

RELIGIOUS FREEDOM AND JOB SECURITY

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Debate on the need for new anti-discrimination laws to address religious discrimination continues in Australia. Claims for greater protection for freedom of religious expression present particular challenges for employers who bear responsibilities to maintain psychologically safe and healthy workplaces for all their employees. The present 'general protections' against discriminatory treatment in the Fair Work Act 2009 (Cth) do not adequately deal with complaints of discrimination, largely because of the ease with which employers can excuse adverse action on the basis of their own workplace policies. However, the proposals in the Religious Discrimination Bill 2019 (Cth) go too far in seeking to address that weakness. We propose that an alternative model for balancing the respective interests in workplace disputes of this kind would be expanding the workplace bullying and unfair dismissal jurisdictions of the Fair Work Commission, to enable these kinds of conflicts to be managed in a proportionate and balanced manner.

I INTRODUCTION

The debate in Australia about protecting religious freedom reached a crescendo in 2019 with the highly publicised dispute between star rugby player, Israel Folau, and his employers, Rugby Australia and New South Wales Rugby Union. Folau's employment was terminated when Rugby Australia formed the view (supported by a Code of Conduct Tribunal ('CCT')) that Folau had committed serious breaches of the mandatory code of conduct in his player contract when he publicised religiously-motivated homophobic views on social media.¹ Folau's own legal action was settled in December 2019, but the dispute had already generated

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1 For a news media summary of the matter, including a screenshot of Folau's controversial social media post, see Sam Clench, 'One Unresolved Legal Question at the Heart of Israel Folau's Case', *News.com.au* (online, 25 June 2019) <<https://www.news.com.au/sport/sports-life/one-unresolved-legal-question-at-the-heart-of-israel-folau-case/news-story/387b057b25ab325d35ea494b9ed087b3>>. Folau had filed proceedings in the Federal Circuit Court of Australia alleging unlawful dismissal under the *Fair Work Act 2009* (Cth) s 772(f), breach of contract, and restraint of trade: see Isileli 'Israel' Folau, 'Alleged Unlawful Termination of Employment', Application in *Isileli ('Israel') Folau v Rugby Australia & Anor*, MLG2486/2019, 31 July 2019. The matter settled on 4 December 2019: see, 'Rugby Australia and Israel

two Exposure Drafts of a federal Religious Discrimination Bill (with potentially a further version of the Bill to be released) and ongoing debate about the need for greater protection for religious freedom.² This article seeks to contribute to that debate by recommending an approach to dealing with such disputes when they manifest in a threat to a worker's job security.³

While we acknowledge the need for more effective protection for workers' entitlements to hold and express their own religious (and for that matter political) values and be free from workplace discipline for that reason, we also recognise that employers are often placed in an invidious position as a consequence of an employee's expression of robust religious and political views that threaten the wellbeing of other workers. In addition to their common law duty of care,⁴ employers owe statutory duties to provide safe and psychologically healthy workplaces for all employees,⁵ and their ability to manage that responsibility risks being compromised by too stringent a requirement to refrain from any discipline whatsoever of the expression of offensive views in the workplace. Employees also share the responsibility to comply with employer policies designed to promote safe and healthy workplaces.⁶ Employers can be held vicariously liable for any harm

Folau Settle Legal Dispute over Sacking', *ABC News* (online, 5 December 2019) <<https://www.abc.net.au/news/2019-12-04/rugby-australia-israel-folau-mediation-settlement/11765866>>.

- 2 'Religious Freedom Bills: First Exposure Drafts', *Australian Government, Attorney-General's Department* (Web Page) <<https://www.ag.gov.au/rights-and-protections/consultations/religious-freedom-bills-first-exposure-drafts>>; 'Religious Freedom Bills: Second Exposure Drafts', *Australian Government, Attorney-General's Department* (Web Page) <<https://www.ag.gov.au/rights-and-protections/consultations/religious-freedom-bills-second-exposure-drafts>>. For more recent calls for state-level religious discrimination laws in New South Wales by One Nation politician Mark Latham, see, eg, Interview with Mark Latham (Ben Fordham, 2GB 873AM Radio, 8 September 2020) <<https://www.2gb.com/mark-latham-proposes-discrimination-bill-supporting-religious-freedoms/>>.
- 3 The many serious threats to people's religious freedoms outlined in the Australian Human Rights Commission and Victorian Equal Opportunity & Human Rights Commission, *Freedom of Religion in Australia: A Focus on Serious Harms* (Report, July 2020) are not addressed in this paper. We consider only the question of protecting those freedoms in the context of workplace disputes.
- 4 See *Czatyрко v Edith Cowan University* (2005) 79 ALJR 839, 842–3 [12] (Gleeson CJ, McHugh, Hayne, Callinan and Heydon JJ); *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 98 [276] (Hayne J).
- 5 See the *Work Health and Safety Act 2011* (NSW) ('*WHS Act*') section 19 which sets out the primary duty of care of a person conducting a business or undertaking to ensure, so far as is reasonably practicable, the health and safety of all workers engaged by them or whose work they influence. 'Health' is defined in section 4 to mean both physical and psychological health. Section 28(d) provides that workers, while at work, must co-operate with any 'reasonable policy or procedure' relating to health or safety at the workplace. Similar provisions can be found in the legislation for all the states and territories which have adopted the model Work Health and Safety legislation: *Work Health and Safety Act 2011* (ACT) ss 4, 28(d); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) ss 4, 28(d); *Work Health and Safety Act 2011* (Qld) ss 4, 28(d), sch 5; *Work Health and Safety Act 2012* (SA) ss 4, 28(d); *Work Health and Safety Act 2012* (Tas) ss 4, 28(d). Although not adopting the model provisions, Victorian legislation also imposes broad duties on employers and employees to cooperate in ensuring safe and healthy workplaces and defines 'health' to include psychological health: *Occupational Health and Safety Act 2004* (Vic) ss 5, 20.
- 6 See, eg, *WHS Act 2011* (NSW) s 28. See also the employee's common law duty to co-operate in maintaining a safe workplace: *X v Commonwealth* (1999) 200 CLR 177, 188 [32] (McHugh J), where it was held that it was an 'inherent requirement' of a job that the employee cooperate in the provision of a safe working environment.

inflicted by a co-worker in connection with employment if that harm flows from breach of the harassment provisions or general non-discrimination obligations in anti-discrimination legislation,⁷ so employers do have a responsibility to take reasonable steps to manage their workplace culture through the promulgation of appropriate workplace conduct policies. While there is general support for the reform of federal anti-discrimination laws to address the absence of protections for religious discrimination in the federal sphere, there are concerns that the way in which the proposals have been framed could encroach on other human rights protections and override existing anti-discrimination laws.⁸ Hence we do not regard the type of legislative approach advocated in the Exposure Drafts of the Bill⁹ as an effective way of addressing the challenges faced by employers. In our view, a more effective solution for workplace disputes over this issue would be to expand the jurisdiction of the Fair Work Commission to deal with these issues as a matter of conciliation and arbitration for a ‘fair go all round’,¹⁰ much in the way that the Fair Work Commission presently manages its unfair dismissal jurisdiction,¹¹ and its more recently introduced workplace bullying jurisdiction.¹² This approach to resolving disputes may provide more effective protection for workers expressing religious and political commitments than are presently available under the General Protections provisions in the *Fair Work Act 2009* (Cth) (*‘Fair Work Act’*),¹³ because the way those provisions have been interpreted by the High Court of Australia has tended to favour employers’ rights to manage their own workplaces.¹⁴ We unpack this argument in several sections following.

In Part II, we begin by relating the tale of the Israel Folau matter, as an illustration of two things. First, the Folau story demonstrates the way in which values may clash: sincerely expressed religious views are capable of causing affront to the sensibilities of others in the workplaces, and can (in some cases) also threaten the viability of an employer’s business. We note several similar cases where the robust expression of religious or political views has generated litigation over a person’s entitlement to job security. Secondly, the Folau litigation demonstrates how these kinds of contests are presently managed under Australian

7 See, eg, *Sex Discrimination Act 1984* (Cth) s 106.

8 See, eg, Australian Human Rights Commission, Submission to the Attorney-General’s Department, *Consultation on Religious Freedom Bills* (27 September 2019) <<https://www.ag.gov.au/sites/default/files/2020-05/Australian%20Human%20Rights%20Commission.pdf>>.

9 For related developments in the state of NSW, see the Private Members’ Bill tabled by Mark Latham: Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW).

10 This expression, which encapsulates the fundamental object of unfair dismissal laws, was first used in *Re Loty and Holloway v Australian Workers’ Union* [1971] AR (NSW) 95, 99 (Sheldon J) (*‘Re Loty’*).

11 *Fair Work Act 2009* (Cth) pt 3-2.

12 Ibid pt 6-4B.

13 Ibid pt 3-1. See also Allison Ballard and Patricia L Easteal, ‘Mapping the Legal Remedy Pathways for Workplace Bullying: A Preliminary Overview’ (2014) 39(2) *Alternative Law Journal* 94; Jack de Flamingh, ‘FWC’s Anti-Bullying Jurisdiction: Is It Working?’ (2015) 16 *Law Society of New South Wales Journal* 80.

14 The key decisions, *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 and *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243 (*‘BHP Coal’*), are noted below.

workplace laws, as a claim that an employer has taken adverse action against an employee for a prohibited reason, without lawful excuse. We explain why this avenue for litigating these kinds of claims has proven to be largely unproductive for employees.

In Part III, we consider the aspects of the proposed Religious Discrimination Bill 2019 (Cth) that would affect employers' obligations and employees' rights, in order to show that this solution to the problem would not necessarily produce favourable outcomes for all employees in any case and may permit further discriminatory conduct against other vulnerable groups in workplaces. In Part IV, we turn our attention to the way that the Fair Work Commission manages unfair dismissal and workplace bullying complaints and suggest that these processes which are directed to finding a 'fair go all round' have the potential to recognise and balance the respective interests of all parties to these disputes: the employer, the outspoken employee, and others at the workplace affected by the conflict. We justify this view by (limited) reference to some of the jurisprudence of the European Court of Human Rights and decisions of the Employment Tribunal in the United Kingdom ('UK') on these kinds of matters, not for the purpose of commenting on that jurisprudence per se, but for the contribution it makes to an understanding of the concept of proportionality in managing disputes between various rights-holders.¹⁵ In Part V, we note some important qualifications to the current unfair dismissal provisions that would be necessary to widen access to this jurisdiction to all employees and other workers affected by these kinds of disputes. And finally, we offer some concluding observations in Part VI.

II RUGBY AUSTRALIA'S OFF-FIELD CONTEST

Rugby Australia found itself at the centre of the debate about religious freedom in Australia when it purported to discipline one of its star players, Israel Folau, for posting a meme on a social media site that indicated that homosexuals would burn in hell, along with a list of other 'sinners'.¹⁶ Rugby Australia's action followed a media storm, in which some commentators castigated Folau for expressing non-inclusive views, and some claimed that sponsors would withdraw support from Rugby Australia unless it disciplined him.¹⁷ Faced with such public outrage from

15 Readers interested in the European Court of Human Rights jurisprudence on these issues will find valuable insights in Hugh Collins, 'The Protection of Civil Liberties in the Workplace' (2006) 69(4) *Modern Law Review* 619; Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71(6) *Modern Law Review* 912; Astrid Sanders, 'The Law of Unfair Dismissal and Behaviour Outside Work' (2014) 34(2) *Legal Studies* 328; Paul Wragg, 'Free Speech Rights at Work: Resolving the Differences Between Practice and Liberal Principle' (2015) 44(1) *Industrial Law Journal* 1. We are grateful to an anonymous reviewer for alerting us to a case in the United States of America, *Buonanno v AT&T Broadband LLC*, 313 F Supp 2d 1069 (D Colo, 2004), which also addresses these issues, however, we will not deal in this article with United States jurisprudence, given its complexity.

16 See Clench (n 1) for a picture of the meme.

17 See Max Mason, 'Rugby Australia Does the Right Thing by Sponsors', *Financial Review* (online, 8 May 2019) <<https://www.afr.com/companies/media-and-marketing/israel-folau-rugby-australia-does-the-right-thing-by-sponsors-20190508-p511bk>>; Daisy Doctor, 'Qantas Reconsiders Wallabies

fans and sponsors, Rugby Australia initiated disciplinary proceedings against Folau. From Rugby Australia's point of view, the matter raised serious concerns about its ability to manage its business reputation, its relationships with fans and sponsors, and its commitment to social inclusion, including support for those people involved in the sport who were seriously upset by the publication of homophobic views by such a high-profile ambassador for the sport.¹⁸ This kind of adverse publicity can be very damaging to an organisation. There is a social media organisation, known as 'Sleeping Giants', that makes it its business to publicise the names of sponsors of organisations that appear to tolerate racist, homophobic and misogynist views.¹⁹ This group campaigned against former 2GB radio broadcaster, Alan Jones, following his vitriolic attack on New Zealand's Prime Minister, Jacinda Ardern.²⁰ From the point of view of protecting business reputation and financial viability, it is not unreasonable for employers to take notice of these kinds of challenges.

From a legal point of view, Rugby Australia relied on what it claimed to be express contractual rights. Rugby Australia relied on a term in Folau's player contract that required him to abide by a Code of Conduct containing (among an extensive catalogue of provisions) prohibitions on using social media to disseminate homophobic views in contradiction of the inclusive values of Rugby Australia. The individual player contract was a standard form contract, negotiated collectively between Rugby Australia, its member clubs in each state, and the Rugby Union Players Association ('RUPA') representing the employed players. It was also a term of this player contract that Rugby Australia should refer any allegation of breaches of the Code of Conduct to a CCT, comprised of three members, one representing Rugby Australia, one representing RUPA, and one independent member. The CCT determined that Folau had committed a 'high level' breach of the code, and recommended termination of his employment as the appropriate sanction. Rugby Australia promptly implemented this advice and terminated Folau's contract, whereupon Folau commenced litigation alleging, among other

Sponsorship after Player's Homophobic Comments', *B&T* (Blog Post, 9 April 2018) <<https://www.bandt.com.au/qantas-reconsiders-israel-falou-sponsorship-homophobic-comments/>>. There was also considerable media support for Folau's right to express his religiously based views, and the debate continued until after Folau withdrew his claim for an undisclosed settlement: see, eg, Brad Norington and Nick Tabakoff, 'Clerics Back Folau "Free Speech"', *The Australian* (online, 10 April 2018) <<https://www.theaustralian.com.au/sport/rugby-union/clerics-back-israel-falaus-right-to-free-speech/news-story/d98df5f986e2bd19809feb3b643d484a>>; Crispin Hull, 'Israel Folau and the Importance of Protecting Free Speech', *The Canberra Times* (online, 20 April 2019) <<https://www.canberratimes.com.au/story/6079801/the-importance-of-protecting-free-speech/>>.

18 See, eg, Interview with Andy Brennan (Monique Schafter, *ABC News*, 3 September 2019) <<https://www.abc.net.au/news/2019-09-03/andy-brennan-openly-gay-israel-folau-awful-comments/11474590>>.

19 See 'Sleeping Giants Oz (@slpng_giants_oz)', *Twitter* (Web Page) <https://twitter.com/slpng_giants_oz>.

20 See Lindsay Bennett, 'Activist Group Sleeping Giants Targets Alan Jones Advertisers', *AdNews* (online, 9 October 2018) <<https://www.adnews.com.au/news/activist-group-sleeping-giants-targets-alan-jones-advertisers>>; Jenny Noyes, 'Alan Jones Losing More Advertisers in Wake of Attack on Jacinda Ardern', *The Sydney Morning Herald* (online, 19 August 2019) <<https://www.smh.com.au/entertainment/tv-and-radio/alan-jones-losing-more-advertisers-in-wake-of-attack-on-jacinda-ardern-20190819-p52iip.html>>.

things, breach of *Fair Work Act* section 772, which prohibits unlawful termination of employment on discriminatory grounds.²¹

A Why ‘Unlawful’ Dismissal?

The *Fair Work Act* purports to protect employees from discriminatory treatment at work by providing a series of ‘general protections’ against adverse action because they have exercised a workplace right or manifest a protected characteristic.²² Section 351 of the *Fair Work Act* lists a range of protected characteristics, most of which are also protected by a range of state and federal anti-discrimination laws.²³ For our purposes, the list in section 351 includes religion and political opinion, and also sexual orientation. Importantly, for the Israel Folau story, however, religion is not presently included among the protected characteristics in the *Anti-Discrimination Act 1977* (NSW).²⁴

Part 3-1 of the *Fair Work Act* is underpinned (largely) by the corporations power in the *Australian Constitution*, so its provisions apply only to national system employers and their employees.²⁵ In order to retain the comprehensive protections against unlawful dismissal for discriminatory reasons that were contained in earlier iterations of the federal industrial legislation,²⁶ the *Fair Work Act* includes provisions in part 6-4 that extend protection from ‘unlawful dismissal’ to non-national system employees. This part of the *Fair Work Act* is underpinned by the external affairs power in the *Australian Constitution* (section 51(xxix)), because it purports to give effect to Australia’s obligations under a number of International

21 Isileli ‘Israel’ Folau, ‘Alleged Unlawful Termination of Employment’, Application in *Isileli* (‘Israel’) *Folau v Rugby Australia & Anor*, MLG2486/2019, 31 July 2019.

22 Key provisions in part 3-1 include: section 340, which states the prohibition on taking adverse action against a person because of their workplace right; section 342, which defines ‘adverse action’; and section 361, which provides for a reversed burden of proof.

23 See, eg, *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth), and *Age Discrimination Act 2004* (Cth) at the federal level, and the following state enactments: *Discrimination Act 1991* (ACT) s 7; *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1992* (NT) s 19; *Anti-Discrimination Act 1991* (Qld) s 7; *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas) s 16; *Equal Opportunity Act 2010* (Vic) s 6; *Equal Opportunity Act 1984* (WA).

24 Coverage in NSW is limited to ethno-religious origin: *Anti-Discrimination Act 1977* (NSW) s 4. On proposed reforms, see Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW) and the inquiry of the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020: ‘Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW)’, *Parliament of New South Wales* (Web Page) <<https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=267>>.

25 National system employers include all foreign, trading, and financial corporations and any employer included in the national system as a consequence of states referring industrial matters to the Commonwealth, but there are still some gaps in coverage. For an understanding of the constitutional complexity of the coverage of the *Fair Work Act 2009* (Cth), see Rosemary Owens, ‘Unfinished Constitutional Business: Building a National System to Regulate Work’ (2009) 22(3) *Australian Journal of Labour Law* 258.

26 *Workplace Relations Act 1996* (Cth) s 659(1).

Labour Organisation conventions.²⁷ Israel Folau is likely to have framed his claim as a breach of section 772 of the Act, even though he was clearly employed by a national system employer, because his advisers were concerned about the risk that Rugby Australia would seek to raise a defence under the *Fair Work Act* section 351(2)(a) which exempts any conduct that is not unlawful in the place in which the conduct occurred. Since the conduct occurred in New South Wales ('NSW'), and religion was not a protected characteristic under the *Anti-Discrimination Act 1977* (NSW), it is possible that Rugby Australia would have sought to defend its action on the basis that its conduct was not unlawful in the place in which it occurred. This defence is not available for an alleged breach of section 772.

This particularly peculiar defence in section 351(2)(a) of the *Fair Work Act* was not part of earlier federal workplace legislation.²⁸ It has caused some difficulty for employees in a number of cases. For example, it was assumed in *McIntyre v Special Broadcasting Services Corporation*²⁹ that a journalist who was dismissed for expressing objectionable political opinions about the sacred Australian holiday of Anzac Day could not bring a General Protections claim under section 351 against his employer because political opinion was not a protected characteristic in NSW.³⁰ This view was also taken in *Rumble v The Partnership* ('*Rumble*'),³¹ concerning a legal consultant dismissed for expressing political opinions contrary to the interests of the firm's clients. In that case, Perram J held that if the adverse action complained of had taken place in NSW, the defence in section 351(2)(a) would have applied, because Dr Rumble's political opinion was not a protected characteristic under the *Anti-Discrimination Act 1977* (NSW).³² 'If an action is not proscribed by any anti-discrimination law then plainly the action is not unlawful.'³³

On the other hand, Manousaridis J, in *Cameron v Goldwind Australia Pty Ltd*, has taken the view that section 351(2)(a) only excludes conduct where the state law contains an express exemption for certain otherwise discriminatory conduct.³⁴ This was, however, an interlocutory injunction case before the Federal Circuit Court

27 *Discrimination (Employment and Occupation) Convention (No 111)*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960); *Workers with Family Responsibilities Convention (No 156)*, opened for signature 23 June 1981, 1331 UNTS 295 (entered into force 11 August 1983); *Termination of Employment Convention (No 158)*, opened for signature 22 June 1982, 1412 UNTS 159 (entered into force 24 November 1985); *Termination of Employment Recommendation (No 166)* (22 June 1982); *Fair Work Act 2009* (Cth) s 771.

28 *Workplace Relations Act 1996* (Cth) s 659(2). The only defences in sections 659(3) and 659(4) were for 'inherent requirements of the particular position', and the special exemption permitting religious organisations to discriminate in order to protect the sensibilities of adherents to their faith.

29 [2015] FWC 6768, [30]–[38] (Commissioner Cambridge) ('*McIntyre*').

30 *McIntyre* [2015] FWC 6768 was also settled prior to final determination. See also Lisa Visentin and Louise Hall, 'Sacked Reporter Scott McIntyre and SBS Resolve Dispute over Anzac Day Tweets', *The Sydney Morning Herald* (online, 11 April 2016) <<https://www.smh.com.au/business/companies/sacked-reporter-scott-mcintyre-and-sbs-resolve-dispute-over--anzac-day-tweets-20160411-go37vt.html>>.

31 (2019) 289 IR 72 ('*Rumble*'); upheld on appeal to a full bench of the Federal Court of Australia: *Rumble v The Partnership* (2020) 275 FCR 423 ('*Rumble Appeal*').

32 *Rumble* (2019) 289 IR 72, 99–100 [141]–[143] (Perram J).

33 *Ibid* 100 [142] (Perram J). Justice Perram cited paragraph [220] of the supplementary Explanatory Memorandum to the Fair Work Bill 2008 (Cth) as justification for this interpretation.

34 [2019] FCCA 1541 [43].

and no injunction was ordered in any event, so the safest option for employees in NSW and South Australia, where the anti-discrimination legislation does not protect religion or political opinion, is to proceed with a claim under section 772.³⁵

B A More Serious Gap in the General Protections

The risk that Rugby Australia might rely successfully on a defence under section 351(2)(a) was not, in our view, the most significant risk to Israel Folau's prospects of success, had he continued with his claim instead of accepting a settlement. More serious was the risk that Rugby Australia could establish that it did not take adverse action against him 'because' of his religious views. Clearly, Folau was dismissed as a consequence of expressing his religiously motivated views about homosexual people being destined for hell. Had he refrained from expressing those views, he would not have lost his place on the team. This, however, is not the test for establishing a General Protections claim. Rather, the court interrogates the reasons that the decision-maker has given about their motivation for taking adverse action, and if they can provide a credible reason that does not include a prohibited reason, they will have satisfied their reverse burden of proof in section 361 of the *Fair Work Act*. Where employers have been able to establish that their reason for disciplining an employee was the employee's breach of a code of conduct, employers have escaped liability for breach of the General Protections.³⁶

The cases involving the exercise of rights to engage in industrial activity provide the most cogent illustrations of the operation of the General Protections, and their weakness in the face of a contest with an employer's contractual code of conduct. The High Court of Australia has already determined, in a case concerning the protection in section 346 of the *Fair Work Act* of the right to engage in industrial activities, that an employer did not take impermissible adverse action when it dismissed a unionist for holding up a sign condemning 'scabs' on the grounds that this constituted a flagrant breach of the employer's workplace civility policy.³⁷ Ever since the High Court decision in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* ('*Barclay*'),³⁸ which also concerned an employee dismissed as a consequence of, but not 'because of', his conduct as a union official, the focus in adverse action cases has been on the subjective reasons given by the decision-maker for their conduct.³⁹

35 For this advice, see Fair Work Commission, 'Benchbook: General Protections' (Benchbook, July 2021) 101. See also Belinda Smith, 'Anti-Discrimination Law' in Carolyn Sappideen, Paul O'Grady and Joellen Riley (eds), *Mackenzie's Law of Employment* (Thomson Reuters, 8th ed, 2016) 645 [15.280].

36 See, eg, *BHP Coal* (2014) 253 CLR 243.

37 *Ibid* 247 [3] (French CJ and Kiefel J).

38 (2012) 248 CLR 500.

39 For more detailed analyses of these provisions, see Anna Chapman, Kathleen Love and Beth Gaze, 'The Reverse Onus of Proof Then and Now: The *Barclay* Case and the History of the *Fair Work Act*'s Union Victimisation and Freedom of Association Provisions' (2014) 37(2) *University of New South Wales Law Journal* 471; Beth Gaze, Anna Chapman and Adriana Orifici, 'Evaluating the Adverse Action Provisions of the *Fair Work Act*: Equally Thwarted?' in John Howe, Anna Chapman and Ingrid Landau (eds), *The Evolving Project of Labour Law: Foundations, Development and Future Research Directions* (Federation Press, 2017) 88; Liam Meagher, 'Australian Courts' Approaches to Unconscious Direct Discrimination and Adverse Action' (2017) 30(1) *Australian Journal of Labour Law* 1; Joellen Riley, 'General Protections:

Rumble illustrates the focus on the employer's subjective reasons in determining whether adverse action has been taken for a prohibited reason in a case involving the expression of a political opinion.⁴⁰ Dr Gary Rumble was employed as a consultant to a firm of solicitors,⁴¹ and in that capacity he had undertaken a review of sexual misconduct in the defence forces.⁴² Over a course of years, he became concerned that the government had not taken adequate steps to address the findings of his report.⁴³ He began to make comments in the media (including on a television program) criticising the Department of Defence, who continued to be a client of the firm.⁴⁴ He claimed that he was making these comments in his private capacity, and not as a member of the firm. Nevertheless, the managing partner of the firm issued a direction that he should not make media comments at all without first seeking permission, and in any event, should not make public comments critical of the firm's clients. The firm promulgated a new media comment policy in response to Dr Rumble's conduct, but Dr Rumble continued to ignore the policy, claiming a personal right to make comments in his private capacity.⁴⁵ Ultimately, his contract with the firm was terminated, for 'repeatedly disobey[ing] a reasonable direction to cease from criticising the firm's clients'.⁴⁶ Justice Perram recognised that Dr Rumble's contravention of the media policy 'was constituted by his expression of political opinion', so as a matter of fact, his political expression caused his dismissal.⁴⁷ Nevertheless, that was not the relevant enquiry. The question to be answered was, what was the subjective mental state of the decision maker who took the adverse action? Which characterisation of the conduct actuated the decision maker?⁴⁸ In this case, it was the characterisation of the conduct as a breach of the firm's media comment policy. It is difficult to imagine that the case between Folau and Rugby Australia would have been determined differently from this case, so long as Rugby Australia could present a convincing argument that its decision-maker was motivated only by a concern to enforce its contractual code of conduct which, on its face, made no mention of religion.

The consistent line of authority following *Barclay* and *BHP Coal* means that employers will frequently avoid a finding that they have breached the General Protections, because they will be able to point to a legitimate subjective reason for taking adverse action, even when the reason is simply an alternative characterisation of the employee's exercise of a workplace right or freedom.⁴⁹ On the whole, the General Protections provisions have proven to be a considerable disappointment

Industrial Activities and Collective Bargaining' in Shae McCrystal, Breen Creighton and Anthony Forsyth (eds), *Collective Bargaining under the Fair Work Act* (Federation Press, 2018) 162; Anna Chapman, 'Part 3-1, Adverse Action and Equality' (2020) 33(1) *Australian Journal of Labour Law* 107.

40 *Rumble* (2019) 289 IR 72.

41 *Ibid* 73 [1] (Perram J).

42 *Ibid* 74 [7].

43 *Ibid* 85–6 [67]–[70].

44 *Ibid* 88 [80].

45 *Ibid* 90–1 [96]–[97].

46 *Ibid* 76 [14].

47 *Ibid* 97–8 [132].

48 *Ibid*.

49 See also *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* (2015) 231 FCR 150.

for employee advocates hoping to see some genuine protection for employees' workplace rights, including claimed rights to express unpopular religious and political views.⁵⁰

III NEW FEDERAL PROVISIONS TO DEAL SPECIFICALLY WITH RELIGIOUS DISCRIMINATION

A Existing Discrimination Laws

In the middle of the Folau drama, the Morrison Coalition Government tabled a Religious Discrimination Bill 2019 (Cth), intending to add statutory protection against religious discrimination to the suite of federal anti-discrimination statutes purporting to protect citizens from discrimination on various grounds in all aspects of life, and not only at work. As an alternative to bringing a General Protections claim under the *Fair Work Act*, employees complaining of discriminatory treatment because of their race, sex, age or disability also have the option to pursue a complaint to the Australian Human Rights Commission.⁵¹ A patchwork of state anti-discrimination laws also gives rise to other avenues of redress.⁵² The Federal Parliament has introduced new attributes to the scope of legislative protection from discrimination in a piecemeal manner over time, commencing with race in 1975,⁵³ sex in 1984,⁵⁴ disability in 1992,⁵⁵ age in 2004⁵⁶ and finally sexual orientation, gender identity and intersex status in amendments to the *Sex Discrimination Act 1984* (Cth) ('*Sex Discrimination Act*') in 2013.⁵⁷

The latter constellation of protected attributes (sexual orientation, gender identity and intersex status)⁵⁸ are particularly relevant to the Religious Discrimination Bill 2019 (Cth), because some forms of robust expression of certain religiously motivated opinions in a workplace context may constitute discrimination or sexual harassment under the *Sex Discrimination Act*, and trigger the vicarious liability provisions, sheeting responsibility for that conduct back to the employer. The *Sex Discrimination Act* section 106 provides that an employer is liable for acts done by an employee 'in connection with' their employment. This statutory expression has been held to capture a broader range of conduct than vicarious liability under the common law for conduct 'in the course of' employment.⁵⁹ An employer could

50 See above the commentary noted at n 39.

51 *Australian Human Rights Commission Act 1986* (Cth), ss 3, 46P.

52 Space here precludes a full discussion of all state enactments. For a useful table showing all state legislation and the attributes protected in each jurisdiction, see Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 295–307.

53 *Racial Discrimination Act 1975* (Cth).

54 *Sex Discrimination Act 1984* (Cth).

55 *Disability Discrimination Act 1992* (Cth).

56 *Age Discrimination Act 2004* (Cth).

57 Inserted into the *Sex Discrimination Act 2004* (Cth) by *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth).

58 *Sex Discrimination Act 1984* (Cth) ss 5A–5C.

59 See, eg, *South Pacific Resort Hotels v Trainor* (2005) 144 FCR 402, which concerned alleged sexual harassment occurring after work hours in accommodation provided by the employer.

be found to be vicariously liable for discrimination or harassment engaged in by employees expressing religiously based antagonism towards others because of their sexual orientation, gender identity or intersex status. An employer can defend a vicarious liability claim by showing they took ‘all reasonable steps’ to prevent the conduct in question.⁶⁰ Promulgating and enforcing workplace codes of conduct is one way employers may show that they have taken such steps.⁶¹ However, if protections for religious discrimination were enacted based on the approach in these Bills, the ability to enforce codes of conduct of this nature would be diminished (discussed below).

B Religious Discrimination Bill 2019 (Cth)

The Religious Discrimination Bill 2019 (Cth) proposed at the end of 2019 would have provided employees who have been disciplined for holding or expressing religious commitments with an alternative avenue for complaint in the federal system. There have to date been two iterations of the Bill released for public comment. Our observations, which are necessarily tentative given that consultation processes have been undertaken on two Draft Exposure Bills and no final version has yet been tabled in Parliament, focus on the later version released on 10 December 2019.

The enactment of a legislative proscription of religious discrimination is generally a welcome development in the evolution of federal anti-discrimination laws and has a sound basis for implementation under article 26 of the *International Covenant on Civil and Political Rights* (‘ICCPR’). Overall, while the prospect of a federal statute outlawing religious-based discrimination is not particularly controversial in itself, the drafting of this particular Bill provoked considerable controversy and many submissions from interested parties.⁶² At the heart of the controversy is whether the proposed law strikes an appropriate balance with other protected rights (such as sexual orientation, gender identity and intersex status) and whether it would excuse discrimination by faith-based organisations and individuals against others, who would otherwise be protected under other federal, state and territory discrimination laws. Space does not permit interrogation of the full range of complex questions raised by the Bill. We mention only those aspects of the most recent draft that speak to the contest between an employer’s claim of a right to govern their own workplaces in the interests of psychological health and

⁶⁰ *Sex Discrimination Act 1984* (Cth) s 106(2).

⁶¹ For example, in *Naidu v Group 4 Securitas Pty Ltd* [2005] NSWSC 618, [228], [305], Adams J relied on the employer’s failure to adequately enforce a workplace bullying policy by providing clear procedures for reporting breaches to support a finding that the employer was liable for breach of a duty of care to an employee. See also *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82.

⁶² For submissions on the first and second draft Bills, see ‘Submissions Received for the Religious Freedom Bills: First Exposure Drafts Consultation’, *Australian Government* (Web Page, 24 March 2020) <<https://www.ag.gov.au/rights-and-protections/publications/submissions-received-religious-freedom-bills-first-exposure-drafts-consultation>>; ‘Submissions Received for the Religious Freedom Bills – Second Exposure Drafts Consultation’, *Australian Government* (Web Page, 3 March 2020) <<https://www.ag.gov.au/rights-and-protections/publications/submissions-received-religious-freedom-bills-second-exposure-drafts-consultation>>.

safety, and employees' assertion of rights to express their religious convictions without sanction.

1 *Statements of Belief*

One of the most controversial aspects of the Bill is that the expression of a personal belief that qualifies as a 'statement of belief' of a religious nature would attract special protections.⁶³ Section 42 of the Bill provides that 'in and of itself' a statement does not constitute discrimination for the purposes of any anti-discrimination laws, a particular provision of Tasmanian anti-discrimination laws,⁶⁴ or any other law prescribed by regulation. However, this protection would not arise if the statement of belief was malicious, likely to harass, threaten, seriously intimidate or vilify another person or group of persons,⁶⁵ or that a reasonable person would conclude that, in expressing the belief, the person was counselling, promoting, encouraging or urging conduct that would constitute a serious offence.⁶⁶

A 'belief' would qualify for protection if it was a religious belief, made in good faith, 'that a person of the same religion as the first person could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teaching of that religion'.⁶⁷ This implies that religious beliefs must be shared by more than one person. Idiosyncratic and heretical beliefs appear not to be given protection. Nevertheless, given that there is no attempt to define religion and that the High Court has taken a broad approach to what belief systems can claim religious status,⁶⁸ it is only a question of whether a *person of the same religion* would agree that the statement accords with the beliefs or teaching of that particular religion. It does not require that the belief meet any objective, general standard of reasonableness.⁶⁹

Proposed section 42 of the Religious Discrimination Bill 2019 (Cth) provides a broad exoneration of all statements of belief from liability. It also changes the established balance of co-existing state, territory and federal anti-discrimination legislation. If enacted, a provision of this kind would present particular difficulties for statements of belief made at a workplace that might impact adversely on the health, welfare or safety of others in the workplace or visitors to a workplace. Unless the statement fell within one of the exceptions, it would not be conduct to which an employer could direct a proportionate disciplinary response. For example,

63 Exposure Draft of the Religious Discrimination Bill 2019 (Cth) pts 2, 4.

64 *Anti-Discrimination Act 1998* (Tas) s 17(1). This provision prohibits conduct which 'offends, humiliates, intimidates, insults or ridicules another person' on the basis of attributes including (inter alia) sexual orientation, gender identity, and intersex variations of sex characteristics.

65 This exception uses a definition of 'vilify' that means 'in relation to a person or group of persons, incite hatred or violence towards the person or group': Exposure Draft of the Religious Discrimination Bill 2019 (Cth) pt 1. This is a higher threshold for establishing vilification than under the *Racial Discrimination Act 1975* (Cth) s 18C which refers to conduct that 'is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person'.

66 Religious Discrimination Bill 2019 (Cth) ss 42(2), 28(1)(b) ('Religious Discrimination Bill').

67 Ibid s 5 ('Statement of Belief').

68 *The Church of the New Faith v The Commissioner of Pay-Roll Tax (Victoria)* (1983) 154 CLR 120 (Mason ACJ, Murphy, Wilson, Brennan and Deane JJ).

69 See Wojciech Sadurski, 'On Legal Definitions of "Religion"' (1989) 63 *Australian Law Journal* 834, 836–8 for a critique of the High Court's view of religion.

a statement of belief targeted at a fellow employee's sexual orientation might adversely impact that individual but may not necessarily meet the threshold of harassment. In the absence of this exoneration, such conduct could still constitute a breach of the *Sex Discrimination Act* if it amounted to affording less favourable treatment in the conditions of work to the targeted employee than to others, and an employer could be held to be vicariously liable for harm suffered as a consequence of that breach, if the employer took no reasonable steps to prevent it.⁷⁰ Although the provisions of the Bill attempt to ensure that statements of this nature would not be actionable under anti-discrimination law, such conduct may still have an adverse impact on the psychological health or wellbeing of the targeted employee and hence put the employer at risk of being in breach of their work, health and safety obligations. As noted in our introduction, work health and safety legislation in most states and territories provides that all persons conducting a business undertaking have a primary duty of care to 'ensure so far as is reasonably practicable' the health and safety of persons at work, and 'health' includes psychological health.⁷¹

2 Conduct Rules, Indirect Discrimination, and Inherent Requirements

The Folau matter sparked considerable debate about the manner in which workplace codes of conduct affect an employee's freedom to express their beliefs on a subject unconnected with their work but likely to have repercussions for the employer's business or for relations within the workplace.⁷² The Bill includes provisions that attempt to provide a legislative resolution of that debate. Proposed section 8 is directed to the manner in which an indirect discrimination claim should be assessed where a person expressing a religious belief is adversely affected by a condition which is a workplace conduct rule. In other areas of discrimination law, a condition that has or is likely to disadvantage a particular group may be justified if it can be shown that the condition is reasonable. The standard practice is to assess the reasonableness of the condition by balancing the criteria established by the jurisprudence in the field,⁷³ and in accordance with any factors that are articulated in the relevant anti-discrimination statute.⁷⁴ The Bill proposes a set of criteria for reasonableness that would apply only to indirect discrimination on the ground of religious belief or activity.⁷⁵ In the case of workplace conduct rules, the specific factor to be considered is 'the extent to which the rule would limit the ability of

70 *Sex Discrimination Act 1984* (Cth) ss 5, 106.

71 See above the enactments listed in n 5.

72 See, eg, Samantha Smith, 'Code of Conduct vs the *Fair Work Act*: Is Firing Folau Illegal?', *HRM* (online, 13 May 2019) <<https://www.hrmonline.com.au/employment-law/folau-code-conduct-vs-fair-work-act/>>; Stephen Booth, 'Out of Work Employee Conduct vs Internal Codes of Conduct: the Cases of Israel Folau and Jack de Belin', *Coleman Grieg Lawyers* (Web Page) <<https://www.colemangreig.com.au/News-1293-Out-of-Work-Employee-Conduct-vs-Internal-Codes-of-Conduct-The-Cases-of-Israel-Folau-and-Jack-de-Belin.aspx>>; Josh Bornstein, 'Did you Cheer for Israel Folau's Sacking: Sorry, but You Can't Have It Both Ways', *ABC News* (online, 7 August 2019) <<https://www.abc.net.au/news/2019-08-07/israel-folau-should-be-able-to-go-back-to-work/11386826>>.

73 See, eg, *Waters v Public Transport Corporation* (1991) 173 CLR 349, 408–9 (McHugh J).

74 See, eg, *Sex Discrimination Act 1984* (Cth) s 7B.

75 Religious Discrimination Bill 2019 (Cth) cl 8(2).

an employee to hold or engage in [their] religious belief or activity'.⁷⁶ A conduct rule that would affect or restrict an employee from making a statement of belief, other than in the course of the employee's employment, would be deemed not to be reasonable where the employer is a private entity with an annual turnover of more than AUD50 million,⁷⁷ unless compliance with the rule by employees is necessary to avoid unjustifiable financial hardship to the relevant employer.⁷⁸ This carve-out for conduct in the course of employment raises the often-disputed territory of the employees' 'common law right' 'to wear what [they choose], to act as [they choose], in matters not affecting [their] work'.⁷⁹ Under the common law, whenever a matter can be shown to affect work, even in the most peripheral manner, it is lawful and reasonable for an employer to issue orders in respect of that matter.⁸⁰ The Explanatory Memorandum for the Bill⁸¹ states:

Subclause 8(3) only applies to employer conduct rules which restrict religious expression outside of work hours. Nothing in this subclause affects the ability of relevant employers to regulate religious expression at work. The reasonableness of employer conduct rules which restrict religious expression during work must be considered in accordance with the general reasonableness test at subclause 8(2), including paragraph 8(2)(d).⁸²

This still leaves unresolved the sticky problem of how conduct that occurs outside the spatial or temporal confines of the workplace might have repercussions for harmonious relationships and the management of the workplace. These days, many employment disputes arise as a consequence of employees expressing contrary views on social media. Employees seek to claim that their Facebook and Instagram accounts are private spaces, but when these posts leak into the public sphere of work (as they often do), they can result in justified workplace discipline, on the basis that the posts have caused grief for the employer or co-workers.⁸³ In *Linfox Australia Pty Ltd v Stutsel*, a Fair Work Commissioner noted that, '[u]nlike conversations in a pub or café, the Facebook conversations leave a permanent

76 Ibid cl 8(2)(d).

77 Ibid cl 5.

78 Ibid cl 8(3)(b).

79 *Australian Tramways Employees' Association v Brisbane Tramways Co Ltd* (1912) 6 CAR 35, 42 ('*Tramways*'). *Tramways* was not merely a matter of a dress regulation. At its heart it concerned employees' rights to express their affiliation with their trade union, so it also concerned the right to express deeply held convictions.

80 See, eg, *McManus v Scott-Charlton* (1996) 70 FCR 16, 28 (Finn J): 'once an employee's conduct can be shown to have significant and adverse effects in the workplace – because of its impact on workplace relations, on the productivity of others, or on the effective conduct of the employer's business – that conduct becomes a proper matter of legitimate concern to an employer, and does so because of its consequences'.

81 Explanatory Notes, Exposure Draft of the Religious Discrimination Bill 2019 (Cth).

82 Ibid 17 [129].

83 See, eg, *Linfox Australia Pty Ltd v Stutsel* (2012) 217 IR 52 ('*Linfox*'); *Wilkinson-Reed v Launty Pty Ltd* [2014] FWC 644; *Fitzgerald v Smith* (2010) 204 IR 292. See generally Louise Thornthwaite, 'Social Media, Unfair Dismissal and the Regulation of Employees' Conduct Outside Work' (2013) 26(2) *Australian Journal of Labour Law* 164; Andrew Corney, 'Unfair Dismissal Relating to the Use of Social Media: An Analysis of Case History' (2014) 12(1) *Canberra Law Review* 144.

written record of statements and comments made by the participants, which can be read at any time into the future until they are taken down by the page owner'.⁸⁴

Under the proposed Bill the ability of large private sector employers to argue the reasonableness of their conduct rules in the face of a claim that those rules indirectly discriminated on the grounds of religious belief or activity would be limited to relying on unjustifiable financial hardship alone.⁸⁵ This excludes the possibility of arguing other relevant factors, including the impact on other employees or the employer's corporate reputation. Finally, the Bill also reframed how conduct rules should interact with the defence of 'inherent requirements' of a job, which is also a feature of other anti-discrimination laws and the General Protections provisions in the *Fair Work Act*.⁸⁶ The Bill provided that directing an employee to comply with a conduct rule that did not meet the requirements of reasonableness could not be an inherent requirement of employment.⁸⁷ Again, the opportunity for large private sector employers to balance a range of factors in determining the inherent requirements of the job under the approach advocated by the Bill would be restricted by the manner that reasonableness is to be determined. The jurisprudence of the High Court on this topic involves a more contextual approach that extends beyond the physical ability to carry out the tasks

because employment is not a mere physical activity in which an employee participates as an automaton. It takes place in a social, legal and economic context. Unstated, but legitimate, employment requirements may stem from this context. It is therefore always permissible to have regard to this context when determining the inherent requirements of a particular employment.⁸⁸

In our view, the Bill pursues a laudable goal in seeking to protect individuals from discrimination on the basis of their religious beliefs,⁸⁹ however it overreaches that goal to the extent that it purports to defend those who engage in discriminatory treatment of others. A broadly conceived notion of 'reasonableness', and the notion of the 'inherent requirements of the job' have been important features of Australian discrimination laws, ensuring a measure of balance and proportionality in their application. The Religious Discrimination Bill 2019 (Cth), as conceived in its 10 December 2019 iteration, presents a risk that new religious discrimination protections will disrupt other anti-discrimination laws. Perhaps this is a consequence of the Exposure Bills being made available for public comment as a response to the furore surrounding the Folau matter, and that free of that influence, more proportionate laws will be developed to protect religious freedom in a manner that is coherent with other anti-discrimination laws.

84 *Linfox* (2012) 217 IR 52, 61 [26] (Boulton J, SDP, Harrison SDP and Commissioner Deegan).

85 See, eg, *King v Jetstar Airways Pty Limited* [2012] FCAFC 115.

86 *Fair Work Act 2009* (Cth) s 351(2)(b).

87 Religious Discrimination Bill 2019 (Cth) cl 8(3).

88 *X v Commonwealth* (1999) 200 CLR 177, 188 [33] (McHugh J).

89 We do not seek in this article to address the extensive philosophical literature on religion and the law. Our pragmatic concern is to interrogate the appropriate means for resolving disputes about religious expression at work on the assumption that there is evidence of broad consensus in the community that religious freedom should be protected.

In any event, we advocate that any development of further protection for the expression of religious beliefs without jeopardising job security be fashioned to fall within the jurisdiction of the Fair Work Commission as a matter for conciliation and arbitration. As we demonstrated in Part I, the rights-based model of the General Protections which takes disputes through the Federal Court system for final resolution has proved singularly unsuccessful in vindicating employees' workplace rights. Commentators note the significant limitations of an enforcement model that relies on individual complainants to pursue claims through the Federal Court system, if the matter has not been resolved by conciliation, presenting those who experience discrimination with onerous hurdles to secure any remedy.⁹⁰ Similarly, some observers suggest that some aspects of discrimination at work might be better regulated as a matter of workplace safety.⁹¹ We propose that these kinds of matters are more appropriate for resolution as interests disputes by an administrative body (such as the Fair Work Commission). A dispute involving a clash of conflicting rights between different people in a workplace, for example, between an outspoken believer and the outraged 'sinner' condemned to hell by their rhetoric, is best resolved by finding a compromise. The Commission could be charged with finding a solution that provides a 'fair go all round' and empowered to order a range of appropriate remedies to address the ongoing management of such conflicts in the workplace, much in the same way that the Fair Work Commission has developed in its workplace bullying jurisdiction.⁹²

IV FINDING A FAIRLY BALANCED SOLUTION

Often an employee who can establish the essential elements of a General Protections claim will nevertheless pursue an unfair dismissal application under part 3-2 of the *Fair Work Act* instead. The advantages of an unfair dismissal application for both parties are that it can be quickly resolved at relatively small expense, and it may result in reinstatement of the worker if it is shown that the

90 See, eg, Belinda Smith, 'A Regulatory Analysis of the *Sex Discrimination Act 1984* (Cth): Can it Effect Equality or Only Redress Harm?' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006) 105; Dominique Allen, 'Remedying Discrimination: The Limits of the Law and the Need for a Systemic Approach' (2010) 29(2) *University of Tasmania Law Review* 83; Anna Chapman, Beth Gaze, and Adriana Orifici, 'Substantive Equality at Work: Still Elusive Under Australia's *Fair Work Act*' (2017) 30(3) *Australian Journal of Labour Law* 214; Belinda Smith, Melanie Schleiger and Liam Elphick, 'Preventing Sexual Harassment in Work: Exploring the Promise of Work Health and Safety Laws' (2019) 32(2) *Australian Journal of Labour Law* 219, 227–30.

91 See, eg, Therese MacDermott, 'The Duty to Provide a Harassment-Free Work Environment' (1995) 37(4) *Journal of Industrial Relations* 495; Smith, Schleiger and Elphick (n 90); Elizabeth Shi and Freeman Zhong, 'Addressing Sexual Harassment Law's Inadequacies in Altering Behaviour and Preventing Harm: A Structural Approach' (2020) 43(1) *University of New South Wales Law Journal* 155.

92 On the remedial option available: *Fair Work Act 2009* (Cth) s 789FF; Fair Work Commission, 'Benchbook: Anti-Bullying' (Benchbook, 2 October 2019) 114–29.

employer's decision was 'harsh, unjust or unreasonable'.⁹³ Applications must be brought within 21 days of termination of the employment, filing fees are modest, and the process is initiated by filing a simple form that can be managed without legal representation.⁹⁴ If the parties are willing, it can be resolved very informally by a telephone conference.⁹⁵ If the matter does eventually go to compulsory arbitration, the applicant may be afforded a remedy even if they have not been completely faultless themselves, although misconduct on the part of the employee will be taken into account in determining the quantum of a compensation award.⁹⁶ This is because the objective of unfair dismissal protections is to permit a Commissioner exercising administrative power to determine a 'fair go all round' for all parties concerned.⁹⁷ This is the Australian vernacular for a proportionate decision that takes into account all competing claims and finds a balance between them.⁹⁸

The disadvantages of the unfair dismissal option include strict eligibility requirements that exclude so-called 'high income' earners whose employment is not covered by a modern award or enterprise agreement, and employees who have not served a minimum employment period.⁹⁹ Also, the primary remedy of reinstatement is rarely awarded in arbitrated matters, and compensation is capped at a maximum of six months' remuneration.¹⁰⁰ (Statistics are not available to confirm the optimistic possibility that more reinstatements may result from voluntary settlements at the conciliation stage.) Also, the unfair dismissal jurisdiction only becomes available to an employee after they have been dismissed.

One of the important features of the Fair Work Commission's workplace bullying jurisdiction under part 6-4B of the *Fair Work Act* is that it provides scope for employees to seek assistance in dealing with bullying behaviour while they remain employed.¹⁰¹ 'Bullied at work' is defined as repeated and unreasonable behaviour that creates a risk to health and safety.¹⁰² The list of conduct that the

93 *Fair Work Act 2009* (Cth) s 385(b). Reinstatement requires a return to actual duties, and not merely reinstatement of the contract: *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539, 544–5 [14] (McHugh J).

94 *Fair Work Act 2009* (Cth) s 394.

95 For a more comprehensive account of the dispute resolution processes for unfair dismissal applications, see Therese MacDermott and Joellen Riley, 'ADR and Industrial Tribunals: Innovations and Challenges in Resolving Individual Workplace Grievances' (2012) 38(2) *Monash University Law Review* 82.

96 *Fair Work Act 2009* (Cth) s 392(3).

97 *Ibid* s 381(2).

98 The notion of the 'fair go all round' was first articulated in *Re Loty* [1971] AR (NSW) 95, a case decided by the New South Wales Industrial Relations Commission exercising its jurisdiction to settle an industrial dispute that involved termination of some employees' contracts. This case is still cited in the note to the *Fair Work Act 2009* (Cth) section 381(2).

99 *Fair Work Act 2009* (Cth) ss 382–4. The high-income threshold (*Fair Work Act 2009* (Cth) s 382(b) (iii); *Fair Work Regulations 2009* (Cth) reg 2.13) is reviewed annually and, in July 2021, was raised to AUD158,500.

100 Fair Work Commission, *Annual Report: Access to Justice 2018–19* (Report, 26 September 2019), app D, tables D1, D6. These tables showed that in the year ended June 2019, of the 8,161 unfair dismissal matters settled by conciliation, only 55 resulted in reinstatement, and of the 229 matters that went to arbitration, only 13 resulted in reinstatement. These figures are consistent with previous years.

101 Rodney Worth and Joan Squelch, 'Stop the Bullying: The Anti-Bullying Provisions in the Fair Work Act and Restoring the Employment Relationship' (2015) 38(3) *University of New South Wales Law Journal* 1015.

102 *Fair Work Act 2009* (Cth) s 789FD(1).

Commission has held constitutes bullying includes the ways in which religiously-motivated shaming based on a person's sexual orientation, gender identity or intersex status might be characterised: humiliation, sarcasm, victimisation, verbal abuse, emotional abuse, belittling, harassment, isolation, freezing-out, ostracism, innuendo, disrespect, and mocking.¹⁰³ When it receives a complaint the Fair Work Commission must take action within 14 days, by gathering information, calling a conference or holding a hearing.¹⁰⁴ While it can make a broad range of orders designed to stop the bullying conduct, it cannot order any compensation, although it can require an employer to continue to pay wages to a worker who is stood down while a matter is being resolved.¹⁰⁵ Typical orders direct employers to institute practices that will avoid opportunities for bullying, such as separating antagonists into different rosters and locations, or require employers to moderate communication between the employees involved.¹⁰⁶ Employers may also be required to implement anti-bullying policies and educate their staff in compliance.¹⁰⁷

The main advantage in recommending that the Fair Work Commission's processes for dealing with unfair dismissal and workplace bullying complaints may provide a more suitable means of dealing with workplace religious discrimination complaints, is that these processes offer a quick and less formal method of dealing with a matter that can guide the parties in finding a compromise solution to their dispute. An unfair dismissal complaint may, for example, have provided a more suitable solution for Ms Banerji, the public servant disciplined for publishing anonymous commentary critical of her employer on social media.¹⁰⁸ Her case reached the High Court on the question of whether she enjoyed a constitutional right to freedom of political speech.¹⁰⁹ In the course of rejecting her claim, the High Court noted that Ms Banerji's entitlement to contest her dismissal under the unfair dismissal provisions in the *Fair Work Act* was an aspect of the procedural protections in the Australian Public Service Code of Conduct that ensured that it did *not* unreasonably restrain public servants' expression of political views.¹¹⁰ There is no record of Ms Banerji challenging her dismissal as 'harsh, unjust or

103 *Amie Mac v Bank of Queensland Limited* [2015] FWC 774, [99] (Hatcher V-P).

104 *Fair Work Act 2009* (Cth) s 789FE(1).

105 *Ibid* s 789FF(1); *South Eastern Sydney Local Health District v Lal* (2019) 285 IR 355, 364 [27] (Hatcher V-P, Sams DP and Commissioner Hampton) ('*Lal*').

106 See, eg, *Lal* (2019) 285 IR 355, 363 [24] (Hatcher V-P, Sams DP and Commissioner Hampton).

107 See, eg, *Re Ms LP* [2015] FWC 6602, [194] (Commissioner Hampton); *CF and NW* [2015] FWC 5272, [31]–[34] (Commissioner Hampton).

108 *Comcare v Banerji* (2019) 267 CLR 373 ('*Banerji*').

109 This implied constitutional guarantee was established and explained in a number of cases: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*'). For commentary, see HP Lee 'The Implied Freedom of Political Communication' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 383; Nicholas Aroney, 'The Implied Rights Revolution – Balancing Means and Ends?' in HP Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 173, 178–86.

110 *Banerji* (2019) 267 CLR 373, 404 [41] (Kiefel CJ, Bell, Keane and Nettle JJ), 419–20 [87] (Gageler J), 429 [125] (Gordon J), 454–5 [198] (Edelman J). It is interesting to note that none of the bench referred to Ms Banerji's aborted claim brought under *Fair Work Act 2009* (Cth) section 351.

unreasonable' under the *Fair Work Act* part 3-2, although she did attempt to seek an injunction preventing her dismissal under part 3-1 (the General Protections).¹¹¹ Justice Edelman appears to have treated Ms Banerji's case with considerably more sympathy than others on the bench, although he reached essentially the same conclusion. He expressed the view that loss of employment can be an extreme and indeed 'catastrophic' punishment for breach of a code of conduct.¹¹² This is the language of harshness: it describes a dismissal that may have been unwarranted because the punishment inflicted was disproportionate to the offence.

A General Protections claim may also be conciliated by the Fair Work Commission if the parties consent to conciliation,¹¹³ however a contested matter will be heard by a court exercising federal jurisdiction, because the General Protections constitute legal rights, determinable only by courts exercising judicial power.¹¹⁴ There will be a clear winner and a loser in such a contest: there is no scope for finding a compromise in a 'fair go all round'. As we have seen, in so many General Protections claims even those employees who have clearly been disadvantaged as a consequence of exercising a workplace right will be losers, so long as the employer can point to a credible, legitimate reason for taking adverse action, usually based in some workplace policy.

The prospect of a compromise solution in an unfair dismissal determination (even when it goes through to compulsory arbitration) means that this process is particularly suitable to contests involving conflicting interests – not only the interests of employer and employee, but the interests of others at the workplace aggrieved by an outspoken employee's expression of censorious religious views. The discretion to find the 'fair go all round' affords the Fair Work Commission an opportunity to arrive at a balanced and proportionate outcome, and to make appropriate orders to give effect to that outcome. The concept of proportionality is an important one in cases involving contests of this kind.

Consider, for example, *Chief of Defence Force v Gaynor* ('Gaynor'),¹¹⁵ a case in which the Federal Court was required to consider whether a decision to terminate the commission of an Army Reservist was a proportionate exercise of the Army's discretion to discipline its members, notwithstanding their exercise of a claim to free expression of religiously-motivated opinions. Gaynor had publicised comments on social media highly critical of the army's gender inclusive policies, and of one senior transgender officer in particular.¹¹⁶ Like Ms Banerji in *Comcare v Banerji*,¹¹⁷

111 *Banerji v Bowles* [2013] FCCA 1052 (Neville J). For an explanation of the long history of all proceedings in the Banerji litigation: Kieran Pender, 'Comcare v Banerji: Public Servants and Political Communication' (2019) 41(1) *Sydney Law Review* 131.

112 *Banerji* (2019) 267 CLR 373, 453 [195] (Edelman J).

113 *Fair Work Act* 2009 (Cth) ss 369, 595.

114 *Ibid* s 566. For an explanation of the respective roles of the Fair Work Commission and the Federal Court in cases of discriminatory dismissal, see Joellen Riley, 'Rethinking the Fair Work Protection against Discriminatory Dismissal' (2013) 41(1) *Federal Law Review* 181.

115 (2017) 246 FCR 298 ('Gaynor'). The High Court refused leave to appeal from this decision: see *Gaynor v Chief of the Defence Force* [2017] HCATrans 162, [750] (Keane J).

116 *Gaynor* (2017) 246 FCR 298, 302 [11].

117 (2019) 267 CLR 373.

he complained that the decision taken by his government employer (this time under the *Defence (Personnel) Regulations 2002* (Cth) regulation 85(1)(d)) to terminate his commission infringed the implied constitutional freedom of political communication.¹¹⁸ He succeeded at first instance upon a finding that he had made his media comments as a ‘private citizen’, and ‘in a personal capacity, unconnected with the ADF except by the ongoing formal circumstance of ADF membership’.¹¹⁹ In a unanimous judgment, the Federal Court full bench overturned this decision, and held that although the Chief of Army’s exercise of the discretion under regulation 85 to terminate his commission did operate to restrict Gaynor’s political expression,¹²⁰ it nevertheless met the requirements of the second limb of the *Lange* test.¹²¹ The *Lange* test, from *Lange v Australian Broadcasting Corporation*,¹²² requires consideration of two limbs. The first limb asks whether the law in question does restrict political expression. If so, the second limb asks whether the restriction is nevertheless consistent with preservation of the integrity of Australia’s constitutional system of representative and responsible government.¹²³ Applying the second limb involves assessing whether the law is suitable to meeting its purpose, necessary (in that no less restrictive measure might achieve the purpose), and balanced or proportionate, meaning that the benefits gained must outweigh any harm caused.¹²⁴ In this case, the purpose of regulation 85 was to permit the Defence Forces to maintain discipline among personnel, and to ensure that officers were persons of suitable character.¹²⁵ Gaynor had shown himself to be unsuitable because of his ‘lack of tolerance and respect for fellow officers’, and his persistent disobedience of a lawful command not to make such comments while identifying himself as a member of the Australian Defence Forces.¹²⁶ Exercise of the discretion in regulation 85 to terminate his commission was held to be a proportionate response, given the extreme intransigence of his conduct.¹²⁷

Gaynor had also raised an argument based on the *Australian Constitution* (section 116), because he claimed a religious motivation for his disrespectful communications.¹²⁸ Section 116 provides that ‘[t]he 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’. To this argument, the Full Bench responded:

118 *Gaynor* (2017) 246 FCR 298, 300 [1] (Perram, Mortimer and Gleeson JJ).

119 *Gaynor v Chief of the Defence Force (No 3)* (2015) 237 FCR 188, 255–6 [284], [279] (Buchanan J) (*‘Gaynor (No 3)’*).

120 *Ibid* 216 [105].

121 *Ibid* 216–7 [106]–[112].

122 *Lange* (1997) 189 CLR 520.

123 *Ibid* 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

124 *Gaynor* (2017) 246 FCR 298, 319 [91] (Perram, Mortimer and Gleeson JJ). See also *McCloy v State of New South Wales* (2015) 257 CLR 178, 217–19 [80]–[87] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ).

125 *Gaynor* (2017) 246 FCR 298, 323 [108] (Perram, Mortimer and Gleeson JJ).

126 *Ibid* 324 [109]–[111].

127 *Ibid* 324 [111]–[112].

128 *Ibid* 303 [17].

[a]bsent, perhaps, some arguments based on unlawful discrimination, an officer in the respondent's position cannot rely on his religious beliefs as an excuse for disobeying lawful orders and directions from his superiors, even if ... it had been proven that those beliefs compelled or necessitated the conduct under question.¹²⁹

The concept of proportionality also informs decisions of the European Court of Human Rights ('ECHR') when it is considering contests between conflicting rights in an employment context. A set of four cases which went on appeal from courts in the UK to the ECHR demonstrate that even the constitutional protection under the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ('Convention') of a fundamental human right to express one's religious views can still be constrained by the competing demands of an employer's business and the well-being of other co-workers, so long as the constraints imposed by the employer protect a legitimate interest in a proportionate manner. *Eweida v The United Kingdom* ('Eweida')¹³⁰ considered four complaints from plaintiffs who had been unsuccessful before UK courts and tribunals. Two concerned employees who claimed to have been discriminated against in their employment because they insisted on wearing a necklace bearing a cross, to signify their Christian faith. One, Ms Eweida, was successful in her claim, because a majority of the Court found that the employer's uniform policy was not essential to the employer's business interests, and in any event the employer had ultimately been willing to alter it.¹³¹

The second case concerned a nurse, Ms Chaplin, who, like Ms Eweida, insisted on wearing her cross on a necklace while on duty, and refused to cooperate with suggestions that she instead wear it under clothing, or as a brooch, so that it would not create any potential risk to patient safety.¹³² The ECHR determined that while her employer's refusal to allow her to remain in her post while wearing the cross was 'an interference with her freedom to manifest her religion',¹³³ the 'protection of health and safety on a hospital ward' was a legitimate reason to limit her freedom, and the means adopted were not disproportionate.¹³⁴

The second two cases concerned employees who conscientiously objected to some of the duties required of their jobs, on religious grounds. Ms Ledele worked as a civil marriage celebrant for the London Borough of Islington. She was a Christian who held the belief that same-sex civil partnerships were 'contrary to God's law'.¹³⁵ So, when the *Civil Partnership Act 2004* (UK) came into force, she refused to conduct civil partnerships between same-sex couples and claimed that her right to manifest her religious beliefs should entitle her to opt out of these duties.¹³⁶ Other civil celebrants employed by Islington complained of the rostering difficulties she was creating by refusing certain duties, and some gay colleagues

129 Ibid 326 [122].

130 *Eweida v The United Kingdom* (European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013).

131 Ibid 35 [94]–[95]. Two judges dissented: President David Thór Björgvinsson and Judge Bratza.

132 Ibid 36 [98].

133 Ibid 36 [97].

134 Ibid 37 [99].

135 Ibid 7 [23].

136 Ibid 8 [23], [25]–[26].

also complained that they felt victimised by her stance.¹³⁷ She was ultimately dismissed from her employment. In this case, while the ECHR held that the local authority had discriminated against her on grounds of her religious belief, it was held to have done so in the pursuit of a legitimate ‘policy aimed to secure the rights of others which are also protected under the Convention’, namely the rights of gay couples.¹³⁸ The majority found in the UK’s favour, on the basis that ‘[t]he court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights’.¹³⁹

Judges Vucinic and De Gaetano wrote a strongly worded dissenting opinion in *Ms Ladele*’s case. They distinguished this as a case of freedom of ‘conscience’ rather than freedom of religion and described Ms Ladele as a victim of ‘backstabbing’ colleagues, and a ‘blinkered political correctness of the Borough of Islington (which clearly favoured “gay rights” over fundamental human rights)’.¹⁴⁰ The tone of the dissenting judgment in this matter indicates how vexed these kinds of contests between competing claims can be. It might be argued that the dissenting judges themselves used offensively non-inclusive language in their published reasons, referring as they did to ‘gay rights’ in quotation marks, as if such rights were questionable.

The fourth case was of Mr McFarlane, a social worker employed with a private, not-for-profit company that provided psycho-sexual counselling to couples.¹⁴¹ Like Ms Ladele, he was a Christian who believed that homosexuality was sinful.¹⁴² He was not prepared to give his employer an unqualified commitment that he would provide therapy to same-sex couples if called upon to do so, so he was dismissed.¹⁴³ The ECHR held that the employer’s action was justified because it was ‘intended to secure the implementation of its policy of providing a service without discrimination’.¹⁴⁴

In each of the three cases in which the UK succeeded (*Chaplin*, *Ladele* and *McFarlane*), the employer was able to demonstrate a legitimate interest related to their own objectives – in avoiding risk to patient care (*Chaplin*) and providing non-discriminatory services to the community (*Ladele* and *McFarlane*). While each matter was held to have involved discrimination on the basis of the manifestation of religious belief, these three cases were held to be justified, on the basis of the employer’s legitimate interest, reasonably protected by proportionate means. We see from this small sample of cases that the concept of proportionality and balance is fundamental to resolution of claims when competing value-systems come into conflict.

In addition, there have been a number of pertinent cases decided by the UK Employment Tribunal where individuals expressing contentious views have

137 Ibid 8 [26].

138 Ibid 38 [106].

139 Ibid.

140 Ibid 50 [5].

141 Ibid 11 [34].

142 Ibid 10 [31].

143 Ibid 12 [37].

144 Ibid 39 [109].

sought to challenge actions taken by their employer. An example is Dr Mackereth's unsuccessful challenge to the termination of his employment for breaching his employer's policy that required all employees to use the personal pronoun preferred by the client being assessed, regardless of the client's biological sex.¹⁴⁵ The employer's evidence was that the policy was designed with the legitimate purpose of seeking to ensure that transgender clients were treated with respect.¹⁴⁶ The employer argued that Dr Mackereth's views should not be recognised as a belief worthy of protection, because at the heart of those beliefs was an intolerance towards transgender people.¹⁴⁷ The Tribunal found that Dr Mackereth's refusal to refer to transgender clients' by their preferred pronouns, titles or styles would constitute unlawful discrimination or harassment under the *Equality Act 2010* (UK) ('EqA').¹⁴⁸ The Tribunal found that his biblically-based objection to 'transgenderism' similarly did not pass the requisite test for a protectable belief as it was incompatible with human dignity and conflicted with the fundamental rights of others.¹⁴⁹

However, a recent decision of the Employment Appeal Tribunal has taken issue with this approach. Maya Forstater worked as a visiting fellow and consultant for a think tank in the international development sphere. She alleged that the relationship came to an end and she was not offered any more work because of her view that sex is immutable, whatever the person's stated gender identity or gender expression.¹⁵⁰ Other staff working for the respondent raised concerns that Ms Forstater's comments and public tweets to the effect that 'transwomen are men', as well as her insistence on calling people by the sex she considered appropriate, were offensive and transphobic.¹⁵¹ The matter was dealt with not by way of a full hearing, but as a prehearing to determine a number of preliminary issues. One of those issues was whether the belief relied on by the claimant qualified as a 'philosophical belief' pursuant to the protections for religion or belief under the EqA section 10.¹⁵² At a preliminary hearing, the UK Employment Tribunal found that her view, 'in its absolutist nature, is incompatible with human dignity and the fundamental rights of others'.¹⁵³ The Tribunal went on to state that '[e]ven paying due regard to the qualified right to freedom of expression, people cannot expect to be protected if their core belief involves violating others' dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for them'.¹⁵⁴ However, on appeal, the Tribunal concluded that the potential for offence cannot be a reason to exclude a belief from protection altogether,¹⁵⁵ stating that

145 *Mackereth v The Department for Work and Pensions* [2019] UKET 1304602/2018.

146 *Ibid* 10 [62]–[63].

147 *Ibid* 2 [7].

148 *Ibid* 33 [201].

149 *Ibid* 32 [197].

150 *Forstater v CGD Europe* [2019] UKET 2200909/2019, 2 [3] (Tayler J).

151 *Ibid* 30 [9].

152 *Ibid* 3 [6].

153 *Ibid* 24 [84], citing *Nicholson* [2010] 2 All ER 253, 263 [24] (Burton J).

154 *Ibid* 25 [87].

155 *Forstater v CGD Europe* [2021] UKEAT/0105/20/JOJ, 53 [110] (President Choudhury, Edwards and McArthur).

‘the Claimant’s belief, whilst offensive to some, and notwithstanding its potential to result in the harassment of trans persons in some circumstances’ fell within the protection of the Act.¹⁵⁶

The appeal decision makes clear that its purview is limited to the threshold question of whether a belief qualifies for protection and not the substance of an unlawful discrimination or harassment claim, stating that ‘the fact that the act of misgendering was a manifestation of a belief falling with s 10, EqA would not operate automatically to shield her from such liability’.¹⁵⁷ The matter was remitted back to the Tribunal to determine whether the treatment complained about by Ms Forstater was because of or related to her belief. In its conclusion, the Appeal Tribunal emphasised that the decision does not give a licence to harass or discriminate at work:

This judgment does not mean that those with gender-critical beliefs can ‘misgender’ trans persons with impunity. The Claimant, like everyone else, will continue to be subject to the prohibitions on discrimination and harassment under the EqA. Whether or not conduct in a given situation does amount to harassment or discrimination within the meaning of EqA will be for a tribunal to determine in a given case ... This judgment does not mean that employers and service providers will not be able to provide a safe environment for trans persons. Employers would be liable (subject to any defence under s 109(4), EqA) for acts of harassment and discrimination against trans persons committed in the course of employment.¹⁵⁸

Mackereth and *Forstater* demonstrate that the Employment Tribunal in the UK is also confronted with the difficulty of how best to balance the competing claims of workers, with freedom to express their beliefs on the one hand, and protection from harassment and discrimination on the other. We turn now to consider an approach that we recommend should be adopted in Australia, engaging the dispute resolution powers of the Fair Work Commission.

V A FAIR WORK COMMISSION BASED SOLUTION

We have argued that the general approach to dispute resolution in the unfair dismissal and workplace bullying jurisdictions of the Fair Work Commission is preferable to the General Protections or discrimination law approach. There are aspects of both these jurisdictions that are worth considering in terms of fashioning a legislative scheme to deal with issues surrounding religious freedoms at work. We view this as a better way forward than trying to introduce special protections into anti-discrimination legislation for those who engage in discriminatory actions or expression based on their religious beliefs. Anti-discrimination legislation by its very nature is concerned with protections from discrimination, rather than establishing the right to engage in discriminatory conduct or expression. The workplace bullying provisions in the *Fair Work Act* are an example of the crafting of a specific legislative regime to address a discrete workplace problem. It is a

156 Ibid 3–4 (Summary).

157 Ibid 50–1 [104].

158 Ibid 56–7 [118].

regime that seeks to balance the right of workers to complain about their treatment at work with the ability of employers to undertake reasonable disciplinary action. There are advantages to taking this type of targeted approach to dealing with a particular type of problem at work – in this case the conflicts that arise over the clash of competing interests where religious freedoms are exercised at work. However, one of the drawbacks of this scheme is that it only operates while the employment relationship is on foot and offers a remedy in those circumstances to bring any alleged bullying to an end. Where an applicant has felt unable to remain in that place of employment or had their employment terminated, the workplace bullying jurisdiction offers no remedy.

In those circumstances, access to a jurisdiction that looks to the harshness, justice and reasonableness of that termination is required. But as we outlined earlier, eligibility criteria and compensation caps in the existing unfair dismissal jurisdiction present problems for the wider availability of access to some form of timely resolution that offers appropriate compensation for the loss suffered. Hence, it was not the avenue of choice for applicants such as Folau or Rumble. In response, we suggest that eligibility to bring a claim should be open to all employees and not limited by the present eligibility requirements. As provisions dealing with discrimination on the basis of fundamental human rights recognised in article 26 of the *ICCPR*, they would be underpinned by the external affairs power in the *Australian Constitution* and so need not be limited by any constitutional constraints. There should be no requirement for any minimum period of employment, or for the employee's salary to fall below any income threshold. There should also be no cap on orders for compensation when compensation is deemed to be the only appropriate remedy, and compensatory orders should be permitted to include recognition of distress, hurt and humiliation, given that these kinds of harm will be common in these kinds of matters because they involve contests over deeply personal convictions and identities.

As in the case of both General Protections and workplace bullying complaints, applications should be permitted, and indeed encouraged, to be made prior to termination of employment, so that there is scope to repair and preserve relationships. The Fair Work Commission needs a discretion to make appropriate orders from the range it currently applies in both unfair dismissal and workplace bullying complaints and should be empowered to make these orders against applicants as well as respondents, so that an outspoken employee can be directed to modify their communications or adjust their conduct to accommodate the interests of co-workers or their employer's legitimate interest in maintaining business reputation and relationships.

Critics may complain that this solution would give the Fair Work Commission too much power to interfere in the management of workplaces. We would argue that the Commission already wields considerable influence through its unfair dismissal and workplace bullying jurisdictions. Moreover, the Fair Work Commission is a forum solely dedicated to resolving issues at work, and its ability to offer timely access to forms of negotiated dispute resolution (for example, set at 14 days initially for a bullying claim) makes it well placed to resolve these workplace problems expeditiously where possible. Finally, this article has exposed problems

with using legal avenues such as the *Fair Work Act*'s General Protections due to the restrictive interpretations adopted by courts. At the same time, the federal unfair dismissal jurisdiction imposes eligibility criteria that restricts access to certain classes of employees, and a compensation cap that limits the effectiveness of pecuniary remedies. These criticisms of the enforcement of General Protections, and the scope of the unfair dismissal jurisdiction raise broader questions of reform, beyond our concern with the particular need for a system of redress for individuals complaining that their personal freedoms have been constrained at work.

VI CONCLUSION

Our concern in this article has been to contribute a pragmatic solution to the current debate about the appropriate means of protecting employees' rights to free expression of their religious views without jeopardising their job security. At the heart of the debate is the question of where the line must be drawn between employees' freedom of expression, and employers' interests in protecting their own business reputations and promoting harmony in diverse workplaces. Sometimes, the employer's own 'mission statements', values and 'brands' will have been influenced by the same social norms expressed in anti-discrimination statutes, such as the obligation to provide an inclusive work environment. Similarly, employers' attempts to manage these commitments through codes of conduct may be motivated by a concern to avoid vicarious liability for harm inflicted by some employees on others.

When secular employers make a case for an entitlement to manage these kinds of issues, they are asking for nothing more than what religious organisations already enjoy in the form of an exemption from liability under the *Fair Work Act* section 351. Section 351(2)(c) permits religious organisations to defend otherwise discriminatory conduct on the basis that they are acting to protect their own belief systems.¹⁵⁹ Presently, only faith-based institutions enjoy this privilege. A purely humanistic organisation, committed only to the promotion of respect, mutual tolerance and kindness among all people here on earth, would have no claim to exclude people from employment who expressed antagonism to and undermined those values on the basis of some alternative political or religious commitment. Rugby Australia, as a secular organisation with its own values and convictions, can raise no defence under section 351(2)(c).

The question now facing Australian policymakers is whether further legislation is needed to alter the present balance of our laws in this respect. As we have sought to demonstrate in Part II above, the Religious Discrimination Bill 2019 (Cth) would produce further constraints on secular employers' capacity to manage these issues, and in our view these proposals are best left undone.

Whether Australia really needs more robust protections for employees' claims to religious and political freedom remains a difficult question. Cases in which

159 See Anja Hilkemeijer and Amy McGuire, 'Religious Schools and Discrimination Against Staff on the Basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence' (2019) 93(9) *Australian Law Journal* 752.

employees' expression of religious views have no bearing on their capacity to perform their duties at work are easy. 'The common law right of an employee is to ... act as [they] choose, in matters not affecting [their] work'.¹⁶⁰ But what of a case where sponsors and customers of the employer take umbrage at the employees' conduct, and seek to punish the employer by withdrawal of business, as (allegedly) occurred in the Folau matter? Must an employing organisation be required to risk insolvency as a consequence of being forced to continue paying the salaries of staff whose public statements undermine the revenue base of the organisation? In an age where consumers often select products and services based on value-laden brand identities, the highly publicised religious views of people associated with a company can potentially affect sales.

As we have explained above, the immediate financial impact on an employer's business is not the only issue at stake in these cases. Employers owe a duty of care to all of their employees. As the small sample of UK cases noted above demonstrates, some freedoms are inherently diametrically opposed. An employer respecting its duty of care towards LGBTIQ+ staff may well face an unavoidable conflict of duties if it is also required to tolerate without correction the blistering expression of anti-gay views by their religiously devout colleagues. In our view, statements of belief that do not respect the human rights and dignity of others ought not to be shielded from the consequences of protective human rights laws. In addition, a better process for dealing with these kinds of contests may very well be the processes of conciliation and arbitration managed by the Fair Work Commission. An approach to dispute resolution that respects proportionality and balance in addressing competing interests is likely to provide more acceptable solutions than litigious processes. There is great merit in the idiosyncratically Australian 'fair go all round' approach to resolving disputes over workplace claims and in charging the already experienced Fair Work Commission with managing such a system.

VII POSTSCRIPT

This article was accepted for publication in February 2021, with a publication date of March 2022. On 25 November 2021, the Religious Discrimination Bill 2021 (Cth) ('2021 Bill') was tabled in Parliament. On 26 November 2021, pursuant to section 7 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Attorney-General referred the 2021 Bill and related bills¹⁶¹ to the Parliamentary Joint Committee on Human Rights to inquire into and report on these Bills to both Houses of Parliament by 4 February 2022.¹⁶² On 2 December 2021, the Bills were

¹⁶⁰ *Tramways* (1912) 6 CAR 35, 42.

¹⁶¹ Religious Discrimination (Consequential Amendments) Bill 2021 (Cth); Human Rights Legislation Amendment Bill 2021 (Cth).

¹⁶² Letter from Michaelia Cash, Attorney General to Dr Anne Webster, Chair, Parliamentary Joint Committee on Human Rights, 26 November 2021.

also referred to the Senate Legal and Constitutional Affairs Legislation Committee, with that Committee's report due by the same date.¹⁶³

The 2021 Bill differs from the Religious Discrimination Bill 2019 (Cth) in a number of respects. In terms of employers' obligations and employees' rights, the special protections for statements of belief, the overriding of other anti-discrimination legislative protections, and the manner in which employer conduct rules and policies operate remain key considerations.

In terms of what constituted a statement of belief, the definition proposed in the 2021 Bill retains the subjective nature of the enquiry, with a modest change away from 'that a person of the same religion as the first person could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teaching of that religion' to 'is a belief that the person *genuinely considers* to be in accordance with the doctrines, tenets, beliefs or teachings of that religion'.¹⁶⁴ The essence of the protection proffered by the 2019 Bill for a statement of belief remains, with section 12 nominating a long list of federal, state and territory anti-discrimination laws that are overridden. The exception to this exoneration where the statement of belief involves certain forms of offensive conduct is also retained, but now includes a reasonable person dimension to what would be considered threatening, intimidating, harassing or vilifying.¹⁶⁵

An additional override provision has been included in the 2021 Bill.¹⁶⁶ Conduct by religious educational institutions giving preference in employment to persons of a particular religious belief, where this accords with its publicly available written policy, does not contravene prescribed state or territory laws. The provision explicitly states that it is intended to apply to the exclusion of any state or territory law, thereby preventing concurrent operation.

The overriding theme of other anti-discrimination law protections in this manner is a departure from the established approach to the concurrent operation of anti-discrimination laws that has been in place since the High Court of Australia considered this question in the 1980s.¹⁶⁷ It also has the potential to create difficulties for state and territory tribunals hearing discrimination claims where a federal matter of this nature is raised and requires a determination by a Chapter III court.

A particularly controversial aspect of the 2019 Bill was how the reasonableness of workplace conduct rules that could impinge on an employee's ability to express their religious beliefs were to be interpreted in the context of indirect discrimination. This is no longer a feature of the 2021 Bill, leaving the application of workplace conduct rules to be determined by general anti-discrimination principles, including the question of reasonableness.¹⁶⁸ However, it is discriminatory on the basis of a person's religious belief or activity if a qualifying body imposes a conduct

163 'Religious Discrimination Bill 2021', *Parliament of Australia* (Web Page) <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2F6821%22>>.

164 Religious Discrimination (Consequential Amendments) Bill 2021 (Cth) s 5 (emphasis added).

165 Ibid s 12(2)(b).

166 Ibid s 11.

167 See *Viskaskas v Niland* (1983) 153 CLR 280; *Metwally v University of Wollongong* (1984) 158 CLR 447.

168 Religious Discrimination (Consequential Amendments) Bill 2021 (Cth) s 14.

rule that restricts or prevents a person from expressing a statement of belief (other than in the course of their profession, trade or occupation), unless it is an essential requirement of that profession, trade or occupation.¹⁶⁹ The employment practices of religious bodies in a range of settings (education, hospitals, aged care facilities, accommodation providers and disability service providers) are also not discriminatory where this accords with their publicly available policy.¹⁷⁰

¹⁶⁹ Ibid s 15.

¹⁷⁰ Ibid ss 7(6), 9(3).