

6 March 2015

Ms Sabina Wynn  
Executive Director  
Australian Law Reform Commission  
GPO Box 3708  
Sydney NSW 2001

Dear Ms Wynn

**Submission to the Australian Law Reform Commission Freedoms Inquiry:  
Response to IP 46 *Traditional Rights and Freedoms – Encroachments by  
Commonwealth Laws***

Thank you for the opportunity to make a submission in relation to the Australian Law Reform Commission's Inquiry into Traditional Rights and Freedoms.

The submission is made on behalf of the Centre for Comparative Constitutional Studies (CCCS), a research centre of Melbourne Law School.

Please contact me if you have any enquiries about our submission and if I can be of further assistance to the Commission.

Yours sincerely



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## Introduction

The Centre for Comparative Constitutional Studies (CCCS) is a research centre of Melbourne Law School at the University of Melbourne. The Centre undertakes research, teaching and engagement in relation to the Australian constitutional system as well as comparative constitutional law.

We welcome the opportunity to contribute to the ALRC Freedoms Inquiry by making a submission in response to the Issues Paper. Our submission deals only with freedom of speech, and responds to two questions asked in the Issues Paper:

**Question 2-1:** What general principles or criteria should be applied to help determine whether a law that interferes with freedom of speech is justified?

**Question 2-2:** Which Commonwealth Laws unjustifiably interfere with freedom of speech, and why are these laws unjustified?

This submission has been prepared on behalf of CCCS by the Centre Director, Professor Adrienne Stone, with the assistance of Anna Dziedzic and Alexandra Harrison-Ichlov. The research was supported by the Australian Research Council.

## Executive Summary

We submit that the general principles or criteria to be applied in determining whether a law interferes with freedom of speech is justified are as follows:

1. As a general matter the determination should take account of the principle of proportionality which requires examination of:
  - the end pursued by the law;
  - the means used by the law to achieve that end; and
  - the relative importance of the end pursued as balanced against the value of freedom of speech in the context.
2. More specifically, in applying the principles of proportionality, regard should be had to the following:
  - whether the law interfering with freedom of speech is 'content-neutral' or 'content-based';
  - the extent to which the law interferes with freedom of speech including the availability of alternative, less restrictive means; and
  - the nature of the affected speech.

In light of these principles we submit that the Commonwealth laws listed in Appendices 1 and 2 unjustifiably interfere with freedom of speech.

## **1. General principles to determine whether a law that interferes with freedom of speech is justified (Question 2-1)**

### **1.1 *Freedom of Speech as a Legal Principle***

Freedom of speech is a right recognised in international law,<sup>1</sup> in all democratic constitutions<sup>2</sup> (even those few without express protections of rights<sup>3</sup>), and in the common law (through the principle of legality and other doctrines).

In Australia constitutional protection of freedom of speech is conferred by the implied freedom of political communication, which protects political communication necessary for the effective operation of representative and responsible government.<sup>4</sup>

### **1.2 *The Justification for Limits on Speech***

#### **1.2.1 *Proportionality***

In all cases, even where expressed in absolute terms,<sup>5</sup> the right to freedom of speech is recognised to be subject to limitations. Therefore a key task for lawmakers and courts is to determine the extent of permissible limitations on speech. Most commonly, the permissibility of limitations is determined by reference to a test of 'proportionality'.

An instance of a proportionality test is provided by the High Court in the context of the freedom of political communication. The test for applying the freedom of political communication involves two questions:<sup>6</sup>

1. Does the impugned law effectively burden the freedom of political communication either in its terms, operation or effect?
2. If the provision effectively burdens the freedom, is the provision reasonably appropriate and adapted, or proportionate, to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative government?

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<sup>1</sup> Article 19, *International Covenant and Civil and Political Rights*; Article 10, *European Convention on Human Rights*.

<sup>2</sup> For an analysis of the comparative constitutional law of freedom of speech see: Adrienne Stone, 'The Comparative Constitutional Law of Freedom of Expression' (2010) University of Melbourne Legal Studies Research Paper No 476, available at SSRN: <http://ssrn.com/abstract=1633231>.

<sup>3</sup> For example, Australia and Israel. See discussion in Stone, above n 2.

<sup>4</sup> *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520.

<sup>5</sup> Even the right of freedom of speech conferred by the First Amendment to the Constitution of the United States is subject to limitations.

<sup>6</sup> *Tajjour v New South Wales* [2014] HCA 35 (8 October 2014), [32]. This test was first stated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and modified in *Coleman v Power* (2004) 220 CLR 1.

The first of these questions identifies whether a law interferes with (or burdens) freedom of political communication. The second implements 'proportionality' analysis.<sup>7</sup>

Proportionality tests do not themselves determine whether a limitation is permissible. Rather they structure the inquiry by examining three matters, which can be summarised as follows:

1. whether the law imposing a limitation on freedom of speech is directed to a legitimate end;
2. whether the law imposing a limitation on freedom of speech uses an appropriate means to achieve this end; and
3. whether the costs to freedom of speech are proportionate to the end pursued by the law.<sup>8</sup>

### 1.2.2 *Applying Proportionality Analysis: More Specific Criteria*

Proportionality tests require careful attention to the context and facts of every case. We submit that it will be relevant to consider the following:

- A. the purpose of the regulation of speech;
- B. the extent of limitations on speech, the nature of the sanction and the availability of less restrictive means; and
- C. the nature of the affected speech.

#### A. The Purpose of the Regulation of Speech

*General principle:* Proportionality analysis requires that a law interfering with freedom of speech pursue a legitimate end. We submit that the concept of a legitimate end should encompass a wide range of laws and that only exceptionally would a law be considered not to pursue a legitimate end.

*Content-based vs Content-neutral Laws:* In our view it is relevant to consider the purpose of the law with a view to answering a different question, namely whether the law is a content-based law or a content-neutral law.

- *Content-based Law:* A content-based law aims to address harms caused by the *content* of the message conveyed. Defamation laws, hate speech laws, laws regulating obscenity or pornography, and laws directed at sedition are all examples of content-based laws.
- *Content-neutral Law:* A content-neutral law is directed towards some other purpose unrelated to the content of expression. Laws directed to the 'time, place and manner' in which speech occurs such as laws that regulate protest (by requiring that protest be limited to certain places or times),

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<sup>7</sup> On the equivalence of proportionality and 'reasonably appropriate and adapted' see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 n 272.

<sup>8</sup> See Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1.

laws that impose noise controls, or a law that limits the distribution of leaflets directed at preventing litter are all examples of content-neutral laws. They are directed towards preventing a harm that occurs independently of the message conveyed.

We submit that content-based laws should, as a general matter, be considered more difficult to justify than content-neutral laws. Where government aims to suppress a message because of its content there is a danger that it will act to suppress unpopular speech or even to further the government's own interests. An especially egregious form of a content-based law occurs when a law targets a 'viewpoint'. So for instance laws that apply only to protests of a particular kind, rather than protest in general, are especially suspect in this regard.

We do not suggest however that, as in United States law,<sup>9</sup> content-based laws be considered *presumptively invalid*. However, we do submit that the character of a law as content-based is a relevant matter for consideration and that it militates against acceptability.

#### B. The Extent of Limitations on Speech, the Nature of the Sanction and the Availability of Less Restrictive Means

In addition, we submit that it is relevant to consider the extent of limitations on speech and relatedly whether there are less restrictive means available to achieve the object of the law.

As a general matter, the more extensive the limitation on speech, the more significant the justification for that limitation must be. Therefore extensive or 'blanket' bans on speech in a particular context or of a particular kind, will be more difficult to justify than laws that apply in only some circumstances or in some places.

More specifically, a law that could achieve its object through the use of less restrictive means imposes an unacceptable limitation on speech. Therefore while a law directed, for example, to preventing protesters obstructing roads or accessing a building, pursues a legitimate end, it may not be justified if it places restrictions beyond those necessary.

In addition, we submit that a law imposing criminal sanctions should be more difficult to justify than a law imposing non-criminal sanctions. For obvious reasons, the possibility of criminal sanction constitutes an especially strong interference with freedom of speech and so requires greater justification.

#### C. The Nature of the Affected Speech

Another matter that is relevant to the application of the proportionality analysis is the nature of the speech that is infringed. In this regard we suggest the following principles are relevant.

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<sup>9</sup> *RAV v St Paul* 505 US 377(1992).

First, some speech should be regarded as especially valuable.

- Valuable speech takes many forms. Freedom of speech is not limited to political communication, but also protects social, cultural, artistic and other kinds of speech, including satire, and some forms of conduct, including protest. The subject matter of such speech may not be entirely political, and in some cases may be considered unpleasant, obscene, or offensive in nature.
- Nonetheless, speech about the political process is particularly important in a democracy, because it informs debate about political issues and matters in the public interest, and is an essential part of the process by which governments are made accountable to the people.<sup>10</sup> As such, speech about political matters, in various forms, requires a higher level of protection, and laws that operate to interfere with political speech should require special justification.

Secondly, speech may deserve protection even if it causes upset, insult or offense. In particular we note that satirical material, which is often deliberately intended to provoke reactions of shock, unease and outrage, still constitutes a valuable form of expression within the public sphere and ought to be protected.

## **2. Commonwealth laws that unjustifiably interfere with freedom of speech (Question 2-2)**

With these principles in mind and following a review of Commonwealth laws, we submit that the following laws unjustifiably interfere with freedom of speech.

### ***2.1 Criminal offence for offensive letter-writing***

Section 471.12 of the *Criminal Code 1995* (Cth) creates a criminal offence for the use of a postal or similar service in a way that a reasonable person would consider to be menacing, harassing or offensive. The maximum penalty is two years' imprisonment.<sup>11</sup>

#### ***2.1.1 Constitutionality: *Monis v The Queen****

The constitutionality of this provision was recently considered by the High Court in *Monis v The Queen* (2013) 249 CLR 92. The appellants, Monis and Droudis, had written letters to relatives of Australian soldiers killed in Afghanistan and to the relative of an AusAid official killed in Indonesia. The letters expressed opposition to the war in Afghanistan and insulted those who had died. Relevantly, Monis was convicted of twelve offences under s 471.12 for use of a postal service in a way that a reasonable person would, in all the circumstances, regard as being

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<sup>10</sup> As discussed in the Issues Paper, [2.5].

<sup>11</sup> This provision is extracted at Appendix 1.

‘offensive’. Droudis was convicted of aiding and abetting Monis in the commission of those offences.

On appeal to the High Court, Monis and Droudis argued that s 471.12 illegitimately infringed the implied freedom of political communication protected by the Constitution. The six member Court divided equally on the validity of s 471.12 as a result of differing applications of the second limb of the Lange test, concerning whether the impugned law serves a legitimate end that is compatible with the maintenance of the system of representative and responsible government provided for by the Constitution.

Chief Justice French, Hayne and Heydon JJ held that s 471.12 was invalid on the basis that the aim of s 471.12 to prevent offence through a postal or similar service was not a ‘legitimate aim’. Justices Crennan, Kiefel and Bell, however, interpreted s 471.12 to be aimed at preventing a higher degree of offensiveness that would provoke a more heightened emotional or psychological response by a victim. Their Honours held that preventing such harm was a legitimate aim and that the law was reasonably appropriate and adapted to achieving this aim.

As a result of these divergent opinions, the constitutionality of s 471.12 remains undetermined.

#### 2.1.2 *Unjustified interference with freedom of speech*

We consider that s 471.12 in its current form unjustifiably interferes with freedom of speech, and political communication in particular, for the following reasons:

##### A. Application to core political speech

First, the broad scope of the provision means that it can operate to suppress core political speech, for example, letters written to Members of Parliament or about political matters if they are highly offensive.

##### B. Criminal Offense for ‘Offensiveness’

Secondly, the reference to ‘offensiveness’ as a standard by which a Court must determine whether an individual has committed an offence under s 471.12 is not sufficient to justify a law that *criminalises* political speech.

The Court’s interpretation in *Monis* that ‘offence’ in s 471.12 requires a serious level of offensiveness does not prevent the provision operating to prohibit forms of speech that should be protected by the freedom of speech. Some seriously offensive communications, if on core political matters, may be worthy of protection.

The High Court in *Monis* accepted the need to consider the reactions of an objective ‘reasonable person’ when determining whether the use of a postal (or similar) service has been ‘menacing, harassing or offensive’. Nevertheless, French

CJ addressed the shortcomings of this ‘reasonable person’ test, stating that ‘even when applied to a high threshold definition of what is “offensive”, [it] does not prevent the application of the prohibition to communications on government or political matters in a range of circumstances the limits of which are not able to be defined with any precision and which cannot be limited to the outer fringes of political discussion’.<sup>12</sup> Furthermore, Hayne J emphasised that political debate in Australia is often emotional and passionate in nature, and inevitably leads to ‘the giving and taking of offence’.<sup>13</sup> His Honour warned that a provision that purports to regulate the giving and taking of offence may have a detrimental impact on the capacity of the Australian people to fully exercise the rights inherent in the system of representative government protected by the Constitution.

We note the reasons of Crennan, Kiefel and Bell JJ, which highlight the potential for offensive letters to intrude into the home and workplace. We accept that it may be desirable to protect individuals from highly offensive intrusions of this kind. However, this law’s broad application even to core political speech and the standard of offensiveness mean that s 471.12 is an unjustified interference with freedom of speech, and political speech in particular.

We suggest that there are two avenues for reform of this law, which could be pursued individually or together:

- Section 471.12 should include clear exceptions for communication pertaining to matters that are in the public interest in order to protect core political speech.
- Offensiveness should not be used as a criterion of the offence, leaving only ‘menacing’ and ‘harassing’. Alternatively, s 471.12 could specify matters that the court must consider when determining whether the communication was offensive (see, for example, s 473.4 of the *Criminal Code 1995* (Cth)),<sup>14</sup> as discussed by Crennan, Kiefel and Bell JJ in *Monis*<sup>15</sup>).

A comparison with s 18C of the *Racial Discrimination Act 1975* (Cth) is illuminating on this point. Unlike s 471.12, s 18C does not create a criminal offense and, in s 18 D, is subject to a number of broadly defined defences.

## **2.2 Criminal offences for insulting members of various Tribunals and Commissions**

### **2.2.1 Offence for Insulting or Disturbing a Member of a Commission or Tribunal (the ‘Insult’ and ‘Disturb’ Offences)**

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<sup>12</sup> *Monis v The Queen* (2013) 249 CLR 92, [74].

<sup>13</sup> *Ibid*, [220].

<sup>14</sup> This provision is extracted in Appendix 1.

<sup>15</sup> *Monis* (2013) 249 CLR 92, [263].

We have identified nine provisions<sup>16</sup> that regulate the conduct of persons appearing before various Tribunals and Commissions, for the purpose of protecting and upholding the integrity and efficiency of these bodies. While the language of each offence is slightly different, each provision makes it a criminal offence for a person to engage in conduct that insults or disturbs a member of a Commission or Tribunal. These provisions are:

- *Fair Work Act 2009* (Cth), s 674
- *Administrative Appeals Tribunal Act 1975* (Cth), s 63
- *Bankruptcy Act 1966* (Cth), s 264E
- *Copyright Act 1968* (Cth), s 173
- *Defence Act 1903* (Cth), s 89
- *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 119
- *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth), s 61
- *Law Enforcement Integrity Commissioner Act 2006* (Cth), s 94
- *Royal Commissions Act 1902* (Cth), s 60

#### 2.2.2 *Offence to use Words that are False and Defamatory (The 'Defamation Offences')*

Four of these provisions also make it an offence for a person to use words that are false and defamatory of a Commission; or words calculated to bring a Member of a Commission into disrepute. These provisions are:

- *Bankruptcy Act 1966* (Cth), s 264E
- *Fair Work Act 2009* (Cth), s 674
- *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth), s 61
- *Royal Commissions Act 1902* (Cth), s 60

#### 2.2.3 *The 'Defamation Offences': Similarity to Law ruled Unconstitutional*

With respect to the 'Defamation Offences' we note that a similarly framed law was held to be unconstitutional in the case of *Nationwide News v Wills* (1992) 177 CLR 1. In that case, the publisher of *The Australian* was prosecuted under s 299(1)(d)(ii) of the *Industrial Relations Act 1988* (Cth) – an early predecessor of the *Fair Work Act 2009* (Cth) – which made it an offence for a person to use words in writing or speech calculated to bring a member of the Commission or the Commission itself into disrepute. The Court held that this provision was invalid, with four judges deciding that the provision infringed the implied freedom of political communication.

We submit that

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<sup>16</sup> These provisions are extracted in Appendix 2.

- Section 264E(1)(e)(ii) of the *Bankruptcy Act 1966* (Cth) is nearly identical in its terms to the provision held to be invalid in *Nationwide News* and almost certainly unconstitutional.
- The other three identified 'Defamation Offences' use different language and target false and defamatory speech, or statements that are likely to have an adverse effect on public confidence in the Commission. Nevertheless, they adopt – to varying degrees – the general framework of the *Nationwide News* provision. There are serious questions about the constitutionality of these offences.

#### 2.2.4 Both Sets of Offences: Unjustified Interference in Freedom of Speech

In addition, and irrespective of their constitutional status, we submit that all the identified legislative provisions (the 'Defamation Offences' and the 'Insult and Disturb Offences') unjustifiably interfere with freedom of speech. We make this submission having regard to:

- A. the content-based nature of the laws;
- B. their effect on core political speech; and
- C. the availability of less restrictive non-criminal means to achieve the laws' purpose.

##### A. The Content-Based Nature of the Laws

We start by observing that, with the exception of those aimed at preventing disturbances of proceedings in a Tribunal, these laws are largely content-based. They regulate speech because of the harm caused by the communication of a message: namely the damage to reputation of the Tribunal or the Member. As submitted above, a 'content-based' law is harder to justify than a 'content-neutral' law.

##### B. Effect on Core Political Speech

Second, the provisions directly target criticism of public officers engaged in performing public functions. In doing so, they affect core political speech. The right of individuals to criticise executive bodies, including Commissions and Tribunals, was recognised by the High Court in *Nationwide News*. Justices Deane and Toohey stated that integral to the implied freedom of political communication is 'the freedom of the people of the Commonwealth to communicate information, opinions and ideas about all aspects of the government of the Commonwealth including the qualifications, conduct and performance of those entrusted (or who seek to be entrusted) with the exercise of any part of the legislative, executive or judicial powers of the government'.<sup>17</sup> It is detrimental to the system of representative government established by the

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<sup>17</sup> *Nationwide News v Wills* (1992) 177 CLR 1, 74.

Constitution to suppress public opinion about institutions that serve to regulate or affect the lives of individuals in Australian society.<sup>18</sup>

Moreover, as was noted in *Nationwide News*, provisions such as these operate to suppress all criticism that could detrimentally impact on the Commission's reputation, and can therefore attach to criticism that is 'justifiable, fair and reasonable'.<sup>19</sup>

In the case of *R v O'Dea* (1983) FLR 436, O'Dea was charged under s 60(1) of the *Royal Commissions Act 1902* (Cth) for 'wilfully insulting' a Royal Commission established in 1982 to investigate alleged unlawful conduct by the Australian Building Construction Employees' and Builders Labourers' Federation. In giving evidence before the Commission, O'Dea alleged that the establishment of the Commission was a plan devised by the government for the purpose of destabilising unions and oppressing the Australian working class. He chastised the conduct of the Commission, alleging that it constituted a 'smear campaign' and lacked due process. He concluded his statement with the following comment: 'Our union has been one of the most successful of all unions in Australia in fighting for and maintaining conditions for our members. This Royal Commission, with its kangaroo court approach of anything goes, represents yet another attempt to break our resistance.'<sup>20</sup>

Justice Davies of the Federal Court held that O'Dea's claim that the Commission was a 'political device' was an insulting and 'intemperate attack' on the Commission,<sup>21</sup> and constituted an offence pursuant to s 60 of the Act, irrespective of whether or not the statements were truthful.<sup>22</sup> The Court did not engage with O'Dea's argument that his comments focused on the political motives surrounding the Commission's establishment, and thus ought to be protected by freedom of speech. Although the decision in *R v O'Dea* predates the development of the implied freedom of political communication, we think it likely that the speech considered in *O'Dea* would now be protected by the implied freedom.

C. The availability of less restrictive non-criminal means to achieve the laws' purpose

Third, we submit that less restrictive means are available to achieve the ends pursued by these laws. These criminal offences have two identifiable purposes. First, they seek to protect the integrity and reputation of various Commissions and Tribunals. Second, they seek to prevent disruption to proceedings before these Tribunals.

Both these purposes could be pursued through less restrictive, non-criminal means. In particular

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<sup>18</sup> Ibid 53 (Brennan J).

<sup>19</sup> Ibid 39 (Brennan J).

<sup>20</sup> *R v O'Dea* (1983) 72 FLR 436, 443.

<sup>21</sup> Ibid 446-447.

<sup>22</sup> Ibid 444, 446.

- The reputation of individual Commissioners (and through them the various Tribunals and Commissions) could be protected by existing defamation law.
- The proceedings of Tribunals and Commissions might be adequately protected from disturbance through powers to exclude individuals who engage in conduct that insults or disturbs a member or the Tribunal or Commission itself. For instance, s 77(3) of the *Privacy Act 1988* (Cth) grants the Information Commissioner the power to exclude a person from a conference who, *inter alia*, uses insulting language at the conference, creates or takes part in creating or continuing a disturbance at the conference, or who disturbs the conference repeatedly.

For these reasons, we consider that these provisions are too broadly framed and unjustifiably interfere with freedom of speech. The provisions in their current form potentially operate to suppress free discussion and criticism of the performance of a number of Commonwealth Commissions and Tribunals, and place an unjustifiable burden on the freedom of political communication. In our view, these provisions should be repealed.

## APPENDIX 1

### *Criminal Code 1995 (Cth)*

#### **471.12 Using a postal or similar service to menace, harass or cause offence**

A person is guilty of an offence if:

- (a) the person uses a postal or similar service; and
- (b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

Penalty: Imprisonment for 2 years.

### *Criminal Code 1995 (Cth)*

#### **473.4 Determining whether material is offensive**

The matters to be taken into account in deciding for the purposes of this Part whether reasonable persons would regard particular material, or a particular use of a carriage service, as being, in all the circumstances, offensive, include:

- (a) the standards of morality, decency and propriety generally accepted by reasonable adults; and
- (b) the literary, artistic or educational merit (if any) of the material; and
- (c) the general character of the material (including whether it is of a medical, legal or scientific character).

## APPENDIX 2

### *Fair Work Act 2009 (Cth)*

#### **Section 674 Offences in relation to the FWC**

Insulting or disturbing an FWC Member

(1) A person commits an offence if:

- (a) the person engages in conduct; and
- (b) the person's conduct insults or disturbs an FWC Member in the performance of functions, or the exercise of powers, as an FWC Member.

Penalty: Imprisonment for 12 months.

Using insulting language

(2) A person commits an offence if:

- (a) the person uses insulting language towards another person; and
- (b) the person is reckless as to whether the language is insulting; and
- (c) the other person is an FWC Member performing functions, or exercising powers, as an FWC Member.

Penalty: Imprisonment for 12 months.

Interrupting matters before the FWC

(3) A person commits an offence if:

- (a) the person engages in conduct; and
- (b) the person's conduct interrupts a matter before the FWC.

Penalty: Imprisonment for 12 months.

Creating or continuing a disturbance

(4) A person commits an offence if:

- (a) the person engages in conduct; and
- (b) the person's conduct creates, or contributes to creating or continuing, a disturbance; and
- (c) the disturbance is in or near a place where the FWC is dealing with a matter.

Penalty: Imprisonment for 12 months.

Improper influence of FWC Members etc.

(5) A person commits an offence if:

- (a) the person uses words (whether by writing or speech) that are intended to improperly influence another person; and
- (b) the other person is an FWC Member or a person attending before the FWC.

Penalty: Imprisonment for 12 months.

Delegates of the FWC

(6) A reference in subsections (1) to (5) to the FWC or an FWC Member includes a delegate of the FWC.

Adversely affecting public confidence in the FWC

(7) A person commits an offence if:

- (a) the person publishes a statement; and
- (b) the statement implies or states that an FWC Member (whether identified or not) has engaged in misconduct in relation to the performance of functions, or the exercise of powers, as an FWC Member; and
- (c) the FWC Member has not engaged in that misconduct; and
- (d) the publication is likely to have a significant adverse effect on public confidence that the FWC is properly performing its functions and exercising its powers.

Penalty: 12 months imprisonment.

Note 1: Sections 135.1, 135.4, 139.1, 141.1 and 142.1 of the *Criminal Code* create offences of using various dishonest means to influence a Commonwealth public official.

Note 2: Sections 676 and 678 of this Act and sections 36A, 37, 38 and 40 of the *Crimes Act 1914* create offences relating to interference with a witness. Section 39 of that Act makes it an offence to destroy anything that may be required in evidence.

## ***Administrative Appeals Tribunal Act 1975 (Cth)***

### **Section 63 Contempt of Tribunal**

Insulting a member

(1) A person is guilty of an offence if:

- (a) the person engages in conduct; and
- (b) the person's conduct insults a member in, or in relation to, the exercise of his or her powers or functions as a member.

Penalty: 30 penalty units or imprisonment for 6 months, or both.

Interrupting proceedings of the Tribunal

(2) A person is guilty of an offence if:

- (a) the person engages in conduct; and
- (b) the person's conduct interrupts the proceedings of the Tribunal.

Penalty: 30 penalty units or imprisonment for 6 months, or both.

Creating a disturbance

(3) A person is guilty of an offence if:

- (a) the person engages in conduct; and
- (b) the person's conduct creates a disturbance in or near a place where the Tribunal is sitting.

Penalty: 30 penalty units or imprisonment for 6 months, or both.

Taking part in creating or continuing a disturbance

(4) A person is guilty of an offence if:

- (a) the person takes part in creating or continuing a disturbance; and
- (b) the disturbance is in or near a place where the Tribunal is sitting.

Penalty: 30 penalty units or imprisonment for 6 months, or both.

Contempt of Tribunal

(5) A person is guilty of an offence if:

- (a) the person engages in conduct; and
- (b) the person's conduct would, if the Tribunal were a court of record, constitute a contempt of that court.

Penalty: 30 penalty units or imprisonment for 6 months, or both.

### ***Bankruptcy Act 1966 (Cth)***

#### **Section 264E Offences in relation to Registrar or magistrate conducting an examination**

(1) A person shall not:

- (a) insult or disturb a Registrar or magistrate before whom an examination under this Act is being held;
- (b) interrupt an examination under this Act before a Registrar or magistrate;
- (c) create a disturbance, or take part in creating or continuing a disturbance, in or near a place where an examination under this Act is being held before a Registrar or magistrate;
- (d) use insulting or threatening language towards a Registrar or magistrate before whom an examination under this Act is being held; or
- (e) by writing or speech use words calculated:
  - (i) to influence improperly a Registrar or magistrate before whom an examination under this Act is being held; or
  - (ii) to bring a Registrar or magistrate before whom an examination under this Act is being held into disrepute.

Penalty: \$1,000 or imprisonment for 6 months, or both.

(2) For the purposes of an offence against subsection (1), strict liability applies to the following physical elements of circumstance of the offence:

- (a) that the Registrar or magistrate is a Registrar or magistrate before whom an examination under this Act is being held;
- (b) that the examination is an examination under this Act being held before a Registrar or magistrate.

Note: For **strict liability**, see section 6.1 of the *Criminal Code*.

### **Copyright Act 1968 (Cth)**

#### **Section 173 Offences relating to the Tribunal**

##### Insulting a member

(1) A person commits an offence if:

- (a) the person engages in conduct; and
- (b) the person's conduct insults or disturbs a member in the exercise of his or her powers or functions as a member.

Penalty: 30 penalty units or imprisonment for 6 months, or both.

##### Interrupting proceedings of the Tribunal

(2) A person commits an offence if:

- (a) the person engages in conduct; and
- (b) the person's conduct interrupts the proceedings of the Tribunal.

Penalty: 30 penalty units or imprisonment for 6 months, or both.

##### Using insulting language

(3) A person commits an offence if:

- (a) the person uses insulting language towards another person; and
- (b) the other person is a member.

Penalty: 30 penalty units or imprisonment for 6 months, or both.

##### Creating a disturbance

(4) A person commits an offence if:

- (a) the person engages in conduct; and
- (b) the person's conduct creates a disturbance in or near a place where the Tribunal is sitting.

Penalty: 30 penalty units or imprisonment for 6 months, or both.

##### Taking part in creating or continuing a disturbance

(5) A person commits an offence if:

- (a) the person takes part in creating or continuing a disturbance; and
- (b) the disturbance is in or near a place where the Tribunal is sitting.

Penalty: 30 penalty units or imprisonment for 6 months, or both.

##### Contravention of direction limiting publication of evidence

(6) A person commits an offence if:

- (a) the person engages in conduct; and
- (b) the conduct contravenes a direction of the Tribunal under paragraph 163(2)(b).

Penalty: 30 penalty units or imprisonment for 6 months, or both.

#### Contempt of Tribunal

(7) A person commits an offence if:

- (a) the person engages in conduct; and
- (b) the person's conduct would, if the Tribunal were a court of record, constitute a contempt of that court.

Penalty: 30 penalty units or imprisonment for 6 months, or both.

#### Definition of **engage in conduct**

(8) In this section:

**"engage in conduct"** means:

- (a) do an act; or
- (b) omit to perform an act.

#### ***Defence Act 1903 (Cth)***

##### **Section 89 Contempt of service tribunals etc.**

(1) A person shall not:

- (a) insult a member of a court martial, a judge advocate, a Defence Force magistrate or a summary authority in or in relation to the exercise of his or her powers or functions as such a member, judge advocate, magistrate or authority, as the case may be;
- (b) interrupt the proceedings of a service tribunal;
- (c) create a disturbance or take part in creating or continuing a disturbance in or near a place where a service tribunal is sitting; or
- (d) do any other act or thing that would, if a service tribunal were a court of record, constitute a contempt of that court.

Penalty: \$1,000 or imprisonment for 6 months.

(1A) An offence under this section is an offence of strict liability.

Note: For **strict liability**, see section 6.1 of the *Criminal Code*.

(2) In this section, **court martial**, **judge advocate**, **Defence Force magistrate** and **summary authority** have the same respective meanings as they have in the *Defence Force Discipline Act 1982*.

#### ***Environment Protection and Biodiversity Conservation Act 1999 (Cth)***

##### **Section 119 Contempt**

(1) A person is guilty of an offence punishable on conviction by a fine of not more than 30 penalty units if:

- (a) the person insults, disturbs or uses insulting language towards another person; and
- (b) the person knows the other person is a commissioner exercising the powers or performing the functions or duties of a commissioner.

(2) A person is guilty of an offence punishable on conviction by a fine of not more than 30 penalty units if:

- (a) the person creates a disturbance, or takes part in creating or continuing a disturbance, in or near a place; and

(b) the person knows the place is a place where a commission is holding an inquiry.

(3) A person must not:

(a) interrupt an inquiry by a commission; or

(b) do any other act or thing that would, if a commission were a court of record, constitute a contempt of that court.

Penalty: 30 penalty units.

***Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012***  
**(Cth) Section 61     Obstruction of a Commission**

A person commits an offence if the person:

(a) insults or disturbs a Commission; or

(b) interrupts the hearings of a Commission; or

(c) uses any insulting language towards a Commission; or

(d) by writing or speech uses words false and defamatory of a Commission; or

(e) engages in conduct that is intended, or likely, to amount to an improper interference with:

(i) the free exercise by a Commission of its authority or functions; or

(ii) the free performance by a member of the member's duties as

a member.

Penalty: Imprisonment for 6 months.

***Law Enforcement Integrity Commissioner Act 2006 (Cth)***  
**Section 94     Offences--disturbing or interrupting hearings**

(1) A person commits an offence if:

(a) the person insults, disturbs or uses insulting language towards another person; and

(b) the person knows that:

(i) the other person is the Integrity Commissioner; and

(ii) the other person is holding a hearing in the performance of his or her functions, or the exercise of his or her powers, as Integrity Commissioner.

Penalty: Imprisonment for 6 months.

(2) A person commits an offence if:

(a) the person creates a disturbance, or takes part in creating or continuing a disturbance, in or near a place; and

(b) the person knows that the place is a place where a hearing is being held for the purpose of:

(i) investigating a corruption issue; or

(ii) conducting a public inquiry.

Penalty: Imprisonment for 6 months.

(3) A person commits an offence if:

(a) the person interrupts a hearing that is being held for the purpose of:

(i) investigating a corruption issue; or

(ii) conducting a public inquiry; or

(b) the person does any other act or thing that would, if the hearing were held in a court of record, constitute a contempt of that court.

Penalty: Imprisonment for 6 months.

***Royal Commissions Act 1902 (Cth)***

**Section 60 Contempt of Royal Commission**

(1) Any person who intentionally insults or disturbs a Royal Commission, or interrupts the proceedings of a Royal Commission, or uses any insulting language towards a Royal Commission, or by writing or speech uses words false and defamatory of a Royal Commission, or is in any manner guilty of any intentional contempt of a Royal Commission, shall be guilty of an offence.

Penalty: Two hundred dollars, or imprisonment for three months.

(2) If the President or Chair of a Royal Commission or the sole Commissioner is a Justice of the High Court, or a Judge of any other Federal Court, of the Supreme Court of a Territory or of the Supreme Court or County Court or District Court of a State, he or she shall, in relation to any offence against subsection (1) of this section committed in the face of the Commission, have all the powers of a Justice of the High Court sitting in open Court in relation to a contempt committed in face of the Court, except that any punishment inflicted shall not exceed the punishment provided by subsection (1) of this section.