murmers of Sex Change Regret", *The Federalist* (11 November 2014): http://thefederalist.com/2014/11/11/trouble-in-transtopia-murmurs-of-sex-change-regret/

[54] Matt Slick, "Are sex change operations okay?", Christian Apologetics and Research Ministry (CARM): https://carm.org/sex-change-operations (accessed 26 February 2015).

[55] Oliver O'Donovan, "Transsexualism and Christian Marriage", *Grove Booklet on Ethics* (1982), p 11.

[56] "Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons", Congregation for the Doctrine of the Faith (3 June 2003), para 8: http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html

[57] Matt Slick, "Would Jesus okay same sex marriage?", Christian Apologetics and Research Ministry (CARM): https://carm.org/would-jesus-ok-same-sex-marriage (accessed 26 February 2015).

[58] *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284 (14 December 2006), para 36: http://www.austlii.edu.au/au/cases/vic/VSCA/2006/284.html

[59] *Catch the Fire Ministries*, paras 38-61: http://www.austlii.edu.au/au/cases/vic/VSCA/2006/284.html

[60] *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 (6 July 2010): http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCA/2010/155.html?stem=0&synonyms=0&query=title(Wesley%20)

[61] *Defence Act 1903 (Cth)*, section 61A.

[62] *Age Discrimination Act 2004*, s 35

[63] Catholic Church, *Code of Canon Law,* clause 1031

[64] Catholic Church, *Code of Canon Law,* clause 538

[65] *Disability Discrimination Act 1992*, s 4(g)

[66] Interim Report, Freedom of Religion, para 4.48

[67] Interim Report, Freedo of Religion, para 4.44

[68] Aristotle, *Eudemian Ethics*, 1242 a25.

[69] Aristotle, *Politics*, 1278b20.

[70] *Ibid.* The right of voluntary association is defended by Pope Leo XIII in his encyclical *Rerum Novarum*: "To enter into private societies is a natural right of man, and the state must protect natural rights, not destroy them. If it forbids its citizens to form associations, it contradicts the very principle of its own existence; for both they and it exist in virtue of the same principle, namely, the natural propensity of man to live in society."

[71] James Ryan, "Right of Voluntary Association", *The Catholic Encyclopedia*, Volume II, 1907, Online Edition (1999).

[72] *Ibid.*

[73] *Ibid.*

[74] Genesis 12:2-3, *Holy Bible*, New International Version (Biblica, 2011).

[75] "Confucianism", *Wikipedia*: http://en.wikipedia.org/wiki/Confucianism.

[76] Matthew 22:39, Mark 12:31, *Holy Bible*, New International Version (Biblica, 2011).

[77] Leviticus 19:18, *Holy Bible*, New International Version (Biblica, 2011).

[78] International Covenant of Civil and Political Righs, *Article 22 – 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*

[79] Sharon Detrick, "A commentary on the United Nations Convention on the Rights of the Child", Martinus Nijhoff Publishers (1999), p. 261, citing K. J. Partsch, "Freedom of Conscience and Expression, Political Freedoms", in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights,* New York, Columbia University Press (1981), p. 235.

[80] Andrew P. Napolitana, "It is dangerous to be right when the government is wrong: the case for personal freedom", (Thomas Nelson, 2011), p. 52.

[81] Attorney-General's Department, "Right to freedom of assembly and association", Australian Government: http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/Righttofreedomofassemblyandassociation.aspx (accessed 30 January 2015).

[82] Attorney-General's Department, "Right to freedom of assembly and association".

[83] Australian Crime Commission, *Crime Profile Series — Outlaw Motorcycle Gangs*, Australian Government, (29 July 2013): https://www.crimecommission.gov.au/sites/default/files/OUTLAW%20MOTORCYCLE%20GANGS%20JULY%202013.pdf

[84] Andrew McLeod, "On the Origins of Consorting Laws", *Melbourne University Law Review*, (2013), Vol 37, 103-142.

[85] Andrew McLeod, "On the Origins of Consorting Laws", *Melbourne University Law Review*, (2013), Vol 37, 103-142.

[86] *South Australia v Totani* [2010] HCA 39 at 4.

[87] *Wainohu v New South Wales* [2011] HCA 24 at 7.

[88] "Ebola quarantine a sound idea", *The Australian*, Opinion (27 October 2014): http://www.theaustralian.com.au/opinion/editorials/ebola-quarantine-a-sound-idea/story-e6frg71x-1227102882641

[89] Dan Harrison, "Australia shuts borders to Ebola-affected countries", *The Sydney Morning Herald* (28 October 2014): http://www.smh.com.au/federal-politics/political-news/australia-shuts-borders-to-ebolaaffected-countries-20141027-11ciut.html

[90] "Waterfall Sanatorium", State Records, NSW Government: http://investigator.records.nsw.gov.au/entity.aspx?path=%5Cagency%5C1995 (accessed 3 March 2015).

[91] Sanjaya N. Senanayake and Mark J. Ferson, "Detention for tuberculosis: public health and the law", *The Medical Journal of Australia*, 180/11 (2004), 573-576: https://www.mja.com.au/journal/2004/180/11/detention-tuberculosis-public-health-and-law

[92] Cameron Houston, "Anger swells over bid to gay-proof beach", *The Age* (5 June 2011): http://www.theage.com.au/victoria/anger-swells-over-bid-to-gayproof-beach-20110604-1fmdh.html

[93] Jason Om, "Keeping Maslin Beach Safe...and Nude", *ABC Stateline South Australia* (27 April 2007): http://www.abc.net.au/stateline/sa/content/2006/s1909854.htm

[94] Q Society of Australia Inc.: www.qsociety.org.au

[95] James Dowling, "Protestors attacked me, claims member of Geert Wilders audience", *Herald Sun* (21 February 2013): http://www.heraldsun.com.au/news/victoria/protestors-attacked-me-claims-member-of-geert-wilders-audience/story-e6frf7kx-1226583027521

[96] OSCE Office for Democratic Institutions and Human Rights, "Guidelines on Freedom of Peaceful Assembly: 2nd ed.", para. 80, p. 52.

[97] "Scholarships", Australian Indigenous Education Foundation: http://www.aief.com.au/scholarships

[98] "Aboriginal Football Programs", Western Australia Football Commission: http://www.perthdemons.com.au/district/development/aboriginal-programs (accessed 8 March 2015.)

[99] *Sex Discrimination Act 1984,* ss 5 - 6

[100] *The chronicle of Henry of Huntingdon*; cited in "King Canute and the waves", *Wikipedia*, (accessed 7 March 2015).

[101] Miles Kemp, "Equal Opportunity Tribunal ruling ends gender based bowls competitions", *The Advertiser*, (21 December 2012): http://www.adelaidenow.com.au/news/south-australia/equal-opportunity-tribunal-ruling-ends-gender-based-bowls-competitions/story-e6frea83-1226542152842

[102] Ibid.

[103] *Sex Discrimination Act 1984*, s 25(3)

[104] *Sex Discrimination Act 1984,* s 42(1)

[105] *Sex Discrimination Act 1984,* s 42(2)

[106] *Age Discrimination Act 2004*, ss, 21, 26, 27, 28 & 29

[107] *Sex Discrimination Act 1984*, s 37(1)(d)

[108] *Age Discrimination Act 2004,* Division 4; *Sex Discrimination Act 1984*, Division 4

[109] *Age Discrimination Act 2004*, s 21(1)

[110] *Age Discrimination Act 2004*, s 21

[111] Stuart Rintoul, "A fight for right (not) to party at Harkaway Hall", *The Australian* (26 September 2011): http://www.theaustralian.com.au/news/nation/a-fight-for-right-not-to-party-at-harkaway-hall/story-e6frg6nf-1226146157164

[112] Lilly O'Gorman, "Party ban upheld", *Pakenham Gazette* (28 March 2012): http://pakenham.starcommunity.com.au/gazette/2012-03-28/party-ban-upheld

[113] See for example, *Sex Discrimination Act 1984*, s

[114] *Disability Discrimination Act 1992,* ss 5 & 6

[115] *Disability Discrimination Act 1992*, s 28

[116] *Disability Discrimination Act 1992*, s 4(g)

[117] "William Pitt, 1st Earl of Chatham", Wikiquote: http://en.wikiquote.org/wiki/William_Pitt,_1st_Earl_of_Chatham (accessed 11 March 2015).

[118] Ibid.

[119] *The Australian Constitution*, section 51 (xxxi).

[120] Interim Report, *Property Rights,* para 7.11

[121] *Yanner v Eaton [1999]* HCA 53 (7 October 1999): http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1999/53.html (accessed 11 March 2015).

[122] "Property Rights", *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Issues Paper IP46, Chapter 6, Australian Law Reform Commission (10 December 2014), para 6.15.

[123] "What is a contract?", *The Law Handbook*, Fitzroy Legal Service Inc. http://www.lawhandbook.org.au/handbook/ch12s01s01.php (accessed 12 March 2015).

[124] "Freedom of contract", Wikipedia: http://en.wikipedia.org/wiki/Freedom_of_contract (accessed 6 March 2015).

[125] Matthew Johnson and Julia Millar, "Doing business in Australia: contract law", *Clayton Utz Insights*, (12 June 2014): http://www.claytonutz.com/publications/edition/12_june_2014/20140612/doing_business_in_australia_contract_law.page (accessed 6 March 2015).

[126] *Sex Discrimination Act 1984*, ss 14 – 16, 17, 20 - 25

[127] *Sex Discrimination Act 1984*, s 38

[128] Brittany Vonow, "Churchie student told it was school's strong preference that he brings a 'young lady' to formal", *Courier Mail* (6 March 2015): http://www.couriermail.com.au/news/queensland/churchie-student-told-it-was-schools-strong-preference-that-he-brings-young-lady-to-formal/story-fnn8dlfs-1227250147166

[129] Ibid.

[130] *"Report of Inquiry into a Complaint of Discrimination in Employment and Occupation: Discrimination on the ground of sexual preference", Human Rights and Equal Opportunity Commission, HRC Report No. 6* (1998): http://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/discrimination_sexual_pref.pdf

[131] Ibid.

[132] "Gay snub Cornish B&B owners lose Supreme Court appeal", *BBC News*, (27 November 2013): http://www.bbc.com/news/uk-england-25119158

[133] Ibid.

[134] *Age Discrimination Act 2004*, ss18, 21, 26, 27, 28, 29 & 30

[135] *Age Discrimination Act 2004*, s 29

[136] *Age Discrimination Act 2004*, s 29(4)

[137] *Age Discrimination Act 2004*, s 3 (a) & (b)

[138] *Disability Discrimination Act 1992*, ss 15, 16, 22, 23, 24, 25 & 26

[139] [2004] FCAFC 197 (6 August 2004)

[140] *Disability Discrimination Act 1992,* s 22

[141] *Fair Work Act 2009*, ss 153, 195, 351 & 772

[142] Jennifer Crawley, "Union in anti-discrimination dispute with Bethlehem over non-employment of women", *The Mercury* (29 October 2014): http://www.themercury.com.au/news/tasmania/union-in-antidiscrimination-dispute-with-bethlehem-over-nonemployment-of-women/story-fnj4f7k1-1227105089978

[143] Ibid.

[144] William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) 352.

[145] 177 CLR292, 326 (Deane J) and 362 (Gaudron J).

[146] In *Carr v Western Australia* (2007) 232 CLR 138; Kirby J wrote that it is "usually essential to the proper conduct of a criminal trial that the prosecution prove the guilt of the accused and do so by admissible evidence."

[147] *Momcilovic v The Queen* (2011) 245 CLR 1, 51 [44] (French CJ).

[148] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(2).

[149] *Momcilovic v The Queen* (2011) 245 CLR 1, 51 [54] (French CJ).

[150] *Glossary of Legal Terms*, The Law Society of New South Wales, "Onus of Proof": https://www.lawsociety.com.au/about/news/Glossary/index.htm

[151] *Sorby v The Commonwealth* (1983) 152 CLR 281, 294.

[152] *Glossary of Legal Terms*, The Law Society of New South Wales, "Onus of Proof",

[153] *Glossary of Legal Terms*, The Law Society of New South Wales, "Onus of Proof",

[154] [2014] HCA 46 [240] (Crennan, Kiefel, Gageler & Keane JJ).

[155] *Sex Discrimination Act 1984* (Cth) – Sect 7C.

[156] S. Breheny & M. Begg, "The state of fundamental legal rights in Australia: An audit of federal law", Institute of Public Affairs (2014), p 10: http://ipa.org.au/portal/uploads/The_state_of_fundamental_legal_rights_in.pdf

[157] *Sex Discrimination Act 1984* (Cth) – Sect 7B.

[158] Interim Report, *Burden of Proof*, para 11.102

[159] Interim Report, *Burden of Proof*, para 11.125

[160] *Age Discrimination Act 2004* (Cth) - Sect 15.

[161] Australian Human Rights Commission, "Roadmap to ADA: The Age Discrimination Act 2004 (2007)", p 10: https://www.humanrights.gov.au/sites/default/files/content/age/roadmap_ADA.pdf

[162] D. Allen, "Reducing the Burden of Proving Discrimination in Australia", *Sydney Law Review*, v. 31, p. 597: citing *Igen* [2005] ICR 931, [31] (emphasis added) http://sydney.edu.au/law/slr/slr31/slr31_4/Allen.pdf

[163] *Disability Discrimination Act 1992* (Cth) - Sect 6: http://www.austlii.edu.au/au/legis/cth/consol_act/dda1992264/s6.html