



rights & responsibilities 2014

Discussion Paper

Tim Wilson

Human Rights Commissioner

Australia's Human Rights Commissioner, Tim Wilson, is conducting a national consultation about how effectively we protect people's human rights and freedoms in Australia. The consultation will focus on building understanding and improved protection of our fundamental human rights, freedoms and responsibilities.

Past consultations, such as the National Human Rights Consultation under the previous federal government, have tended to focus mainly on what government should do to protect human rights. This consultation aims to go beyond this objective and identify where there are restrictions on rights and freedoms that are disproportionate to the harm to be prevented. Importantly, the consultation seeks to identify where people are advancing their rights and freedoms through community-based and voluntary programs.

What are human rights and freedoms?

Human rights and freedoms are basic standards of treatment that everyone enjoys. They are universal. Everyone has them. Human rights recognise the inherent value of each person, regardless of their background, where they live, what they look like, what they think or what they believe. They affect 'everyone, everywhere, everyday'.

Freedoms are focused on liberty and the ability to express your rights without external control or interference. The most commonly identified freedoms are:

- freedom of opinion or expression
- freedom of thought, conscience or religious worship
- freedom of association or peaceful assembly
- freedom from arbitrary detention.

Rights and freedoms are based on principles of dignity, equality before the law and mutual respect, which are shared across cultures, religions and philosophies. They are about being treated fairly, treating others fairly and having the ability to make genuine choices in our daily lives. Respect for human rights underpins the democratic processes of our society and is the cornerstone of a society that respects individuals and voluntary community collaboration.

Human rights and freedoms have evolved from political, social and cultural movements over thousands of years. The idea of rights existed in ancient societies, but the modern understanding of human rights evolves from documents such as:

- The *Magna Carta* (the Great Charter) of 1215, which subjected King John to the rule of law.
- The 1688 *English Bill of Rights* that universalised many of the principles of the *Magna Carta* so they applied to all individuals.
- The United States of America's *Declaration of Independence* in 1776 that asserted that all people are created equal and have rights to 'life, liberty and the pursuit of happiness', and the subsequent *Constitution of the United States* (1787) and *Bill of Rights* (1791).
- The *Declaration of the Rights of Man and of the Citizen* in France in 1789, which proclaimed that all citizens are to be guaranteed the rights to liberty, property, security and resistance to oppression.

The concept of human rights and freedoms also evolved through philosophical movements, such as the Enlightenment of the 17th and 18th centuries. This emphasised that people should be able to pursue their own opportunities, activities and enterprise free from unnecessary interference and free from the potential abuse of power by the monarchy or government.

The 1948 *Universal Declaration of Human Rights* internationalised the idea of human rights to all people in the world, particularly after the atrocities of the Nazi and fascist regimes and World War II. It provides that all people are born free and equal. Rights and freedoms are universal (held by everyone) and inalienable (exist whether they are recognised by governments or not).

Since 1948, human rights have also been expressed in the form of international treaties, customary international law, general principles and other sources of international law. International human rights treaties outline obligations of governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.

Australia has agreed to uphold and respect the seven main international human rights treaties, namely the:

- *International Covenant on Civil and Political Rights*
- *International Covenant on Economic, Social and Cultural Rights*
- *International Convention on the Elimination of All Forms of Racial Discrimination*
- *Convention on the Elimination of All Forms of Discrimination against Women*
- *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*
- *Convention on the Rights of the Child*
- *Convention on the Rights of Persons with Disabilities.*

Rights and responsibilities

The exercise of rights and freedoms is not absolute. Limits on rights have been established to ensure individuals do not harm others when exercising their own rights. This means that human rights must be exercised responsibly and with respect for the reciprocal rights of others.

Individuals have a responsibility to exercise their freedoms with respect for others, and to accept that society and the community will hold people accountable for how they exercise their freedoms.

Where rights are expressed in international treaties, the exercise of some human rights may also carry ‘special duties and responsibilities’.¹ Notably, any measure that limits a human right must be ‘necessary, reasonable and proportionate and...[have] adequate safeguards against abuse’.²

Limits on rights have two dimensions: first, there are limits on the extent to which governments may restrict the human rights of individuals; and second, limits guide individuals about the point at which their rights may affect others’ rights or values.³

The Australian context – *Rights & Responsibilities 2014*

Human rights are protected in Australia through a myriad of federal, state and territory laws, policies and practice, as well as through the common law (that is, decisions of the courts) and culture.⁴ Australia has not fully implemented all of its commitments in international human rights treaties, such as through a constitutional or statutory charter of human rights at the national level.⁵

At the federal level, the *Human Rights (Parliamentary Scrutiny) Act 2011* provides a mechanism to consider whether any new legislation is compatible with human rights. An assessment of whether legislation is compatible with human rights or not is undertaken by a Joint Parliamentary Committee on Human Rights (Joint Committee).⁶

Recent reports from the Joint Committee indicate that legislative proposals do occasionally have the potential to erode human rights protections. This is particularly through the erosion of the right to a fair trial and guarantees of procedural fairness, and the right to privacy.⁷

Consequently, *Rights & Responsibilities 2014* is seeking to examine whether Australia’s different levels of government, through the enactment of legislation and implementation of policies, are unnecessarily limiting the capacity of individuals to exercise their human rights, and/or undermining the role of civil society to determine restrictions on human rights in accordance with social norms and conventions.

This consultation will engage, at a community level, the attitudes of Australians about:

- how well rights and freedoms are protected in Australia
- examples of legislation, policies and practices by governments that unduly restrict the exercise of human rights and freedoms
- what is being done, and what more should be done, to promote a culture of respect for rights and responsibilities.

A particular focus of the consultation will be on building a culture of respect for rights and responsibilities among the Australian community. The consultation is interested in learning about initiatives at the local and community level that advance rights and freedoms, and the responsible exercise of these. This might be through developing voluntary codes of conduct and practice, service provision, sporting events or other community-based education activities.

The consultation will focus discussions on some of the key rights and freedoms that have traditionally underpinned our liberal democracy in Australia. These include:

- the right to freedom of expression
- the right to freedom of thought, conscience and religious worship
- the right to freedom of association
- property rights.

Appendix A provides an overview of these key rights, and examples of how they are currently impacted upon in Australia.

How can you participate in *Rights & Responsibilities 2014*?

Consultations will be held across Australia between August and December 2014. There will be a specific focus on everyday Australians – people in Australia from all walks of life, whether they live in our cities, the suburbs, or regional, rural or remote Australia. Similarly, the consultations will engage community groups and civil society, such as chambers of commerce, small business associations, civic groups (such as Rotary and Lions Clubs), sporting clubs and associations, as well as local councils.

Public events will be advertised in the local media and on the Commission's website.

Individuals and organisations are also invited to participate in an online survey at <http://www.humanrights.gov.au/rights2014> or email a submission to rights2014@humanrights.gov.au.

Please note that when making a submission, you are indicating that you have read and understood the Commission's Submission Policy which can be found at <https://www.humanrights.gov.au/submission-policy>.

What will be the outcome from *Rights & Responsibilities 2014*?

Information from *Rights & Responsibilities 2014* will be used to inform the priorities of the Human Rights Commissioner in the coming years. A public report will also be released that will identify the key issues raised during the consultation process, identify best practice initiatives to promote human rights and freedoms, and set out recommendations for further advancing the protection and promotion of human rights and freedoms in Australia.

Who to contact if you have questions?

If you have any questions about *Rights & Responsibilities 2014*, you can:

Email: rights2014@humanrights.gov.au
Telephone: (02) 9284 9600
Fax: (02) 9284 9611

For detailed and up to date information about the Australian Human Rights Commission, please visit the website at www.humanrights.gov.au.

Appendix A

Right to freedom of expression⁸

The right to freedom of expression (commonly referred to as freedom of speech) provides the foundation for individual autonomy, the capacity for individuals to think for themselves and impart knowledge, and a strong democracy where opinions and ideas can be debated freely. The right enables discussions and debates about political and social views, and in so doing, creates the basis for the effective exercise and defence of many other human rights and freedoms. The right is:

closely linked to the rights to freedom of association, assembly, thought, conscience and religion, and participation in public affairs. It symbolizes, more than any other right, the indivisibility and interdependence of all human rights. As such, the effective enjoyment of this right is an important indicator with respect to the protection of other human rights and fundamental freedoms.⁹

Freedom of expression is an extension of the absolute right of freedom to hold opinions without interference.

The right to freedom of expression applies to any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.

Under international law, freedom of expression may only be limited where it is prescribed by law and deemed necessary to protect the rights or reputations of others, national security, public order, or public health or morals. A mandatory limitation also applies to the right to freedom of expression in relation to ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’.¹⁰

Further information about the right to freedom of expression is available at <http://www.humanrights.gov.au/freedom-information-opinion-and-expression>.

Freedom of expression in Australia

Australia does not have a bill or charter of rights that protects freedom of expression. The rights to freedom of opinion and expression are not enshrined in Australian federal law; however, the High Court of Australia has inferred a freedom of political communication from the Australian Constitution.¹¹

Your rights to freedom of opinion and expression are relevant to federal legislation, policies or programs that seek to:

- regulate the content of any speech, publication, broadcast, display or promotion
- regulate the format or manner of any form of expression (for example, requiring prior approval for public protest or placing restrictions on the uses of places in which protest activity may take place)
- restrict or censor media coverage, including in relation to political matters
- require material to be approved before it may be published
- attach criminal or civil liability to the publication of opinions or information
- regulate or restrict access to information, including on the internet
- impose censorship or provides for classification of entertainment content, or
- regulate commercial expression (such as advertising).

Rights & Responsibilities 2014 will focus on:

- how you exercise your right to freedom of expression
- where restrictions on freedom of expression exist
- whether you have felt restricted or prohibited from exercising your right to freedom of expression
- how individuals can be held accountable for the use of their freedom of expression outside of law
- what could be done to enable you to exercise your right to freedom of expression.

Right to freedom of thought, conscience and religious worship¹²

The right to freedom of thought, conscience and religious worship encompasses the beliefs of all religions, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. Key elements of the right include the freedom to:

- choose and change religion or belief
- exercise religion or belief publicly or privately, alone or with others
- exercise religion or belief in worship, teaching, practice and observance.

Thus, freedom of religion is simultaneously an individual right and a collective right.

The internal dimension of the right – the freedom to adopt or hold a belief – is absolute. However, the external dimension – the freedom to manifest that belief in worship, observance, practice or teaching – may be limited by law when deemed necessary to protect the public safety, order, health or morals, or the fundamental rights and freedoms of others.

Further information about the right to freedom of religion is available at <http://www.humanrights.gov.au/freedom-thought-conscience-and-religion-or-belief>.

Freedom of religion in Australia

There is limited protection of religious freedom in the Australian Constitution and federal legislation. The right to freedom of religion is recognised in section 116 of the Constitution, which restrains the legislative power of the federal government and prevents one religion having pre-eminence over other beliefs. It does not operate as a free-standing individual right to freedom of religion and does not provide individuals with an avenue for legal redress.¹³

The main issue regarding the right to freedom of religion in federal law has been in relation to anti-discrimination legislation, particularly the extent to which religious organisations are exempt from these laws. For example, while amendments were made to the *Sex Discrimination Act 1984* (Cth) in 2013 to prohibit discrimination on the basis of sexual orientation, gender identity and intersex status in a range of areas of public life, the Act also included exceptions for ‘religious bodies’ and ‘educational institutions established for religious purposes’.¹⁴ Similar restrictions operate in different state laws.

Your right to freedom of religion is relevant to federal legislation, policies or programs that seek to:

- restrict or interfere with the observance or teaching of a particular religion or set of beliefs, for instance by regulating conduct that might have this effect
- require a person to disclose their religion or belief
- affect a person’s ability to adhere to his or her religion or belief
- subject conduct that is required or encouraged by a particular religion or belief to criminal penalties
- set dress standards that do not accommodate religious dress or symbols
- affect the right of the adherents of particular religions to observe holidays or periods of rest
- relate to planning or land use that may make it difficult to use or establish places of religious worship
- impose eligibility requirements for government benefits that cannot be met by the adherents of particular religions
- regulate the teaching of children in a way that might undermine particular religions or beliefs
- regulate conscientious objection to military service.

Rights & Responsibilities 2014 will focus on:

- the ways you exercise your right to freedom of religion
- where restrictions on freedom of religious worship exist
- whether you have felt restricted or prohibited from exercising your right to freedom of religion
- what could be done to enable you to exercise your right to freedom of religion.

Right to freedom of association¹⁵

All people have the right to freedom of association with others, including the right to form and join associations to pursue common goals and protect interests. Associations comprise a diverse range of interests such as political parties, professional and sporting clubs, non-governmental organisations and trade unions.

Freedom of association supports other rights such as freedom of expression, religion, assembly and political rights, because the effectiveness of these rights and freedoms would be significantly diminished without the right to freedom of association.

The right limits the imposition of unreasonable and disproportionate restrictions by governments, including:

- preventing people from joining or forming an association
- imposing procedures for the formal recognition of associations that effectively prevent or discourage people from forming an association
- punishing people for their membership of a group.¹⁶

The right to form and join trade unions is specifically protected in international human rights treaties, which also articulate that the right to association includes the right to participate in the lawful activities of an association. However, there is no settled international law on whether the right to freedom of association encompasses the right not to be compelled to join an association, such as a trade union or professional association.¹⁷

Any limits to freedom of association must be prescribed by laws that are necessary in a democratic society 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.

Further information about the right to freedom of association is available at <http://www.humanrights.gov.au/freedom-association>.

Freedom of association in Australia

There is no federal legislation that enshrines the right to freedom of association in all circumstances, although the importance of freedom of association for a democratic society was recently reaffirmed by the High Court of Australia.¹⁸

The *Fair Work Act 2009* (Cth) protects freedom of association in the workplace, which bridges the gap in the international law around the right not to be compelled to join a professional association.

The *Australian Human Rights Commission Regulations 1989* (Cth) also prescribes ‘trade union activity’ as a ground for discrimination in employment. This means that, under the *Australian Human Rights Commission Act 1986* (Cth), the Commission can investigate complaints about discrimination in employment based on trade union activity.

Your right to freedom of association may be affected by federal legislation, policies or programs that seek to:

- prohibit or create disincentives for membership of particular organisations
- require or coerce membership of particular organisations
- regulate membership of groups or associations
- require a person to disclose membership of a group or association
- treat people differently on the basis of their membership of a group or association.

Rights & Responsibilities 2014 will focus on:

- the ways you exercise your right to freedom of association
- where restrictions on freedom of association exist
- whether you have felt restricted or prohibited from exercising your right to freedom of association
- what could be done to enable you to exercise your right to freedom of association.

Right to property¹⁹

The right to property includes ownership and use of physical property, individuals' ownership of their own bodies, and intellectual property. In modern legal systems, 'property' embraces every possible interest recognised by law which a person can have in anything and includes all valuable rights.

The right to own property includes the right:

- to own property alone as well as in association with others
- to acquire or dispose of property
- not to be arbitrarily deprived of their property.

Property rights in Australia

The importance of private property rights in Australia is recognised in section 51(xxxi) of the Constitution, which guarantees the acquisition on just terms of all types of property by the federal government.

However, while section 51(xxxi) provides one of the few guarantees of individual rights within the Constitution, in practice the 'just terms' guarantee offers limited protection to property rights because it does not extend to state governments who can compulsorily acquire property without paying compensation.²⁰ The High Court of Australia has also applied a narrow interpretation of section 51(xxxi); for example, the Court has applied a strict technical definition of 'acquisition', which has resulted in the federal government effectively side-stepping the just terms guarantee providing property rights are limited or restricted in a manner that does not amount to an actual acquisition.²¹

Section 10 of the *Racial Discrimination Act 1975* (Cth) also guarantees the right to enjoy property on an equal basis, referring particularly to property owned by Aboriginal and Torres Strait Islander peoples.

Some individuals and organisations have argued that there has been 'a gradual, but significant, erosion of traditional protections for private property rights' in recent years.²² This is because property rights of individuals in Australia may be compromised, removed or damaged by government regulations and actions. Examples of government restrictions on property rights may range from large national policy initiatives, such as the preservation of native vegetation which can undermine the use and purpose of land, through to individual decisions directly affecting particular people and properties, such as the refusal by the Victorian Civil and Administrative Tribunal to grant development consents on coastal land in part because of climate change considerations.²³

Rights & Responsibilities 2014 will focus on:

- the types of property you own or believe you should own
- where restrictions on property rights exist
- whether your right to own property or exercise property rights has been compromised, restricted or removed
- what could be done to enable you to exercise your right to property.

- 1 For example, see Article 19(3) of the *International Covenant on Civil and Political Rights*.
- 2 Parliamentary Joint Committee on Human Rights, *Guide to Human Rights*, Commonwealth of Australia (2014), p 8.
- 3 International Council on Human Rights Policy, *Taking Duties Seriously: individual duties in international human rights law*, Switzerland (1999), pp 39-40.
- 4 For a broader discussion, see G Williams and D Hume, *Human Rights Under the Australian Constitution* (2nd edition), Oxford University Press (2013).
- 5 While there is no national statutory charter of rights, the Australian Capital Territory has enacted the *Human Rights Act 2004* (ACT) and Victoria has enacted the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
- 6 See the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), ss 4 and 7, which provides for the appointment of a Parliamentary Joint Committee on Human Rights to examine and report to Parliament on the compatibility of bills, legislative instruments and existing legislation with human rights; and undertake inquiries on human rights matters referred by the Attorney-General.
- 7 For example, see Parliamentary Joint Committee on Human Rights, *Practice Note 2 (interim) Civil Penalties*, Commonwealth of Australia (2013); Parliamentary Joint Committee on Human Rights, *Annual Report 2012-2013*, Commonwealth of Australia (2013).
- 8 The rights are set out in Articles 19 and 20 of the *International Covenant on Civil and Political Rights*, Articles 4 and 5(d)(viii) of the *International Convention on Elimination of All Forms of Racial Discrimination*, Articles 12 and 13 of the *Convention on the Rights of the Child*, and Article 21 of the *Convention on the Rights of Person with Disabilities*.
- 9 F La Rue, *Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, UN Doc: A/HRC/14/23, 20 April 2010, para 27.
- 10 Article 20(2) of the *International Covenant on Civil and Political Rights*.
- 11 *Lange v Australian Broadcasting Corporation* (1997) ALR 96.
- 12 The right is set out in Article 18 of the *International Covenant on Civil and Political Rights*, Article 5(d)(vii) of the *International Convention on the Elimination of All Forms of Racial Discrimination* and Article 14 of the *Convention on the Rights of the Child*.
- 13 The High Court of Australia has generally adopted a narrow view of the scope of section 116. For example, it held that a law providing for financial aid to the educational activities of church schools was not a law for establishing a religion, even though the law might indirectly assist the practice of religion, and accordingly, the law was not in breach of section 116 (*Attorney-General (Victoria); Ex rel Black v The Commonwealth* (1981) 146 CLR 559).
- 14 *Sex Discrimination Act 1984* (Cth), ss 37 and 38.
- 15 The right is set out in Article 22 of the *International Covenant on Civil and Political Rights*, Article 8(1)(a) of the *International Covenant on Economic, Social and Cultural Rights*, Article 5 of the *Convention on the Elimination of All Forms of Racial Discrimination*, Article 15 of the *Convention on the Rights of the Child* and Article 21 of the *Convention on the Rights of Persons with Disabilities*.
- 16 Parliamentary Joint Committee on Human Rights, *Guide to Human Rights*, Commonwealth of Australia (2014), p 39.
- 17 Attorney-General's Department, *Right to Work and Rights at Work*. At <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/Righttoworkandrighatsatwork.aspx> (viewed 26 August 2014).
- 18 *Unions NSW v New South Wales* [2013] HCA 58.
- 19 The right is set out in Article 17 of the *Universal Declaration on Human Rights*, Article 1 of the *European Convention on Human Rights*, Article 21 of the *Inter-American Convention on Human Rights* and Article 14 of the *African Charter on Human and Peoples Rights*.
- 20 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.
- 21 The technical definition of 'acquisition' was strictly applied in cases such as *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 and *ICM Agriculture Pty Ltd v Commonwealth* [2009] HCA 51.
- 22 For example, see L Staley, *Reshaping the Landscape: The quiet erosion of property rights in Western Australia*, Institute of Public Affairs and Mannkal Economic Education Foundation, Project Western Australia Discussion Paper (2007), p 1.
- 23 This occurred in *Gippsland Coastal Board v South Gippsland Shire Council* [2008] VCAT 1545 and *Myers v South Gippsland Shire Council* [2008] VCAT 2414.

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