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Religious freedom and freedom from discrimination

In 2017, the Australian Government held a voluntary postal plebiscite to ask voters if the Marriage Act 1961 (Cwth) should be changed to allow same-sex couples to marry. Almost 80 per cent of eligible Australians voted in the plebiscite. Sixty-one per cent of those voted in favour of same-sex marriage, with 38.4 per cent against. The Marriage Act was subsequently amended to allow for marriage equality for same-sex couples.

The very public debate regarding same-sex marriage brought into tension the right to equality and freedom from discrimination on the basis of sexual orientation and the right to freedom of thought, conscience and religion. Advocates for religious freedom argued for some limitations, for example to permit ministers of religion to refuse to solemnise same-sex marriages if doing so would conflict with the tenets of their religious faith. Some concessions were made in the legislative reform in an attempt to balance competing perspectives of where justice lay.

Balancing rights claims

Human rights are expressed, in international law, as universal, inalienable and indivisible. There is no hierarchy of rights to provide clear and easy resolution when tension arises between them. In a modern and diverse society, individuals and communities will have different views on which rights they regard as most essential for their wellbeing. In such cases, rights may sometimes need to be constrained.

This process of balancing rights claims is not untethered under international law, or the law in some Australian jurisdictions. The Siracusa Principles justify the limitation of a fundamental human right where:

- the limitation is necessary
- it pursues a legitimate aim
- the limitation is proportionate to the aim.

These principles of limitation are incorporated into the human rights laws of several countries, in Victoria and the ACT, and by the Commonwealth Parliamentary Joint Committee on Human Rights. That Committee is responsible for assessing whether Commonwealth legislation accords with Australia's human rights obligations. The Committee adds that a measure limiting a human right should be prescribed by law. Through these guidelines, decision-makers ought to be able to arrive at an acceptable balance or reconciliation of rights claims – a situation of greatest justice.

This essential search for balance or reconciliation of rights' claims is, unfortunately, particularly challenging in Australia due to our lack of a genuine human rights culture or discourse. Australia is the only democratic country in the world to lack a constitutional or statutory bill or charter of rights. At the national level, anti-discrimination law is the main source of what might be called human rights law. These provisions do not remotely meet Australia's international legal obligations, willingly consented to, to incorporate the full range of universal human rights in domestic law and policy. This state of affairs undermines the assertion of the Australian government, in making its bid for UN Human Rights Council membership, that human rights are ‘national values deeply embedded in Australian society’. Importantly, this absence also denies Australian society the language and precedent that should underpin the challenging but essential processes of balancing rights claims.

In this area, we can, and should, work towards the construction of a true human rights culture, through the development of a national law protecting the full range of human rights to which Australia is genuinely committed as an international citizen. Many other countries have grappled with the dilemmas posed by tensions between religious freedom and freedom from discrimination. The construction of a domestic human rights framework will better enable Australia to draw on their experiences and evaluate what is suitable for our social life.
The debate about religious freedom, religious schools and discrimination against students and staff

After the marriage reform plebiscite, the Commonwealth Government established an inquiry to consider whether Australian law adequately protects the freedom of religion. The inquiry, chaired by former parliamentarian Philip Ruddock and known as the ‘Ruddock Review’, recommended that the Commonwealth introduce a new law prohibiting discrimination on the basis of religion. This statute would sit alongside those that prohibit discrimination against people on the basis of their race, sex, age or disability.

The Ruddock Review focused particularly on exemptions in anti-discrimination law that permit religious schools to discriminate against students and employees on the basis of their sexual orientation or gender identity. The recommendations of this review, which were leaked to the public, caused an outcry, with considerable protests relating to the prospect of religious schools, for example, expelling students because they are gay. It was not widely understood in the community that religious schools already have such a capacity under the law in most Australian jurisdictions.

In late 2018, considerable public and parliamentary debate focused on how, or whether, the Sex Discrimination Act should be amended to limit existing exemptions that allow religious schools to discriminate on these bases. In early 2019, no resolution has been reached and the matter will come before the parliament again later this year.

In the debate regarding the extent to which religious schools ought to be permitted to discriminate against students or teachers on the basis of their sexual orientation or gender identity, various rights are in tension. There is a right to freedom of thought, conscience and religion, which is unconstrained in its private sense (of an individual’s belief or non-belief) but subject to potential limitation in terms of its public manifestations. There is also the fundamental pursuit of equality of all people before the law and the parallel prohibition on discrimination which would undermine that pursuit of equality. There are rights to privacy and to family life. Concern must also be given to the body of human rights law concerned with the rights of the child, particularly the ‘best interests of the child’ standard.

These considerations must sit alongside each other in their social context. Any attempt to establish a hierarchy between different human rights undermines their essential goal of protecting the ‘equal and inalienable rights of all members of the human family’. If we privilege individualistic rights, such as the right to freedom of

Right to equality and freedom from discrimination

Article 26, International Covenant on Civil and Political Rights (1966)
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.

Right to freedom of thought, conscience and religion

Article 18, International Covenant on Civil and Political Rights (1966)
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.

Best interests of the child standard

Article 3(1), Convention on the Rights of the Child (1990)
In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
thought, conscience and religion, above rights to equality and freedom from discrimination we risk particular harm to some of the most vulnerable individuals and communities in our society.

Religious adherence is of great significance to people of faith, and Australian law ought to protect the right to freedom of thought, conscience and religion. Human rights law also respects the right of parents to ensure the religious education of their children in accordance with their own convictions. With more than one in three Australian children enrolled in religious schools, and considerable government funding being directed towards that sector, it is clear that Australian society is invested in the furtherance of this right. However, in like legal systems including New Zealand, Ireland and the UK, the legal exemptions to discrimination law for religious schools are significantly more limited. In those countries, the freedom of religion of religious schools is attended to only by exemptions permitting the exclusion of children of a different sex from single-sex schools and the refusal of admission to students who do not adhere to the faith of a school community.

It is reasonable and necessary to limit religious freedom in the context of religious schools to protect the best interests of children and their rights to an education appropriate to their needs. As shown above, paragraph 3 of Article 18 of the International Covenant on Civil and Political Rights, which enshrines freedom of religion, permits limitations on the manifestation of religion as prescribed by law and necessary to protect the fundamental rights and freedoms of others.

Arguably, exemptions which permit direct discrimination against students in religious schools should be removed. This would prevent schools from, for example, expelling students because they are gay. There is also a strong argument for limiting exemptions that permit indirect discrimination against students in religious schools, for example where a school may seek to prevent students from forming clubs or discussion groups that challenge the school’s ethos. In such a case, LGBT students are not being singled out, but the effect of the school’s policy may be indirectly discriminatory towards them because it is more likely that a support group for LGBT students will highlight the incongruity between their school’s ethos and their identities.

It is understandable that religious organisations want teachers in religious schools to protect and maintain their school’s ethos. On this point, schools should have a capacity to require that teachers engaged in religious instruction be willing to adhere to the school’s ethos in that instruction. Such a position could be characterised as a ‘genuine occupational requirement’. In contrast, it seems unreasonable to permit religious schools to refuse to hire or to terminate the employment of any teacher, staff member or contractor on the basis of their sexual orientation. Such a capacity is not consistent with human rights law or court decisions.

Importantly, removing exemptions that permit discrimination against LGBT students in religious schools would not prevent those schools from communicating their ethos through religious instruction. Instead, it would respond to a contemporary challenge for Australian society – the question of whether the law should permit discrimination in education against children on the basis of their sexual orientation or gender identity. Our growing understanding of the diversity of human life and experience dictates that our understanding of equality evolves over time. This is especially the case considering the risks of harm to LGBT young people if the law permits extensive discrimination against them by religious schools. The experience of discrimination has detrimental impacts on the mental health of LGBT people, and these members of our society are disproportionately represented in statistics of self-harm and suicide. LGBT young people in religious schools are more likely than their non-religious peers to experience social exclusion, bullying, homophobic language and attacks, and to feel negatively about their same-sex attraction and report suicidal ideation.

Governments must prioritise the best interests of children in their regulation of schools. While the freedom of religion dictates that schools must be permitted to operate with a religious ethos, the primary responsibility of those schools remains the safety and wellbeing of their pupils. Children are entitled to special protection because they are more vulnerable than adults and lack equal capacity to assert their rights. The religious freedom of schools should be somewhat constrained in law, because the best interests of a child cannot be advanced through discrimination based on their sexual orientation or gender identity.
Student activities

1. Explain the purpose and result of the plebiscite held by the Commonwealth Government.

2. Explain, in your own words, the meaning of universal, inalienable and indivisible.

3. Are human rights ever subject to limitations?

4. Why do you think human rights should or should not be subject to limitations in some cases? You may like to think of a hypothetical case to help your answer.

5. What considerations should a decision-maker use to determine if a human right ought to be subject to limitations?

6. Where is the conflict of rights in the same-sex marriage debate?

7. How did the Australian Parliament seek to balance the right to freedom of religion with the right to equality and freedom from non-discrimination during the debate about same-sex marriage?

8. Group work: In relation to religious schools and discrimination against students on the grounds of gender identity or sexual orientation, list the competing arguments based on:
   a. freedom of religion
   b. the right to equality and freedom from non-discrimination.

9. Group work: In relation to religious schools and discrimination against teachers and other school staff on the grounds of gender identity or sexual orientation, list the competing arguments based on:
   a. freedom of religion
   b. the right to equality and freedom from non-discrimination.

10. Why was there a public outcry following the publication of the recommendations in the ‘Ruddock Review’?

11. How does New Zealand deal with this balance between the right not to be discriminated against and the right of religious freedom?

12. Do you believe that our understanding of human rights evolves over time? Explain.

13. Do you think that an emphasis on the rights of the child should be seen as more important than religious freedom in some circumstances? Give your reasons.

14. Should Australia have a bill or charter of rights? Give your reasons.

15. How might a bill or charter of rights affect how Australian parliaments deal with the debate regarding religious schools and discrimination on the grounds of sexual orientation or gender identity?
Sometimes the law can seem a distant and rather intimidating phenomenon. After all, it is very rare that a single form of action can affect the entire community of a state or a nation, let alone possess the capacity to bind every member of the community to the achievement of its objectives. So, when we speak about the law we are considering something of enormous significance and value.

Speaking of value, it is also very important to consider the law’s fundamental purpose. That purpose is the achievement of justice. There is no more important social value than that one. The law is not always successful in attaining the ideal of justice, but the pursuit of that ideal is of fundamental importance.

The American civil rights leader, Martin Luther King, encapsulated this thought beautifully. He stated that:

*The arc of the moral universe is long, but it bends towards justice.*

And at its heart, this is what the law is about.

In the Australian legal system, the law is contained principally in the Australian Constitution and in legislation made by the Commonwealth Parliament and each state and territory parliament. The Australian Constitution is the nation’s foundational legal document. It establishes the framework of Australian government. It sets down the fundamental law with respect to the operation of each of the three branches of Australian government: the legislature, the executive and the judiciary. And it delineates the relationship between the Commonwealth, state and territory governments.

The Constitution is very difficult to change. It has remained essentially the same ever since its adoption in 1901 at the time of Australian federation. The reason it is difficult to change is that any amendment of the Constitution requires the assent of the Australian people to an amendment through the mechanism of a referendum. And to pass, a referendum proposal must not only be agreed to by a majority of the Australian people, it must also be agreed to by a majority of the Australian people in a majority of the states. Since federation, only eight of 44 referendums have been successful. Consequently, the Australian Constitution is now one of the oldest Constitutions in the Western democratic world. It is out of date. Today, therefore, the reform of the Constitution is an important national priority.

To provide just one example, the Constitution makes no reference at all to Australia’s indigenous peoples. It subsumes our indigenous people within a larger reference to the ‘people of any race’. In the last few decades, Australians have become much more aware of the significance of the nation’s indigenous peoples, the fact of their original ownership of the land, and the contribution that they have made to Australia’s economic, social and cultural development.

To reflect this greater awareness and appreciation, indigenous and non-indigenous peoples alike have argued that the Australian Constitution must be amended to give proper recognition to our indigenous peoples as the ‘first peoples’ of the land, and to provide them with an independent and influential constitutional voice. We are now, therefore, in the midst of a very constructive national conversation about how this indigenous voice might best be included and constructed in the Constitution by way of its amendment.

When a final referendum proposal on this subject is decided upon, every one of us, of voting age, will be able to influence constitutional change by engaging actively in the campaign for indigenous constitutional recognition and by voting in the referendum to approve it. If successful, that will be an extraordinary change in the law.

Apart from the Constitution, Australian law is made primarily through parliament. So, the first answer to the question of how to change the law is that one should engage with parliament. In this context I will speak primarily of the Commonwealth Parliament but my remarks apply equally to changing the law through state and territory parliaments.

The House of Representatives is comprised of members representing geographic electorates from every part of the country. The Senate is elected by a system of proportional representation, with members elected on a state by state basis. There are 150 members of the House of Representatives and 76 members of the Senate.

If an individual wants to change the law in any particular direction, the best starting point is for her or him to contact their local member of the House of Representatives. Each member of the House of Representatives has a responsibility to represent the citizens of their electorate in Parliament. The members of the House of Representatives are the first and best avenue for citizens to have their voices heard in parliamentary deliberations. You can find a list of members on the parliamentary website here: https://www.aph.gov.au/Senators_and_Members.

Write to your local member, arrange a meeting, bring a delegation with you, and argue your case for law reform. This would be an active and constructive step in placing your concerns on the parliamentary agenda. And you can expect your local member to report back to you on what progress he or she has made in advancing your interests. Each local member has a small team of staff to assist with the receipt of law reform submissions from local citizens. If the local member is too busy to see you personally, you should be able to have a conversation with one of the electoral office staff.

Each house of the parliament has established a system of committees. The principal task of these committees is to review draft legislation (known as bills) prior to its submission to the parliament as a whole, and to conduct detailed inquiries upon issues of parliamentary and public concern. Involvement in the proceedings of parliamentary committees when these are discussing law reform matters of particular interest to relevant segments of the community is a great way to get one’s voice heard.

The most powerful committees are those of the Senate, given that the Senate is primarily a house of review. Here are some of the most important Senate Committees:

- The Legal and Constitutional Affairs Committee
- The Foreign Affairs, Defence and Trade Committee
- The Economics Committee
- The Education and Employment Committee
- The Environment and Communications Committee.

The committees conduct far reaching inquiries as the prelude to the development of acts of parliament.

A well conducted and informed inquiry can lay an almost complete foundation for the legislation that will spring from it. To take the example of the Legal and Constitutional Affairs Committee, shown below are its current inquiries:

- Combating child exploitation. This inquiry is concerned with the development of laws to criminalise and deter child trafficking.
- Creation of a National Integrity Commission. This inquiry is concerned with the problem of corruption and seeks to establish a Commonwealth anti-corruption commission.
- The resolution of disputes with financial service providers within the justice system. This inquiry is concerned to protect consumers from deficient advice provided by investment and financial advisers.
- The effectiveness of the current temporary skilled visa system in targeting genuine skills’ shortages. This inquiry is directed towards identifying priority areas of skills’ shortages in the Australian workforce and to ensuring that visas are provided to the overseas workers best qualified to meet the identified workforce needs.

Members of the community are always invited to make submissions to inquiries such as these. The Committees set out the terms of reference for each inquiry and encourage community participation in their deliberations. Further information on committees can be found here: https://www.aph.gov.au/Parliamentary_Business/Committees. Submissions may be lodged with the Clerk of the Senate here: seniorclerk.committees.sen@aph.gov.au. If your submissions are good, you may be invited to address the relevant committee in person in a public hearing.

The parliamentary committees have some very instructive advice about how best to frame a submission. And this advice applies in every arena in which an individual member of the community wishes to make their case for law reform. The key suggestions are that a submission should:

- directly address the terms of reference
- be concise, usually no longer that five pages
- commence with a short introduction about yourself or the organisation you represent
- explain how you think the problems with which you are concerned may be best addressed
- emphasise all your principal points so that they are clear
only include information that you would be happy to see published on the internet.

The next really good way that people can advance law reform in their areas of special interest is to engage with civil society. The thing that needs to be understood here is that lawmakers respond to political and public pressure. Becoming involved with a civil society organisation that shares the same interests as you, and knows how to place pressure on parliament and government, can substantially strengthen your hand.

The general rule with respect to influencing the parliament is that those with the loudest voices tend to be those who are heard. And the loudest voices in the wider community are those from influential lobbyists, representative bodies, public policy think-tanks and significant non-governmental organisations (NGOs). So, an individual can have his or her voice magnified by joining a prominent civil society organisation in one or more of those categories.

To provide another example, let’s assume that a person is deeply troubled by the imprisonment of asylum seekers in offshore processing centres on Nauru or Manus Island. A personal letter from the person to their local member of parliament or a Minister objecting to offshore detention is unlikely to count for much. But a detailed, well researched submission to the government or parliament from a prominent NGO, objecting to human rights abuses on the islands, is likely to be far more persuasive. The same goes for a single NGO. If a minister receives a submission signed by several prominent NGOs, he or she is likely to sit up and listen.

In relation to the mistreatment of asylum seekers, a quick Google search will provide the requester with the names of several NGOs that might be worthwhile joining. Each of them has a comprehensive website, contact details and all other relevant information. On refugee matters, a quick search is likely to bring up some terrific organisations, which welcome new members. Some refugee specific organisations are listed below:

- **The Refugee Council of Australia.** This organisation is the umbrella organisation for civil society bodies concerned with refugee policy and action.

- **Refugee Legal.** This legal body provides free legal services for refugees and asylum seekers and runs critical legal cases before relevant courts and tribunals.

- **The Asylum Seeker Resource Centre.** This centre provides counselling, welfare and financial assistance to people seeking to obtain refugee status in Australia.

Or one could go wider and join a significant human rights advocacy organisation. These organisations are not single issue but advocate with parliament and government on the whole range of human rights issues that arise under Australian and international human rights law. Here is a list of some of these organisations:

- **Liberty Victoria.** Liberty is one of Australia’s most influential human rights advocacy organisations and makes representations to government on such matters as refugee law, criminal law and procedure, counter-terrorism law, and arbitrary detention.

- **The Human Rights Law Centre.** This organisation represents clients who believe that their human rights have been infringed before the courts. It also runs major human rights campaigns such as the current campaign for a bill of rights in Australia.

- **Human Rights Watch.** This international organisation has an Australian branch and has done terrific work around refugee rights, indigenous rights, imprisonment and arbitrary detention, and social security.

- **GetUp.** This online organisation has more than one million Australian members and invites its members to participate actively in a very diverse array of political and social campaigns.

If one doesn’t want to participate directly in an NGO, it is easy to place oneself on its mailing list. NGOs will alert anyone interested in law reform and social justice to a host of individual events designed to draw the attention of government and parliament to legal issues of significant community concern. For instance there are public meetings and talks, protests and demonstrations, social media campaigns, crowdfunding opportunities, petitions, social events and many other similar activities.

Law reform is hard work. But it can be incredibly rewarding. You can make a difference. Just remember the moral arc of the universe – and where it’s headed.
Student activities

1. What is the most important aspect of all laws?

2. Explain the main role of the Australian Constitution.

3. Explain the requirement to pass a referendum.

4. Why is the reform of the Constitution an important national priority?

5. Do you think a change in the Constitution is necessary relating to indigenous people? Give your reasons.

6. Explain the difference between the voting system for the Senate and that of the House of Representatives.

7. What is the first contact you should make if you think there is a need for a change in the law?

8. Find the name of your local member for the House of Representatives and the names of the Senators representing yours state. For each, state which party they represent or if they are an independent.

9. Why do you think becoming involved in a committee process could be a good way to influence a change in the law? What can you do to become involved?

10. Choose one of the current enquiries of the Legal and Constitutional Affairs Committee and explain the terms of reference of that enquiry.

11. In groups or individually, think up a change in the law that you think should be made. The change can be either relating to state or federal law. Find an appropriate committee that you think you could submit your suggestion to and write a submission including the suggestions made in the article. (Note you will need to look up the committee on the Commonwealth or state website depending on whether your suggested change is relating to state or federal law.)

12. What is the most successful way to find assistance in influencing a change in the law? Explain.

13. Investigate some of the NGOs mentioned in this article. Choose one to investigate more fully and explain its aims and why it could be interesting to you.