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Freedom of expression



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Key issues

- Unlike its anglosphere counterparts, Australia lacks express federal freedom of expression protections. Instead, the scope of freedom of expression can be influenced by human rights commitments, parliamentary scrutiny, regulatory exceptions and the High Court's constitutional rulings. Accordingly, the boundaries of freedom of expression are continually shifting.
- Although relatively rare, recent expansions in the scope of freedom of expression in Australia include defamation law reform and protections from termination for employees expressing 'political opinions'.
- Preserving existing freedom of expression often involves balancing it against other public interests. However, legislative changes to expand the scope of freedom of expression can often be controversial and struggle to achieve political consensus.
- Policymakers can also use their discretionary powers to alter the scope of freedom of expression and preference other social values, such as through the 'character test' for granting visas.

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Introduction

Freedom of expression (paired with freedom of opinion) has been [described](#) as ‘the foundation stone for every free and democratic society’. In Australia, there is no federal law which broadly enshrines a right to freedom of expression. Instead, the scope of freedom of expression is predominantly shaped through human rights treaty commitments, legislative scrutiny, regulatory exceptions and constitutional interpretation. For policymakers, this patchwork of influences makes gaining a holistic view of freedom of expression challenging. Against this backdrop, this paper considers:

- recent examples where freedom of expression has expanded, such as defamation law reform
- the challenges of reducing limits on freedom of expression, in the context of discrimination law
- varying approaches to balancing freedom of expression in privacy law and social cohesion offences
- the discretion of decision makers to change policy and influence freedom of expression.

Freedom of expression with Australian characteristics

In 1980, Australia ratified the [International Covenant on Civil and Political Rights](#), which obliges parties to protect freedom of expression (article 19) as well as recognising that the exercise of this right carries with it ‘special duties and responsibilities’. Although [Victoria](#), [Queensland](#) and the [ACT](#) have explicitly included freedom of expression within their human rights laws, this has not been replicated federally. Despite this lack of legislative recognition, new federal regulatory frameworks often contain provisions that protect freedom of expression. This preservation of freedom of expression is a product of Australia’s human rights treaty obligations and parliamentary scrutiny, including by the [Parliamentary Joint Committee on Human Rights](#) (PJCHR) as well as requirements that new legislation be accompanied by [statements of compatibility with human rights](#).

Australia’s differences with its ‘5 eyes’ counterparts (which have specific legislative or constitutional freedom of expression protections) may be partly due to varied social attitudes. For example, a 2024 [Pew Research survey](#) indicated that Australians placed slightly less importance on the ability of people to say what they want without censorship, compared with respondents from the US, UK and Canada.

Since 1992, the decisions of the High Court have significantly shaped the scope of freedom of expression in Australia. In [Australian Capital Television v Commonwealth](#) and [Nationwide News Pty Ltd v Wills](#), the High Court established that an implied freedom of political communication (implied freedom) is an indispensable part of Australia’s [constitutional system](#) of government.

This implied freedom is not a personal right but rather a limit on legislative or other government power. Laws may be constitutionally valid even if they burden the implied freedom, provided the burden is proportionate in response to a legitimate policy goal. However, the High Court's interpretation has evolved over time and recent cases (for example [Ravbar v Commonwealth](#)) indicate some judicial disagreement exists regarding its application.

Oft lost without deserving: defamation and termination for political opinion

Australia once had a reputation as the '[defamation capital of the world](#)' due to a permissive environment for well-funded litigants and proceedings against media organisations. Notably, a 2017 [Senate inquiry](#) highlighted that defamation laws had 'played a significant part in curtailing journalists' efforts to pursue public interest stories' (p. 128).

However, nationally-agreed changes to the [model defamation laws](#) have increased protections for freedom of expression. For example, the reforms introduced a 'serious harm' threshold and public interest defence (modelled on a [UK example](#)) which was [first established](#) in case law in August 2025. As a comparison, Germany has a statutory [framework of criminal defamation offences](#), including a specific offence for insult, malicious gossip and defamation 'directed at persons in political life' ([section 188](#)). This has led [German politicians to file hundreds of criminal complaints](#) against persons and raised concerns the law is infringing on the right of citizens to express their views.

Workplace contractual obligations can also constrain freedom of expression; however, the [Fair Work Act 2009](#) provides that an [employee must not be terminated](#) due to their 'political opinion'. In June 2025, the Federal Court clarified the scope of this protection in [Lattouf v ABC \(No 2\)](#), finding that it 'encompasses not only the holding of a political opinion but also the expression of a political opinion' (at [129]).

A ratchet effect: reform to discrimination law

Easing freedom of expression restrictions can often be controversial, as illustrated in attempts to modify key provisions of the [Racial Discrimination Act 1975](#). In particular, [section 18C](#) of the Act provides that it is unlawful to act in a way reasonably likely to 'offend, insult, humiliate or intimidate another person or a group of people ... because of [their] race, colour or national or ethnic origin'. [Section 18D](#) provides limits and exceptions to protect legitimate freedom of expression, which include making 'fair comment' on a matter of public interest 'if the comment is an expression of a genuine belief held by the person'.

In 2017, a [PJCHR inquiry](#) failed to agree on an approach to reform sections 18C and 18D (recommendation 3), despite concerns the existing law was 'not clear and accessible'. Many submissions to the inquiry argued that changing section 18C 'would send a dangerous message' (p. 115). For example, Professor Anne Twomey contended:

The difficulty facing the Committee and the Parliament is essentially that even if s 18C warrants reform, the message sent out by undertaking the reform might itself result in damage that outweighs the benefits of the reform (p. 35).

Following this inquiry, the Senate rejected the Government's proposed [amendments](#) which would have limited the scope of section 18C.

Similarly, attempts to [introduce religious discrimination laws faltered in 2022](#). Despite bipartisan support for overall religious discrimination protections, a proposed exception (clause 12) to provide that 'certain statements of belief do not constitute discrimination' proved a key sticking point. The [PJCHR's report](#) on the Bill acknowledged that this aspect of the proposed legislation was 'contentious' and that 'numerous submitters raised concerns about the range of statements that could be protected' (p. 198).

Getting the balance right: a new privacy tort and social cohesion offences

Australia's approach to preserving freedom of expression often involves balancing it against other public interests through legislative exceptions and defences. For example, the objects of the [new statutory tort of serious invasion of privacy included recognition](#) that 'the public interest in protecting privacy is balanced with other public interests'. The non-exhaustive list of countervailing public interests includes 'freedom of expression, including political communication and artistic expression' ([paragraph 7\(3\)\(a\)](#)).

Distinguishing between harmful and legitimate freedom of expression can be a delicate task, as seen in the 2023 [legislation creating offences for the public display of prohibited symbols](#) including the Nazi Hakenkreuz (hooked cross). Notably, the legislation contained exceptions for 'religious, academic, educational, artistic, literary or scientific' conduct. The then Attorney-General [highlighted](#) that the legislation would protect the continued use of the symbol by communities of faith.

More recently, in 2025 the federal [Parliament legislated](#) to expand offences in the [Criminal Code \(sections 80.2A and 80.2B\)](#) for 'advocating force or violence' against groups or their members. This included extending protections for targeted groups, reducing the fault element from 'intention' to 'recklessness' and removing the defence in [section 80.3](#) for 'acts done in good faith'. In considering the expanded offences, the [PJCHR's report](#) cautioned:

There is a risk that, in practice, the offences could capture a greater range of conduct that may be offensive and insulting but the prohibition of which may constitute an impermissible limit on the rights to freedom of expression and religion. In relation to the offences related to urging violence, this risk appears to be particularly pronounced given the proposed removal of the defence of acting in good faith (p. 100).

In contrast, the US Supreme Court's line of authority from the case of [Brandenburg v Ohio](#) provides that the [First Amendment](#) protects 'mere advocacy' of violence or illegality unless it is 'directed to inciting or producing imminent lawless action and is likely to incite or produce such action' (p. 447).

We will decide: visa restrictions

Changes in government policy can also influence the scope of freedom of expression, as illustrated by the [Migration Act 1958](#) ‘character test’ which all non-citizens travelling to Australia must pass. The test considers various factors, including the risk that a person entering or remaining in Australia would ‘incite discord in the Australian community..’ ([subparagraph 501\(6\)\(d\)\(iv\)](#)).

Over time this part of the test has incrementally been amended to increase ministerial discretion to refuse visas. Originally, it required the minister to be satisfied that a person seeking a visa ‘[would](#)’ [incite discord](#). However, in 1998 the threshold was amended to a ‘[significant risk](#)’ of inciting discord and in 2014 changed again to merely a ‘[risk](#)’.

Failed character tests have blocked entry into Australia for controversial figures, [including political commentator Candace Owens](#) who had scheduled a speaking tour in 2024. Ms Owens challenged her visa refusal, but in October 2025 the [High Court rejected](#) an argument that this part of the character test infringed the implied freedom.

In August 2025, the Home Affairs Minister, Tony Burke, indicated he would prioritise [social cohesion over freedom of speech](#) considerations in granting visas. This approach aligns with a recent UK decision where it [denied entry to a South African politician](#) considered ‘non-conducive to the public good’. Elsewhere, the [US State Department](#) revoked the visas of persons who ‘celebrated the heinous assassination of Charlie Kirk’. Conversely, the [New Zealand government reversed its original decision](#) to deny Ms Owens a visa, citing ‘the importance of freedom of speech’.

Conclusion

As it navigates future regulatory reforms, the Parliament will need to balance freedom of expression against competing public interests across diverse policy areas. Without federal legislative recognition of freedom of expression, decision-makers may face challenges in assessing how proposed changes will broaden or limit its scope. In particular, following the terrorist attack on Bondi Beach in December 2025, the Government [has announced legislative reforms](#) including new criminal offences for hate speech and additional powers for the Minister for Home Affairs to cancel or reject visas.

In 2026, the United Nations Human Rights Council [Fourth Universal Periodic Review](#) will scrutinise Australia’s human rights record, as part of a peer country assessment process. In the previous 2021 review, the [limited commentary](#) regarding Australia’s freedom of expression protections focused on the impact of national security laws on journalists and whistleblowers (pp 17-18). However, recent reforms (including [unprecedented social media age restrictions](#)), may draw increased attention to the protection of freedom of expression in Australia.

Further reading

- Patrick Graham, '[Burdening the Implied Freedom of Political Communication: Method, Ideas, and Disagreement](#)', *University of NSW Law Journal* 48, no. 3 (2025): 1036–1069.
- Report of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, [Threats to freedom of expression online in turbulent times](#), (Geneva: United Nations General Assembly, 18 August 2025).
- Australian Law Reform Commission (ALRC), [Traditional Rights and Freedoms—Encroachments by Commonwealth Laws: final report](#), ALRC report, 129, (Sydney: ALRC, December 2015).

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