

2. Freedom of Speech

Contents

A common law right	21
Protections from statutory encroachments	23
Australian Constitution	23
Principle of legality	24
International law	24
Bills of rights	25
Justifications for encroachments	25

A common law right

2.1 Freedom of speech is a fundamental common law right.¹ It has been described as ‘the freedom *par excellence*; for without it, no other freedom could survive’.²

2.2 This chapter discusses: the source and rationale of freedom of speech; how it is protected from statutory encroachment; and when laws that encroach on freedom of speech may be justified. The ALRC calls for submissions on two questions.

Question 2–1 What general principles or criteria should be applied to help determine whether a law that interferes with freedom of speech is justified?

Question 2–2 Which Commonwealth laws unjustifiably interfere with freedom of speech, and why are these laws unjustified?

2.3 In *Monis v The Queen* (2013), Chief Justice French explained the source of freedom of speech:

Freedom of speech is a common law freedom. 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. Lord Coleridge CJ in 1891 described what he called the right of free speech as ‘one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done’. The common law and the freedoms

1 *Nationwide News v Wills* (1992) 177 CLR 1, 32 (Mason CJ); *Attorney-General (South Australia) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 67 [151].

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

it encompasses have a constitutional dimension. It has been referred to in this Court as ‘the ultimate constitutional foundation in Australia’.³

2.4 Free speech or free expression is understood to be an integral aspect of a person’s right of self-development and fulfilment.⁴ Professor Eric Barendt writes that freedom of speech is ‘closely linked to other fundamental freedoms which reflect... what it is to be human: freedoms of religion, thought, and conscience’.⁵

2.5 This freedom is intrinsically important, but 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.⁶

2.6 In Australian law, particular protection is given to political speech. Australian law recognises 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.⁷

2.7 The common law on freedom of speech both reflects and informs the works of some leading philosophers and jurists from Aristotle in the 4th century BCE,⁸ JS Mill in the 18th century,⁹ through to John Rawls, Ronald Dworkin¹⁰ and Eric Barendt¹¹ in the 20th century.¹² Freedom of speech has been enshrined in founding constitutions for modern republics such as that of France and the United States of America.

3 *Monis v The Queen* (2013) 249 CLR 92, 128 [60].

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

5 Ibid. See also United Nations Human Rights Committee, General Comment No 34 (2011) on Article 19 of the ICCPR on Freedoms of Opinion and Expression (CCPR/C/GC/34) [1].

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

7 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 108 (Mason CJ). See also, *Nationwide News v Wills* (1992) 177 CLR 1, 74 (Brennan J).

8 Aristotle, *Politics* (Hackett Publishing Company, 1998) vol Book 6.

9 John Stuart Mill, *On Liberty* (London, 1859) in John Gray (ed) *On Liberty and Other Essays* (Oxford University Press, 1991).

10 Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury Publishing, 1978).

11 Barendt, above n 4.

12 John Rawls, *Political Liberalism* (Columbia University Press, 1993).

Protections from statutory encroachments

Australian Constitution

2.8 Beginning with a series of cases in 1992,¹³ the High Court has recognised that freedom of political communication is implied in the *Australian Constitution*. This freedom ‘enables the people to exercise a free and informed choice as electors’.¹⁴

2.9 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.¹⁵

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?¹⁶

2.10 However, the freedom is not absolute. For one thing, it only protects some types of speech—political communication.¹⁷ ‘It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*.’¹⁸

2.11 In *Lange v Australian Broadcasting Corporation* (1997), the High Court formulated a two-step test to determine whether a law burdens the implied freedom. As modified in *Coleman v Power* [2004],¹⁹ the test involves asking 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

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

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

15 *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.

16 *Unions NSW v State of New South Wales* (2013) 88 ALJR 227 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). 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 (the Court). 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 (the Court).

17 However, French CJ has said that the ‘class of communication protected by the implied freedom in practical terms is wide’: *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, 43 [67] (French CJ).

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

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

submitting a proposed amendment of the *Constitution* to the informed decision of the people?²⁰

2.12 The *Australian Constitution* has not been found to protect free speech more broadly.

Principle of legality

2.13 The principle of legality provides some protection to freedom of speech.²¹ 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.²²

2.14 For example, in *Attorney-General (South Australia) v Corporation of the City of Adelaide* (2013), 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.²³

International law

2.15 International instruments provide for freedom of expression including the right to ‘seek, receive and impart information and ideas of all kinds regardless of frontiers’.²⁴ The UN’s 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.²⁵

2.16 International instruments cannot be used to ‘override clear and valid provisions of Australian national law’.²⁶ However, where a statute is ambiguous, courts will

20 *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, 43–44 [67] (French CJ).

21 The principle of statutory interpretation now known as the ‘principle of legality’ is discussed more generally in Ch 1.

22 *Attorney-General (South Australia) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 30–33 [42]–[46]; *Evans v State of New South Wales* [2008] FCAFC 130 (15 July 2008) [72]; *R v Secretary of State for the Home Department; Ex Parte Simms* [2002] 2 AC 115 130.

23 *Attorney-General (South Australia) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 32 [44] (French CJ). See also, *Monis v The Queen* (2013) 249 CLR 92, 331.

24 *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 1948*.

25 United Nations Human Rights Committee, General Comment No 34 (2011) on Article 19 of the ICCPR on Freedoms of Opinion and Expression (CCPR/C/GC/34) [11].

26 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).

generally favour a construction that accords with Australia's international obligations.²⁷

Bills of rights

2.17 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 United States,²⁸ United Kingdom,²⁹ Canada³⁰ and New Zealand³¹. 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.³²

2.18 Although the right may be stronger for being incorporated into statute law, the particular freedom may not necessarily be different from the freedom recognised at common law: several members of the House of Lords expressed the opinion 'that in the field of freedom of speech there was in principle no difference between English law on the subject and article 10 of the Convention.'³³

2.19 The First Amendment to the United States *Constitution* provides significant protection to free speech. In *New York Times v Sullivan*, Brennan J 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'.³⁴

2.20 Free speech is also provided for in the Victorian Charter of Human Rights and Responsibilities and the *Human Rights Act 2004* (ACT).³⁵

Justifications for encroachments

2.21 It is widely recognised that freedom of speech is not absolute. Conventions enshrining the freedom recognise that it may be subject to laws necessary to protect the rights or reputations of others, national security, and 'public health or morals'.³⁶ Even the First Amendment of the United States *Constitution* has been held not to protect all

27 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

28 *United States Constitution* amend I.

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

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

31 *Bill of Rights Act 1990* (NZ) s 14.

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

33 *Attorney General v Guardian Newspapers Ltd (No 2) (Spycatcher)* [1988] 1988 UKHL 6 283–284 (Lord Goff). This was approved in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 550–551 (Lord Keith); *R v Secretary of State for the Home Department; Ex Parte Simms* [2002] 2 AC 115.

34 *New York Times v Sullivan* 376 US 254 (1964) 270 (Brennan J, giving the opinion of the Court).

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

36 *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).

speech: it does not, for example, protect obscene publications or speech inciting imminent lawless action.³⁷

2.22 The difficulty is always balancing the respective rights or objectives. ‘It is difficult to draw a line between speech which might appropriately be regulated and speech which in any liberal society should be tolerated.’³⁸

2.23 Laws limiting freedom of speech have been justified:

- to prevent the publication or dissemination private or confidential information,³⁹ including the identity of vulnerable persons;
- to protect national security;⁴⁰ or
- to prevent or restrict dissemination of indecent or classified material.

2.24 Similarly, laws prohibit, or render unlawful, speech that causes harm, distress or offence to others through incitement to violence,⁴¹ harassment, intimidation⁴² or discrimination.⁴³

2.25 International law provides that freedom of expression may be justifiably limited where, for example, an individual’s privacy is interfered with.⁴⁴

2.26 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and ‘demonstrably justified in a free and democratic society’.⁴⁵

2.27 Many of these encroachments on free speech may be justified. The ALRC invites submissions identifying those Commonwealth laws that limit free speech and that are *not* justified, and explaining why these laws are not justified.

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

38 Barendt, above n 4, 21.

39 An individual’s privacy is, to some extent, protected by the equitable action for breach of confidence and under the *Privacy Act 1988* (Cth).

40 See for example, *Crimes Act 1914* (Cth) s 70.

41 *Criminal Code Act 1995* (Cth) s 11.4.

42 *Fair Work Act 2009* (Cth) s 676.

43 *Racial Discrimination Act 1975* (Cth) s 18C.

44 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17(1).

45 *Canada Act 1982 c 11, Sch B Pt 1* (‘*Canadian Charter of Rights and Freedoms*’) s 1. See also, *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.