Third Study Commission Questionnaire 2022
Israel

For 2022, the Third Study Commission, which focuses on Criminal Law, decided to study "Restrictions by the criminal law of the freedom of speech".

In order to facilitate discussion to assist us in learning from colleagues, we ask that each country answers the following questions:

1. **Does your country protect freedom of speech and, if so, how? Please refer to legislation, including any applicable bills of rights or charter of rights or human rights codes, as examples, and/or jurisprudence (court decisions) as an overall picture.**

Protection differs as between the Commonwealth of Australia and the States and Territories which make up the Commonwealth of Australia.

There is no Commonwealth legislation or charter of rights enshrining protections for freedom of speech. However the High Court of Australia has inferred from parts of the *Australian Constitution* an implied freedom of political communication. The implied freedom of political communication is not absolute, and can be permissibly burdened by legislative or executive acts which pursue a legitimate public policy purpose in a proportionate way.

In the State of Queensland, the *Human Rights Act 2019* enshrines a number of rights which are protective of freedom of speech. First, and most pertinently, s 21 provides a right to freedom of expression in near identical terms as Article 19 of the *International Covenant on Civil and Political Rights*. Second, s 20 enshrines a right to freedom of thought, conscience, religion and belief. Third, s 22 provides a right to peaceful assembly and freedom of association. All of these free speech protections can, by virtue of s 13 of the Act, be subject to some statutory interference that can be 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom'. Section 48 of the Act also requires that courts and tribunals interpret statutory provisions, to the extent that is consistent with their purpose, in a way compatible with the enshrined rights, and confers jurisdiction on the Supreme Court of Queensland to declare that a statutory provision cannot be interpreted in a way compatible with human rights: s 55. It is important to note that the protection is limited. Incompatibility with human rights does not lead to invalidity: if the only way in which a statute can be interpreted is incompatible with human rights, then it will be interpreted in that way.

Some other Australian States and Territories have analogous protections: see *Human Rights Act 2004* (ACT) ss 14, 15, 16, 28, 31, and 32; *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 7, 14, 15, 16, 32, 33, 36.

2. **Does your country criminalize hate speech and, if so, how? Please refer to legislation and/or jurisprudence as an overall picture.**

The criminalisation of hate speech in Australia is principally dealt with by Commonwealth and State anti-discrimination statutes.

At the Commonwealth level, s 18C of the *Racial Discrimination Act 1975* prohibits a public act which is reasonably likely "to offend, insult, humiliate or intimidate another person or a group of people" if the act is done because of the race, colour or national or ethnic origin of the

other person or of some or all of the people in the group. The policy choice in criminalising conduct which is merely offensive is the subject of continuing debate. At one time it was part of the policy of the conservative side of politics to amend s 18C, but that has been dropped.

While s 18C makes this conduct unlawful, it does not however make it a criminal offence: s 26. However, speech which falls foul of s 18C may amount to an offence under relevant provisions of the Commonwealth *Criminal Code* which prohibit the use of postal and telecommunications carriage services to menace, harass or cause offence: ss 471.12 and 474.17.

In Queensland s 131A of the *Anti-Discrimination Act 1991* makes it an offence for a person to knowingly or recklessly incite hatred, serious contempt for, or severe ridicule of, a person or group of persons on the ground of race, religion, sexuality or gender identity in a way that threatens physical harm or incites others to threaten physical harm. This offence carries a maximum penalty of 6 months' imprisonment.

Some other Australian States and Territories have analogous protections: see *Racial and Religious Tolerance Act 2001* (Vic) ss 24 and 25; *Racial Vilification Act 1996* (SA) s 4; C*riminal Code Act Compilation Act 1913* (WA) ss 77-80; *Anti-Discrimination Act 1977* (NSW) s 20C; *Discrimination Act 1991* (ACT) ss 67A; *Anti-Discrimination Act 1998* (Tas) s 19.

3. Does your country have restrictions by the criminal law of the freedom of speech? And if yes, could you give an overall picture what the legislation is like? Including

- **Are there any groups of persons who enjoy special protection of their freedom of speech due to their gender, sexual preference, religion, race or other conditions**
- **Are there topics that enjoy special protection in terms of freedom of speech – for example topics of religion and politics.**

The hate speech provisions identified in response to Question 2 provide examples of criminal law restrictions on freedom of speech which target particular types of speech for restriction. Putting aside those provisions, there are other criminal law restrictions on freedom of speech in both Commonwealth and State Criminal Codes.

The Commonwealth *Criminal Code* provide for offences for treason (s 80.1); urging violence against the *Constitution* and lawful government (s 80.2); urging violence against groups or members of groups (ss 80.2A and 80.2B); advocating terrorism or genocide (ss 80.2C and 80.2D); a wide number acts in relation to prescribed terrorist organisations (div 102); providing false or misleading information or documents (ss 136.1, 137.1,137.2); and counselling the committing of suicide (s 474.29A and B). Part 5.6 of the *Code* also contains provisions protecting government secrecy and the disclosure of government information on national security grounds.

In the Queensland *Criminal Code*, relevant offences include sedition (s 52); interference with the Governor or Ministers (s 54); demands with menaces upon agencies of government (s 54A); interfering with and disturbing the Legislature (ss 55 and 56); threatening violence (s 75); consorting (Ch 9A); interfering with political liberty (s 78); disclosure of official secrets (s 85); interfering with elections (ss 100, 102 and 108); disturbing religious worship (s 207); certain hoaxes (ss 239 and 321A); and criminal defamation (s 365).

These criminal law restrictions on speech are primarily targeted at protecting public order and the free functioning of Australia's democratic parliamentary system of politics and

government. Further, there are no special speech privileges afforded to any particular class or group of people according to sex, race, religion, etc. The criminal offences contained in the codes are of equal application.

4. **If there are restrictions in the criminal law of the freedom of speech, are the restrictions then absolute or must they be weighed against the consideration of free speech?**
    - **Does this apply to all groups and if not, are the restrictions either absolute or not? Please mention which persons and groups belong to which category**
    - **In cases where the freedom of speech and the restrictions are to be weighted against each other –**
        - **Are there then guidelines on how the balancing should be done?**
        - **If Yes, which of the two parameters weighs the heaviest, a) the protection of free speech or b) the category that is protected by the legislation. And does this differ from category to category?**
        - **And how much discretion is there such that the outcome of the balancing exercise may differ from judge to judge?**

Commonwealth and State statutes criminalising speech must comply with the implied freedom of political communication and are thus vulnerable to challenge on constitutional grounds.[1] If restrictions are challenged, courts will assess and weigh the impugned law using a doctrinal tool called 'structured proportionality', which involves answering the four sequential questions set out in the table below:[2]

1. Legitimacy	Is the purpose pursued by the law compatible with the constitutionally prescribed system of representative and responsible government?
2. Suitability	Is the law suitable as having a rational connection to its purpose?
3. Necessity	Is the law necessary in the sense that there are no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which have a less restrictive effect on freedom of political communication?
4. Adequacy	Is the law adequate in its balance? A criterion requiring a value judgment describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes. The greater the restriction on the freedom of political communication, the more important the public policy purpose must be.

An answer of 'no' to any of these questions will result in legislative invalidity. The final stage of the analysis – adequacy in balance – is not discretionary, but because it involves open-textured evaluation could produce different results from judge to judge.

But that protection is limited to the political communications. There is no other protection save that, criminal restrictions of freedom of speech contained in State laws would have to

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1 See, for example, *Coleman v Power* (2004) 220 CLR 1; *Monis v The Queen* (2013) 249 CLR 92; *Tajjour v New South Wales* (2014) 254 CLR 508; *Brown v Tasmania* (2017) 261 CLR 328.

2 *McCloy v New South Wales* (2015) 257 CLR 178 at 193-195 per French CJ, Kiefel, Bell and Keane JJ.

be construed in the way required by the legislative provisions identified in the answer to Question 1. But if, properly construed, they operate in a way incompatible with freedom of speech, they will nevertheless be valid.

5. **Do you find that the legislation is clear and comprehensible to the citizen or does it give cause for doubt?**
    - **If it gives cause for doubt, how is it expressed? Does it deter the citizen from making statements? Or does it deter citizens from suing?**

Generally, State and Commonwealth legislation containing criminal restrictions on speech are clear and comprehensible to the ordinary, reasonable citizen. This is so for two primary reasons. First, the offences are drafted in accessible way and in plain English. While some offences involve the use of the recklessness standard, which may engender some confusion, the legislation is mostly direct, clear and straightforward, and does not give cause for doubt.

Secondly, the aforementioned speech restrictions have wide consensus from the general public. For instance, the restrictions largely prohibit universally condemnable speech such as the urging of violence, the advocation of terrorism and genocide, and hateful discrimination. As the restrictions strongly align with the values of the public at large, the restrictions generally have no deterrent effect on speech for the ordinary, reasonable citizen.

The greater restrictions on freedom of speech are contained in the substantive law of defamation. There is an ongoing debate as to whether those laws unacceptably limit freedom of speech by, in particular, journalists.

6. **Do you find in your work as a judge that the relevant legislation in your country, as it pertains to the freedom of speech and its protection and the criminalization of hate speech, is clear and comprehensible, or do you find it gives too much room for different outcomes in the same type of cases?**

I have no significant experience in consideration of the statutes and restrictions which I have identified in the answers to these questions.