



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

Topic 8.2: Rights and Freedoms in the Australian Constitution

The Implied Freedom of Political Communication - Students

Unlike in the United States, there is no constitutional right to free speech in Australia. What we do have is a freedom of political communication, which allows us to communicate freely so we can be informed citizens and have meaningful elections and other votes. This is a limited kind of free speech, and is implied in our Constitution. It only protects political communication from interference, and does not give people a right that they can use against others.

The implied freedom of political communication

Despite the lack of express protection for free speech in the Constitution, the High Court recognised, in 1992, an implied freedom of political communication.

It reasoned that because sections 7 and 24 of the Constitution require that the two Houses of Parliament be 'directly chosen by the people', and section 128 requires any constitutional change to be approved by voters in a referendum, the Australian people must be put in a position where they can make a free and informed choice when voting.

For this to happen, there needs to be free access to relevant political information and the ability to communicate about it. If Parliament enacts a law that impedes communication about political matters, it may be breaching the Constitution, because it is potentially undermining the free choice of the people when they vote. If a court decides it does breach the freedom of political communication implied by the Constitution, the law will be struck down for being invalid.

However, there are exceptions. Some laws can limit political communication and yet still be valid and effective. These laws can interfere with political communication, but only if they are for a purpose that is compatible with our system of government and democracy in Australia, and only if they are suitable, reasonably necessary and proportionate in achieving that purpose.



In Australia, we do have freedom of political communication, which allows us to communicate freely so we can be informed citizens and have meaningful elections and other votes

Source: iStock



*The implied freedom only protects political communication, not speech generally.
Source: IStock*

Communication must be 'political'

The implied freedom only protects political communication, not speech generally. 'Political communication' is interpreted broadly, as including communications about federal, state, local and even international political issues. It applies at all times, rather than just during election periods. This is because the way people vote in federal elections and referendums is based upon political views which can be formed from a wide range of sources at different times.

For example, a person's views about how a political party has operated at a State level might affect whether he or she votes for the same party at a federal election. Political communication includes political advertising, protests and criticism of government officials, politicians and policies. These are all a part of lively political discussion that can inform voters.

'Communication' means more than just speech

'Communication' also has a wide meaning. It includes speech, but also other conduct or actions, as long as they communicate some idea about government or politics. Signs, symbols, advertisements, gestures and images are all forms of communication that could be protected. They might be seen or heard on television, social media, radio, in newspapers or during protests. Even displaying the dead bodies of birds, in a protest against duck shooting, has been recognised as a form of political communication. Burning a flag or 'taking a knee' during the playing of the anthem, are also symbolic forms of political communication.

The implied freedom does not give us personal rights to use against others

The implied freedom of political communication restricts laws or government acts from interfering with the free flow of political communication. The freedom is not a personal right that we can wield against the government or each other. It does not give us a right to have our political opinions heard by others. It won't stop someone from shutting us down during a conversation. Nor will it stop a social media platform from removing our comments, or an event holder from preventing us from speaking or being heard.

This is because the implied freedom only limits laws or government acts. While we may be free to express our opinions, others are not forced to listen to them, or to give us a platform.

Some laws are able to interfere with the free flow of political communication

In some cases, laws will limit freedom of political communication, but still be valid, because they are needed to support another legitimate purpose, like preventing discrimination, protecting a person's reputation or maintaining public order, which is compatible with our system of representative government.

The courts have worked out a three-stage test to decide which laws are permissible.



High Court of Australia (HCA)
Source: HCA

First, does the law burden political communication? The law must have a real or practical effect upon political communication, eg by prohibiting or limiting the content of what is communicated, or the time, place or manner in which it is communicated. If there is no burden, then the implied freedom does not apply. If there is a burden, then the law may still be valid if it passes steps two and three of the test.

Second, does the law have a legitimate purpose that is compatible with the system of representative government created by the Constitution? A legitimate purpose might be to keep citizens safe from emotional or physical harm, to preserve public order, or to protect the security of the nation. A legitimate purpose for a law controlling how public protests take place could be to prevent damage to public property, protect public health or to limit disruption to others and businesses.

Third, is the law tailored to achieve that legitimate purpose in a way that minimises its effect upon political communication?

There must be a rational connection between the law and the legitimate purpose and the law must be reasonably necessary to achieve that purpose. So if there's another way to achieve the same purpose, which is just as effective but which is not as restrictive of the freedom of political communication, then the law will probably be invalid because it is not reasonably necessary.

Finally, the courts will balance the importance of the purpose served by the law against the seriousness of the restriction that it places on the freedom. If the level of burden upon the political communication is much greater than the importance of the purpose (i.e. it is disproportionate), it will be invalid.

For example, a law that limits noisy protests from taking place on streets near homes very late at night or early in the morning would strike a suitable balance and would be reasonably necessary to limit disruption to others. But a law that says protests must be completely silent at all times would not be reasonably necessary or adequately balanced, and so it would breach the implied freedom of political communication and be held invalid.





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Topic 8.2: Rights and Freedoms in the Australian Constitution

The Implied Freedom of Political Communication - Teachers

Protection of speech in Australia

The High Court of Australia first recognised the existence of a constitutionally implied freedom of political communication in 1992. Since then, it has developed this implied freedom in several of its later decisions. Before 1992, the courts recognised freedom of speech as a common law freedom that existed so long as it was not removed by Acts of Parliament. Freedom of speech was also protected in a limited way through the 'principle of legality', which informs how courts interpret laws. Under that principle, courts interpret laws in a way that is consistent with fundamental rights, such as a right to freedom of speech or expression, except where it is clear that Parliament intends for those rights to be diminished.

Unlike the United States, Australia does not have an express constitutional right to free speech. In fact, there are very few rights expressly guaranteed by the Commonwealth Constitution.

By contrast, the First Amendment to the US Constitution explicitly protects freedom of speech by providing that Congress 'shall make no law ... abridging the freedom of speech, or of the press'. In addition, there is no federal law outside of the Constitution that we can point to that establishes such a right to free speech. Although Australia is a party to some international treaties which protect free speech, like the International Covenant on Civil and Political Rights, these treaties do not become a part of Australian law until implemented through domestic legislation, which the Commonwealth Parliament has not done in respect of free speech.

Implying a freedom of political communication

The High Court's recognition of an implied freedom of political communication in two of its 1992 decisions was thus a controversial step. In these decisions, the High Court found that a freedom of political communication is to be implied from the Commonwealth Constitution, after looking at the system of government established by the Constitution. That system involves a democratically elected House of Representatives and Senate, whose members are required to be 'directly chosen by the people' under sections 7 and 24 of the Constitution.



Source: IStock



*Anti-COVID-19 lock-down protests were held during the pandemic
Source: IStock*

The system also requires the Government to be formed from and to sit in Parliament, where it must answer questions and be 'responsible' to Parliament. Further, section 128 leaves the voting power to change the Constitution in a referendum in the hands of the Australian people.

The Court reasoned that in order for this system and its structures to operate effectively, there needs to be a freedom to communicate about political matters within society, so as to enable a free and informed choice to be made concerning elections and referenda. In other words, it regarded communication on matters of government and politics as an indispensable part of the system of representative and responsible government set up by the Constitution. As well as ensuring that individuals are able to discuss political matters freely, the freedom ensures that potential representatives are not prevented by law from making their views and policies known.

What is the 'political communication' that the implied freedom protects?

The implied freedom protects free speech in a limited way, and is narrower than some of its equivalents elsewhere, such as the First Amendment to the United States Constitution. Importantly, the implied freedom only protects political communication, not speech generally.

However, the High Court has given 'political communication' a broad meaning. It includes communication about anything that is capable of affecting the outcome of an election or a referendum, since the purpose of the freedom

is to protect the Australian democratic process. Political communication may relate to local, state, federal or even international matters, and is not limited to communication that occurs around election periods. Discussion of policies, such as those concerning welfare, immigration, climate change or foreign affairs, could easily be 'political' discussion that is protected. Criticism of the actions and policies of politicians at all levels, or of the police force or government departments may also be political communication.

The implied freedom ultimately captures the wide range of communications that together form the lively political discussion and debate needed for voters to be informed. Hence criticism of politicians and government policies and actions may be protected. Communication can also take a variety of forms. As well as speech, it includes signs, symbols, advertisements, gestures and images that are capable of communicating ideas or issues related to political matters.

How is political communication protected?

The implied freedom operates as a limitation on law-making power and government action. If a court finds that a State or Commonwealth law impermissibly burdens the freedom of political communication, it will declare that law invalid. This means that the law has no operation or effect. But the freedom is not a positive right an individual can exercise against others. A person could only challenge a law or government act that restricts the implied freedom. See, for example, [Bob Brown's](#) challenge to anti-protest laws in Tasmania and [Laurie Levy's](#) challenge to laws concerning duck-shooting that impeded the effectiveness of his protest.



The High Court of Australia
Source: HCA

Moreover, the implied freedom does not give us a right to have our political opinions heard by others. It will not stop a social media platform from removing our comments, or an event holder from preventing us from speaking or being heard, because none of these potential restrictions on political communications amount to laws or government acts. While we may be free to express our opinions, others are not forced to listen to them, or to give us a platform.

The freedom is also not absolute. There are many exceptions to it, as laws can burden or restrict political communication and yet still be valid if they serve some legitimate purpose, provided that they are reasonably appropriate and adapted to advancing that purpose. This reflects that the implied freedom is limited to what is necessary for the effective operation of our constitutionally prescribed system of representative and responsible government.

A wide range of other rights and interests need to be balanced against the necessity for there to be a free flow of political communication. There are criminal laws, secrecy laws, anti-discrimination laws and media and telecommunication laws, amongst others, which burden the implied freedom of political communication but do so in a permissible way, due to the legitimate purposes they serve and their suitability to achieve those purposes.

For instance, national anti-discrimination laws have the potential to limit political communication by making it unlawful to say things that could offend, intimidate or harass people based on factors such as race, age, gender or disability. The Australian Law Reform Commission has provided a useful [survey and discussion](#) of laws that limit free speech.

The High Court has gradually developed the test for determining whether a law breaches the implied freedom and is thus invalid. Since 2015, it has generally applied a three-stage test.

The test for determining whether a law offends the implied freedom of political communication

1. Does the law burden political communication?

The first stage of the test asks whether a law effectively burdens (or interferes with) the freedom of political communication in its terms, operation or effect. The implied freedom only protects us from laws that burden or affect the ability of voters to make a true and informed choice. Laws limiting contributions to political campaigns, restricting where and how protests can take place, and penalising offensive communications from being made, have all been found to burden the implied freedom. But even laws that burden political communication can still be allowed, if they pass steps 2 and 3 of the test.



*Freedom of Political Communication
in Australia
Source: IStock*

2. Does the law have a legitimate purpose?

The second stage asks whether the law has a legitimate purpose, being a purpose that is compatible with the maintenance of the system of representative government prescribed by the Constitution. It recognises that a balance is to be struck between enabling the free flow of political communication on the one hand, and ensuring the protection of other rights and interests on the other. The focus of the second stage is on the purpose of the law being challenged, rather than on the means adopted to achieve that purpose.

Previous High Court decisions have recognised a wide range of legitimate purposes for a law that burdens political communication. Regulating an ordered society, promoting public safety and convenience, protecting reputations, upholding the community's sense of decency and preserving the right of individuals to live peacefully have each been recognised. So too has prohibiting the incitement of violence or racial hatred.

Other legitimate purposes have aimed at protecting the integrity of the electoral process and include reducing the risk of deception of voters and preventing corruption and undue influence. For example, in 2015 the High Court upheld laws imposing caps on political donations from property developers, as although these laws burdened the free flow of political communication, they addressed the legitimate concern that this distinct group may seek to influence politicians inappropriately.

3. Is the law appropriate for achieving that legitimate purpose?

The third stage asks whether the law is reasonably appropriate and adapted to advance its legitimate object in a manner that is compatible with the maintenance of the system of representative government prescribed by the Constitution. Not every law that burdens the implied freedom in order to advance some legitimate purpose will be valid. Rather, the burden on political communication it imposes must be suitable, necessary and adequate in its balance.

The Court will consider the extent and severity of the burden on political communication. To be 'suitable', the law must have some rational connection with its legitimate purpose. It also must be necessary. This means there cannot be some obvious or compelling alternative which may achieve the same purpose in as effective and reasonably practicable a manner, while imposing less of a restriction on the implied freedom. The court will therefore consider the different, less restrictive ways that the law could have achieved its purpose. It is generally for the party arguing that the law breaches the implied freedom to demonstrate these alternative, less restrictive means. Finally, the law must be adequate in its balance. This involves a value judgment as to whether the importance of the purpose served by the law outweighs the restriction it places on the freedom.

HERO FOR WATERBIRDS

BANNED

FROM THE WETLANDS



Laurie Levy in 2016
Source: Facebook

The wider the range of communications caught by the law, and the greater the burden placed on the implied freedom, the less likely it is that a law will be adequate in its balance so as to be valid.

A law that burdens the implied freedom of political communication and fails to pass either the second or the third stage of the test will breach the implied limitation on legislative power, and will be invalid.

Case Study 1 – [Levy v Victoria](#) (1997)

Mr [Laurie Levy](#) was a committed campaigner against duck shooting. Every year he would collect injured and dead ducks, swans and birds of endangered species and parade them before the cameras. Sometimes he would dump them on the steps of Parliament or outside ministerial offices.

The Victorian Government made the *Wildlife (Game) (Hunting Season) Regulations 1994 (Vic)*, which restricted entry to permitted duck hunting areas between certain hours during the opening of the duck-shooting season, unless a person held a valid game licence. It also prevented a person from being within 5 meters of a licensed hunter who is hunting, unless the person was also a licensed hunter and using the same boat or hide. This applied for the whole of the duck shooting season. The regulations effectively excluded both protesters and the media from filming the destruction of birds at the opening of the duck shooting season.

Despite the law, Mr Levy did enter the area, in order to make his protest. He was arrested and charged. He took action in the High Court claiming that the regulations were invalid because they restricted his freedom of political communication. He said that it was critical to the effectiveness of his protest that he be seen to be there on the spot, rendering aid to injured birds and collecting dead birds of protected species. He argued that this was essential to help inform the political judgments of the voters of Victoria.

Mr Levy could, of course, still have complained before the cameras about duck hunting in a different location. He was not restricted at all in what he could say. It was the graphic visual images of the dead ducks which he was prevented from showing. This kind of communication is visual, rather than verbal. Did the implied freedom of political communication extend to non-verbal communication?

The High Court accepted that images could still amount to the kind of 'political communication' that is protected by the Constitution. Chief Justice Brennan concluded that non-verbal conduct is capable of communicating an idea about the government or politics which is protected by the implied freedom. But he warned that non-verbal conduct may be more dangerous than mere words and require greater regulation. For example, bonfires or burning political effigies may need to be restricted or banned in circumstances where there is a serious risk of bushfires as a result.

Justice McHugh thought that signs, symbols, gestures and images were potentially protected by the implied freedom. This included emotive images, such as the photograph of the running child in the Vietnam War who was burned with napalm. They could be more politically effective than reasoned argument. Controversially, Justice McHugh also took the view that the implied freedom does more than protect rational argument and peaceful conduct. He thought it also protects false, unreasoned and emotional political communications as well as true, reasoned and detached ones.

Justice Kirby pointed out that 'lifting a flag in battle, raising a hand against advancing tanks, wearing symbols of dissent, participating in a silent vigil, public prayer and meditation, turning away from a speaker or even boycotting a big public event clearly constitutes political communication although not a single word is uttered.'

While the Court accepted that the implied freedom of political communication could protect Mr Levy's non-verbal protest, and that the time and place of the protest was important to its effectiveness, it still upheld the law as valid. This was because it accepted that the law was directed at the legitimate purpose of ensuring the safety of people (by keeping them from being accidentally shot by hunters) and that the law was reasonably appropriate and adapted to achieve this legitimate purpose.

Case study 2 – [Brown v Tasmania](#) (2017)

[Mr Bob Brown](#), the former leader of the Australian Greens Party in the Senate, was [arrested](#) in 2016 while protesting in Lapoinya Forest against logging. The Tasmanian *Workplaces (Protection from Protesters) Act 2014 (Tas)* was enacted to protect businesses from being harmed by persons obstructing their ability to operate or damaging their equipment. In particular, it prohibited protesters from obstructing access to business premises and permitted a police officer to direct them to leave. If a person refused to leave or entered the area again within 4 days of that direction, it was an offence.

Mr Brown was arrested for refusing to leave a relevant 'area' when directed to do so, but due to uncertainty about what the actual 'area' was, the charges against him were later dropped. Nonetheless, he proceeded with his High Court challenge.

[Brown succeeded](#). The provisions were struck down by a majority of the High Court because they breached the implied freedom of political communication. In their joint judgment, Chief Justice Kiefel and Justices Bell and Keane accepted that the Act had a legitimate purpose of preventing damage and disruption to business operations, including forestry. But they struck down the validity of the section that prevented a person from re-entering the area after having previously been ordered to leave. This was because it operated even though the returning person presented no threat of damage or disruption to the business. They thought the provision was really directed at getting rid of protesters, rather than protecting businesses.

Their Honours also struck down other provisions they thought were really meant to deter protesters, rather than prevent damage or disruption to businesses. The heavy penalties and the Act's vagueness and poor drafting made its effects even worse. The law imposed 'too high a cost to the freedom given the limited purpose' of the Act. The measures taken in the Act went 'far beyond those reasonably necessary for its purpose'.



Topic 8.2 Lesson/ Activities: Two

Rights and Freedoms in the
Australian Constitution (Freedom
of political communication)



AUSTRALIAN
CONSTITUTION
CENTRE

Time/Lesson

- 1 hour/ 1 Lesson

Learning Goal

- To distinguish between freedom of speech and freedom of political communication.
- To understand the meaning and justifications for the implied freedom of political communication in Australia.
- To evaluate the limitations on political communication.

Rationale

Students should know the characteristics of active citizenship and the freedoms that enable participation in democracy within the bounds of law, including freedom of speech, (AC9HC7K02), and when the 'bounds of law' can limit these freedoms (AC9HC7K02_E5).

Success Criteria

Students can explain the freedom of political communication in Australia. Students can justify when the law should limit free political communication.

Teaching Reference Document

- TRD 81: The Implied Freedom of Political Communication (Student Resource)
- TRD 82: The Implied Freedom of Political Communication (Teacher Resource)

Resources

- 'Freedom of Speech' VIDEO: [Do Australians Have A Right To Freedom of Speech](#)

Tuning In

- **RECAP:** Rights and freedoms are not absolute, because a right or freedom that you exercise might infringe some else's rights and freedoms. Screaming racial abuse at someone on a bus infringes their right to dignity and right not to be subject to racial discrimination or racial hatred. Freedom of speech is therefore limited, at least to some extent, in all countries, including those with a bill of rights. Speech that incites violence, defames a person, or prevents a fair trial from being held, will usually be restricted or prohibited. In Australia, it is usually Parliament, rather than the courts, that determines how rights and freedoms are balanced against each other. But the High Court has given constitutional status to freedom of political communication because it is necessary to support Australia's democratic system.
- **WATCH:** '[Do Australians Have A Right To Freedom of Speech](#)' by the *Law Society of NSW*.
- **OPTIONAL WATCH:** '[Freedom of Speech](#)' by *BTN*, start at 1:48.
- **DISCUSSION QUESTION** or **THINK/PAIR/SHARE:** According to this/these video(s), why might it be important to limit free speech?

Teacher Instruction

- **READ: TRD 81:** The Implied Freedom of Political Communication (Student Resource).
- **THINK/PAIR/SHARE:** How and why did the High Court imply a freedom of political communication from the phrase 'directly chosen by the people' in sections 7 and 24 of the Constitution? It is important here to make the connection that voting in a democracy requires free speech concerning political matters. This is because restriction of political communication would also undermine democracy.
- **OPTIONAL:** Does 'fake news' amount to political communication? Some judges think the implied freedom protects false, irrational and emotive speech, but others think it is confined to protecting statements that are factually correct and not misleading. What are the arguments each way? If you suppress controversial views, does that make people believe in them more?

Group Independent Learning

- See 'Freedom of Speech' Worksheet.
- Analysis: Freedom of speech is necessary in a democracy, but some kinds of speech can cause harm. Deciding where to draw the line is difficult. Ask students to brainstorm what objective criteria ought to be used to limit free speech. Then ask students to apply them to the following examples. Which should be restricted or prohibited, and why?
- A [student newspaper](#) which explains to students techniques of how to shoplift.
- A scientific study which makes findings about which sex is better at driving.
- A web-site that expresses doubts about the safety of vaccines.
- Sending [offensive letters](#) to the grieving parents of Australian soldiers killed in action.
- [Swearing at police officers](#) and accusing them of corruption.
- Inciting a riot or violence against a group of people.
- Creating panic by making false statements (eg a bomb threat) that are likely to result in danger to a crowd.
- False statements about a political candidate.
- Acts that [offend](#), insult, humiliate or intimidate people on account of their race.

Wrapping It Up

- After attempting to apply their criteria to these examples, ask students if they have changed their minds as to what the criteria should be?
- Ask students why the High Court of Australia has protected 'political communication' rather than free speech in general. Do they agree?

Differentiation/Enrichment

VIDEO: '[Freedom of Speech in Australia](#)' by Auspol Explained. (38 mins).

Assessment Strategies

Collect 'Freedom of Speech' Worksheet.



Additional Resources for Activity: Topic 8.2: Lesson/Activities 2

Freedom of Speech Work Sheet for Assessment

Freedom of speech is necessary in a democracy, but some kinds of speech can cause harm. Deciding where to draw the line is difficult. Brainstorm what objective criteria ought to be used to limit free speech.

Freedom of Speech Criteria	
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Apply these criteria to the following examples. Which should be restricted or prohibited, and why?

Example	Example OK, Restricted or Prohibited? Justify your response.
A student newspaper which explains to students techniques of how to shoplift.	
A scientific study which makes findings about which sex is better at driving.	
A web-site that expresses doubts about the safety of vaccines.	
Sending offensive letters to the grieving parents of Australian soldiers killed in action.	
Swearing at police officers and accusing them of corruption.	
Inciting a riot or violence against a group of people.	
Creating panic by making false statements (eg a bomb threat) that are likely to result in danger to a crowd.	
False statements about a political candidate.	
Acts that offend, insult, humiliate or intimidate a person or group on account of their race.	