

THE ETHOS OF PROTECTION FOR FREEDOM OF RELIGION OR BELIEF IN AUSTRALIAN LAW

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This article suggests that an ‘ethos’ of protection for the protection of freedom of religion or belief (‘FoRB’) exists in Australian law. The ethos involves three components. First, an approach to rights protection found in international and Australian domestic law which both recognises the individual right to FoRB, and the need for it to be balanced against the community interest. Second, the content of the right itself, found in constitutional, statutory (Commonwealth, State, and Territory), and common law protections for FoRB. And, third, remedies for the violation of the right, which operate within a wider rights ‘dialogue’ or ‘conversation’ between the three branches of government—legislative, executive, and judicial—in an attempt to balance individual and community interests implicated by FoRB.

I INTRODUCTION

The events surrounding the dismissal of Israel Folau by Rugby Australia for deeply offensive social media posts predicated on claimed religious beliefs,¹ and the Commonwealth government attempts to enact a package of legislative religious freedom protections² raise, yet again, an important reality for Australians: the lack of a constitutionally-entrenched and comprehensive protection for freedom of religion or belief (‘FoRB’).³ Put another way, the

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¹ See Paul Babie and Collette Langos, ‘Social Media, Free Speech, and Religious Freedom’ (2019) 20 *Rutgers Journal of Law and Religion* in press.

² *Religious Discrimination Bill 2019* (Cth), the *Religious Discrimination (Consequential Amendments) Bill 2019* (Cth), and the *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019* (Cth) (collectively, ‘*Religious Freedom Bills*’). See Attorney-General’s Department, Religious Freedom Bills <<https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills.aspx>>. Following extensive public comment on the initial exposure drafts of these bills, the Prime Minister’s Office announced on 30 November 2019 that revised discussion drafts of the *Religious Freedom Bills* would be released before the end of 2019, and introduced in Parliament in 2020: Prime Minister of Australia, ‘Government Will Protect Religious Freedoms by Getting the Law Right’ (30 November 2019) <<https://www.pm.gov.au/media/government-will-protect-religious-freedoms-getting-law-right>>. The second exposure drafts of the proposed legislation were released by the Prime Minister on 10 December 2019: Australian Government, Attorney-General’s Department, ‘Religious Freedom Bills – Second Exposure Drafts’ (10 December 2019) <<https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills-second-exposure-drafts.aspx>>.

³ See Paul Babie and Neville Rochow, ‘Feels Like Déjà Vu: An Australian Bill of Rights and Religious Freedom’ [2010] *BYU Law Review* 821.

current protections for FoRB must be constructed from a number of disparate sources, some constitutional, some legislative—Commonwealth, State, and Territory—and some common law. Some see this ‘piecemeal’ approach to protecting FoRB as a troubling deficiency of Australian law.⁴ But while we may lack a comprehensive, constitutionally-entrenched protection for religious freedom, it is worth remembering that Australian law *does* contain protection for FoRB. It may lack a unitary source of comprehensiveness, it may be piecemeal, but it is there in what I call in this article the ‘ethos’ of protection for FoRB.

The ethos is more akin to the ‘unwritten’ *British Constitution*,⁵ in the sense that it is comprised of two disparate sources: laws properly so-called (constitutional, statute, and common law), and ‘conventions, understandings, habits, or practices [which]...may...be termed...constitutional morality.’⁶ Indeed, it may even be the case that this ethos of protection for FoRB may have a wider ambit than any rigidly defined, written protection, such as a proposed Commonwealth Religious Freedom Act. In other words, rather than being found in any one single document, one finds the ethos in a convergence of sources found in many texts the product of legislative and judicial processes: the *Commonwealth Constitution*, at least one State constitution, Commonwealth, State, and Territory legislation, and in the common law.⁷

Yet, one might ask: why not rely upon a proposed Commonwealth Religious Freedom Act for achieving protection of FoRB? The ethos matters, I suggest, for four reasons, two theoretical, and two pragmatic. The first, theoretical, reason is that recognising FoRB as part of Australian law makes what has been called ‘constitutional space’ for other fundamental freedoms: a

⁴ This deficiency is a reason used to call for a comprehensive bill or charter of rights, either constitutional or legislative. See Babie and Rochow (n 3); Arthur Moses, ‘A flawed bill is no way to protect precious rights’, *Law Council of Australia* (12 December 2019) <<https://www.lawcouncil.asn.au/media/news/opinion-piece--a-flawed-bill-is-no-way-to-protect-precious-rights>>; Gloria Kalache, ‘A lot of wrongs to repair’: Justice Michael Kirby calls for national bill of rights’, *SBS News* (May 29, 2019) <https://www.sbs.com.au/news/a-lot-of-wrongs-to-repair-justice-michael-kirby-calls-for-national-bill-of-rights_2>.

⁵ See AV Dicey, *The Law of the Constitution* (JWF Allison (ed), Oxford University Press, 2013) 20.

⁶ *Ibid.*

⁷ My approach is not unheard of: see Peter Bowal and Dustin Thul, ‘Bills of Rights in Canada’ (January 1, 2013) *Law Now: Relating Law to Life in Canada* <<https://www.lawnow.org/bills-of-rights-in-canada/>>; John Hucker, ‘Antidiscrimination Laws in Canada: Human Rights Commissions and the Search for Equality’ (1997) 19 *Human Rights Quarterly* 547.

constitutionally protected right to FoRB ensures that ‘the conditions...for investigation and pursuit of truth’ are possible, which in turn makes ‘space’ not only for FoRB, but also for competing fundamental rights and freedoms, and for the methods of balancing them when they come into conflict with one another.⁸ Yet making this space for other fundamental freedoms cannot be achieved by a solitary legislative enactment alone. Instead, it requires at the very least some constitutional recognition of FoRB for the making of space to have any purchase. Thus, the ethos will continue to matter for Australians in respect of the protection of fundamental freedoms even if the proposed Commonwealth *Religious Discrimination Act* should become law.

The second theoretical reason for seeing the protection of FoRB in Australian law as an ethos which emerges from the convergence of a number of sources is that doing so reveals an important dimension about the protection of fundamental rights generally, and of FoRB specifically: every right which protects individual conduct must be balanced against the community interest. As with constitutional space, one sees much more clearly the deep importance of the need to balance the individual’s interest in FoRB against the community’s interest in not being subject to detrimental conduct predicated upon religious beliefs when the former interest and right is viewed from a number of perspectives. That is possible when one views FoRB as the product of constitutional, legislative, and common law sources, each providing their own calculus for balancing the individual right against the community interest.

The second theoretical reason for seeing FoRB protection as an ethos serves as important background to the first pragmatic reason for doing so. Australians still, only just, consider that there ought to be protection for FoRB, at least for individuals. The Centre for Independent Studies recently found that while 78% of Australians agreed that respecting religious traditions and beliefs should be an important part of a multicultural society, 52% believe that religion is a divisive rather than a uniting force. The study also found that while 54% believe religious perspectives should be permitted in public debates, even if others find those views offensive, 56% believe that

⁸ This term was coined by Brett G Scharffs, ‘Why Religious Freedom? Why the Religiously Committed, the Religiously Indifferent and Those Hostile to Religion Should Care’ [2017] *Brigham Young University Law Review* 957.

people should not be allowed to ridicule the religious views of others, and 64% do not think organisations should be allowed to refuse to employ someone on religious grounds.⁹ Given this sharp division within Australian society, the second theoretical reason for seeing FoRB as an ethos takes on practical significance. Far from being an all or nothing, winner take all proposition, FoRB must be mediated through a careful balance of the individual and community interests. Failing to do so risks alienating a large segment of the Australian populace, to the detriment of both the individual interest in FoRB and the community interest in ensuring an open, fair, and respectful society.

The second pragmatic reason for seeing FoRB as an ethos in Australian law follows from both the necessity of making constitutional space for other fundamental freedoms and from the reality of a sharply divided Australian community concerning the protection of religious freedom. If the Commonwealth enacts its *Religious Discrimination Act* in 2020, recognising that there is an ethos of protection for FoRB which already exists in Australian law will form the background to the operation of the new Commonwealth law, informing, most importantly, the way in which the individual and community interests are balanced, and adding to the scope of protection for the individual right. In discussing the convergence of similar sources for the protection of fundamental rights and freedoms in Canadian law, Bowal and Thul write:

The merely statutory (i.e. not constitutional) human rights Bills and Acts and the constitutionally-entrenched *Canadian Charter of Rights and Freedoms* share similar origins, purposes and language. It is not surprising, therefore, that they overlap to a considerable extent. Yet, there are still some interesting differences in scope and content. In numerous small ways, the provincial legislation actually reaches farther and is more generous than the Canadian *Charter* in conferring human rights and freedoms.¹⁰

And they add that

A *Human Rights Act* [anti-discrimination legislation], by contrast [to the constitutionally entrenched *Charter of Rights and Freedoms*], generally confers

⁹ Monica Wilkie and Robert Forsyth, *Respect and Division: How Australians View Religion*, Policy Paper No 27 (Culture, Prosperity, & Civil Society: Defending Liberty in Australia; The Centre for Independent Studies, December 2019) 1 <<https://www.cis.org.au/app/uploads/2019/11/pp27-emb.pdf>>.

¹⁰ Bowal and Thul (n 7). And see also Hucker (n 7).

the one major right of equality (or non-discrimination) and extends this particular right completely through to the private sector. This is the most recent and controversial extension of human rights. Therefore, residential landlords, employers, professions and businesses generally must grant equality to all those individuals who would do business with them. Private parties such as businesses have no ability to ensure one has the right to vote in elections and they even cannot guarantee free speech, so their sole legal obligation in human rights is to treat their tenants, employees or customers (as the case may be) with equality. This is monitored by reference to specific 'prohibited grounds of discrimination' such as religion, gender, race, disability, etc.¹¹

What this means is that FoRB need not, indeed, ought not, to be seen as a winner take all game in which all protection flows from one source. Instead, recognising an ethos of protection for FoRB in Australian law means that there is more than one source for its protection, broadening the scope of protection for the individual whose right is infringed, and making possible the recognition of the community's interest to be free from harmful and detrimental conduct predicated upon FoRB.

My goal, then, is to demonstrate that FoRB is already articulated and respected—whether the proposed Commonwealth *Religious Discrimination Act* is enacted or not—by the ethos which I identify in the existing law. Given the uncertainty surrounding the proposed *Religious Discrimination Act*, however, I leave for another day a consideration of how that legislation, if enacted, would fit within this ethos, focussing instead here on what we do know, which is the current state of Australian law. That said, my goal in this article is not a comprehensive review of the available literature surrounding these sources for FoRB protection, especially those that might be found in the *Commonwealth Constitution*; there is a good deal of commentary surrounding the status and operation of the rights scattered throughout that text,¹² and I do not pretend to be dealing with the broad scope of rights protections found there. Instead, because my concern here is simply FoRB, I limit my assessment to s 116 and the way in which that provision might once have been viewed, and how it is viewed today. My analysis is neither historical, nor detailed. Rather, it is simply intended to demonstrate that s

¹¹ Bowal and Thul (n 7).

¹² See, eg, Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27 *Sydney Law Review* 29.

116 might still, notwithstanding its restrictive modern interpretation, provide a source of protection for FoRB in contemporary Australia.¹³ Until such time as we *do* have comprehensive constitutional protection not only for FoRB, but also for all fundamental rights—and we *do* need such comprehensive protection—the approach I advocate here must serve as a ‘placeholder’ for the protection of FoRB in Australian law.

The article contains four parts. Part II examines an approach to rights protection found in international and Australian domestic law which both recognises the individual right to FoRB, and the need to balance that interest against the community interest. Part III considers the content of the right itself as already protected by Australian law. This is found in constitutional, statutory (Commonwealth, State, and Territory), and common law protections for FoRB. Part IV briefly examines the place of remedies within the wider rights ‘dialogue’ or ‘conversation’ between the three branches of government—legislative, executive, and judicial—in the attempt to balance individual and community interests around FoRB. Part V offers brief concluding reflections.

II BALANCE

A *Individual*

Two powerful sources of law provide the background or context to the ethos of protection for FoRB in Australian law: international law and the *Commonwealth Constitution*. The former might seem an unexpected source for guidance; it is well known that no part of the ‘International Bill of Rights’¹⁴—those human rights instruments that protect the fundamental

¹³ On the potential of s 116, and the approach I take to it, see Richard Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth 1891-1906* (Melbourne University Press, 1976); Luke Beck, *Religious Freedom and the Australian Constitution: Origins and Future* (Routledge, 2018); Renae Barker, *State and Religion: The Australian Story* (Routledge, 2018).

¹⁴ Australian Human Rights Commission, *Human Rights Explained: Fact sheet 5: The International Bill of Rights* <<https://www.humanrights.gov.au/our-work/education/human-rights-explained-fact-sheet-5-the-international-bill-rights>>. The International Bill of Rights is comprised of five instruments: the International Bill of Rights are the *Universal Declaration of Human Rights*, adopted 10 December 1948, U.N.G.A. Res. 217 A (III), the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976), the *International Covenant on Economic, Social and Cultural Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI), 16 December 1966 (entered into force 3 January 1976) art. 27, the *Optional Protocol to the International Covenant on Civil and Political Rights*,

freedoms of all humans—form part of Australian domestic law. Yet, Australian law sometimes ‘borrows’ components of international law as part of the background to understanding those rights which might be protected, and how they might be balanced against community interests, in domestic law.¹⁵ Such borrowings include the context which surrounds the ethos of protection for FoRB.

Two international human rights instruments contain the specific protection for FoRB:¹⁶ the *Universal Declaration of Human Rights* (1948) (*UDHR*); and the *International Covenant on Civil and Political Rights* (1966) (*ICCPR*). The *UDHR*, Article 18, provides:

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

And the *ICCPR*, Article 18 reads:

1. 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.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

These provisions must be ‘borrowed’, though, because they are not binding domestic Australian law. Because it is not a treaty, the *UDHR* does not create domestic legal obligations; and, while ratified, the *ICCPR* has yet to be adopted in Australian domestic law (a schedule to the *Australian Human Rights Commission Act 1986* (Cth), however, establishes the Australian Human Rights Commission as an Australian monitor of

opened for signature 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) art. 1, the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, opened for signature 24 September 2009 (entered into force 5 May 2013) (“ICESCR”) art. 2.

¹⁵ Jemimah Roberts, ‘Constitutional ‘borrowing’ and freedom of expression: Can Australia learn from the US First Amendment?’ (2019) 44 *Alternative Law Journal* 56.

¹⁶ William Shrubbs, ‘40 years of the ICCPR’, *Rule of Law* (23 March 2016) <<https://www.ruleoflaw.org.au/40-years-iccpr/>>.

compliance), and findings of the United Nations Human Rights Committee remain unenforceable in Australian law.¹⁷

Why, then, do the *UDHR* and the *ICCPR* matter for FoRB in Australia? Simply, because, these instruments serve to uphold and improve the rule of law, especially human rights, in Australia. Or, put another way, this ethos of protection, which is an important part of the context for FoRB, allows Australian law some scope for creativity with those rights that can be found in domestic law: ‘the ultimate question is whether judges and other lawyers, trained until now to think strictly in jurisdictional terms, can adapt their minds to a new way of thinking that is harmonious to the realities of the world about them.’¹⁸ This works in combination with the context of rights protection found in the *Commonwealth Constitution*.

Looking back over the course of Australia’s federal history, it was not always true that the express rights found in the *Commonwealth Constitution*¹⁹ were treated merely as limitations on Commonwealth legislative power.²⁰ In 1936, for instance, Lord Wright MR wrote that:

It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changed, but the changing circumstances illustrate and illuminate the full import of that meaning. It has been said that ‘in interpreting a constituent or organic statute such as the Act (i.e., the British North America Act), that construction most beneficial to the widest possible amplitude of its powers must be adopted’. But that principle may not be helpful when the section is, as s 92 may seem to be, a *constitutional guarantee of rights*, analogous to the guarantee of religious freedom in s 116, or of equal right of all residents in all States in s 117.²¹

¹⁷ Australian Human Rights Commission (n 14).

¹⁸ Michael Kirby, ‘Domestic Implementation of International Human Rights Norms’ (1999) 5 *Australian Journal of Human Rights* 109, 125.

¹⁹ The *Australian Constitution*, ss 80, 92, 116, 117, and s 51(xxxi).

²⁰ See Paul Babie, ‘The Concept of Freedom of Religion in the Australian Constitution: A Study in Legislative-Judicial Cooperative Innovation’ [2018] *Quaderni di Diritto e Politica Ecclesiastica* 259; Paul Babie, ‘National Security and the Free Exercise Guarantee of Section 116: Time for a Judicial Interpretive Update’ (2017) 45 *Federal Law Review* 351.

²¹ *James v. Commonwealth* (1936) 55 CLR 1 (Lord Wright MR) 43-44 (emphasis added) (internal citations omitted).

The scattered rights might, in other words, have once been considered as together comprising a constitutional guarantee of rights, albeit piecemeal and non-comprehensive.

Lord Wright MR's position seems the accepted view of the rights contained in the *Constitution* for much of Australia's history, a view which gains support from Geoffrey Sawer, one of Australia's foremost constitutional scholars,²² who in *Australian Federalism in the Courts*,²³ written in 1967, referred extensively to the sprinkling of rights in the *Constitution* as 'freedoms' and 'fundamental guarantees'—and nowhere as limitations on power—noting specifically that s 116, which seems to protect FoRB in express terms, was couched as an individual guarantee.²⁴ This contextualisation remains available for use by the judiciary today in assessing claims of state interference with FoRB pursuant to s 116.²⁵ This ethos not only serves as background to the contemporary interpretation and application of those rights, but it also acts as a means of thinking more broadly about human rights in Australia, both at the Commonwealth and at the State levels.

The contextualisation of rights protection found in the express terms of the *Constitution*—as interpreted by Lord Wright MR and as assessed by Sawer—can be bolstered by its 'implications', first identified by Justice Lionel Murphy. In 1978, Murphy J wrote that '[t]he *Constitution* is a framework for a free society[]',²⁶ and that a constitution is an

Instrument[] which briefly state[s] the framework of government, the political divisions and organs, their composition, functions and interrelations, and sometimes specific guarantees of human rights. Because of the brevity of constitutions, implications are a prominent feature in the history of their judicial interpretation. The Australian *Constitution* does not express all that is intended by it: much of the greatest importance is implied. Some implications arise from consideration of the text; others arise from the nature of the society which operates the constitution. Constitutions are designed to enable a society to endure through successive generations and changing circumstances.

²² See Susan Bartie, *Free Hands and Minds: Pioneering Australian Legal Scholars* (Hart, 2019).

²³ Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967).

²⁴ *Ibid* 18-9, 168-71, and ch 10.

²⁵ For my argument as to how the judiciary might restore this dominant understanding of s 116 today, see Babie, 'National Security' (n 20).

²⁶ *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120, 158 (Murphy J).

...

The history of interpretation of the Australian Constitution shows that implications have been freely made.²⁷

Most significantly for FoRB, Murphy J found fundamental rights implied from the democratic principle which animates the *Constitution*. Justice Murphy enunciated one of these implied rights, the freedom of political communication, in *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth*:

Elections of federal Parliament provided for in the Constitution require freedom of movement, speech and other communication, not only between the States, but in and between every part of the Commonwealth. The proper operation of the system of representative government requires the same freedoms between elections. These are also necessary for the proper operation of the Constitutions of the States... From the [express] provisions and from the concept of the Commonwealth arises an implication of a constitutional guarantee of such freedoms, freedoms so elementary that it was not necessary to mention them in the Constitution.... The freedoms are not absolute, but nearly so. They are subject to necessary regulation (for example, freedom of movement is subject to regulation for purposes of quarantine and criminal justice; freedom of electronic media is subject to regulation to the extent made necessary by physical limits upon the number of stations which can operate simultaneously). The freedoms may not be restricted by the Parliament or State Parliaments except for such compelling reasons.²⁸

What matters here is not the nature or the content of the right in question, but rather, that rights themselves, including FoRB, form a fundamental contour of the Australian domestic legal landscape—not the positive law, but as an interpretative guide—and that this is founded upon borrowings from international law, and from the express and implied nature of the democratic federal constitutional compact. This ethos within which to interpret and apply FoRB remains available to the Australian judiciary.

²⁷ *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 668-670 (Murphy J). On the role of implications throughout Australia's federal constitutional history, see Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, 1999) 169. This is supported by Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 329.

²⁸ *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 88 (Murphy J) (citations omitted).

B *Community*

Whatever the context for the protection of FoRB in Australian law, it does not amount to an unfettered right. FoRB is, of its very nature, limited. And the context for its protection in Australian law assumes that an individual right to FoRB must be understood within the wider context of the community interest, and that so conceived, limitations may justifiably be placed upon the former to protect the interests of the latter. Put another way, no right is absolute, and whatever it might be, it is subject to justifiable limitations so as to ensure the protection of the wider community.²⁹

While balancing between the protection of the individual and that of the community results in what some have referred to as a ‘dialogue’, ‘conversation’, or ‘institutional interaction’ between the three branches of government,³⁰ the judiciary typically takes the lead in initiating that process in the context of FoRB. This is well-understood. Justice Owen J Roberts of the Supreme Court of the United States, for instance, wrote that FoRB involves distinguishing between the ‘freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.’³¹ And Latham CJ said that

the protection of any form of liberty as a social right within a society necessarily involves the continued existence of that society as a society. Otherwise the protection of liberty would be meaningless and ineffective. It is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community. The Constitution protects religion within a community organized under a Constitution, so that the continuance of such protection necessarily assumes the continuance of the community so organized. This view makes it possible to reconcile religious freedom with ordered government. It does not mean that the mere fact that the Commonwealth Parliament passes a law in the belief that it will promote the peace, order and good government of Australia precludes any consideration by a court of

²⁹ *Cantwell v Connecticut*, 310 US 296, 303–4 (1940) (Roberts J).

³⁰ Peter W Hogg and Allison A Bushell, ‘The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing after All)’ (1997) 35 *Osgoode Hall Law Journal* 75; Leighton McDonald, Rights, ‘Dialogue’ and Democratic Objections to Judicial Review’ (2004) 32 *Federal Law Review* 1.

³¹ *Cantwell v Connecticut*, 310 US 296, 303–4 (1940) (Roberts J).

the question whether or not such a law infringes religious freedom. The final determination of that question by Parliament would remove all reality from the constitutional guarantee. That guarantee is intended to limit the sphere of action of the legislature. The interpretation and application of the guarantee cannot, under our Constitution, be left to Parliament. If the guarantee is to have any real significance it must be left to the courts of justice to determine its meaning and to give effect to it by declaring the invalidity of laws which infringe it and by declining to enforce them. The courts will therefore have the responsibility of determining whether a particular law can fairly be regarded as a law to protect the existence of the community, or whether, on the other hand, it is a law 'for prohibiting the free exercise of any religion.'³²

Both international and foreign domestic legal systems provide guidance as to the standard to be used by courts in attempting to balance an infringed individual right against a justification for that infringement claimed to protect the community interest. In international law, the *ICCPR* provides that:³³

Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

The *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* provide guidance in applying the *ICCPR* and 'the conditions and grounds for permissible limitations and derogations in order to achieve an effective implementation of the rule of law'.³⁴

An exemplar from foreign domestic law, the Canadian *Charter of Rights and Freedoms* provides:³⁵

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

³² *Adelaide Co of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116, 131–2 (Latham CJ).

³³ *ICCPR* (n 14) art 18(3).

³⁴ UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, 3.

³⁵ *Canadian Charter of Rights and Freedoms*, s 1, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

In *R v Oakes*,³⁶ the Supreme Court of Canada crafted a test for use in applying s 1, in these terms:

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'.... The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves 'a form of proportionality test'.... Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question.... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of 'sufficient importance'.³⁷

Peter Hogg, who suggests that the '*Oakes* test' enjoys status as 'holy writ', summarises its requirements as comprising four criteria:

1. Sufficiently important objective: The law must pursue an objective that is sufficiently important to justify limiting a Charter right.
2. Rational connection: The law must be rationally connected to the objective.
3. Least drastic means: The law must impair the right no more than is necessary to accomplish the objective.
4. Proportionate effect: The law must not have a disproportionately severe effect on the persons to whom it applies.³⁸

³⁶ *R v Oakes* [1986] 1 SCR 103.

³⁷ *R v Oakes* [1986] 1 SCR 103, 138–9 (Dickson CJ) (references omitted).

³⁸ Peter W Hogg, *Constitutional Law of Canada* (Carswell, 2015) 38-17, -18.

Australian law provides two examples of standards to be used in balancing the individual FoRB right with the community interest. The Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic),³⁹ for example, provides that ‘A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom....’ And the implied freedom of political communication in the *Commonwealth Constitution* contains a limitations test which ensures that:

if [a] law effectively burdens th[e] freedom, [the court must ask if it] is...reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government...?⁴⁰

I make no claim whatsoever that these limitations standards draw upon the same underlying rationale for their existence, nor that they operate in the same way as one another. Rather, my point is simply this: what these standards ensure, each in their own way, is that no right has an unfettered scope of application so as to permit individual conduct detrimental to the wider community interest. There will, in seeking a balance, in the conversation or dialogue between the three branches of government, be instances in which the individual right will prevail against the community interest, and there will be others in which it will not. And the judiciary, using a limitations standard, must be the arbiter of the balancing exercise, initiating the conversation, but ultimately working with the legislative and executive branches of government to reach a functioning outcome.⁴¹

III RIGHT

With an understanding of the need to balance the individual and community interests in FoRB, it is possible to map some of the contours of the protection for that right found more broadly in Australian law. One finds this content in three sources: (i) the constitutional texts of the Commonwealth and of

³⁹ See also the *Human Rights Act 2004* (ACT), s 28(2); *Human Rights Act 2019* (Qld), s 13.

⁴⁰ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

⁴¹ See Laura Grenfell and Sarah Moulds, ‘The Role of Committees in Rights Protection in Federal and State Parliaments in Australia’ (2018) 41 *University of New South Wales Law Journal* 40.

Tasmania; (ii) legislation (Commonwealth, State, and Territory) establishing a broad equality right—both positive and negative, applicable to governmental and non-governmental actors; and (iii) judicially-established protections. I consider each in turn.

A *Constitution*

The *Commonwealth Constitution* contains both express and implied rights which protect FoRB. In the case of the former, s 116 provides that

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.⁴²

Today, the rights scattered throughout the Commonwealth Constitution, including s 116, are understood as limitations on the legislative and executive power of the Commonwealth as opposed to broad protections of an individual right; it ‘...is not, in form, a constitutional guarantee of the rights of individuals;... [It]...instead takes the form of express restriction upon the exercise of Commonwealth legislative power.’⁴³ Still, as we have seen above, this was not always so; indeed, taking account of the entirety of the history of the interpretation and understanding of s 116 reveals that its protections may, until relatively recently, have been treated as providing a somewhat wider ambit of protection for FoRB. In any case, whether given the wider meaning suggested by Lord Wright MR or Geoffrey Sawer, or the narrower approach of the modern High Court, s 116, when understood within the wider context of the balance to be struck between the individual and the community, remains an important component of the overall structure of the protection afforded FoRB.

⁴² This has been interpreted in *Krygger v Williams* (1912) 15 CLR 366; *Adelaide Company of Jehovah Witnesses Inc v Commonwealth* (1943) 67 CLR 116; *Attorney-General (Vic); Ex rel Black v Commonwealth (DOGS Case)* (1981) 146 CLR 559; *Church of the New Faith v Commissioner for Payroll Tax* (1983) 154 CLR 120; *Kruger v Commonwealth* (1997) 190 CLR 1.

⁴³ *Attorney-General (Vic); Ex rel Black v Commonwealth (DOGS Case)* (1981) 146 CLR 559, 605 (Stephen J).

While it is understood that the four guarantees found in s 116 are triggered by establishing that one's beliefs constitute a religion,⁴⁴ little further judicial guidance exists, aside from the free exercise guarantee. In respect of FoRB, the law was settled by the High Court in its 1912 decision in *Krygger v Williams*, in which Griffith CJ wrote that s 116 protects against:

prohibiting the practice of religion – the doing of acts which are done in the practice of religion. 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. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition....⁴⁵

And notwithstanding the seeming attempt by the High Court to update this interpretation so as to provide for both direct and indirect prohibitions on FoRB,⁴⁶ the *Krygger* position remains the law. Thus, it seems, at a minimum, that s 116 prevents at least direct Commonwealth prohibition of FoRB, and Commonwealth attempts to establish a defined state religion, to which observance must be given, and of which one must be a member in order to hold a public office.

In addition to the Commonwealth Constitution, the Tasmanian *Constitution Act 1934* (Tas), s 46, provides that:

- (1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.
- (2) No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office.

Section 46 has been called a 'unique addition[...considered a 'historical puzzle'.⁴⁷ And while it contains an express protection for FoRB as well as its own limitation standard, in *Corneloup v Launceston City Council*, Tracey J wrote:

⁴⁴ On the definition of religion, see the various tests expounded in *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120.

⁴⁵ *Krygger v Williams* (1912) 15 CLR 366, 369 (Griffith CJ).

⁴⁶ See *Kruger v Commonwealth* (1997) 190 CLR 1.

⁴⁷ Tasmanian Constitutional Law Reform Project, *The Current Constitution* <<https://wikis.utas.edu.au/display/TCLRP/The+Current+Constitution#FootnoteMarker39-0>> nn39-40. See also Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006); RD Lumb and Moira Lumb, *The Constitutions of the Australian States* (University of Queensland Press, 1991); See also Sawer (n 23), 171.

that [it] does not, in terms, confer any personal rights or freedoms on citizens. The qualified ‘guarantee’ has been held to prevent coercion in relation to the practise of religion and to guarantee a freedom to profess and practise a person’s religion of choice.... There is, however, no authority to which I was referred which determines the practical effect of the ‘guarantee’. In particular, there remains an open question as to whether it could operate to render invalid provisions of other Tasmanian legislation (or subordinate legislation made thereunder), given that the Constitution Act is also an Act of the Tasmanian Parliament and s 46 is not an entrenched provision.⁴⁸

Thus, while its operation is uncertain, as with the express provisions of s 116 of the *Commonwealth Constitution*, s 46 provides for a qualified guarantee, at least in Tasmania, for FoRB.

In addition to the express guarantees found in the Commonwealth, and perhaps the Tasmanian, constitutional texts, some additional protection is found in a range of guarantees found by the High Court to be implied by its text. The High Court’s finding of a freedom of political communication⁴⁹ provides some additional potential scope for the protection of FoRB. As with the express protections found in s 116, the High Court seems to suggest that the implied freedom of political communication is not an individual right, but a limitation on governmental power.⁵⁰ As such, in *McCloy v New South Wales*,⁵¹ the High Court established the ambit of the implied freedom as a:

[a] qualified limitation on legislative power implied in order to ensure that the people of the Commonwealth may ‘exercise a free and informed choice as electors.’ It is not an absolute freedom. It may be subject to legislative restrictions serving a legitimate purpose compatible with the system of representative government for which the Constitution provides, where the extent of the burden can be justified as suitable, necessary and adequate, having regard to the purpose of those restrictions.⁵²

⁴⁸ *Corneloup v Launceston City Council* [2016] FCA 974, [38] (Tracey J) (internal citations omitted).

⁴⁹ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *APLA Ltd v Legal Services Commissioner* (NSW) (2005) 224 CLR 322; *Hogan v Hinch* (2011) 243 CLR 506; *Unions NSW v State of New South Wales* (2013) 88 ALJR 227; *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1; *McCloy v New South Wales* [2015] HCA 34; *Brown v Tasmania* [2017] HCA 43; *Clubb v Edwards*; *Preston v Avery* [2019] HCA 11.

⁵⁰ *Comcare v Banerji* [2019] HCA 23, [164]-[166] (Edelman J).

⁵¹ *McCloy v New South Wales* [2015] HCA 34, [2] (French CJ, Kiefel, Bell and Keane JJ).

⁵² *Ibid* (footnotes and citations omitted).

And the High Court suggests, in *Attorney-General (SA) v Corporation of the City of Adelaide*,⁵³ that

some ‘religious’ speech may also be characterised as ‘political’ communication for the purposes of the freedom.... Plainly enough, preaching, canvassing, haranguing and the distribution of literature are all activities which may be undertaken in order to communicate to members of the public matters which may be directly or indirectly relevant to politics or government at the Commonwealth level. The class of communication protected by the implied freedom in practical terms is wide.⁵⁴

The ambit of the implied freedom of political communication seemingly expands, then, so as to cover religious communication, whether the infringement is Commonwealth or State.⁵⁵ And given that the freedom is implied from the text, and that the text expressly includes the protection of FoRB in s 116, it seems possible that the implied freedom of political communication must extend so far as to protect, at the very least, what Roberts J of the Supreme Court of the United States referred to as ‘the freedom to believe’, which must be absolute.⁵⁶

With respect to the freedom to act upon beliefs, however, as Roberts J said, the right to believe must be distinguished from the freedom to act. The first is absolute, but the second, by its very nature, cannot be; rather, ‘[c]onduct remains subject to regulation for the protection of society.’⁵⁷ And the High Court, too, recognises the need to balance the individual and community interests in respect of the implied freedom of political communication. In *McCloy v New South Wales*,⁵⁸ the High Court establishes a three-question standard by which to test the justifiability of limitations upon the implied freedom:

Does the law effectively burden the freedom in its terms, operation or effect?

⁵³ *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 43-4 (French CJ), see also 73-4 (Crennan and Kiefel JJ).

⁵⁴ *Ibid.*

⁵⁵ In *Clubb v Edwards; Preston v Avery* [2019] HCA 11 the High Court at least implies that the freedom extends so far as to encompass religious speech.

⁵⁶ *Cantwell v Connecticut*, 310 US 296, 303-4 (1940) (Roberts J).

⁵⁷ *Cantwell v Connecticut*, 310 US 296, 303-4 (1940) (Roberts J).

⁵⁸ *McCloy v New South Wales* [2015] HCA 34, [2] (French CJ, Kiefel, Bell and Keane JJ) (footnotes and citations omitted). This has been affirmed in *Brown v Tasmania* [2017] HCA 43, [123]-[131] (Kiefel CJ, Bell and Keane JJ), [236] (Nettle J), *Clubb v Edwards; Preston v Avery* [2019] HCA 11, and in *Comcare v Banerji* [2019] HCA 23, [164]-[166] (Edelman J).

If “no”, then the law does not exceed the implied limitation and the enquiry as to validity ends.

If “yes” to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government? This question reflects what is referred to in these reasons as “compatibility testing”.

The answer to that question will be in the affirmative if the purpose of the law and the means adopted are identified and are compatible with the constitutionally prescribed system in the sense that they do not adversely impinge upon the functioning of the system of representative government.

If the answer to question 2 is “no”, then the law exceeds the implied limitation and the enquiry as to validity ends.

If “yes” to question 2, is the law reasonably appropriate and adapted to advance that legitimate object? This question involves what is referred to in these reasons as “proportionality testing” to determine whether the restriction which the provision imposes on the freedom is justified.

The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test – these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:

suitable — as having a rational connection to the purpose of the provision;
necessary — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;

adequate in its balance — a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

If the measure does not meet these criteria of proportionality testing, then the answer to question 3 will be “no” and the measure will exceed the implied limitation on legislative power.⁵⁹

While the ambit of the right to believe, to speak, and to act on religious beliefs is arguably broad, the Commonwealth justifiably limits that right so as to protect the community interest. A continuum may be plotted, with belief, an absolute and unfettered right, at one end, and conduct animated by belief, a

⁵⁹ *McCloy v New South Wales* [2015] HCA 34, [2] (French CJ, Kiefel, Bell and Keane JJ) (footnotes and citations omitted). This has been affirmed in *Brown v Tasmania* [2017] HCA 43, [123]-[131] (Kiefel CJ, Bell and Keane JJ), [236] (Nettle J).

right susceptible by its very nature to limitation in furtherance of protecting the community, at the other. Yet this is not unusual; indeed, as we have seen, this balancing of the individual and community interests lies at the very heart of the approach taken to the protection of fundamental rights and freedoms in most legal systems throughout the latter half of the 20th century.

B *Legislation*

Commonwealth and State and Territory human rights and anti-discrimination legislation provide negative protections and positive obligations in respect of equality. The Supreme Court of Canada referred to a nearly identical body of Canadian law as having a ‘quasi-constitutional’ status enjoying a level of paramountcy over other legislation:⁶⁰

[h]uman rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement. To adopt and apply any theory of implied repeal by later statutory enactment to legislation of this kind would be to rob it of its special nature and give scant protection to the rights it proclaims.⁶¹

While no equivalent High Court authority exists with respect to Australian anti-discrimination regimes, it seems likely that any attempts to repeal this legislation would meet significant opposition.⁶² For that reason, one might conclude that this Australian law might also hold a quasi-constitutional status. The Australian legislation falls into two categories, which I consider in turn: (i) State and Territory statutory charter or bills of rights and (ii) Commonwealth, State, and Territory anti-discrimination legislation.

Three legislated ‘bills’ or ‘charters’ of rights—the *Human Rights Act 2004* (ACT), *The Charter of Human Rights and Responsibilities Act 2006* (Vic), and the *Human Rights Act 2019* (Qld)—protect a range of fundamental

⁶⁰ See Bowal and Thul (n 7); Hucker (n 7); William F Pentney (ed), *Walter S Tarnopolsky Discrimination and the Law* (revd ed, 1993) 2-28.

⁶¹ *Winnipeg School Division No. 1 v. Craton*, [1985] 2 SCR 150, 156 (McIntyre J).

⁶² See Simeon Beckett, ‘Interpreting Legislation Consistently with Human Rights’ (2007) 58 *AIAL FORUM* 43.

human rights.⁶³ In respect of FoRB specifically, protections exist for freedom of thought, conscience, religion and belief, and the rights of minorities to enjoy their own culture, religion and language.⁶⁴ In addition to these specific religious rights, the legislation also protects the rights to equality before the law,⁶⁵ life,⁶⁶ privacy,⁶⁷ peaceful assembly and association,⁶⁸ expression, taking part in public life,⁶⁹ and liberty and security of the person.⁷⁰ These rights apply only to individuals,⁷¹ and ‘may be subject to reasonable limits set by...laws that can be demonstrably justified in a free and democratic society.’⁷²

In the decade following their enactment, little use was made by litigants of these legislated bills of rights. This trend seems, though, to be reversing.⁷³ And perhaps of greater significance, the bills have resulted in a greater concern for the protection of rights as part of the policymaking and legislative processes,⁷⁴ and in driving the debate surrounding rights protection.⁷⁵

In addition to these legislated bills of rights, both Commonwealth and State and Territory anti-discrimination legislation establish a broad equality right or protection against discrimination on prohibited grounds. In the case of the former, s 109 of the *Commonwealth Constitution* ensures that matters in respect of which the Commonwealth Parliament legislates are paramount

⁶³ For the background to the enactment of the *Victorian Charter*, see Andrew Byrnes, Hilary Charlesworth, and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2008) 109-14; Alistair Pound & Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (Thomson Lawbook Co, 2008); Carolyn Evans & Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis, 2008); Greg Taylor, *The Constitution of Victoria* (Federation Press, 2006) 51-2; Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights a Decade On* (Federation Press, 2017).

⁶⁴ See, eg, *Human Rights Act 2004* (ACT) ss 14 and 27.

⁶⁵ *Ibid* s 8.

⁶⁶ *Ibid* s 9.

⁶⁷ *Ibid* s 12.

⁶⁸ *Ibid* s 15.

⁶⁹ *Ibid* s 16.

⁷⁰ *Ibid* s 18.

⁷¹ *Ibid* s 6.

⁷² *Ibid* s 28(1).

⁷³ See, eg, Lisa Martin, ‘Blair Cottrell moves to appeal conviction over mock beheading video’, *The Guardian* (July 10, 2019) <<https://www.theguardian.com/australia-news/2019/jul/10/blair-cottrell-moves-to-appeal-conviction-over-mock-beheading-video>>.

⁷⁴ Byrnes et al (n 63), 86-98. See especially, Grenfell and Moulds (n 41).

⁷⁵ Byrnes et al (n 63), 106-7.

to similar State legislation.⁷⁶ As such, while not constitutionally entrenched, the Commonwealth equality protections—known as ‘federal discrimination law’⁷⁷—protect every Australian⁷⁸ against unlawful discrimination⁷⁹ pursuant to four principal enactments: *Racial Discrimination Act 1975* (Cth) (‘*RDA*’), *Sex Discrimination Act 1984* (Cth) (‘*SDA*’), *Disability Discrimination Act 1992* (Cth) (‘*DDA*’), the *Age Discrimination Act 2004* (Cth) (‘*ADA*’)⁸⁰ (the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (‘*HREOC Act*’)) establishes the Australian Human Rights Commission (the ‘AHRC’).⁸¹ The AHRC holds a number of significant functions with respect to federal discrimination law, most significantly, ensuring consistency with protected rights of Commonwealth legislation or acts of authorities,⁸² and providing for a regime to make complaints of unlawful discrimination.

While applicable to all Australians, federal discrimination law, due to gaps in legislative competence, fails to protect against all classes of discrimination. Notable among the omissions in federal discrimination law is religion; it is here that the proposed *Religious Discrimination Act* would

⁷⁶ See Vince Morabito and Henriette Strain, ‘The Section 109 ‘Cover the Field’ Test of Inconsistency: An Undesirable Legal Fiction’ (1993) 12 *University of Tasmania Law Review* 182.

⁷⁷ See *ibid.*

⁷⁸ For further detail on the operation of Commonwealth discrimination law, see Australian Human Rights Commission, *Federal Discrimination Law* (2016).

⁷⁹ For a comprehensive treatment of the history and operation of Australian equality/anti-discrimination regimes, see Australian Human Rights Commission (n 78) and Neil Rees, Simon Rice, and Dominique Allen, *Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018). ‘Unlawful discrimination’ is defined by s 3 of the *HREOC Act* as ‘any acts, omissions or practices that are unlawful under’ one of the *RDA*, *SDA*, *DDA*, or the *ADA*. The particular grounds of unlawful discrimination can be summarised as: race, colour, descent or national or ethnic origin; sex; sexual orientation; gender identity; intersex status; marital or relationship status; pregnancy or potential pregnancy; breastfeeding; family responsibilities; disability; people with disabilities who have a carer, assistant, assistance animal or disability aid; and, age: Australian Human Rights Commission (n 78) 19–20.

⁸⁰ To this list could be added a fifth, the *Fair Work Act 2009* (Cth) (‘*FWA*’) which, while containing key rights in respect of workplace discrimination, does not fall within the jurisdiction of the Australian Human Rights Commission; rather, the Fair Work Commission has responsibility for discrimination pursuant to this regime. On discrimination pursuant to this legislation, see Rees et al (n 79). The Israel Folau saga demonstrates the application of the *FWA* in the case of employment discrimination on the basis of religious beliefs: see David Mark, ‘Israel Folau’s case is heading to the courts — so what happens now?’, *ABC News* (July 20, 2019) <<https://www.abc.net.au/news/2019-07-20/why-the-israel-folau-case-is-relevant-to-you/11282386>>.

⁸¹ The *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) Sch 3, s 1, amended the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) by renaming it the *Australian Human Rights Commission Act 1986* (Cth) and renaming the Commission the Australian Human Rights Commission.

⁸² *Human Rights Commission Act 1986* (Cth) s 11(e).

fill an existing gap in the comprehensiveness of protection for every Australian with respect to FoRB. The States and Territories,⁸³ however, provide comprehensive protection against defined grounds of discrimination, including FoRB,⁸⁴ but only with respect to prohibited conduct occurring within a given State or Territory.

The State and Territory protection afforded FoRB falls into two categories. The first, as noted above, comes through the prohibition of discrimination against individuals on the basis of a professed religious belief,⁸⁵ or the lack of such a belief.⁸⁶ The second category takes the form of exemptions from the equality principle carved out for the benefit of religious orders, bodies or institutions generally, as well for religious and non-religious educational institutions more specifically, allowing for discrimination on prohibited grounds necessary for the religious purposes of the order, body, or institution.⁸⁷

C Common Law

The common law contains no express recognition of rights.⁸⁸ Instead, canons of statutory interpretation provide limited protection through a ‘common law

⁸³ *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1996* (NT); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic).

⁸⁴ A list of the prohibited grounds, representative of State and Territory regimes, found in the *Equal Opportunity Act 2010* (Vic) s 6, includes: age; breastfeeding; employment activity; gender identity; disability; industrial activity; lawful sexual activity; marital status; parental status or status as a carer; physical features; political belief or activity; pregnancy; race; religious belief or activity; sex; sexual orientation; an expunged homosexual conviction; and, personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.

⁸⁵ See, eg, *Equal Opportunity Act 2010* (Vic) s 6(1)(n). In Victoria, discrimination on the basis of a characteristic of a person’s religion is also prohibited: *Equal Opportunity Act 2010* (Vic) s 7(2)(b) and (c); *Kapoor v Monash University* (2001) 4 VR 483.

⁸⁶ See, eg, *Equal Opportunity Act 2010* (Vic) s 4(1).

⁸⁷ See, eg, *Anti-Discrimination Act 1977* (NSW) ss 31A, 31K, 46A, 49ZO, and 56; *Sex Discrimination Act 1984* (Cth) ss 37, 38; *Equal Opportunity Act 1984* (SA) ss 50, 85ZM; *Equal Opportunity Act 1984* (WA) ss 66(1), 72, 73; *Discrimination Act 1991* (ACT) ss 32, 33, 46; *Anti-Discrimination Act 1991* (Qld) ss 41(a), 90, 109; *Anti-Discrimination Act 1996* (NT) ss 30(2), 37A, 51; *Anti-Discrimination Act 1998* (Tas) ss 51, 52; *Equal Opportunity Act 2010* (Vic) ss 39, 81, 82, 83, 84. See also *Fair Work Act 2009* (Cth) ss 153(2)(c), 195(2)(c), 351 (2)(c), 772(2)(c); *Sex Discrimination Act 1984* (Cth) s 37(a), (b), (d), and 38.

⁸⁸ *Grace Bible Church v Reedman* (1984) 36 SASR 376. See also Dan Meagher, ‘The judicial evolution (or counter-revolution) of fundamental rights protection in Australia’ (2017) 42 *Alternative Law Journal* 9; Dan Meagher, ‘One of my Favourite Law Review Articles: Paul Finn’s, ‘Statutes and the

bill of rights' and the principle of legality.⁸⁹ These norms apply to legislation which may purport to limit a specific right, such as FoRB. Courts will look, therefore, to whether a statute which seeks to limit FoRB does so in clear and unambiguous terms,⁹⁰ or, in the case of ambiguous legislation, the court ought to favour a construction which is most in conformity with Australia's treaty obligations concerning the right in question.⁹¹

Because legislation is so easily modified, any protections afforded by these canons of interpretation are minimal.⁹² Nonetheless, these canons suggest a judicial willingness to consider legislation through a broader ethos protection for rights generally, and FoRB specifically.

IV CONVERSATION

Of course, there comes a point where reconciling the interest of the individual to enjoy FoRB with that of the community not to be subjected either to speech or action considered disruptive to social order will become impossible. It is there that either the right must give way to the community interest, or the community interest must cede ground to the individual. It is in this latter instance that remedies become important, for without them, the individual cannot prevail against the will of the community. Or, put another way, rights are meaningless without remedies.

The careful reader no doubt perceives that in the attempt to balance the individual and community interests around FoRB, the protection of the former requires one to ask which segment of the latter, precisely, is prohibited from interference. Is it the government alone, or might it be other non-

Common Law' (1992) 22 *University Of Western Australia Law Review* 7' (2016) 35 *Queensland University Law Journal* 135; Dan Meagher, 'The Common Law Principle of Legality' (2013) 38 *Alternative Law Journal* 209.

⁸⁹ James Spiegelman, 'The Common Law Bill of Rights', Speech delivered at McPherson Lectures on Statutory Interpretation and Human Rights, University of Queensland (March 10, 2008); Meagher, 'The judicial evolution' (n 88); Meagher, 'One of my Favourite Law Review Articles' (n 88); Meagher, 'The Common Law Principle of Legality' (n 88).

⁹⁰ *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130 (Mason ACJ, Brennan J); *Re Bolton; Ex Parte Douglas Beane* (1987) 162 CLR 514, 523 (Brennan J); *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525, 544 (McHugh J).

⁹¹ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

⁹² *Aboriginal Legal Rights Movement Inc v South Australia [No 1]* (1995) 64 SASR 551, 552 (Doyle CJ, with whom Bollen J agreed), 554 (Debelle J).

governmental members of the wider community? The question reveals an advantage to the piecemeal approach by which Australia protects FoRB: rather than the prohibition being placed on government alone in the case of a constitutional protection, the wider range of content sources for the FoRB right—its ethos—allows the prohibition on interference to extend to a wide range of the community, governmental and non-governmental actors and entities alike.⁹³

And yet a further question arises: in determining which segment of the community must be prohibited from interfering with an individual right to FoRB—government, non-government, or some combination of both—it becomes clear that the outcome of a dispute will involve an interpretation of the meaning or content of FoRB, and the scope of its operation and the acceptable limitations which may be imposed upon it to protect the community interest. Put another way, the answer to the question of balance between the individual and community interests involves the conversation between the three branches of government identified earlier. The conversation takes on concrete and specific meaning when one of those participating in the conversation must decide upon a remedy for protecting the individual right, or a justifiable limitation imposed in furtherance of the community interest. The potential remedies the subject of these conversations fall into three classes: constitutional, legislative, and judicial. A brief review identifies the way in which remedies allow for striking a balance between individual and community.

The constitutional recognition of FoRB is protected by one or by a combination of three remedial options: (i) declaration of invalidity—‘the ‘law’ is treated as being void *ab initio*, as never having been a law at all’;⁹⁴ (ii) writ of prohibition; or (iii) one of the supervisory (prerogative) writs—if granted, a tribunal or officer must stop proceeding with the matter (*certiorari* quashes a tribunal’s decision, while *mandamus* results in a tribunal being told to proceed with the matter under the valid parts of a law).⁹⁵ Constitutional remedies are available only against the Commonwealth or its agents.

⁹³ See Bowal and Thul (n 7).

⁹⁴ John Pyke, *Government Powers Under a Federal Constitution: Constitutional Law in Australia* (ThomsonReuters/Lawbook Co, 2017) 92 [7.6].

⁹⁵ *Ibid.*

Legislative remedies attach to three ‘bills’ of rights in the ACT, Queensland, and Victoria, and to anti-discrimination legislation. The former preserve parliamentary sovereignty by leaving ultimate decisions concerning the violation of human rights to the legislature (thus establishing a form of conversation, albeit weak). Having done so, though, there exist five enforcement mechanisms:⁹⁶ (i) an obligation on decision-makers to interpret laws so as to be consistent so far as possible with human rights;⁹⁷ (ii) judicial power to issue declarations of incompatibility in cases where legislation cannot be interpreted so as to be consistent;⁹⁸ (iii) a duty on the Attorney-General to present written statements on the compatibility of each government bill presented to the parliament;⁹⁹ (iv) an office of Human Rights Commissioner, with power to review laws for compatibility with the human rights legislation;¹⁰⁰ and (v) possible override of legislation for a limited term.¹⁰¹

State and Territory anti-discrimination legislation typically carries a range of potential judicial or administrative remedies which may be issued against both governmental and non-governmental entities and actors.¹⁰² Remedies might include:

(1) findings of a declaratory nature that unlawful discrimination has occurred; (2) compensatory damages; and (3) injunctive-style orders which compel or prohibit conduct by the respondent. In some jurisdictions there is a fourth miscellaneous category, with some of those additional remedies being apologies and retractions, awards of damages which are not compensatory in nature, and orders setting aside or varying contracts.¹⁰³

The power to issue such remedies significantly expands the scope of protection for FoRB available to a party claiming a violation of a fundamental right, well beyond available constitutional remedies. Federal discrimination

⁹⁶ For the history and legislative background to the *Human Rights Act 2004* (ACT), see Byrnes et al (n 63), 74-9.

⁹⁷ See, eg, *Human Rights Act 2004* (ACT) s 30; see Byrnes et al (n 63), 83-5, for a detailed discussion of the operation of this provision.

⁹⁸ See, eg, *Human Rights Act 2004* (ACT) ss 32, 39, and 33.

⁹⁹ See, *ibid*, s 37.

¹⁰⁰ See, *ibid*, s 41; see also, ss 38, 43, 44, and Sch 2.

¹⁰¹ See, *ibid*, s 31. On these grounds, see Byrnes et al (n 63), 123-3.

¹⁰² See, eg, *Equal Opportunity Act 2010* (Vic), ss 4(1) ‘person’ and 5.

¹⁰³ Rees et al (n 79), 894.

law, rather than enumerating available remedies, confers on the Federal Court the power to ‘make such orders as it thinks fit’.¹⁰⁴

In a sense, every remedial category is a ‘judicial’ remedy. Yet there remains a discrete category of remedies which are neither found in a constitutional or legislative text, but which are judicially crafted to protect the common law bill of rights and the principle of legality. Legislation which fails to satisfy these common law standards may not be applied by a court. While it may seem a limited remedy, its existence brings us full circle, for it makes clear that in remedies one sees clearly the conversation that occurs amongst the three branches of government so as to provide for a balance of the individual right of FoRB against the interests of the community.

V CONCLUSION

The ethos of protection for FoRB which I suggest here, on one view, is piecemeal and lacks comprehensiveness, bringing together, as it does, a loose collection of constitutional, legislative, and judicial texts and approaches to the protection of rights generally and religious freedom specifically. Some see that as flawed. I suggest that the piecemeal, disparate nature of this approach represents an inherent advantage, for approaching FoRB this way reveals the importance of the balancing of the individual and community interests animated by the right, it recognises the ongoing inter-institutional conversation among the branches of governments surrounding that balance, and it widens the possible ambit of the right itself, rendering it applicable to governmental and non-governmental actors alike, subject to justifiable limitations in furthering the community interest.

But more importantly, in my view, this ethos approach to FoRB instructs that placing all of one’s hopes on one source may prove disappointing. What is in fact necessary in Australia is not merely a Commonwealth *Religious Discrimination Act*, which will do no more than add another piece to the already piecemeal puzzle of protection for rights generally and FoRB specifically, but a constitutionally-entrenched bill of rights, comprehensive in

¹⁰⁴ *Australian Human Rights Commission Act 1986* (Cth), s 46PO(4). And see Rees et al (n 79), 894. For further detail on the operation of remedies in federal discrimination law, see Australian Human Rights Commission (n 79), 367-430.

its protections, widely applicable to both levels and all branches of government, and which provides for a balancing of individual and community interests. But even that is deficient—constitutions protect against abuses of governments, not other members of society. Some other protection, in the form of broader human rights legislation, is necessary for that. The ethos which I suggest here fulfills those needs. It serves, in short, as an effective placeholder for FoRB until such time as Australians enjoy comprehensive constitutional and legislative protections for all fundamental rights and freedoms.