

## 4. Freedom of Speech

---

### Contents

Summary	77
The common law	79
Protections from statutory encroachment	80
Australian Constitution	80
Principle of legality	83
International law	84
Bills of rights	85
Justifications for limits on freedom of speech	86
Legitimate objectives	86
Balancing rights and interests	89
Laws that interfere with freedom of speech	90
Criminal laws	91
Secrecy laws	98
Court and tribunal orders	108
Privilege and contempt laws	108
Anti-discrimination laws	111
Racial Discrimination Act	112
Media, broadcasting and communications laws	120
Information laws	122
Intellectual property laws	123
Other laws	125
Conclusion	126

### Summary

4.1 Freedom of speech has been described as ‘the freedom *par excellence*; for without it, no other freedom could survive’.<sup>1</sup> Freedom of speech is ‘closely linked to other fundamental freedoms which reflect ... what it is to be human: freedoms of religion, thought, and conscience’.<sup>2</sup>

4.2 This chapter discusses the source and rationale of the common law right of freedom of speech; how this right is protected from statutory encroachment; and when laws that interfere with freedom of speech may be considered justified, including by reference to the concept of proportionality.

---

1 Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 113.

2 Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 13.

4.3 Free speech and free expression are understood to be integral aspects of a person's right of self-development and fulfilment. The freedom is intrinsically important, and also serves a number of broad objectives:

First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'. Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.<sup>3</sup>

4.4 At the same time, it is widely recognised that freedom of speech is not absolute. In Australia, legislation prohibits, or renders unlawful, speech or expression in many different contexts. Some limitations on speech have long been recognised by the common law itself, such as obscenity and sedition, defamation, blasphemy, incitement, and passing off.

4.5 Numerous Commonwealth laws may be seen as interfering with freedom of speech and expression. There are, for example, more than 500 government secrecy provisions alone. In the area of commercial and corporate regulation, a range of intellectual property, media, broadcasting and telecommunications laws restrict the content of publications, broadcasts, advertising and other media products. In the context of workplace relations, anti-discrimination law—including the general protections provisions of the *Fair Work Act 2009* (Cth)—prohibit certain forms of speech and expression.

4.6 Some areas identified as being of concern are:

- various counter-terrorism offences provided under sch 1 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*) and, in particular, the offence of advocating terrorism;
- various terrorism-related secrecy offences in the *Criminal Code*, *Crimes Act 1914* (Cth) and *Australian Security Intelligence Organisation Act 1979* (Cth) (*ASIO Act*) and, in particular, those relating to 'special intelligence operations';
- Commonwealth secrecy offences generally, including the general secrecy offences in ss 70 and 79 of the *Crimes Act*; and
- anti-discrimination law and, in particular, s 18C of the *Racial Discrimination Act 1975* (Cth) (*RDA*).

4.7 Counter-terrorism and national security laws, including those mentioned above, should be subject to further review to ensure that the laws do not interfere unjustifiably with freedom of speech, or other rights and freedoms. Further review on this basis could be conducted by the Independent National Security Legislation Monitor

---

3 *R v Secretary of State for the Home Department; Ex Parte Simms* [2002] 2 AC 115, 126 (Lord Steyn).

(INSLM) and the Parliamentary Joint Committee on Intelligence and Security (Intelligence Committee).

4.8 The ALRC has not established whether s 18C of the *RDA* has, in practice, caused unjustifiable interferences with freedom of speech. However, it appears that pt IIA of the *RDA*, of which s 18C forms a part, would benefit from more thorough review in relation to freedom of speech.

4.9 In particular, there are arguments that s 18C lacks sufficient precision and clarity, and unjustifiably interferes with freedom of speech by extending to speech that is reasonably likely to ‘offend’. In some respects, the provision is broader than is required under international law to prohibit the advocacy of racial hatred, broader than similar laws in other jurisdictions, and may be susceptible to constitutional challenge.

4.10 However, any such review should take place in conjunction with a more general review of anti-vilification laws. This could consider not only existing encroachments on freedom of speech, but also whether existing Commonwealth laws serve their purposes, including in discouraging the urging of violence towards targeted groups distinguished by race, religion, nationality, national or ethnic origin or political opinion. Greater harmonisation between Commonwealth, state and territory laws in this area may also be desirable.

4.11 There is also reason to review the range of legislative provisions that protect the processes of tribunals, commissions of inquiry and regulators. Some of these laws may unjustifiably interfere with freedom of speech—and may be unconstitutional—in prohibiting criticism of public officers engaged in performing public functions.

4.12 Finally, the Australian Government should give further consideration to the recommendations of the ALRC in its 2009 report on secrecy laws,<sup>4</sup> and to whether Commonwealth secrecy laws—including the *Australian Border Force Act 2015* (Cth)—provide for proportionate limitations on freedom of speech.

## The common law

4.13 Freedom of speech has been characterised as one of the ‘fundamental values protected by the common law’.<sup>5</sup> Heydon J has observed that ‘there are many common law rights of free speech’ in the sense that the common law recognises a ‘negative theory of rights’ under which rights are marked out by ‘gaps in the criminal law’.<sup>6</sup>

4.14 The High Court of Australia has stated that freedom of speech is ‘a common law freedom’ and that it ‘embraces freedom of communication concerning government and political matters’:

The common law has always attached a high value to the freedom and particularly in relation to the expression of concerns about government or political matters ... The

---

4 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009).

5 *Nationwide News v Wills* (1992) 177 CLR 1, 31.

6 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, [145] (Heydon J). See Ch 2.

common law and the freedoms it encompasses have a constitutional dimension. It has been referred to in this Court as ‘the ultimate constitutional foundation in Australia’.<sup>7</sup>

4.15 In relation to defamation, the common law defence of qualified privilege has been extended on the basis of the constitutionally protected freedom of communication, discussed below. In *Lange v Australian Broadcasting Corporation* (*Lange*), the High Court determined that, as the development of the common law in Australia cannot run counter to constitutional imperatives, the common law rules of qualified privilege should properly reflect the requirements of ss 7, 24, 64, 128 and related sections of the *Australian Constitution*.<sup>8</sup>

4.16 Freedom of speech is not absolute. Even the First Amendment of the *United States Constitution* has been held not to protect all speech: it does not, for example, protect obscene publications or speech inciting imminent lawless action.<sup>9</sup> Australian common law has long recognised limits to free speech, for example, in relation to the criminal law of incitement and conspiracy, and in obscenity and seditious law.

## Protections from statutory encroachment

### Australian Constitution

4.17 In Australian law, particular protection is given to political speech, recognising that free speech on political matters is necessary for our system of representative government:

Freedom of communication in relation to public affairs and political discussion cannot be confined to communications between elected representatives and candidates for election on the one hand and the electorate on the other. The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community.<sup>10</sup>

4.18 Beginning with a series of cases in 1992,<sup>11</sup> the High Court has recognised that freedom of political communication is implied in the *Constitution*. This freedom ‘enables the people to exercise a free and informed choice as electors’.<sup>12</sup> The *Constitution* has not been found to protect free speech more broadly.

4.19 The *Constitution* does not protect a personal right, but rather, the freedom acts as a restraint on the exercise of legislative power by the Commonwealth.<sup>13</sup>

7 *Monis v The Queen* (2013) 249 CLR 92, [60] (French CJ).

8 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566, 571.

9 *Brandenburg v Ohio* 395 US 444 (1969).

10 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 139 (Mason CJ). See also *Nationwide News v Wills* (1992) 177 CLR 1, 74 (Brennan J).

11 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1.

12 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 570.

13 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Nationwide News v Wills* (1992) 177 CLR 1; *Wotton v Queensland* (2012) 246 CLR 1; *Hogan v Hinch* (2011) 243 CLR 506. This ‘negative’ form of the right to freedom of speech is shared by the United States and other common law countries, where ‘constitutional rights are thought to have an exclusively negative cast’: Adrienne Stone, ‘The Comparative Constitutional Law of Freedom of Expression’ (University of Melbourne Legal Studies Research Paper 476) 12.

The freedom is to be understood as addressed to legislative power, not rights, and as effecting a restriction on that power. Thus the question is not whether a person is limited in the way that he or she can express himself or herself, although identification of that limiting effect may be necessary to an understanding of the operation of a statutory provision upon the freedom more generally. The central question is: how does the impugned law affect the freedom?<sup>14</sup>

4.20 The freedom is not absolute. For one thing, it only protects some types of speech—political communication.<sup>15</sup> In *Lange*, it was held that the freedom is ‘limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*’.<sup>16</sup>

4.21 While the scope of the implied freedom is open to some interpretation, it does not appear to extend to non-political communication and non-federal communications concerning discrete state issues.<sup>17</sup> French CJ has advocated a broader understanding of the meaning of ‘political communications’ to include ‘matters potentially within the purview of government’.<sup>18</sup> This interpretation has not so far commanded support from a majority of the High Court.<sup>19</sup>

4.22 The limited scope of the communications covered by the implied freedom is illustrated by the decision of the High Court in *APLA Ltd v Legal Services Commissioner (NSW)*.<sup>20</sup> This concerned prohibitions, in New South Wales legislation, on advertising by barristers and solicitors. The High Court held that the prohibitions did not burden the implied freedom of political communication, because the advertising was not communication about government on political matters.<sup>21</sup>

14 *Unions NSW v New South Wales* (2013) 304 ALR 266, [36]. Also, the High Court said in *Lange*: ‘Sections 1, 7, 8, 13, 24, 25, 28 and 30 of the Constitution give effect to the purpose of self-government by providing for the fundamental features of representative government’: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557. Sections 7 and 24 do not ‘confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power’: *Ibid* 560.

15 Political communication includes ‘expressive conduct’ capable of communicating a political or government message to those who witness it: *Levy v Victoria* (1997) 189 CLR 579.

16 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561.

17 See George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 184. However, the High Court has stated that the ‘complex interrelationship between levels of government, issues common to State and federal government and the levels at which political parties operate necessitate that a wide view be taken of the operation of the freedom of political communication’: *Unions NSW v New South Wales* (2013) 304 ALR 266, [25].

18 *Hogan v Hinch* (2011) 243 CLR 506, [49]. French CJ has said that the ‘class of communication protected by the implied freedom in practical terms is wide’: *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, [67]. The case left open the possibility that religious preaching may constitute ‘political communication’.

19 See Williams and Hume, above n 17, 185.

20 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.

21 Kirby J, in dissent, held that as a matter of basic legal principle, a protected freedom of communication arises to protect the integrity and operation of the judicial branch of government, just as it does with regard to the legislature and executive branch: *Ibid* [343]. The laws in question, he said, amounted to ‘an impermissible attempt of State law to impede effective access to Ch III courts and to State courts exercising federal jurisdiction’, which ‘cannot stand with the text, structure and implications of the Constitution’: *Ibid* [272].

4.23 In *Lange*, the High Court formulated a two-step test to determine whether an impugned law infringes the implied freedom. In *Attorney-General (SA) v Corporation of the City of Adelaide*, the *Lange* test (as modified in *Coleman v Power*)<sup>22</sup> was described as involving two questions:

1. Does the law, in its terms, operation or effect, effectively burden freedom of communication about government or political matters?
2. If the law effectively burdens that freedom, is the law nevertheless reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government, and the procedure prescribed by s 128 of the *Constitution* for submitting a proposed amendment of the *Constitution* to the informed decision of the people?<sup>23</sup>

4.24 In *McCloy v New South Wales*, the High Court expressly adopted a proportionality test to be applied, where the purpose of a law and the means adopted to achieve that purpose are legitimate:

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

*suitable*—as having a rational connection to the purpose of the provision;

*necessary*—in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;

*adequate in its balance*—a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.<sup>24</sup>

4.25 Commonwealth and state legislative limits on freedom of speech have been subject to constitutional challenge under the implied freedom of political communication doctrine. These have included criminal laws,<sup>25</sup> restrictions on public canvassing,<sup>26</sup> and electoral funding laws.<sup>27</sup>

22 *Coleman v Power* (2004) 220 CLR 1.

23 *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, [67] (French CJ).

24 *McCloy v New South Wales* [2015] HCA 34 (7 October 2015) [3] (French CJ, Kiefel, Bell and Keane JJ) footnote omitted.

25 *Criminal Code* s 471.12; *Monis v The Queen* (2013) 249 CLR 92. Also vagrancy laws: *Coleman v Power* (2004) 220 CLR 1.

26 *Local Government Act 1999* (SA), By-law No 4—Roads [2.3], [2.8]; *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1. The High Court upheld the validity of a by-law that restricted preaching, canvassing, haranguing and handing out printed matter.

27 *Election Funding, Expenditure and Disclosures Act 1981* (NSW) pt 6 div 4A; *McCloy v New South Wales* [2015] HCA 34 (7 October 2015). The High Court upheld the validity of an Act that imposed a cap on political donations, prohibited property developers from making such donations, and restricted indirect campaign contributions.

4.26 The constitutionality of provisions of the *Criminal Code*, concerning using a postal or similar service to menace, harass or cause offence,<sup>28</sup> was considered by the High Court in *Monis v The Queen*.<sup>29</sup> The High Court divided equally on whether s 471.12 of the *Criminal Code* exceeded the limits of the legislative power of the Commonwealth Parliament because it impermissibly burdened freedom of communication about government or political matters. As a result, the decision of the New South Wales Court of Criminal Appeal—that the provision was valid—was affirmed.

4.27 The three judges who held that the provision was invalid did so on the basis that preventing offence through a postal or similar service was not a ‘legitimate end’, as referred to in the *Lange* test.<sup>30</sup> The other judges read down s 471.12 as being ‘confined to more seriously offensive communications’ and aimed at the legitimate end of preventing a degree of offensiveness that would provoke a more heightened emotional or psychological response by a victim.<sup>31</sup> Read this way, the law went no further than was reasonably necessary to achieve its protective purpose.<sup>32</sup>

4.28 Another constitutional aspect of freedom of speech concerns parliamentary privilege, which protects the freedom of speech of parliamentarians and witnesses before Parliament and its committees. Section 49 of the *Constitution* provides that the ‘powers, privileges, and immunities’ of Parliament ‘shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth’.

4.29 The effect of this provision is to incorporate into the constitutional law of Australia a branch of the common and statutory law of the United Kingdom as it existed in 1901, and to empower the Commonwealth Parliament to change that law in Australia by statute.<sup>33</sup>

### Principle of legality

4.30 The principle of legality provides some further protection to freedom of speech. When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of speech, unless this intention was made unambiguously clear.<sup>34</sup>

---

28 *Criminal Code* s 471.12.

29 *Monis v The Queen* (2013) 249 CLR 92.

30 *Ibid* [73]–[74] (French CJ), [97] (Hayne J), [236] (Heydon J).

31 *Ibid* [327]–[339] (Crennan, Kiefel and Bell JJ).

32 *Ibid* [348].

33 Harry Evans and Rosemary Laing (eds), *Odgers’ Australian Senate Practice* (Department of the Senate, 13th ed, 2012) 39.

34 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, [42]–[46]; *Evans v New South Wales* (2008) 168 FCR 576, [72]; *R v Secretary of State for the Home Department; ex parte Simms* [2002] 2 AC 115 130.

4.31 For example, in *Attorney-General (SA) v Corporation of the City of Adelaide*, French CJ said:

The common law freedom of expression does not impose a constraint upon the legislative powers of the Commonwealth or the States or Territories. However, through the principle of legality, and criteria of reasonable proportionality, applied to purposive powers, the freedom can inform the construction and characterisation, for constitutional purposes, of Commonwealth statutes. It can also inform the construction of statutes generally and the construction of delegated legislation made in the purported exercise of statutory powers. As a consequence of its effect upon statutory construction, it may affect the scope of discretionary powers which involve the imposition of restrictions upon freedom of speech and expression.<sup>35</sup>

4.32 In *Monis*, Crennan, Kiefel and Bell JJ held:

The principle of legality is known to both the Parliament and the courts as a basis for the interpretation of statutory language. It presumes that the legislature would not infringe rights without expressing such an intention with ‘irresistible clearness’. The same approach may be applied to constitutionally protected freedoms. In such a circumstance it may not be necessary to find a positive warrant for preferring a restricted meaning, save where an intention to restrict political communication is plain (which may result in invalidity). A meaning which will limit the effect of the statute on those communications is to be preferred.<sup>36</sup>

### International law

4.33 International instruments provide for freedom of expression including the right, under art 19 of the *International Covenant on Civil and Political Rights* (ICCPR), to ‘seek, receive and impart information and ideas of all kinds regardless of frontiers’.<sup>37</sup>

4.34 The United Nations Human Rights Committee provides a detailed list of forms of communication that should be free from interference:

Political discourse, commentary on one’s own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching and religious discourse.<sup>38</sup>

4.35 The freedom of political communication doctrine in Australia applies to a narrower range of speech, as compared to protections in other countries (including the US, Canada, the UK and New Zealand). Australia is the only democratic country that does not expressly protect freedom of speech in its ‘national Constitution or an enforceable national human rights instrument’.<sup>39</sup> From one perspective, common law

35 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, [44] (French CJ).

36 *Monis v The Queen* (2013) 249 CLR 92, [331].

37 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(2). The Universal Declaration of Human Rights also enshrines freedom of speech in its preamble: *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948).

38 United Nations Human Rights Committee, *General Comment 34 on Article 19 of the ICCPR on Freedoms of Opinion and Expression*, UN Doc CCPR/C/GC/34 (12 September 2011) [11].

39 George Williams, ‘Protecting Freedom of Speech in Australia’ (2014) 39 *Alternative Law Journal* 217, 218.



‘protection of free speech at the Commonwealth level essentially dates back to 1992, and is very limited compared with the equivalent protection under international law’.<sup>40</sup>

4.36 International instruments cannot be used to ‘override clear and valid provisions of Australian national law’.<sup>41</sup> However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia’s international obligations.<sup>42</sup>

### Bills of rights

4.37 In other countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. Bills of rights and human rights statutes protect free speech in the US,<sup>43</sup> UK,<sup>44</sup> Canada<sup>45</sup> and New Zealand.<sup>46</sup> For example, the *Human Rights Act 1998* (UK) gives effect to the provisions of the *European Convention on Human Rights*, art 10 of which provides:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.<sup>47</sup>

4.38 This legislative right may not necessarily be different from the freedom recognised at common law: in the *Spycatcher* case, several members of the House of Lords expressed the opinion that in relation to freedom of speech there was, in principle, no difference between English law and art 10 of the Convention.<sup>48</sup>

4.39 The First Amendment to the *United States Constitution* provides significant protection to free speech. In *New York Times v Sullivan*, the US Supreme Court spoke of a ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials’.<sup>49</sup>

4.40 There are also protections for free speech in the Victorian *Charter of Human Rights and Responsibilities* and the *Human Rights Act 2004* (ACT).<sup>50</sup>

40 Monash University Castan Centre for Human Rights, *Submission 18*. The Castan Centre was referring to the decisions in *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1.

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

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

43 *United States Constitution* amend I.

44 *Human Rights Act 1998* (UK) c 42, s 12 and sch 1 pt I, art 10(1).

45 *Canada Act 1982* (UK) c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 2(b).

46 *New Zealand Bill of Rights Act 1990* (NZ) s 14.

47 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 10(1).

48 *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109. This view was approved in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 550–1 (Lord Keith); *R v Secretary of State for the Home Department; ex parte Simms* [2002] 2 AC 115.

49 *New York Times v Sullivan* 376 US 254 (1964) 270 (Brennan J).

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

## Justifications for limits on freedom of speech

4.41 In the US, doctrine on First Amendment freedom of speech is said to be characterised by a categorical approach to justification, according to which the law is dominated by relatively inflexible rules, each with application to a defined category of circumstances.<sup>51</sup>

4.42 In other jurisdictions, bills of rights generally allow for limits on rights provided the limits are reasonable, prescribed by law, and ‘demonstrably justified in a free and democratic society’.<sup>52</sup> Article 19.3 of the ICCPR and the Siracusa Principles<sup>53</sup> also provide guidelines on when limits on freedom of speech may be justified.

4.43 The literature on freedom of speech is extensive and there is considerable disagreement about the appropriate scope of the freedom. Professor Adrienne Stone observed that the ‘sheer complexity of the problems posed by a guarantee of freedom of expression’ makes it unlikely that a single ‘theory’ or ‘set of values’ might be appropriate in resolving ‘the entire range of freedom of expression problems’.<sup>54</sup>

4.44 In relation to justifications for limiting freedom of expression, the UN Human Rights Committee has stated:

When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.<sup>55</sup>

4.45 Some stakeholders expressly endorsed proportionality as a means of assessing justifications for interferences with freedom of speech.<sup>56</sup> As discussed above, in relation to the constitutional implied freedom of political communication, a form of proportionality test has been expressly endorsed by the High Court.<sup>57</sup>

### Legitimate objectives

4.46 The threshold question in a proportionality test is whether the objective of a law is legitimate. Outside constitutional contexts, some guidance on the legitimate

51 Stone, above n 13, 8.

52 *Canadian Charter of Rights and Freedoms* s 1. See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *New Zealand Bill of Rights Act 1990* (NZ) s 5.

53 United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984).

54 Stone, above n 13, 21.

55 United Nations Human Rights Committee, *General Comment 34 on Article 19 of the ICCPR on Freedoms of Opinion and Expression*, UN Doc CCPR/C/GC/34 (12 September 2011) [35].

56 National Association of Community Legal Centres, *Submission 143*; Law Council of Australia, *Submission 75*; Centre for Comparative Constitutional Studies, *Submission 58*; Public Interest Advocacy Centre, *Submission 55*; UNSW Law Society, *Submission 19*. FamilyVoice Australia referred to the ‘harm principle’, the ICCPR and the Siracusa Principles as providing a proper basis for determining whether limitations on freedom of expression are justified: FamilyVoice Australia, *Submission 73*.

57 *McCloy v New South Wales* [2015] HCA 34 (7 October 2015).

objectives of a law that interferes with freedom of speech may be derived from the common law and international human rights law.

4.47 The common law and international human rights law recognise that freedom of speech can be restricted in order to pursue legitimate objectives—such as the protection of reputation and public safety. Many existing restrictions on freedom of speech are a corollary of pursuing other important public or social needs, such as the conduct of fair elections, the proper functioning of markets or the protection of property rights.

4.48 In the context of the constitutional implied freedom of political communication, the purpose of a law limiting freedom of speech must be compatible with the constitutionally prescribed system of government. On this approach, the High Court may consider an objective to be legitimate provided simply that it is *not directed* to regulating political communication.<sup>58</sup>

4.49 Another judicial approach is to address the question of legitimate objective by reference to considerations of the common law. For example, in *Monis*, Hayne J observed that ‘the common law has never recognised any general right or interest not to be offended’<sup>59</sup> and that it would be incongruent with common law rules of defamation, to find as legitimate, a statutory purpose of preventing serious offence without any defence of truth or qualified privilege.<sup>60</sup>

4.50 Associate Professor James Stellios has written that the broader High Court approach should be preferred ‘as it allows for political processes to determine legitimate ends; not traditional conceptions of legally cognisable rights or interests’. That is, provided a law is ‘not directed to regulating political communication, it should be considered to be legitimate, and then subjected to the rigour and transparency of a proportionality analysis’.<sup>61</sup>

4.51 International law gives some other guidance on what legitimate objectives may justify restrictions on freedom of speech more generally. The ICCPR states that the exercise of freedom of expression ‘carries with it special duties and responsibilities’:

It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;

---

58 James Stellios, ‘The Second Limb of Lange: The Continuing Uncertainties with the Implied Freedom of Political Communication’ (Research Paper 14–49, ANU College of Law, 2015) 6. Referring to *Monis v The Queen* (2013) 249 CLR 92 [349] (Crennan, Kiefel and Bell JJ); *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, [221] (Crennan, Kiefel and Bell JJ). Of course, a purpose may still be legitimate even where it is directed to regulate political communication, but it must do so for a legitimate purpose, for example, to prevent corruption in the political process.

59 *Monis v The Queen* (2013) 249 CLR 92 [223].

60 *Ibid* [213].

61 Stellios, above n 58, 8.

- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.<sup>62</sup>

4.52 Many laws that restrict freedom of speech can be seen as pursuing these objectives. For example, many criminal laws—and incitement offences—clearly protect the rights of others, including the right not to be a victim of crime. Some criminal laws, such as counter-terrorism laws, are concerned with the protection of national security or public order.<sup>63</sup>

4.53 Some secrecy laws prohibit the disclosure of information that has the potential to damage national security—such as those in the *ASIO Act*—or public order. It may be harder to justify secrecy offences where there is no express requirement that the disclosure cause, or be likely to cause, a particular harm.<sup>64</sup> Arguably, public order is not necessarily engaged where the objective of a secrecy offence is simply to ensure the efficient conduct of government business or to enforce general duties of loyalty and fidelity on employees.

4.54 On the other hand, some regulatory agencies, such as taxation, social security and health agencies, and regulatory and oversight bodies such as corporate regulators, need to strictly control disclosures of sensitive personal and commercial information provided to them by the public. For these agencies, the harm caused by the unauthorised disclosure of this information is not only harm to a person's privacy or commercial interests, but harm to the relationship of trust between the government and individuals which is integral to an effective regulatory or taxation system, and the provision of government services.<sup>65</sup> Avoiding this harm may more easily be seen as implicating 'public order', in the sense used in the ICCPR.

4.55 To the extent that contempt laws may be characterised as limiting freedom of speech, the laws may be justified as protecting the rights or reputations of others, and public order, because protecting tribunal proceedings can be seen as essential to the proper functioning of society. A limitation to freedom of speech based upon protecting the reputation of others should not be used to 'protect the state and its officials from public opinion or criticism'.<sup>66</sup>

4.56 However, the justification of proceedings for contempt of court or Parliament 'lies not in the protection of the reputation of the individual judge or parliamentarian

62 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19.3.

63 The Siracusa Principles define 'public order', as used in the ICCPR, as 'the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded': United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984) [22]. The Siracusa Principles also state that 'respect for human rights is part of public order'.

64 See, eg, Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) Ch 8.

65 *Ibid* [8.145].

66 United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984) [37]. Cf *Nationwide* in relation to the constitutional implied right in Australia: *Nationwide News v Wills* (1992) 177 CLR 1.

but in the need to ensure that parliaments and courts are able effectively to discharge the functions, duties and powers entrusted to them by the people'.<sup>67</sup>

4.57 Restrictions on freedom of speech under anti-discrimination laws may also be justified under the ICCPR if they are necessary to respect the rights or reputations of others, including the right to effective protection against discrimination, as provided by art 26.

4.58 Laws to prevent or restrict dissemination of indecent or classified material, such as the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*), may be justified as protecting public health or morals. As discussed below, limitations on unsolicited telemarketing calls contained in the *Do Not Call Register Act 2006* (Cth) have been justified as protecting privacy; and tobacco advertising prohibitions as protecting public health.<sup>68</sup>

4.59 There remain other laws restricting freedom of speech and expression that do not as obviously fall within the permissible limitations referred to in art 19 of the ICCPR.

### **Balancing rights and interests**

4.60 Eric Barendt has stated that it 'is difficult to draw a line between speech which might appropriately be regulated and speech which in any liberal society should be tolerated'.<sup>69</sup> The difficulty is always balancing the respective rights or objectives.

4.61 The UN Human Rights Committee has observed that the principle of proportionality must take account of the 'form of expression at issue as well as the means of its dissemination'. For instance, the value placed on 'uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain'.<sup>70</sup> This is consistent with the additional constitutional protection afforded under Australian common law to political communication.

4.62 The Centre for Comparative Constitutional Studies submitted that in applying the principles of proportionality to limitations on freedom of speech, regard should be had to the following:

- whether the law interfering with freedom of speech is 'content-neutral' or 'content-based';
- the extent to which the law interferes with freedom of speech including the availability of alternative, less restrictive means; and
- the nature of the affected speech.<sup>71</sup>

---

67 *Theophanous v The Herald and Weekly Times Ltd* (1994) 182 CLR 104, 187 (Deane J).

68 Tobacco advertising prohibitions are discussed in Ch 19, in relation to property rights.

69 Barendt, above n 2, 21.

70 United Nations Human Rights Committee, *General Comment 34 on Article 19 of the ICCPR on Freedoms of Opinion and Expression*, UN Doc CCPR/C/GC/34 (12 September 2011) [34].

71 Centre for Comparative Constitutional Studies, *Submission 58*.

4.63 In relation to the first of these criteria, a content-based law aims to address harms caused by the content of the message communicated. Defamation laws, hate speech laws, laws regulating obscenity or pornography, and laws directed at sedition were given as examples of content-based laws.

4.64 In contrast, a content-neutral law is directed towards some other purpose unrelated to the content of expression. Laws directed to the ‘time, place and manner’ in which speech occurs, such as laws that regulate protest—by requiring that protest be limited to certain places or times—laws that impose noise controls, or that limit the distribution of leaflets directed at preventing litter were given as examples of content-neutral laws.<sup>72</sup>

4.65 The Centre for Comparative Constitutional Studies submitted that content-based laws should, ‘as a general matter, be considered more difficult to justify than content-neutral laws’.<sup>73</sup> The Centre also submitted that, as a general matter, the more extensive the limitation on speech, the more significant the justification for that limitation must be. Therefore extensive or ‘blanket’ bans on speech in a particular context or of a particular kind, will be more difficult to justify than laws that apply in only some circumstances or in some places. Further, some speech should be regarded as especially valuable. In particular, speech about political matters, in various forms, was said to require a higher level of protection, and laws that operate to interfere with political speech should require special justification.<sup>74</sup>

4.66 These views are consistent with High Court statements that a distinction may be made between ‘restrictions on communication which target ideas or information and those which restrict an activity or mode of communication by which ideas or information are transmitted’.<sup>75</sup> Under a proportionality test, a more compelling justification for the burden on political communication is required for restrictions on content rather than mode of communication.

## **Laws that interfere with freedom of speech**

4.67 A wide range of Commonwealth laws may be seen as interfering with freedom of speech and expression, broadly conceived. Commonwealth laws prohibit, or render unlawful, speech or expression in many different contexts and include:

- criminal laws;
- secrecy laws;
- privilege and contempt laws;
- anti-discrimination laws;
- media, broadcasting and telecommunications laws;

---

72 Ibid.

73 Ibid.

74 Ibid.

75 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 143 (Mason CJ). See also 234–5 (McHugh J).

- information laws; and
- intellectual property laws.<sup>76</sup>

4.68 Some of these laws impose limits on freedom of speech that have long been recognised by the common law, for example, in relation to obscenity and sedition. Arguably, such laws do not encroach on the traditional freedom, but help define it. However, these traditional limits are crucial to understanding the scope of the freedom, and possible justifications for new restrictions.<sup>77</sup>

4.69 These laws are summarised below. Some of the justifications that have been advanced for laws that interfere with freedom of speech, and criticisms of laws on that basis, are also discussed.

### Criminal laws

4.70 A number of offences directly criminalise certain forms of speech or expression. Some of these have ancient roots in treason and sedition, which since feudal times punished acts deemed to constitute a violation of a subject's allegiance to his or her lord or monarch.

4.71 Following the demise of the absolute monarchy and the abolition of the Star Chamber by the Long Parliament in 1641, the law of sedition was developed in the common law courts. Seditious speech may, therefore, be seen as falling outside the scope of traditional freedom of speech. However, the historical offence of sedition would now be seen as a 'political' crime, punishing speech that is critical of the established order. Prohibiting mere criticism of government that does not incite violence reflects an antiquated view of the relationship between the state and society, which would no longer be considered justified.<sup>78</sup>

4.72 Offences that may restrict speech or expression include the modern offences of treason, urging violence, and advocating terrorism contained in the following provisions of the *Criminal Code*:

- s 80.1AA (Treason—materially assisting enemies);

---

76 Other laws that interfere with freedom of speech include defamation laws: *Defamation Act 2005* (NSW); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA); *Civil Law (Wrongs) Act 2002* (ACT) ch 9; *Defamation Act 2006* (NT). As this Inquiry is concerned with Commonwealth laws, it does not consider the operation of these state and territory laws.

77 In fact, freedom of speech has been said to represent the 'limits of the duty not to utter defamation, blasphemy, obscenity, and sedition': Glanville Williams, 'The Concept of Legal Liberty' (1956) 56 *Columbia Law Review* 1129, 1130.

78 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report No 104 (2006) rec 3–1. This followed an earlier recommendation of the Gibbs Committee that, given its similarity to the then existing treason offence, the offence of treachery should be repealed and a new provision created, making it an offence for an Australian citizen or resident to help a state or any armed force against which any part of the Australian Defence Force is engaged in armed hostilities: see H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (Commonwealth of Australia, 1991). This wording became part of the treason and sedition offences in the *Criminal Code*, as enacted in 2005.

- s 80.2 (Urging violence against the Constitution);
- s 80.2A (Urging violence against groups);
- s 80.2B (Urging violence against members of groups); and
- s 80.2C (Advocating terrorism).

4.73 In addition, the offence of treachery contained in s 24AA of the *Crimes Act* covers the doing of any act or thing with intent: to overthrow the *Constitution* of the Commonwealth by revolution or sabotage; or to overthrow by force or violence the established government of the Commonwealth, of a state or of a proclaimed country. In 2006, in the context of its review of sedition laws, the ALRC recommended that the treachery offence be reviewed to consider whether it merited retention, modernisation and relocation to the *Criminal Code*.

4.74 There are other terrorism-related offences that may involve speech or expression, such as providing training connected with terrorism, making documents likely to facilitate terrorism, and directing the activities of, recruiting for, or providing support to a terrorist organisation.<sup>79</sup> The power to prescribe an organisation as a ‘terrorist organisation’ under div 102 of the *Criminal Code*—which triggers a range of these offences—may also be seen as infringing rights to freedom of speech.<sup>80</sup>

4.75 Counter-terrorism offences were criticised in some submissions on the grounds that their potential interference with freedom of speech was not justified.<sup>81</sup>

In the context of counter terrorism, the pursuit of national security is quintessentially a legitimate aim. However, a number of provisions risk burdening free speech in a disproportionate way. The chilling effect of disproportionate free speech offences should not be underestimated, nor should the normalising effect of gradually limiting free speech over successive pieces of legislation.<sup>82</sup>

4.76 Counter-terrorism and national security laws, including those mentioned above, should be subject to further review to ensure that the laws do not interfere unjustifiably with freedom of speech, or other rights and freedoms.

### ***Advocating terrorism***

4.77 Section 80.2C of the *Criminal Code* makes it an offence if a person advocates the doing of a terrorist act, or the commission of a terrorism offence, and is reckless as to whether another person will engage in that conduct as a consequence. A person ‘advocates’ the doing of a terrorist act or the commission of a terrorism offence if the person ‘counsels, promotes, encourages or urges’ the doing of it. A defence is provided covering, for example, pointing out ‘in good faith any matters that are producing, or

---

79 *Criminal Code* ss 101.2, 101.5, 102.2, 102.4, 102.5, 102.7.

80 Gilbert and Tobin Centre of Public Law, *Submission 22*.

81 See, eg, Public Interest Advocacy Centre, *Submission 55*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

82 Public Interest Advocacy Centre, *Submission 55*.



have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters’.<sup>83</sup>

4.78 The statement of compatibility with human rights stated:

The criminalisation of behaviour which encourages terrorist acts or the commission of terrorism offences is a necessary preventative mechanism to limit the influence of those advocating violent extremism and radical ideologies.<sup>84</sup>

4.79 The parameters of the offence were considered by the Parliamentary Joint Committee on Human Rights (the Human Rights Committee) and the Senate Standing Committee for the Scrutiny of Bills (the Scrutiny of Bills Committee) in their deliberations on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.<sup>85</sup>

4.80 The Human Rights Committee concluded that the provision was ‘likely to be incompatible with the right to freedom of opinion and expression’.<sup>86</sup> In reaching this conclusion the Human Rights Committee noted that a number of existing provisions in the *Criminal Code* contain offences that may apply to speech that incites violence and expressed concern that, despite the good faith defences, this additional offence was ‘overly broad’ in its application:

This is because the proposed offence would require only that a person is ‘reckless’ as to whether their words will cause another person to engage in terrorism (rather than the person ‘intends’ that this be the case). The committee is concerned that the offence could therefore apply in respect of a general statement of support for unlawful behaviour (such as a campaign of civil disobedience or acts of political protest) with no particular audience in mind.<sup>87</sup>

4.81 The Scrutiny of Bills Committee highlighted the definition of ‘advocates’ and stated that this is a broad definition that ‘may therefore amount to an undue trespass on personal rights and liberties as it is not sufficiently clear what the law prohibits’, and have a ‘chilling effect on the exercise of the right of free expression’.<sup>88</sup> It also noted existing offences in the *Criminal Code* which may already cover conduct intended to be captured by the proposed offence.<sup>89</sup>

---

83 *Criminal Code* s 80.3(1)(d).

84 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [138].

85 The Bill also received scrutiny from the Parliamentary Joint Committee on Intelligence and Security: Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014).

86 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 14th Report of the 44th Parliament* (2014) [1.259].

87 *Ibid* [1.258].

88 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *14th Report of 2014* (October 2014) 795.

89 *Ibid*. Citing *Criminal Code* ss 80.2, 80.2A, 80.2B, 101.5, 102.4.

4.82 The Attorney-General responded to these concerns by emphasising that terrorist offences generally require a person to have: the capability to act, the motivation to act, and the imprimatur to act (for example, endorsement from a person with authority).

The new advocating terrorism offence is directed at those who supply the motivation and imprimatur. This is particularly the case where the person advocating terrorism holds significant influence over other people who sympathise with, and are prepared to fight for, the terrorist cause.<sup>90</sup>

4.83 In relation to the availability of other offences, the Attorney-General advised that where the Australian Federal Police (AFP) has sufficient evidence, the existing incitement or urging violence offences would be pursued. However, these offences require the AFP to prove that the person intended the crime or violence to be committed. There will not always be sufficient evidence to meet this threshold because ‘persons advocating terrorism can be very sophisticated about the precise language they use, even though their overall message still has the impact of encouraging others to engage in terrorist acts’.<sup>91</sup>

4.84 The Scrutiny of Bills Committee acknowledged these points but concluded that, on balance, it would be appropriate to further clarify the meaning of ‘advocate’ to assist people in ‘prospectively knowing the scope of their potential criminal liability’.<sup>92</sup> The Bill was not amended in this respect.

4.85 Stakeholders in this Inquiry submitted that the scope of the offences in s 80.2C of the *Criminal Code* constituted an unjustified encroachment on freedom of speech.<sup>93</sup>

4.86 For example, the Gilbert and Tobin Centre of Public Law submitted that s 80.2C directly infringes the right to freedom of speech as it ‘limits the capacity for individuals to voice their views and opinions on terrorism and overseas conflicts’.<sup>94</sup> Such an approach is unjustified because of its significant impact on free speech, and because it ‘may contribute to a sense of alienation and discrimination in Australia’s Muslim communities if they feel like the government is not willing to have an open discussion about issues surrounding terrorism and Islam’.<sup>95</sup> Councils for Civil Liberties considered that the provision ‘disproportionately burdens free speech beyond what is necessary to protect national security’.<sup>96</sup>

---

90 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, 14th *Report of 2014*, (October 2014) 796.

91 Ibid.

92 Ibid 797. This conclusion was consistent with recommendations of the Intelligence Committee: Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill* (October 2014) rec 5.

93 Councils for Civil Liberties, *Submission 142*; Australian Lawyers for Human Rights, *Submission 106*; National Association of Community Legal Centres, *Submission 66*; Public Interest Advocacy Centre, *Submission 55*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

94 Gilbert and Tobin Centre of Public Law, *Submission 22*.

95 Ibid.

96 Councils for Civil Liberties, *Submission 142*.

4.87 Problems with the offence were said to include:

- the broad meaning of the word ‘advocates’;
- the use of a recklessness standard;
- the limited scope of defences; and
- the existence of other offences covering similar conduct.

4.88 Councils for Civil Liberties submitted that a person exercising free speech and arguing publicly in support of ‘oppressive and non-democratic’ regimes may be a person who ‘advocates’ (which is defined to include ‘encourages’) the doing of a terrorist act ‘merely because that regime has engaged in terrorist activity in the past’.<sup>97</sup> The National Association of Community Legal Centres (NACLC) stated that the breadth of the definition of ‘advocates’ poses a ‘significant risk of criminalising legitimate exercises of free speech by seriously impacting on the confidence of individuals and organisations to voice radical and controversial (albeit not illegal) views regarding overseas conflicts and terrorism’.<sup>98</sup>

4.89 The use of a recklessness standard was criticised, among other reasons, because a person can never be certain as to whether they are acting recklessly in making a statement and, therefore, such a test may ‘discourage public speech, in particular robust speech concerning contentious national and international political and military matters’.<sup>99</sup> The offence was said to go beyond the concept of incitement by criminalising the ‘promotion’ of terrorism and by requiring only that the person is ‘reckless’ as to whether their words may result in terrorism (as opposed to intending that result).<sup>100</sup>

4.90 The Law Council of Australia (Law Council) observed that the good faith defence in s 80.3(1)(d) may not address concerns about the criminal liability of ‘those engaged in publishing or reporting on matters that could potentially fall within the broad scope of the offences’.<sup>101</sup>

4.91 Stakeholders also questioned the need for s 80.2C, in view of the offence in s 80.2 of the *Criminal Code* (criminalising ‘urging violence’ against the *Constitution* or a Commonwealth, state or territory government) and the offence of incitement,<sup>102</sup> which covers urging another person to commit a terrorist act.<sup>103</sup>

---

97 Ibid.

98 National Association of Community Legal Centres, *Submission 143*.

99 Councils for Civil Liberties, *Submission 142*. The implications for journalism, notwithstanding the defences, were also highlighted. See also Public Interest Advocacy Centre, *Submission 55*.

100 Gilbert and Tobin Centre of Public Law, *Submission 22*.

101 Law Council of Australia, *Submission 75*.

102 *Criminal Code* s 11.4.

103 Public Interest Advocacy Centre, *Submission 55*. See also National Association of Community Legal Centres, *Submission 143*; Councils for Civil Liberties, *Submission 142*.

**Prescribed terrorist organisations**

4.92 Similar concerns about overreach have been identified in relation the definition of a terrorist organisation under div 102 of the *Criminal Code*. These provisions allow an organisation to be specified by regulations as a terrorist organisation where it is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or advocates the doing of a terrorist act.<sup>104</sup>

4.93 The prescription of a terrorist organisation by the Minister is by disallowable instrument, subject to review by the Parliamentary Joint Committee on Intelligence and Security,<sup>105</sup> and judicial review.

4.94 Professor George Williams has commented that, while it is understandable that the law would permit groups to be banned that engage in or prepare for terrorism, ‘it is not justifiable to ban an entire group merely because someone affiliated with it praises terrorism’.<sup>106</sup>

4.95 The Gilbert and Tobin Centre stated that, as a result, members of an organisation may be exposed to serious criminal offences for expressing radical and controversial (but not necessarily harmful) views about terrorism and religion.

An organisation may be proscribed on the basis of views expressed by some of its members, which means that other individuals may be exposed to liability when they do not even agree with those views. Indeed, an organisation may even be proscribed on the basis that the views it expresses might encourage a person with a severe mental illness to engage in terrorism.<sup>107</sup>

4.96 Councils for Civil Liberties considered that the definition of what constitutes a terrorist organisation has the potential to capture organisations ‘which are legitimate religious or other organisations’ because an organisation can be prescribed where it is ‘indirectly ... fostering the doing of a terrorist act’.<sup>108</sup> If a legitimate religious organisation is found to be a ‘terrorist organisation’ under the provisions, its members ‘may come within the associated criminal offence provisions in carrying out day to day activities such as worship, welcoming new followers, making donations and fundraising’.<sup>109</sup>

---

104 *Criminal Code* s 102.1. Related criminal offences include those concerning being a member of, training with, or providing support or resources to a terrorist organisation: Ibid ss 102.3, 102.5, 102.7.

105 *Criminal Code* s 102.1A.

106 Williams, above n 39, 220.

107 Gilbert and Tobin Centre of Public Law, *Submission 22*. A similar perspective was expressed by NACLC: National Association of Community Legal Centres, *Submission 143*. Section 102.1(1A)(c) of the *Criminal Code* provides that an organisation advocates the doing of a terrorist act if it ‘directly praises the doing of a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment that the person might suffer) to engage in a terrorist act’. The notion of proscribing speech based upon a reaction of someone who suffers from a mental impairment is ‘extraordinary’ and a ‘radical departure from the normal, accepted legal standard of a “reasonable person”’: Williams, above n 39, 220.

108 Councils for Civil Liberties, *Submission 142*. Referring to *Criminal Code* s 102.1(2).

109 Councils for Civil Liberties, *Submission 142*.

***Using a postal service to menace, harass or cause offence***

4.97 Another provision of the *Criminal Code* that received comment in submissions was s 471.12, which provides that a person is guilty of an offence if the person uses a postal or similar service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive. This provision was the subject of the High Court's deliberations in *Monis v The Queen*.<sup>110</sup>

4.98 The University of Melbourne Centre for Comparative Constitutional Studies submitted that s 471.12 unjustifiably interferes with freedom of speech, and political communication in particular, for the following reasons:

- it applies to core political speech—the broad scope of the provision means that it can operate to suppress core political speech; and
- the 'offensiveness' standard is not sufficient to justify a law that criminalises political speech.<sup>111</sup>

4.99 The Centre for Comparative Constitutional Studies suggested that s 471.12 should include 'clear exceptions for communication pertaining to matters that are in the public interest in order to protect core political speech' and that offensiveness should not be used as a criterion of the offence, leaving only 'menacing' and 'harassing'.<sup>112</sup> Alternatively, the provision could specify matters that the court must consider when determining whether the communication was offensive.<sup>113</sup>

***Other criminal laws***

4.100 Many other *Criminal Code* provisions potentially engage with freedom of speech, including those creating offences in relation to providing false or misleading information or documents;<sup>114</sup> distributing child pornography material;<sup>115</sup> and counselling the committing of suicide.<sup>116</sup>

4.101 Section s 474.29A of the *Criminal Code* makes it an offence to use a carriage service to access, transmit or publish material that counsels or incites committing or attempting to commit suicide. Civil Liberties Australia stated that this law is used to restrict access to materials relating to euthanasia and clearly restricts freedom of speech. It observed that the law is 'a rare (and perhaps the only instance) where it is an offence to counsel the commission of an act that is not in itself an offence'.<sup>117</sup>

110 *Monis v The Queen* (2013) 249 CLR 92.

111 Compare *Racial Discrimination Act 1975* (Cth) s 18C. Unlike s 471.12, s 18C does not create a criminal offence and is subject to a number of broadly defined defences: Centre for Comparative Constitutional Studies, *Submission 58*.

112 Centre for Comparative Constitutional Studies, *Submission 58*.

113 *Ibid.* Cf *Criminal Code* s 473.4.

114 *Criminal Code* ss 136, 137.1, 137.2.

115 *Ibid* div 273, ss 471.16–471.20.

116 *Ibid* s 474.29A.

117 Civil Liberties Australia, *Submission 94*.

***Incitement and conspiracy laws***

4.102 The concepts of incitement and conspiracy have a long history in the common law. Traditional freedom of speech has never protected speech inciting the commission of a crime.

4.103 Under s 11.4 of the *Criminal Code* a person who urges the commission of an offence is guilty of the offence of incitement. Incitement may relate to any offence against a law of the Commonwealth and is not limited to serious offences, such as those involving violence. Therefore, a person may commit the offence of incitement by urging others to engage in peaceful protest by trespassing on prohibited Commonwealth land.<sup>118</sup>

4.104 Similarly, a person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence.<sup>119</sup>

4.105 The Law Council observed that various features of the terrorism offences in div 101 of the *Criminal Code*—including the preparatory nature of some offences, and the broad and ambiguously defined terms on which the offences are based, when combined with the offence of incitement, may ‘impact on freedom of speech more than is necessary to achieve the putative objective and is not specific enough to avoid capturing less serious conduct’.<sup>120</sup>

**Secrecy laws**

4.106 The secrecy of government information has a long history.<sup>121</sup> The notion that the activities of government should be secret goes back to a period when monarchs were motivated by a desire to protect themselves against their rivals and official information was considered the property of the Crown, to be disclosed or withheld at will. Two principal rationales for secrecy in the modern context are the Westminster system of government and the need to protect national security.<sup>122</sup>

4.107 The exposure of state secrets may be seen as falling outside the scope of traditional freedom of speech. However, while the conventions of the Westminster system were once seen to demand official secrecy, secrecy laws may need to be reconsidered in light of principles of open government and accountability—and modern conceptions of the right to freedom of speech.

4.108 The constitutional implied freedom of political communication is particularly relevant in this context. In *Bennett v HREOC*, for example, a blanket secrecy provision

---

118 An offence under *Crimes Act 1914* (Cth) s 89. For the person to be guilty, the person must intend that the offence incited be committed: *Criminal Code* s 11.4(2).

119 *Criminal Code* s 11.5.

120 Law Council of Australia, *Submission 75*.

121 See Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) Ch 2.

122 *Ibid* [2.4].

in reg 7(13) of the *Public Service Regulations 1999* (Cth) was held to be constitutionally invalid by the Federal Court.<sup>123</sup>

4.109 Finn J applied the *Lange* test and found that, under the second limb of the test, while there may be public interests, or ‘legitimate ends’, that justify the burden that secrecy provisions impose on freedom of political communication—including national security, cabinet confidentiality, protection of privacy and the maintenance of an impartial and effective public service—a ‘catch-all’ provision that did not differentiate between the types of information protected or the consequences of disclosure went too far.<sup>124</sup>

4.110 The Attorney-General’s Department (Security and Intelligence Law Branch) conducts scrutiny of draft legislation and legislative instruments containing secrecy provisions and administers the secrecy offences in pts VI and VII of the *Crimes Act*. In relation to the breadth of secrecy provisions, the Department considers and gives advice on, among other things, whether prohibitions on disclosing official information may infringe the implied constitutional freedom of political communication.

4.111 Many Commonwealth laws contain provisions that impose secrecy or confidentiality obligations on individuals or bodies in respect of Commonwealth information. Statutory secrecy provisions typically exhibit four common elements:

- protection of particular kinds of information;
- regulation of particular persons;
- prohibition of certain kinds of activities in relation to the information; and
- exceptions and defences which set out the circumstances in which a person does not infringe a secrecy provision.

4.112 In its 2009 report, *Secrecy Laws and Open Government in Australia* (ALRC Report 112), the ALRC identified 506 secrecy provisions in 176 pieces of primary and subordinate legislation.<sup>125</sup> Provisions in Commonwealth legislation that expressly impose criminal sanctions for breach of secrecy or confidentiality obligations include, for example:

- *Crimes Act* ss 70, 79;
- *Aboriginal and Torres Strait Islander Act 2005* (Cth) ss 191, 193S, 200A;
- *Aged Care Act 1997* (Cth) ss 86-2, 86-5, 86-6, 86-7;
- *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ss 121, 122, 123, 127, 128(5) and (10), 130, 131(4);

---

123 *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334.

124 *Ibid* [98]–[99]. See also Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) [2.57]–[2.59].

125 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) Appendix 4.

- *Australian Border Force Act* s 24, pt 6;
- *Australian Prudential Regulation Authority Act 1998* (Cth) s 56;
- *Australian Securities and Investments Commission Act 2001* (Cth) s 127(4EA), (4F); and
- *Australian Security Intelligence Organisation Act 1979* (Cth) ss 18, 34ZS(1)–(2), 35P(1)–(2), 81, 92(1) and (1A).

4.113 Other provisions impose secrecy or confidentiality obligations but do not expressly impose criminal sanctions. Such provisions create a ‘duty not to disclose’, which may attract criminal sanctions under s 70 of the *Crimes Act*. These include, for example:

- *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 189B, 251(3), 324R, 341R, 390R;
- *Export Finance and Insurance Corporation Act 1991* (Cth) s 87(4); and
- *Food Standards Australia New Zealand Act 1991* (Cth) s 114.

4.114 The ALRC recommended, among other things, that the general secrecy offences in ss 70 and 79 of the *Crimes Act* should be repealed and replaced by new offences that require that the disclosure of Commonwealth information did, or was reasonably likely to, or intended to cause harm.<sup>126</sup> For example, s 70 might be replaced with a new offence requiring that the disclosure of Commonwealth information did, or was reasonably likely to, or intended to:

- damage the security, defence or international relations of the Commonwealth;
- prejudice the prevention, detection, investigation, prosecution or punishment of criminal offences;
- endanger the life or physical safety of any person; or
- prejudice the protection of public safety.<sup>127</sup>

4.115 The ALRC also concluded that specific secrecy offences are only warranted where they are ‘necessary and proportionate to the protection of essential public interests of sufficient importance to justify criminal sanctions’ and should include an express requirement that the unauthorised disclosure caused, or was likely or intended to cause, harm to an identified essential public interest.<sup>128</sup> These recommendations have not been implemented.

---

126 Ibid recs 4–1, 5–1.

127 Ibid rec 5–1.

128 Ibid recs 8–1, 8–2.



4.116 A number of stakeholders expressly supported the ALRC's earlier recommendations.<sup>129</sup> The Law Council recommended that the Australian Government give further consideration to the implementation of the ALRC's 2009 secrecy report, which it stated would 'assist in ensuring that official secrecy is justified, proportionate and necessary to achieving legitimate objectives'.<sup>130</sup>

4.117 Stakeholders highlighted a number of specific secrecy provisions as being of particular concern for their impact on freedom of speech in Australia. These are discussed below.

#### ***Australian Border Force Act***

4.118 Part 6 of the *Australian Border Force Act* makes it an offence to record or disclose any information obtained by a person in their capacity as an entrusted person ('protected information'),<sup>131</sup> punishable by imprisonment for 2 years.<sup>132</sup>

4.119 An 'entrusted person' is defined to include the Secretary of the Department of Immigration and Border Protection, the Australian Border Force Commissioner and any Immigration and Border Protection worker.<sup>133</sup> The latter category of person may, by written determination of the Secretary or Commissioner, include any consultant, contractor or service provider—such as a doctor or welfare worker in an offshore immigration detention centre.<sup>134</sup>

4.120 Sections 42–49 of the Act provide an extensive range of exceptions. In summary, however, unauthorised disclosure is only permissible if it is 'necessary to prevent or lessen a serious threat to the life or health of an individual' and the disclosure is 'for the purposes of preventing or lessening that threat'.<sup>135</sup> In addition, in some circumstances, an entrusted person who makes a disclosure may be protected by the *Public Interest Disclosure Act 2013* (Cth), as discussed below.

4.121 The Explanatory Memorandum to the Australian Border Force Bill 2015 (Cth) noted that the secrecy provisions

are necessary to provide assurances to law enforcement and intelligence partners in Australia and internationally and to industry that information provided to the Department will be appropriately protected ... The application of the secrecy provisions across the integrated department will ensure the disclosure of sensitive information is appropriately regulated.<sup>136</sup>

---

129 Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 140*; Public Interest Advocacy Centre, *Submission 55*.

130 Law Council of Australia, *Submission 140*.

131 *Australian Border Force Act 2015* (Cth) s 4.

132 *Ibid* s 42.

133 *Ibid* s 5.

134 *Ibid* ss 4, 5. Secrecy may also, of course, also be preserved by contractual terms of employment.

135 *Ibid* s 48.

136 Explanatory Memorandum, Australian Border Force Bill 2015 (Cth) 14.

4.122 Stakeholders in this Inquiry submitted that the scope of the secrecy and disclosure offences in the *Australian Border Force Act* constitute an unjustified encroachment on freedom of speech.<sup>137</sup>

4.123 The Law Council stated that it was concerned that the *Australian Border Force Act* may unjustifiably encroach on freedom of speech because it did not include an adequate public interest disclosure exception to the secrecy provisions; and operated extraterritorially without the associated protections that apply in Australia.<sup>138</sup>

4.124 One concern is the breadth of the definition of an entrusted person, which can include external consultants, contractors or service providers ‘such as doctors and welfare workers performing work by contract for the Department’<sup>139</sup> and any person employed by an entrusted person.

The first people to find themselves silenced under this law will be those who work in Australia’s regional processing centres in Nauru and Papua New Guinea (PNG). However, the law may reach far beyond this, to silence every person involved in the provision of legal, counselling and welfare services to refugees, if their non-government employer is in receipt of government funding.<sup>140</sup>

4.125 Councils for Civil Liberties observed that an organisation like the Victorian Foundation for the Victims of Torture ‘may be caught by the legislation solely on the ground that the Foundation provides counselling services for refugee clients of the Immigration Department’.<sup>141</sup> The Law Council submitted that any review may wish, among other things, to consider whether the definition of ‘entrusted person’ should be more narrowly defined.<sup>142</sup>

4.126 Academics at the Sydney Centre for International Law submitted that pt 6 of the Act violated international law and the constitutional implied freedom of political communication. In relation to the first point, they argued that the secrecy provisions were not necessary for the protection of national security or public order, or for protecting rights and reputations, in terms of art 19.3 of the ICCPR.

It is difficult to see how all ‘protected information’ as defined by the Act—that is, including any information at all, obtained by an [immigration and border protection] worker in the course of his or her work—has the potential to damage national security or public order, and thus why such a broad restriction is ‘necessary’.<sup>143</sup>

---

137 National Association of Community Legal Centres, *Submission 143*; Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 140*; E Moore, M Darwish and A Pert, *Submission 109*.

138 Law Council of Australia, *Submission 140*. These protections include Australian state and territory legislation requiring mandatory disclosure of suspected child abuse by relevant professionals.

139 *Ibid.*

140 *Ibid.*

141 Councils for Civil Liberties, *Submission 142*. The councils submitted that ‘the contracted and non-governmental agencies to which the legislation applies should be specifically defined and properly limited’.

142 Law Council of Australia, *Submission 140*.

143 E Moore, M Darwish and A Pert, *Submission 109*.

4.127 Further, they suggested that even if it is accepted that the Act is protecting legitimate national security or public order interests, the imposition of criminal sanctions (up to two years' imprisonment) was arguably unnecessary and disproportionate to protecting any potential legitimate objective.<sup>144</sup>

4.128 The provisions were also said to breach the implied freedom of political communication because 'any entrusted persons who in their working capacity come across any objectionable conduct or content which could be the basis for legitimate criticism of government policy will be forced to risk imprisonment by disclosure of such information' and the necessary element of proportionality was lacking.<sup>145</sup>

#### ***ASIO Act secrecy provisions***

4.129 Secrecy offences in the *ASIO Act* have been extended to apply to the unauthorised disclosure of information relating to a 'special intelligence operation'.<sup>146</sup> Section 35P(1) of the *ASIO Act* provides that a person commits an offence if the person discloses information; and the information relates to a 'special intelligence operation'.<sup>147</sup> Recklessness is the fault element in relation to whether the information relates to a special intelligence operation.<sup>148</sup>

4.130 Section 35P(2) provides an aggravated offence where the person intends to endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation; or the disclosure of the information will endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation.

4.131 The Explanatory Memorandum stated that these offences are 'necessary to protect persons participating in a [special intelligence operation] and to ensure the integrity of operations, by creating a deterrent to unauthorised disclosures, which may place at risk the safety of participants or the effective conduct of the operation'.<sup>149</sup>

4.132 The Human Rights Committee examined provisions of the *ASIO Act* in its consideration of the National Security Legislation Amendment Bill (No 1) 2014, and concluded that these offence provisions had not been shown to be a reasonable, necessary and proportionate limitation on the right to freedom of expression.<sup>150</sup> The provisions were incompatible with the right to freedom of expression because they appeared to impose disproportionate limits on that right.<sup>151</sup>

---

144 Ibid.

145 Ibid.

146 *Australian Security Intelligence Organisation Act 1979* (Cth) s 35P.

147 'Special intelligence operation' is defined in *Ibid* s 4.

148 *Ibid* s 35P(1)(b).

149 Explanatory Memorandum, National Security Legislation Amendment Bill (No 1) 2014 (Cth) [553].

150 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011*, 16th Report of the 44th Parliament (November 2014) [2.107].

151 *Ibid* [2.112].

4.133 While the statement of compatibility highlighted the existence of defences and safeguards, the Human Rights Committee observed that, because s 35P(1) ‘applies to conduct which is done recklessly rather than intentionally, a journalist could be found guilty of an offence even though they did not intentionally disclose information about a [special intelligence operation]’.<sup>152</sup>

As [special intelligence operations] can cover virtually all of ASIO’s activities, the committee considers that these offences could discourage journalists from legitimate reporting of ASIO’s activities for fear of falling foul of this offence provision. This concern is compounded by the fact that, without a direct confirmation from ASIO, it would be difficult for a journalist to accurately determine whether conduct by ASIO is pursuant to a [special intelligence operation] or other intelligence gathering power.<sup>153</sup>

4.134 The Scrutiny of Bills Committee criticised the broad drafting:

First, they are not limited to initial disclosures of information relating to a [special intelligence operation] but cover all subsequent disclosures (even, it would seem, if the information is in the public domain). In addition, these new offences as currently drafted may apply to a wide range of people including whistleblowers and journalists.

Second, the primary offence (unlike the aggravated version) is not tied to the underlying purposes of the criminalisation of disclosure. This means that the offence (under subsection 35P(1)) could be committed even if unlawful conduct in no way jeopardises the integrity of operations or operatives.<sup>154</sup>

4.135 The Scrutiny of Bills Committee added that its concerns were heightened by the fact that the application of the offences depends on whether or not the information relates to a special intelligence operation, which in turn depends on an authorisation process which is internal to ASIO.<sup>155</sup>

4.136 The Attorney-General provided a detailed response to these concerns, restating that the wrongdoing to which the offences are directed is the harm inherent in the disclosure of highly sensitive, intelligence-related information; and that the provisions were ‘necessary and proportionate to the legitimate objective to which they are directed’. For example:

- the offences need to be capable of covering information already in the public domain because risks associated with disclosure of information about a special intelligence operation (including its existence, methodology or participants) are just as significant in relation to a subsequent disclosure as they are in relation to an initial disclosure;

---

152 Ibid [2.107].

153 Ibid.

154 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *12th Report of 2014* (September 2014) 627–8.

155 Ibid 628.

- the offences need to be capable of applying to all persons, consistent with avoiding the significant risks arising from disclosure, and it would be contrary to the criminal law policy of the Commonwealth to create specific exceptions for journalists from legal obligations to which all other Australian persons and bodies are subject; and
- the policy justification for adopting recklessness as the applicable fault element is to place an onus on persons contemplating making a public disclosure to consider whether or not their actions would be capable of justification to this standard.<sup>156</sup>

4.137 Section 35P of the *ASIO Act* was enacted unchanged.<sup>157</sup> In December 2014, the Prime Minister announced that the INSLM would review any impact on journalists of the provisions.<sup>158</sup> The INSLM, the Hon Roger Gyles AO QC, announced on 30 March 2015 that his first priority was the review of s 35P. As at 1 November 2015, the report on the INSLM's review of s 35P was being prepared.<sup>159</sup>

4.138 Stakeholders in this ALRC Inquiry expressed concerns about these secrecy provisions of the *ASIO Act*, which ranged from points of drafting through to broader arguments about the possible impact on journalism generally, and suggested repeal or reform because of the impact on freedom of speech and of the press.<sup>160</sup> Some stakeholders suggested a new public interest disclosure exception should be incorporated.<sup>161</sup>

4.139 The adoption of recklessness as the fault element, in the lesser offence under s 35P(1), caused some concern.<sup>162</sup> However, unless otherwise specified, recklessness is the fault element provided for under the *Criminal Code* for a 'physical element that consists of a circumstance', such as that information relates to a 'special intelligence

156 Ibid 628–34.

157 In response to recommendations made by the Parliamentary Joint Committee on Intelligence and Security, the Government amended the Explanatory Memorandum to the Bill to refer to the need for the Commonwealth Director of Public Prosecutions to consider the public interest in the commencement or continuation of a prosecution: Revised Explanatory Memorandum, National Security Legislation Amendment Bill (No 1) 2014 (Cth) [582].

158 Prime Minister of Australia, the Hon Tony Abbott MP, 'Appointment of Independent National Security Legislation Monitor' (Media Release, 7 December 2014).

159 See Department of the Prime Minister and Cabinet, *Independent National Security Legislation Monitor* <<http://www.dpmc.gov.au/pmc/about-pmc/core-priorities/independent-national-security-legislation-monitor>>.

160 Councils for Civil Liberties, *Submission 142*; Australian Lawyers for Human Rights, *Submission 106*; Law Council of Australia, *Submission 75*; Joint Media Organisations, *Submission 70*; Public Interest Advocacy Centre, *Submission 55*; Free TV Australia, *Submission 48*; Human Rights Law Centre, *Submission 39*; UNSW Law Society, *Submission 19*. See also submissions to the Independent National Security Legislation Monitor's current review of s 35P of the *ASIO Act*: Department of the Prime Minister and Cabinet, above n 159.

161 National Association of Community Legal Centres, *Submission 143*; Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 140*.

162 Australian Lawyers for Human Rights, *Submission 106*; Free TV Australia, *Submission 48*; UNSW Law Society, *Submission 19*.

operation'.<sup>163</sup> It is applied to similar offences under the *Crimes Act* relating to the disclosure of information about controlled operations conducted by the AFP.<sup>164</sup>

4.140 The scope of the available defences was criticised. The UNSW Law Society, for example, stated that the lesser offence unnecessarily restricts freedom of speech because there is 'no public interest defence for unauthorised disclosure, which is likely to restrict legitimate scrutiny of security agencies',<sup>165</sup> and because there is no harm element. The Public Interest Advocacy Centre (PIAC) observed that the 'natural and ordinary meaning of the provision suggests a broad scope: it could apply, for example, to a journalist publishing information in circumstances where there may well be an overriding public interest to do so'.<sup>166</sup>

4.141 The Joint Media Organisations expressed a range of concerns about s 35P, including that it

- criminalises journalists for undertaking and discharging their role in a modern democratic society;
- does not include an exception for journalists and the media for public interest reporting; and
- further erodes the already inadequate protections for whistle-blowing and has a chilling effect on sources.<sup>167</sup>

4.142 Free TV Australia expressed concern that the offences remained capable of capturing 'the activities of journalists reporting in the public interest'. Section 35P, it said, appeared to capture circumstances where a person does not know whether the relevant information relates to an intelligence operation; or knows that the information relates to an intelligence operation but does not know it is a special intelligence operation.<sup>168</sup>

4.143 Councils for Civil Liberties were concerned that the impact of s 35P 'cannot be confined to journalists or whistle-blowers' and that academics, members of civil society and religious groups, community advocates and ordinary members of the community may be affected. The new offences 'could be used to prevent or deter publication or disclosure of important information regarding the use and misuse of official power that is essential to the proper functioning of a democratic state' and appear intended to have 'a major deterrent effect on legitimate whistle-blowers, on the freedom of the media to report on abuses of power by ASIO and on debate relating to

---

163 *Criminal Code* s 5.6(2).

164 *Crimes Act 1914* (Cth) ss 15HK, 15HL.

165 UNSW Law Society, *Submission 19*. However, s 35P(3) does provide for disclosure to the Inspector-General of Intelligence and Security in certain circumstances.

166 Public Interest Advocacy Centre, *Submission 55*.

167 Joint Media Organisations, *Submission 70*.

168 Free TV Australia observed that the impact of s 35P may be 'amplified in the context that information relating to [special intelligence operations] is unlikely to be readily identifiable as such', so that journalists reporting on intelligence and national security matters will not necessarily know whether or not information 'relates to' a special intelligence operation or not: Free TV Australia, *Submission 48*.

intelligence and counter terrorism issues—even when these pose no threat to national security’.<sup>169</sup>

#### **Other secrecy provisions**

4.144 Other provisions identified as raising freedom of speech concerns included:

- *Criminal Code* s 105.41, which provides for a range of offences in relation to disclosing that a person is in preventative detention;<sup>170</sup>
- *Criminal Code* s 119.7, which prohibits the advertising or publishing of material which discloses the manner in which someone might be recruited to become a foreign fighter;<sup>171</sup>
- *Crimes Act* s 3ZZHA, which prohibits the unauthorised disclosure of information in relation to the application for or execution of a delayed notification search warrant;<sup>172</sup> and
- *Crimes Act* ss 15HK, 15HL, which prohibit the disclosure of information relating to a ‘controlled operation’.<sup>173</sup>

#### **Public interest disclosure**

4.145 The *Public Interest Disclosure Act* is intended to encourage and facilitate the making of public interest disclosures by public officials and, in some circumstances, provides public officials with protection from liability under secrecy laws.

4.146 The Joint Media Organisations criticised this protection as inadequate, a problem that was ‘further exacerbated when laws, such as the three tranches of 2014–2015 national security laws, not only provide no protection but criminalise information disclosure (external or otherwise)—and therefore unjustifiably interfere with freedom of speech’.<sup>174</sup>

4.147 Councils for Civil Liberties recommended that the INSLM conduct a review of counter-terrorism and national security legislative provisions that

erode legitimate journalistic freedom and weaken protections for legitimate whistle-blowers with the intention of developing a comprehensive set of effective shield laws for journalists and comprehensive and effective whistle-blower legislation which protects all citizens.<sup>175</sup>

---

169 Councils for Civil Liberties, *Submission 142*.

170 Australian Lawyers for Human Rights, *Submission 43*.

171 Joint Media Organisations, *Submission 70*; Free TV Australia, *Submission 48*.

172 Joint Media Organisations, *Submission 70*; Free TV Australia, *Submission 48*.

173 Joint Media Organisations, *Submission 70*.

174 *Ibid.*

175 Councils for Civil Liberties, *Submission 142*.

### **Court and tribunal orders**

4.148 Courts have powers to suppress information relevant to court proceedings, or may be empowered to do so by legislation. These powers can be seen to be inherent to the scope of freedom of speech at common law.

4.149 The federal courts have such implied powers as are incidental and necessary to exercise their jurisdiction and express powers conferred on them by legislation.<sup>176</sup> The Federal Court has held that it has power to make suppression orders as a result of these implied powers, including in relation to documents filed with the Court.<sup>177</sup> Part VAA of the *Federal Court of Australia Act 1976* (Cth) sets out expressly when and how these powers can be exercised by providing for suppression and non-publication orders.

4.150 Commonwealth administrative tribunals also have power to make orders for private hearings, non-publication and non-disclosure in relation to administrative review proceedings.<sup>178</sup>

### **Privilege and contempt laws**

#### ***Parliamentary privilege***

4.151 Parliamentary privilege is derived from art 9 of the *Bill of Rights Act 1688* in which it was declared that the ‘freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament’. However, in protecting freedom of speech of parliamentarians and witnesses before Parliament and its committees, privilege can interfere with others’ freedom of speech.

4.152 One of the effects of s 16 of the *Parliamentary Privileges Act 1987* (Cth), which declares and enacts art 9, is that it limits the freedom of members of the public to question directly or indirectly, in judicial proceedings, what is said in Parliament. Section 16(3) provides:

- (3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:
- (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
  - (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
  - (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

---

176 *DJL v The Central Authority* (2000) 201 CLR 226, 240–41.  
177 *Central Equity Ltd v Chua* [1999] FCA 1067 (29 July 1999).  
178 See, eg, *Administrative Appeals Tribunal Act 1975* (Cth) s 35.



4.153 The provision also limits the ability of citizens sued for defamation by a member or a witness before Parliament to defend themselves, by introducing evidence of what may have been said in parliamentary proceedings.

4.154 The question of whether s 16 violates the implied freedom of political communication has not been authoritatively determined by the High Court, but other courts have rejected constitutional challenges.<sup>179</sup>

#### ***Contempt of Parliament***

4.155 The law of contempt of Parliament can be used to limit criticisms of the Parliament or of individual parliamentarians.

4.156 Section 4 of the *Parliamentary Privileges Act* defines contempt as *excluding* conduct (including the use of words) ‘unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member’s duties as a member’. Section 6 expressly abolishes defamatory words or acts as a punishable contempt.

#### ***Contempt of court***

4.157 The law of contempt of court is a regime of substantive and procedural rules, developed primarily within the common law, whereby persons who engage in conduct tending to interfere with the administration of justice may be subjected to legal sanctions.<sup>180</sup> Powers to punish for contempt of court are part of the inherent jurisdiction of superior courts, and are also provided for in legislation.<sup>181</sup>

4.158 Section 264E of the *Bankruptcy Act 1966* (Cth) makes it an offence to insult or disturb a court registrar or magistrate conducting an examination in bankruptcy.<sup>182</sup> Section 195 of the *Evidence Act 1995* (Cth) provides that a person must not, without the express permission of a court, print or publish any question that the court has disallowed nor any question in respect of which the court has refused to give leave under pt 3.7 (in relation to credibility). This is a strict liability offence.

#### ***Tribunals, commissions of inquiry and regulators***

4.159 A range of other legislative provisions protect the processes of tribunals, commissions of inquiry and regulators. These laws interfere with freedom of speech by, for example, making it an offence to use insulting language towards public officials or to interrupt proceedings, and include:

- *Administrative Appeals Tribunal Act 1975* (Cth) s 63 (Administrative Appeals Tribunal);

---

179 *Amann Aviation v Commonwealth* (1988) 19 FCR 223; *Rann v Olsen* (2000) 172 ALR 395.

180 Thomson Reuters, *The Laws of Australia* (at 1 November 2015) 10 Criminal Offences, ‘10.11 Administration of Law and Justice’, [10.11.140].

181 See, eg, *Family Law Act 1975* (Cth) ss 35, 69F, 112AP.

182 *Bankruptcy Act 1966* (Cth) s 264E.

- *Copyright Act 1968* (Cth) s 173 (Copyright Tribunal);
- *Defence Act 1903* (Cth) s 89 (service tribunals);
- *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 119 (Commissioners);
- *Fair Work Act 2009* (Cth) s 674 (Fair Work Commission);
- *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 61 (parliamentary commissions);
- *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 94 (Integrity Commissioner);
- *Royal Commissions Act 1902* (Cth) s 60 (royal commissions); and
- *Veterans' Entitlements Act 1986* (Cth) s 170 (Veterans' Review Board).

4.160 Some of these laws also make it an offence to use words that are false and defamatory of a body or its members; or words calculated to bring a member into disrepute.<sup>183</sup>

4.161 The Centre for Comparative Constitutional Studies submitted that such laws unjustifiably interfere with freedom of speech—and may in some cases be unconstitutional—having regard to

- the content-based nature of the laws—that is, the laws regulate speech because of the harm caused by the communication of a message, rather than being directed to the ‘time, place and manner’ in which speech occurs;
- the provisions directly target criticism of public officers engaged in performing public functions, affecting ‘core political speech’; and where
- less restrictive means are available to achieve the ends pursued by these laws, such as existing defamation law and powers to exclude individuals from proceedings.<sup>184</sup>

4.162 An example of a contempt law that was found to be unconstitutional is the provision struck down by the High Court in *Nationwide News v Wills*.<sup>185</sup> This concerned s 299(1)(d)(ii) of the *Industrial Relations Act 1988* (Cth), which criminalised the publication of a writing calculated to bring the Commission into disrepute. The judges were unanimous in holding the provision to be an interference with the implied freedom of political communication.

4.163 In 2014, the Human Rights Committee requested further advice from the Minister for Veterans' Affairs as to the compatibility of the provision now appearing as

---

183 Ibid; *Fair Work Act 2009* (Cth) s 674; *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 61; *Royal Commissions Act 1902* (Cth) s 60; *Veterans' Entitlements Act 1986* (Cth) s 170.

184 Centre for Comparative Constitutional Studies, *Submission 58*.

185 *Nationwide News v Wills* (1992) 177 CLR 1.

s 170 of the *Veterans' Entitlements Act* with the right to freedom of opinion and expression. Section 170 provides, among other things, that it is an offence to insult another person in the exercise of the other person's powers or functions under the part of the Act relating to the operations of the Veterans' Review Board. In particular, the Committee asked whether the measure was rationally connected to its stated objective; and proportionate to achieving that objective.<sup>186</sup>

4.164 The Minister responded that the provision was likely to be effective in achieving the objective of protecting the Board and its hearings because it would act as a deterrent to inappropriate and disruptive behaviour. As to the question of proportionality, it was noted that, on occasion, the Board operates from non-secure, non-government premises, and protections are required to ensure the safety and proper function of the Board and its members.<sup>187</sup>

4.165 In 2015, it was suggested in Parliament<sup>188</sup> that public criticism of the Royal Commissioner in charge of the Royal Commission into Trade Union Governance and Corruption might constitute an offence under the *Royal Commissions Act*.<sup>189</sup>

4.166 There seems reason to review the range of legislative provisions that protect the processes of tribunals, commissions of inquiry and regulators. Some of these laws may unjustifiably interfere with freedom of speech—and may be unconstitutional—in prohibiting criticism of public officers engaged in performing public functions.

### Anti-discrimination laws

4.167 Commonwealth anti-discrimination laws may interfere with freedom of speech by making unlawful certain forms of discrimination, intimidation and harassment that can be manifested in speech or other forms of expression. At the same time, such laws may protect freedom of speech, by preventing a person from being victimised or discriminated against by reason of expressing, for example, certain political or religious views.

4.168 Together, these Acts<sup>190</sup> prohibit discrimination on the basis of race, colour, descent, or national or ethnic origin, sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, breastfeeding or family responsibilities, disability, and age. The conduct prohibited may include speech or other forms of expression.

186 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Ninth Report of the 44th Parliament* (July 2014) 111.

187 *Ibid* 111–112. However, the Board 'would not use these provisions lightly' as it would require an extreme event to warrant consideration of applying the contempt provisions and the decision to prosecute would be undertaken by the Commonwealth Director of Public Prosecutions on referral from the police.

188 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 August 2015, 8885 (Tony Abbott, Prime Minister).

189 *Royal Commissions Act 1902* (Cth) s 6O.

190 *Age Discrimination Act 2004* (Cth); *Disability Discrimination Act 1992* (Cth); *Sex Discrimination Act 1984* (Cth); *Racial Discrimination Act 1975* (Cth).

4.169 The *RDA* makes unlawful offensive behaviour because of race, colour or national or ethnic origin.<sup>191</sup> The *Sex Discrimination Act 1984* (Cth) makes sexual harassment unlawful in a range of employment and other contexts.<sup>192</sup> Various Commonwealth anti-discrimination laws make it an offence to advertise an intention to engage in unlawful discrimination.<sup>193</sup> Each of these Acts also makes it an offence to victimise a person because the person takes anti-discrimination action.<sup>194</sup>

4.170 Similarly, the general protections provisions of the *Fair Work Act 2009* (Cth) provide protection from workplace discrimination because of a person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.<sup>195</sup>

### Racial Discrimination Act

4.171 There has been much debate over the scope of s 18C and pt IIA of the *RDA*. Section 18C provides that it is unlawful to 'do an act', otherwise than in private, if:

- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
- (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

4.172 Importantly, s 18C does not create a criminal offence. Under s 46P of the *Australian Human Rights Commission Act 1986* (Cth), a person may make a complaint about an unlawful act to the Australian Human Rights Commission. Where the complaint is not resolved, an application alleging unlawful discrimination may be made to the Federal Court or the Federal Circuit Court. If the court is satisfied that there has been unlawful discrimination, the court may make orders, including for compensation.<sup>196</sup>

4.173 Section 18D provides exemptions. It states that s 18C does not render unlawful anything said or done reasonably and in good faith for various purposes, including artistic work and reporting on events or matters of public interest.<sup>197</sup>

191 *Racial Discrimination Act 1975* (Cth) s 18C. See exemptions in s 18D.

192 *Sex Discrimination Act 1984* (Cth) pt II div 3.

193 *Age Discrimination Act 2004* (Cth) s 50; *Disability Discrimination Act 1992* (Cth) s 44; *Sex Discrimination Act 1984* (Cth) s 86. FamilyVoice submitted that these laws are unjustified restrictions on freedom of speech and should be repealed: FamilyVoice Australia, *Submission 122*.

194 *Racial Discrimination Act 1975* (Cth) s 27(2); *Sex Discrimination Act 1984* (Cth) s 94; *Age Discrimination Act 2004* (Cth) s 51; *Disability Discrimination Act 1992* (Cth) s 42.

195 *Fair Work Act 2009* (Cth) s 351. See also civil remedy provisions concerning coercion, misrepresentations and inducements in relation to industrial activity, and the offence of intimidation: *Ibid* ss 348–350, 676.

196 *Australian Human Rights Commission Act 1986* (Cth) s 46PO.

197 These sections were inserted into the *RDA* in 1995 by the *Racial Hatred Act 1995* (Cth).

4.174 On 25 March 2014, the Attorney-General, Senator the Hon George Brandis QC, announced that the Government proposed amending the *RDA* to repeal s 18C and insert a new section prohibiting vilification and intimidation on the basis of race, colour or national or ethnic origin.<sup>198</sup> This announcement followed controversy about s 18C occasioned by the decision of *Eatoock v Bolt*.<sup>199</sup>

4.175 On 6 August 2014, after consultation on an exposure draft Freedom of Speech (Repeal of s 18C) Bill, then Prime Minister, the Hon Tony Abbott MP, announced that the proposed changes to s 18C had been taken ‘off the table’.<sup>200</sup> On 25 September 2014, a private members’ Bill to amend s 18C was introduced in the Senate.<sup>201</sup>

4.176 In the ALRC’s view, s 18C of the *RDA* would benefit from more thorough review in relation to implications for freedom of speech. In particular, there are arguments that s 18C lacks sufficient precision and clarity, and unjustifiably interferes with freedom of speech by extending to speech that is reasonably likely to ‘offend’. In some respects, the provision is broader than is required under international law, broader than similar laws in other jurisdictions, and may be susceptible to constitutional challenge.

4.177 The ALRC received widely divergent views on whether s 18C unjustifiably interferes with freedom of speech. Some stakeholders considered that it strikes an appropriate balance between freedom of speech and other interests, including the right to be free from racial discrimination.<sup>202</sup> Others considered that it significantly overreaches, and should be amended or repealed.<sup>203</sup>

### *Scope of s 18C*

4.178 Many of the arguments used to justify s 18C appear to relate primarily to vilification—rather than simply giving offence, or even causing insult or humiliation. Racial vilification, in this context, generally refers to public acts that encourage or incite others to hate people because of their race, nationality, country of origin, colour or ethnic origin.<sup>204</sup> Vilification carries with it a sense of extreme abuse or hatred of its

198 See Attorney-General’s Department, Exposure Draft, Freedom of Speech (Repeal of s 18C) Bill 2014 (Cth).

199 *Eatoock v Bolt* (2011) 197 FCR 261.

200 Emma Griffiths, *Government Backtracks on Racial Discrimination Act 18C Changes; Pushes Ahead with Tough Security Laws* <www.abc.net.au>. Submissions on the exposure draft Freedom of Speech (Repeal of s 18C) Bill are not made available on the Attorney-General’s Department’s website.

201 Racial Discrimination Amendment Bill 2014 (Cth).

202 National Association of Community Legal Centres, *Submission 143*; Law Society of NSW Young Lawyers, *Submission 69*; National Association of Community Legal Centres, *Submission 66*; Public Interest Advocacy Centre, *Submission 55*; Arts Law Centre of Australia, *Submission 50*; Jobwatch, *Submission 46*; Kingsford Legal Centre, *Submission 21*; UNSW Law Society, *Submission 19*.

203 FamilyVoice Australia, *Submission 122*; Wilberforce Foundation, *Submission 118*; FamilyVoice Australia, *Submission 73*; Wilberforce Foundation, *Submission 29*; Church and Nation Committee, Presbyterian Church of Victoria, *Submission 26*; P Parkinson, *Submission 9*.

204 See, eg, *Racial Vilification Act 1996* (SA) s 4.

object, and can provoke hostile and even violent responses. Arguably, the words of s 18C do not convey this meaning.<sup>205</sup>

4.179 Section 18C has long been criticised for extending to giving offence. In 2004, Dan Meagher of Deakin University highlighted that the meaning of the words ‘offend’ and ‘insult’ in s 18C of the *RDA* were ‘so open-ended as to make any practical assessment by judges and administrators as to when conduct crosses this harm threshold little more than an intuitive and necessarily subjective value judgement’.<sup>206</sup>

4.180 Stakeholders in this Inquiry echoed concerns about the scope of the provision. The Church and Nation Committee, for example, submitted that the state ‘cannot legislate against offence and insult without doing serious damage to wide-ranging freedom of speech’.<sup>207</sup>

4.181 The Wilberforce Foundation stated that s 18C was flawed because it ‘essentially makes speech and acts unlawful as a result of a subjective response’. This flaw, it said, is compounded by s 18D, which does not make truth a defence.<sup>208</sup> FamilyVoice Australia (FamilyVoice) submitted that, since ‘justifiable limitations on offensive speech are already available under state defamation laws, the provisions of section 18C are superfluous’.<sup>209</sup>

4.182 Other stakeholders considered that the scope of s 18C, together with the defence provision in s 18D, were appropriate. The Law Society of NSW Young Lawyers, for example, stated that the provision ‘finely balances fair and accurate reporting and fair comment with discrimination protections’.<sup>210</sup> PIAC observed that, in relation to racial vilification, ‘the law must strike a balance between permitting the expression of views that might be disagreeable or worse, but draw a line to prohibit speech that causes unreasonable harm to others’.<sup>211</sup>

4.183 Australian Lawyers for Human Rights (ALHR) submitted that the right to be free from racist abuse and hate speech was an important right, which deserved protection even at the expense of some ‘relatively minor and proportionate limits’ upon free speech, (as provided by the *RDA*).<sup>212</sup> It stated that the ‘evidence is that encouraging, accepting and tolerating racism causes it to increase and causes the forms that racism takes to become more harmful and more violent’.<sup>213</sup>

---

205 Liberty Victoria, Submission to Attorney-General’s Department, *Exposure Draft Freedom of Speech (Repeal of s 18C) Bill 2014 (Cth)*, 2014.

206 Dan Meagher, ‘So Far So Good? A Critical Evaluation of Racial Vilification Laws in Australia’ [2004] *Federal Law Review* 225, 231.

207 Church and Nation Committee, Presbyterian Church of Victoria, *Submission 26*.

208 Wilberforce Foundation, *Submission 29*.

209 FamilyVoice Australia, *Submission 122*.

210 Law Society of NSW Young Lawyers, *Submission 69*.

211 Public Interest Advocacy Centre, *Submission 55*. One of the key motivations for PIAC’s opposition to the proposed rollback of restrictions on racist speech, in 2014, was said to be evidence of the wide-ranging impact of racially motivated hate speech on PIAC’s clients.

212 Australian Lawyers for Human Rights, *Submission 106*.

213 *Ibid*.

4.184 NSW Young Lawyers considered that, rather than going too far, s 18C limits freedom of speech only to the extent required to ensure that communities are protected from racial vilification:

Racial vilification can have a silencing effect on those who are vilified. In the absence of a federal bill of rights and constitutional guarantees of human rights, the need to strike a clear and equitable balance between the right to free speech and the right to be free from vilification is obviously all the more pressing.<sup>214</sup>

4.185 The Australia/Israel and Jewish Affairs Council (AIJAC) observed that pt IIA of the *RDA* was ‘drafted to best balance the twin goals of maintaining maximum freedom of expression consistent with maintaining freedom from racial vilification’ and was the product of widespread public consultation and debate.<sup>215</sup>

#### ***The ‘reasonably likely’ standard***

4.186 Section 18C provides that an act must be ‘reasonably likely, in all the circumstances’ to cause the listed harms. This element has been criticised because the reasonableness requirement may demand that the court make a ‘political decision’ about the boundaries of permissible speech. The objective test of reasonableness in s 18C may not ‘cure the definitional indeterminacy of these words that a decision-maker must objectively apply’.<sup>216</sup>

4.187 Tasmanian anti-vilification legislation avoids this particular problem by confining the question to whether the speaker acted honestly in the pursuit of a permissible purpose.<sup>217</sup>

4.188 In contrast, it has been submitted that the test does allow for an objective assessment to be made, and ensures that the threshold for racial vilification is appropriate, given that s 18D of the *RDA* provides safeguards to protect freedom of speech by imposing a list of exemptions for ‘anything said or done reasonably and in good faith’.<sup>218</sup>

#### ***Section 18C in practice***

4.189 Those with concerns about the potential scope of s 18C often place little emphasis on how the provision has been interpreted in practice by the courts. Broad meanings of ‘offend’ have been rejected by Australian courts. For example, in *Creek v Cairns Post Pty Ltd*, Kiefel J held that the section requires the harm to be ‘profound and serious effects not to be likened to mere slights’.<sup>219</sup>

---

214 Law Society of NSW Young Lawyers, *Submission 69*. See also Australian Lawyers for Human Rights, *Submission 106*.

215 Australia/Israel & Jewish Affairs Council, *Submission 100*.

216 Meagher, above n 206, 231.

217 Darryn Jensen, ‘The Battlelines of Interpretation in Racial Vilification’ (2011) 27 *Policy* 14, 19; *Anti-Discrimination Act 1998* (Tas) ss 19, 55.

218 Law Society of NSW Young Lawyers, *Submission 69*. ‘The Australian Courts have historically interpreted sections 18C and 18D in a fair and reasonable manner, and with the public interest in mind’: *Ibid*.

219 *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, [16].

4.190 In *Eatock v Bolt*, the defendant essentially failed in his defence because he was found not to have acted reasonably and in good faith, in terms of s 18D. Bromberg J held that s 18C is ‘concerned with consequences it regards as more serious than mere personal hurt, harm or fear’. Rather, it is

concerned with mischief that extends to the public dimension. A mischief that is not merely injurious to the individual, but is injurious to the public interest and relevantly, the public’s interest in a socially cohesive society.<sup>220</sup>

4.191 The words ‘offend, insult, humiliate or intimidate’ were ‘not intended to extend to personal hurt unaccompanied by some public consequence’ of the kind pt IIA of the *RDA* is directed to avoid.<sup>221</sup>

4.192 NSW Young Lawyers submitted that Australian courts have ‘historically interpreted sections 18C and 18D in a fair and reasonable manner, and with the public interest in mind’.<sup>222</sup> The Refugee Council of Australia (RCOA) submitted that:

currently existing sections 18B, 18C, 18D and 18E protect people from the harm of racial vilification and discrimination, as exemplified by almost 20 years of case law. We argue that there is a lack of a clear rationale for these changes, which have only been brought about after extensive media attention regarding one case. Indeed, research shows that these laws have been considered in less than 100 finalised court cases since 1995 and RCOA argues that the courts have applied these laws reasonably and appropriately.<sup>223</sup>

### ***International law***

4.193 One reason that s 18C might be considered an unjustified interference with freedom of speech is that it is broader in its terms than art 20 of the ICCPR. Article 20 provides that any ‘advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’.<sup>224</sup> Professor Patrick Parkinson stated that s 18C should be similarly confined and not extend to matters likely only to offend.<sup>225</sup>

4.194 FamilyVoice submitted that s 18C does not fall within the ‘justifiable limitations of protecting personal reputation, national security, public order, public health or public morals’ set out in the ICCPR and, therefore, constitutes an unjustifiable limitation on freedom of speech.<sup>226</sup>

4.195 In *Coleman v Power*, Kirby J observed that the widest possible meaning of the term ‘insulting’—in Queensland legislation prohibiting ‘threatening, abusive or

---

220 *Eatock v Bolt* (2011) 197 FCR 261, [263].

221 *Ibid* [267]. However, the ‘public consequence’ can be slight. Bromberg J held that ‘conduct which invades or harms the dignity of an individual or group, involves a public mischief in the context of an Act which seeks to promote social cohesion’.

222 Law Society of NSW Young Lawyers, *Submission 69*.

223 Refugee Council of Australia, *Submission 109*.

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

225 P Parkinson, *Submission 9*.

226 FamilyVoice Australia, *Submission 122*.



insulting words' in a public place—would go beyond the permissible limitations on freedom of speech set out in art 19.3 of the ICCPR.<sup>227</sup>

4.196 On the other hand, the need to protect against harmful speech is clearly contemplated in international law.<sup>228</sup> Federal Court cases have found that s 18C is consistent with Australia's undertakings under international law and, in particular, with the *Convention on the Elimination of Racial Discrimination* (CERD) and the ICCPR.<sup>229</sup>

#### **Other jurisdictions**

4.197 Other common law countries have anti-vilification legislation. In New Zealand, the *Human Rights Act 1993* (NZ) makes it unlawful to use words in a public place which are 'threatening, abusive, or insulting' and 'likely to excite hostility against or bring into contempt any group of persons ... on the ground of the colour, race, or ethnic or national origins of that group of persons'.<sup>230</sup>

4.198 In the UK, it is an offence for a person to 'use threatening, abusive or insulting words or behaviour' if the person 'intends thereby to stir up racial hatred' or, having regard to all the circumstances, 'racial hatred is likely to be stirred up thereby'.<sup>231</sup>

4.199 The New Zealand and UK provisions seem narrower than the Australian provision—leaving aside the operation of the exemptions in s 18D. For example, the provisions do not cover offensiveness, and require that the person provoke hostility or hatred against a group of persons defined by race or ethnicity.

4.200 Before 2013, the *Canadian Human Rights Act 1985* (Can) prohibited the sending of messages 'likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination'.<sup>232</sup>

4.201 The repeal of this provision, introduced by a private member's Bill and subjected to a conscience vote,<sup>233</sup> was controversial.<sup>234</sup> Repeal was justified on a number of grounds, including that the provision conflicted with the 'freedom of

227 *Coleman v Power* (2004) 220 CLR 1, [242].

228 Public Interest Advocacy Centre, *Submission 55*. In addition to art 20 of the ICCPR, art 4(a) of the *Convention on the Elimination of Racial Discrimination* states that signatory states should declare an offence 'the dissemination of ideas based on racial superiority or hatred and declare an offence all other propaganda activities promoting and inciting racial discrimination': *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969). In this regard, art 4 is not fully implemented because it does not create a criminal offence of inciting racial discrimination: Public Interest Advocacy Centre, *Submission 55*.

229 Law Council of Australia, *Submission 140*. Referring to *Toben v Jones* (2003) 129 FCR 515; *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105.

230 *Human Rights Act 1993* (NZ) s 61.

231 *Public Order Act 1986* (UK) s 18(1). While this provision is framed as a criminal offence, proceedings can only occur with the prior consent of the Attorney General: *Ibid* s 27(1).

232 *Canadian Human Rights Act 1985* (Can) s 13 (repealed).

233 Jason Fekete, 'Tories Repeal Sections of the Human Rights Act Banning Hate Speech over Telephone or Internet' *National Post* (Canada), 7 June 2012.

234 Jennifer Lynch, 'Hate Speech: This Debate Is Out of Balance' *Globe and Mail* (Canada), 11 June 2009.

thought, belief, opinion and expression’ protected by s 2(b) of the *Canadian Charter of Human Rights and Freedoms*,<sup>235</sup> and because provisions of criminal law were considered to be the ‘best vehicle to prosecute these crimes’.<sup>236</sup>

### **Constitution**

4.202 The constitutional validity of s 18C has not been tested before the High Court. The provision may be vulnerable to challenge on two fronts.<sup>237</sup>

4.203 The first is the question of whether s 18C is validly supported by the external affairs power under s 51(xxix) of the *Constitution*. This would arise if the provision extends beyond Australia’s international obligations under the ICCPR and CERD, which may be said to ‘focus on protecting against racial vilification and hatred rather than prohibiting offence or insult’.<sup>238</sup>

4.204 The second relates to the implied freedom of political communication. In this context, the High Court has observed that ‘insult and invective’ are a legitimate part of political discussion and debate.<sup>239</sup> The inclusion of the words ‘offend’ and ‘insult’ raises a possibility that the High Court, in an appropriate case, might read down the scope of s 18C, or find it invalid.<sup>240</sup>

### **Review of s 18C**

4.205 Australian racial vilification laws have long been the subject of academic and other criticism. For example, in 2004, Dan Meagher suggested that Commonwealth, state and territory laws, including s 18C of the *RDA*, lacked ‘sufficient precision and clarity in key respects’. As a consequence, an incoherent body of case law has developed, where too much is left open to the decision maker in each individual case.<sup>241</sup>

4.206 Meagher concluded that the primary goal of racial vilification laws in Australia—to regulate racial vilification without curbing legitimate public communication—is compromised by this lack of precision and clarity.<sup>242</sup>

235 Brian Storseth, MP ‘Bill C-304 Background’ (17 October 2011).

236 Joseph Breaun, ‘Repeal Controversial Hate Speech Law, Minister Urges’ *National Post* (Canada) 18 June 2011. *Criminal Code 1985* (Can) s 319 provides for an indictable offence applying to anyone who ‘by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace’.

237 Lorraine Finlay, ‘Freedom’s Limits: Speech, Association, and Movement in the Australian Legal System’ (Speech, ALRC Freedoms Symposium, Constitutional Centre of Western Australia, Perth, 29 September 2015).

238 Ibid.

239 *Coleman v Power* (2004) 220 CLR 1, [36], [102] (McHugh J), [197] (Gummow and Hayne JJ); *Monis v The Queen* (2013) 249 CLR 92, [85]–[86] (Hayne J).

240 Cf *Monis v The Queen* (2013) 249 CLR 92. As discussed above, the statute considered in *Monis* concerned using a postal service to ‘cause offence’.

241 Meagher, above n 206, 227.

242 Ibid 228.

4.207 The ALRC has not established whether s 18C of the *RDA* has, in practice, caused unjustifiable interferences with freedom of speech.<sup>243</sup> However, it appears that pt IIA of the *RDA*, of which s 18C forms a part, would benefit from more thorough review in relation to freedom of speech.

4.208 In particular, there are arguments that s 18C lacks sufficient precision and clarity, and unjustifiably interferes with freedom of speech by extending to speech that is reasonably likely to ‘offend’. The provision appears broader than is required under international law to prohibit the advocacy of racial hatred and broader than similar laws in other jurisdictions, and may be susceptible to constitutional challenge.

4.209 However, any such review should not take place in isolation. Stakeholders put forward arguments that people should also be protected from vilification on other grounds, including sex, sexual orientation and gender identity.<sup>244</sup>

4.210 While recognising that anti-vilification laws serve a number of purposes, including providing an ‘educative and symbolic function and acting as a general deterrent’,<sup>245</sup> there are also concerns that existing laws do not effectively prohibit more serious ‘hate speech’.

4.211 For example, the AIJAC suggested that the Australian Government should consider amendments to ss 80.2A and 80.2B of the *Criminal Code* to improve their effectiveness against ‘incitement to racially motivated violence and racial hatred including on online platforms’.<sup>246</sup>

4.212 A review of pt IIA might best be done in conjunction with a more general review of vilification laws that could consider not only existing encroachments on freedom of speech, but also whether existing Commonwealth laws effectively discourage the urging of violence towards targeted groups distinguished by race, religion, nationality, national or ethnic origin or political opinion.<sup>247</sup> In this context, the Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (Cth), introduced on 12 November 2015, would create a new offence of advocating genocide in div 80 of the *Criminal Code*.<sup>248</sup>

4.213 A related issue concerns Australia’s compliance with CERD.<sup>249</sup> Article 4(a) of CERD states that signatory states should criminalise the dissemination of ideas based

---

243 A summary of the instances in which it has been applied can be found in: Gillian Triggs, ‘Freedom of Speech and Racial Vilification: One Man’s Freedom Ends Where Another’s Starts’ (Speech, Sydney Institute, 26 November 2013).

244 JobWatch, *Submission 115*; A Lawrie, *Submission 112*; Australian Lawyers for Human Rights, *Submission 106*; NSW Gay and Lesbian Rights Lobby, *Submission 47*.

245 Standing Committee on Law and Justice, Legislative Council (NSW), *Racial Vilification Law in New South Wales* (2013) xi.

246 Australia/Israel & Jewish Affairs Council, *Submission 100*. See also Glen Falkenstein, ‘Jihad against Jews’—How Our Race Hate Laws Have Failed Us <[www.abc.net.au/news](http://www.abc.net.au/news)>.

247 To adopt the language of *Criminal Code* s 80.2B.

248 The new offence is modelled on the advocating terrorism offence in s 80.2C, but has some important differences, including that it is limited to public acts of advocacy: Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (Cth) [56].

249 Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 140*; Public Interest Advocacy Centre, *Submission 55*.

on racial superiority or hatred and all other propaganda activities promoting and inciting racial discrimination. Article 4 is not fully implemented in Australian law, because s 18C does not create a criminal offence.<sup>250</sup>

4.214 In 2000, the UN Committee on the Elimination of Racial Discrimination acknowledged the ‘civil law prohibition of offensive, insulting, humiliating or intimidating behaviour based on race’ contained in s 18C, and recommended that Australia ‘continue making efforts to adopt appropriate legislation’ giving full effect to art 4(a) of CERD.<sup>251</sup>

4.215 Greater harmonisation between Commonwealth, state and territory laws in this area may also be desirable. While all Australian states and the ACT have racial discrimination legislation in many ways similar to the *RDA*, the approaches to racial vilification and other conduct based on race hate are not uniform.<sup>252</sup>

### Media, broadcasting and communications laws

4.216 Obscenity laws have a long history in the common law,<sup>253</sup> and censorship of publications dates back to the invention of the printing press.<sup>254</sup>

4.217 In Australia, freedom of expression is subject to the restrictions of the classification cooperative scheme for publications, films and computer games implemented through the *Classification Act* and complementary state and territory enforcement legislation.<sup>255</sup>

4.218 Under the classification cooperative scheme some publications, films and computer games may be classified as ‘RC’. In addition, s 9A of the *Classification Act* provides that a publication, film or computer game that advocates the doing of a terrorist act must be classified RC. The RC classification category is the strongest classification that can be given to media content in Australia. Such content is effectively banned and may not be sold, screened, provided online or otherwise distributed.

---

250 Australia has entered a reservation in relation to art 4(a) of CERD that states the Australian Government intends, when suitable, ‘to seek from Parliament legislation specifically implementing the terms of article 4(a)’: United Nations, United Nations Treaty Collection, Chapter IV Human Rights, *International Convention on the Elimination of All Forms of Racial Discrimination*, Reservation Made by Australia.

251 Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, 66th Sess, UN Doc CERD/C/AUS/CO/14 (14 April 2005).

252 Australian Human Rights Commission, *Racial Vilification Law in Australia* <www.humanrights.gov.au>.

253 See *Crowe v Graham* (1968) 121 CLR 375, 391; *Kneller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435, 471. Since 1727, it has been an offence under the common law of England and Wales to publish an obscene libel: *R v Curl* (1727) 2 Str 788; 93 ER 849.

254 For example, by Star Chamber ordinances of 1586 and 1637, there were to be no presses in England, save those that were licensed by the Crown, and registered with the Stationers’ Company: Garrard Glenn, ‘Censorship at Common Law and Under Modern Dispensation’ (1933) 82 *University of Pennsylvania Law Review* 114, 116.

255 The *Classification Act* is supplemented by a number of regulations, determinations and other legislative instruments, including the: National Classification Code (May 2005); Guidelines for the Classification of Publications 2005 (Cth); Guidelines for the Classification of Films 2012 (Cth); and Guidelines for the Classification of Computer Games 2012 (Cth).

4.219 The Law Council observed that s 9A of the *Classification Act* may ‘inadvertently capture genuine political commentary and education materials, and stifle robust public debate on terrorist-related issues’.<sup>256</sup> Civil Liberties Australia also expressed concern about the scope of the classification scheme.<sup>257</sup>

4.220 The *Broadcasting Services Act 1992* (Cth) provides for restrictions on online content. The Act sets out provisions in relation to internet content hosted outside Australia, and in relation to content services, including some content available on the internet and mobile services hosted in or provided from Australia.<sup>258</sup> Broadly, the scheme places constraints on the types of online content that can be hosted or provided by internet service providers and content service providers. This is expressed in terms of ‘prohibited content’.<sup>259</sup>

4.221 Following the passage of the *Enhancing Online Safety for Children Act 2015* (Cth), a scheme addressed at cyber-bullying material is administered by the Children’s e-Safety Commissioner.

4.222 More generally, the *Broadcasting Services Act* regulates aspects of the ownership and control of media in Australia, including through licensing. These rules can also be characterised as interfering with freedom of expression.

4.223 Other communications laws place restrictions on speech and expression. For example, the *Do Not Call Register Act, Spam Act 2003* (Cth) and *Telecommunications Act 1997* (Cth) all place restrictions on various forms of telephone and online marketing. The *Do Not Call Register Act* prohibits the making of unsolicited telemarketing calls and the sending of unsolicited marketing faxes to numbers on the Register (subject to certain exceptions) and, to this extent, may limit the rights of some people to impart information about commercial matters.<sup>260</sup>

4.224 ALHR submitted that s 313 of the *Telecommunications Act* unjustifiably limits freedom of speech.<sup>261</sup> This section imposes obligations on telecommunications carriers, carriage service providers and carriage service intermediaries to do their best to prevent telecommunications networks and facilities from being used in the commission of offences against the laws of the Commonwealth or of the states and territories.

4.225 Commonwealth agencies have used s 313 to prevent the continuing operation of online services in breach of Australian law (for example, sites intended to facilitate financial fraud). The AFP uses s 313 to block websites which contain child sexual abuse and exploitation material. Questions about how government agencies use this

---

256 Law Council of Australia, *Submission 75*.

257 Civil Liberties Australia, *Submission 94*.

258 *Broadcasting Services Act 1992* (Cth) schs 5, 7.

259 Schedule 7 defines ‘prohibited’ or ‘potentially prohibited’ content: Ibid sch 7 cls 20, 21. Generally, ‘prohibited content’ is content that has been classified by the Classification Board as X 18+ or RC and, in some cases, content classified R 18+ or MA 15+ where the content is not subject to a ‘restricted access system’.

260 See Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 10th Report of 2013* (June 2013).

261 Australian Lawyers for Human Rights, *Submission 43*.

provision to request the disruption of online services were the subject of a report, in June 2015, by the House of Representatives Standing Committee on Infrastructure and Communications.<sup>262</sup> The Committee recommended that the Australian Government adopt whole-of-government guidelines for the use of s 313, proposed by the Department of Communications.<sup>263</sup>

4.226 ALHR suggested that only services established to be involved in serious crimes or that directly incite serious crimes should be covered by s 313. They stated that ‘blocking has resulted in the disruption of thousands of legitimate sites with completely legal content, to the commercial disadvantage and inconvenience of the owners’. They went on to argue that s 313 should be redrafted ‘so as to draw a proper balance between the potential infringement of human rights and State interests’, and made subject to new accountability and oversight mechanisms.<sup>264</sup>

### Information laws

4.227 In some circumstances, Commonwealth information laws, including the *Privacy Act 1988* (Cth) and *Freedom of Information Act 1982* (Cth) (*FOI Act*) may operate to interfere with freedom of speech and expression.

4.228 Free TV stated that the range of privacy-related laws and codes that apply across Commonwealth, state and territory jurisdictions, and at common law, ‘collectively operate to limit the ability of the media to report on matters’.<sup>265</sup>

4.229 The *Privacy Act* regulates the handling of personal information about individuals by most Australian Government agencies and some private sector organisations, consistently with 13 Australian Privacy Principles. The application of these principles may sometimes limit freedom of speech and expression, because disclosure would breach privacy.

4.230 The Office of the Australian Information Commissioner (OAIC) observed the functions of that office regularly require balancing the protection of personal information under the *Privacy Act* with the broader public interest in the free flow of information and with an individual’s right to access government information under the *FOI Act*. The role of the OAIC in examining legislative proposals includes assessing whether a law or practice ‘is reasonable, proportionate and necessary and the least privacy invasive option’.<sup>266</sup>

4.231 In the ALRC’s view, there is no reason to suggest that privacy regulation unjustifiably interferes with freedom of speech.

---

262 Parliament of Australia, House of Representatives Standing Committee on Infrastructure and Communications, *Balancing Freedom and Protection: Inquiry into the Use of Subsection 313(3) of the Telecommunications Act 1997 by Government Agencies to Disrupt the Operation of Illegal Online Services*, June 2015.

263 Ibid rec 1.

264 Australian Lawyers for Human Rights, *Submission 43*.

265 Free TV Australia, *Submission 48*.

266 Office of the Australian Information Commissioner, *Submission 114*. See also Australian Privacy Foundation, *Submission 116*.

4.232 While the objectives of the *Freedom of Information Act* include promoting public access to information, the application of the exemptions may sometimes mean that information cannot be released, potentially restricting freedom of speech. Freedom of information has been recognised in international law as an ‘integral part’ of freedom of expression.<sup>267</sup> For example, the ICCPR defines the right to freedom of expression as including freedom to ‘seek’ and ‘receive’ information.<sup>268</sup>

4.233 Free TV identified aspects of the current FOI regime that may stifle ‘the media’s ability to report on government information in a timely way’.<sup>269</sup>

4.234 Freedom of information law is a recent development based on statute, and is concerned primarily with promoting government accountability and transparency by providing a legal framework for individuals to request access to government documents.<sup>270</sup> While freedom to seek and receive information is linked with freedom of speech, it is not a traditional common law right.

4.235 Finally, stakeholders expressed concern about the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth) including in relation to its implications for journalism and the protection of media sources.<sup>271</sup> This Act, which came into force in March 2015, included some safeguards applying to the release of metadata that might identify a journalist’s source. While the effects of this law, and communications and data surveillance laws more generally, may include indirect ‘chilling’ effects on freedom of speech and expression, these concerns are beyond the scope of this Inquiry.<sup>272</sup>

### Intellectual property laws

4.236 Intellectual property laws, including the *Copyright Act 1968* (Cth), *Trade Marks Act 1995* (Cth) and *Designs Act 2003* (Cth) are intended to encourage creativity and innovation and protect businesses that develop original intellectual property by providing limited monopoly privileges.<sup>273</sup>

267 P Timmins, *Submission 27*.

268 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(2).

269 Free TV Australia, *Submission 48*. See also Australia’s Right To Know, *Submission No 24* to Senate Legal and Constitutional Affairs Legislation Committee, *Freedom of Information Amendment (New Arrangements) Bill 2014 [Provisions]* 2014. PIAC also expressed concern about the implications of the Freedom of Information Amendment (New Arrangements) Bill 2014: Public Interest Advocacy Centre, *Submission 55*.

270 *Freedom of Information Act 1982* (Cth) s 3.

271 Law Council of Australia, *Submission 140*; Australian Privacy Foundation, *Submission 116*; Australian Lawyers for Human Rights, *Submission 106*; Civil Liberties Australia, *Submission 94*; Australian Privacy Foundation, *Submission 71*; Joint Media Organisations, *Submission 70*; Public Interest Advocacy Centre, *Submission 55*; Free TV Australia, *Submission 48*; Australian Lawyers for Human Rights, *Submission 43*.

272 See Ch 2. See also, Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014).

273 Following amendments to the *Copyright Act* by the *Copyright Amendment (Online Infringement) Act 2015* (Cth) owners of copyright may now apply to the Federal Court for an order requiring a carriage service provider to block access to an online location that has the primary purpose of infringing copyright or facilitating the infringement of copyright: *Copyright Act 1968* (Cth) s 115A.

4.237 While the history of intellectual property protection goes back to the 1710 *Statute of Anne*,<sup>274</sup> intellectual property rights can be seen as affecting others' freedom of speech and expression.

4.238 A number of stakeholders commented on the impact of copyright law on freedom of expression. The Australian Digital Alliance and Australian Libraries Copyright Committee (ADA and ALCC) observed a 'fundamental tension' between copyright and free speech. The ADA and ALCC submitted that current copyright exceptions unjustifiably interfere with freedom of speech and should be repealed and replaced with a 'fair use' exception<sup>275</sup>—as recommended by the ALRC in its 2014 report, *Copyright and the Digital Economy*.<sup>276</sup> The Copyright Council submitted that to the extent that Australian copyright law may interfere with freedom of speech, it is 'proportionate and appropriate'.<sup>277</sup>

4.239 Other laws relating to intellectual property place restrictions on freedom of speech and expression, including those relating to the use of national and other symbols. In some cases, the use of certain words and symbols, such as defence emblems and flags, is an offence:

- *Defence Act 1903* (Cth) s 83;
- *Geneva Conventions Act 1957* (Cth);
- *Major Sporting Events (Indicia and Images) Protection Act 2014* (Cth);
- *Olympic Insignia Protection Act 1987* (Cth);
- *Protected Symbols Determination 2013* (Cth); and
- *Protection of the Word 'ANZAC' Regulations 1921* (Cth).<sup>278</sup>

4.240 The *Tobacco Advertising Prohibition Act 1992* (Cth) and *Tobacco Plain Packaging Act 2011* (Cth) prohibit the advertising of, and regulate the retail packaging and appearance of, tobacco products. The *Therapeutic Goods Act 1989* (Cth) regulates the advertising of therapeutic goods.<sup>279</sup>

4.241 In a response to a question from the Human Rights Committee, the Minister for Health stated that, while the *Tobacco Advertising Prohibition Amendment Regulation 2012* (Cth) 'could be said to engage the right to freedom of expression as it regulates

274 1710, 8 Anne c 19.

275 Australian Digital Alliance and Australian Libraries Copyright Committee, *Submission 61*. See also D Black, *Submission 6*.

276 Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2014) rec 1.

277 Australian Copyright Council, *Submission 101*. See also Copyright Agency, *Submission 104*.

278 In *Davis v Commonwealth*, the High Court ruled that the grant of a monopoly on '200' to the Australian Bicentennial Authority was beyond the 'corporations' power in s 51(xx) and constitutionally invalid: *Davis v Commonwealth* (1988) 166 CLR 79.

279 *Therapeutic Goods Act 1989* (Cth) ch 5.



advertising content’, art 19.3 of the ICCPR expressly permits restricting this right where necessary for protecting public health.<sup>280</sup>

4.242 The Human Rights Committee also considered the Major Sporting Events (Indicia and Images) Protection Bill 2013 (Cth). The *Major Sporting Events (Indicia and Images) Protection Act 2014* (Cth) provides special protection in relation to the use for commercial purposes of indicia and images connected with certain major sporting events such as the Cricket World Cup 2015 and the Gold Coast 2018 Commonwealth Games. In its report on the Bill, the Committee stated that it

accepts that the limitation on freedom of expression is proposed in pursuit of the legitimate objective of promoting or protecting the rights of others (being the right of people to participate in the events in question and the protection of the intellectual property of the event sponsors), and that the proposed restrictions are rationally connected to that objective in seeking to protect the financial interests of event sponsors and investors, and thereby the financial viability of such events.<sup>281</sup>

4.243 The Human Rights Committee noted, in relation to the proportionality of the restriction, that exemptions were provided for the purposes of criticism, review or the provision of information.<sup>282</sup>

### Other laws

4.244 Many other Commonwealth laws may be characterised as interfering with freedom of speech and expression.

4.245 The *Competition and Consumer Act 2010* (Cth) places restrictions on engaging in secondary boycotts, including through activist campaigning. A secondary boycott—where a party engages with others in order to hinder or prevent a business from dealing with a third party—is prohibited by s 45D if the conduct would have the effect of causing substantial loss or damage to the business of the third person. Section 45DD provides some exemptions where the ‘dominant purpose of conduct relates to environmental protection or consumer protection’.

4.246 There may be a question whether s 45D of the *Competition and Consumer Act* prohibits campaigns that urge the general public to boycott the products of a particular business, including on the basis of the domestic or foreign policies of the nation where the business originates. It has been suggested that it should be put beyond doubt that such campaigns are not prohibited.<sup>283</sup>

---

280 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Sixth Report of 2012* (2012).

281 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Sixth Report of the 44th Parliament* (May 2014) [1.93].

282 Ibid [1.94].

283 Michael Sexton SC, ‘Legislative Restrictions on Freedom of Speech’ (Speech, ALRC Freedoms Symposium, Federal Court of Australia, Sydney, 8 October 2015).

4.247 The Australian Industry Group strongly supported the restrictions on engaging in secondary boycotts and stated that these ‘must not be watered down or removed in favour of uncompetitive behaviour justified by a perceived freedom of speech or expression of employees (or their representatives)’.<sup>284</sup>

4.248 The *Charities Act 2014* (Cth) provides that a charity cannot promote or oppose a political party or a candidate for political office.<sup>285</sup> The *Commonwealth Electoral Act 1918* (Cth) regulates the printing and publication of electoral advertisements and notices, requirements relating to how-to-vote cards, and prohibits misleading or deceptive publications and canvassing near polling booths.<sup>286</sup>

4.249 Other laws impose prohibitions on forms of false, deceptive or misleading statements, including the *Competition and Consumer Act* (Cth) (Australian Consumer Law)<sup>287</sup> and the *Corporations Act 2001* (Cth).<sup>288</sup>

4.250 Finally, a number of Commonwealth laws impose restrictions on the use of certain words or expressions in various contexts. For example:

- *Commonwealth Electoral Act 1918* (Cth) s 129 (restrictions on political party names);
- *Business Names Registration Act 2011* (Cth) ss 27, 28 (restrictions on words that can be used in business names);
- *Banking Act 1959* (Cth) ss 66 and 66A (restrictions on the words ‘bank’, ‘building society’, ‘credit union’ or ‘credit society’); and
- *Corporations Act 2001* (Cth) ss 923A, 923B (restrictions on the use of the words ‘independent’, ‘impartial’ or ‘unbiased’, ‘stockbroker’, ‘sharebroker’ and ‘insurance broker’).

## Conclusion

4.251 The ALRC concludes that the following Commonwealth laws should be further reviewed to determine whether they unjustifiably limit freedom of speech:

- Pt IIA of the *RDA*, in conjunction with consideration of anti-vilification laws more generally.
- Legislative provisions that protect the processes of tribunals, commissions of inquiry and regulators, for example s 170 of the *Veterans’ Entitlements Act*.
- Secrecy offences, including the general secrecy offences in ss 70 and 79 of the *Crimes Act*.

284 Australian Industry Group, *Submission 131*.

285 *Charities Act 2014* (Cth) ss 5, 11.

286 *Commonwealth Electoral Act 1918* (Cth) pt XXI. See also *Broadcasting Services Act 1992* (Cth) sch 2 cl 3, 3A.

287 *Competition and Consumer Act 2010* (Cth) sch 2 s 18.

288 *Corporations Act 2001* (Cth) ss 1309, 1041E.

- 
- *Criminal Code* s 80.2C (advocating terrorism), ss 102.1, 102.3, 102.5, 102.7 (prescribed terrorist organisations) and s 105.41 (preventative detention orders). These provisions are subject to review by INSLM and the Intelligence Committee as part of their ongoing roles.
  - Section s 35P of the *ASIO Act* (special intelligence operations). This provision is also subject to review by INSLM and the Intelligence Committee as part of their ongoing roles.

