

**Characterising freedom of religion**

5.15 Religious freedom involves positive and negative religious liberty. Positive religious liberty involves the ‘freedom to actively manifest one’s religion or beliefs in various spheres (public or private) and in myriad ways (worship, teaching and so on)’.<sup>11</sup>

5.16 Negative religious freedom, on the other hand, is freedom from coercion or discrimination on the grounds of religious or non-religious belief.<sup>12</sup> In the *Scientology* case, Mason ACJ and Brennan J commented that the ‘chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint’.<sup>13</sup>

5.17 The positive exercise of religion—according to certain ‘canons’, ‘standards’ or ‘codes’ of conduct—is a source of potential conflict between freedom in the exercise of religious beliefs and the exercise by others of other rights and freedoms.

**History**

5.18 Any legal protection of religious freedom is a relatively modern phenomenon. British history is punctuated by acts of Parliament that discriminated against some groups on the basis of religion.<sup>14</sup> For instance, the *Act of Toleration* of 1689—a reform Act of its day—allowed freedom of worship to Protestants who dissented from the Church of England (known as Nonconformists) but not to Catholics, atheists or believers of other faiths such as Judaism.<sup>15</sup>

5.19 Another example is the *Royal Marriages Act* of 1772 which provided the conditions of a valid royal marriage including that to succeed to the throne, an heir must marry from within the Church of England.<sup>16</sup>

5.20 The 17th century philosopher, John Locke, wrote about the importance of tolerating other religious beliefs:

The Toleration of those that differ from others in Matters of Religion, is so agreeable to the Gospel of Jesus Christ, and to the genuine Reason of Mankind, that it seems monstrous for Men to be so blind, as not to perceive the Necessity and Advantage of it, in so clear a light.<sup>17</sup>

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11 Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press) 128.  
12 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18.2.  
13 *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130.  
14 The treatment of religious freedom in the common law of Australia developed in a different historical and legal context from that in England. This difference—which includes the fact that Australia never had any religion established by law—is outlined in the High Court’s joint judgment in *PGA v The Queen* (2012) 245 CLR 355, [26] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).  
15 *Act of Toleration 1689* (1 Will & Mary c 18).  
16 *Royal Marriages Act 1772* (12 Geo 3 c 11). This Act, which was an act of the British Parliament, was repealed on 26 March 2015.  
17 John Locke, ‘A Letter Concerning Toleration (1685)’ in David George Mullan (ed), *Religious Pluralism in the West: An Anthology* (Blackwell, 1998) 174. Locke spoke of toleration for Christians and non-Christians.

5. Freedom of Religion

5.21 The concept of religious freedom recognises the existence of multiple identity groups in a pluralist democratic society. Respect for another person’s religious beliefs has been described as ‘one of the hallmarks of a civilised society’.<sup>18</sup>

5.22 Thomas Jefferson, in his *Notes on the State of Virginia*, advocated for religious freedom on the basis of natural rights:

Our rulers have no authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit, we are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg.<sup>19</sup>

5.23 Indirect recognition of freedom of religion in the common law developed towards the end of the 19th century in England in the context of wills, for instance where a testator attempted to influence the religious tendencies of their beneficiaries by attaching conditions to a legacy, such as that the person convert to a particular religion.<sup>20</sup> Generally speaking, the law will make void any condition which is in restraint of religion.<sup>21</sup>

5.24 The equitable doctrine of undue influence also developed to extend to religious influence. In the English case of *Allcard v Skinner*, the Court of Appeal of England and Wales avoided a gift on the basis of undue religious influence. In that case, Lindley LJ stated that:

[T]he influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful, and to counteract it the Courts of Equity have gone very far. They have not shrunk from setting aside gifts made to persons in a position to exercise undue influence over the donors, although there has been no proof of the actual exercise of such influence; and the Courts have done this on the avowed ground of the necessity of going this length in order to protect persons from the exercise of such influence under circumstances which render it impossible.<sup>22</sup>

18 ‘Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilised society individuals respect each other’s beliefs. This enables them to live in harmony’: *R (Williamson) v Secretary of State for Education and Employment; ex parte Williamson* [2005] 2 AC 246, [15] (Nicholls LJ).  
19 Thomas Jefferson, ‘Notes on the State of Virginia (1781–2)’ in David George Mullan (ed), *Religious Pluralism in the West: An Anthology* (Blackwell, 1989) 219.  
20 There are a large number of reported cases on such facts from the late Victorian period: Peter James Hymers (ed), *Halsbury’s Laws of England* (Lexis Nexis Butterworths, 4th ed, 2008) vol 50, [379].  
21 The common law has a range of public policy rules about the validity of conditional bequests that involve so-called restraint of religion clauses: see, eg, Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013) 550. Religious conditions attached to wills have often been held void for uncertainty: *Re Winzar* (1935) 55 WALR 35; *Clayton v Ramsden* [1943] AC 320.  
22 *Allcard v Skinner* (1887) 36 Ch D 145 183–85. For more on the principle of undue influence, see Croucher and Vines, above n 21, 255; Roderick Pitt Meagher, Dyson Heydon and Mark Leeming, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (LexisNexis Butterworths, 4th ed, 2002) ch 15; Pauline Ridge, ‘The Equitable Doctrine of Undue Influence Considered in the Context of Spiritual Influence and Religious Faith: *Allcard v Skinner* Revisited in Australia’ (2003) 26 *University of New South Wales Law Journal* 66.

## Protections from statutory encroachment

### Australian Constitution

5.25 Religious freedom receives some constitutional protection in Australia. Section 116 of the *Australian Constitution* provides:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

5.26 The provision includes four prohibitions on the making of Commonwealth laws,—the ‘establishment’, ‘observance’, ‘free exercise’ and ‘religious test’ clauses respectively. It restrains the legislative power of the Commonwealth to enact laws that would establish a religion or prohibit the free exercise of religion, but does not explicitly create a personal or individual right to religious freedom.<sup>23</sup>

5.27 Australian courts have considered the interpretation of s 116 in only a small number of cases. Those cases have concerned the meaning of religion (as discussed above), and the operation of the ‘free exercise’ and ‘establishment’ clauses.<sup>24</sup> Generally, however, s 116 has been read narrowly by the High Court.<sup>25</sup>

#### *Establishment clause*

5.28 There is only one decision of the High Court that considers the scope of the establishment clause—the case of *Attorney-General (Vic) (ex rel Black) v Commonwealth* (the DOGS case)—in which an organisation called Defence of Government Schools, challenged federal funding of non-government schools operated by religious organisations.<sup>26</sup>

5.29 The High Court held that the funding did not contravene the establishment clause when the funding was for ordinary educational purposes. The reasoning in the DOGS case has been described as ‘restrictive’, ‘strict’ and as setting ‘a very high threshold’.<sup>27</sup> A majority held that the establishment clause only prohibited the

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23 Arguably, the implied constitutional freedom of political communication may also provide some protection for the free exercise of religion, to the extent that public expression of religious perspectives is ‘relevantly political and a factor in the formation of political opinions as a function of the democratic process’: A Deacon, *Submission 84*.

24 The religious test clause was raised in the ‘School Chaplains’ case, but the High Court determined that a school chaplain did not hold an office under the Commonwealth: *Williams v Commonwealth (No 1)* (2012) 248 CLR 156.

25 *Attorney-General (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559, 604 (Gibbs J); *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116; George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 268. See also Tony Blackshield, George Williams and Michael Coper (eds), *Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 93–4; Peter Radan, Denise Meyerson and Rosalind Croucher (eds), *Law and Religion* (Routledge, 2005) ch 4.

26 *Attorney-General (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559.

27 See Luke Beck, ‘The Establishment Clause of the Australian Constitution: Three Propositions and a Case Study’ [2014] *Adelaide Law Review* 225, 225–6.

Commonwealth from passing legislation that purposely created a national church or religion.<sup>28</sup>

5.30 However, the continuing strength of the authority of the decision in the DOGS case has been questioned. One reason is that, since this case was decided in 1981, the High Court has adopted a more liberal approach to the interpretation of constitutional rights and safeguards.<sup>29</sup> More fundamentally, such a narrow interpretation would render the establishment clause meaningless, because it would ‘only ban something about which the Federal Parliament appears to have no power to legislate—the creation of a national church’.<sup>30</sup>

5.31 Importantly, this leaves room to argue that s 116 may be capable of applying to laws that have the effect, and not just the purpose of establishing religion, imposing religious observance, prohibiting the free exercise of religion, or requiring religious tests.

### ***Free exercise clause***

5.32 In *Krygger v Williams* the High Court upheld a law requiring attendance at compulsory peacetime military training by persons who conscientiously objected to military training on religious grounds. The Court found the law requiring attendance at military training did not infringe the free exercise clause of s 116:

To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion.<sup>31</sup>

5.33 Griffith CJ also stated that while ‘a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds ... it does not come within the prohibition of s 116’.<sup>32</sup> These statements can be seen as suggesting that the free exercise clause is concerned only with laws which ‘in terms’ ban religious practices or otherwise forbid the free exercise of religion.<sup>33</sup>

5.34 The *Jehovah’s Witnesses* case challenged a ban of the Jehovah’s Witnesses under defence regulations.<sup>34</sup> The effect of the ban was that the group’s doctrines were illegal and they could not lawfully print or publish their beliefs or hold meetings advocating those beliefs. While the regulations were found to be invalid as *ultra vires* the *National Security Act 1939* (Cth) and, in part, beyond the defence power in s 51(vi) of the *Constitution*,<sup>35</sup> the judgments provided interpretations of s 116.

28 *Attorney-General (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559, 579, 583–4, 604, 615–6, 653; Reid Mortensen, ‘The Unfinished Experiment: Report on Religious Freedom in Australia’ *Emory Law Review* 167, 174.

29 Generally, Mortensen, above n 28; Beck, above n 27.

30 Mortensen, above n 28, 174.

31 *Krygger v Williams* (1915) 15 CLR 366, 369 (Griffith CJ).

32 *Ibid.*

33 *Kruger v Commonwealth* (1997) 190 CLR 1, 130–31.

34 *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116.

35 *Ibid* 148, 150, 156, 157, 168; Mortensen, above n 28, 172.

5.35 Arguably, the judges in the *Jehovah’s Witnesses* case took a broad view of the free exercise clause, and assumed that a ‘facially-neutral regulation directed at the suppression of subversive organizations, burdening religion in its effect’, could offend the clause.<sup>36</sup>

5.36 However, in *Kruger v Commonwealth*, the High Court confirmed the view that laws that have the effect of indirectly prohibiting the free exercise of religion are not invalidated by s 116.<sup>37</sup> That is, s 116 is interpreted as purposive in nature—being directed at laws that explicitly have the prohibited aim, rather than just the indirect effect.<sup>38</sup>

5.37 It remains possible, however, that the removal or lessening of exemptions for religious organisations contained in Commonwealth anti-discrimination laws or, for example, legislating for same-sex marriage without adequate recognition for freedom of religion, may have constitutional implications under s 116.

**Principle of legality**

5.38 The principle of legality provides some protection to freedom of religion. When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of religion, unless this intention was made unambiguously clear.<sup>39</sup> In *Canterbury Municipal Council v Moslem Alawy Society*, it was suggested that Australian courts should show restraint in upholding provisions which interfere with the exercise of religion:

If the ordinance is capable of a rational construction which permits persons to exercise their religion at the place where they wish to do so, I think that a court should prefer that construction to one which will prevent them from doing so.<sup>40</sup>

5.39 However, under Australia’s model of parliamentary supremacy, common law protection of freedom of religion has its limits, where a legislative intention is clearly expressed:

Although a court intent on maximally protecting the common law right to freedom of religion might exhibit unusual reluctance to find that Parliament intended to invade the right, the presumption that Parliament does not intend to interfere with common law rights and freedoms remains rebuttable.<sup>41</sup>

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36 Mortensen, above n 28, 173. Referring, in particular, to *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 132 (Latham CJ).  
37 See, eg, *Kruger v Commonwealth* (1997) 190 CLR 1, 40 (Brennan CJ), 86 (Toohey J).  
38 Gaudron J disagreed with this narrow interpretation and stated that s 116 was ‘intended to extend to laws which operate to prevent the free exercise of religion, not merely those which, in terms, ban it’: Ibid 130–31.  
39 *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130 (Mason ACJ, Brennan J).  
40 *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525, 544 (McHugh JA). See also Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 228–9.  
41 Denise Meyerson, ‘The Protection of Religious Rights under Australian Law’ (2009) 3 *Brigham Young University Law Review* 529, 542.

**International law**

5.40 Article 18 of the *Universal Declaration of Human Rights* enshrines freedom of religion, in providing that everyone ‘has the right to freedom of thought, conscience and religion’.<sup>42</sup>

5.41 Article 18.1 of the International Covenant on Civil and Political Rights, (ICCPR) provides:

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.<sup>43</sup>

5.42 The UN Human Rights Committee has explained that the right to freedom of thought, conscience and religion is ‘far-reaching and profound’ and ‘encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others’.<sup>44</sup>

5.43 Under art 18.4, the parties to the ICCPR also ‘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’.

5.44 The UN Human Rights Committee has noted that public education that includes instruction in a particular religion or belief is inconsistent with art 18.4, unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.<sup>45</sup>

5.45 The UN Human Rights Committee also observed that the fundamental character of freedom of thought, conscience and religion is reflected in the fact that this provision cannot be derogated from, even in time of public emergency.<sup>46</sup>

5.46 Infringement of a person’s rights under art 18 may engage a number of other rights and freedoms protected in the ICCPR, including the right to privacy,<sup>47</sup> the rights to hold opinions and freedom of expression,<sup>48</sup> the right of peaceful assembly,<sup>49</sup> and liberty of movement.<sup>50</sup>

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42 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948) art 18.  
43 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18.1.  
44 United Nations Human Rights Committee, *General Comment 22 on Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, CCPR/C/21/Rev.1 (30 July 1993) [1].  
45 *Ibid* [6].  
46 *Ibid* [1]. See *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 4.2. Derogations allow states parties to adjust their obligations temporarily under the treaty in exceptional circumstances, for example, in times of public emergency threatening the life of the nation.  
47 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17.  
48 *Ibid* art 19.  
49 *Ibid* art 21.  
50 *Ibid* art 12.

5.47 International instruments cannot be used to ‘override clear and valid provisions of Australian national law’.<sup>51</sup> However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia’s international obligations.<sup>52</sup>

**Bills of rights**

5.48 In some countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms, for example in the United States,<sup>53</sup> the United Kingdom,<sup>54</sup> Canada<sup>55</sup> and New Zealand.<sup>56</sup> An example is s 15 of the New Zealand *Bill of Rights Act 1990* (NZ), which provides:

Every person has the right to manifest that person’s religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

5.49 The *Charter of Human Rights and Responsibilities 2006* (Vic) and the *Human Rights Act 2004* (ACT) also include protection for religious freedom.<sup>57</sup>

**Justifications for limits on freedom of religion**

**Legitimate objectives**

5.50 The threshold question in a proportionality test is whether the objective of the law is legitimate. Freedom of religion is ‘subject to powers and restrictions of government essential to the preservation of the community’.<sup>58</sup> For example, in the *Jehovah’s Witnesses* case, Williams J stated that the scope of s 116 of the *Australian Constitution* may be limited in the interests of national security.<sup>59</sup>

5.51 Outside constitutional contexts, some guidance on what should be considered legitimate objectives of a law that interferes with freedom of religion may be derived from international human rights law. International law distinguishes the freedom to manifest religion or belief from freedom of thought and conscience itself. Article 18 of the ICCPR does not permit any limitations on the ‘freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice’.<sup>60</sup>

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51 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J).  
52 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). See Ch 2.  
53 *United States Constitution* amend I.  
54 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 9(1).  
55 *Canada Act 1982* (UK) c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 2.  
56 *New Zealand Bill of Rights Act 1990* (NZ) s 15.  
57 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 14; *Human Rights Act 2004* (ACT) s 14.  
58 *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 149 (Rich J).  
59 *Ibid* 161.  
60 United Nations Human Rights Committee, *General Comment 22 on Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, CCPR/C/21/Rev.1 (30 July 1993) [3].

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5.52 However, under art 18.3, restrictions on the freedom to manifest religion or belief are permitted if limitations are ‘prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others’.<sup>61</sup>

5.53 The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts.<sup>62</sup> The Australian Human Rights Commission has observed that ‘practice’ appears to be the broadest category, but that art 18 does not provide any further guidance about the level of connection required between an act and a belief for it to constitute a manifestation through ‘practice’.<sup>63</sup>

5.54 Clearly, the right to manifest religion or belief ‘does not always guarantee the right to behave in public in a manner governed by that belief’. That is, once a belief is ‘manifested (that is, implemented) in action, it leaves the sphere of absolute protection, because the manifestation of a religious belief may have an impact on others’.<sup>64</sup>

5.55 The UN Human Rights Committee has stated that art 18.3 should be strictly interpreted, and that limitations based on other grounds, such as national security, are not permitted.<sup>65</sup>

5.56 The Siracusa Principles provide some guidance on permissible limitations on human rights.<sup>66</sup> While the scope of the ‘rights and freedoms of others’ that may act as a limitation extend beyond those recognised in the ICCPR, the principles state that when a conflict exists between a right protected in the ICCPR and one which is not, recognition and consideration should be given to the fact that the ICCPR ‘seeks to protect the most fundamental rights and freedoms’.<sup>67</sup>

5.57 There is a wide range of justifications advanced for laws that interfere with freedom of religion, including, but not limited to, protecting people from discrimination in public life, preventing a greater harm, and limitations where laws directly interfere with other legal rights and freedoms. By way of example, there are cases where courts have allowed blood transfusions for a minor where their parents or

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61 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18.3.

62 The practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications: United Nations Human Rights Committee, *General Comment 22 on Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, CCPR/C/21/Rev.1 (30 July 1993) [4].

63 Australian Human Rights Commission, *Freedom to Believe and the Freedom to Manifest That Belief* <[www.humanrights.gov.au](http://www.humanrights.gov.au)>.

64 *Ibid.* Referring to decisions of the European Court of Human Rights.

65 United Nations Human Rights Committee, *General Comment 22 on Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, CCPR/C/21/Rev.1 (30 July 1993) [8].

66 United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984). See Ch 2.

67 *Ibid.* [35]–[36]. The only ICCPR rights recognised as absolute rights, which cannot be limited, are freedom from torture (art 7); freedom from slavery (art 8); freedom from imprisonment for inability to fulfil a contractual obligation (art 11); the prohibition against the retrospective operation of criminal laws (art 15); and the right to recognition as a person before the law (art 16).

guardians have refused on religious grounds.<sup>68</sup> In contrast, courts have not insisted on life-saving treatment where an adult has made the same decision to refuse life-saving treatment.

**Balancing rights and interests**

5.58 In practice, legislatures and the courts often have to strike a balance between ‘equality’ rights like anti-discrimination, and freedom to manifest religious belief. Campbell and Whitmore stated:

As a practical matter, it is impossible for the legal order to guarantee religious liberty absolutely and without qualification ... Governments have a perfectly legitimate claim to restrict the exercise of religion, both to ensure that the exercise of one religion will not interfere unduly with the exercise of other religions, and to ensure that practice of religion does not inhibit unduly the exercise of other civil liberties.<sup>69</sup>

5.59 An example of the need for such balancing was given in an amicus brief to the US Supreme Court case of *Obergefell v Hodges*,<sup>70</sup> in which a majority of the Court upheld the constitutional validity of state-based same-sex marriage legislation:

The Court must protect the right of same-sex couples to marry, and it must protect the right of churches, synagogues, and other religious organizations not to recognize those marriages. This brief is an appeal to protect the liberty of both sides in the dispute over same-sex marriage ... No one can have a right to deprive others of their important liberty as a prophylactic means of protecting his own ... The proper response to the mostly avoidable conflict between gay rights and religious liberty is to protect the liberty of both sides.<sup>71</sup>

5.60 A number of stakeholders submitted that freedom of religion, as a fundamental right, should be given priority in balancing with other rights or interests. For instance, Freedom 4 Faith argued that no limitations can be justified on the right to freedom of religion, warning that ‘religious freedom and associated rights are at risk of being undermined in Australian society due to a disproportionate focus on other, sometimes competing rights’.<sup>72</sup> The Australian Christian Lobby (ACL) wrote:

Courts and legislatures need to acknowledge the supremacy of the fundamental rights of freedom of religion, conscience, speech and association ... [it is] a freedom which must be placed among the top levels of human rights hierarchy.<sup>73</sup>

5.61 In particular, the ACL stated that ‘it is not immediately clear that the right to non-discrimination is a permissible burden on freedom of religion’. Rights and

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68 See, eg, *X v The Sydney Children’s Hospitals Network* (2013) 85 NSWLR 294. In this case, the New South Wales Supreme Court held that a 17 year old, and his parents, could not refuse life-saving therapeutic treatment on the basis of religious belief, despite the minor having ‘Gillick’ competency.  
69 Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 204.  
70 *Obergefell v Hodges* 576 US (June 26, 2015).  
71 Douglas Laycock, ‘Brief of Douglas Laycock, Thomas Berg, David Blankenhorn, Marie Failinger and Edward Gaffney as Amicus Curiae in Support of Petitioners in Same-Sex Marriage Cases (*Obergefell v Hodges* Etc)’ (Public Law and Legal Research Paper Series 1–2, 2015) 1–2.  
72 Freedom 4 Faith, *Submission 23*. Also Australia/Israel & Jewish Affairs Council, *Submission 100*.  
73 Australian Christian Lobby, *Submission 33*. The ACL submitted that, instead, an ‘overly expansive understanding of unjust discrimination has had the related effect of locating fundamental rights below the right to non-discrimination’: Australian Christian Lobby, *Submission 135*.

interests should be ‘carefully balanced without swiftly subjecting fundamental freedoms to non-discrimination’.<sup>74</sup>

5.62 The ACL submitted that rights to non-discrimination reach their limits where ‘differentiations of treatment occur in the reasonable and objective pursuit of other fundamental rights, including freedom of thought, conscience and religion or belief’. This fact, the ACL said, is not currently reflected in Australian law. Rather, ‘anti-discrimination law has become the dominant lens through which rights are viewed’.<sup>75</sup>

5.63 The Church and Nation Committee, Presbyterian Church of Victoria submitted that balancing freedom of religion with principles such as non-discrimination is ‘misguided’, because while religious freedom ‘is a fundamental underpinning of our society, freedom from discrimination is not’.<sup>76</sup>

5.64 Other stakeholders also argued that freedom from discrimination should not be considered an equivalent right to religious freedom. For instance, the Church and Nation Committee argued that the ‘desire for equality’ is incompatible with religious freedom.<sup>77</sup> The Wilberforce Foundation submitted that the ‘focus of human rights discourse on anti-discrimination’ has caused

both a misunderstanding of the effect of the ICCPR and a skewing and imbalance of legislation in favour of anti-discrimination, to the devaluation of the other fundamental rights and (as in the case of the right of freedom of religion) higher order rights than the right to non-discrimination.

5.65 Other stakeholders argued that considerations of religious freedom should always involve a balance with other, competing rights and interests and, in particular, the right to be free from unlawful discrimination.<sup>78</sup> In particular, some stakeholders highlighted the way in which legislative provisions that protect religious freedom may undermine the rights or freedoms of lesbian, gay, bisexual, transgender and intersex Australians—primarily the right to be free from discrimination.<sup>79</sup>

### Laws that interfere with freedom of religion

5.66 Freedom of religion is infringed when a law prevents individuals from exercising their religion or requires them to engage in conduct which is prohibited by their religion.<sup>80</sup> Alternatively, the freedom will also be infringed when a law mandates

74 Australian Christian Lobby, *Submission 135*.

75 *Ibid.*

76 Church and Nation Committee, Presbyterian Church of Victoria, *Submission 26*.

77 *Ibid.*

78 Law Society of NSW Young Lawyers, *Submission 69*; Maronite Catholic Society Youth *Submission 51*; NSW Gay and Lesbian Rights Lobby, *Submission 47*; Kingsford Legal Centre, *Submission 21*. For example, in arguing that existing exemptions for religious organisations undermine the Australian Government’s commitment to international law protecting vulnerable groups, such as women, from discrimination: Public Interest Advocacy Centre, *Submission 55*; Kingsford Legal Centre, *Submission 21*.

79 National Association of Community Legal Centres, *Submission 66*; NSW Gay and Lesbian Rights Lobby, *Submission 47*.

80 Radan, Meyerson and Croucher, above n 25, 4.

a particular religious practice. There are few, if any, Commonwealth laws that can be said to interfere with freedom of religion in these ways.<sup>81</sup>

5.67 Such challenges to freedom of religion as do exist in Australia can be seen as falling outside liturgical and worship settings and involving ‘questions of freedom of conscience in a commercial or service provision setting, the integrity of religious education, and the manifestation of belief in other ways’.<sup>82</sup>

5.68 Encroachments arise in ‘balancing religious freedom with other protected freedoms, such as freedom of speech’.<sup>83</sup> Issues remain about ‘the balance to be struck between the rights of religious organisations to conduct their affairs in accordance with their own beliefs and values and general non-discrimination principles in the community’.<sup>84</sup>

5.69 This chapter identifies provisions in Commonwealth laws that may be characterised as interfering with freedom of religion in the areas of:

- anti-discrimination law;
- workplace relations laws;
- solemnisation laws under the *Marriage Act 1961* (Cth); and
- counter-terrorism legislation.

**Anti-discrimination law**

5.70 The following section discusses the potential for anti-discrimination laws to limit freedom of religion, the operation of exemptions for religious organisations, and whether exemptions should be replaced with a general limitations clause.

5.71 Commonwealth anti-discrimination law makes it unlawful to discriminate against a person on the basis of a person’s personal attributes, such as their sex or sexual orientation, in areas of public life including employment, education and the provision of goods, services and facilities.

5.72 For example, under the *Sex Discrimination Act 1984* (Cth) (*SDA*), it is unlawful to discriminate against a person on the basis of a person’s sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, breastfeeding, and family responsibilities.<sup>85</sup>

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81 Law Council of Australia, *Submission 75*; Public Interest Advocacy Centre, *Submission 55*; Freedom 4 Faith, *Submission 23*; P Parkinson, *Submission 9*.  
82 Australian Christian Lobby, *Submission 135*.  
83 Law Council of Australia, *Submission 75*.  
84 P Parkinson, *Submission 9*.  
85 *Sex Discrimination Act 1984* (Cth) ss 5–7. The *SDA* makes it unlawful to discriminate on those grounds in relation to work and work practices; in the provision of education; in the provision of goods and services; in the provision of accommodation; in the conferral of land or the terms and condition of an offer of land; by refusing membership to a club or in the terms and conditions of membership to a club; in the administration of Commonwealth laws and programs; and in the handling of requests for information: *Ibid* ss 14–27.

5.73 Some religious organisations discriminate on these and other grounds, for example by only appointing male priests and ministers, by excommunicating people who have sexual relationships outside marriage, or employing only teachers who are religiously observant in their schools. In some cases, such conduct will be covered by exemptions to anti-discrimination laws, as discussed below.

5.74 In other cases, conduct considered as giving effect to religious beliefs may constitute unlawful discrimination. FamilyVoice Australia observed that some of the grounds on which discrimination is prohibited in the *SDA*, for example, ‘directly contradict moral values of the Christian faith and other faiths’. From this perspective:

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.<sup>86</sup>

5.75 Arguments have been raised that the practices of religious organisations—including in some areas of employment—lie outside the ‘commons’ or public sphere, and should generally be excluded from government interference, including in relation to eliminating discrimination.<sup>87</sup> Essentially, this appears a political argument for lower anti-discrimination requirements in some areas of activity.

5.76 Dr Joel Harrison and Professor Patrick Parkinson have defined the ‘commons’ as ‘places or encounters where people who may be different from one another in all kinds of respects, including gender, sexual orientation, beliefs and values, can expect not to be excluded’. The commons is not simply whatever is ‘public’ rather than ‘private’, but is more focused on ‘particular spheres of official authority and potentially most commercial enterprises, where non-discrimination should be expected given the norms of the institution or affiliation involved’.<sup>88</sup>

5.77 However, beyond these commons, there lies a range of associations—‘natural, educational, charitable, voluntary, or commercial’. These are said to be ‘voluntary associations of the like-minded, those who share opinions, interests, or a shared identity and are not engaged in profit-making’.<sup>89</sup> They include religious institutions, but also everything from a book club to a political party.<sup>90</sup> Beyond the commons, it is argued that there is less need for imposing anti-discrimination requirements.

5.78 In contrast, the Human Rights Law Centre maintained that a line dividing public and private remains relevant because ‘it marks the point at which the religious beliefs of one person or group impact upon other people and society generally’. That is, when

86 FamilyVoice Australia, *Submission 122*.

87 See, eg, Freedom 4 Faith, *Submission 23*.

88 Patrick Parkinson and Joel Harrison, ‘Freedom beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society’ (2014) 40 *Monash University Law Review* 411, 442–3.

89 *Ibid* 443.

90 *Ibid* 444.

‘religious practice affects those who do not subscribe to the religion, the Government’s regulatory capacity and responsibilities are increased’.<sup>91</sup>

***Exemptions for religious organisations***

5.79 The accommodation or ‘special treatment’ in anti-discrimination law of those who observe religious beliefs is a point of tension.<sup>92</sup> In Australia, debate in this area has crystallised around the exemptions for religious organisations in anti-discrimination legislation. Where exemptions do not apply, or are not broad enough, anti-discrimination law may be considered to encroach on freedom of religion.

5.80 Commonwealth anti-discrimination laws contain exemptions for religious organisations and religious educational institutions. These exemptions apply where the discriminatory act or conduct conforms to the doctrines, tenets or beliefs of a religion, or is necessary to avoid injury to the religious sensitivities of adherents of that religion. For example, in the *SDA*, the exemptions include the following:

- s 23(3)(b), which allows discrimination in the provision of accommodation by religious bodies;
- s 37, which allows discrimination in the ordination or appointment of priests, ministers of religion or members of any religious order, the training or education of persons seeking ordination or appointment, the appointment of persons to perform religious duties or functions, and any other act or practice of a body established for religious purposes that ‘conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion’; and
- s 38, which allows discrimination by educational institutions established for religious purposes in relation to the employment of staff and the provision of education and training, provided that the discrimination is in ‘good faith in order to avoid injury to the religious susceptibilities of adherents of that religion’.

5.81 The effect of these exemptions is that a religious school, for instance, may lawfully choose not to employ a pregnant, unmarried teacher, in circumstances where this would be discriminatory conduct for a non-religious organisation (unless it would breach state or territory law).

***Previous inquiries***

5.82 There have been a number of parliamentary and other inquiries into the exemptions in the *SDA*.

5.83 In 2008, the Senate Standing Committee on Legal and Constitutional Affairs (Legal and Constitutional Affairs Committee) inquired into the effectiveness of the

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91 Human Rights Law Centre, *Submission 148*.  
 92 Radan, Meyerson and Croucher, above n 25, 5. It may also be said that rights to freedom of religion and non-discrimination ‘exist concurrently and within prescribed limits or accommodations’. The characterisation of ‘special treatment’ may arise, in the Australian context, because ‘the single right of non-discrimination has been over-legislated’: Australian Christian Lobby, *Submission 135*.

*SDA* in eliminating discrimination and gender inequality and recommended reform of the exemptions.<sup>93</sup>

5.84 In 2011, the Australian Human Rights Commission's report, *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination*, noted a divergence in opinions about the appropriateness of exemptions for religious organisations, and that most stakeholders who commented on the issue opposed the existing exemptions.<sup>94</sup>

5.85 In 2013, the Legal and Constitutional Affairs Committee conducted an inquiry into the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013. This inquiry also noted the range of opinions on the existence and operation of the exemptions in the *SDA*.<sup>95</sup>

5.86 The Legal and Constitutional Affairs Committee recommended that the religious organisation exemptions in the *SDA* not apply to discrimination on the grounds of sexual orientation, gender identity and intersex status with respect to the provision of aged care accommodation.<sup>96</sup>

5.87 This recommendation was reflected in the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth), and was justified on the basis that 'when such services are provided with tax payer dollars, it is not appropriate for providers to discriminate in the provision of those services'.<sup>97</sup>

5.88 The Attorney-General's Department undertook a public consultation process from 2011 to 2013 on a proposed consolidation of Commonwealth anti-discrimination laws. The Department's Discussion Paper raised various models of exemptions in anti-discrimination law—including a general limitations clause—without settling on a preferred model.<sup>98</sup> The consolidation process resulted in an exposure draft Human Rights and Anti-Discrimination Bill 2012, which was the subject of an inquiry by the Legal and Constitutional Affairs Committee.

5.89 Despite being primarily a consolidation exercise, the draft Bill contained several proposed changes to existing Commonwealth anti-discrimination law. These included a 'streamlined approach' to exemptions, incorporating a new general exception for justifiable conduct, and the preservation of religious exemptions with some limitations applying to Commonwealth-funded aged care services provided by religious organisations.<sup>99</sup>

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93 Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) rec 36.

94 Australian Human Rights Commission, *Addressing Sexual Orientation and Sex And/or Gender Identity Discrimination: Consultation Report* 2011 33.

95 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill* (2013) [3.9].

96 *Ibid* rec 1.

97 *Ibid* [2.31].

98 'Consolidation of Commonwealth Anti-Discrimination Laws' (Discussion Paper, Attorney-General's Department, 2011) 37–41.

99 Senate Legal and Constitutional Affairs Legislation Committee, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013) [1.13].

5.90 The Legal and Constitutional Affairs Committee recommended additional changes to exemptions including the removal of exemptions allowing religious organisations to discriminate against individuals in the provision of services, where that discrimination would otherwise be unlawful.<sup>100</sup>

***Views on the exemptions***

5.91 As in these previous inquiries, submissions in this Inquiry reflected divergent views about the existence and form of the religious organisation exemptions in the *SDA*, and about exemptions to anti-discrimination laws generally. These included:

- arguments that the existing exemptions are too narrow, and that anti-discrimination laws therefore unjustifiably limit freedom of religion; and
- arguments that the existing exemptions are too broad, and undermine the effectiveness of anti-discrimination legislation; and
- objections, in principle, to the use of exemptions to generally applicable anti-discrimination laws as a way of defining freedom of religion.

5.92 Concerns were raised about the limited scope of the exemption in s 38 of the *SDA*.<sup>101</sup> The Presbyterian Church of Queensland observed that the exemption ‘requires courts to weigh the nature of religious truth’, whereas the courts should instead ‘adopt an approach that permits the religious institution and religiously convicted individual the maximum scope to define their own doctrine’.<sup>102</sup> FamilyVoice favoured a general exemption, like that in s 61A of the *Defence Act 1903* (Cth), which exempts certain groups of people such as ministers of religion and others, from military service.<sup>103</sup>

5.93 The ACL expressed concern about the interpretation given to the phrase ‘injury to the religious susceptibilities’ of adherents of a religion. In *Griffin v The Catholic Education Office*,<sup>104</sup> ‘injury to the religious susceptibilities’ was found not to protect the Catholic Education Office from a negative finding where a ‘lesbian activist’ had applied to the Catholic Education Office to be classified as a teacher. The woman was suitably qualified, but her application was declined and she claimed discrimination on the grounds of sexual preference.

5.94 The Human Rights and Equal Opportunity Commission found that the exception from the definition of discrimination in s 3(1) of the (now repealed) *Human Rights and Equal Opportunity Commission Act 1986* (Cth) did not apply, stating that:

If the employment of Ms Griffin would injure the religious susceptibilities of these students and their parents, the injury would be founded on a misconception. Indeed it would be not an injury to their religious susceptibilities but an injury to their

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100 Ibid rec 11. The Committee considered that the Australian Government should develop specific amendments to implement this recommendation, using the approach taken in the *Anti-Discrimination Act 1998* (Tas) as a model. Coalition Senators presented a dissenting report.

101 Presbyterian Church of Queensland, *Submission 136*; Australian Christian Lobby, *Submission 135*.

102 Presbyterian Church of Queensland, *Submission 136*.

103 FamilyVoice Australia, *Submission 73*.

104 *Griffin v The Catholic Education Office* [1998] EOC 92-928.

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prejudices. These injuries do not come within the terms of exception and are not a permissible reason for discriminating on the ground of sexual preference.<sup>105</sup>

5.95 Given this interpretation, and the similar wording of the exemption in s 38 of the *SDA*<sup>106</sup> and s 153(2)(b)(ii) of the *Fair Work Act 2009* (Cth), the ACL stated that the existing exemptions for religious organisations ‘do not provide a high level of confidence for religious bodies that desire to ensure the integrity and ethos of their organisations can be maintained without legal disputes’.<sup>107</sup>

5.96 In relation to exemptions for educational institutions, stakeholders noted that religious observance occurs in all facets of a student’s school experience and is not restricted to specific religious ceremonies, necessitating broader exemptions.<sup>108</sup> Christian Schools Australia Ltd explained that religion is ‘not simply taught as a stand-alone subject’ but ‘permeates all that takes place and is lived out in the daily lives of the community of the school’. Religion is concerned with ‘all manner of conduct—the use of appropriate language, the conduct of relationships, attitudes, values and expression of matters of sexuality’.<sup>109</sup>

5.97 In contrast, the Law Council of Australia submitted that ss 37 and 38 of the *SDA* reflect a reasonable balance between religious freedom and measures promoting non-discrimination.<sup>110</sup> Other stakeholders opposed the exemptions for religious organisations entirely, or argue that they should be wound back<sup>111</sup>—considering that the general application of anti-discrimination law is considered to be a justifiable interference with religious freedom.

5.98 Some stakeholders were concerned that exemptions undermine the effectiveness of anti-discrimination legislation.<sup>112</sup> For example, it was suggested that the employment practices of some religious educational institutions ‘have a significant impact on the ability of people, including women, gay and lesbian persons, to find and remain in work and it is unacceptable that they not be subject to the same laws as other significant employers’.<sup>113</sup>

5.99 There are also arguments that exemptions for religious schools give the message to children that ‘discrimination is relatively minor in comparison to other forms of

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105 Ibid 22.

106 Also *Fair Work Act 2009* (Cth) s 153(2)(b)(ii).

107 Australian Christian Lobby, *Submission 135*.

108 Australian Christian Schools Ltd, *Submission 45*.

109 Ibid.

110 Law Council of Australia, *Submission 140*.

111 See, eg, Law Society of NSW Young Lawyers, *Submission 69*; National Association of Community Legal Centres, *Submission 66*; Public Interest Advocacy Centre, *Submission 55*; NSW Gay and Lesbian Rights Lobby, *Submission 47*.

112 See, eg, Human Rights Law Centre, *Submission 148*; National Association of Community Legal Centres, *Submission 143*; Kingsford Legal Centre, *Submission 110*; Law Society of NSW Young Lawyers, *Submission 69*; National Association of Community Legal Centres, *Submission 66*.

113 Kingsford Legal Centre, *Submission 110*.

harm against which the law protects and from which most religious schools have no exemptions’ and that ‘equality is a goal of limited value’.<sup>114</sup>

5.100 The possible negative effects on lesbian, gay, bisexual and transgender (LGBT) Australians were highlighted by a number of stakeholders.<sup>115</sup> The Victorian Gay and Lesbian Rights Lobby and NSW Gay and Lesbian Rights Lobby (Vic/NSW Gay and Lesbian Rights Lobby) submitted that blanket exemptions for religious exemptions fail to balance the human right of freedom of religion with freedom from discrimination.

Indeed, such wide-ranging exemptions give priority to religious freedom at the expense of the freedoms of LGBT Australians and allow LGBT people to be discriminated against as they seek to obtain an education and access healthcare, themselves fundamental human rights.<sup>116</sup>

5.101 The Public Interest Advocacy Centre (PIAC) accepted that a religious group may need to discriminate ‘on occasions to ensure ongoing manifestation of the core tenets of its faith’, but recommended that current religious exemptions be amended to require that religious organisations justify discrimination in the specific circumstances of each proposed act.<sup>117</sup>

***Exemptions and public funding***

5.102 Some stakeholders questioned exemptions from anti-discrimination legislation for religious organisations that receive public funding or perform public services,<sup>118</sup> which may include, for example, aged care, education, adoption, employment assistance and child welfare.

5.103 On the other hand, regardless of public funding, there is an argument that, for example, the existence of religious schools that have some degree of autonomy from state control, is an important part of a diverse and plural society.<sup>119</sup>

5.104 Religious bodies raised a number of arguments against using public funding as a reason to remove exemptions. The Presbyterian Church of Queensland submitted that the ‘mere receipt of funding does not alter or limit the legitimacy of the rationale for the separate treatment of the organisation’—that is, the protection of religious freedom. Further:

There is also a danger in limiting religious freedom to only those religious entities that do not engage in the commercial sphere. The right to religious freedom (both as classically understood and under contemporary international instruments) is not limited to religious institutions, it applies to all.<sup>120</sup>

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114 NSW Gay and Lesbian Rights Lobby, *Submission 47*. The submission quoted Carolyn Evans and Leilani Ujvari, ‘Non-Discrimination Laws and Religious Schools in Australia’ (2009) 30 *Adelaide Law Review* 31, 42.  
115 Victorian Gay and Lesbian Rights Lobby and NSW Gay and Lesbian Rights Lobby, *Submission 120*; A Lawrie, *Submission 112*.  
116 Victorian Gay and Lesbian Rights Lobby and NSW Gay and Lesbian Rights Lobby, *Submission 120*.  
117 Public Interest Advocacy Centre, *Submission 55*.  
118 Kingsford Legal Centre, *Submission 110*; Public Interest Advocacy Centre, *Submission 55*.  
119 Evans and Ujvari, above n 114, 31.  
120 Presbyterian Church of Queensland, *Submission 136*.

5.105 The ACL suggested that placing restrictions on religious organisations that receive public funding ‘would itself be a form of discrimination against those organisations, as [would be] a refusal to grant funds to certain bodies on the basis of their religious beliefs’.<sup>121</sup> It submitted:

Religious organisations receiving taxpayer funds should be able to determine their own identity without government interference. It is not the role of government to interfere in a religious organisation’s mission or vision.<sup>122</sup>

5.106 These stakeholders also observed that funding restrictions could lead to the withdrawal of religious organisations from the provision of services, with detrimental effects on the autonomy and choice of the recipients of services.<sup>123</sup> Religious service providers were seen as contributing to ‘the common good of society’, and public support, rather than endorsing a particular religious ‘worldview’, is instead an acknowledgment that a ‘pluralistic society sees charitable and social engagements operating in diverse ways for the collective good’.<sup>124</sup>

5.107 A particular concern was that ‘forcing religious charities and bodies to adhere to laws that prevent them from eliminating job applicants who don’t share in their worldview is likely to change the ethos and vision of the organisation’, and make it less likely that people who are motivated by religious values and principles would make themselves available for such work.<sup>125</sup> Parkinson submitted that religious organisations should have a right to ‘select staff who fit with the values and mission of the organisation, just as political parties, environmental groups and LGBT organisations do’ and that to select on the basis of ‘mission fit’ is not discrimination.<sup>126</sup>

***A general limitations clause?***

5.108 Some stakeholders favoured the introduction of a ‘general limitations clause’ as an alternative to the current religious organisation exemptions.<sup>127</sup> Such a clause would clarify that conduct which is necessary to achieve a legitimate objective, including freedom of religion, and is a proportionate means of achieving that objective, is not discrimination.<sup>128</sup>

5.109 Some stakeholders objected to the model of the current exemptions, arguing against the practice of defining religious freedom by way of exemptions from generally applicable laws.<sup>129</sup> Parkinson and Aroney have observed that anti-discrimination laws

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121 Australian Christian Lobby, *Submission 135*.  
122 Ibid.  
123 Presbyterian Church of Queensland, *Submission 136*; Australian Christian Lobby, *Submission 135*.  
124 Australian Christian Lobby, *Submission 135*.  
125 Ibid. Also P Parkinson, *Submission 9*.  
126 P Parkinson, *Submission 9*.  
127 Australian Christian Lobby, *Submission 135*; Victorian Gay and Lesbian Rights Lobby and NSW Gay and Lesbian Rights Lobby, *Submission 120*.  
128 The benefits and disadvantages in adopting a general limitations clause to replace some or all of the current specific exemptions are summarised in: ‘Consolidation of Commonwealth Anti-Discrimination Laws’, above n 98, 37.  
129 Australian Christian Lobby, *Submission 135*; Maronite Catholic Society Youth *Submission 51*; Australian Christian Lobby, *Submission 33*; Wilberforce Foundation, *Submission 29*; Freedom 4 Faith, *Submission 23*; P Parkinson, *Submission 9*.

may diminish freedom of religion if ‘freedom of religion is respected only grudgingly and at the margins of anti-discrimination law as a concessionary “exception” to general prohibitions on discrimination’.<sup>130</sup>

5.110 The ACL argued that ‘religious freedom should not be considered as a concession to more fundamental freedoms from non-discrimination’.<sup>131</sup> It summarised objections to the current exemptions model as follows:

The language of exemptions sends a message of ‘special pleading’ or preferential treatment towards religious bodies. Rather than being the rule, or the assumption, freedom of religion is relegated to being the exception, or the special accommodation. This is a reversal of the place of fundamental freedoms in a free society such as Australia. If the narrative promoted by the relevant legislation clearly articulated the limits of discrimination law and the assumption of freedom, such resentment or confusion could be ameliorated.<sup>132</sup>

5.111 Parkinson and Aroney have proposed a general limitations clause that redefines discrimination to include limitations on freedom of religion where ‘necessary’.<sup>133</sup> The proposed definition is comprehensive and combines direct and indirect discrimination. The definition includes a proportionality test and what is *not* discrimination—due to religious beliefs—within the definitional section itself, rather than expressing it as a limitation, exception or exemption:

1. A distinction, exclusion, restriction or condition does not constitute discrimination if:
  - a. it is reasonably capable of being considered appropriate and adapted to achieve a legitimate objective; or
  - b. it is made because of the inherent requirements of the particular position concerned; or
  - c. it is not unlawful under any anti-discrimination law of any state or territory in the place where it occurs; or
  - d. it is a special measure that is reasonably intended to help achieve substantive equality between a person with a protected attribute and other persons.
2. The protection, advancement or exercise of another human right protected by the International Covenant on Civil and Political Rights is a legitimate objective within the meaning of subsection 2(a).<sup>134</sup>

5.112 In 2008, the Legal and Constitutional Affairs Committee recommended that the exemptions in s 30 and ss 34–43 of the *SDA*—including those for religious organisations—be replaced by a general limitations clause.<sup>135</sup> In making this

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130 P Parkinson and N Aroney, Submission to Attorney-General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws*, 2011.  
 131 Australian Christian Lobby, *Submission 33*.  
 132 Australian Christian Lobby, *Submission 135*.  
 133 This approach was supported by Freedom 4 Faith, *Submission 23*.  
 134 P Parkinson and N Aroney, Submission to Attorney-General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws*, 2011.  
 135 Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) rec 36.

recommendation, the Committee wrote that such a clause would permit discriminatory conduct within reasonable limits and allow a case-by-case consideration of discriminatory conduct. This would allow for a more ‘flexible’ and ‘nuanced’ approach to balancing competing rights.<sup>136</sup>

5.113 The Vic/NSW Gay and Lesbian Rights Lobby submitted that broad permanent exemptions for educational institutions and religious bodies should be removed and replaced with a general justification defence or general limitations clause. Such a clause, it said, should set out criteria for evaluating circumstances in which religious rights and interests should take precedence over the right to freedom from discrimination, and how these competing rights should be balanced.<sup>137</sup>

5.114 In this context, PIAC observed that the 2011–13 process directed towards consolidation of Commonwealth anti-discrimination laws may have represented ‘a missed opportunity to recast the current broad exemptions’—including the exemptions for religious organisations under the *SDA*—so as to comply better with ‘orthodox principles of international human rights law’.<sup>138</sup>

#### **Conscience clauses**

5.115 Others argued for more explicit carve-outs from anti-discrimination law for religious organisations or individuals. The Wilberforce Foundation proposed a model exemption based on a so-called ‘conscience clause’—arguing that the *SDA* should provide that discrimination is only unlawful and actionable if the service which has been denied is not reasonably obtainable elsewhere.<sup>139</sup>

5.116 FamilyVoice submitted that ss 37 and 38 of the *SDA* should be replaced with ‘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’.<sup>140</sup>

5.117 Suggestions have been made that, if legislation is enacted to provide for same-sex marriage, wedding service providers should be able to conscientiously object to providing associated services. This issue is discussed further below, in relation to the *Marriage Act*.

#### **Workplace relations laws**

5.118 Workplace relations laws contain provisions that prohibit employers from discriminating against an employee on the basis of a protected characteristic. This may be considered as interfering with freedom of religion as it may affect the employment

136 Ibid [11.64].

137 Victorian Gay and Lesbian Rights Lobby and NSW Gay and Lesbian Rights Lobby, *Submission 120*.

138 Public Interest Advocacy Centre, *Submission 133*.

139 Wilberforce Foundation, *Submission 29*.

140 FamilyVoice Australia, *Submission 122*. FamilyVoice suggested similar amendment of the *Age Discrimination Act 2004* (Cth) and *Disability Discrimination Act 2004* (Cth).

practices of religious organisations that may wish to select staff who conform to the beliefs of that organisation.<sup>141</sup>

5.119 For instance, in some circumstances, a religious organisation or body may seek to exclude a potential employee where the person does not adhere to the teachings of that religious organisation.

5.120 The *Fair Work Act 2009* (Cth) provisions include the following:

- s 153, which provides that a modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee’s race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- s 351(1), which relates to the General Protections division of the Act and provides that any adverse action taken against an employee on the basis of a protected attribute or characteristic is prohibited; and
- s 772(1)(f), which provides that a person’s employment may not be terminated on the basis of a protected attribute, subject to exceptions in s 772(2)(b).

5.121 Freedom 4 Faith proposed several changes to the *Fair Work Act* including imposing a duty on employers to make reasonable adjustment for an employee who has a conscientious objection to performing a particular duty.<sup>142</sup> FamilyVoice also considered that the Act should include an exemption for persons whose conscientious beliefs do not allow them to comply with it.<sup>143</sup>

5.122 In general, the *Fair Work Act* provisions did not attract much adverse comment. The anti-discrimination provisions of s 351 contain broad exceptions, including where the adverse action is taken by a religious institution ‘to avoid injury to the religious susceptibilities of adherents of that religion or creed’.<sup>144</sup> Further, these provisions do not apply to action that is not unlawful under the relevant state and territory anti-discrimination law.<sup>145</sup>

***Conclusion—anti-discrimination laws***

5.123 While there is no obvious evidence that Commonwealth anti-discrimination laws significantly encroach on freedom of religion in Australia, there is nevertheless a degree of community concern, as evidenced by the 2015 religious freedom roundtables convened by the Australian Human Rights Commission (AHRC).<sup>146</sup>

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141 Ibid.  
142 Freedom 4 Faith, *Submission 23*.  
143 FamilyVoice Australia, *Submission 122*.  
144 *Fair Work Act 2009* (Cth) s 351(2)(c).  
145 Ibid s 351(2)(a). See JobWatch, *Submission 115*.  
146 Australian Human Rights Commission, *Summary: Religious Freedom Roundtable, Sydney, 5 November 2015* (2015).

5.124 Any concerns about freedom of religion should be considered in future initiatives directed towards the consolidation of Commonwealth anti-discrimination laws. In particular, further consideration should be given to whether freedom of religion should be protected through a general limitations clause rather than exemptions.

5.125 Other opportunities to review concerns about freedom of religion and anti-discrimination law may arise in future initiatives directed towards the harmonisation of Commonwealth, state and territory anti-discrimination laws. At present all states, except New South Wales and South Australia, and both territories, have legislation making it unlawful to discriminate on the grounds of religious belief. The definitions of religious discrimination and the scope of exemptions differ.<sup>147</sup> Commonwealth law does not make discrimination on the basis of religion unlawful, although the President of the AHRC has the power to endeavour, by conciliation, to effect a settlement of a complaint.<sup>148</sup>

### Marriage Act

5.126 The policy justifications for government regulation of marriage (and other relationships) include ensuring that people who enter into marriage do so with full consent, preventing polygamy and incest, and maintaining government records for taxation and other regulatory purposes.

5.127 Marriage, under the *Marriage Act*, has some important legal consequences, including in relation to taxation, entitlement to health and welfare benefits and the succession to property on death. Other forms of marital or marriage-like relationship, including those recognised by religions, may or may not have similar legal consequences.<sup>149</sup>

5.128 The *Marriage Act* gives direct legal effect to marriages solemnised by authorised religious celebrants. In other jurisdictions, as in some European countries, the civil ceremony creates the legal marriage, while the religious ceremony has no legal effect.<sup>150</sup>

5.129 The Act establishes three categories of celebrants authorised to solemnise marriages:

- ministers of religion of a recognised denomination, proclaimed under s 26 of the Act, who are nominated by their denomination and registered and regulated by state and territory registries of births, deaths and marriages;

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147 See Westlaw AU, *The Laws of Australia* Vol 21.9 Discrimination (at 19 October 2015) [21.9.780]–[21.9.800]; Evans, above n 2, 140–44. However, NSW anti-discrimination law does cover discrimination on the ground of ‘ethno-religious origin’: *Anti-Discrimination Act 1977* (NSW) ss 4, 7. South Australian law covers discrimination on the basis of religious appearance or dress in employment or education: *Equal Opportunity Act 1984* (SA) ss 85T(1)(f), (7).

148 *Australian Human Rights Commission Act 1986* (Cth) ss 3, 8(6), 11, 31.

149 While marriages and de facto relationships are increasingly treated the same for most legal purposes, marriage may be relevant in determining whether two individuals have the status of a ‘couple’.

150 See, eg, Direction de l’information légale et administrative (Premier ministre), Ministère en charge de la justice, *Mariage En France* <[www.service-public.fr/particuliers/vosdroits](http://www.service-public.fr/particuliers/vosdroits)>.

- state and territory officers who are authorised to perform marriages as part of their duties and are regulated by state and territory registries of births, deaths and marriages; and
- Commonwealth-registered marriage celebrants who are authorised under pt IV, div 1, subdiv C of the Act to perform marriages, and regulated through the Marriage Celebrants Program operated by the Attorney-General’s Department.<sup>151</sup>

5.130 The solemnisation provisions in the *Marriage Act* may have some implications for freedom of religion and, in particular, s 101, which states:

A person shall not solemnise a marriage, or purport to solemnise a marriage, at a place in Australia or under Part V unless the person is authorised by or under this Act to solemnise marriages at that place or under that Part.<sup>152</sup>

5.131 Section 113 deals with second marriage ceremonies and, among other things, provides that ‘a person who is not an authorised celebrant does not commit an offence against section 101 by reason only of his or her having performed a religious ceremony of marriage’ between parties who have complied with s 113(5).<sup>153</sup> Section 113(5) allows a second marriage ceremony between two persons who are already legally married to each other under Australian law, provided certain formalities are followed ensuring that all parties involved in the religious ceremony are aware that it has no legal standing under the *Marriage Act*.

5.132 In *Nelson v Fish*, the Federal Court held that the statutory scheme for regulating the class of persons who may solemnise marriages ‘does not disclose any basis upon which it could be argued that it interferes with religious freedom in a way that conflicts with s 116’ of the *Constitution*.<sup>154</sup> The Court also observed that the provisions of s 113(5) ‘preserve in a way that is consistent with the free exercise of religious observance the right of persons married in the eyes of the law to undergo a religious form of marriage even where the religion concerned is not a recognised denomination and its minister not a registered minister’.<sup>155</sup>

5.133 Parkinson and Krayem argued that the provisions of the *Marriage Act* are a ‘fetter on religious freedoms’, as they ‘operate as restraints upon conducting religious wedding ceremonies other than in accordance with the Act, and indeed s 101 makes

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151 This group includes civil celebrants and celebrants who are ministers of religion whose denomination is not proclaimed under s 26 of the *Marriage Act*: ‘Such proclamations are purely for the purpose of the Marriage Act. A declaration under section 26 does not in any way amount to government endorsement of the organisation concerned or an acknowledgment that it has any particular standing in the community’: Attorney-General’s Department (Cth), *Information Sheet - Recognised Denominations* <www.ag.gov.au>.

152 P Parkinson and G Krayem, *Submission 1*.

153 *Marriage Act 1961* (Cth) s 113(7).

154 *Nelson v Fish* (1990) 21 FCR 430, [14] (French J).

155 *Ibid*.

doing so a criminal offence'.<sup>156</sup> They suggested that s 101, read along with s 113 make it unlawful to conduct a religious wedding unless it occurs after a civil marriage, and is conducted by an authorised celebrant.

5.134 Criminal sanctions for conducting marriages other than in compliance with these provisions of the *Marriage Act* may be seen as an unjustifiable burden on an important form of religious expression, particularly as there may be some religious leaders who are unaware of the offences. Parkinson and Krayem submitted that the criminal sanctions have the potential to produce more major issues if the *Marriage Act* were to be amended to permit same-sex marriages, because some faith organisations, or individual ministers, may choose to conduct weddings as a purely religious ceremony or sacrament.<sup>157</sup>

5.135 On the other hand, the *Marriage Act* may be interpreted as regulating legal marriages, and not purely religious ceremonies. On this view, the criminal sanctions in s 101 only cover situations where an unauthorised person solemnises or purports to solemnise a 'legal' marriage under the *Marriage Act*.<sup>158</sup> Section 101 would not preclude an unauthorised minister of religion from conducting a purely religious ceremony of marriage, where it is not intended or purported to have legal effect, or preclude an authorised minister from conducting a purely religious ceremony of marriage. The *Marriage Act* would not make it unlawful to conduct a religious wedding unless it occurs after a civil marriage, nor require that a purely religious wedding be conducted by an authorised celebrant.

5.136 Parkinson and Krayem propose that to avoid interference with freedom of religion, the law should be amended to allow couples to 'choose the religious celebrant of their choice and be able to register their own marriages if they choose to go through a religious ceremony with someone who is not an authorised celebrant' (provided that it is made clear that the religious ceremony has no legal effect).<sup>159</sup>

5.137 This outcome may already be possible under the *Marriage Act*—in that, following a religious ceremony, a couple may undergo a civil ceremony. However, reforms to clarify the position, or to more clearly separate the civil act from the religious act of solemnising the marriage may be desirable. Religious celebrants could cease to be, in this sense, agents of the state, and able to dedicate themselves to religious rites unburdened by state imposed administrative duties—fully separating church and state.

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156 P Parkinson and G Krayem, *Submission 1*. The Law Council considered that the *Marriage Act* solemnisation provisions 'do not disproportionately impinge on religious freedoms in a way that is disproportionate': Law Council of Australia, *Submission 140*.

157 For example, the NSW arm of the Presbyterian Church has decided to ask its national branch to take the steps necessary to withdraw from the *Marriage Act* entirely if same-sex unions are no longer banned by law: Amy Corderoy, 'Presbyterian Church Considers Withdrawing from Marriage Act If Gay Marriage Allowed', *Sydney Morning Herald* (online), 6 July 2015 <[www.smh.com.au/nsw](http://www.smh.com.au/nsw)>.

158 Or, for example, marriage under Aboriginal laws and customs. See discussion: Commonwealth, *Parliamentary Debates*, Senate, 11 April 1961, 415–6.

159 P Parkinson and G Krayem, *Submission 1*.

***Same-sex marriage***

5.138 A number of stakeholders raised concerns about possible implications for freedom of religion, if the Commonwealth were to legislate to permit same-sex marriage.<sup>160</sup> These include that celebrants may face legal consequences under anti-discrimination law for refusing to solemnise or register marriages; and, more broadly, that wedding service providers should be able to conscientiously object to providing associated services.

5.139 Section 47 of the *Marriage Act* provides that nothing in the solemnisation provisions imposes an obligation on an authorised celebrant, being a minister of religion, to solemnise any marriage. However, this provision does not protect other celebrants, including religious celebrants who are not part of a recognised denomination.

5.140 It has been suggested that, in the event that the *Marriage Act* is amended to provide for same-sex marriage, consideration should be given to whether celebrants who have a genuine religious or conscientious objection to solemnising a marriage of persons of the same sex should be able to refuse to solemnise a marriage of persons of the same sex.

5.141 Provision could be made, for example, for authorised celebrants to register a genuine religious or conscientious objection with registrars of marriage celebrants. Such provisions, protecting a right to ‘conscientiously object’, have been advocated by the Australian Human Rights Commissioner, Tim Wilson.<sup>161</sup>

5.142 In the United Kingdom, the *Marriage (Same Sex Couples) Act 2013* (UK) includes a ‘religious protection’ clause, which provides that a person ‘may not be compelled by any means (including by the enforcement of a contract or a statutory or other legal requirement)’ to conduct or otherwise participate in a same-sex marriage.<sup>162</sup>

5.143 The Vic/NSW Gay and Lesbian Rights Lobby agreed that provisions to make it clear that religious celebrants cannot be compelled to marry same-sex couples would ‘strike an appropriate balance’. However, in their view, permitting civil celebrants, as distinct from religious celebrants, to discriminate on the basis of sexual orientation would be unjustifiable.<sup>163</sup> Another stakeholder stated that allowing civil celebrants to refuse to solemnise same-sex marriages ‘set a concerning precedent whereby individuals would be able to discriminate in service delivery on the basis of their personal religious beliefs’.<sup>164</sup>

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160 See, eg, FamilyVoice Australia, *Submission 122*; Wilberforce Foundation, *Submission 118*; Australian Christian Lobby, *Submission 33*; Freedom 4 Faith, *Submission 23*.  
161 Tim Wilson, *Same-Sex Marriage: A Law That Protects the Rights of All Parties* <[www.humanrights.gov.au](http://www.humanrights.gov.au)>.  
162 *Marriage (Same Sex Couples) Act 2013* (UK) s 2(2).  
163 Victorian Gay and Lesbian Rights Lobby and NSW Gay and Lesbian Rights Lobby, *Submission 120*.  
164 A Lawrie, *Submission 112*.

## 5. Freedom of Religion

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5.144 The Parliamentary Joint Committee on Human Rights (Human Rights Committee) considered the obligations of civil celebrants in its review of the private members' *Marriage Legislation Amendment Bill 2015* (Cth).<sup>165</sup> The effect of the Bill would be that civil celebrants (who are not ministers of religion) would be prohibited from refusing to solemnise same-sex marriages on the ground that the couple are of the same sex. This would apply even if the civil celebrant had a religious objection to the marriage of same-sex couples.<sup>166</sup> The majority of the Human Rights Committee concluded that any limitation on the right to freedom of religion was proportionate to the objective of promoting equality and non-discrimination. However, a number of Committee members considered that 'this limitation is not justified as the bill does not provide civil celebrants with the option to refuse to solemnise marriages that are contrary to their religious beliefs'.<sup>167</sup>

5.145 There have also been suggestions that the law should also permit individuals to conscientiously object to providing goods, services and facilities in relation to the solemnisation of a same-sex marriage.<sup>168</sup>

5.146 Parliament has made it unlawful to discriminate in the provision of goods, services and facilities on the grounds of sexual orientation (with some limited exemptions for religious organisations, but not otherwise for individuals). As Lady Hale, the Deputy President of the Supreme Court of the United Kingdom has observed:

Denying some people a service which you are prepared to offer others is deeply harmful to them. It is reminiscent of the days when women were not allowed to order their own drinks at the bar in certain establishments and landlords were allowed to say 'no blacks here'. It is a denial of their equal dignity as human beings.<sup>169</sup>

5.147 It is not clear that freedom to manifest religion or belief should extend to refusing to provide, for example, a wedding cake for a same-sex couple.<sup>170</sup> Protecting individuals from discrimination in ordinary trade and commerce seems a proportionate limitation on freedom of religion.

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165 Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report—30th Report of the 44th Parliament* (2015) 112–19.

166 Ibid 116.

167 Ibid 118–19.

168 See, eg, Archbishop Anthony Fisher, *Should Bakers Be Required to Bake Gay Wedding Cakes? Democracy and Religious Liberty in Australia* <[www.abc.net.au](http://www.abc.net.au)>; Australian Broadcasting Corporation, *Anglican Church Concerned Gay Marriage Would Force Christian Wedding Suppliers to Cater for Same-Sex Couples* <[www.abc.net.au](http://www.abc.net.au)>.

169 Lady Hale, 'Are We a Christian Country? Religious Freedom and the Law' (Oxfordshire High Sheriff's Lecture 2014, 14 October 2014).

170 See, eg, 'The more expansive view of the concept of freedom of religion—that it should permit a person with religious beliefs to run businesses including aged care facilities, schools, etc consistent with religious doctrines—is not, in CLA's view, the traditional view, at least in developed, secular countries. It is more commonly found in theocratic (and generally repressive) states and it would be regrettable if it gained currency in Australia': Civil Liberties Australia, *Submission 94*.

### **Counter-terrorism legislation**

5.148 Some offences in the *Criminal Code* (Cth) may be characterised as indirectly interfering with freedom of religion, as they may restrict religious expression. These laws include:

- Section 80.2C, which creates the offence of ‘advocating terrorism’. This may be seen to limit religious expression by limiting the capacity of individuals to express religious views which might be radical and controversial.
- Section 102.1(2), which provides that an organisation may be specified as a terrorist organisation, making it an offence to be a member of that organisation, to provide resources or support to that organisation, or to train with that organisation. Some argued that this provision risks criminalising individuals for expressing radical, religious beliefs.<sup>171</sup>
- Section 102.8, which makes it an offence to associate with a terrorist organisation. There may be interference with religious freedom where a person is seen to associate with a member of a terrorist organisation who attends the same place of worship or prayer group. While there is a defence in s 102.8(4)(b) where the association ‘is in a place being used for public religious worship and takes place in the course of practising a religion’, this may place a significant burden on defendants to prove that their association arose in the course of practising their religion.

#### ***Advocating terrorism offence***

5.149 The Gilbert and Tobin Centre for Public Law raised concerns about the effect of s 80.2C of the *Criminal Code* on freedom of religion, arguing that it limits the capacity of individuals to express religious views which might be radical and controversial.<sup>172</sup> Section 80.2C was introduced into the *Criminal Code* by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).

5.150 The Gilbert and Tobin Centre argued that the offence is likely to have a ‘significant chilling effect’ on religious expression, as individuals may refrain from discussing their religious views and current events overseas out of fear they will be prosecuted.<sup>173</sup>

5.151 The Human Rights Committee noted that this provision engaged the right to freedom of expression in art 19.3 of the ICCPR. The Committee sought further information from the relevant Minister about the necessity for this provision, writing that a number of existing provisions in the *Criminal Code* may apply to speech that incites violence:

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171 Gilbert and Tobin Centre of Public Law, *Submission 22*.  
172 Ibid.  
173 Ibid.

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such incitement offences may capture a range of speech acts, including ‘urging’, ‘stimulating’, ‘commanding’, ‘advising’ or ‘encouraging’ a person to commit an unlawful act.<sup>174</sup>

5.152 The Human Rights Committee concluded that the provision was ‘likely to be incompatible with the human right of opinion and expression’.<sup>175</sup> The Committee’s comments were primarily related to restrictions on free speech and are discussed in Chapter 4.

5.153 It is difficult to regard the advocacy of terrorist acts, as defined in div 101 of the *Criminal Code* as being an exercise of religious freedom, unless the advocacy of terrorism is part of a religious creed. If it were, exercise of the freedom would be likely to directly harm the adherents of other religions (or of none), and limitations would be justified.

## Conclusion

5.154 There is no obvious evidence that Commonwealth anti-discrimination laws significantly encroach on freedom of religion in Australia, especially given the existing exemptions for religious organisations. Nevertheless, concerns about freedom of religion should be considered in future initiatives directed towards the consolidation of Commonwealth anti-discrimination laws, or harmonisation of Commonwealth, state and territory anti-discrimination laws. In particular, further consideration should be given to whether freedom of religion should be protected through a general limitations clause rather than exemptions.

5.155 Some concerns have been raised in relation to the solemnisation provisions for marriage celebrants in the *Marriage Act* and, in particular, provisions which make the solemnisation of marriage by an unauthorised celebrant a criminal offence. These provisions have been argued to act as a fetter on religious freedoms. On the other hand, the *Marriage Act* may be interpreted as regulating legal marriages, and not purely religious ceremonies. Reforms to clarify the position, or to more clearly separate the civil act from the religious act of solemnising the marriage may be desirable.

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174 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourth Report of the 44th Parliament* (March 2014) [1.254].

175 Ibid [1.258].



## 6. Freedom of Association and Assembly

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### Summary

6.1 Freedom of association concerns the right of all persons to group together voluntarily for a common goal or to form and join an association, such as a political party, a professional or sporting club, a non-government organisation or a trade union.

6.2 This chapter discusses the source and rationale of the common law rights of freedom of association and freedom of assembly; how these rights are protected from statutory encroachment; and when laws that interfere with them may be considered justified, including by reference to the concept of proportionality.

6.3 Freedom of association is closely related to other fundamental freedoms recognised by the common law, including freedom of speech. It has been said to serve the same values as freedom of speech: ‘the self-fulfilment of those participating in the meeting or other form of protest, and the dissemination of ideas and opinions essential to the working of an active democracy’.<sup>1</sup> Freedom of association is different from, but also closely related to, freedom of assembly.

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1 Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 272.

6.4 Freedom of association serves as a vehicle for the exercise of many other civil, cultural, economic, political and social rights. For example, freedom of association is vital to modern commerce and economic wellbeing because partnerships and corporations, which are associations of shareholders, account for much business activity. In practice, many business activities cannot be undertaken by individuals alone.

6.5 Freedom of association provides an important foundation for legislative protection of employment rights. The system of collective, or enterprise bargaining, which informs much of Australia's employment landscape, relies on the freedom of trade unions and other employee groups to form, meet and support their members.

6.6 Australians are generally free to associate with whomever they like and to assemble to participate in activities including, for example, a protest or demonstration. However, a wide range of Commonwealth laws may be seen as interfering with freedom of association or freedom of assembly, in the contexts of criminal law and counter-terrorism; public assembly; workplace relations; migration; and anti-discrimination. Many of these provisions relate to limitations of these freedoms that have long been recognised by the common law itself, for example, in relation to consorting with criminals, public assembly and other aspects of preserving public order.

6.7 Some areas of particular concern, as evidenced by parliamentary committee materials, submissions and other commentary, involve:

- various counter-terrorism offences provided under sch 1 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*) and, in particular, the offence of associating with a member of a terrorist organisation and thereby providing support to it;
- workplace relations laws, which are centrally concerned with freedom of association and the right to organise;
- the operation of the so-called 'character test' in the *Migration Act 1958* (Cth), which provides a ministerial discretion to refuse a visa to a person whom the Minister reasonably suspects is a member of or has an association with certain groups or organisations or persons; and
- the operation of Commonwealth anti-discrimination laws.

6.8 Counter-terrorism and national security laws, including those mentioned above, should be subject to further review to ensure that the laws do not interfere unjustifiably with freedom of association and freedom of assembly, or other rights and freedoms. Further review on this basis could be conducted by the Independent National Security Legislation Monitor (INSLM) and the Parliamentary Joint Committee on Intelligence and Security (Intelligence Committee).

6.9 Workplace relations laws in Australia have been subject to extensive local and overseas criticism on the basis of lack of compliance with International Labour Organization (ILO) Conventions concerning freedom of association and the right to organise. However, the extent to which obligations under ILO conventions engage the

scope of common law or traditional understandings of freedom of association may be contested.

6.10 For example, the legal power to take industrial action is not a common law entitlement but a statutory grant. Therefore, the exercise of the power and the benefit of legal protection may be subject to statutory conditions. While conditions on industrial action may offend certain ILO norms, they do not necessarily encroach on freedom of association.

6.11 The character test in s 501 of the *Migration Act* may not be a proportionate limitation on the right to freedom of association. The provision might be amended to provide narrower meanings of ‘association’ and ‘membership’. The issue could be dealt with in any future review of Australia’s migration laws aimed at ensuring that these laws do not interfere unjustifiably with freedom of association, or other rights and freedoms.

6.12 Anti-discrimination laws have been criticised for potentially interfering with freedom of association by making unlawful certain forms of discrimination—including the use of rules or criteria excluding people from membership of associations, such as sporting clubs. These concerns overlap with discussion of freedom of religion and are considered in Chapter 5.

## The common law

6.13 There has been some recognition by Australian courts that freedom of association should be considered a common law right.<sup>2</sup> In *Tajjour v New South Wales* (*Tajjour*), Keane J cited High Court authority for the proposition that, at common law, freedom of association is a ‘fundamental aspect of our legal system’.<sup>3</sup>

6.14 The approach of the common law to freedom of assembly has been described as ‘hesitant and negative, permitting that which was not prohibited’.<sup>4</sup> In *Duncan v Jones*, Lord Hewart CJ said that ‘English law does not recognize any special right of public meeting for political or other purposes’.<sup>5</sup>

6.15 Common law freedom of assembly is only for peaceful purposes. Freedom of assembly does not always involve freedom of association. People assemble, for example, for entertainment in a cinema, theatre or a sports stadium without necessarily associating with one another.

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2 *Tajjour v New South Wales* (2014) 313 ALR 221; *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414. See Australian Council of Trade Unions, *Submission 44*.

3 *Tajjour v New South Wales* (2014) 313 ALR 221, [224]. Citing *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 200 (Dixon J).

4 *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, 126–7. This is generally the way in which the common law protects rights: see Ch 2.

5 *Duncan v Jones* [1936] 1 KB 218 222. This ‘reflected the then current orthodoxy’: *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, 126–7.

## Protections from statutory encroachment

### Australian Constitution

6.16 Freedom of association is not expressly protected in the *Australian Constitution* and there is also no freestanding right to association implied in the *Constitution*.<sup>6</sup> Generally, Australian Parliaments may make laws that encroach on freedom of association.

6.17 However, there are some constitutional limits on Parliament’s power to restrict freedom of association. Section 116 places some limits on the Parliament’s power to interfere with freedom of association with respect to religion. Section 92 may prevent the prohibition of interstate trade between corporations. The High Court has also said that the Parliament cannot prohibit trading, financial or foreign corporations under the s 51(xx) corporations power, though it may regulate their activities.<sup>7</sup>

6.18 The power to make laws encroaching on freedom of association is also subject to general constitutional constraints on the legislative powers of the Commonwealth. In 1951, the High Court ruled that the *Communist Party Dissolution Act 1950* (Cth) was not a valid exercise of express legislative power,<sup>8</sup> nor was it valid under an implied power to make laws for the preservation of the Commonwealth and its institutions from internal attack and subversion.<sup>9</sup> The High Court has upheld legislation that deregistered a trade union, validly made under the s 51(xxxv) labour power.<sup>10</sup>

6.19 Most importantly, just as there is an implied constitutional right to ‘political communication’, there may also be an implied right to ‘political association’. As in the case of political communication, any implied right to ‘political association’ would not protect a personal right, but act as a restraint on the exercise of legislative power by the Commonwealth.

6.20 The High Court has said that ‘freedom of association to some degree may be a corollary of the freedom of communication formulated in *Lange v Australian Broadcasting Corporation*’.<sup>11</sup> For example, people should be free, generally speaking, to join groups like political parties to lobby for and effect change. Gaudron J in

6 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, [148] (Gummow and Hayne JJ). See also *Tajjour v New South Wales* (2014) 313 ALR 221; *O’Flaherty v City of Sydney Council* (2014) 221 FCR 382, [28]; *Unions NSW v New South Wales* (2013) 304 ALR 266.

7 *Commonwealth v Bank of New South Wales* (1948) 76 CLR 1, 202–03.

8 Under *Australian Constitution* s 51(xxxix) read with s 61 (incidental and executive powers), s 51(vi) (defence power). However, the majority thought that the law could have been supported by the defence power in times of war: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, see eg, 255–6 (Fullagar J).

9 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

10 *Australian Building Construction Employees’ and Builders Labourers’ Federation v Commonwealth* (1986) 161 CLR 88.

11 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, [148] (Gummow and Hayne JJ). This position has been supported in subsequent judgments: *O’Flaherty v City of Sydney Council* (2014) 221 FCR 382, [28]; *Unions NSW v New South Wales* (2013) 304 ALR 266; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, [158] (Gummow and Hayne JJ); *Wainohu v New South Wales* (2011) 243 CLR 181, [112] (Gummow, Hayne, Crennan and Bell JJ).

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*Australian Capital Television Pty Ltd v Commonwealth* said that the ‘notion of a free society governed in accordance with the principles of representative democracy may entail freedom of movement [and] freedom of association’.<sup>12</sup>

6.21 Recognition of this corollary acknowledges the importance of freedom of association to a vibrant democracy. In many circumstances, freedom of political communication is unrealisable without freedom of association, as when individuals join together to form political parties or other groups to promote or publicise political viewpoints.

6.22 Freedom of assembly may also be a component of the implied freedom of political communication as, for many people, ‘participation in public meetings or less formal forms of protest—marches and other demonstrations on the streets, picketing, and sit-ins—is not just the best, but the only effective means of communicating their views’.<sup>13</sup>

6.23 Nevertheless, in the Australian constitutional context, it seems any implied right to freedom of association, or assembly, is *only* a corollary of the right to political communication. The High Court said in *Wainohu v New South Wales*:

Any freedom of association implied by the *Constitution* would exist only as a corollary to the implied freedom of political communication and the same test of infringement and validity would apply.<sup>14</sup>

6.24 The effect of this decision, Professors George Williams and David Hume wrote, ‘will be to give freedom of association a limited constitutional vitality’.<sup>15</sup>

### **The principle of legality**

6.25 The principle of legality provides some protection to freedom of association. When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of association, unless this intention was made unambiguously clear.

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12 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 212 (Gaudron J).

13 Barendt, above n 1, 269.

14 *Wainohu v New South Wales* (2011) 243 CLR 181, [112]. See also *Tajjour v New South Wales* (2014) 313 ALR 221, [95], [136], [244]–[245]. The case concerned the consorting law contained in s 93X of the *Crimes Act 1900* (NSW), which was found not to be invalid for impermissibly burdening the implied freedom of communication under the *Constitution*.

15 George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 217. Williams and Hume go on to write: ‘It would be better to reformulate the position in *Wainohu* at least so that any freedoms of political association and political movement were identified as derivative, not of freedom of communication, but of the constitutionally prescribed systems of representative and responsible government and for amending the *Constitution* by referendum. In other words, the *Constitution* protects that freedom of association and movement which is necessary to sustain the free, genuine choices which the constitutionally prescribed systems contemplate’: *Ibid* 217–18.

6.26 For example, in *Melbourne Corporation v Barry*, the High Court found that a by-law, made under a power to regulate traffic and processions, could not prohibit traffic and processions. Higgins J said:

It must be borne in mind that there is this common law right; and that any interference with a common law right cannot be justified except by statute—by express words or necessary implication. If a statute is capable of being interpreted without supposing that it interferes with the common law right, it should be so interpreted.<sup>16</sup>

6.27 In *Minister for Immigration and Citizenship v Haneef (Haneef)* the Full Court of the Federal Court approached the construction of the word ‘association’ in the light of common law principles. The Court concluded that those principles tended against a construction authorising the Minister to find a person to have failed a migration character test<sup>17</sup> ‘merely on the basis of an innocent association with persons whom the Minister reasonably suspects have been or are involved in criminal conduct’.<sup>18</sup> The principle of legality, applied to freedom of association, can be seen as an ‘integral part’ of the Court’s approach to statutory interpretation in *Haneef*.<sup>19</sup>

**International law**

6.28 International law recognises rights to peaceful assembly and to freedom of association. The *International Covenant on Civil and Political Rights* (ICCPR) provides for ‘the right of peaceful assembly’<sup>20</sup> and the ‘right to freedom of association including the right to form and join trade unions’.<sup>21</sup>

6.29 The United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association explained the importance of these rights as empowering people to:

express their political opinions, engage in literary and artistic pursuits and other cultural, economic and social activities, engage in religious observances or other beliefs, form and join trade unions and cooperatives, and elect leaders to represent their interests and hold them accountable.<sup>22</sup>

6.30 In addition, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) provides for the ‘right of everyone to form trade unions and join the trade union of his choice’.<sup>23</sup>

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16 *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206.  
17 Under *Migration Act 1958* (Cth) s 501(6)(b).  
18 *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, [114].  
19 Australian Council of Trade Unions, *Submission 44*.  
20 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 21.  
21 *Ibid*, art 22.1.  
22 United Nations Human Rights Council, *The Rights to Freedom of Peaceful Assembly and of Association*, 15th Sess, UN Doc A/HRC/RES/15/21 (6 October 2010).  
23 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 8. Williams and Hume stated: ‘the right to freedom of association is recognised in the ICCPR while the right to form trade unions (which can be seen as a subset of the right to freedom of association) is recognised in the ICESCR’: Williams and Hume, above n 15, 4.

6.31 Australia is bound to respect freedom of association under international labour standards, and through its membership of the ILO.<sup>24</sup> International labour standards seek to guarantee the right of both workers and employers to form and join organisations of their choice.<sup>25</sup>

6.32 World Trade Organization rules and the provisions of free trade agreements to which Australia is a signatory also create obligations which, by implication, protect freedom of association for the purposes of commerce, industry and investment.<sup>26</sup>

6.33 International instruments cannot be used to ‘override clear and valid provisions of Australian national law’.<sup>27</sup> However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia’s international obligations.<sup>28</sup>

### **Bills of rights**

6.34 In other countries, bills of rights or human rights statutes provide some protection from statutory encroachment. Freedom of association is protected in the human rights statutes in the United Kingdom,<sup>29</sup> Canada<sup>30</sup> and New Zealand.<sup>31</sup> For example, the *Human Rights Act 1998* (UK) gives effect to the provisions of the *European Convention on Human Rights*, art 11 of which provides:

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.<sup>32</sup>

6.35 The First Amendment to the *United States Constitution* refers to the ‘right of the people peaceably to assemble, and to petition the Government for a redress of grievances’.<sup>33</sup> Freedom of association in the US is derived primarily from First Amendment freedom of speech.

6.36 Freedom of association is also provided for in the Victorian *Charter of Human Rights and Responsibilities* and the *Human Rights Act 2004* (ACT).<sup>34</sup>

24 See Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) [3.21]–[3.23].

25 See, eg, International Labour Organization, *Freedom of Association and Protection of the Right to Organise Convention*, C87 (entered into force 4 July 1950); International Labour Organization, *Right to Organise and Collective Bargaining Convention*, C98 (entered into force 18 July 1951). See also International Labour Organization, *Declaration on Fundamental Principles and Rights at Work*, 1998.

26 Department of Foreign Affairs and Trade, *The World Trade Organization (WTO) & Free Trade Agreements* <[www.dfat.gov.au/international-relations/international-organisations/wto/pages/the-world-trade-organization-wto-free-trade-agreements](http://www.dfat.gov.au/international-relations/international-organisations/wto/pages/the-world-trade-organization-wto-free-trade-agreements)>.

27 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J).

28 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 2.

29 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 11(1).

30 *Canada Act 1982* (UK) c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 2(d).

31 *New Zealand Bill of Rights Act 1990* (NZ) s 17.

32 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 11(1).

33 *United States Constitution* amend I.

34 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 16(2); *Human Rights Act 2004* (ACT) s 15(2).

## **Justifications for limits on freedom of association and assembly**

6.37 It has long been recognised that laws may be justified in interfering with freedom of association, including to restrict the association of certain classes, groups or organisations of persons who are involved, or likely to be involved, in crime.

6.38 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and ‘demonstrably justified in a free and democratic society’.<sup>35</sup> Similarly, the ICCPR recognises permissible limitations on freedom of association.

6.39 The following section discusses some of the principles and criteria that may be applied to help determine whether a law that interferes with freedom of association is justified, including those under international law.

### **Legitimate objectives**

6.40 The threshold question in a proportionality test is whether the objective of a law is legitimate. Some guidance on what should be considered legitimate objectives of a law that interferes with freedom of association or freedom of assembly may be derived from the common law and international human rights law.

6.41 The common law and international human rights law recognise that freedom of association and freedom of assembly can be restricted in order to pursue legitimate objectives such as the protection of public safety and public order. Some existing restrictions on these freedoms are a corollary of pursuing other important public or social needs, such as the need to counter crime and control traffic.

6.42 Preventing people from ‘getting together to hatch crimes’ has long been considered one justification for restrictions on freedom of association.<sup>36</sup> The High Court has recognised a ‘public interest’ in restricting the activities, or potential activities, of criminal associations and criminal organisations.<sup>37</sup>

6.43 In *South Australia v Totani*,<sup>38</sup> French CJ explained that legislative encroachments on freedom of association are not uncommon where the legislature aimed to prevent crime. He found that the *Serious and Organised Crime (Control) Act 2008* (SA)

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35 *Canadian Charter of Rights and Freedoms* s 1. See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *New Zealand Bill of Rights Act 1990* (NZ) s 5.

36 Professors Campbell and Whitmore wrote, concerning vagrancy laws, that ‘New South Wales in 1835 was still a penal colony and one can understand why at that time it should have been thought necessary to prevent people getting together to hatch crimes’: Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 135. This was quoted in *Tajjour v New South Wales* (2014) 313 ALR 221, [8] (French CJ).

37 *South Australia v Totani* (2010) 242 CLR 1, [92] (Gummow J).

38 In that case, the *Serious and Organised Crime (Control) Act 2008* (SA) s 4 aimed to disrupt and restrict the activities of organisations involved in serious crime and their members and associates and to protect the public from violence associated with such organisations.

does not introduce novel or unique concepts into the law in so far as it is directed to the prevention of criminal conduct by providing for restrictions on the freedom of association of persons connected with organisations which are or have been engaged in serious criminal activity.<sup>39</sup>

6.44 Similarly, in *Tajjour*, the High Court upheld the validity of s 93X of the *Crimes Act 1900* (NSW):

Section 93X is a contemporary version of a consorting law, the policy of which historically has been ‘to inhibit a person from habitually associating with persons ... because the association might expose that individual to temptation or lead to his involvement in criminal activity’. The object of the section is to prevent or impede criminal conduct.<sup>40</sup>

6.45 Limits on freedom of assembly are sometimes said to be necessary for other people to enjoy freedom of association. For example, a noisy protest outside a church interferes with the churchgoers’ freedom of association. Laws that facilitate the freedom of assembly of some may need to inhibit the freedom of assembly of others, for example by giving police certain powers to control or regulate public protests.

6.46 In *Melbourne Corporation v Barry*, Higgins J distinguished between people’s right to ‘freely and at their will to pass and repass without let or hindrance’ from a right to assemble on a public highway. Higgins J said:

A claim on the part of persons so minded to assemble in any numbers, and for so long a time as they please to remain assembled, upon a highway, to the detriment of others having equal rights, is in its nature irreconcilable with the right of free passage, and there is, so far as we have been able to ascertain, no authority whatever in favour of it.<sup>41</sup>

6.47 Freedom of assembly is sometimes limited by laws that regulate protests aimed, for example, at ensuring protests are peaceful and do not disproportionately affect others. Protest organisers may be required to notify police in advance, so that police may prepare, for example by cordoning off public spaces. Police may also be granted extraordinary powers during some special events, such as sporting events and inter-governmental meetings, such as the 2007 APEC meeting in Sydney and the 2013 G20 summit in Brisbane.<sup>42</sup>

6.48 In considering how restrictions may be appropriately justified, one starting point is international human rights law, and the restrictions permitted by the ICCPR. The ICCPR provides that no restrictions may be placed on the rights to freedom of peaceful assembly and of association other than those which are prescribed by law and ‘which

39 *South Australia v Totani* (2010) 242 CLR 1, 36 [44].

40 *Tajjour v New South Wales* (2014) 313 ALR 221, [160] (Gageler J). References omitted. French CJ (in a dissenting judgment) concluded that the net cast by the provision was ‘wide enough to pick up a large range of entirely innocent activity’. The Chief Justice found that the offence was invalid by reason of the imposition of a burden on the implied freedom of political communication, stating that it fails to ‘discriminate between cases in which the purpose of impeding criminal networks may be served, and cases in which patently it is not’: *Ibid* [41], [45].

41 *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206 (Higgins J). Quoting *R v Cunningham Graham and Burns; ex parte Lewis* (1888) 16 Cox 420 (the Trafalgar Square case).

42 See, eg, *G20 (Safety and Security) Act 2013* (Qld); *APEC Meeting (Police Powers) Act 2007* (NSW).

are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others'.<sup>43</sup>

6.49 Many of the laws discussed below pursue these objectives. For example, criminal laws, including counter-terrorism and consorting laws, clearly protect the rights of other people, and public order. Criminal laws, such as counter-terrorism laws or those addressing serious organised crime, are also concerned with the protection of national security and public order.

6.50 In the workplace relations context, additional starting points for considering justifications for restrictions on freedom of association are established under international conventions. Essentially, these provide extra protections for freedom of association in the context of trade unions and workplace relations. Arguably, however, these protections operate in areas that are beyond the scope of the common law or traditional understandings of freedom of association.

6.51 Under art 22.3 of the ICCPR, the permissible reasons for restricting freedom of association are not to be taken to authorise 'legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for' in the ILO *Freedom of Association and Protection of the Right to Organise Convention*.<sup>44</sup>

6.52 Further, art 8 of the ICESCR guarantees the right of everyone to form trade unions and to join the trade union of his or her choice. Limitations on this right are only permissible, similar to the ICCPR, where they are 'prescribed by law' and 'are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others'.<sup>45</sup>

6.53 Article 8 also sets out the rights of trade unions, including the right to function freely subject to no limitations other than those prescribed by law and which are necessary for the purposes set out above, and the right to strike. As with art 22 of the ICCPR, art 8 provides that no limitations on the rights are permissible if they are inconsistent with the rights contained in the ILO *Freedom of Association and Protection of the Right to Organise Convention*.

### **Balancing rights and interests**

6.54 Whether all of the laws identified below as potentially interfering with freedom of association or freedom of assembly, in fact pursue legitimate objectives of sufficient importance to warrant restricting the freedom may be contested. However, even if a

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43 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 21, 22.2; United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984). See Ch 2.

44 International Labour Organization, *Freedom of Association and Protection of the Right to Organise Convention*, C87 (entered into force 4 July 1950).

45 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 8.

law does pursue such an objective, it will also be important to consider whether the law strikes an appropriate balance between these freedoms and other rights and interests.

6.55 A recognised starting point for determining whether an interference with freedom of association or freedom of assembly is justified is the international law concept of proportionality. In arts 21 and 22 of the ICCPR, the phrase ‘necessary in a democratic society’ is seen to incorporate the notion of proportionality.<sup>46</sup>

6.56 In *McCloy v New South Wales*, the High Court expressly adopted a proportionality test to be applied where the purpose of a law and the means adopted to achieve that purpose are legitimate, but the law burdens the implied right of political communication.<sup>47</sup> This test may also be applied to laws that interfere with freedom of association or freedom of assembly, if they are seen as a ‘corollary’ of the constitutional implied right.

6.57 In relation to one element of proportionality—suitability—the UNSW Law Society stated that a requirement for there to be a ‘rational connection’ between the objectives of the law and the need to infringe the right ‘is particularly relevant to Australian association laws, given that the evidence regarding the effectiveness of such legislation is highly disputed amongst scholars’.<sup>48</sup>

## Laws that interfere with freedom of association and assembly

6.58 A wide range of Commonwealth laws may be seen as interfering with freedom of association and freedom of assembly, broadly conceived. Some of these laws impose limits that have long been recognised by the common law, for example, in relation to consorting with criminals and preserving public order. Arguably, such laws do not encroach on the traditional freedom, but help define it. However, these traditional limits are crucial to understanding the scope of the freedom, and possible justifications for new restrictions.

6.59 Commonwealth laws may be characterised as interfering with freedom of association in several different contexts, and including in relation to:

- criminal law;
- public assembly;
- workplace relations;

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46 See, eg, Attorney-General’s Department (Cth), *Right to Freedom of Assembly and Association* <<http://www.ag.gov.au>>; United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984).

47 *McCloy v New South Wales* [2015] HCA 34 (7 October 2015) [3] (French CJ, Kiefel, Bell, Keane JJ). See Ch 2.

48 UNSW Law Society, *Submission 19*. The Society observed that, for example, while association laws ‘have been thought to reduce crime owing to the fact that they prevent communication and planning, there have also been instances where anti-association laws have had the opposite effect as in Canada, where following the introduction of legislation to ban Bikie clubs there was a proliferation in ethnic gangs’.

- migration law; and
- anti-discrimination law.

6.60 These laws are summarised below. Some of the justifications that have been advanced for laws that interfere with freedom of association, and criticisms of laws on that basis, are also discussed.

### **Criminal law**

6.61 A number of offences in the *Criminal Code* directly criminalise certain forms of association. Notably, these include counter-terrorism and foreign incursion offences, and consorting laws which criminalise associating in support of criminal activity or criminal organisations.

#### ***Terrorism offences***

6.62 Section 102.8 of the *Criminal Code* provides for the offence of associating with a member of a terrorist organisation and thereby providing support to the organisation, if the person intends the support to assist it. A terrorist organisation is defined as an organisation that is ‘directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act’<sup>49</sup> or is specified by regulations made under s 102.1 of the *Criminal Code*.<sup>50</sup> The Attorney-General’s Department has issued a protocol that provides guidance on the process for listing organisations for this purpose.<sup>51</sup>

6.63 Section 119.5 of the *Criminal Code* provides for offences of allowing the use of buildings, vessels and aircraft to commit offences, by permitting a meeting or assembly of persons to be held with the intention of supporting preparations for incursions into foreign countries for the purpose of engaging in hostile activities.

6.64 In addition, the terms of counter-terrorism control orders issued under the *Criminal Code* may contain a prohibition or restriction on a person ‘communicating or associating with specified individuals’.<sup>52</sup>

6.65 The Law Council of Australia (Law Council) observed that the associating with terrorist organisations offence ‘may disproportionately shift the focus of criminal liability from a person’s conduct to their membership of an organisation’.<sup>53</sup> It added that assessing justification for the offence is difficult, ‘given the broad executive

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49 *Criminal Code* s 102.1(1).

50 See eg, *Criminal Code (Terrorist Organisation—Al-Qa’ida) Regulation 2013* (Cth). Other specified terrorist organisations include: Al-Qa’ida in the Lands of the Islamic Maghreb; Al-Qa’ida in the Arabian Peninsula; Islamic State; Jabhat al-Nusra; Jamiat ul-Ansar; Jemaah Islamiyah; Abu Sayyaf Group; Al-Murabitun; Ansar al-Islam; Boko Haram; Jaish-e-Mohammad; Lashkar-e Jhangvi.

51 Attorney-General’s Department (Cth) *Protocol—Listing Terrorist Organisations under the Criminal Code*.

52 *Criminal Code* s 104.5(3)(e).

53 Law Council of Australia, *Submission 75*.

discretion to proscribe a particular organisation and the absence of publicly available binding criteria to be applied'.<sup>54</sup>

6.66 Problems with the process of specifying terrorist organisations were said to include that it 'involves the attribution of defining characteristics and commonly shared motives or purposes to a group of people based on the statements or activities of certain individuals within the group'.<sup>55</sup> Further, an organisation can be listed as a terrorist organisation simply on the basis that it 'advocates' the doing of a terrorist act. The Law Council stated:

The offences may also disproportionately impinge on freedom of association as the current process of proscribing terrorist organisations set out in Division 102 does not afford affected parties the opportunity to be heard prior to an organisation being listed or to effectively challenge the listing of an organisation after the fact, without exposing themselves to prosecution; and the avenues for review after an organisation has been listed may also be inadequate.<sup>56</sup>

6.67 The UNSW Law Society also criticised the associating with terrorist organisations offence. It observed that it is important to understand that 'mere association with a terrorist organisation may not be intentional and is not directly linked to the planning and execution of an attack'. It stated that despite the 'legitimacy of the broad aims of counter-terrorism laws in Australia, it is debatable whether targeting individuals by criminalising association with terrorist organisations is effective and appropriate'.<sup>57</sup>

6.68 The Law Council criticised the control orders and preventative detention orders regimes under divs 104 and 105 of the *Criminal Code* because a 'person's right to associate may be removed or restricted before the person is told of the allegations against him or her or afforded the opportunity to challenge the restriction of liberty'.<sup>58</sup>

6.69 The Law Council also submitted that the offence of entering or remaining in a 'declared area' contained in s 119.2 of the *Criminal Code* may have the

unintended effect of preventing and deterring innocent Australians from travelling abroad and associating with persons for legitimate purposes out of fear that they may be prosecuted for an offence, subjected to a trial and not be able to adequately displace the evidential burden.<sup>59</sup>

### ***Consorting offences***

6.70 Courts have long held the power to restrict freedom of association in circumstances where criminal associations may pose a threat to peace and order. In

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54 Ibid.

55 Ibid.

56 Ibid.

57 UNSW Law Society, *Submission 19*.

58 Law Council of Australia, *Submission 75*. See also Human Rights Law Centre, *Submission 39*.

59 Law Council of Australia, *Submission 75*.

*Thomas v Mowbray*, Gleeson CJ referred to counter-terrorism control orders as having similar characteristics to bail and apprehended violence orders.<sup>60</sup>

6.71 The High Court has also recognised that there may be circumstances where the legislature is justified in infringing freedom of association in order to disrupt and restrict the activities of criminal organisations and their members.<sup>61</sup>

6.72 This is an object, the High Court observed, that has been ‘pursued in the long history of laws restricting the freedom of association of certain classes, groups or organisations of persons involved or likely to be involved in the planning and execution of criminal activities’. The object is ‘legitimised by the incidence and sophistication of what is generally called “organised crime”’.<sup>62</sup>

6.73 Consorting laws are not a new phenomenon. In *Tajjour*, French CJ observed that:

Laws directed at inchoate criminality have a long history, dating back to England in the Middle Ages, which is traceable in large part through vagrancy laws. An early example was a statute enacted in 1562 which deemed a person found in the company of gypsies, over the course of a month, to be a felon.<sup>63</sup>

6.74 In Australia, these laws are creatures of statute that first emerged early last century, also in vagrancy legislation:

Their primary object was (and remains) to punish and thereby discourage inchoate criminality, and the means by which they sought to achieve this was the imposition of criminal liability for keeping company with disreputable individuals.<sup>64</sup>

6.75 In relation to modern NSW consorting laws, the High Court has stated that ‘preventing or impeding criminal conduct is compatible with the system of representative and responsible government established by the *Constitution*’.<sup>65</sup>

6.76 Concerns about the impact on freedom of association of state and territory consorting laws<sup>66</sup> were repeatedly mentioned during the Australian Human Rights Commission’s 2014 rights and responsibilities consultation.<sup>67</sup>

6.77 At the Commonwealth level, ss 390.3 and 390.4 of the *Criminal Code* provide for offences of associating in support of serious organised criminal activity and supporting a criminal organisation. Section 390.3 is stated not to apply ‘to the extent (if

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60 *Thomas v Mowbray* (2007) 233 CLR 307, [16]. Quoting Blackstone, who wrote of what he called ‘preventive justice’: William Blackstone, *Commentaries on the Laws of England*, (1769) vol IV, Bk IV, Ch 18, 248.  
61 See, eg, *Wainohu v New South Wales* (2011) 243 CLR 181.  
62 *Ibid* [8] (French CJ and Kiefel J).  
63 *Tajjour v New South Wales* (2014) 313 ALR 221, [7]. See Andrew McLeod, ‘On the Origins of Consorting Laws’ (2013) 37 *Melbourne University Law Review* 103, 113.  
64 McLeod, above n 63, 104.  
65 *Tajjour v New South Wales* (2014) 313 ALR 221, [160] (Gageler J). Referring to *Crimes Act 1900* (NSW) s 93X. Gageler J held that an ‘association’ must involve the ‘temptation of involvement in criminal activity’: *Ibid* [160].  
66 For example, *Crimes Act 1900* (NSW) s 93X; *Vicious Lawless Association Disestablishment Act 2013* (Qld); *Criminal Organisations Control Act 2012* (WA).  
67 Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015) 32.

any) that it would infringe any constitutional doctrine of implied freedom of political communication'.<sup>68</sup>

6.78 Some stakeholders in this ALRC Inquiry questioned the justification for the Commonwealth consorting laws. The Law Council, for example, stated that the offences in div 390

shift the focus of criminal liability from a person's conduct to their associations. Offences of this type have the potential to unduly burden freedom of association for individuals with a familial or community connection to a member of a criminal association.<sup>69</sup>

6.79 The Public Interest Advocacy Centre (PIAC) submitted that Commonwealth consorting legislation should be 'proportionate to the legitimate aim of public safety by inserting sufficient safeguards, such as ensuring the laws can be limited to a targeted group of persons involved in serious criminal activity'.<sup>70</sup> Because any consorting law, 'by its very nature, impinges on a person's right to freedom of association', PIAC stated that it would be 'difficult to draft such legislation so as to comply with international human rights law'.<sup>71</sup>

6.80 However, the Commonwealth offences may constitute a proportionate interference with freedom of association. Legislating for specific criminal offences that target the conduct of members of criminal groups is a common approach internationally to combating serious and organised crime.<sup>72</sup> The Explanatory Memorandum for these offences provided the following example of the type of offence targeted by the provisions:

Person A meets with person B on two or more occasions. Person B is proposing to engage in an illegal operation with four other people involving the import into Australia of commercial quantities of border controlled drugs ... Person A works at the airport through which person B proposes to import the drugs, and knows that Person B proposes to engage in the illegal importation. The purpose of person A's meetings with person B is to provide advice on how person B may circumvent the airport security system as part of the operation. In doing so, person A is reckless as to whether his advice will help person B to engage in the illegal importation.<sup>73</sup>

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68 *Criminal Code* s 390.3(8). Arguably, following the decision of the High Court in *Tajjour*, upholding the constitutional validity of s 93X of the *Crimes Act 1900* (NSW), this qualification is no longer necessary: *Tajjour v New South Wales* (2014) 313 ALR 221.

69 Law Council of Australia, *Submission 75*.

70 Public Interest Advocacy Centre, *Submission 55*.

71 *Ibid*.

72 Definitions used in the criminal organisation offences draw on the *United Nations Convention Against Transnational Organized Crime*: See *United Nations Convention Against Transnational Organized Crime*, opened for signature 12 December 2000, resolution adopted by the General Assembly, 8 January 2001, A/RES/55/25 (entered into force 29 September 2003) art 2(a).

73 Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009 (Cth).

### Public assembly

6.81 Most legislative interferences with the right of public assembly are contained in state and territory laws including, for example, unlawful assembly<sup>74</sup> and public order offences where there is some form of ‘public disturbance’, such as riot, affray or violent disorder.<sup>75</sup> Sometimes, state laws limiting freedom of assembly are enacted for the purposes of specific events, such as those related to APEC and the G20.<sup>76</sup>

6.82 At Commonwealth level, the *Public Order (Protection of Persons and Property) Act 1971* (Cth) regulates the ‘preservation of public order’ in the territories and in respect of Commonwealth premises and certain other places, such as the premises of federal courts and tribunals and diplomatic and special missions.

6.83 Under the Act it is an offence to take part in an assembly in a way that ‘gives rise to a reasonable apprehension that the assembly will be carried on in a manner involving unlawful physical violence to persons or unlawful damage to property’.<sup>77</sup> An assembly consisting of no fewer than twelve persons may be dispersed if it causes police reasonably to apprehend a likelihood of unlawful physical violence or damage to property.<sup>78</sup>

6.84 It may be hard to conceive of an alternative method of prevention in circumstances of imminent danger to public order. In this regard, the Act seems to adopt the standard model in democratic states with respect to when assembly will be unlawful.<sup>79</sup>

### Workplace relations laws

6.85 The *Fair Work Act 2009* (Cth) is intended, in part, to protect freedom of association. An object of the Act is to recognise the right to freedom of association and the right to be represented.<sup>80</sup> Part 3-1 of the Act contains protections for freedom of association and involvement in lawful industrial activities, including protection under

74 For example, in NSW, *Crimes Act 1900* (NSW) s 545C. The requirements for a ‘lawful assembly’ are set out in *Summary Offences Act 1988* (NSW) ss 22–27.

75 For example, in NSW, *Crimes Act 1900* (NSW) s 93B (riot), s 93C (affray); *Summary Offences Act 1988* (NSW) s 11A (violent disorder).

76 *APEC Meeting (Police Powers) Act 2007* (NSW); *G20 (Safety and Security) Act 2013* (Qld).

77 *Public Order (Protection of Persons and Property) Act 1971* (Cth) ss 6(1), 15(1). See also *Parliamentary Precincts Act 1988* (Cth) s 11. This applies the *Public Order (Protection of Persons and Property) Act 1971* (Cth) to the parliamentary precincts in Canberra.

78 *Public Order (Protection of Persons and Property) Act 1971* (Cth) s 8(1).

79 See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 21.

80 *Fair Work Act 2009* (Cth) s 3(e). In *Barclay v The Board of Bendigo*, Gray and Bromberg JJ stated that the objects of the *Fair Work Act* emphasise that ‘recognition of the right to freedom of association and the right to be represented is designed to enable fairness and representation at work’: *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, [14].

s 346 against adverse action being taken because a person is (or is not) a member of an industrial association or has (or has not) engaged in ‘industrial activity’.<sup>81</sup>

6.86 In *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education*, the Federal Court stated that freedom to associate in this context is ‘not simply a freedom to join an association without adverse consequences, but is a freedom to be represented by the association and to participate in its activities’.<sup>82</sup> The freedom to participate in an association’s lawful industrial activities—such as an industrial protest—does not give participants unfettered protection from being dismissed for their conduct during such activities. For example, in *CFMEU v BHP Coal Pty Ltd*, the decision of an employer to dismiss an employee (partly) because of an ‘offensive and abusive’ protest sign was upheld as lawful.<sup>83</sup>

6.87 BHP Billiton observed that regulation of workplace relations involves balancing rights, where ‘exercise of one person’s right will commonly encroach upon the rights of another’. For example, union rights of entry ‘encroach upon the co-existent rights of an occupier to have the quiet enjoyment of property free from trespass and the co-existent rights of an employer to have the benefit of an employment contract without interference’. Similarly, the rights of employees include a ‘right not to be pressed into membership of a union where that is the employee’s preference’.<sup>84</sup>

6.88 The Kingsford Legal Centre stated that, in the workplace, freedom of association protects the right to form and join associations ‘to pursue common goals in the workplace, helping to correct the significant power imbalance between employees and employers’. This principle, it said, ‘has been a long-standing and beneficial feature of Australian labour law’ and, without such protections, the ability of employees to bargain with their employer in their collective interest is greatly reduced.<sup>85</sup>

6.89 The Australian Institute of Employment Rights (AIER) observed that, in the workplace relations context, freedom of association is the ‘base from which other rights flow, in particular the right to collectively bargain and the right to strike’. It argued that the practical application of the right to freedom of association in the workplace is subject to ‘considerable and unjustified encroachment by the laws of the Commonwealth’—in particular, by provisions of the *Fair Work Act*.<sup>86</sup>

81 *Fair Work Act 2009* (Cth) s 346. Part 3-1 of the *Fair Work Act* is also concerned with protecting a freedom not to associate, a concept that is not mandated by ILO labour standards: Creighton and Stewart, above n 24, [20.06].

82 *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, [14].

83 Gageler J stated that the protection afforded by s 346(b) is ‘not protection against adverse action being taken by reason of engaging in an act or omission that has the character of a protected industrial activity’. Rather, Gageler J found that it is ‘protection against adverse action being taken by reason of that act or omission having the character of a protected industrial activity’: *CFMEU v BHP Coal Pty Ltd* (2014) 314 ALR 1, [92].

84 BHP Billiton, *Submission 129*.

85 The Centre submitted that ‘the current protections for freedom of association in the workplace are integral and that any repeal of these legislative protections or the introduction of laws that interfere with these protections would not be justified’: Kingsford Legal Centre, *Submission 21*.

86 Australian Institute of Employment Rights, *Submission 15*.

6.90 The Australian Council of Trade Unions (ACTU) stated that existing provisions of the *Fair Work Act* ‘unjustifiably interfere with the right to freedom of association and should be reconsidered’. These included restrictions on the right to strike, the duration of industrial action and union access to workplaces.<sup>87</sup>

6.91 Arguably, however, while some of these provisions may be seen as inconsistent with international labour law norms<sup>88</sup>—as reflected in ILO conventions—they do not necessarily infringe on the scope of freedom of association, as understood by the common law.

### ***Protected industrial action***

6.92 Protected industrial action is acceptable to support or advance claims during collective bargaining. When an action is ‘protected’, those involved are granted immunity from legal actions that might otherwise be taken against them under any law, including, for example, in tort or contract.<sup>89</sup>

6.93 Industrial action will generally be unlawful if it does not meet the criteria for ‘protected industrial action’, which are set out in the *Fair Work Act*.<sup>90</sup> Each of the criteria for protected action<sup>91</sup> can be interpreted as interfering with freedom to associate for the purposes of taking industrial action.

6.94 The AIER noted criticism of these provisions by the ILO Committee on Freedom of Association,<sup>92</sup> including in relation to: prohibitions on sympathy strikes and general secondary boycotts;<sup>93</sup> removal of protection for industrial action in support of multiple business agreements;<sup>94</sup> and prohibitions in relation to pattern bargaining.<sup>95</sup>

6.95 In particular, restrictions on the right to strike contained in the *Fair Work Act* have been criticised by the ILO Committee of Experts on the Application of Conventions and Recommendations on the basis that industrial action is only protected during the process of bargaining for an agreement.<sup>96</sup> The emphasis within the *Fair Work Act* on enterprise level bargaining can also be seen as an unnecessary

87 Australian Council of Trade Unions, *Submission 44*.

88 For more analysis on how the *Fair Work Act* may be seen as failing to accord with international labour standards on freedom of association, see, eg, Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010) ch 10; Breen Creighton, ‘International Labour Standards and Collective Bargaining under the Fair Work Act 2009’ in Anthony Forsyth and Breen Creighton (eds), *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective* (Routledge, 2014) ch 3.

89 *Fair Work Act 2009* (Cth) s 415. The immunity does not apply to actions likely to involve personal injury, damage to property or the taking of property. Defamation is also excluded. See also Ch 16.

90 *Ibid* ss 408–414.

91 These include the following provisions of the *Fair Work Act*: the definitions of an employee claim action, employee response action and employer response action (ss 409–411); the prohibition on ‘pattern bargaining’ (ss 409–412); the requirement to be genuinely trying to reach an agreement (ss 409–411, 413); the notice requirements in relation to industrial action (ss 409–411, 413, 414); and the requirements for protected action ballots (s 409(2), pt 3–3, div 8).

92 Australian Institute of Employment Rights, *Submission 15*.

93 *Fair Work Act 2009* (Cth) ss 408–411.

94 *Ibid* s 413(2).

95 *Ibid* ss 409(4), 412.

96 Australian Council of Trade Unions, *Submission 44*. The ILO Committee of Experts on the Application of Conventions and Recommendations examines government reports on ratified ILO conventions.

encroachment on the right to collectively bargain.<sup>97</sup> For example, industrial action in support of pattern bargaining by employees is restricted.<sup>98</sup>

6.96 The ACTU also criticised provisions of the *Fair Work Act* concerning the circumstances in which industrial action is authorised by protected action ballots. The Act provides that at least 50% of the employees on the roll of voters must actually vote; and more than 50% of the valid votes must be in favour of taking action.<sup>99</sup> The ILO Committee of Experts has commented that such requirements are ‘excessive and could excessively hinder the possibility of carrying out a strike, particularly in large enterprises’.<sup>100</sup> The ACTU submitted that these ‘restrictions on the right to strike unjustifiably interfere with the right to freedom of association’.<sup>101</sup>

6.97 Finally, the ACTU and the AIER considered that the powers of the Fair Work Commission to suspend or terminate industrial action on various grounds, including economic harm, health and safety, third party damage and cooling off,<sup>102</sup> are cast too broadly and unjustifiably interfere with the right to freedom of association.<sup>103</sup>

6.98 In contrast, BHP Billiton submitted that there is no legitimate criticism of the current legislation regulating industrial action on the basis of freedom of association concerns. It observed that industrial action involves a ‘substantial encroachment on the legal, economic and societal rights of others’ and should not be facilitated by legislation except as reasonable and proportionate. In Australia, the legislative framework is based on a system of regulated enterprise bargaining, and it would not be ‘in any way proportionate or reasonable, to expand industrial action rights beyond what is reasonable and appropriate within an accepted enterprise bargaining framework’.<sup>104</sup>

### ***Right of entry***

6.99 The *Fair Work Act* provides a framework for rights of entry to workplaces for union officials to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions of workplace laws.<sup>105</sup>

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97 Australian Institute of Employment Rights, *Submission 15*. See, eg, *Fair Work Act 2009* (Cth) pt 2–4, ss 3(f), 186(2)(ii), 229(2).

98 This is said to conflict with the principle of free and voluntary collective bargaining embodied in art 4 of the ILO *Right to Organise and Collective Bargaining Convention*: International Labour Organization, *Right to Organise and Collective Bargaining Convention*, C98 (entered into force 18 July 1951).

99 *Fair Work Act 2009* (Cth) s 459(1)(b)–(c). However, the roll of voters may not represent the entire workforce or even every employee that will be covered by the enterprise agreement the subject of bargaining: Australian Industry Group, *Submission 131*.

100 Australian Council of Trade Unions, *Submission 44*.

101 Ibid.

102 *Fair Work Act 2009* (Cth) ss 423–426. See also s 431, which allows for the Minister to terminate industrial action without reference to the parties or to any process: Australian Institute of Employment Rights, *Submission 15*.

103 Australian Council of Trade Unions, *Submission 44*; Australian Institute of Employment Rights, *Submission 15*. The AIG stated that these provisions have been exercised infrequently under the *Fair Work Act*, and predecessor legislation: Australian Industry Group, *Submission 131*.

104 BHP Billiton, *Submission 129*.

105 *Fair Work Act 2009* (Cth) pt 3–4.

6.100 The object of these provisions is to balance the right of unions to represent people and to provide information to employees and the ‘right of occupiers of premises and employers to go about their business without undue inconvenience’.<sup>106</sup> The expressed intention was to

balance the right of employers to go about their business without undue interference; to balance it, though, with the democratic right, the right of employees in a functioning democracy, to be represented in their workplace and to participate in discussions with unions at appropriate times.<sup>107</sup>

6.101 Some limitations on rights of entry may be characterised as interfering with union members’ freedom of association.<sup>108</sup> The relevant legislative limitations include the requirement to hold a valid entry permit, which may only be issued to a ‘fit and proper person’;<sup>109</sup> the required period of notice before entry;<sup>110</sup> and limitations on the circumstances in which an official can gain entry.<sup>111</sup>

6.102 The ILO Committee of Experts found that these provisions breach the *Freedom of Association and Protection of the Right to Organise Convention* because the right of trade union officials to have access to places of work and to communicate with management is a basic activity of trade unions, which should not be subject to interference by the authorities.<sup>112</sup> The ACTU submitted that it is likely that the requirements placed on the right of entry unjustifiably interfere with the right to freedom of association.<sup>113</sup>

6.103 The National Farmers’ Federation criticised div 7 of pt 3–4 of the *Fair Work Act*, concerning arrangements in remote areas. These provisions may compel occupiers of remote premises to enter into arrangements to provide accommodation and transport to persons exercising the right of entry. The Federation submitted that these requirements ‘are extraordinary in the sense that they authorise what would otherwise be the tort of trespass’ and should be repealed.<sup>114</sup>

6.104 The Australian Industry Group (AIG) rejected the idea that limitations on rights of entry interfere with an employee’s right to freely associate with a union. It submitted

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106 Ibid s 480.

107 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2013, 2907–08 (Bill Shorten).

108 At the same time, rights of entry may also be characterised as ‘authorising the commission of a tort’ (ie, the tort of trespass to land), another encroachment on traditional rights, freedoms and privileges referred to in the Terms of Reference.

109 *Fair Work Act 2009* (Cth) ss 512–513. The ACTU stated that the range of issues the Fair Work Commission can consider in determining whether an applicant is ‘fit and proper’ to hold an entry permit is ‘expansive and non-exhaustive’ and includes considerations such as ‘appropriate training’: Australian Council of Trade Unions, *Submission 44*.

110 *Fair Work Act 2009* (Cth) s 487(3).

111 For example, to investigate a suspected contravention of the Act or a fair work instrument, to hold discussions with employees, to investigate an occupational health and safety matter: see Ibid ss 481, 484, 494.

112 See Australian Council of Trade Unions, *Submission 44*.

113 Ibid.

114 National Farmers’ Federation, *Submission 54*.

that ‘reasonable restrictions on the right of an employee representative to enter a workplace are necessary to prevent misuse of entry rights by unions’.<sup>115</sup>

6.105 BHP Billiton stated that it is important to understand rights of entry as substantive rights of the employees, rather than of the union or the union officer. It submitted that ‘there is no legal or other proper principle under which statutory rights of entry for union officials should be expanded or restrictions protecting the encroached rights of others should be lessened’.<sup>116</sup>

6.106 The Productivity Commission, in its 2015 draft report on the workplace relations framework, stated that the provisions of the *Fair Work Act* providing rights of entry by union officials to worksites ‘are broadly sound, though at times both sides play games with each other’.<sup>117</sup>

**Registration of organisations**

6.107 The *Fair Work (Registered Organisations) Act 2009* (Cth) includes requirements for the registration and operation of trade unions and other similar organisations. Registered organisations are required to meet the standards set out in the Act in order to gain the rights and privileges accorded to them under the Act and under the *Fair Work Act*.<sup>118</sup>

6.108 By requiring registration and prescribing rules for employer and employee organisations, the *Fair Work (Registered Organisations) Act* can be interpreted as interfering with freedom of association.<sup>119</sup>

6.109 However, from another perspective, provisions of the *Fair Work (Registered Organisations) Act*, which enhance the financial and accountability obligations of employee and employer organisations, to ensure that the fees paid by members of such organisations are used for the purposes intended, and that the officers of such organisations use their positions for proper purposes, are not inconsistent with freedom of association—because the obligations promote association.

6.110 The ILO Committee of Experts has stated, with regard to the ability of governments to intervene in employee or employer organisations, that legislative provisions which ‘regulate in detail the internal functioning of workers’ and employers’ organizations pose a serious risk of interference which is incompatible with the Convention’.<sup>120</sup>

115 Australian Industry Group, *Submission 131*.

116 BHP Billiton, *Submission 129*.

117 Productivity Commission, *Workplace Relations Framework—Productivity Commission Draft Report* (2015) 42.

118 These standards are intended, among other things, to ensure that employer and employee organisations are representative of and accountable to their members, and are able to operate effectively; and provide for the democratic functioning and control of organisations: *Fair Work (Registered Organisations) Act 2009* (Cth) s 5(3).

119 See, eg, Explanatory Memorandum, *Fair Work (Registered Organisations) Amendment Bill 2012* (Cth).

120 Committee of Experts on the Application of Conventions and Recommendations, ‘General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization, 2008’ (Report, International Labour Conference, 2012) [108].