

BLOG

‘Obedience to the Unenforceable.’

John Fletcher Moulton* in a speech made long ago, which he called *‘Law and Manners’* said, that Governments must trust their citizens, otherwise tyranny happens. *‘Mere obedience to Law does not measure the greatness of a nation, the true test is the extent to which individuals can be trusted to obey self-imposed law.’* The lust of governing needs to be controlled, if not avoided.

He identified three areas of human action. First, was the area of positive law. Next was free choice. Between these two areas lay one which was neither subject to regulation nor having the privilege of freedom of choice. He described it as the domain of ‘obedience to the unenforceable.’ Governments must resist expanding the domain of regulation into this intermediate domain.

This intrusion into the domain of obedience to the unenforceable is illustrated by an abundance of laws made by Commonwealth, State and Territory Parliaments with respect to anti-discrimination. The Commonwealth relies on the *International Convention on the Elimination of All Forms of Racial Discrimination 1969*. This convention was ratified by Australia on 30 October 1975 and in accordance with ss.2(2), 3(1) and the Schedule of the *Racial Discrimination Act 1975* (Cth) became part of the law of Australia.

Racial discrimination is covered by at least twelve Acts:

- i. *Racial Discrimination Act 1975* (Cth), e.g. ss.18B-F on racial hatred;
- ii. *Anti-Discrimination Act 1977* (NSW), e.g. ss. 20B-D on racial vilification;
- iii. *Equal Opportunity Act 1984* (WA), e.g. ss. 49A-D on racial harassment;
- iv. *Equal Opportunity Act 1984* (SA), e.g. ss.51-65 discrimination on the grounds of race;
- v. *Anti-Discrimination Act 1991* (Qld), e.g. ss. 124A and 131A on racial vilification;
- vi. *Discrimination Act 1991* (ACT), e.g. ss. 65-67 unlawful racial vilification;
- vii. *Anti-Discrimination Act 1992* (NT), e.g. s.19(1)(a) discrimination on the grounds of race;
- viii. *Racial Vilification Act 1996* (SA), s.4 a criminal offence of racial vilification;
- ix. *Anti-Discrimination Act 1998* (Tas), e.g. ss.14, 16(a), 17 and 19 (a) discrimination on the grounds of race;
- x. *Racial and Religious Tolerant Act 2001* (Vic), e.g. ss.7 and 24 unlawful and serious racial vilification;
- xi. *The Criminal Code* (WA), e.g. ss.76-80J, racist harassment and incitement to racist harassment; and
- xii. *Equal Opportunity Act 2010* (Vic), e.g. ss. 6(m), 8 and 9 discrimination on the grounds of race.

It should be noted that the legislative powers of the Commonwealth Parliament set out in s. 51 of the Constitution are definite powers which are held concurrently with State Parliaments. They in turn have indefinite legislative powers as affirmed in s.107 of the Constitution.

Legislation passed by the State Governments on the subject of racial discrimination begs the question as to whether they are void and inoperative under s. 109 of the Constitution to the extent that they are inconsistent with the *Racial Discrimination Act 1975* (Cth). The answer would seem to be that these Acts are not inconsistent, but work consistently with the Commonwealth Act, as confirmed by s. 6A and in particular s.18F with respect to racial hatred.

Whether the Commonwealth Act is invalid as beyond the external affairs power would seem to be answered in the negative by the decisions of the High Court in *Koowarta v Bjkle-Petersen* (1982)153 CLR 168 and *Commonwealth v Tasmania* (1983) 158 CLR 1 (*the Tasmanian Dam case*). Of course there is always the remote possibility that the High Court might overrule itself on these decisions. Even if they were, the concurrent State Acts would still remain in force. In short, there would be little, if any, significant change. This would also seem to be the case if the Commonwealth Act were to be repealed either wholly, or in part with respect to its topical s.18C.

Essentially, the difference between the Commonwealth and the State and Territory anti-discrimination legislation is in the meaning of direct discrimination. In the former reference is made to preferences and distinctions made on race whereas in the latter, direct discrimination occurs where a person is treated less favourably than another person of a different race. It is doubtful whether much turns on this distinction.

The point of all this, is whether the twelve Acts listed above serve any useful purpose. On its face, they show that the Parliaments do not trust the people. Put simply, they merely usurp the Christian commandment, 'to love your neighbour as yourself.' These Acts represent an unwarranted invasion of the domain of obedience to the unenforceable. It should not be overlooked, that this intermediate domain draws no distinction between public and private acts. Worse still, the anti-discrimination legislation reveals the generally accepted, but misconceived idea, in Western Democracies that the statute book is the key to curing social ills. Experience surely tells us that this is not so.

* Lord Moulton, in the words of the Lord Chancellor, Lord Birkenhead (F.E. Smith,) was a 'noted Judge, a great Parliamentarian and Minister.' His speech on 'Law and Manners' was republished in the *Australian Law Journal*, (1999) 73 ALJ 259.

Bryan Pape
www.bryanpape.com.au
11 April 2014.

Disclaimer

Material on this web site is for information only and does not constitute legal advice. This site is updated as and when convenient and may not reflect the most recent developments in any particular area. To the extent permissible by law, I exclude all liability for anything contained on or accessed via this site and any use you make of it.