Submission

to the

Queensland Human Rights Commission

review of the

Anti-Discrimination Act 1991 (Qld)

Email: adareview@qhrc.qld.gov.au
Website: https://www.qhrc.qld.gov.au/law-reform/have-your-say/submissions

by

FamilyVoice Australia

Telephone: 1300 365 965
Email: office@familyvoice.org.au
Website: www.familyvoice.org.au

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1. Terms of reference

2. The Commission is asked to review the AD Act and consider whether there is a need for any reform to enhance and update the AD Act, taking into account Australian and international best practices, to best protect and promote equality, and nondiscrimination and the realisation of human rights.

3. In undertaking this review, the Commission should consider whether there is a need for any reform, and if so, the scope of reform regarding:

(a) the compatibility of the AD Act with the Human Rights Act 2019;

(b) the preamble and preliminary provisions under Chapter 1 of the AD Act, including whether a more positive approach is required to eliminate discrimination, and other objectionable conduct prohibited in the AD Act;

(c) the attributes of discrimination, including (but not limited to):

i. whether the current definitions given to protected attributes under Schedule 1 of the AD Act best promote the rights to equality and nondiscrimination; and

ii. whether additional attributes of discrimination should be introduced to section 7 of the AD Act,1 including (but not limited to) spent criminal conviction or irrelevant criminal record; expunged homosexual conviction; irrelevant medical record; immigration status; employment activity; and physical features;

(d) the areas of activity which discrimination is prohibited under Part 4 of the AD Act;

(e) the definitions in the AD Act (other than vilification), including (but not limited to), discrimination, unjustifiable hardship, genuine occupational requirements, sexual harassment, and victimisation;

(f) whether the AD Act should contain a positive duty on organisations to eliminate discrimination and other objectionable conduct prohibited by the AD Act, similar to the duty contained in section 15 of the Equal Opportunity Act 2010 (Vic);

(g) whether the AD Act should reflect protections, processes and enforcement mechanisms that exist in other Australian discrimination laws;

(h) exemptions and other legislative barriers that apply to the prohibition on discrimination; 1 Section 235(f) of the AD Act provides that it is a function of the Commission, when requested by the Minister "to research and develop additional grounds of discrimination and to make recommendations for the inclusion of such grounds in the Act".

(i) whether the requirement for less favourable treatment, as imported by the concept of the comparator, remains an appropriate requirement to establish discrimination or whether there are other contemporary responses that would be appropriate;

(j) whether the functions, processes, powers and outcomes of the Commission are appropriately suited to ensuring it can further the objective of eliminating discrimination and other objectionable conduct under the AD Act, to the greatest possible extent;

(k) the functions, processes, powers and outcomes of the Queensland Civil and Administrative Tribunal (QCAT) and the Queensland Industrial Relations Commission (QIRC) under the AD Act;

(l) ways to improve the process and accessibility for bringing and defending a complaint of discrimination, including (but not limited to) how the complaints process should be enhanced to improve access to justice for victims of discrimination;

(m) options for more tailored approaches towards, or alternatives to existing frameworks for, dispute resolution that enable systemic discrimination to be addressed as well as discrimination complaints that raise public interest issues;

(n) any other matters the Commission considers relevant to the review.

4. In light of the Government's commitment for a Parliamentary Committee inquiry on serious vilification and hate crime, the Commission is directed not to consider as part of this review vilification or sections 124A or 131A of the AD Act.

5. The review will also consider ongoing efforts by the Palaszczuk Government and relevant work in other Australian jurisdictions in implementing the recommendations from the Australian Human Rights Commission's Respect@Work: Sexual Harassment National Inquiry Report (2020) and include options for legislating for a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation as far as possible.[1]

FamilyVoice Australia is a national Christian advocacy group – promoting family, freedom, and faith 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 flourish, Australia's Christian heritage is valued, and fundamental freedoms are enjoyed.

The closing date for submissions is **Tuesday, 1 March 2022**.

2. 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 or compulsion. The first recorded reference to the freedom of religion term is found in the works of Tertullian, a Christian writer around AD 200:

> *It is a fundamental human right, a privilege of nature, that every man should worship according to his own convictions.*[2]

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. As Augusto Zimmerman stated, when he was a senior law lecturer at Murdoch University:

> *...religion is not an isolated component of life, because religion has broad, holistic implications for the lives of its adherents as a worldview that shapes the way individuals think and act.*[3]

Princeton University Professor of Law Robert P. George has described the broad nature of religious freedom in this way:

> *The US Commission on International Religious Freedom has stood for religious freedom in its most robust sense. It has recognized that the right to religious freedom is far more than a mere "right to worship." It is a right that pertains not only to what the believer does in the synagogue,*

> *church, or mosque, or in the home at mealtimes or before bed; it is the right to express one's faith in the public as well as private sphere and to act on one's religiously informed convictions about justice and the common good in carrying out the duties of citizenship. Moreover, the right to religious freedom by its very nature includes the right to leave a religious community whose convictions one no longer shares and the right to join a different community of faith, if that is where one's conscience leads. And respect for the right strictly excludes the use of civil authority to punish or impose civic disabilities on those who leave a faith or change faiths.*[4]

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.*

This however has very important ramifications for the protection of religious freedom. Limitations clauses under the International Covenant on Civil and Political Rights (ICCPR), including religious freedom in Article 18(3) are required to be interpreted in accordance with The United Nations Economic and Social Council's ***Siracusa Principles*** on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights:

- These Principles provide that 'all limitation clauses shall be interpreted strictly and in favor of the rights at issue';
- 'Whenever a limitation is required in the terms of the Covenant to be "***necessary***," this term implies that the limitation:
  - Is based on one of the grounds justifying limitations recognised by the relevant article of the Covenant;
  - Responds to a pressing public or social need;
  - Pursues a legitimate aim;
  - Is proportionate to that aim.

The Siracusa Principles also require that 'in applying a limitation, a state shall use no more restrictive means than are required'. This means that:

- Where consideration is being given to the implementation of a fundamental right that conflicts with the right to religious and conscientious freedom, consideration of alternative means for progressing that fundamental right must be undertaken;
- A weighing of the relative burden placed upon religious and conscientious freedom amongst the alternatives is then required in order to identify the means that are the least restrictive.

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.[5] 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..."[6] 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.

3. Anti-Discrimination Act 1991 (Qld)

3.1. Faith-based organisations

The removal of important religious freedoms from faith-based organisations threatens the tremendous good work they do in the community.

As one example of the large number of services provided by a religious organisation:

> *The Catholic Church provides Australia's largest non-government grouping of hospitals, aged and community care services, providing approximately 10 per cent of health care services in Australia. It provides social services and support to more than 450,000 people across Australia each year. There are more than 1,750 Catholic schools with more than 94,000 staff providing education to more than 765,000 Australian students. There are two Catholic universities, teaching more than 46,000 students.*[7]

Human rights lawyer Mark Fowler has highlighted that "twenty-three of the largest 25 charities in Australia (after pure religious charities are removed) are faith-based."[8] Changes to exemptions place the provision of services by religious organisations to the community at risk.

Cardinal George Pell has rightly pointed out:

> *Neither the government nor anyone else has the right to say to religious agencies "we like your work with vulnerable women; we just need you to offer them abortion as well" or "we really like your schools, but we can't allow you to teach that marriage between a man and a woman is*

> *better or truer than other expressions of love and sexuality." Our agencies are there for everyone without discrimination, but provide distinctive teachings and operations. In a wealthy, sophisticated country like Australia, leaving space for religious agencies should not be difficult.*[9]

Forcing faith-based organisations to operate at odds with their religious beliefs restricts their religious freedom. For a society to be construed as open and democratic, it must allow both individuals and associations to publicly provide their notion of truth to wider society: "Any removal of the ability of faith-based entities to determine and espouse their beliefs would be a restriction on these historically hard-won liberties, which arguably are characteristic of the Western legal tradition."[10]

The further erosion of religious freedom only serves to reinforce it as a second-class right, as noted by US Supreme Court Justice Samuel Alito:

> *Supreme Court Justice Samuel Alito stated that "in certain quarters, religious liberty is fast becoming a disfavored right." And is viewed by some as "not a cherished freedom, it's often just an excuse for bigotry and it can't be tolerated, even when there is no evidence that anybody has been harmed."*[11]

It is important to note that Comment 18 of the United Nations Human Rights Committee recognises that under the International Convention on Civil and Political Rights **"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".**

The removal of exemptions is a real problem because exemptions are the major way that State and Federal governments are currently dealing with their obligations to protect religious freedom in Australia.

Another problem is that when religious organisations are merely permitted an exemption they are perceived negatively as discriminatory organisations, when in reality they are not doing anything wrong but simply living out their faith.

To help overcome this perception issue, a section should be added to the *Anti-Discrimination Act 1991 (ADA)* that religious organisations are taken not to be discriminatory when they engage in conduct which is consistent with the religion.

Recommendation 1

To balance the flawed exemption model which creates a perception of wrong doing, a section should be added to the ADA*, stating: *that religious organisations are taken not to discriminate when they engage in conduct which is consistent with the religion.

3.2. Freedom of conscience

Exemptions should apply to natural persons who adhere to religious beliefs and practices. To not do so is a failure to take religious belief seriously. Religious exemptions should be recognised for any person who holds a genuine and conscientious belief that some of the protected attributes are morally unacceptable.

A general religious exemption from provisions of the *ADA* 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;*[12]

Relevant sections of the *ADA* should be replaced by a simple provision for exemption for persons, natural or corporate, whose conscientious beliefs do not allow them to comply with the *ADA*, or with particular provisions of the *ADA*.

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 2

Relevant sections of the ADA 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.

3.3. Education

Religious schools exist not only to educate students in their ABCs but to also transmit faith to students. Their very existence is tied to religious instruction. These schools are not simply educational institutions with a religious flavour; rather, they are about providing religious education to the young.

However, this issue is not just about religious freedom; it is also about the fundamental right of parents to determine their children's education. As detailed earlier in this submission, article 18(4) of the ICCPR states:

> *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.*[13]

The Association of Independent Schools of SA (AISSA) has rightly pointed out that:

> *For adherents to a faith, matters of religious belief are of the highest personal significance. For many people, they rest at the very core of their existence, informing all of their conduct and decision-making.*[14]

Restricting the right of parents to educate their children in accordance with their religious beliefs marginalises people of faith. As a diverse group of eminent leaders – Charles J. Chaput (Roman Catholic Archbishop of Philadelphia), William E. Lori (Roman Catholic Archbishop of Baltimore), Albert Mohler, Jr. (President of the Southern Baptist Theological Seminary), Russell Moore (President of the Ethics and Religious Liberty Commission, Southern Baptist Convention) and Russell P. George (McCormick Professor of Jurisprudence, Princeton University) – have said:

> *When basic moral convictions and historic religious wisdom rooted in experience are deemed "discrimination," our ability to achieve civic harmony, or even to reason clearly, is impossible.*[15]

Any change to the *ADA* should strengthen, not weaken, protections for religious educational institutions.

Recommendation 3

To balance the flawed exemption model which creates a perception of wrong doing by educational institutions, a section should be added to the ADA* highlighting the right of *parents to educate their children in accordance with their religious beliefs and that religious educational organisations are taken not to discriminate when they engage in conduct which is consistent with their religious foundation, including the hiring of all staff (not just teachers) with a consistent ethos and also with respect to the enrolment of students.

3.4. Sexual orientation & gender identity

Sexual orientation

Discrimination on the ground of sexual orientation laid out in section 7 of the *ADA* 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.*[16]

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.*[17]

Gender identity

Prohibitions against discrimination on the ground of "gender identity" detailed in section 7 of the *ADA* 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.*[18]

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...*[19]

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.*[20]

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."*[21]

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.

Recommendation 4

Gender identity be removed as a protected attribute.

3.5. 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".[22]

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.[23] Justice Kirby also included the presumption of innocence as a necessary part of a fair trial.[24] The court further highlighted the importance of this presumption by insisting that interpretation of Commonwealth Law must not unnecessarily undermine it.[25]

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".[26]

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."[27]

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.[28] 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".[29] 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".[30] 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".[31] 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".[32] 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 the 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.

It would be unjust to place the burden of proof on the alleged discriminator to prove that no discrimination took place.

Within the *Anti-Discrimination Act 1991,* section 204 states that the burden of proof must be proved by the complainant on the balance of probabilities, rather than the higher threshold beyond a reasonable doubt.

With respect to indirect discrimination, section 205 reverses the burden, placing it on the respondent to prove, on the balance of probabilities, that a term complained of is reasonable.

While section 206 also reverses the burden of proof, requiring that if a respondent is relying on an exemption, that the respondent must prove it applies on the balance of probabilities.

In keeping with the serious nature of charges of discrimination, the burden of proof should remain on the complainant. Further, the standard of proof for matters should be that of beyond a reasonable doubt. The respondent should not have to prove anything.

Recommendation 5

The ADA should be amended to make clear that:

- ***The burden of proof remains on the complainant;***
- ***The standard of proof for matters is that of beyond a reasonable doubt; and***
- ***The respondent does not have to prove anything***

4. Conclusion

Religious freedom is a fundamental human right. If there are going to be amendments to the *ADA*, any changes should strengthen religious freedom, not weaken it. As has been pointed out, the removal of exemptions is a real problem because exemptions are the major way that State and Federal governments are currently dealing with their obligations to protect religious freedom in Australia.

Another problem is that when religious organisations are merely permitted an exemption they are perceived negatively as discriminatory organisations, when in reality they are not doing anything wrong but simply living out their faith.

To help overcome this perception issue, a section should be added to the *ADA* that religious organisations are taken not to discriminate when they engage in conduct which is consistent with the religion.

The *ADA* should also be amended to strengthen protections for freedom of conscience both for natural persons and corporations.

5. Endnotes

[1] https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0005/32396/2021-Review-of-the-ADA-Terms-of-Reference.pdf

[2] "The Edict of Milan" https://www.holyspirit-al.com/ourpages/auto/2011/7/28/60780317/edict%20of%20milan.pdf

[3] Augusto Zimmermann, "The Secular Challenge to Freedom of Belief", *News Weekly*, 28 February 2015

[4] Robert P. George, 'What is religious Freedom?', *Public Discourse*, Witherspoon institute, July 24, 2013.

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

[6] *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."

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

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