



Unit 10: Rights and freedoms in the Australian Constitution – Year 8 -  
C & C Strand: Citizenship, Identity & Diversity

Topic 8.2: Rights and Freedoms in the Australian Constitution

## Freedom of Religion and the Constitution

Many Australians think that Australia has a constitutional 'separation of church and state', like in the United States. But this is not true. Instead, there is a very limited freedom of religion set out in the Commonwealth Constitution, which imposes some limits on Commonwealth laws. It does not extend at all to the States, and two attempts to extend it to the States failed in referendums held in 1944 and 1988.

### What does the Commonwealth Constitution say?

In summary, [section 116](#) of the Constitution says that the Commonwealth shall not:

- make any law for establishing any religion
- make any law for imposing any religious observance
- make any law for prohibiting the free exercise of any religion
- require any religious test as a qualification for any office or public trust under the Commonwealth.

### What does 'establishing any religion' mean?

In some countries, there is an official 'established' religion. This means that it is formally recognised as the national religion and it is given special privileges within the governmental system, such as seats in Parliament for its representatives.

*Christianity, St Mary's Catholic Cathedral, Sydney, NSW.*

*Source: Catholic Archdiocese of Sydney*





*Islam, Auburn Gallipoli Mosque, Sydney, NSW.  
Source: IStock*

There is also some kind of obligation on the people to give support to that religion and its teachings, even though they might not belong to it. An example is the Church of England, which is the established religion in England. The [monarch](#) is Supreme Governor of the Church of England and appoints its Bishops on the advice of the Prime Minister (regardless of what religion the Prime Minister happens to be), from nominees proposed by the Crown Nominations Commission. Twenty-six of its bishops, known as 'Lords Spiritual' have seats in the House of Lords due to their office as Bishop, and can debate bills in Parliament and vote for or against them.

Australia has never had an established religion. There is no official church of Australia and no obligation to support a particular religion. Bishops are not appointed on the advice of the Prime Minister and religious leaders do not have dedicated seats in Parliament.

Some people have argued that the making of government grants to religious schools breaches the establishment clause in section 116, but the High Court has rejected this view. Government aid to religious schools does not create one established religion for Australia – it supports the education of people from many different religions. A [majority of the High Court](#) said there was no establishment of a religion, because the Commonwealth law did not recognise a particular religion as a national institution, or grant it special titles and privileges, or impose duties to promote or support it. The majority said that the United States cases were based on a more broadly phrased constitutional provision and were not applicable in Australia. Section 116, in contrast, was directed at laws 'for' establishing religion – so there needed to be a direct purpose.

## Does the free exercise of my religion exempt me from ordinary laws?

What if a religious practice involved human sacrifice, or theft, or some other activity ordinarily considered a crime in Australia? Is the law that prohibits such acts invalid if it criminalises acts performed in the free exercise of religion? No.

First, most criminal laws are State laws, and section 116 does not apply to State laws. But secondly, the [High Court has also interpreted](#) section 116 as not invalidating laws that are there to protect society. The word 'for' allows the courts to look at the purpose of the law – is it for protecting the community or for prohibiting the free exercise of any religion? Justice Rich said that: "Freedom of religion is not absolute. It is subject to powers and restrictions of government essential to the preservation of the community". He thought freedom of religion could not be used as a cover for spying or undermining the war effort.

Can a law require you to act in a way that offends your religious beliefs? Yes, it can. In [Krygger v Williams](#) a conscientious objector argued that he could not be required to undertake training in the armed forces because it breached his religious beliefs. The High Court was not sympathetic.



*Buddhist, Chung Tian Temple,  
Brisbane, QLD*

*Source: Wiki Commons*

The Court noted that in a time of war there were special provisions that allow conscientious objectors to do life-saving work, like driving an ambulance. Chief Justice Griffith also said that 'a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds', but would not breach section 116. It would not prohibit him from exercising his religion. Do you agree?

What if a law is not directed at stopping you from exercising your religion, but may have this effect in practice? This issue arose in the [Stolen Children Case](#). The removal of Aboriginal children from their families often had the effect of separating them from their religious practices. Did this breach the Constitution? The Court concluded that the purpose of the law was not to prohibit the free exercise of religion. It therefore did not breach section 116.

## A religious test?

[Mr Williams](#) was unhappy that there was a Commonwealth-funded chaplain in the State school his children attended. He wanted to argue that this was a breach of the separation of church and state. The best argument he could make regarding section 116 was that there was a [religious test](#). To be a chaplain a person had to be recognized 'through formal ordination, commissioning, recognized qualifications or endorsement by a recognized or accepted religious institution or a State/territory government approved chaplaincy service'.

Mr Williams argued that this was a 'religious test' for school chaplains, and because they were employed in government schools and paid under a Commonwealth scheme, it breached section 116.

This argument [failed in the High Court](#) at the first hurdle, because the chaplains were not Commonwealth officers. They were employed by Scripture Union Queensland and held no office under the Commonwealth. Just because Scripture Union Queensland received Commonwealth funds, this did not turn its employees into the holders of a Commonwealth office. (Mr Williams won his case on a different ground, unrelated to freedom of religion.)

What about the King? He must meet a [religious test](#) to be King of the United Kingdom, and under the same laws to be King of Australia. He must be a [Protestant](#) and 'in communion with the [Church of England](#)'. Does this [breach the Constitution](#)?

The framers of the Constitution were well aware of this requirement when they wrote the Constitution. We can only assume that they considered that the office of Queen or King was not one that was an office that was 'under the Commonwealth'. The Queen or King, it would seem, is 'over' the Commonwealth and not affected by section 116.





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Topic 8.2: Rights and Freedoms in the Australian Constitution

## Common law freedoms and the principle of legality: Case studies on the protection of the rights of ordinary Australians

The common law (i.e. law recognised by judges over centuries) has recognised a number of fundamental freedoms, such as freedom of speech, freedom of religion, freedom of movement, freedom of association and freedom of assembly. These freedoms were seen as fundamental to the notion of 'liberty'. People are at liberty to act unless forbidden by law.

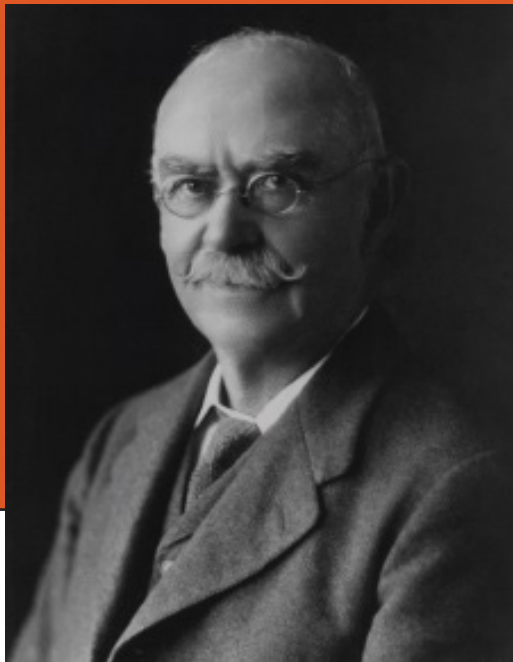
The High Court described this common law freedom in the case of *Lange v Australian Broadcasting Corporation* in 1997 as follows:

'Under a legal system based on the common law, "everybody is free to do anything, subject only to the provisions of the law", so that one proceeds "upon an assumption of free speech" and turns to the law "to discover the established exceptions to it".'

This means that the freedom is a weak one. It only exists to the extent that no law has taken it away. Parliament has the power to legislate to limit these freedoms (subject to any constitutional restrictions).

*Chinese miners on the goldfields near  
Beechworth in Victoria.  
Source: State Library of Victoria*





*Chief Justice Sir Frank Gavan Duffy (1931-1935) had earlier successfully represented James Minahan in the High Court. Because Minahan was born in Australia he was not an 'immigrant'*  
*Source: High Court of Australia*

But the courts have sought to protect fundamental freedoms by interpreting statutes in such a way as not to limit fundamental freedoms unless it is extremely clear on the face of the statute that this is what is intended. The rationale for this approach is that these freedoms are so important that they should not be limited by accident. If Parliament is to take such an important step as to limit a fundamental freedom, then this needs to be addressed in Parliament so that all those voting in favour of it are clear what they are doing, and so that the voters also are aware of what their representatives are doing. This ensures that there is ultimate accountability for actions taken.

### **Case study 1 – *Potter v Minahan* (1908)**

James Minahan was born in 1876 in Melbourne to a Chinese father, Cheong Ming, who had been a store-keeper in the gold fields, and an Irish-Australian mother, Winifred Minahan. His parents were not married and he was registered as an Australian under his mother's surname. When he was five years old he returned with his father to China. But he was treated poorly in China because of his mixed-race background. When he became an adult, he returned to Australia. Upon entry, he showed his birth certificate as evidence that he was an Australian citizen. He was disbelieved and was treated as an immigrant who had to undertake the 'dictation test'. The test was done in English, but because he had returned to China as a young child, he did not remember any English.

Minahan was refused entry to the country, and brought legal proceedings claiming that he had a right to enter the country because he was an Australian citizen.

He was charged with being an illegal immigrant. Minahan had witnesses who had known him from his childhood in Australia and visited him regularly in China. He won his case before a Police Magistrate.

The Prime Minister, however, instructed that the Commonwealth should appeal the case, so as to get certainty about who is an 'immigrant' under the Constitution. In the High Court, Minahan was represented by Frank Gavan Duffy, who was later to become Chief Justice of the High Court. Again, Minahan was successful. A majority of the Court found that he was not an 'immigrant', because he had been born in Australia.

Justice O'Connor applied the principle of statutory interpretation that general words in a statute are not to be interpreted in a way that would overthrow fundamental principles, infringe rights or depart from the general system of law unless such an intention is expressed 'with irresistible clearness'.



Justice O'Connor concluded that it was:

'the right of every British subject born in Australia, and whose home is in Australia, to remain in, depart from, or re-enter Australia as and when he thought fit, unless there was in force in Australia a positive law to the contrary.... It cannot be denied that, subject to the Constitution, the Commonwealth may make such laws as it may deem necessary affecting the going and coming of members of the Australian community. But in the interpretation of those laws it must, I think, be assumed that the legislature did not intend to deprive any Australian-born member of the Australian community of the right after absence to re-enter Australia unless it has so enacted by express terms or necessary implication.'

James Minahan therefore had the right to enter and live in Australia.

## Case study 2 – World Youth Day case – *Evans v New South Wales*

In 2008, 'World Youth Day' was held in Australia. It was a gathering of Catholic youth for a series of events, culminating in a Mass said by the Pope. Two members of the 'No to the Pope' coalition wished to attend and protest against Catholic teachings. The *World Youth Day Regulation 2008* (NSW) had been made to manage the crowds and the running of the event. Clause 7 gave police officers the power to direct people to cease engaging in conduct that risked public safety, obstructed events or caused annoyance or inconvenience to participants.

*World Youth Day Celebrations at Barangaroo, Sydney, 2008.*

*A regulation that limited freedoms for the purpose of ensuring crowd safety at World Youth Day celebrations was challenged in the Federal Court. Most of it was upheld, but a part directed at 'annoyance' was held to be invalid because it fell outside the scope of the power granted by the authorising statute. Source: National Film and Sound Archive of Australia*

The Federal Court accepted that section 58 of the *World Youth Day Act 2008* (NSW) was sufficiently broad to support the making of such a regulation. It authorised the making of regulations in relation to matters including regulating the conduct of the public at World Youth Day venues and facilities. But the Court said that where there is a choice about how to interpret provisions, the principle in *Potter v Minahan* should be applied so as not to burden common law rights and freedoms.

The Court accepted that freedom of speech was a fundamental common law freedom that applied, subject to reasonable regulation for the purposes of an ordered society. The Court also accepted that freedom of religious expression and belief was a fundamental freedom in Australia.

There was potential for the two freedoms to conflict, if freedom of speech were to be used to disrupt or obstruct the exercise of freedom of religious expression.

The Federal Court concluded that the parts of the regulation which prohibited actions that would obstruct World Youth Day events or cause risks to safety fell validly within the scope of the power, as this was consistent with fundamental freedoms.

However, it struck down the part of the Regulation that prohibited acts that caused 'annoyance'. It considered that there was no objective test that could be used by the police to assess annoyance.

People could be annoyed by expressions of free speech that did not disrupt or interfere with the freedoms of others. But the Court upheld the validity of part of the Regulation that prohibited acts that 'inconvenienced' others, as this was more objective in nature and would not prevent the expression of opinions with which people might disagree.



## Topic 8.2 Lesson/ Activities: Four



**AUSTRALIAN  
CONSTITUTION  
CENTRE**

Rights and Freedoms in the  
Australian Constitution (Freedom  
of religion, common law freedoms  
and the principle of legality)

### Time/Lesson

- 1 hour/ 1 Lesson

### Learning Goal

To understand the limited constitutional protection given to freedom of religion in Australia and how the courts protect common law freedoms through the 'principle of legality.'

### Rationale

To give students a better understanding of rights in Australia, including when rights can be limited by Parliament and how rights are protected by the courts.

### Success Criteria

Students can understand how courts protect common law rights by applying the principle of legality and can explain the limited protection given to freedom of religion in the Constitution.

### Teaching Reference Document

- TRD 87: Freedom of religion and the Constitution
- TRD 88: Common law freedoms and the principle of legality

### Resources

- Attorney-General's Department, 'Right to freedom of thought, conscience and religion or belief': <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/humanrights-scrutiny/public-sector-guidance-sheets/right-freedom-thought-conscience-and-religion-or-belief#:~:text=The%20Commonwealth%20shall%20not%20make,public%20trust%20under%20the%20Commonwealth>

### Tuning In

- The right to freedom of religion is also connected to freedom of thought, conscience and belief. Article 18 of the International Covenant on Civil and Political Rights says that 'Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or 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.' But it also says that this freedom is subject to limitations prescribed by law that are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.
- Discuss with the class the circumstances where the right to freedom of religion might need to be balanced against other rights or limited by a law.
- How might freedom of religion conflict with freedom of speech, freedom of expression or anti-discrimination rights? Who decides which right or freedom prevails and how do they make that decision?
- Read the Attorney-General's Department discussion on the 'Right to freedom of thought, conscience and religion or belief' (see resource above). Look for examples of where these rights need to be respected.



## Teacher Instruction

- **READ: TRDs** on freedom of religion, common law freedoms and the principle of legality.
- In a case called *Krygger v Williams* (1912), in which a conscientious objector challenged the validity of a law requiring compulsory military training, Chief Justice Griffith said that 'a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds', but would not breach section 116 [of the Constitution]. It would not prohibit him from exercising his religion.'
- Ask students if they agree with this reasoning? Does it prohibit your free exercise of your religion if you are compelled by law to do an act that is forbidden by your religion? Might the fact that the conscientious objector could have served in the armed forces in a role that saved lives, such as by driving an ambulance, have affected the Court's reasoning? What if there were no such options, and he had been required to serve in a role that involved killing the enemy? Should religious belief be a ground for exemption? Organize a class debate on the subject.

## Group Independent Learning

- Case-study - *Potter v Minahan* (1908) . Ask students to study the facts of the case. Justice O'Connor concluded that it was: 'the right of every British subject born in Australia, and whose home is in Australia, to remain in, depart from, or re-enter Australia as and when he thought fit, unless there was in force in Australia a positive law to the contrary.... It cannot be denied that, subject to the Constitution, the Commonwealth may make such laws as it may deem necessary affecting the going and coming of members of the Australian community. But in the interpretation of those laws it must, I think, be assumed that the legislature did not intend to deprive any Australian-born member of the Australian community of the right after absence to reenter Australia unless it has so enacted by express terms or necessary implication.'
- Ask students to assess why the Court wanted to make Parliament be very clear when it intends to limit rights.
- Ask students to apply Justice O'Connor's statement to the exclusion of Australians during the India travel ban during the pandemic. Why did the Court decide the law restricting access to Australia was valid? (See Unit 9 Topic 8.1 Case Study - Delegated legislation and the 2021 India travel ban.)

## Wrapping It Up

Discuss why and how the courts protect common law rights by applying the principle of legality. Is it reasonable to force Parliament to be clear when it intends to restrict rights? Are greater protections for rights in Australia needed, or is it best to leave Parliament with the flexibility to decide what limitations on rights are needed in the circumstances?

## Differentiation/Enrichment

Students research the Stolen Children case and why the Court concluded that section 116 was not breached.

## Assessment Strategies

Assess understanding as exhibited in class debate and discussion.

