

## 4. Freedom of Religion

---

### Contents

The common law	97
Definition	98
History	99
Protections from statutory encroachment	101
Australian Constitution	101
Principle of legality	102
International law	103
Bills of rights	103
Laws that interfere with freedom of religion	104
Workplace relations laws	105
Anti-discrimination law	106
Solemnising marriage ceremonies	111
Criminal law and national security legislation	113
Justifications for laws that interfere with freedom of religion	114
Legitimate objectives	117
Proportionality and religious freedom	119
Conclusions	119

### The common law

4.1 Generally speaking, Australians enjoy significant religious freedom, particularly by comparison to other jurisdictions. Australians enjoy the freedom to worship and practise religion, as well as the freedom not to worship or engage in religious practices.

4.2 The common law provides limited protection for freedom of religion.<sup>1</sup> The scope of religious freedom at common law is less clear than other related freedoms, such as freedom of speech.

4.3 This chapter discusses the source and rationale for freedom of religion in Australian law; how this freedom is protected from statutory encroachment; and when laws that interfere with freedom of religion may be justified.

---

<sup>1</sup> Professor Carolyn Evans writes that ‘the common law quite possibly does not protect religious freedom’: Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (2012) 88. To support this statement, Evans pointed to the South Australian case of *Grace Bible Church v Redman* where White J concluded that ‘the common law has never contained a fundamental guarantee of the inalienable right of religious freedom and expression’: *Grace Bible Church v Reedman* (1984) 36 SASR 376, 388.

4.4 However, in *The Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (the *Scientology case*), in defining the meaning of ‘religion’ for taxation purposes, Mason ACJ and Brennan J commented:

Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society.<sup>2</sup>

4.5 In *Evans v New South Wales*, the Federal Court described religious belief and expression as an ‘important freedom generally accepted in society’.<sup>3</sup>

4.6 The freedom to engage in religious expression through observance and worship is at times intertwined with freedom of speech and expression, as well the freedom to associate.<sup>4</sup>

### **Definition**

4.7 The High Court of Australia has enumerated various definitions of ‘religion’. In the *Adelaide Company of Jehovah’s Witnesses Case*, Latham CJ explained that ‘it would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed, in the world’.<sup>5</sup>

4.8 In the *Scientology case*—a case concerned with whether the Church of the New Faith qualified as a religion for the purposes of charitable tax exemptions—Mason ACJ and Brennan J expressed differing views from Wilson and Deane JJ about how religion may be defined.

4.9 Mason ACJ and Brennan J proposed the following definition of religion:

[T]he criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion. Those criteria may vary in comparative importance, and there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion.<sup>6</sup>

4.10 Wilson and Deane JJ proposed the following definition:

One of the most important indicia of ‘a religion’ is that the particular collection of ideas and/or practices involves belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses. If that be absent, it is unlikely that one has ‘a religion’. Another is that the ideas relate to man’s nature and place in the universe and his relation to things supernatural. A third is that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance. A fourth is that, however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable

---

2 *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130.

3 *Evans v New South Wales* 168 FCR 576, [79] (French, Branson and Stone JJ).

4 See Chs 3 and 5.

5 *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 123.

6 *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 136.

groups. A fifth, and perhaps more controversial, indicium ... is that the adherents themselves see the collection of ideas and/or practices as constituting a religion.<sup>7</sup>

4.11 The exercise of religion or ‘canons of conduct’ as described by Mason ACJ and Brennan J is a source of potential conflict between freedom in the exercise of religious beliefs and the exercise by others of other rights and freedoms.

4.12 Broadly speaking, 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>8</sup> This notion of positive rights is captured in the preamble to the *Universal Declaration of Human Rights*, which states that the ‘recognition of the inherent dignity of individuals’ is essential to acknowledging the autonomy of individuals to make decisions about the way they live their lives.<sup>9</sup>

4.13 Negative religious freedom, on the other hand, is freedom from coercion or discrimination on the grounds of religious or non-religious belief.<sup>10</sup> In the *Scientology case*, Mason ACJ and Brennan J commented:

[A] definition of religion ... mark[s] 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>11</sup>

## History

4.14 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>12</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>13</sup>

4.15 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>14</sup>

7 Ibid 173–74.

8 Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press) 128.

9 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948).

10 *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).

11 *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130.

12 The treatment of religious freedom in the common law of Australia developed in a different historical and legal context to that in England. This difference—which includes the fact that Australia never has 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).

13 *Act of Toleration 1689* (1 Will & Mary c 18).

14 *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. See further Anne Twomey, ‘Power to the Princesses: Australia Wraps up Succession Law Changes’ *The Conversation*, 26 March 2015 <<https://theconversation.com/power-to-the-princesses-australia-wraps-up-succession-law-changes-39370>>.

4.16 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>15</sup>

4.17 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>16</sup>

4.18 Thomas Jefferson, writing 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>17</sup>

4.19 Recognition of freedom of religion in the common law developed significantly towards the end of the 19<sup>th</sup> century in England. Issues of religious freedom evolved in the context of wills cases, for instance in cases 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>18</sup> Generally speaking, the law will make void any condition which is in restraint of religion.<sup>19</sup> Also in succession law, the equitable doctrine of undue influence has developed to extend to religious influence. In the English case of *Allcard v Skinner*, the Court of Appeal of England and Wales voided 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

---

15 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.

16 '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] (Lord Nicholls).

17 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.

18 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].

19 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.

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>20</sup>

## Protections from statutory encroachment

### Australian Constitution

4.20 Religious freedom is one of the few freedoms that 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.

4.21 This provision has been read narrowly by the High Court.<sup>21</sup> The provision 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. Indeed, Latham CJ stated that not all infringements of religion will be invalidated by s 116, but rather only those that exert ‘undue infringement[s] of religious freedom’.<sup>22</sup>

4.22 Australian courts have considered s 116 in only a small number of cases. Those cases have concerned the meaning of ‘religion’, the ‘free exercise’ clause and the ‘establishment of a religion’.

4.23 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 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>23</sup>

4.24 Section 116 is purposive in nature, being directed at laws that explicitly establish a religion or prohibit the free exercise of religion. For instance in *Kruger v Commonwealth*, the High Court explained that laws that indirectly prohibit the ‘free exercise’ of religion do not restrict s 116.<sup>24</sup>

20 *Allcard v Skinner* (1887) 36 Ch D 145 183–85. For more on the principle of undue influence, see Croucher and Vines, above n 19, 255; 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.

21 *Attorney-General 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* (OUP, 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.

22 *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 131.

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

24 *Kruger v Commonwealth* (1997) 190 CLR 1.

4.25 Given the limitations of s 116 as a protection of religious freedom,<sup>25</sup> and the limited protection at common law,<sup>26</sup> there is some debate about the extent to which freedom of religion is protected by Australian law.<sup>27</sup>

4.26 The Commonwealth has the power to legislate with regard to ‘external affairs’<sup>28</sup> by way of implementing treaty obligations. Given the protections afforded for religious freedom in the *International Covenant on Civil and Political Rights* (ICCPR)—to which Australia is a party—this may be seen as one way that the Australian legislature can legislate with regard to religion.<sup>29</sup>

4.27 A diverse group of stakeholders noted that there is limited legal protection for religious freedom in Commonwealth law.<sup>30</sup> Several of these stakeholders suggested ways to reform the law to better protect religious freedom.

4.28 The Law Society of NSW Young Lawyers advocated that religion be included as a protected attribute in Commonwealth anti-discrimination legislation.<sup>31</sup>

4.29 The Australian Christian Lobby (ACL) submitted that there should be a ‘clear statement of legislative intent to protect freedom of religion’, modelled on art 18 of the ICCPR.<sup>32</sup> While the ACL did not specify in which act this statement could be introduced, they stated their opposition to a bill of rights.

4.30 The Public Interest Advocacy Centre (PIAC) advocated an amendment to the *Acts Interpretation Act 1901* (Cth) to require that Commonwealth legislation be interpreted in a non-discriminatory way unless it is ‘clearly stated that the government intended for the legislative provision to be discriminatory’.<sup>33</sup> PIAC argued that this would ‘provide general protection for religious belief’.<sup>34</sup>

### **Principle of legality**

4.31 The principle of legality provides some protection to freedom of religion.<sup>35</sup> When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of religion, unless this intention was made unambiguously

---

25 For instance, Wilson J stated that s 116 does ‘not form part of a bill of rights’: *Attorney-General ex rel Black v Commonwealth* (1981) 146 CLR 559, 652.

26 See for instance, *Grace Bible Church v Reedman* (1984) 36 SASR 376, 385 (Zelling J), 389 (Millhouse J).

27 See for instance, Carolyn Evans’s discussion of the limited protection afforded to religious freedom by the common law: Evans, above n 1, 88.

28 Australian Constitution s 51(xxix).

29 Paula Gerber and Melissa Castan, *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters (Professional) Australia, 2013) [19.20].

30 Law Council of Australia, *Submission 75*; Law Society of NSW Young Lawyers, *Submission 69*; Public Interest Advocacy Centre, *Submission 55*; Australian Christian Lobby, *Submission 33*; Freedom 4 Faith, *Submission 23*; Kingsford Legal Centre, *Submission 21*.

31 Law Society of NSW Young Lawyers, *Submission 69*.

32 Australian Christian Lobby, *Submission 33*.

33 Public Interest Advocacy Centre, *Submission 55*.

34 *Ibid.*

35 The principle of statutory interpretation now known as the ‘principle of legality’ is discussed more generally in Ch 1.

clear.<sup>36</sup> McHugh JA in *Canterbury Municipal Council v Moslem Alawy Society* suggested that Australian courts should show restraint in upholding provisions which interfere with religious exercise:

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>37</sup>

### International law

4.32 Article 18 of the *Universal Declaration of Human Rights* enshrines freedom of religion:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.<sup>38</sup>

4.33 The ICCPR provides in art 18(i) that ‘everyone shall have the right to freedom of thought, conscience and religion’.<sup>39</sup>

4.34 The United Nations Human Rights Committee has explained that the infringement of a person’s rights under art 18 will often engage a number of other rights and freedoms protected in the ICCPR, including the right to privacy,<sup>40</sup> the rights to hold opinions and freedom of expression,<sup>41</sup> the right of peaceful assembly,<sup>42</sup> and liberty of movement.<sup>43</sup>

4.35 International instruments cannot be used to ‘override clear and valid provisions of Australian national law’.<sup>44</sup> However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia’s international obligations.<sup>45</sup>

### Bills of rights

4.36 In some countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. Bills of rights and human rights statutes

---

36 *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130 (Mason ACJ, Brennan J).

37 *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) 228–29.

38 *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.

39 *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).

40 *Ibid* art 17.

41 *Ibid* art 19.

42 *Ibid* art 21.

43 *Ibid* art 12.

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

45 *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 1.

protect freedom of religion in the United States,<sup>46</sup> the United Kingdom,<sup>47</sup> Canada<sup>48</sup> and New Zealand.<sup>49</sup> An example is s 15 of the New Zealand *Bill of Rights Act*, 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.<sup>50</sup>

4.37 The *Charter of Human Rights and Responsibilities 2006* (Vic) and the *Human Rights Act 2004* (ACT) also include protection for religious freedom.<sup>51</sup>

## **Laws that interfere with freedom of religion**

4.38 Freedom of religion is infringed when a law prevents individuals from practising their religion or requires them to engage in conduct which is prohibited by their religion.<sup>52</sup> Alternatively, the freedom will also be infringed when a law mandates a particular religious practice.

4.39 There are few Commonwealth laws that can be said to interfere with freedom of religion.<sup>53</sup> The Law Council of Australia advised that it 'has not identified any laws imposing any specific restriction on the freedom of religion' and 'that any specific encroachment is likely to arise in balancing religious freedom with other protected freedoms, such as freedom of speech'.<sup>54</sup>

4.40 Similarly, Freedom 4 Faith stated that 'the laws of the Commonwealth do not particularly encroach upon freedom of religion'.<sup>55</sup>

4.41 Despite the limited number of provisions in Commonwealth law that may be said to interfere with religious freedom, Professor Patrick Parkinson AM stated that there remain important issues to be resolved in Australian law about

the balance to 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>56</sup>

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

- workplace relations laws;

---

46 *United States Constitution* amend I.

47 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 9(1).

48 *Canada Act 1982 c 11 Sch B Pt 1* (*Canadian Charter of Rights and Freedoms*).

49 *New Zealand Bill of Rights Act 1990* (NZ) s 15.

50 *Ibid.*

51 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 14; *Human Rights Act 2004* (ACT) s 14.

52 Radan, Meyerson and Croucher, above n 21, 4.

53 Several stakeholders noted that there are few significant encroachments on religious freedom in Commonwealth laws: Law Council of Australia, *Submission 75*; Public Interest Advocacy Centre, *Submission 55*; Freedom 4 Faith, *Submission 23*; P Parkinson, *Submission 9*.

54 Law Council of Australia, *Submission 75*.

55 Freedom 4 Faith, *Submission 23*.

56 P Parkinson, *Submission 9*.



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

### Workplace relations laws

4.43 The Terms of Reference ask the ALRC to consider laws that interfere with freedom of religion, particularly in workplace relations, commercial and corporate regulation and environmental regulation.

4.44 There are some provisions in workplace relations laws that prohibit employers from discriminating against an employee on the basis of a protected characteristic. This may be characterised as interfering with freedom of religion as it may affect the employment practices of religious organisations that may wish to select staff who conform to the beliefs of that organisation. For instance, in some circumstances, a religious organisation or body may seek to exclude a potential employee where the prospective employee does not adhere to the teachings of that religious organisation.

4.45 In the *Fair Work Act 2009* (Cth) these provisions include the following:<sup>57</sup>

- section 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;
- section 195(1), which lists discriminatory terms in enterprise agreements including those terms that discriminate against an employee on the basis of their religion and other personal characteristics;
- section 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
- section 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).

4.46 These provisions do not appear to be particularly controversial. They have not been raised in recent parliamentary inquiries on anti-discrimination law, or by stakeholders to this Inquiry. The next section outlines an area of anti-discrimination legislation that has raised significant discussion in recent years.

---

<sup>57</sup> Freedom 4 Faith proposed several changes to the *Fair Work Act 2009* (Cth) including imposing a duty on employers to make reasonable adjustment for an employee who has a conscientious objection to the performance of a particular duty: Freedom 4 Faith, *Submission 23*.

### **Anti-discrimination law**

4.47 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. 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>58</sup>

4.48 However, there are a range of exemptions for religious organisations and religious educational institutions 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. The exemptions include the following:

- section 23(3)(b), which provides that accommodation provided by a religious body is exempt from s 23(1) making it unlawful to discriminate against a person on the basis of a protected attribute in the provision of accommodation;
- section 37, which exempts the ordination or appointment of priests, Ministers of religion or members of any religious order and accommodation provided by a religious body from the effect of the SDA; and
- section 38, which exempts educational institutions established for religious purposes from the effect of the SDA 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'.

4.49 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.

### ***Religious organisation exemptions in the SDA***

4.50 One of the most challenging issues in the interaction between religion and law is the accommodation or 'special treatment' of those who observe religious beliefs.<sup>59</sup> In Australia, one way in which this debate has crystallised is about religious organisation exemptions in anti-discrimination legislation.

---

58 *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.

59 Radan, Meyerson and Croucher, above n 21, 5.

4.51 A wide range of stakeholders made submissions on the anti-discrimination provisions and religious organisation exemptions in the SDA.<sup>60</sup> The submissions reflected various views about the existence and form of the religious organisation exemptions in ss 37 and 38.

4.52 Some stakeholders objected to the form of the current exemptions,<sup>61</sup> arguing against the practice of defining religious freedom by way of exceptions to generally applicable laws.<sup>62</sup>

4.53 These exemptions do not interfere with religious freedom—they protect religious freedom. However, some stakeholders argued that the exemptions provide inadequate protection for religious groups. For instance, the ACL argued that ‘religious freedom should not be considered as a concession to more fundamental freedoms from non-discrimination’.<sup>63</sup>

4.54 Parkinson argued:

Faith-based organisations 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. To select on the basis of ‘mission fit’ is not discrimination.<sup>64</sup>

4.55 Freedom 4 Faith wrote that it is ‘inappropriate for anti-discrimination laws to address issues of religious freedom by means of exceptions or exemptions from otherwise applicable laws’.<sup>65</sup>

4.56 Family Voice considered the current exemptions ‘completely inadequate’ and argued that courts and tribunals ‘should not be asked to determine such things as the “doctrines, tenets or beliefs” or the “injury to the religious susceptibilities of adherents” to a religious creed’.<sup>66</sup>

4.57 Some of these stakeholders proposed new models for religious organisation exemptions. The models vary significantly and are outlined below.

4.58 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

---

60 Law Council of Australia, *Submission 75*; FamilyVoice Australia, *Submission 73*; 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*; Australian Christian Schools Ltd, *Submission 45*; Australian Christian Lobby, *Submission 33*; Wilberforce Foundation, *Submission 29*; Church and Nation Committee, Presbyterian Church of Victoria, *Submission 26*; Freedom 4 Faith, *Submission 23*; P Parkinson, *Submission 9*; A Lawrie, *Submission 03*; P Parkinson and G Krayem, *Submission 1*.

61 Maronite Catholic Society Youth *Submission 51*; Australian Christian Lobby, *Submission 33*; Wilberforce Foundation, *Submission 29*; P Parkinson, *Submission 9*.

62 P Parkinson, *Submission 9*. This is discussed in greater detail in the context of freedom of association in Ch 5.

63 Australian Christian Lobby, *Submission 33*.

64 P Parkinson, *Submission 9*.

65 Freedom 4 Faith, *Submission 23*.

66 FamilyVoice Australia, *Submission 73*.

obtainable elsewhere. In its view, a provision of this nature will ensure that the right of religious freedom is on an equal footing with the right of non-discrimination.<sup>67</sup>

4.59 Family Voice 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>68</sup>

4.60 The ACL favoured a general limitations clause as an alternative to the current religious organisation exemptions. In their view, a general limitations clause is favourable to an exemption, as the language of ‘exemptions’ implies an ‘entitlement to discriminate’.<sup>69</sup>

4.61 In a submission to the Attorney-General’s Department’s Inquiry into the consolidation of Commonwealth anti-discrimination laws, Professors Parkinson and Aroney proposed a model that redefines discrimination to include limitations on freedom of religion where ‘necessary’.<sup>70</sup> The proposed definition is comprehensive and combines direct and indirect discrimination. Further, the definition includes a proportionality test. The definition includes 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>71</sup>

4.62 In proposing this model, Parkinson and Aroney aimed to ensure that freedom from discrimination does not diminish freedom of religion. They argued that this

can readily happen, for example, 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>72</sup>

---

67 Wilberforce Foundation, *Submission 29*.

68 FamilyVoice Australia, *Submission 73*.

69 Australian Christian Lobby, *Submission 33*.

70 This approach was supported by Freedom 4 Faith, *Submission 23*.

71 P Parkinson and N Aroney, Submission to Attorney-General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws*, 2011.

72 *Ibid*.

4.63 Other stakeholders opposed the exemptions altogether. Some of these stakeholders argued that the existence of the exemptions represented an inappropriate balance between freedom of religion and the principle of non-discrimination. These groups would argue that the general application of anti-discrimination legislation is a justifiable interference on religious freedom.

4.64 The Law Society of NSW Young Lawyers argued, for example, that the exemptions ‘severely limit the effectiveness of protections against discrimination’.<sup>73</sup> Similarly, the National Association of Community Legal Centres opposed broad ‘permanent exemptions from anti-discrimination law for religious organisations’, arguing that they ‘undermine the effectiveness of anti-discrimination legislation’.<sup>74</sup>

4.65 While PIAC accepted that a religious group may need to discriminate ‘on occasions to ensure ongoing manifestation of the core tenets of its faith’, it also recommended that current religious exemptions be amended to require that religious organisations justify discrimination in the specific circumstances of each proposed act.<sup>75</sup> Further, PIAC recommended that an appropriate government body be given the function to consider claims of discrimination, in order to assess whether discrimination has occurred and to what extent an individual’s right to equality has been infringed.<sup>76</sup>

4.66 Alastair Lawrie argued that the exemptions amount to the Australian Government’s ‘tacit endorsement of discrimination, by religious organisations, against lesbian, gay, bisexual and transgender (LGBT) Australians’.<sup>77</sup>

4.67 The NSW Gay & Lesbian Rights Lobby referred to the academic work of Professor Carolyn Evans and Leilani Ujvari who argued:

The message that such exemptions can give is that discrimination is relatively minor in comparison to other forms of harm against which the law protects and from which most religious schools have no exemptions. Law has a legitimating as well as a regulating function and when religious schools are permitted to avoid discrimination laws, it may serve to legitimate discrimination, conveying to a group of impressionable children that equality is a goal of limited value; something which can be avoided if desired.<sup>78</sup>

4.68 Some stakeholders also asked whether it is appropriate to exempt religious organisations that receive public funding from discrimination legislation. For instance, PIAC argued that where a religious organisation is in receipt of public funding or performing a service on behalf of government, it should not be permitted to discriminate in a way that would otherwise be unlawful.<sup>79</sup>

---

73 Law Society of NSW Young Lawyers, *Submission 69*.

74 National Association of Community Legal Centres, *Submission 66*.

75 Public Interest Advocacy Centre, *Submission 55*.

76 Ibid.

77 A Lawrie, *Submission 03*.

78 Carolyn Evans and Leilani Ujvari, ‘Non-Discrimination Laws and Religious Schools in Australia’ (2009) 30 *Adelaide Law Review* 31, 42.

79 Public Interest Advocacy Centre, *Submission 55*.

4.69 On the other hand, there is an argument that 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>80</sup> Some stakeholders argued that religious observance occurs in all facets of a student's school experience and is not restricted to specific religious ceremonies.<sup>81</sup> Teachers in religious schools may be seen as role models for students in the way they conduct their lives outside of structured classes. Christian Schools Australia Ltd explained that religion is 'not simply taught as a stand-alone subject'. Rather,

it permeates all that takes place and is lived out in the daily lives of the community of the school ... The conduct and character of individuals, and the nature of their relationships with others in the school community, are key concerns in establishing such a Christian learning community. This includes all manner of conduct—the use of appropriate language, the conduct of relationships, attitudes, values and expression of matters of sexuality, and many other aspects of conduct within the community in general.<sup>82</sup>

### ***Previous inquiries***

4.70 There have been several parliamentary and other inquiries into the exemptions in the SDA.

4.71 The Senate Standing Committee on Legal and Constitutional Affairs conducted an Inquiry into the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013. The 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>83</sup> The recommendation was adopted by the Government when enacting the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth). The Hon Mark Butler MP justified this decision 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>84</sup>

4.72 The same Senate Standing Committee Inquiry noted the range of opinions on the existence and operation of the exemptions.<sup>85</sup> The human rights statement of compatibility stated that the Bill was

compatible with human rights because it advances the protection of human rights, particularly the right to equality and non-discrimination. To the extent that it may limit rights, those limitations are reasonable, necessary and proportionate.<sup>86</sup>

---

80 Evans and Ujvari, above n 78, 31.

81 Australian Christian Schools Ltd, *Submission 45*.

82 Ibid.

83 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill* (2013) rec 1.

84 Ibid 13.

85 Ibid [3.9].

86 Explanatory Memorandum, *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* (Cth).

4.73 In 2008, the Senate Standing Committee inquired into the ‘Effectiveness of the *Sex Discrimination Act 1984* (Cth) in Eliminating Discrimination and Gender Inequality’. The 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>87</sup> In making this 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>88</sup>

4.74 The Australian Human Rights Commission’s 2011 report, *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination*, noted a divergence in stakeholder opinions on exemptions for religious organisations, reporting that the majority of the participants who commented on the issue opposed exemptions. Those who opposed the inclusion of such exemptions held a range of positions on the issue, including that there should be:

- no exemptions;
- no exemptions for organisations that receive public funding;
- no blanket exemptions, but that exemptions should be allowed on a case-by-case basis; or
- only narrow exemptions if any exemptions are contained in federal anti-discrimination legislation.<sup>89</sup>

4.75 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—without settling on a preferred model—including discussing the merits of a general limitations clause in the SDA.<sup>90</sup>

### **Solemnising marriage ceremonies**

4.76 It may be argued that the solemnisation provisions in the *Marriage Act 1961* (Cth) (*Marriage Act*) affect freedom of religion.<sup>91</sup> The provisions include the following:

- s 101, which provides that the solemnisation of marriage by an unauthorised person is a criminal offence. To be authorised under s 29, a religious leader must register their status as a marriage celebrant, provided that the denomination is recognised by the Australian Government, and the minister is nominated by their

---

87 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.

88 Ibid [11.64].

89 ‘Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination’ (Consultation report, Australian Human Rights Commission, 2011) 33.

90 ‘Consolidation of Commonwealth Anti-Discrimination Laws’ (Discussion Paper, Attorney-General’s Department, 2011) 37–41. This consolidation process was not carried forward.

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

denomination. This may discriminate against smaller, less well-known religious groups, or break-away groups or sects within established religious traditions; and

- s 113(5), which makes it unlawful to conduct a religious wedding ceremony, unless it occurs after the performance of a legal civil marriage.

4.77 The *Marriage Act* gives direct legal effect to marriages conducted by religious celebrants. In doing so, the Act makes it unlawful to conduct a religious wedding unless it occurs after a civil marriage, and is conducted by an authorised celebrant. In other jurisdictions, such as in Europe, the civil ceremony creates the legal marriage, while the religious ceremony has no legal effect.<sup>92</sup>

4.78 Parkinson and Krayem argue 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 doing so a criminal offence. That is a fetter on religious freedom.<sup>93</sup>

4.79 There are clear policy justifications for regulating marriage, including to ensure that parties who enter into marriage do so as consenting adults, as well as to prevent polygamy and incest, and to maintain government records for family taxation and other regulatory purposes. There may be some religious leaders who are unaware of these offences. Criminal sanctions may be seen as an unjustifiable burden on an important form of religious expression.

4.80 There is little departmental or other material that outlines the justifications for the solemnisation provisions of the *Marriage Act*. The Attorney-General’s Department has released Guidelines for Marriage Celebrants that explain the process for authorisation of a celebrant under the Act.<sup>94</sup> The Explanatory Memorandum for the Marriage Bill 1960 (Cth) does not refer to justifications for the solemnisation provisions.

4.81 Second Reading speeches from the debate in the House of Representatives on the Marriage Bill evidence some concerns about the celebrant system. For example, Richard Cleaver MP pointed to the burden on religious celebrants:

One can sympathise with many ministers of religion who ask, ‘Why should this not be a civil ceremony of necessity, with a certificate supplied by the civil authority to the minister, freeing him from so much of the clerical duty?’ People who desire the blessing of the church on the marriage could have it, and the contract would be completed. ... [I]t is also felt that ministers of religion should be freed as much as possible from the clerical and legal obligations that are laid down in the proposed legislation, for this calls upon them virtually to act as assistants to the registrar. That would enable ministers of religion who perform marriages to give their undivided

---

92 Ibid.

93 Ibid.

94 Australian Government, *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, July 2014.



attention to what is distinctly their duty according to their vocation—the religious guidance and counselling for marriage.<sup>95</sup>

4.82 Parkinson and Krayem proposed that the solemnisation provision in the *Marriage Act* should provide that:

(1) 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, as the case may be.

(2) Nothing in this section makes it unlawful for a person who is not authorised by or under this Act to solemnise marriages, to conduct a religious ceremony of marriage, provided that the parties to the marriage are at least 18 years of age and are informed in writing, or otherwise aware, that the celebrant is not authorised to solemnise marriages under the *Marriage Act 1961*, and that the religious ceremony has no legal effect.

4.83 If this model were adopted, ss 113(5) and 113(7) of the *Marriage Act* could be repealed.

### **Criminal law and national security legislation**

4.84 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 the following:

- s 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;<sup>96</sup>
- s 102.1(2), which provides that an organisation may be prescribed 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>97</sup> and
- s 102.8, which makes it an offence to associate with a proscribed ‘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.<sup>98</sup>

---

95 Commonwealth, *Parliamentary Debates* House of Representatives, Marriage Bill 1960 Second Reading Speech, 18 August 1960 (Richard Cleaver).

96 This provision is discussed in more detail in Ch 3.

97 Gilbert and Tobin Centre of Public Law, *Submission 22*.

98 These last two provisions are discussed in more detail in Ch 5.

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

4.85 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>99</sup> Section 80.2C was introduced into the *Criminal Code* by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).

4.86 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>100</sup>

4.87 The Parliamentary Joint Committee on Human Rights 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:

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>101</sup>

4.88 The Committee concluded that the provision was ‘likely to be incompatible with the human right of opinion and expression’.<sup>102</sup> Its comments are primarily related to restrictions on free speech and so are analysed more thoroughly in Chapter 3.<sup>103</sup>

## **Justifications for laws that interfere with freedom of religion**

4.89 It is generally recognised that freedom of religion is not absolute. Instead, ‘it is subject to powers and restrictions of government essential to the preservation of the community’.<sup>104</sup> Legislatures and the courts will often have to strike a balance between so-called ‘equality’ rights like anti-discrimination, and other freedoms like freedom of religion:

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

---

99 Gilbert and Tobin Centre of Public Law, *Submission 22*.

100 *Ibid*.

101 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].

102 *Ibid* [1.258].

103 The Bill was passed without amendment to this provision. See further, Ch 3.

104 *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 149 (Rich J).

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>105</sup>

4.90 An amicus brief by several legal academics to the US Supreme Court case of *Obergefell v Hodges*,<sup>106</sup> where a majority of that Court upheld the constitutional validity of state-based same-sex marriage legislation, canvassed an argument in favour of balancing different—sometimes competing—rights and interests:

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>107</sup>

4.91 The common law provides some authority for when it may be justified to encroach on religious freedom. In *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*, Williams J stated that the scope of s 116 of the *Australian Constitution* may be limited in the interests of national security.<sup>108</sup>

4.92 Having said this, the common law provides no significant guidance on the limits of religious freedom in Australia. This may in part be due to Australia's model of parliamentary supremacy:

Even suitably beefed up common law protection is incapable of dislodging the principle of state parliamentary sovereignty. 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>109</sup>

4.93 Stakeholders expressed different perspectives on the scope of appropriate justifications for laws that interfere with religious freedom. Some argued that considerations of religious freedom will always involve a balance between other, competing rights and interests. For instance, Kingsford Legal Centre argued that a law which interferes with freedom of religion is justified if that law protects other important freedoms, such as the right to be free from unlawful discrimination.<sup>110</sup>

105 Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 204. Some stakeholders disputed this balancing: see discussion below on non-discrimination.

106 *Obergefell v Hodges* 576 US (June 26, 2015).

107 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)' [2015] *Public Law and Legal Research Paper Series* 1–2.

108 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 161.

109 Denise Meyerson, 'The Protection of Religious Rights under Australian Law' 3 *Brigham Young University Law Review* 529, 542.

110 Kingsford Legal Centre, *Submission 21*.

4.94 Similarly, the Law Society of NSW Young Lawyers wrote that

the right to freedom of religion is a fundamental right, but that right is not absolute, and needs to be finely balanced against competing rights, such as the right to be free from discrimination.<sup>111</sup>

4.95 Other stakeholders argued that freedom of religion should not be usurped by 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>112</sup>

4.96 Similarly, the 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>113</sup>

4.97 Christian Schools Australia Ltd underscored ‘the need to balance rights’, while stressing that religious freedom should not merely be an ‘afterthought’.<sup>114</sup>

4.98 The Church and Nation Committee, Presbyterian Church of Victoria submitted that balancing freedom of religion with principles such as non-discrimination is ‘misguided’, stating that while religious freedom ‘is a fundamental underpinning of our society, freedom from discrimination is not’. They went on to argue that

Freedom from discrimination is not a fundamental human right because it is neither attainable nor universal. Discrimination—that is, to choose something or someone over another—needs to be a lawful part of a free society. To label non-discrimination as a ‘fundamental right’ is inherently misguided.<sup>115</sup>

4.99 Christian Schools Australia Ltd provided the following principles which, in their view, could be applied to test whether laws that interfere with freedom of religion are justified:

- the importance of religious freedom should not be undervalued;
- equity and balance must be sought;
- Christian heritage must be acknowledged and respected;
- minority views must be protected;
- freedom to act on religious belief is essential; and
- the limitations of the law must be recognised.<sup>116</sup>

---

111 Law Society of NSW Young Lawyers, *Submission 69*.

112 Freedom 4 Faith, *Submission 23*.

113 Australian Christian Lobby, *Submission 33*.

114 Australian Christian Schools Ltd, *Submission 45*.

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

116 Australian Christian Schools Ltd, *Submission 45*.

4.100 There is a wide range of justifications advanced by legislatures 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 guardians have refused on religious grounds.<sup>117</sup> Courts have not insisted on life-saving treatment where an adult has made the same decision to refuse life-saving treatment.

4.101 Stakeholders primarily focused on whether laws that interfere with freedom of religion may be justified if they advance the principle of non-discrimination. This issue is examined in more detail below.

### **Legitimate objectives**

4.102 In considering how restrictions on freedom of religion may be appropriately justified, one starting point is the ICCPR. Article 18(3) provides that freedom of religion may be limited where it is ‘necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others’.

4.103 The UN Human Rights Committee has strictly interpreted art 18(3), indicating that general public interest criteria, such as national security concerns, may not be sufficient to justify interferences with religious freedom.<sup>118</sup>

4.104 On the issue of the religious and moral education of children, art 18(4) provides that States Parties must ensure ‘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’.

### **Non-discrimination**

4.105 Non-discrimination is one principle advanced to justify laws that limit freedom of religion. However, the way in which this principle is balanced with the often competing interest of religious freedom, is contested. For instance, stakeholder opinions diverged on the appropriate weight to be afforded to non-discrimination in the application of religious organisation exemptions.

4.106 On the one hand, several stakeholders stressed the importance of safeguarding the right to be free from discrimination when discussing appropriate limitations on religious freedom.<sup>119</sup> Kingsford Legal Centre and PIAC argued, for example, that existing exemptions for religious organisations undermine the Australian

---

117 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 could not refuse life-saving therapeutic treatment on the basis of their religious belief, despite finding that the minor had ‘Gillick’ competency as a mature minor to refuse the treatment.

118 United Nations Human Rights Committee, General Comment No 22 (1993) on Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion, CCPR/C/21/Rev.1 [8].

119 Law Society of NSW Young Lawyers, *Submission 69*; Maronite Catholic Society Youth *Submission 51*; NSW Gay and Lesbian Rights Lobby, *Submission 47*.

Government's commitment to international law that protects vulnerable groups, such as women, from discrimination.<sup>120</sup>

4.107 Some stakeholders drew specific attention to the way that legislative provisions that protect religious freedom may undermine the rights or freedoms of lesbian, gay, bisexual, trans and intersex (LGBTI) Australians (primarily the right to be free from discrimination).<sup>121</sup>

4.108 Other stakeholders 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:

The problem is that freedom and equality are not mutually compatible. Unfortunately, we cannot all be free and completely equal at the same time. Freedom implies an inequality that goes hand-in-hand with difference. We cannot all be equal except in the eyes of the law. As a society we need to work out what we cherish more: freedom or equality.<sup>122</sup>

4.109 There is also an argument advanced by some stakeholders that the practices of religious organisations—such as in the areas of employment—lie outside the 'commons' or public sphere, and should thus be excluded from government intervention.<sup>123</sup> Dr Joel Harrison and Professor Patrick Parkinson 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'.<sup>124</sup> They highlighted voluntary associations, like book clubs, educational, voluntary, charitable, commercial and religious associations, as the kind of groups that exist beyond the 'commons'.

4.110 Freedom 4 Faith also argued that religious organisations operate outside the 'commons', explaining that, like voluntary associations, religious groups should be able to set their own criteria for selecting members.<sup>125</sup>

4.111 International human rights law provides some guidance on the relationship between religious freedom and non-discrimination. Article 4 of the ICCPR provides that some ICCPR rights may be derogated from in times of public emergency, however States Parties must ensure that

such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

---

120 Public Interest Advocacy Centre, *Submission 55*; Kingsford Legal Centre, *Submission 21*.

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

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

123 Freedom 4 Faith, *Submission 23*.

124 Patrick Parkinson and Joel Harrison, 'Freedom beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society' *Monash University Law Review* 39.

125 Freedom 4 Faith, *Submission 23*.

4.112 Anti-discrimination provisions in international human rights law may constitute a permissible limitation on religious freedom. Articles 2, 4, 21 and 26 of the ICCPR provide that the protection of individual's rights must not be 'without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, property birth or other status'.

### **Proportionality and religious freedom**

4.113 Some stakeholders adopted a proportionality approach when assessing appropriate limitations on religious freedom.<sup>126</sup> PIAC recommended that the ALRC adopt a proportionality test when determining whether an infringement of religious freedom is justified. PIAC recommended that limitations are only reasonable where it is necessary and can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.<sup>127</sup>

4.114 Daniel Black also promoted the use of a proportionality approach to reconcile laws that require a balance between freedom of religion and other rights. He was highly critical of the justificatory processes employed by relevant parliamentary committees and government departments, arguing that

an adequate level of analysis isn't always being provided by departments (including the Attorney-General's department) putting forward human rights compatibility statements in a much more broadly considered approach (as per the APS code of conduct). Rather the current approach seems to avoid controversial areas to push through legislation advocated by the government of the day. As such considering statements of human rights compatibility to legislation without considering the responses of the Joint Parliamentary Committee on Human Rights reports and potentially parliamentary submissions is accepting a potentially biased view, especially on controversial topics.<sup>128</sup>

## **Conclusions**

4.115 Generally speaking, Australians are not constrained in the exercise of religious freedom. There are only a few provisions in Commonwealth laws that interfere with religious freedom.

4.116 A diverse range of stakeholders raised concerns about the scope and application of the religious organisation exemptions in ss 37 and 39 of the *Sex Discrimination Act 1984* (Cth). While these provisions do not, on their face, interfere with religious freedom, some stakeholders objected to the form of the exemptions, arguing against the practice of defining religious freedom by way of exceptions to generally applicable laws. Others argued that the exemptions are an unjustifiable encroachment on the principle of non-discrimination. There have been several recent inquiries conducted by the Australian Human Rights Commission and by parliamentary committees into the operation of anti-discrimination legislation.

---

126 Public Interest Advocacy Centre, *Submission 30*; D Black, *Submission 6*.

127 Public Interest Advocacy Centre, *Submission 55*.

128 D Black, *Submission 6*. For further discussion of parliamentary scrutiny mechanisms, see Ch 2.

4.117 The solemnisation provisions for wedding celebrants in the *Marriage Act 1961* (Cth) raise practical concerns about the authorisation of religious celebrants. Review of these provisions may be desirable. The ALRC is interested on further comment on whether and to what extent the solemnisation provisions in the *Marriage Act 1961* (Cth) unjustifiably interfere with freedom of religion.