



**HUMAN RIGHTS**  
LAW ALLIANCE

**Select Committee on the Exposure Draft to the Marriage Amendment (Same-sex Marriage) Bill**

**Supplementary Submission 2**

Further particulars concerning the rationale for, and detail of the general limitations reform proposal for anti-discrimination laws

In response to:

Question taken on notice from Senator Paterson.



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## HUMAN RIGHTS LAW ALLIANCE

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*Further particulars relating to the proposed “general limitations” reform of anti-discrimination law, as requested on notice by Senator Paterson.*

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### **Human Rights and Common Law**

Human rights are protected in Australia through a combination of common law and legislation, save for the few which are expressed or implied in the Constitution.

In a common-law system, fundamental freedoms are guaranteed by way of what the law does not say. This is on account of the principle that all things are permitted (including all beliefs, speech, associations and expression) unless expressly prohibited by law.

*Under a legal system based on the common law, ‘everybody is free to do anything subject only to the provisions of the law’, so that one proceeds ‘upon the assumption of freedom of speech’ and turns to the law ‘to discover the established exceptions to it’.<sup>1</sup>*

The corollary of this principle is that no person or authority may interfere with the liberty of a person except by authority of law.<sup>2</sup>

This is also the reason why express statements of human rights such as freedom of association or even freedom of speech are rare in common law precedent. The codification of such rights was never necessary, because they existed naturally as a product of the legal assumptions inherent in our system of law.

### **Human Rights Treaties**

When Australia ratified various human rights treaties following the Second World War, including the International Covenant on Civil and Political Rights, few of the rights contained therein were absent from our legal system.

All of those rights expressed as fundamental freedoms are inherent in the common-law system.

The right to non-discrimination and equality before the law (Article 26) insofar as the citizens relate to the State was guaranteed in rule of law principles which, among other things, required that all citizens are equal before the law and no law shall be of arbitrary effect.<sup>3</sup> Dicey notes the same as a fundamental tenet of the rule of law.<sup>4</sup>

However, insofar as acts of discrimination might be perpetrated, not by the State, but by citizens toward other citizens, the law at that time was largely silent. The pursuit of this right gradually

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<sup>1</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) quoting *Attorney General v Guardian Newspapers* (No 2) [1990] 1 AC 109, 283.

<sup>2</sup> *Entick v Carrington* (1765) 19 St Tr 1029.

<sup>3</sup> *R v Shrestha* (1991) 173 CLR 48 at 60 per Brennan and McHugh JJ; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 485 per Deane and Toohey JJ.

<sup>4</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (1959) at 185 – 193.

became the subject of new anti-discrimination legislation over subsequent decades in all jurisdictions.

### **Anti-Discrimination Legislation**

The right to non-discrimination is but one right among many. Nonetheless, extensive non-discrimination legislative regimes that set out remedies for citizen to citizen acts of discrimination have been implemented. The Commonwealth has enacted four anti-discrimination statutes and every state or territory has enacted at least one in the form of an Anti-Discrimination or Equal Opportunity Act. Victoria is one notable exception where there also exists the *Racial and Religious Tolerance Act 2001*, which also contains aggressive non-discrimination provisions.

This amounts to an extraordinary volume of legislation in pursuit of an aspect of a single right, particularly when almost no other rights have been legislated for. Even those jurisdictions with human rights acts only apply those acts to government bodies.

This raises the question of whether rights can be considered to be appropriately balanced.

### **Balancing Rights**

Commenting on the legitimacy of section 18C of the *Racial Discrimination Act 1975*, former New South Wales Chief Justice James Spigelman has recently said:

*The freedom to offend is an integral component of freedom of speech. There is no right not to be offended... When rights conflict, drawing the line too far in favour of one, degrades the other right.*<sup>5</sup>

Spigelman CJ here refers to a fundamental and universally accepted human rights principle: all human rights are finely balanced, and the over-emphasis of one or another right inevitably degrades some or all of the other rights.

The extraordinary emphasis on the right to non-discrimination seen in Australia raises concerns in this regard. Common law rights are vulnerable to incursion or even displacement by legislation because legislation prevails over common law. If a legislated right which demands interference by the government oversteps its proper limits and boundaries, then common law freedoms, which exist by virtue of government inaction are vulnerable.

### **Balancing Non-Discrimination Legislation**

A key human rights law problem in Australia stems from the fact that anti-discrimination legislation is not balanced according to best practice. Few of the relevant instruments define the actual limits of the right or provide for any balancing exercise in the event of a clash of rights.

This is why vilification provisions in such statutes can so easily attack free speech, or why, in the present inquiry, the inability of discrimination laws to assess the legitimacy of a freedom of religion claim was exposed. It is doubly concerning on account of the fact that these freedoms are common law freedoms, enjoying no protection from this legislative overreach.

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<sup>5</sup> James Spigelman, '2012 Human Rights Day Oration' (Speech delivered at the Australian Human Rights Commission's 25th Human Rights Award Ceremony, Sydney, 10 December 2012).

Australia has failed its implementation obligations under international law on account of its failure to balance rights according to best practice and to implement the internationally accepted definition of discrimination.

The United Nations Human Rights Committee has provided the limits of the right to non-discrimination in its General Comment 18 on Article 26 of the ICCPR (the right to non-discrimination and equality before the law).

*Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the covenant.<sup>6</sup>*

This subjects discrimination to a “reasonable and objective criteria” test and a “legitimate purpose” test.

The reasonable and objective criteria test is often enlivened where legal rights or immunities apply to a particular category of person. For example, the criteria to be an aged-pension recipient ought only to be a person’s age. It is not unjust discrimination to exclude a 64-year old from **aged** pension entitlements on the basis that they are too young to qualify because the relevant criteria for the differentiation of treatment is **age** and the relevant benefit is an **aged** pension. If, however, the criteria were to be expanded so as to limit the aged pension to persons who are over the age of 65, are not lesbians and are not of Chinese descent, then two of the three criteria are unjustly discriminatory. This is because neither Chinese descent nor a lesbian sexuality can have any conceivable relevance to the criteria for receiving an aged pension. The criteria are arbitrary. This is discrimination that ought to be proscribed by law. Note that, if discrimination is merely defined in terms of difference of treatment resulting in some detriment, the legitimacy of this age discrimination is immediately less clear. If it were a more controversial distinction, although reasonable, it would be vulnerable to challenge.

The legitimate purpose criteria is especially relevant to the present inquiry. It is often enlivened where rights may be perceived to clash. For example, the criteria that a person employed by a political party be a member of that party may appear to limit equal opportunity for employment candidates, infringing their right to non-discrimination. The legitimate purpose test applies in such a case, however, because the political party in question is pursuing its own right to freedom of association. This is a ‘legitimate purpose under the covenant’ because it is the pursuit of one of the other covenant rights. It is also reasonable and objective in the light of the nature of the employment.

This balancing clause is in accordance with the fundamental principle of human rights law, which is that rights exist in a balance. They are related such that over-emphasising one degrades others, and the enforcement of one should be carried out in consideration of its impact upon others.

If the definition of discrimination in all relevant Australian legislation was amended to adopt this best practice, all rights would be more comprehensively protected. Further, difficult cases of balancing rights could be raised in court and arguments in favour of each assessed judicially.

### **Relevance to This Inquiry**

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<sup>6</sup> At paragraph [13].

The problems raised in this inquiry relate primarily to the balancing of the right to non-discrimination with other fundamental rights.

It must be remembered that freedom of thought, conscience and religion or belief, as well as the various other freedoms raised in our submission already existed at common law. They are degraded only insofar as legislation infringes upon them.

The legislative infringement in the cases discussed tends to be the result of the interplay between anti-discrimination and anti-vilification laws and the *Marriage Act 1961*.

When judicial consideration of particular cases takes place, the simplistic criteria of “difference” and some distinction or detriment leaves no scope for fulsome human rights arguments to be raised.

These competing rights first need to be acknowledged and considered. This is the function of the ‘legitimate purpose’ test.

The objective basis for the alleged difference then needs to be tested. This is the function of the ‘reasonable and objective criteria’ test.

A videographer with a genuine, good faith conscientious and religious objection to participating in a same-sex wedding ceremony could then argue firstly that their right is legitimate and worthy of protection, and secondly that the basis for their difference of treatment is not directly sexuality (ie ‘no gays’), but forced participation in an event, having an objective and reasonable basis in their coherent belief about marriage.

### **Possible Reform**

In its final report from the Freedom’s Inquiry, the Australian Law Reform Commission recommended that consideration be made of a general limitations reform in any review of anti-discrimination legislation.

The reform is implemented by way of a “general limitations clause” which gives “discrimination” a more accurate definition.

The clause extracted in full in that report was drafted by Professors Nicholas Aroney and Patrick Parkinson and partly achieves what is described above. It is repeated here by way of an example:

1. *A distinction, exclusion, restriction or condition does not constitute discrimination if:*
  - a. *it is reasonably capable of being considered appropriate and adapted to achieve a legitimate objective; or*
  - b. *it is made because of the inherent requirements of the particular position concerned; or*
  - c. *it is not unlawful under any anti-discrimination law of any state or territory in the place where it occurs; or*
  - d. *it is a special measure that is reasonably intended to help achieve substantive equality between a person with a protected attribute and other persons.*

*The protection, advancement or exercise of another human right protected by the International Covenant on Civil and Political Rights is a legitimate objective within the meaning of subsection 1(a).<sup>7</sup>*

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<sup>7</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Report 129), at [5.111].