4. Freedom of Association

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A common law right

4.1 In practice, Australians are generally free to associate with whomever they like, and to assemble together to participate in a protest or demonstration. However, freedom of association and assembly are less often discussed, and their scope at common law less clear, than related freedoms, such as freedom of speech. Lord Bingham described the approach of the English common law to freedom of assembly as 'hesitant and negative, permitting that which was not prohibited'.[1] In *Duncan v Jones* (1936), Lord Hewart CJ said that 'English law does not recognize any special right of public meeting for political or other purposes'.[2]

4.2 Nevertheless, freedom of association is widely regarded as one of the fundamental rights. This chapter discusses the source and rationale of freedom of association; how this freedom is protected from statutory encroachment; and when laws that encroach on this freedom may be justified.

4.3 The ALRC calls for submissions on two questions about this freedom:

> **Question 4–1** What general principles or criteria should be applied to help determine whether a law that interferes with freedom of association is justified?
>
> **Question 4–2** Which Commonwealth laws unjustifiably interfere with freedom of association, and why are these laws unjustified?

1 *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, 126–127.

2 *Duncan v Jones* [1936] 1 KB 218, 222. This 'reflected the then current orthodoxy': *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, 126–127.

4.4 The 19th century author of *Democracy in America*, Alexis de Tocqueville, considered freedom of association as 'almost as inalienable as the freedom of the individual':

> The freedom most natural to man, after the freedom to act alone, is the freedom to combine his efforts with those of his fellow man and to act in common ... The legislator cannot wish to destroy it without attacking society itself.[3]

4.5 Professor Thomas Emerson wrote in 1964 that freedom of association has 'always been a vital feature of American society':

> In modem times it has assumed even greater importance. More and more the individual, in order to realize his own capacities or to stand up to the institutionalized forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives. His freedom to do so is essential to the democratic way of life.[4]

4.6 Freedom of association is closely related to other fundamental freedoms recognised by the common law, particularly freedom of speech. It has been said to serve the same values as freedom of speech: 'the self-fulfilment of those participating in the meeting or other form of protest, and the dissemination of ideas and opinions essential to the working of an active democracy'.[5]

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

> express their political opinions, engage in literary and artistic pursuits and other cultural, economic and social activities, engage in religious observances or other beliefs, form and join trade unions and cooperatives, and elect leaders to represent their interests and hold them accountable.[6]

4.8 Freedom of assembly and association serve as a vehicle for the exercise of many other civil, cultural, economic, political and social rights.

4.9 Freedom of association provides an important foundation for legislative protection of employment rights. The system for collective, or enterprise bargaining, which informs much of Australia's employment landscape, relies on the freedom of trade unions and other employee groups to form, meet and support their members.[7]

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3 Alexis de Tocqueville, *Democracy in America* (Library of America, 2004) 220. See also Anthony Gray, 'Freedom of Association in the Australian Constitution and the Crime of Consorting' (2013) 32 *University of Tasmania Law Review* 149, 161.

4 Thomas I Emerson, 'Freedom of Association and Freedom of Expression' [1964] *Yale Law Journal* 1, 1.

5 Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 272. ('For many people, participation in public meetings or less formal forms of protest—marches and other demonstrations on the streets, picketing, and sit-ins—is not just the best, but the only effective means of communicating their views. ... Taking part in public protest, particularly if the demonstration itself is covered on television and widely reported, enables people without media access to contribute to public debate': Ibid 269.)

6 UN Human Rights Council, The Rights to Freedom of Peaceful Assembly and of Association, A/HRC/RES/15/21, 15th Session, 06/10/2010.

7 The General Protections provisions of the *Fair Work Act* 2009 (Cth) concern an employee's right to join, or to not join, a union.

Protections from statutory encroachment

The Australian Constitution

4.10 Freedom of association is not expressly protected in the *Australian Constitution*. There is also no free-standing right to association implied in the *Constitution*.[8] Generally, Australian Parliaments may make laws that encroach on freedom of association.

4.11 However, just as there is in the *Constitution* an implied right to 'political communication', arguably there is also an implied right to 'political association'. The High Court has said that 'freedom of association to some degree may be a corollary of the freedom of communication formulated in *Lange v Australian Broadcasting Corporation*'.[9]

4.12 Recognition of this corollary acknowledges the importance of freedom of association to a vibrant democracy. People should be free, generally speaking, to join groups like political parties to lobby for and effect change. Gaudron J in *Australian Capital Television Pty Ltd v The Commonwealth* (1992) said that the

> notion of a free society governed in accordance with the principles of representative democracy may entail freedom of movement [and] freedom of association.[10]

4.13 However, it seems this right to free association is *only* a corollary of the right to political communication. The High Court said in *Wainohu v New South Wales* (2011):

> Any freedom of association implied by the *Constitution* would exist only as a corollary to the implied freedom of political communication and the same test of infringement and validity would apply.[11]

4.14 The effect of this decision, Professors George Williams and David Hume write, 'will be to give freedom of association a limited constitutional vitality'.[12]

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8 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 234 [148] (Gummow and Hayne JJ). ('There is no such 'free-standing' right [as freedom of association] to be implied from the *Constitution*'). See also, *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35 (8 October 2014). See also: *O'Flaherty v City of Sydney Council* [2014] FCAFC 56 [28]; *Unions NSW v State of New South Wales* (2013) 88 ALJR 227.

9 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 234 [148] (Gummow and Hayne JJ). This position has been supported in recent judgements: *O'Flaherty v City of Sydney Council* [2014] FCAFC 56 [28]; *Unions NSW v State of New South Wales* (2013) 88 ALJR 227; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 238 [158] (Gummow & Hayne JJ); *Wainohu v New South Wales* (2011) 243 CLR 181, 230 [112] (Gummow, Hayne, Crennan & Bell JJ).

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

11 *Wainohu v New South Wales* (2011) 243 CLR 181, 230 [112] (Gummow, Hayne, Crennan and Bell JJ with French CJ and Kiefel J agreeing 220 [72], 251 [186] (Heydon J).

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

The principle of legality

4.15 The principle of legality provides some protection to freedom of association.[13] When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of association, unless this intention was made unambiguously clear.[14]

4.16 For example, in *Melbourne Corporation v Barry* (1922), the High Court found that a by-law, made under a power to regulate traffic and processions, could not prohibit traffic and processions. Higgins J said:

> It must be borne in mind that there is this common law right; and that any interference with a common law right cannot be justified except by statute—by express words or necessary implication. If a statute is capable of being interpreted without supposing that it interferes with the common law right, it should be so interpreted. As stated in *Ex parte Lewis*, it is a 'right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance'.[15]

International law

4.17 International law recognises rights to peaceful assembly and to freedom of association. For example, the ICCPR provides for a 'right to freedom of association including the right to form and join trade unions'.[16]

4.18 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[17] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[18]

Bills of rights

4.19 In other countries, bills of rights or human rights statutes provide some protection from statutory encroachment. Freedom of association is protected in the human rights statutes in the United Kingdom,[19] Canada[20] and New Zealand.[21] For example, the *Human Rights Act 1998* (UK) gives effect to the provisions of the European Convention on Human Rights, art 11 of which provides:

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13 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

14 *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206.

15 Ibid quoting *Ex parte Lewis* (1888) 21 QBD, 197.

16 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 21, 22.

17 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).

18 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

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

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

21 *Bill of Rights Act 1990* (NZ) s 17. The protection provided by bills of rights and human rights Act is discussed more generally in Ch 1.

> Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.[22]

4.20 The First Amendment of the US Constitution refers to the 'right of the people peaceably to assemble, and to petition the Government for a redress of grievances'.[23]

4.21 Freedom of association is also provided for in the Victorian Charter of Human Rights and Responsibilities and the *Human Rights Act 2004* (ACT).[24]

Justifications for encroachments

4.22 Preventing people from 'getting together to hatch crimes' has long been considered one justification for restrictions on freedom of association.[25] Chief Justice of the High Court, Robert French, has said that:

> Laws directed at inchoate criminality have a long history, dating back to England in the Middle Ages, which is traceable in large part through vagrancy laws. An early example was a statute enacted in 1562 which deemed a person found in the company of gypsies, over the course of a month, to be a felon.[26]

4.23 The High Court has recognised a 'public interest'[27] in restricting the activities, or potential activities, of criminal associations and criminal organisations.[28] In *South Australia v Totani* (2011),[29] French CJ explained that legislative encroachments on freedom of association are not uncommon where the legislature aimed to prevent crime. The *Serious and Organised Crime (Control) Act 2008* (SA)

> does not introduce novel or unique concepts into the law in so far as it is directed to the prevention of criminal conduct by providing for restrictions on the freedom of

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

23 *United States Constitution* amend I.

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

25 Professors Campbell and Whitmore wrote, concerning vagrancy laws, that 'New South Wales in 1835 was still a penal colony and one can understand why at that time it should have been thought necessary to prevent people getting together to hatch crimes': Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 135. This was quoted in *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35 (8 October 2014) [8] (French CJ).

26 *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35 (8 October 2014). The court was citing Andrew McLeod, 'On the Origins of Consorting Laws' (2013) 37 *Melbourne University Law Review* 103, 113.

27 *South Australia v Totani* (2010) 242 CLR 1, 54 [92] (Gummow J). While Mason CJ recognised that some restrictions on this freedom of communication may be permitted, he went on to say that they 'must be no more than is reasonably necessary to achieve the protection of the competing public interest': *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 143 (Mason CJ).

28 For example, the Immigration Minister has the power to refuse or cancel the visa of a non-citizen where that person does not pass a 'character test' due to an association with a group or organisation who the Minister reasonably suspects has or will be involved in criminal activity: *Migration Act 1958* (Cth) s 501. This particular provision has been construed narrowly: *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414.

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

> association of persons connected with organisations which are or have been engaged in serious criminal activity.[30]

4.24 Similarly, in *Tajjour v State of New South Wales,* the High Court upheld the validity of s 93X of the *Crimes Act 1900* (NSW):

> Section 93X is a contemporary version of a consorting law, the policy of which historically has been 'to inhibit a person from habitually associating with persons ... because the association might expose that individual to temptation or lead to his involvement in criminal activity'. The object of the section is to prevent or impede criminal conduct.[31]

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

4.26 In *Melbourne Corporation v Barry*, Higgins J distinguished between people's right to 'freely and at their will to pass and repass without let or hindrance' from a right to assemble on a public highway. Quoting *Ex parte Lewis* (1888) (the Trafalgar Square Case), Higgins J said:

> A claim on the part of persons so minded to assemble in any numbers, and for so long a time as they please to remain assembled, upon a highway, to the detriment of others having equal rights, is in its nature irreconcilable with the right of free passage, and there is, so far as we have been able to ascertain, no authority whatever in favour of it.[32]

4.27 Similarly, freedom of association is sometimes limited by laws that regulate protests, laws perhaps aimed at ensuring the protests are peaceful and do not disproportionately affect others. Protest organisers might be required to notify police in advance, so that police may prepare, for example by cordoning off public spaces. Police may also be granted extraordinary powers during some special events, such as sporting events and inter-governmental meetings like the G20 or APEC.

4.28 International law and bills of rights include certain general circumstances in which limits on freedom of association may be justified, for example, to:

- protect the rights or freedoms of others;
- protect national security or public safety;

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

31 *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35 (8 October 2014) [160] (Gageler J). References omitted.

32 *R v Cunningham Graham and Burns; ex parte Lewis* [1888] 16 Cox 420. This case was quoted in *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206 (Higgins J).

- prevent public disorder or crime.[33]

4.29 The ICCPR provides that freedom of association may be limited where it is necessary and in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.[34]

4.30 International instruments also provide that the right to join a trade union may be limited as it applies to 'members of the armed forces or of the police or of the administration of the State'.[35]

4.31 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.[36]

4.32 The ALRC invites submissions identifying Commonwealth laws that limit free association without appropriate justification, and explaining why such laws are not justified.

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33 See, *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 11(2). See also, *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 1; *Bill of Rights Act 1990* (NZ) s 5; *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28.

34 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 22(2).

35 Ibid art 8. (Williams and Hume: 'the right to freedom of association is recognised in the ICCPR while the right to form trade unions (which can be seen as a subset of the right to freedom of association) is recognised in the ICESCR': Williams and Hume, above n 12, 4.)

36 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 1. See also, *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.