



# **The Limits of Australian Anti-discrimination Law**

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# **The Limits of Australian Anti-discrimination Law**

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All errors that remain are, of course, my own.



## Executive Summary

Anti-discrimination law affects how Australians run their businesses, educate their children, consume goods and services, and speak their minds. It has spurred consequential and far-reaching changes in each of these spheres.

Yet the first Commonwealth anti-discrimination statute was passed only in 1975, and some new Commonwealth anti-discrimination protections (ADPs) are only a decade old, e.g. the *Age Discrimination Act* 2004.

The growth of anti-discrimination law has been driven by the rise of identity politics (including the institutionalisation of an identity politics industry), rising expectations of what degree of protection anti-discrimination law should extend to covered classes, and the repeated pattern in which legislators frame ADP statutes in general language which is then interpreted broadly by judges and bureaucracies.

Furthermore, ADP has a poor track record in helping the populations it is designed to protect. The wage gap between men and women, for example, narrowed dramatically prior to the passage of the *Sex Discrimination Act* 1983 and plateaued after it. In the case of disability discrimination laws, they have been shown to actually *reduce* workforce participation among the disabled both in Australia and abroad.

The relatively novel rights created by ADP often come into conflict with older, more established legal rights, like the right to property, freedom of association, and freedom of speech. In the case of the *Fair Work Act* 2009's ADPs, the traditional burden of proof is reversed and rests with the respondent.

Twice in the past five years, the Commonwealth Attorney General has proposed consolidation and harmonisation of state and Commonwealth ADP. Additionally, the prospect of same-sex marriage has gay activists and church groups worrying how far ADP will extend when it comes into conflict with religious conscience objections. These two factors raise the possibility that anti-discrimination law will be the subject of reform in the near future.

If so, reformers should reflect on the failures of the past 40 years of anti-discrimination law and avoid similar failures in the future by framing ADP provisions as narrowly as possible. ADP should be targeted at specific policy objectives rather than vague symbolic aspirations. Finally, we should leave as much space as possible for civil society to work out more lasting solutions to thorny social conflicts than would be possible through the clumsy and coercive means of legislation and litigation.





## Introduction

On Wednesday, 1 June 2016, Australian of the Year Lt. Gen. David Morrison AM (Ret.) launched a video on behalf of Diversity Council Australia designed to crack down on “exclusive language, gender-based language, or inappropriate language in the workplace.” Among the gendered terms targeted by the #WordsAtWork campaign was ‘guys’ when referring to a mixed-sex group. When asked about whether “guys” was really that offensive, Foreign Minister Julie Bishop advised a more relaxed attitude: “I don’t think we try and interfere with the freedom of speech in this country to a point where people are too concerned about day-to-day conversations.”<sup>1</sup>

But concern about day-to-day conversations is exactly what anti-discrimination law requires.

- An employer in Victoria who passed remarks about an obese employee’s weight was ordered to pay \$2,500 to compensate for having subjected the employee to less favourable treatment due to “physical appearance” — a protected attribute under state law.<sup>2</sup>
- An auto-electrician whose workmates nicknamed him “Romeo” for boasting about his love life lodged a claim under the provision in Victoria’s anti-discrimination law protecting “lawful sexual activity”.<sup>3</sup>
- The Tasmanian Anti-Discrimination Commission found that the archbishop of Hobart had a case to answer when a Greens activist brought a complaint

against him (later dropped) over a pamphlet stating the Catholic Church’s position on marriage.<sup>4</sup>

- Employers are discouraged from even asking female prospective employees if they are married or if they plan on having children in the near future, since the *Sex Discrimination Act* “prohibits collection of information relating to pregnancy... if it is being collected for a discriminatory purpose (ie the information will be used to treat that person less favourably than someone without the protected attribute).”<sup>5</sup>

In short, anti-discrimination law requires much more than simply avoiding racial slurs and refraining from treating people differently due to prejudice.

This paper will look at:

- The development of anti-discrimination protection (ADP) and what it now covers;
- How ADP has been expanded by both legislation and litigation;
- Whether or not it helps the populations it is designed to help; and
- Parallels and tensions between the civil rights protected by anti-discrimination law and other rights.

## 2. The development of anti-discrimination protection

The modern era of anti-discrimination legislation began with the passage in the United States of the *Civil Rights Act 1964*, which outlawed discrimination on grounds of race in public accommodations and employment.<sup>6</sup> The standard legal textbook *Australian Anti-Discrimination Law* acknowledges that “Australian anti-discrimination legislation has many of its roots in [this] statute ... *The Civil Rights Act 1964* (US) greatly influenced the shape of race and sex discrimination legislation enacted in the United Kingdom in the 1970s. Those British laws served, in turn, as the model for anti-discrimination statutes throughout Australia.”<sup>7</sup>

The Civil Rights Act was aimed at a very specific racial caste system prevailing in the southern states of America: the ‘Jim Crow’ laws that enforced segregation of public facilities between whites and blacks. However, over the following decades the same anti-discrimination model was applied to other disadvantaged groups, such as women, the aged, and the handicapped — even when those groups had very different histories and faced very different obstacles. Also, the general language of the standard anti-discrimination statute hides considerable ambiguity about what kinds of “distinction, exclusion, restriction or preference” will be covered.<sup>8</sup>

In Australia, the first Commonwealth anti-discrimination statute was the *Racial Discrimination Act 1975*, the text of which was lifted directly from the United Nations Convention on the Elimination of All Forms of Racial Discrimination. Other Commonwealth anti-discrimination statutes are the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992*, and the *Age Discrimination Act 2004*. Complaints under these are handled by the Australian Human Rights Commission. There are also anti-discrimination provisions in the *Fair Work Act 2009*, and complaints under these are lodged with the Fair Work Ombudsman.

States and territories have their own anti-discrimination statutes, and like the Commonwealth statute, complaints under these laws are handled by special commissions (e.g. in New South Wales the Anti-Discrimination Board and the Equal Opportunity Division of the Administrative Decisions Tribunal). States differ in the number and type of protected classes covered by their anti-discrimination laws. Tasmania has the most, with 20 separate

attributes including gender identity and irrelevant criminal record. Most states’ statutes cover religious identity, but New South Wales protects “ethno-religious” origin, and South Australia protects only “religious appearance or dress.”<sup>9</sup> These are civil offences, but all states except Tasmania have also made it a criminal offence to incite hatred on racial grounds, and Victoria and Queensland make both racial and religious vilification a criminal offence.<sup>10</sup>

If the AHRC fails to resolve a complaint under Commonwealth anti-discrimination law, the complainant can take his or her case to the Federal Court of Australia. At the state level, the decisions of state anti-discrimination tribunals can be appealed to state courts.

Even though anti-discrimination law is quite young relative to other branches of law — very young indeed in the case of disability discrimination and age discrimination — it has been so thoroughly accepted by the legal profession and the public that its underlying principles are taken for granted. Indeed, many find it hard to imagine a world without it. And yet there is a strange uncertainty that lies beneath anti-discrimination law’s unquestioned status in the legal landscape, as American law professor Richard Epstein’s *Forbidden Grounds: The Case Against Employment Discrimination Laws* describes:

Although there has been widespread social acceptance of the basic antidiscrimination norm, there is massive disagreement on every aspect of its operation: the standards of proof for the basic violation, the class of permitted exceptions and defences, and remedies imposed when violations have been established. The main weakness of the debate is that no one seems willing to consider the possibility that entire argument rests on a false premise that some antidiscrimination law is necessary in the first place.<sup>11</sup>

Epstein’s book has been lauded as “a model of academic first-principles thinking” even by scholars who resist his conclusions, yet his invitation to reconsider whether the anti-discrimination norm might be ill-suited to enshrinement in law has so far not been taken up.<sup>12</sup>

### 3. Expansion of ADP and the rise of identity and grievance politics

In the U.S., expansions of ADP have taken place primarily via Supreme Court cases. In Britain and Australia, the expansions have been mostly legislative — though it should be noted that many of these legislative expansions have been prompted by U.S. court cases or, if not American cases, United Nations conventions. For example, the American court case *Griggs v. Duke Power Co.* directly prompted the inclusion of indirect discrimination provisions in the United Kingdom's *Sex Discrimination Act 1975*, which itself served as the model for Australia's *Sex Discrimination Act 1984*.<sup>13</sup> The Americans with Disabilities Act 1990 was followed shortly by Australia's *Disability Discrimination Act 1992*, and both were passed during the United Nations 'Decade of Disabled Persons' 1983–1992. The evolution of anti-discrimination law has long been international, so any examination of the forces driving this evolution must take into account both Australian and international factors.

The first factor is the growth of identity politics. As fellow CIS researcher Peter Kurti has written, in Australia multiculturalism developed in the 1970s from an ethic of tolerance into an ideology of diversity, and this latter form ('hard' multiculturalism) has encouraged Australians to press for social and political recognition on the basis of their distinctive ethnic or cultural identities rather than on the basis of their common citizenship.<sup>14</sup> As 'diversity' has become more and more celebrated as a value, subgroups have more and more incentive to emphasise their differences and leverage their claim to diversity to achieve social, economic, and political goals.

The institutionalization of an identity politics industry has facilitated this process. There are now organisations, lobby groups, even entire professions (e.g. diversity consulting) dedicated to preserving a sense that identity politics is a matter of urgent concern. Many large companies offer their employees some form of diversity training, often at a cost of thousands of dollars per session to the consultants engaged to provide it.<sup>15</sup> There is also a parallel anti-discrimination industry, much of it taxpayer funded—the AHRC has a budget of \$15.5 million. These two industries often work to each other's advantage. For example, companies that are successfully targeted with anti-discrimination complaints, in addition to paying compensation to the complainant, will often agree to bring in workplace relations specialists to consult on diversity, at the tribunal's encouragement.<sup>16</sup>

Uncertainty can function as a tacit form of ADP expansion. Harassment grievance procedures, diversity training, and other HR programs are favoured by employers seeking to lay the groundwork for a 'good faith effort' defence in future lawsuits. It is important for employers to be proactive in this way, since Australian

jurisprudence has established that merely having an official workplace anti-discrimination policy is not sufficient to head off a harassment or discrimination complaint.<sup>17</sup> These active steps can be expensive, but not as expensive as legal settlements can be. "If it stops one sexual harassment suit, it's worth the investment," said one American manager interviewed by sociologist Frederick Lynch by way of justifying a million-dollar diversity training program.<sup>18</sup> In the mid-1970s, "personnel experts pushed [American] firms to install maternity leave programs to comply with civil rights law, until the [U.S.] Supreme Court ruled in 1976 that Title VII did not require maternity leave" — a precedent then superseded by the *Pregnancy Discrimination Act 1978 (US)*.<sup>19</sup> In this case as in many others, employers erred on the side of interpreting anti-discrimination protections broadly, and in the end their broad interpretation was proven correct.

There has also been a change in expectations regarding what kinds of behaviour anti-discrimination laws are supposed to cover. As overt discrimination has faded into history, the beneficiaries of anti-discrimination law are less likely to be in obvious need of government assistance in obtaining an essential remedy—indeed, some plaintiffs freely admit that they care less about obtaining a remedy than about obtaining validation from the courts and from society. It is rare for plaintiffs in anti-discrimination cases involving gay weddings and florists, photographers, and bakers, to claim to be unable to find alternative vendors for the wedding services sought. In the course of a landmark U.S. case brought by a cohabiting couple against a landlord who had discriminated against them on the basis of their unmarried status, the couple in question married but declined to drop their claim. "Some people have said, 'If you're getting married, what's the big deal,' but that's not the issue. We don't want people telling us we have to be married. We want to be married when we want to be married."<sup>20</sup> The goal is no longer equal access to services, but equal social approval.

"If the Civil Rights Act of 1964 had read, 'It shall be unlawful for employers to operate without written job descriptions, diversity training programs, and sexual harassment grievance procedures,' firms would have seen the revolution coming," writes Professor Frank Dobbin in *Inventing Equal Opportunity*.<sup>21</sup> Instead, as he explains, Congress "outlawed discrimination in broad strokes" and allowed personnel managers, human resources professionals, and federal bureaucrats to define what equal opportunity would require in practice. This pattern — broad legislative language, followed by judicial and bureaucratic elaboration — has been a recipe for expanding ADP in all countries where it has been followed.



## 4. Has ADP solved the problems of disadvantage?

### Evidence from Australia

On the 20<sup>th</sup> anniversary of the *Sex Discrimination Act*, many female politicians and leaders took the opportunity to express their disappointment in the law's practical legacy. "While we congratulate the SDA on reaching its 20<sup>th</sup> birthday, we query the extent to which it has brought equality to Australian women," wrote two female law professors in the *University of New South Wales Law Journal*.<sup>22</sup> Pru Goward, who before being elected to the New South Wales Parliament served as federal Sex Discrimination Commissioner, admitted that the SDA "followed, rather than preceded, sociological and economic change . . . It merely confirmed the direction in which we were already heading."<sup>23</sup>

This skepticism is borne out by data. The wage gap between men and women changed more before the passage of the SDA than after it. Between 1974 and 1978, women's wages relative to men's improved from 0.78 to 0.90. Since then, the number has fluctuated between 0.90 and 0.94—a virtual plateau.<sup>24</sup> This is not because the provisions are languishing unused. The number of sex discrimination complaints filed at the federal, state, and territory level has not dropped below 1,000 in the last fifteen years.<sup>25</sup> Indicators for Aboriginal and Torres Strait Islander Australians have also failed to show significant gap-narrowing attributable to ADP — the employment rate for those aged 15 and over, for example, was the same in 2002 (46 percent) as in 2014–15.<sup>26</sup>

Some anti-discrimination protections fail to affect disadvantage because they are not used. The ACT has made it illegal to vilify someone on the ground of their HIV/AIDS status, but not a single complaint has ever

been filed under that provision.<sup>27</sup> The textbook *Australian Anti-Discrimination Law* describes activity under New South Wales's carer's responsibilities provision as "at a fairly constant low level."<sup>28</sup>

Finally, ADP has been unhelpful in those cases where the anti-discrimination principle does not offer a clear guide to how to resolve the dilemma. In disability discrimination cases involving students with special needs, for example, such as the landmark *Purvis v New South Wales*,<sup>29</sup> the dilemma at bottom is whether the student and his peers will be better off if he is mainstreamed in a normal classroom or segregated into a special classroom more tailored to his disability. This is a complicated question that divides education experts to this day — and the non-discrimination principle could be enlisted on either side of the question, depending on what hypothetical comparator is selected to determine whether the special needs student has received less favourable treatment. As a legal guide, the anti-discrimination principle is simply not useful — as some legal analysts have begun to admit. Kate Rattigan and Susan Roberts have both argued that in cases like *Purvis* judges "work backwards from the desired outcome . . . [to] what legal construct of [the DDA] has to exist for this to be achieved."<sup>30</sup>

Sometimes ADP is not merely unhelpful but positively harmful. As we saw above, employers can respond defensively to ADP by hiring diversity consultants, implementing diversity policies, and otherwise going above and beyond in order to establish a "good faith effort" defence in future lawsuits. But that is not the only kind of defensive behaviour that ADP prompts. An employer could avoid hiring people from protected classes in the first place in order to avoid the possibility of a lawsuit arising. An employer forbidden from asking

a prospective hire if she plans on having children in the near future might find it safest to assume based on her age and sex that she will. An employer might hesitate to take on someone with a disability for fear that the company will later have to pay for an expensive accommodation.

Naturally, it is much harder to collect data on the hirings and promotions that don't happen than on those that do (though the American context has more data to offer; see below). It is difficult, for example, to tell how many young women of childbearing age forgo promotions or advancement, and extremely difficult to isolate what proportion of those were due to employers assuming a female employee would soon leave the workforce and what proportion was attributable to other factors like personal choice. However, in the case of disability discrimination law, the data is both stark and suggestive. Labour force participation among Australians with disabilities has actually gone *down* since the passage of the DDA, from 54.9 percent in 1993 to 52.8 percent in 2012.<sup>31</sup>

A final example of perverse consequences of ADP is the *Age Discrimination Act* 2004's effect on the elderly. This law, which was intended to help older Australians who had suffered from discriminatory policies like compulsory retirement ages, has ended up making it more difficult for companies to set up residential communities dedicated to older residents. One such company, the Lifestyle group, applied for an ADA exemption in order to restrict residence in a new retirement village to those aged over 50, and the exemption was denied on the grounds that "the admission rule would limit the equality rights of all persons not aged over 50 years."<sup>32</sup>

## International evidence

When the United States Congress passed the *Civil Rights Act* of 1964, the legislators were not entirely sure how the new law would work in practice. Many of its provisions were unprecedented at the federal level. Title VII, which outlawed discrimination in employment, had state-level precursors, but these had only arisen after World War II, less than two decades before.<sup>33</sup> Prior to that, no attempt had been made to regulate the racial balance of the American workforce. The hope was that the 1964 law would grant black citizens equality in access to public accommodations, voting rights, and jobs, and thereby remake the social and economic fabric of the Jim Crow south. But the kind of data available from state-level anti-discrimination commissions — number of complaints filed, number of cases cleared — was not detailed enough to provide an empirical case one way or the other for the effectiveness of anti-discrimination laws.<sup>34</sup>

Later economists with better data have evaluated the effects of anti-discrimination laws on African-Americans' income, labour force participation, and occupational distributions. They have found that after a brief burst of effectiveness these laws soon cease to make much of a difference. "Most analysts agree that, after the 1965–75 surge, blacks have made far less economic progress

since then," summarises a 2000 paper by Cornell law professor Steven Schwab. "The antidiscrimination laws seem to have had little effect in the last twenty years."<sup>35</sup> Economist William J. Collins, who examined state fair employment laws in the decades prior to 1960, found that those passed in the 1940s had greater positive effects than those passed in the 1950s, even though "evidence from caseload volume does not support the view that the state agencies created in the 1950s were less active than their predecessors."<sup>36</sup>

Similar studies of sex discrimination laws have found that their effects on women's relative earnings are small and their effects on women's relative employment rates may actually be negative.<sup>37</sup> Richard Posner, in his "Economic Analysis of Sex Discrimination Laws," concluded that "it is possible that women as a whole have not benefited and have in fact suffered" insofar as the laws "are more likely to benefit particular groups of women at the expense of other groups rather than women as a whole."<sup>38</sup> All of these findings support the hypothesis that anti-discrimination laws are highly effective at dealing with low-hanging fruit — for example, when a racial caste system excludes a large class of workers from the employment market, as was the case under Jim Crow — but not very effective at dealing with subtle, lingering, or marginal disparities after the initial barriers have been breached.

Later workplace anti-discrimination measures have had even less empirical backing, such as sensitivity training and diversity management. Sociologist Frederick Lynch devoted five years and hundreds of interview hours to his study of workplace diversity programs, during which time he heard many HR professionals assert that their programs had bottom-line benefits — they "increased productivity and reduced turnover and absenteeism," or were "good for business because minority customers favoured companies with strong reputations for hiring and promoting minorities." However, Lynch invariably found that these boosters had to concede that their claims were "yet to be validated by research." Lynch concludes, "There is still no systemic proof that diversity management programs decrease ethnic and gender tensions while increasing profits, productivity, and creativity."<sup>39</sup> Earlier this year, a quantitative analysis of workplace diversity programs published by the *Harvard Business Review* found that most fail, as measured by minority representation among employees and management before and after implementation. "Nonetheless," the authors write, "nearly half of midsize companies use [diversity training], as do nearly all the *Fortune* 500."<sup>40</sup>

Outside the employment sphere, anti-discrimination laws have often seen their effectiveness fade because the anti-discrimination principle that resolved an earlier policy question proved to be no help at all in resolving later ones. Ending school segregation in the south was a banner victory for the American civil rights movement in the 1950s, but the legal precedent established in that battle was no help to school boards in the south-west facing Latino demands for bilingual education. Litigants since the 1970s have argued (and the Supreme Court has accepted to an extent) that the same principle of

non-discrimination that *demanded* the integration of black and white students *restricts* the integration of English- and Spanish-speaking students, since English instruction puts the latter at a disadvantage.<sup>41</sup> In voting rights cases, anti-discrimination laws offered no rational guidance to judges deciding cases about racial gerrymandering, since it is not obvious whether black voters are better off in terms of political power if they are concentrated into few districts or spread across many.<sup>42</sup>

In the annals of anti-discrimination laws that ended up harming the population they were meant to help, the Americans with *Disabilities Act* (ADA) 1991 — one of the models for Australia's *Disability Discrimination Act* 1992 — is a textbook example. Workforce participation among the disabled actually went *down*, by as much as ten percentage points among disabled men.<sup>43</sup> Blind businessman and U.S. Civil Rights Commissioner Russell Redenbaugh had warned, "My own fear is that the ADA implementing regulations can have a chilling effect on the hiring of the disabled," and that is almost certainly what happened, with employers reluctant to take on workers who might later demand costly accommodations.<sup>44</sup> The negative effect on workforce participation was also "larger in states where there have been more ADA-related discrimination charges."<sup>45</sup> The anti-discrimination model was not necessarily the model

best suited to the goal of empowering the disabled, yet it was chosen by virtue of its status as the go-to model for legislation aimed at minorities.

Perverse effects have proceeded from race and sex discrimination laws as well. "An employer is ... far more likely to be sued when it terminates a minority worker than when it refuses to hire minority job applicants. This makes employers more reluctant to hire minorities in the first place," according to Professor Schwab. Some companies avoided locating new facilities in areas with black populations above 35 percent after the U.S. Supreme Court began interpreting civil rights law to mean that companies must hire minorities in proportion to their numbers in the local community.<sup>46</sup>

Sometimes the unintended consequences of anti-discrimination law fall not on the minority itself but on society at large. In the California case *Isbister v. Boys' Club of Santa Cruz*, the American Civil Liberties Union (ACLU) successfully sued to force a charitable recreation facility for at-risk boys to admit girls, which resulted in the donor who had given \$1.5 million to endow the club to withdraw the unspent portion of her gift.<sup>47</sup> The expansion of anti-discrimination law to include gays and lesbians has resulted in the closure of many Catholic charities and adoption agencies.<sup>48</sup>



## 5. The tension between ADP and other rights

### Equality Before the Law

The New South Wales *Anti-Discrimination Act* 1977 forbids discriminating on grounds of homosexuality, as opposed to other states' statutes which have more generic provisions against discrimination on grounds of sexuality.<sup>49</sup> This is an explicit example of something that is true of anti-discrimination laws in general: they extend privileges to certain segments of the population and not others, creating privileged classes with special rights that other citizens do not enjoy.

In his fascinating genealogy of European hate speech laws, Yale Law School professor James Q. Whitman theorises that the old aristocratic idea of *Satisfaktionsfähig* (which described the elite who were "capable of giving satisfaction" and thus within the scope of duelling culture) is a direct ancestor of the modern German legal concept of *beleidigungsfähig*, "capable of being insulted," which describes those minorities who fall within the scope of hate speech laws.<sup>50</sup> Whitman argues that this makes protected minorities a class apart in the same way the old aristocracy was.

The division of society into protected and unprotected classes runs contrary to the tradition in English law that there should be "one rule for Rich and Poor, for the Favourite at Court and the Country Man at Plough," in the words of John Locke.<sup>51</sup> Equality before the law is a fundamental tenet of the Anglosphere legal system—all the more so in countries like Australia and the United States that pride themselves on their lack of a titled aristocracy.<sup>52</sup>

It is contrary to that principle that a member of one of the 13 protected classes listed in the *Fair Work*

*Act* should be able to second-guess their bosses by hauling them before a federal body to give rationale for any 'adverse action', yet workers outside those 13 protected classes cannot. Most Australians have had the experience of being badly treated by service staff in a shop, restaurant, or hotel, but only members of protected classes can file a complaint with a state anti-discrimination commission seeking redress for the 'less favourable' treatment in question. In *Buchanan v Lindisfarne R&SLA Sub-Branch and Citizen's Club*, the Tasmanian Anti-Discrimination Tribunal invalidated a club's decision to refuse membership to an applicant on the grounds that he would not swear loyalty to the Queen, a choice that the tribunal categorised as 'political activity,' a protected attribute.<sup>53</sup> If the club had rejected him simply because they did not care for his personality, or some other equally subjective and potentially unfair reason, the refused applicant would have had no legal recourse.

### Shift in Burden of Proof

Under the *Fair Work Act* 2009, once an allegation of discriminatory adverse action is made and deemed facially valid by the Fair Work Ombudsman, the employer becomes responsible for proving that his or her conduct was not discriminatory. This is a shift in the burden of proof from the accuser to the accused, as occurs in many jurisdictions in anti-discrimination law. In the U.S., Canada, the U.K. and the EU, "there is a shift in the allocation of the burden of proof once the plaintiff has established a prima facie case of racial discrimination."<sup>54</sup>

This is especially problematic when employers have a different system of values from the judges to whom they

must explain their reasoning. For example, in *Walsh v St Vincent De Paul Society Queensland (No 2)*, a woman who had worked for the Catholic charity for many years was told after accepting a new position within the organisation that she must either become Catholic, relinquish the new position, or leave the Society. The state Anti-Discrimination Tribunal held that Ms Walsh had been illegally discriminated against, since being Catholic was not a genuine occupation requirement for the positions she held — as if judges knew better than the Catholic charity itself how important Catholicism is to the work they do.<sup>55</sup>

Respondents seeking to prove that their conduct was ‘reasonable’ under the law do not face an easy task. Commonwealth jurisprudence has established that the ‘reasonable’ standard requires something less than necessity but more than convenience, and “the fact that a distinction has a ‘logical and understandable basis’ will not always be sufficient to ensure that a condition or requirement is objectively reasonable.”<sup>56</sup> If a respondent’s conduct rests on “assumptions [that] overlook or discount the discriminatory impact of the decision”—or seems to a judge to do so—then the complaint may prevail. Requiring employers, businessmen, and other Australians to justify not only their actions but their assumptions, instead of requiring complainants to prove that the conduct at issue was unreasonable, is a reversal of the traditional burden of proof.

## Property Rights & Freedom of Association

In the *St Vincent De Paul Society* case cited above, the charity had extra leeway in asserting its right to run its operations however it wants insofar as it is a religiously-based organisation with a recognised interest in furthering Catholic values. However, businesses, organisations, and individuals without any such explicit commitments also have rights that should be protected. By allowing complainants to second-guess their fellow citizens’ decisions about what to say and whom to associate with, anti-discrimination law erodes ancient rights of property and freedom of association.

Since the time of Blackstone, English law has recognised certain obligations on the part of common carriers and “common callings” — variously thought to include innkeepers, surgeons, blacksmiths, farriers, and victuallers — to serve all comers indiscriminately.<sup>57</sup> Apart from such rare exceptions, however, the general rule has been that property can be defined as a “bundle of rights” among which is “the right to exclude others.”<sup>58</sup> This right applies whether the property owner excludes others for good reason, bad reason, or no reason at all.

The most egregious example of ADP superseding private property rights is the U.S. Supreme Court decision in *Shelley v. Kraemer*, which achieved the laudable outcome of banning racially restrictive property covenants only by the deplorable means of categorising the private covenants as a form of *state* action insofar as the restrictive contracts would — like any contract —

be enforceable by judges. This ‘attribution’ doctrine was tantamount to “erasing the distinction between public and private action,” as even left-leaning law professors like Mark D. Rosen have come to realize.<sup>59</sup>

But the particularly egregious logic of *Shelley* is only a logical outgrowth of the fundamental principle behind anti-discrimination law, which holds that, where the possibility of direct or indirect discrimination is involved, businesses may refuse to serve, individuals may refuse to associate with, and employers may refuse to hire people only for reasons that the government finds (according to the Australian Commonwealth standard) ‘reasonable.’

## Free Speech

Racial vilification complaints accounted for 18% of complaints filed with the AHRC under the *Racial Discrimination Act* in 2014–15.<sup>60</sup> In terms of public interest, however, speech-limiting provisions are among the most prominent features of anti-discrimination law. The case of *Eatock v Bolt* was a flashpoint in this debate, due to the national prominence of the respondent, columnist Andrew Bolt. The aspect of this decision most threatening to free speech rights was not the judge’s finding that Bolt’s columns constituted vilification on grounds of race, but his finding that the columns did not fall under the protections in section 18D for “fair comment on [a] matter of public interest” or for a “genuine purpose in the public interest.”<sup>61</sup> One can acknowledge the validity of racial vilification as a legal offence and still recognise that the political issues raised by Bolt — the allocation of taxpayer-funded grants and, more broadly, the rise of identity politics — are topics of legitimate interest to Australian citizens.

But *Eatock v Bolt* is by no means the only instance of ADP encroaching upon speech rights. In a New South Wales case of 2004, a radio host was found to have violated state law against homosexual vilification for a segment about an episode of the home renovation show *The Block* featuring a gay couple, even though the tribunal accepted that the host’s conduct was “not itself severe ridicule.” The violation lay in the fact that listeners “could have understood that they were being incited to severe ridicule of homosexual men.”<sup>62</sup>

Even in the United States, where the First Amendment gives explicit protection to freedom of expression, anti-discrimination law has limited free speech in significant ways. Housing discrimination law has been interpreted as banning any mention in a property advertisement that an apartment is “walking distance from a synagogue” — a relevant detail for observant Jews who do not drive on the Sabbath — because it implies a preference for Jewish buyers.<sup>63</sup> The Denver city government refused to issue a permit for a Columbus Day parade on the grounds that it would create a “hostile public environment” for American Indians. It should therefore be no surprise that Australia’s far flimsier statutory protections have proven insufficient to forestall chilling anti-free-speech precedents.



## Conclusion & Policy Recommendations

Since the passage of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth), discrimination on the basis of sexual orientation, gender identity and intersex status has been banned under Commonwealth law. This has coincided with increasing likelihood that Australia will follow the example of the United States, New Zealand, and more than a dozen other countries and extend the definition of marriage to same-sex couples. These developments have raised the question of whether vendors with conscience objections to gay marriage will be allowed to decline to participate in such ceremonies, or whether that refusal of service constitutes illegal discrimination. As Catholic Archbishop Fisher of Sydney put it in the title of his 2015 Acton Lecture, “Should bakers be forced to bake cakes for same-sex weddings?”<sup>64</sup>

In the United States, this question has plunged courts into ever-deeper subtleties. Is wedding photography ‘speech’ in the sense of being a form of creative expression, and therefore under First Amendment protection? What about baking a cake, surely an act of creativity in some circumstances? But even in Australia, the question is fraught with subtleties of almost equal delicacy. For example, is there a difference between refusing to serve a gay customer (which is clearly already illegal under existing law) and declining to serve a gay wedding? The *Sex Discrimination Act* contains explicit exemptions for religious bodies. Should this exemption be expanded to cover the deeply held religious beliefs of private business-owners like Archbishop Fisher’s hypothetical baker?

The United States has so far tended to deal with these questions through adding to the body of law, as with state RFRA (Religious Freedom Restoration Acts) designed to defend private parties against anti-discrimination litigation that substantially burdens their free exercise of religion. But there is another option. Instead of piling exemption on exemption, one could simply cut the Gordian knot of anti-discrimination law by returning to a regime of property rights, in which owning a business or a club means being able to operate it however you see fit without being second-guessed by litigants. If that were too radical, one could at least define “discrimination” as narrowly and straightforwardly as possible, in order to minimize its encroachments upon other important rights.

Defining ‘discrimination’ narrowly may sound like it would constitute a reduction in rights, but we should rather think of it as expanding and protecting rights

and creating space for organic solutions to flourish. In a pluralistic society, different systems of values will inevitably come into conflict, but these conflicts do not have to be solved through litigation or legislation. Indeed, it is often better if they are not. One reason the culture wars are so bitter in Australia is that they revolve around government. When both sides know that the winner will be able to enforce their preferred outcome on the whole country via legislation, they approach the fight with winner-take-all ruthlessness and become reluctant to compromise or agree to disagree. A patchwork of organic solutions, worked out via civil society, does not incentivise radicalism in that way. It also yields more lasting and resilient solutions, since organic solutions are not coerced but freely chosen.

In the near future there may be a consolidation or harmonization of anti-discrimination law, as was attempted by attorney general Nicola Roxon in 2012 and her successor George Brandis in 2014, and as was recommended by the Australian Law Reform Commission’s Freedoms Inquiry in 2016.<sup>65</sup> This could be a positive development. In choosing whether to opt for broader or narrower definition of what constitutes discrimination, future reformers should bear in mind the possible alternative of allowing civil society to forge its own solutions.

Too often in their 50-year history, anti-discrimination laws have been expanded not for any logical reason, much less any evidence-based reason, but simply because a minority seemed to be ‘next’ or had ‘come of age’ as a pressure group. Too rarely have people stopped to ask whether anti-discrimination law is really the best means for accomplishing some new political goal, especially given that, as this paper has shown, anti-discrimination laws may not even be accomplishing the goals for which they were expressly designed any more.

As Australia deliberates how anti-discrimination law should evolve in response to changes in the legal definition of marriage, or the increasingly confident transgender rights movement, or any of the new social challenges posed by diversity in the age of multiculturalism, we should keep in mind exactly what goals we want to accomplish. No anti-discrimination laws should be added or expanded unless there is good reason to think the expansion will accomplish some specific goal—and unless there is reason to doubt that Australian citizens operating within civil society will find solutions on their own.

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