

# ***The Jurisprudential Rationale Behind LGBTQ Anti-Discrimination Law***

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**Abstract:** This essay examines the philosophical and legal rationale underpinning the criminalization of discriminatory behaviour against LGBTQ individuals, highlighting how anti-discrimination law serves as a regulatory mechanism. It explores three jurisprudential approaches: the moral wrongdoing approach, the individual autonomy approach, and the community welfare approach, analysing how each justifies the prohibition of discrimination. The essay argues that the balance between individual autonomy and community welfare forms the foundation of LGBTQ anti-discrimination law, ensuring that legal intervention addresses harmful conduct while respecting personal freedoms. Additionally, it investigates the elements of discriminatory behaviour, focusing on the actus reus (prohibited act) and mens rea (accompanying mental state) to determine the criteria for criminal liability. By evaluating the appropriate standards of intent and harm, the research underscores the importance of crafting laws that protect LGBTQ individuals while maintaining legal certainty and fairness. This analysis contributes to the broader discourse on how anti-discrimination laws can foster a more inclusive society through balanced regulation and enforcement.

**Keywords:** LGBTQ, Anti-discrimination Law, Jurisprudence.

## **1. Introduction**

LGBTQ rights have emerged as a global focal point, though the advancement of LGBTIQ+ rights vary significantly across different jurisdictions. In countries such as Thailand, transgender individuals are integrated into the cultural fabric, while nations like the United States, the United Kingdom, and Australia legally recognize same-sex marriage. Conversely, countries like Russia implement strict laws that criminalize the promotion of homosexual rights. Consequently, the justification for LGBTQ anti-discrimination law poses considerable difficulties, intersects with broader debates on morality, individual rights, and community welfare. At the core of this area of inquiry is the examination of how legal frameworks can protect LGBTQ individuals from discrimination, while simultaneously accommodating the diverse values and interests present within society. This essay argues that the jurisprudential rationale for LGBTQ anti-discrimination law is grounded in a delicate balance between competing considerations of individual autonomy and community welfare. By addressing the actus reus (the prohibited act) and mens rea (the accompanying mental state) elements of discriminatory behaviours, it is concluded that, according to the rule of law, the courts should, with respect to individual autonomy, intervene with specific indiscriminatory behaviours with legal justifications.

This research contributes to a deeper understanding of how anti-discrimination laws can be crafted to foster a more just and inclusive society by penalizing harmful discriminatory conduct while safeguarding individual autonomy. Finally, the essay will provide a clear and accessible standard for assessing discriminatory behaviour in the context of criminal law.

## **2. The Justification for Prohibiting Discriminatory Behaviour**

When considering whether discriminatory behaviour should be prohibited by law, three distinct approaches can be explored: the moral wrongdoings approach, the individual autonomy approach, and the community welfare approach.

### **2.1. The Moral Wrongdoings Approach**

H.L.A. Hart, in *Law, Liberty and Morality*, discussed Lord Devlin's argument that morality underpins the social fabric, and that immoral behaviour destabilizes society, thereby justifying the use of criminal law to deter such behaviour [1]. However, defining "moral wrongdoings" in cases of gender discrimination is complex and imprecise, especially when influenced by religious beliefs. It is well accepted that religious doctrines often contain discriminatory views against gender minorities, yet freedom of religious belief is a protected right. When such religions significantly influence public morality, it becomes challenging to categorize discriminatory behaviours as "moral wrongdoings." For example, in Australia, this issue is evident in legislative and common law contexts.

A notable example is the case of Israel Folau. On 12 September 2017, following the Australian Rugby Union's support for the 'Yes' campaign for same-sex marriage, Folau tweeted his opposition to gay marriage. On 4 April 2018, he posted on Instagram that gay people would face Hell unless they repented. Rugby Australia acknowledged Folau's personal beliefs but emphasized they did not align with their values. Despite no immediate disciplinary action, major sponsor Qantas threatened to withdraw support. On 10 April 2019, Folau posted another Instagram message condemning various sinners, including homosexuals. Rugby Australia then planned to terminate his contract due to the inconsistency of his comments with their values, which led to public support for Folau and criticism of his treatment. A researcher has commented that "given the existing body of case law and the facts of Folau's case, it is difficult to see how any disciplinary action--let alone contract termination--can be justified. Folau's only 'crime' was to express his moral conviction regarding homosexuality that differed from his employer and its sponsors [2]."

Similarly, the Religious Discrimination Bill in Australia has also sparked debate. Opponents argue that the bill favours religious rights at the expense of LGBTIQ+ individuals. The bill, including the controversial "Israel Folau clause," aimed to protect religious expression without fear of termination. Although the clause was removed, the revised bill continues to attempt a balance between religious freedom and protections against offensive statements.

### **2.2. The Individual Autonomy Approach**

The individual autonomy approach champions the principle that individuals should enjoy the freedom to lead their lives with minimal interference, placing a strong emphasis on the importance of freedom of speech and thought. This perspective maintains that criminal law should be reserved for addressing actions that cause direct harm to others, thereby allowing individuals the liberty to express discriminatory views if they so choose. This view gains particular relevance in the context of Criminal Law, as it resonates with Ashworth and Horder's esteemed minimalist approach to criminalization. According to their principle, criminal law should only be employed when alternative methods are inadequate, and actions should not be criminalized if doing so would lead to greater harm [3].

Accordingly, behaviours that are discriminatory but cannot be demonstrated to cause tangible harm to identifiable victims should not be subject to legal penalties. For example, when discriminatory statements are made among individuals who share similar beliefs and have consented to such exchanges, imposing criminal sanctions might be unnecessary and counterproductive. This approach advocates for the avoidance of criminalization in favour of employing less severe mechanisms, such as education and public discourse, to address discriminatory behaviours. By reserving criminal sanctions as a last resort, this perspective seeks to strike a balance between safeguarding individual freedoms and addressing genuine harm, thus promoting a more nuanced and measured approach to criminal justice.

### 2.3. The Community Welfare Approach

The Community Welfare Approach, in contrast, emphasizes the primacy of public welfare over individual autonomy, advocating for the application of criminal law to intervene in private affairs to prevent the intentional infliction of harm. This perspective aligns with the broader function of criminal law in addressing behaviours that society deems detrimental. Proponents assert that this approach is congruent with the fundamental purpose of criminal law: to deter actions considered harmful to society. Conversely, critics argue that it unduly restricts personal freedom and imposes the moral standards of the judiciary upon the community. This discourse has been explored in scholarly literature regarding the controversial English case *Brown v R* [1993] UKHL 19; [1994] 1 AC 212, whose ruling is perceived to illuminate the conflict between individual autonomy and societal welfare [4,5].

The community welfare approach gains substantial relevance when considering how discriminatory environments affect this population. As David Harvey argues, a society that fails to safeguard the rights and dignity of individuals cannot achieve true justice. In this context, discrimination not only infringes upon the rights of LGBTIQ+ individuals but also hampers their ability to fully participate and contribute to society, limiting access to essential services, opportunities, and social inclusion [6]. Similarly, Nancy Fraser, in *Justice Interruptus*, emphasizes that social justice extends beyond the protection of individual rights; it also requires institutional measures to ensure equal opportunity and respect for all members of society. The Community Welfare Approach, therefore, justifies legal interventions to protect the physical and emotional well-being of LGBTIQ+ individuals by acknowledging their integral role in the community [7].

From this perspective, it becomes evident that anti-discrimination laws should aim to mitigate the adverse effects of discrimination, fostering a more inclusive and equitable society where every member, regardless of their identity, can thrive without fear of prejudice. Such legislation not only protects individuals from discriminatory practices but also establishes a supportive and inclusive environment, ensuring that every person can both contribute to and benefit from societal well-being. This underscores the necessity of legal frameworks to counteract discrimination and promote a just society, where the rights and dignity of all individuals are upheld and respected.

### 2.4. Evaluating the Need of Legal Prohibition

To decide whether the law should prohibit gender discriminative behaviours, we must first consider the purpose of anti-discrimination law. Generally, law is society's most powerful tool for regulating social harms. First, it can prevent discriminatory behaviour that society deems harmful or potentially harmful. Second, the law can protect the bodily integrity, property security, and moral values of the LGBTQ population. While some may argue that many discriminatory behaviours are not serious enough to be considered crimes, the purpose of preventing public harm provides a strong justification for anti-discrimination law. This is similar to laws that control "victimless" crimes such as drug use,

prostitution, and certain forms of gambling. Additionally, making anti-discrimination law statutory provides greater legal certainty, as it is easier for society to understand the law when it is codified rather than relying on common law.

### **3. Criteria in determining the Unlawfulness of Discriminatory Behaviour**

In determining whether certain behaviour is unlawful, the general rule of "Actus non facit reum, nisi mens sit rea" suggests that a person is not guilty of a crime merely by performing a forbidden act; it must also be shown that they had a guilty mind. The "crime" of discriminatory behaviour against LGBTQIA+ individuals can be said to have two elements of actus reus: first, there is the discriminatory behaviour, and second, the victim being a LGBTQIA+ individual.

#### **3.1. The First Actus Reus: Discriminatory Behaviour**

In the context of discriminatory behaviour, the actus reus involves the specific conduct that constitutes discrimination against LGBTQIA+ individuals. To determine the appropriate mens rea, or mental state, associated with this behaviour, we need to consider the various thresholds of intent that can apply.

The mens rea standard for an act typically involves an inquiry into the defendant's intention, which can be assessed at different levels. One threshold is a "voluntary act," where the focus is on whether the defendant engaged in the behaviour deliberately and with conscious control. This standard requires that the act itself be performed voluntarily, without coercion or involuntary circumstances. On the other hand, a higher threshold involves "an intention to discriminate," where the defendant must have acted with a specific intent to harm or disadvantage LGBTQIA+ individuals. This higher standard necessitates proof that the defendant's actions were motivated by discriminatory intent or malice toward the group. Given the nature of discriminatory behaviour, which often involves subtle or indirect forms of harm, applying a high threshold of mens rea can complicate the prosecution of such crimes. It requires clear evidence that the defendant's actions were driven by a deliberate and targeted intent to discriminate.

For this reason, a lower threshold of mens rea, such as the "voluntary act" standard, may be more appropriate for cases involving discriminatory behaviour. This approach recognizes that the mere act of engaging in behaviour that disparages or harms LGBTQIA+ individuals, even if not explicitly intended to discriminate, is sufficient to meet the criteria for criminal liability. It simplifies the prosecution process by focusing on the act itself rather than requiring proof of specific discriminatory intent, which can be challenging to establish and may inadvertently allow discriminatory conduct to go unpunished.

#### **3.2. The Second Actus Reus: Victim as a LGBTQ Individual**

The second element of actus reus in discriminatory behaviour is identifying the victim as an LGBTQIA+ individual. This component is crucial for determining the applicability of anti-discrimination laws and assessing whether the conduct in question falls within the scope of criminal liability. In this context, the mens rea standard for a circumstance involves establishing the defendant's knowledge about the victim's status.

#### **3.3. The "Mens Rea" Requirement**

Typically, the mens rea for a circumstance is one of "knowledge," meaning that the defendant must be aware of the relevant facts that make their behaviour criminal. In cases of discriminatory behaviour, this means proving that the defendant knew or should have known that the target of their actions or

statements was an LGBTQIA+ individual. This knowledge requirement ensures that individuals are only held criminally liable if they are aware of the specific characteristics of their victim, thereby providing a safeguard against unjust prosecution based on assumptions or misunderstandings.

Alternatively, the mens rea standard could involve “an absence of a reasonable and honest mistake of fact.” This means that if the defendant genuinely did not know and could not reasonably have known that the victim was LGBTQIA+, they might not be held liable for discriminatory conduct. This standard ensures that criminal liability is not imposed in cases where the defendant’s lack of knowledge is both honest and reasonable under the circumstances.

The mens rea requirement is the gist of the respect of individualism shown by criminalization. This essay argues that an individual should not be punished unless it intentionally or recklessly preformed a discriminatory conduct, which is harmful to the society. The assessment of mens rea should be done objectively, with no unjustified invertention of moral judgements.

It was argued that judges both created the doctrine of mens rea and simultaneously sought to undermine it. This is described by the scholars as the “eternal tension in the position of the judge”. While a judge is expected to serve as an impartial adjudicator, safeguarding the rights and liberties of individuals, he also functions as a “State instrumentality”, a governmental organ. It is observing that it is this latter role that has significantly influenced judicial attitudes towards criminal fault [8].

### 3.4. Appropriate Criteria

A crucial aspect to consider here is the diversity of discriminatory behaviours. When determining which standards to apply, we should categorize discriminatory behaviours similarly to how the Senate Standing Committee on Constitutional and Legal Affairs (Parliamentary Paper 312/1982) suggests classifying criminal offenses. This approach involves three main categories:

**Difficult-to-Prove Offenses:** Where proving the discriminatory behaviour is challenging or impossible for the Crown, particularly when the facts are primarily within the defendant’s knowledge (e.g., subtle gender bias in private conversations).

**Serious Offenses:** Where there is a strong community interest in preventing the offense, even at significant cost (e.g., systematic sexual harassment in the workplace).

**Convenience-Based Offenses:** Where the burden of proof is placed on the defence as a matter of convenience to the prosecution (e.g., instances of discriminatory comments made in public spaces).

For discriminatory behaviours that are more difficult to prove, it is appropriate to apply lower thresholds for criminal elements. However, in considering the standards for criminalization, we must also take into account the severity of the behaviour’s harm. For actions that cause significant harm to the LGBTQ community and have a strong social impact, greater enforcement measures and lower thresholds should be applied. This approach ensures that the law can effectively address more severe discriminatory behaviours while balancing the burden of proof and enforcement rigor.

## 4. Consent as Defence

Criminal law safeguards specific social interests, yet it does so through a universal and general language framed in terms of respect for the individual [8]. Legal justice is limited and partial because it deals with individuals in a particular abstract fashion. Individuals are not in fact known to the law. It picks out certain aspects of individuality but excludes others [8]. There is a legal conception of the individual which ignores, conceals, and discounts fundamental features of the lives of people.

In *R v M(B)* [2019] QB 1, the Court identified several key factors relevant to determining whether consent can serve as a valid defence in criminal cases involving harm [9]. Firstly, the court considers the inherent danger of the activity, asking whether the conduct in question could escalate beyond control, as seen in cases like *Brown* and *Emmett*, where concerns about serious consequences such



as loss of hearing or infection were raised. Secondly, the vulnerability of the victim is crucial, particularly when the harm might disproportionately affect those who are unable to fully protect themselves. Thirdly, public acceptability plays a significant role; courts are mindful of societal norms, distinguishing between conduct that is broadly tolerated and that which is considered unacceptable. Australian courts, following these principles, generally hold that while minor harm with consent may be permissible, serious harm, even if consensual, cannot evade criminal liability. The determination of whether consent acts as a defence is context-dependent, influenced by the nature of the activity, its social acceptance, and the level of risk involved. Regulated, socially beneficial activities that adhere to accepted practices are more likely to be protected by consent, whereas extreme harm in unregulated environments typically negates such a defence. Thus, the distinction between valid and invalid consent hinges on careful legal analysis of these factors, as supported by case law.

## 5. Conclusion

The jurisprudential rationale for LGBTQ anti-discrimination law is deeply embedded in a nuanced interplay of moral, individual, and community considerations. The diversity of discriminatory behaviours necessitates a thoughtful approach to criminalization, balancing the principles of justice with the need for effective legal intervention. As demonstrated, the classification of discriminatory behaviours into categories such as difficult-to-prove offenses, serious offenses, and convenience-based offenses helps in applying appropriate legal standards.

For behaviours that are challenging to prove, lower thresholds for criminal elements are warranted. However, the severity of the harm caused by such behaviours, especially those with significant impact on the LGBTQ community, must also be considered. The law should adapt to ensure that severe and socially damaging discriminatory acts are met with greater enforcement measures and lower thresholds for criminalization.

Ultimately, a well-considered anti-discrimination law should not only address and penalize harmful discriminatory conduct but also uphold the fundamental rights of marginalized groups. By balancing enforcement rigor with practical considerations of proof and harm, such legislation fosters a more inclusive and equitable society. It is through this balance that the law can effectively protect minority rights, promote social cohesion, and advance justice for all individuals.

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