Freedom of interstate movement in Australia: To what extent is it protected by the Constitution?

Do Australians have a constitutional right of free movement from one State to another or within a State? Section 92 of the Constitution protects the movement of people across State borders, but it only provides a qualified freedom.

What does the Constitution say?

Section 92 of the Constitution says that 'trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free'.

The High Court has applied different tests to the part that deals with trade and commerce (which we won't deal with here) and the part that deals with 'intercourse among the States', which means the movement of people, goods and communications across State borders.

The Constitution says that this movement 'shall be absolutely free', but the High Court has accepted that this does not really mean what it says. There must be some reasonable limits. You can't be absolutely free to take something extremely dangerous into a State. There may be some really good reasons to impose limitations.

Preventing criminals from crossing State borders

Sometimes it is said, after a particularly nasty criminal is released from jail after serving his or her sentence in one State, that another State should pass a law to prevent him or her from entering the State. Can this be done?

The High Court held that it couldn't. New South Wales once had an Influx of Criminals Prevention Act 1903 (NSW), which prohibited convicted criminals from other States from entering New South Wales within three years after their imprisonment. It tried to use the Act against John Benson, a Victorian convicted of vagrancy, but the High Court struck it down on the ground that section 92 protected freedom of interstate movement. So a State cannot prevent people from other States entering it just because they have done something wrong in the past (which NSW complained led to a flourishing trade of interstate burglars). But Chief Justice Griffith and Justice Barton accepted that a State could impose limitations to protect public order and public safety.

Preventing movement of citizens during the war

Dulcie Johnson was a young woman in Sydney during World War II. Her fiancé was about to be shipped off to the war, from Perth. She might never have seen him again. So she got on a train to travel from Sydney to Perth to visit him one last time. There was a law that said that the Director-General of Land Transport had to give permission before anyone could undertake interstate rail travel. Dulcie had sought permission, but was told that her reason for travelling was not sufficient. She went anyway, but was caught and prosecuted.

Dulcie challenged the validity of the law in the High Court and won. While the Court accepted that there could be valid justifications for limiting travel, such as public safety, it concluded that the limitations here were directed solely against interstate travel, not travel generally, and there seemed to be no reason why interstate travel was more dangerous or wasteful of scarce resources than travel within the State. It therefore concluded that the law was directed at interstate travel without a valid justification and was invalid.

Section 92 and freedom of interstate movement in a pandemic

In 1919, during the Spanish flu pandemic, States shut their borders and Western Australia even seized the inter-state train to enforce quarantine, causing grief for the WA Premier who was stranded in Victoria at an inter-governmental meeting.

In 2020 during the COVID-19 pandemic, States also closed their borders to people entering from other States. Some States also imposed restrictions on the movement of people within the State, requiring people to stay within a certain distance of their home, or requiring people to stay at home except for specific reasons (such as buying food, getting medical care and getting exercise). In Victoria there was even a curfew at night, with people being required to be at home between certain hours.

Gerner v Victoria

In *Gerner v Victoria,* the High Court rejected a challenge to Victoria's laws during the 2020 coronavirus pandemic that imposed a night-time curfew and limits on how far people could travel from their homes. Mr Gerner, who ran a bar and restaurant in Sorrento in Victoria, argued that there was a 'freedom of movement' that could be implied from the text and structure of the Constitution, including section 92 of the Constitution. The Court summarised Gerner's argument on this point as claiming 'that freedom of movement is implicit in [section] 92 on the basis that intrastate movement is a necessary incident of the freedom of interstate intercourse it guarantees'. Mr Gerner argued that this constitutionally implied freedom acted as a limitation on State legislative power, with the result that the lock-down laws were invalid.

The Court rejected this argument. It said that if it accepted the argument, this new implied freedom of movement 'would swallow the freedom expressly guaranteed by [section] 92.' It would mean that there was no point in section 92 expressly singling out the interstate movement of people and goods for protection, because this implied freedom would extend to every type of movement, including movement within a State, which section 92 does not claim to protect.

The Court did not agree with the notion of identifying an implication which is wider than the express terms of a constitutional provision. Their Honours thought that the text of section 92 was explicit in its application only to trade, commerce and intercourse among the States, and not within the States. As the text was clear, it has to be applied.

The Court also referred to the original intention of the framers of the Constitution, noting that Isaac Isaacs (later Chief Justice of the High Court) had identified the purpose of section 92 as dealing with border impediments to movement, not the internal management of States. Another of the framers, Richard O'Connor (later a Justice of the High Court) had also recognised that section 92 would not impede the exercise of State powers to prevent the entry of people and animals suffering from contagious diseases into the State.

Finally, the Court pointed out that the effect of Mr Gerner's argument would be to change the words 'among the States' in section 92 to 'throughout the Commonwealth'. But these words had been expressly rejected during the course of the Constitutional Convention Debates. The Court concluded that it 'would be a distinctly unsound approach to the interpretation of the constitutional text actually adopted by the framers to attribute to that text a meaning that they were evidently "united in rejecting"'. Accordingly, section 92 of the Constitution did not support a constitutional implication of freedom of movement within a State.

Palmer v Western Australia

Clive Palmer, a businessman, challenged the closure of Western Australia's borders during the COVID-19 pandemic. He argued that he needed to visit Western Australia from his Queensland home, for business.

The Western Australian Government argued that Mr Palmer could use the internet and phone instead. It said that it was protecting Western Australians from a deadly disease. It argued that its laws were 'reasonably necessary' because other methods, such as excluding people from particular 'hot-spots' of infection, were ineffective. By the time a 'hot-spot' was identified, it was too late, as infected people had already crossed the border.

Clive Palmer: The former MP and businessman argued in the High Court he needed to visit Western Australia from his Queensland home. The High Court unanimously rejected Mr Palmer's challenge. Source: Wiki Commons

The High Court referred the matter to the Federal Court to hear evidence from epidemiologists about the risk of spread of the disease. Justice Rangiah made findings about the different risks involved. The matter then returned to the High Court, which considered whether or not the laws put in place by the Western Australian Government were 'reasonably necessary' to protect public health, or were really directed at just stopping people from entering the State.

In *Palmer v Western Australia*, the High Court unanimously rejected Mr Palmer's challenge. The Court focused on the constitutional validity of the provisions in the statute which allowed an Order to be made that closed the border, rather than the validity of the Order itself.

The Justices pointed out that under the statute, the duration of an emergency period was very short – three days to begin with, plus extensions of 14 days. Each time an extension was made, the Minister had to get advice from the State Emergency Coordinator and be satisfied both that an emergency was occurring and that extraordinary measures were required to minimise loss of life and harm to health.

The power to issue the Orders restricting movement, including across State borders, could only be exercised for the purpose of managing the adverse effects of the declared emergency, such as preventing the spread of disease. The powers were therefore tightly restricted and could only be exercised for the legitimate purpose of protecting life and public health and in a way that was 'reasonably necessary' to achieve that purpose.

Chief Justice Kiefel and Justice Keane said: 'It may be accepted that the restrictions are severe but it cannot be denied that the importance of the protection of health and life amply justifies the severity of the measures'. They did not agree with Mr Palmer that other less burdensome restrictions could have been imposed, such as allowing the entry of persons from low risk States.

Their Honours relied on the findings of fact by Justice Rangiah about the risk of the spread of the disease. They noted that once a person infected with COVID-19 entered the community there was a 'real risk of community transmission and that it may become uncontrollable'. They continued: 'Because of the uncertainties about the level of risk and the severe, or even catastrophic, outcomes which might result from community transmission, a precautionary approach should be adopted'.

Overall, the Court's decision makes clear that there is no absolute requirement that State borders remain open. There may be a justification for closing borders or limiting movement across State borders, such as protecting human life or health. But any restrictions on the closure of State borders must still be reasonably necessary and proportionate.

Freedom of Movement: Challenges to lockdowns during the COVID-19 pandemic (Student Resource)

Freedom of movement and the hierarchy of laws

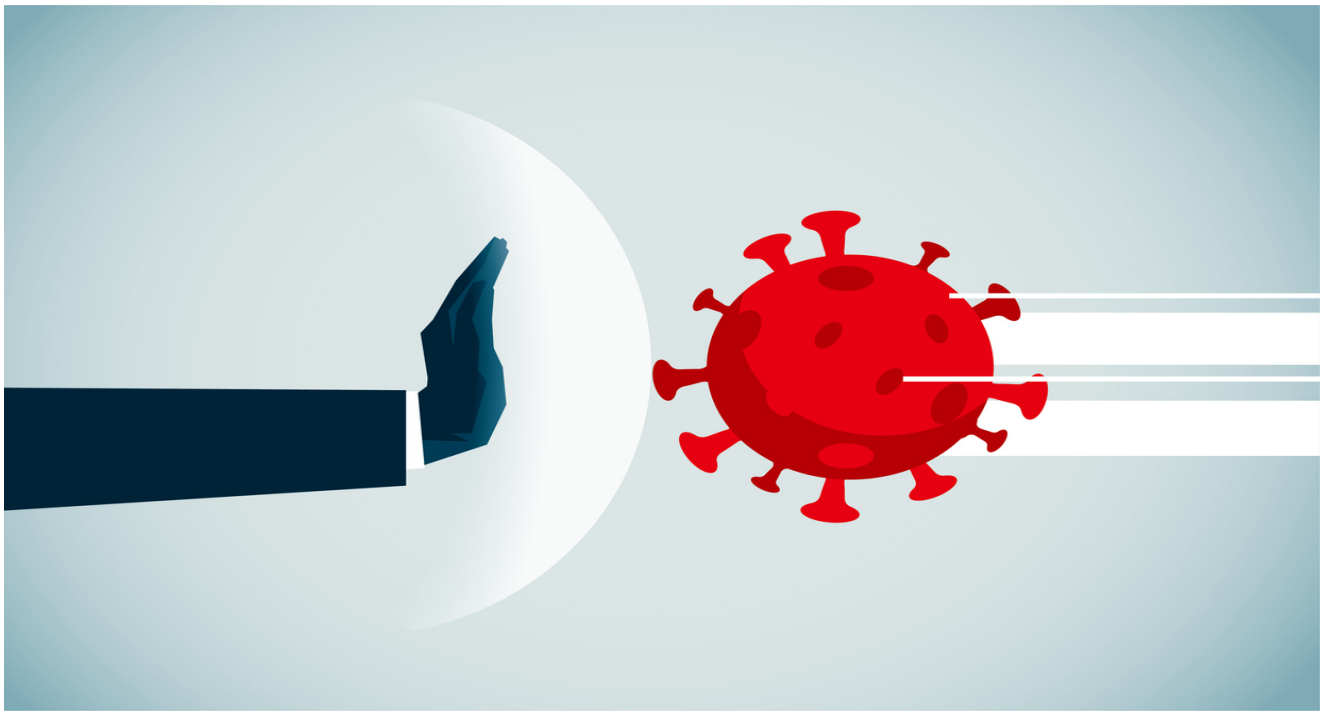
The High Court stated in the *Gerner v Victoria* case in 2020 that at 'common law individuals may move about as they see fit'. This freedom, however, is 'subject to the laws of the land'. This means that it can be limited by statutes. So where a statute and a common law freedom conflict, the statute wins.

A statute, including delegated legislation authorized by a statute, can limit a common law freedom of movement, as long as it makes it extremely clear that this is what is intended.

The courts apply the 'principle of legality', which presumes that Parliament does not intend that a fundamental freedom be limited. If it does intend to limit the freedom, it must openly accept responsibility for doing so and make it absolutely clear that the limitation is intended.

This hierarchy would be upended, however, if the freedom of movement were required by the Constitution. This is because all statutes and delegated legislation must comply with the Constitution and there is no power to enact statutes or make delegated legislation that is inconsistent with the Constitution.

People wearing masks to stop the Covid spread
Source: IStock



Stopping the spread of COVID-19
Source: IStock

Accordingly, if there were an implied freedom of movement in the Constitution, it would have a constitutional status and act as a limitation on the power of the Parliament and the Executive to make laws. Any statute or statutory rule which impermissibly limited a person's freedom of movement would be invalid because it would conflict with the Constitution.

This would not mean that a person has a 'personal right' to freedom of movement which he or she could assert against others – only that laws limiting that freedom may be invalid. As the High Court said in the *Gerner* case: 'to assert that a freedom of movement is implicit in the Constitution is to assert that the Constitution impliedly denies to the Commonwealth and the States power to make laws the object of which is to restrict freedom of movement.'

Is there a freestanding constitutional implication of freedom of movement?

The High Court will only recognise an implication in the Constitution if it is anchored in the text or structure of the Constitution and if it is 'necessary' to give effect to the Constitution and the system of government it establishes. The Court has previously rejected the notion that there can be freestanding constitutional implications which get their content from outside the Constitution.

In the Gerner case, Mr Gerner argued that the process of federation brought together the separate colonies into 'one people, one nation', and that freedom to move across that nation was part of the essence of being one nation, community or society.

Mr Gerner sought to base an implied freedom of movement in the principle of federalism. The High Court, however, said that what is required by federalism depends on what is in 'the text and structure' of the Constitution. It is not appropriate to identify specific provisions in the Constitution, such as section 92, which protect limited freedoms, such as interstate movement, and then draw from them the presence in the Constitution of a broader restriction on legislative power. The Court regarded such an approach as inconsistent with orthodox methods of constitutional interpretation (i.e. wrong).

The Court accepted that there were many routine State and federal laws that limit freedom of movement, such as laws that imprison people or restrict the movement of terrorists and people on bail, traffic laws that limit where, and at what speed, people may drive, town planning laws, and laws that regulate access to property. The Court also pointed to quarantine laws, which restrict or prohibit the movement of people, but are permitted by section 51(ix) of the Constitution and under concurrent State quarantine powers that were preserved at the time of federation under section 106 of the Constitution.

If there were a constitutionally implied freedom of movement, it would potentially invalidate all these laws. If the Court treated freedom of movement in the same way it treats the implied freedom of political communication, the Court would have to examine these laws, when they were challenged, to identify whether they were made for another legitimate purpose, and whether they were reasonably necessary or proportionate in the circumstances.

The High Court of Australia
Source: HCA

The High Court refused to take this path. It did not accept that there was an implied freedom of movement, as it was not a necessary implication that found its source in the text and structure of the Constitution.

Is there a freedom of movement that is an aspect of the implied freedom of political communication?

In the *Gerner* case, the High Court explained that 'freedom of movement or communication enjoys constitutional protection as an aspect or corollary of the protection of freedom of political communication'. For example, if the movement involved was part of an expression of political communication – eg marching in a picket line around a building, or climbing on a building or structure to unfurl a political message, or using boats to impede the activities of whaling vessels or nuclear-powered naval vessels – then the limitation of the movement might breach the implied freedom of political communication. The question would then be whether the law was for a legitimate purpose and was proportionate.

The Court rejected, however, an argument that the implied freedom of political communication protects freedom of movement for any purpose. It said that laws that limit movement for the purpose of political protest, such as laws that limited access to duck-shooting grounds in the *Levy case* or access to forests for environmental protests in the *Brown case*, might breach the implied freedom of political communication. But limits on movement which do not have a political character would not.

The Court concluded that laws that 'limit freedom of movement so as to burden political communication may be invalid', but that is because they affect political communication, rather than because they affect movement itself.

The High Court also discussed statements in two earlier judgments that suggested that there might be some kind of constitutional right of access to the 'seat of government' (i.e. Canberra) in the Australian Capital Territory, so citizens can get direct access to the Government, Parliament and national courts.

But their Honours said that such an implication would be 'better understood today' under the implied freedom of political communication, so far as access to the seat of government is concerned, or implications arising from the separation of powers and Chapter III of the Constitution, in relation to access to the courts.

This is relevant to the restrictions placed on politicians travelling to Canberra to sit in Parliament during a pandemic. If they are prevented from getting to Canberra or if any quarantine conditions are not reasonably necessary, there might be grounds for a constitutional challenge.

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AUSTRALIAN CONSTITUTION CENTRE

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

Topic 8.2: Rights and Freedoms in the Australian Constitution

Freedom of Movement: Challenges to lockdowns during the COVID-19 pandemic. (Teacher Resource)

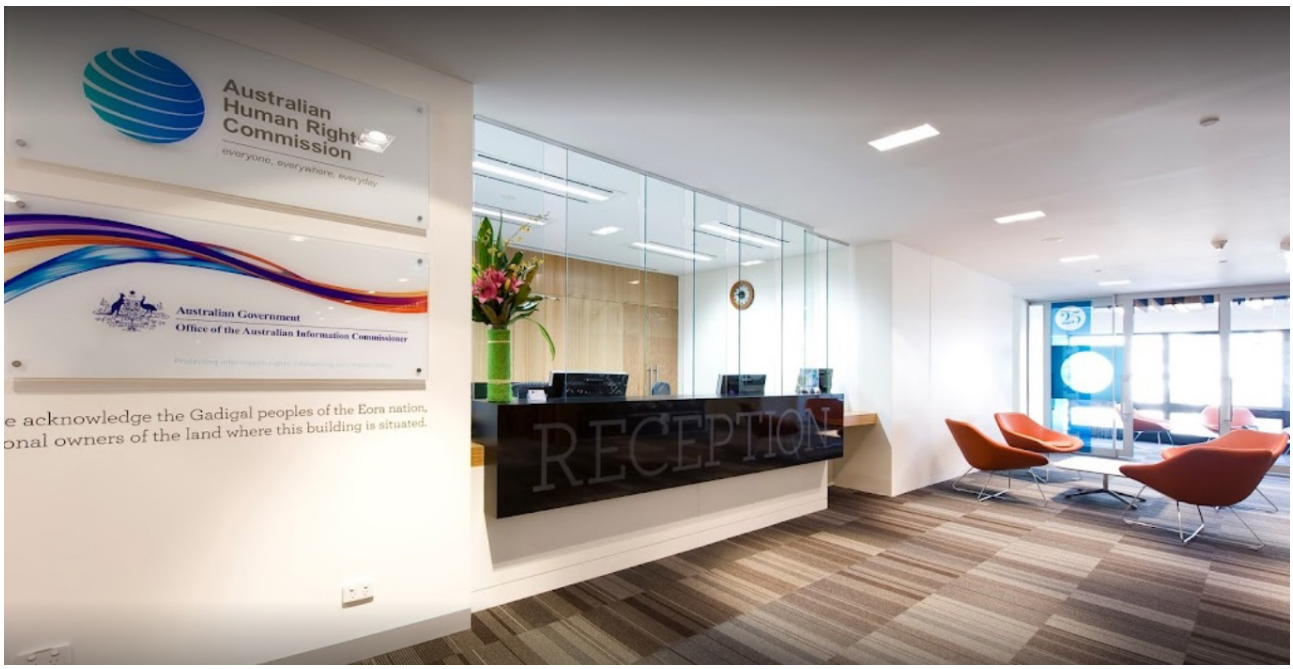
Freedom of movement and the hierarchy of laws

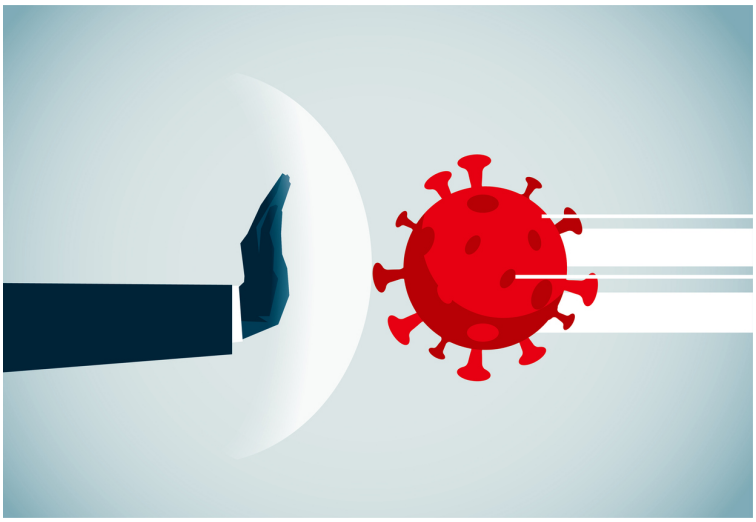
The High Court stated in the *Gerner v Victoria* case in 2020 that at 'common law individuals may move about as they see fit'. This freedom, however, is 'subject to the laws of the land'. This means that it can be limited by statutes. So where a statute and a common law freedom conflict, the statute wins.

A statute, including delegated legislation authorized by a statute, can limit a common law freedom of movement, as long as it makes it extremely clear that this is what is intended. The courts apply the 'principle of legality', which presumes that Parliament does not intend that a fundamental freedom be limited. If it does intend to limit the freedom, it must openly accept responsibility for doing so and make it absolutely clear that the limitation is intended.

This hierarchy would be upended, however, if the freedom of movement were required by the Constitution. This is because all statutes and delegated legislation must comply with the Constitution and there is no power to enact statutes or make delegated legislation that is inconsistent with the Constitution.

During the COVID-19 pandemic the Australian Human Rights Commission scrutinised whether limits imposed on rights or freedoms were necessary and proportionate
Source: Human Rights Commission





Stopping the spread of COVID-19
Source: IStock

Accordingly, if there were an implied freedom of movement in the Constitution, it would have a constitutional status and act as a limitation on the power of the Parliament and the Executive to make laws. Any statute or statutory rule which impermissibly limited a person's freedom of movement would be invalid because it would conflict with the Constitution. This would not mean that a person has a 'personal right' to freedom of movement which he or she could assert against others – only that laws limiting that freedom may be invalid. As the High Court said in the Gerner case: 'to assert that a freedom of movement is implicit in the Constitution is to assert that the Constitution impliedly denies to the Commonwealth and the States power to make laws the object of which is to restrict freedom of movement.'

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The Court, however, said that what is required by federalism depends on what is in 'the text and structure' of the Constitution. It is not appropriate to identify specific provisions in the Constitution, such as section 92, which protect limited freedoms, such as interstate movement, and then to draw from them the presence in the Constitution of a broader restriction on legislative power. The Court regarded such an approach as inconsistent with orthodox methods of constitutional interpretation (i.e. wrong).

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If there was a constitutionally implied freedom of movement, it would potentially invalidate all these laws. If the Court were to take a similar approach to that which it takes in relation to the implied freedom of communication, the Court would have to examine these laws, when they were challenged, to identify whether they were made for another legitimate purpose, and whether they were reasonably necessary or proportionate in the circumstances. The High Court refused to take this path. It did not accept that there was an implied freedom of movement, as it was not a necessary implication that found its source in the text and structure of the Constitution.

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This is relevant to the restrictions placed on politicians travelling to Canberra to sit in Parliament during a pandemic. If they were prevented from getting to Canberra or if any quarantine conditions were not reasonably necessary, there might be grounds for a constitutional challenge.

Freedom of movement in international law and its impact in Australia

Article 13 of the Universal Declaration of Human Rights says that 'Everyone has the right to freedom of movement and residence within the borders of each state' and 'Everyone has the right to leave any country, including his own, and to return to his country'. Sometimes you see people quoting from the Universal Declaration of Human Rights and asserting that they legally hold these rights and can assert them against others. This is not the case. The Universal Declaration of Human Rights sets aspirational standards (i.e. things we would hope to achieve). It is not legally binding on Australia and it does not establish rights as part of the law within Australia.

Australia is also a party to the International Covenant on Civil and Political Rights ('ICCPR'). Article 12 of the ICCPR says that everyone lawfully within the territory of a country shall 'have the right to liberty of movement and freedom to choose his residence'. It also says that everyone 'shall be free to leave any country, including his own'. It then qualifies these rights by saying that they 'shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized' in the ICCPR.

The UN Human Rights Committee has interpreted this article as also requiring that any such limitations on freedom of movement are necessary and proportionate to the protective purpose and must be the least intrusive effective means of achieving that purpose. In addition, article 4 of the ICCPR recognises that sometimes countries may need to restrict human rights 'in time of public emergency which threatens the life of the nation', where such an emergency has been officially proclaimed. Hence, when there is a pandemic and an emergency has been proclaimed in a country (such as when a human biosecurity emergency was proclaimed by the Governor-General in Australia on 18 March 2020), it may, by law, restrict or deny entry into, or departure from, the country. Nonetheless, the law should still be necessary and proportionate to achieving the public health purpose and the least intrusive effective means of protecting public health.

The ICCPR is a treaty, which imposes obligations on Australia under international law. But under Australia's system of law, its treaty obligations do not become part of Australia's domestic law unless they are given effect by statute.

Australia could, for example, enact a Bill of Rights or Human Rights Act which implemented the ICCPR. While this has been proposed and debated on a number of occasions, Parliament has not passed such a law. Mostly, Australia gives effect to the ICCPR by choosing not to enact laws that breach the rights contained in the ICCPR. In addition, the Commonwealth Parliament has given the Australian Human Rights Commission power to inquire into and conciliate complaints about Commonwealth Government acts or practices that are inconsistent with any human right set out in the ICCPR and a range of other human rights treaties and declarations.

The Australian Human Rights Commission said the following about the restriction of human rights during the COVID-19 pandemic:

- Any measures that limit people's human rights must be necessary.
- This is important as we need to limit the ability of governments to interfere with our fundamental freedoms.
- COVID-19 is a very serious threat to public health, and to the human rights of people in the community (such as the rights to life, and the highest achievable standard of health). However, under international human rights law, governments have a responsibility to demonstrate that any limitations they put on rights are necessary and proportionate – however serious the threat.
- The measures chosen must be the least intrusive measures possible that will still be effective.
- Ultimately it is necessary to look at each measure on a case by case basis and see if the limits it places on human rights [are] proportionate to the benefit it achieves in combatting COVID-19.

Commonwealth laws reflect these constraints. For example, on 25 March 2020 the Commonwealth Government placed a ban (with some exceptions) on people leaving Australia. That ban was given effect by delegated legislation – the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020*. Such a ban clearly had a great impact on freedom of movement and freedom to leave the country.

It was made under the authority of section 477(1) of the *Biosecurity Act 2015* (Cth). It says that during a human biosecurity emergency (such as a pandemic), the Health Minister may determine any requirement that he or she is satisfied is necessary to prevent or control the entry or spread of a disease in Australia or the spread of a human disease to another country.

But before making that determination, section 477(4) says that the Minister must be satisfied of the likely effectiveness of the requirement in achieving its purpose, that the requirement is appropriate and adapted to achieving its purpose, that the requirement, and how it is applied, is no more restrictive or intrusive than is required in the circumstances and that the period during which it applies is only as long as is necessary.

These qualifications on the Minister's exercise of power align with international law obligations that the measures be necessary, proportionate and no more intrusive than needed to achieve the relevant purpose of protecting public health. The fact that these criteria are set down in legislation means that the Minister's determination could be challenged in court if it was claimed that he took into account improper purposes or irrelevant considerations or could not have been properly satisfied of the matters set out in section 477(4). The judiciary can therefore act as a check upon this exercise of executive power under delegated legislation authorised by a statute enacted by Parliament.

Freedom of movement under State/ Territory Charters of Rights

In addition, Victoria, Queensland and the Australian Capital Territory have Charters of Rights. They require governments to act consistently with human rights and to consider those rights when enacting laws, making policy and making administrative decisions.

Section 13 of the Australian Capital Territory's *Human Rights Act 2004* (ACT) says that 'Everyone has the right to move freely within the ACT and to enter and leave it, and the freedom to choose his or her residence in the ACT'.

Section 19 of Queensland's *Human Rights Act 2019* (Qld) says that 'Every person lawfully within Queensland has the right to move freely within Queensland and to enter and leave it, and has the freedom to choose where to live'.

Section 12 of the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) says that 'Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live'.

In none of these jurisdictions are these rights absolute. They can be restricted in certain circumstances and for particular purposes.

They are not personal rights that can be exercised against others. They only bind public authorities of the relevant jurisdiction, which are obliged to obey them. They must also be taken into consideration when enacting legislation and the Courts must interpret legislation in a manner that is consistent with them, when this is possible.

So how effective were these rights to freedom of movement during the COVID-19 pandemic? The issue was brought before the Victorian Supreme Court in *Loielo v Giles*. On 5 August 2020, during the deadly second wave of the COVID-19 pandemic in Victoria, a curfew was introduced from 8pm to 5am (later reduced to 9pm-5am) by way of a Direction, which required people living in Greater Melbourne to stay in their homes during that time to help stop the spread of the virus. It affected the liberty of around 5 million people.

A Victorian café owner, Michelle Loielo, challenged the validity of the curfew, relying in part on Victoria's Charter of Rights. She claimed that millions of healthy citizens had been arbitrarily detained in their homes and deprived of their freedom of movement.

The *Public Health and Wellbeing Act 2008* (Vic) authorised the Chief Health Officer to exercise certain emergency powers, during a state of emergency, to eliminate or reduce a serious risk to public health. The Chief Health Officer had validly authorised Associate Professor Michelle Giles, in her capacity as Deputy Public Health Commander, to exercise those powers, which she did in applying the curfew and other measures. Ms Loielo claimed that in exercising her powers, Professor Giles had focused too much on the rights to life and to health and not enough on the right to liberty and the right not to be subject to arbitrary detention. This raised the question of how to deal with conflicting rights.

Justice Ginnane considered two arguments. One was based upon judicial review of administrative action, arguing that the curfew decision was unreasonable, irrational or illogical. The second was that in making the curfew decision, Professor Giles had not given proper consideration to human rights set out in the *Charter of Human Rights and Responsibilities Act,* including the right of freedom of movement (section 12) and the right to liberty (section 21(1)), including a right not to be subject to arbitrary detention (section 21(2)).

In Victoria, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. But human rights may be subject to such reasonable limits as can be demonstrably justified in a free and democratic society, taking into account matters set out in section 7(2).

Justice Ginnane rejected these arguments. He accepted that while different persons might have reached different conclusions about the need for a curfew, Professor Giles based her decision on public health grounds, which was the purpose of her statutory discretion. Her action could not be said to be irrational or illogical. A logical or rational person would have considered her actions to be reasonably necessary to protect public health.

He also accepted that there was no breach of Charter obligations. Professor Giles had given proper consideration to relevant human rights. Taking into account 'the purpose of the emergency powers and the temporary duration of the curfew', Justice Ginnane concluded that the limitations on human rights caused by the curfew were reasonably necessary and proportionate to the purpose of protecting public health.

But Justice Ginnane also stressed that even in a pandemic, the rule of law still applies. He said that when 'basic human rights such as freedom of movement are being restricted, it is particularly important that legal procedure is followed'. He pointed to a case on the New Zealand lockdown – *Borrowdale v Director-General of Health* – where the New Zealand Prime Minister had announced lockdown instructions, which were imposed, but the person with the actual power to make these orders under the legislation, only did so nine days later. The High Court of New Zealand found that for nine days unlawful restrictions on rights and freedoms were imposed, because the person in whom the legal power rested had not yet acted.

This was an example of politicians announcing immediate action without taking sufficient care to ensure that it is lawful. In Victoria, however, the right person had acted and had taken into account all the relevant matters. While some might disagree with the outcome, the correct processes were followed and there was compliance with the rule of law.

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AUSTRALIAN CONSTITUTION CENTRE

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

Are freedom of association and assembly protected under the Australian Constitution?

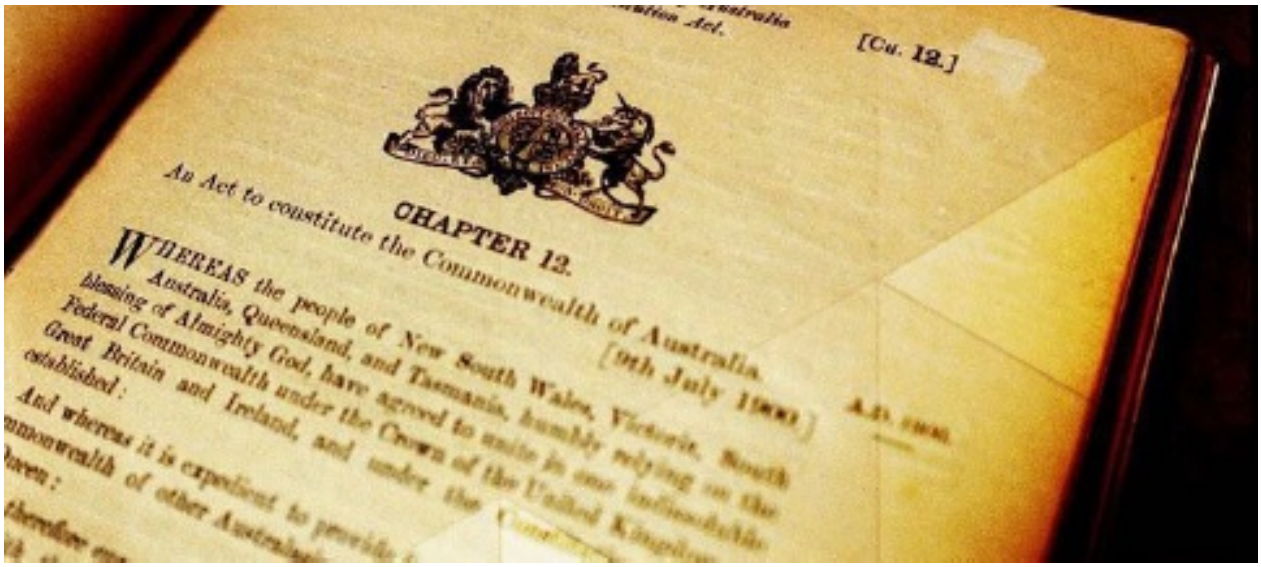
Many aspects of our lives depend on being able to interact freely with other people. Think about the things you do for fun. Maybe you are a member of a sports club or a band? What about when you are older? You might want to start your own business and employ others or join a group that raises awareness about an issue that you are really passionate about. Our ability to do all these things with other people depends on having the freedom to associate and assemble with others.

What is freedom of association and assembly?

Freedom of association protects the right to form and join groups to pursue common goals. This includes groups such as political parties, sporting clubs, religious groups, trade unions, businesses, and many others.

Freedom of assembly protects the ability of individuals and groups to meet for a common purpose, such as to protest or express their views publicly, or to exchange ideas and communicate amongst themselves. It is limited to peaceful assembly and excludes those that use violence.

The Australian Constitution
Source: Wiki Commons



Do you think the NSW crime of 'consorting' is fair? Source: IStock

Rights to freedom of association and assembly can properly be called human rights. They are recognised by major international human rights treaties, such as in articles 21 and 22 of the International Covenant on Civil and Political Rights, to which Australia is a party.

Why are freedom of association and assembly important?

These freedoms are especially important in a political context. Many significant changes in the law have been and continue to be brought about after people take action as a group to bring issues to the attention of the public and those in government. There are many examples of important causes that have depended on widespread social organisation, ranging from the women's suffrage movement in the early days of the Australian federation, to environmental activism seen today.

However, these freedoms are also important outside a political context, as they allow people to pursue an enjoyable life. If laws controlled who we were allowed to associate and meet with, life might look very different. Imagine not being able to choose who you spend time with, or if you weren't able to do the things you enjoy in public with others.

Are freedom of association and assembly protected by the Constitution in Australia?

Freedom of association and freedom of assembly are not directly protected by the Constitution in Australia. The framers of the Australian Constitution deliberately chose not to include a Bill of Rights in the Constitution, unlike some other countries, such as the United States.

However, the Constitution does indirectly provide some protection for the freedoms of association and assembly. Despite the decision not to include a Bill of Rights, the High Court has found that there is an 'implied freedom of political communication' in the Constitution. This is not a personal constitutional right to freedom of speech. However, this concept does limit the power of any Australian Parliament to makes laws which interfere too much with people's ability to communicate with one another about political matters. In this context, what counts as 'political' is very broad, including almost any topic relating to public affairs.

As freedom of association and assembly are very closely related to freedom of speech, the 'implied freedom of political communication' can provide some protection to freedom of association and freedom of assembly where they overlap with political communication. For example, laws which interfere with the ability of people to gather together for the political purpose of protesting about issues of public importance may be unconstitutional unless there is another good reason for the law, such as protecting the health of people during a pandemic, and the law is proportionate.

The other side of this limited protection is that if the activity is not in the area where political communication overlaps with association or assembly, then it will not be protected by the Constitution at all. The High Court has decided that there is no separate implied freedom of association found in the Constitution.

Are freedom of association and freedom of assembly protected in other ways in Australia?

Freedom of association and assembly are protected by human rights legislation in some states and territories, but not all. Victoria, Queensland and the ACT have legislation which protects freedom of association and freedom of assembly. Unlike the implied freedom of political communication, these protections are not constitutional. This means that other legislation can validly interfere with or override freedom of association or assembly.

In addition, the courts can protect freedom of association and assembly by applying the 'principle of legality'. Under this principle, unless the Parliament makes it absolutely clear in an Act that it means to take away or interfere with a fundamental common law right such as freedom of association and freedom of assembly, the court will apply the Act in a way which respects those freedoms.

For example, most local councils are allowed by law to regulate the use of public spaces in their area. This would not be interpreted as allowing councils to ban public gatherings altogether.

However, the protection provided by the courts only works where Parliament is not clear about its intent to take away or interfere with freedom of association or assembly. Accordingly, if the Parliament makes itself clear, then the courts must give effect to the Act.

Threats to freedom of association and assembly

Given how important these rights are, you might wonder why anyone would want to take them away. The answer is that the laws which interfere with freedom of association and freedom of assembly are usually pursuing some other goal.

Most recently, laws which interfere with these rights have been aimed at protecting the public from harm by preventing terrorism or organised crime. However, in these situations it is still important to ensure that these laws are specifically targeted at their purpose, and don't go too far by restricting the rights of innocent people.

For example, in New South Wales, a crime called 'consorting' has been introduced to stop organised crime gangs forming and meeting.

To be guilty of this crime, a person has to meet with two or more convicted offenders on at least two occasions after being warned by the police that the others are convicted offenders and that consorting with them is an offence. It does not matter why the person meets with the offenders, even if the reason is completely innocent. The High Court has confirmed these laws are valid. Do you think these laws go too far? Why or why not?

Topic 8.2 Lesson/ Activities: Three

Rights and Freedoms in the Australian Constitution (Freedom of movement, association and assembly)

AUSTRALIAN CONSTITUTION CENTRE

Time/Lesson	Learning Goal
• 1 hour/ 1 Lesson	• To understand that even though interstate freedom of movement is guaranteed by the Constitution, it can still be subject to limitations for purposes such as protecting public health and safety. • To recognise that other freedoms of movement, association and assembly have some constitutional protection if they fall within political communication.
Rationale	**Success Criteria**
To give students a better understanding of rights and when rights can be limited by Parliament. Students need to understand the difference between common law rights, which may be overridden by statutes, and constitutional rights which override statute, subject to exceptions where the law is reasonably necessary to achieve another legitimate purpose.	Students can explain the the difference between common law rights and constitutional rights and identify when they can be limited.

Teaching Reference Document

- TRD 83: Freedom of interstate movement in Australia
- TRD 84: Freedom of Movement during COVID -19
- TRD 86: Freedom of association and assembly

Resources

- Australian Human Rights Commission: A Human Rights Act for Australia: https://humanrights.gov.au/sites/default/files/free_equal_hra_2022_-_2_pager_rgb_0.pdf

Tuning In

- **RECAP**: Rights such as freedom of movement, freedom of association and freedom of assembly have been regarded as fundamental to democracy. They are recognised by the common law. Discuss why the framers of the Constitution preferred to leave to Parliament the protection of rights and the balancing of conflicting rights, rather than inserting a bill of rights in the Constitution. What does this tell us about how they perceived the role of the courts and the role of Parliament? Are our views different today?
- Brainstorm why interstate freedom of movement was included within the Constitution as a guaranteed freedom, but freedom of movement within a state was not. Was this because the Constitution was focused on dealing with issues at a 'federal' level, such as crossing State borders, but the framers preferred to leave matters within a State for the State to deal with?
- Discuss the proposal by the Australian Human Rights Commission for a Human Rights Act (see online resource above). How is this different from a constitutional bill of rights? What are the arguments for and against it?

Teacher Instruction

- **READ**: TRDs for this topic on freedom of movement, freedom of association and freedom of assembly. In particular, focus on the challenges to lockdowns during the COVID-19 pandemic.
- Ask students to prepare an opinion piece for a newspaper on one side or the other on the question of whether States should shut their borders during a deadly pandemic, to stop the disease entering the State, even if this means that families are separated and some people cannot return home? What is more important – a right to return home and be with family or protection of public health? Should we prioritise the interests of the individual or the wider community? Should we prioritise the health of the economy or the health of the community? How should we balance the mental health risks of separating people from their families and loved ones against the physical health risks? How should we assess and balance risk and are we any good at it?

Group Independent Learning

- During the 2020 pandemic, in the Loielo case , a café owner claimed that the Victorian health official who made a curfew order during the second wave of the pandemic concentrated too much on the right to life and health and not enough on the right to liberty and freedom from arbitrary detention.
- Ask students to consider how you balance such different and important rights? Who should to the balancing? Should it be elected politicians or qualified health officers, or senior public servants or judges? Why?
- What difference did having a Charter of Rights make in Victoria?
- In the Gerner case, the High Court was not prepared to imply a general freedom of movement from the Constitution. Why not? What concerns did it raise about the effect of such an implication on existing laws that restrict movement?
- Why is the High Court only prepared to protect freedom of movement, association and assembly when it involves political communication? How does this tie to the constitutional requirement that the Houses of Parliament be directly chosen by the people?
- Students choose either the Gerner case or the Loielo case and write a 500 word submission to the court arguing for one side or the other, showing persuasive reasoning.

Wrapping It Up

Discuss the relationship between the implied freedom of political communication, which is given constitutional protection by the High Court, and the freedoms of movement, association and assembly. Identify examples of cases where restrictions on movement, association or assembly could breach the implied freedom.

Differentiation/Enrichment

Students identify examples of where rights conflict and brainstorm ways of balancing and respecting rights in such cases. Who should decide and what should they take into account? Are some rights more important than others?

Assessment Strategies

Assess understanding as exhibited in class discussion and written work.