

5. Freedom of Religion

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Summary

5.1 Religious freedom encompasses freedom of conscience and belief, the right to observe or exercise religious beliefs, and freedom from coercion or discrimination on the grounds of religious (or non-religious) belief.

5.2 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.

5.3 Australians enjoy the freedom to worship and observe religion, and the freedom not to be coerced into engaging in religious practices. There are very few, if any, provisions in Commonwealth laws that interfere with religious freedom in these ways. The main areas of tension arise where religious freedom intersects with anti-discrimination laws, which have the potential to limit the exercise of freedom of conscience outside liturgical and worship settings.

5.4 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. These laws, such as the *Sex Discrimination Act 1984* (Cth), are intended to give effect to Australia's international treaty obligations, and other relevant international instruments, and to eliminate various forms of discrimination that have negative social, health, and financial effects for individuals and society.

5.5 Some religious groups or individuals may wish to engage in conduct that may constitute unlawful discrimination against others, on the grounds of sex, sexual orientation, or the marital or relationship status of individuals.

5.6 Some stakeholders have argued for reforms to anti-discrimination laws to ensure that freedom of religion is protected more fully, including through the operation of exemptions from anti-discrimination laws for religious organisations, or 'conscientious objection' provisions. Other stakeholders, by contrast, suggested that the existing exemptions for religious organisations should be narrowed or removed, not widened.

5.7 A broader concern of stakeholders is that freedom of religion may be vulnerable to erosion by anti-discrimination law if religious practice or observance is respected only through exemptions to general prohibitions on discrimination. An alternative approach would involve the enactment of general limitations clauses, under which legislative definitions of discrimination would recognise religious practice or observance as lawful discrimination, where the conduct is a proportionate means of achieving legitimate religious objectives.

The common law

5.8 Arguably, 'the struggle for most of the principal civil liberties we have today originated in the struggle for various aspects of religious liberty'.¹ However, the common law itself has provided little protection for freedom of religion.²

5.9 Australian courts have stated that religious belief is a 'fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity';³ and that freedom of religion is the 'paradigm freedom of conscience' and 'of the essence of a free society'.⁴ In *Evans v New South Wales*, religious belief and expression was described as an 'important freedom generally accepted in society'.⁵

5.10 Freedom of religion has been characterised as a 'composite' freedom—as it derives from freedom of thought and conscience, and its exercise directly involves

1 Jay Newman, *On Religious Freedom* (University of Ottawa Press, 1991) 100.

2 The common law 'quite possibly does not protect religious freedom': Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (2012) 88. See, eg, *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.

3 Supreme Court of Victoria, Court of Appeal: *Christian Youth Camps Limited v Cobaw Community Health Services Limited* (2014) 308 ALR 615, [560] (Redlich JA).

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

5 *Evans v New South Wales* (2008) 168 FCR 576, [79] (French, Branson and Stone JJ).

other freedoms such as freedom of speech and association.⁶ Therefore, the common law may provide indirect protection to the limited extent that it protects against encroachments of other freedoms, without which freedom of religion is not possible.

Definition

5.11 The High Court has propounded various definitions of ‘religion’. In the *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (the *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’.⁷

5.12 In *The Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (the *Scientology* case)—which concerned whether the Church of the New Faith qualified as a religion for the purposes of charitable tax exemptions—judges of the High Court expressed a range of views about how religion may be defined. Mason ACJ and Brennan J proposed the following criteria for the existence of a 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.⁸

5.13 Wilson and Deane JJ set out five indicia:

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 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.⁹

5.14 These definitions are wide enough to apply to most religions, but may raise questions about their application to, for example, Buddhism or indigenous religion or spirituality.¹⁰

6 Newman, above n 1, 99–100.

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

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

9 *Ibid* 173–4.

10 In the *Scientology* case, Mason ACJ and Brennan J stated that the ‘search for religious indicia should not be confined to the Judaic group of religions—Judaism, Christianity, Islam—for the tenets of other acknowledged religions, including those which are not monotheistic or even theistic, are elements in the contemporary atmosphere of ideas’: *Ibid* 133.

Characterising freedom of religion

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

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

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

History

5.18 Any legal protection of religious freedom is a relatively modern phenomenon. British history is punctuated by acts of Parliament that discriminated against some groups on the basis of religion.¹⁴ 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.¹⁵

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

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

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

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

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

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

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

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

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

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

18 'Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilised society individuals respect each other's beliefs. This enables them to live in harmony': *R (Williamson) v Secretary of State for Education and Employment; ex parte Williamson* [2005] 2 AC 246, [15] (Nicholls LJ).

19 Thomas Jefferson, 'Notes on the State of Virginia (1781–2)' in David George Mullan (ed), *Religious Pluralism in the West: An Anthology* (Blackwell, 1989) 219.

20 There are a large number of reported cases on such facts from the late Victorian period: Peter James Hymers (ed), *Halsbury's Laws of England* (Lexis Nexis Butterworths, 4th ed, 2008) vol 50, [379].

21 The common law has a range of public policy rules about the validity of conditional bequests that involve so-called restraint of religion clauses: see, eg, Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013) 550. Religious conditions attached to wills have often been held void for uncertainty: *Re Winzar* (1935) 55 WALR 35; *Clayton v Ramsden* [1943] AC 320.

22 *Allcard v Skinner* (1887) 36 Ch D 145 183–85. For more on the principle of undue influence, see Croucher and Vines, above n 21, 255; Roderick Pitt Meagher, Dyson Heydon and Mark Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 4th ed, 2002) ch 15; Pauline Ridge, 'The Equitable Doctrine of Undue Influence Considered in the Context of Spiritual Influence and Religious Faith: *Allcard v Skinner* Revisited in Australia' (2003) 26 *University of New South Wales Law Journal* 66.

Protections from statutory encroachment

Australian Constitution

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

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

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

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

Establishment clause

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

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

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

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

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

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

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

Commonwealth from passing legislation that purposely created a national church or religion.²⁸

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

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

Free exercise clause

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

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

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

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

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

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

30 Mortensen, above n 28, 174.

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

32 *Ibid.*

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

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

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

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

5.36 However, in *Kruger v Commonwealth*, the High Court confirmed the view that laws that have the effect of indirectly prohibiting the free exercise of religion are not invalidated by s 116.³⁷ That is, s 116 is interpreted as purposive in nature—being directed at laws that explicitly have the prohibited aim, rather than just the indirect effect.³⁸

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

Principle of legality

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

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

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

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

36 Mortensen, above n 28, 173. Referring, in particular, to *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 132 (Latham CJ).

37 See, eg, *Kruger v Commonwealth* (1997) 190 CLR 1, 40 (Brennan CJ), 86 (Toohey J).

38 Gaudron J disagreed with this narrow interpretation and stated that s 116 was 'intended to extend to laws which operate to prevent the free exercise of religion, not merely those which, in terms, ban it': Ibid 130–31.

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

40 *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525, 544 (McHugh JA). See also Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 228–9.

41 Denise Meyerson, 'The Protection of Religious Rights under Australian Law' (2009) 3 *Brigham Young University Law Review* 529, 542.

International law

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

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

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.⁴³

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

5.43 Under art 18.4, the parties to the ICCPR also ‘undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions’.

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

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

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

42 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948) art 18.

43 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18.1.

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

45 *Ibid* [6].

46 *Ibid* [1]. See *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 4.2. Derogations allow states parties to adjust their obligations temporarily under the treaty in exceptional circumstances, for example, in times of public emergency threatening the life of the nation.

47 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17.

48 *Ibid* art 19.

49 *Ibid* art 21.

50 *Ibid* art 12.

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

Bills of rights

5.48 In some countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms, for example in the United States,⁵³ the United Kingdom,⁵⁴ Canada⁵⁵ and New Zealand.⁵⁶ An example is s 15 of the New Zealand *Bill of Rights Act 1990* (NZ), which provides:

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

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

Justifications for limits on freedom of religion

Legitimate objectives

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

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

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

52 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). See Ch 2.

53 *United States Constitution* amend I.

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

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

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

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

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

59 *Ibid* 161.

60 United Nations Human Rights Committee, *General Comment 22 on Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, CCPR/C/21/Rev.1 (30 July 1993) [3].

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

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

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

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

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

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

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

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

63 Australian Human Rights Commission, *Freedom to Believe and the Freedom to Manifest That Belief* <www.humanrights.gov.au>.

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

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

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

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

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

Balancing rights and interests

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

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

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

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

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

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

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

68 See, eg, *X v The Sydney Children’s Hospitals Network* (2013) 85 NSWLR 294. In this case, the New South Wales Supreme Court held that a 17 year old, and his parents, could not refuse life-saving therapeutic treatment on the basis of religious belief, despite the minor having ‘Gillick’ competency.

69 Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 204.

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

71 Douglas Laycock, ‘Brief of Douglas Laycock, Thomas Berg, David Blankenhorn, Marie Failinger and Edward Gaffney as Amicus Curiae in Support of Petitioners in Same-Sex Marriage Cases (*Obergefell v Hodges* Etc)’ (Public Law and Legal Research Paper Series 1–2, 2015) 1–2.

72 Freedom 4 Faith, *Submission 23*. Also Australia/Israel & Jewish Affairs Council, *Submission 100*.

73 Australian Christian Lobby, *Submission 33*. The ACL submitted that, instead, an ‘overly expansive understanding of unjust discrimination has had the related effect of locating fundamental rights below the right to non-discrimination’: Australian Christian Lobby, *Submission 135*.

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

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

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

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

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

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

Laws that interfere with freedom of religion

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

74 Australian Christian Lobby, *Submission 135*.

75 *Ibid.*

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

77 *Ibid.*

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

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

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

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

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

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

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

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

Anti-discrimination law

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

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

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

81 Law Council of Australia, *Submission 75*; Public Interest Advocacy Centre, *Submission 55*; Freedom 4 Faith, *Submission 23*; P Parkinson, *Submission 9*.

82 Australian Christian Lobby, *Submission 135*.

83 Law Council of Australia, *Submission 75*.

84 P Parkinson, *Submission 9*.

85 *Sex Discrimination Act 1984* (Cth) ss 5–7. The *SDA* makes it unlawful to discriminate on those grounds in relation to work and work practices; in the provision of education; in the provision of goods and services; in the provision of accommodation; in the conferral of land or the terms and condition of an offer of land; by refusing membership to a club or in the terms and conditions of membership to a club; in the administration of Commonwealth laws and programs; and in the handling of requests for information: *Ibid* ss 14–27.

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

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

Many parts of antidiscrimination laws represent a direct assault on religious freedom by prohibiting some conduct that may be required to give effect to religious beliefs. Religious beliefs generally make moral distinctions between right and wrong, between good and bad, whereas antidiscrimination laws may declare conduct giving effect to such moral distinctions to be unlawful.⁸⁶

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

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

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

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

86 FamilyVoice Australia, *Submission 122*.

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

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

89 *Ibid* 443.

90 *Ibid* 444.

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

Exemptions for religious organisations

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

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

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

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

Previous inquiries

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

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

⁹¹ Human Rights Law Centre, *Submission 148*.

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

SDA in eliminating discrimination and gender inequality and recommended reform of the exemptions.⁹³

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

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

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

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

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

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

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

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

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

96 Ibid rec 1.

97 Ibid [2.31].

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

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

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

Views on the exemptions

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

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

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

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

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

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

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

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

102 Presbyterian Church of Queensland, *Submission 136*.

103 FamilyVoice Australia, *Submission 73*.

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

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

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

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

5.97 In contrast, the Law Council of Australia submitted that ss 37 and 38 of the *SDA* reflect a reasonable balance between religious freedom and measures promoting non-discrimination.¹¹⁰ Other stakeholders opposed the exemptions for religious organisations entirely, or argue that they should be wound back¹¹¹—considering that the general application of anti-discrimination law is considered to be a justifiable interference with religious freedom.

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

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

105 Ibid 22.

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

107 Australian Christian Lobby, *Submission 135*.

108 Australian Christian Schools Ltd, *Submission 45*.

109 Ibid.

110 Law Council of Australia, *Submission 140*.

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

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

113 Kingsford Legal Centre, *Submission 110*.

harm against which the law protects and from which most religious schools have no exemptions' and that 'equality is a goal of limited value'.¹¹⁴

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

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

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

Exemptions and public funding

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

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

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

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

114 NSW Gay and Lesbian Rights Lobby, *Submission 47*. The submission quoted Carolyn Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia' (2009) 30 *Adelaide Law Review* 31, 42.

115 Victorian Gay and Lesbian Rights Lobby and NSW Gay and Lesbian Rights Lobby, *Submission 120*; A Lawrie, *Submission 112*.

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

117 Public Interest Advocacy Centre, *Submission 55*.

118 Kingsford Legal Centre, *Submission 110*; Public Interest Advocacy Centre, *Submission 55*.

119 Evans and Ujvari, above n 114, 31.

120 Presbyterian Church of Queensland, *Submission 136*.

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

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

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

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

A general limitations clause?

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

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

121 Australian Christian Lobby, *Submission 135*.

122 Ibid.

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

124 Australian Christian Lobby, *Submission 135*.

125 Ibid. Also P Parkinson, *Submission 9*.

126 P Parkinson, *Submission 9*.

127 Australian Christian Lobby, *Submission 135*; Victorian Gay and Lesbian Rights Lobby and NSW Gay and Lesbian Rights Lobby, *Submission 120*.

128 The benefits and disadvantages in adopting a general limitations clause to replace some or all of the current specific exemptions are summarised in: ‘Consolidation of Commonwealth Anti-Discrimination Laws’, above n 98, 37.

129 Australian Christian Lobby, *Submission 135*; Maronite Catholic Society Youth *Submission 51*; Australian Christian Lobby, *Submission 33*; Wilberforce Foundation, *Submission 29*; Freedom 4 Faith, *Submission 23*; P Parkinson, *Submission 9*.

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

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

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

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

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

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

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

131 Australian Christian Lobby, *Submission 33*.

132 Australian Christian Lobby, *Submission 135*.

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

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

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

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

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

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

Conscience clauses

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

5.116 FamilyVoice submitted that ss 37 and 38 of the *SDA* should be replaced with ‘a simple provision for exemption from the Act for persons, natural or corporate, whose conscientious beliefs do not allow them to comply with the Act, or with particular provisions of the Act’.¹⁴⁰

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

Workplace relations laws

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

136 Ibid [11.64].

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

138 Public Interest Advocacy Centre, *Submission 133*.

139 Wilberforce Foundation, *Submission 29*.

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

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

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

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

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

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

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

Conclusion—anti-discrimination laws

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

141 Ibid.

142 Freedom 4 Faith, *Submission 23*.

143 FamilyVoice Australia, *Submission 122*.

144 *Fair Work Act 2009* (Cth) s 351(2)(c).

145 Ibid s 351(2)(a). See JobWatch, *Submission 115*.

146 Australian Human Rights Commission, *Summary: Religious Freedom Roundtable, Sydney, 5 November 2015* (2015).

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

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

Marriage Act

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

155 *Ibid*.

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

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

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

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

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

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

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

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

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

Same-sex marriage

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

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

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

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

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

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

160 See, eg, FamilyVoice Australia, *Submission 122*; Wilberforce Foundation, *Submission 118*; Australian Christian Lobby, *Submission 33*; Freedom 4 Faith, *Submission 23*.

161 Tim Wilson, *Same-Sex Marriage: A Law That Protects the Rights of All Parties* <www.humanrights.gov.au>.

162 *Marriage (Same Sex Couples) Act 2013* (UK) s 2(2).

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

164 A Lawrie, *Submission 112*.

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

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

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

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

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

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

166 Ibid 116.

167 Ibid 118–19.

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

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

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

Counter-terrorism legislation

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

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

Advocating terrorism offence

5.149 The Gilbert and Tobin Centre for Public Law raised concerns about the effect of s 80.2C of the *Criminal Code* on freedom of religion, arguing that it limits the capacity of individuals to express religious views which might be radical and controversial.¹⁷²

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

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

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

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

172 Ibid.

173 Ibid.

such incitement offences may capture a range of speech acts, including 'urging', 'stimulating', 'commanding', 'advising' or 'encouraging' a person to commit an unlawful act.¹⁷⁴

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

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

Conclusion

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

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

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

175 Ibid [1.258].

