

4 Free Speech and Accountability

The rule of law requires that power is used according to the law, and that those who have power are accountable for how they use it. The freedom to speak out publicly about the use of power, or the law, and the freedom of the media are essential principles that support the rule of law in Australia.

The Separation of Powers

The separation of powers in Australia can be seen in action when the courts decide cases about the freedom of political communication. In these cases the courts are interpreting the Constitution and considering whether the Parliament and Executive are acting in line with the Australian Constitution.

Importantly, the freedom of political communication also provides an argument to protect public assemblies, but a recent case which argued this, *O'Flaherty v City of Sydney Council* [2014] FCAFC 56, was not successful in doing so.

People Should Not Fear their Government

The rule of law is strong in a country where people can criticise the law and those in power openly, and in public. People should not be afraid of the government and its officials: judges, politicians, police, and other government officers.

Appropriate checks and balances on the power of officials ensure that an individual does not feel fearful of being persecuted if they criticise someone who has power.

The Importance of Journalists

Australian society often relies on journalists to investigate the actions of those in power. Freedom of the media is an essential part of maintaining the rule of law.

While many journalists are fearless in trying to expose issues where abuse of power occurs, this can raise difficult legal questions about where journalists get their information.

If a whistleblower gives confidential government information to a journalist, they may be guilty of a criminal offence, and the journalist may be guilty of an offence if they publish that information publicly.

Many journalists feel that increased surveillance and coercive powers of police and law enforcement, as well as a lack of legal protections for journalists and their sources have a 'chilling effect' on the freedom of the media in Australia.

See our resource on Metadata & the Rule of Law for more information: www.ruleoflaw.org.au/education/metadata/

"The law and its administration is subject to open and free criticism by the people, who may assemble without fear."

- Rule of Law Institute of Australia, Principle No. 3

"It's become a sadly normal reality that journalists' sources can be targeted in Australia in an effort to hunt down whistleblowers. Over the years, under both Labor and Coalition governments, sensitive stories by journalists that embarrassed or shamed governments have often been referred to the AFP..."

And almost always it's about politics. It's not about national security. It's about stopping embarrassing leaks that tell uncomfortable truths about power in Australia.

- Journalist, Paul Farrell, 'Australia's attacks on journalists' sources are about politics, not national security', *The Guardian*, 15/04/2016.

1 Freedom of Speech and the Rule of Law

Freedom of speech allows an individual to express their opinion publicly without being punished for it. It is one of the most important, and most debated, freedoms in many societies.

People have been debating freedom of speech, and what, if any, limits should be placed on it, for thousands of years. Over that time, many different approaches have come about.

One of the most famous laws which protects free speech is the First Amendment to the United States Constitution. However, **this law has no effect outside the borders of the United States of America.**

A number of international agreements such as the **Universal Declaration of Human Rights** and the **International Covenant on Civil and Political Rights** provide protections for freedom of expression. The ICCPR contains a broad definition of freedom of expression, but also places some restrictions on it, such as:

- "1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

Article 20, ICCPR (1966)

Freedom of Speech in Australia

Freedom of speech or expression is not mentioned in the Australian Constitution. However, beginning in the early 1990s, the High Court developed the idea of the 'implied freedom of political communication,' which they said was a **constitutional right** that limited the power of government and protected political communications.

The freedom of political communication is narrower than the freedom of expression described by the ICCPR, and relates to the requirement in the **Australian Constitution** that the Federal Parliament be elected:

"To **sustain a representative democracy** embodying the principles prescribed by the Constitution, freedom of **public discussion** of **political and economic matters** is **essential**"

Brennan J in *Nationwide News Pty Ltd v Wills* [1992] HCA 46

The freedom of political communication is one of the few constitutional rights found in the Australian Constitution. A legal test called the **Lange Test** has been developed to make decisions about whether a law or decision of government is incompatible with the Australian Constitution because it burdens **political communication**.

This resource examines some of the most recent and important cases about the freedom of political communication that have reached the High Court of Australia (HCA) and the Federal Court of Australia (FCA).

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

Universal Declaration of Human Rights (1948)

"Congress shall make no law... abridging the freedom of speech, or of the press."

First Amendment to the United States Constitution

Terminology

The Australian Constitution the supreme law of Australia which outlines the structure and powers of government.

Constitutional right a right that is found in the Constitution.

Implied right/freedom a right or freedom found by a judge(s) to exist because the law suggests it does.

Freedom of Political Communication an implied freedom found in legal cases that limits the power of government to make laws or decisions which burden communicating about political issues. The Australian Constitution suggests it exists because it requires a system of representative democracy.

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What does 'justified' mean? That the law is suitable, necessary and adequate in balance. Suitable - there is a rational connection between the purpose of the law and the way it achieves that purpose. In *Gaynor*, the law was seen as **necessary** because there was no other way the ADF could deal with someone who was "defiant and intractable".

Adequate in Balance - whether the law's purpose is important enough to be worth the restriction placed on political communication. In *Chief of the Defence Force* the regulation used to dismiss Mr Gaynor was found to be **adequate** because of the importance of the law's purpose, maintaining conduct and behaviour compliant with ADF policy among Army Reservists, and because the court found that its purpose did not concern the holding, expression, and communication of a political opinion, in public or otherwise.

Necessary - there is no alternative way to achieve the purpose of the law in a way which is less of a burden to political communication. In *Gaynor*, the law was seen as **necessary** because there was no other way the ADF could deal with someone who was "defiant and intractable".

Adequate in Balance - whether the law's purpose is important enough to be worth the restriction placed on political communication. In *Chief of the Defence Force* the regulation used to dismiss Mr Gaynor was found to be **adequate** because of the importance of the law's purpose, maintaining conduct and behaviour compliant with ADF policy among Army Reservists, and because the court found that its purpose did not concern the holding, expression, and communication of a political opinion, in public or otherwise.

See the case summary of *Chief of Defence Force v Gaynor* [2017] FCAFC 41 on the reverse side.

What does limiting political communication mean? A law which burdens political communication would stop or restrict a person from communicating or publishing comments about politics, and the actions or policies of the government. What does it look like? In *Coleman v Power* the High Court decided that the freedom of political communication included the freedom to criticise the police, and that a law punishing insulting language burdened the freedom of political communication. See the case summary of *Coleman v Power* [2004] HCA 39 on the reverse side.

What does compatible with the Australian Constitution mean? If the "purpose" and "means" of a law do not undermine the system of representative and responsible government it is compatible with the **Australian Constitution**. What does it look like? In the *Street Preachers* case, the High Court decided that a council by-law which burdened political communication had a **purpose** and **means** that were compatible with the **Constitution** because a law to protect public safety and thoroughfares in public spaces, did not undermine **representative and responsible government**. See the case summary of *State of South Australia v Corporation of the Attorney-General for the City of Adelaide* [2013] HCA 3 "The Street Preachers Case" on the reverse side.



Read down - where the court decides that words in a law have a more specific or narrower meaning.

Struck down - where a law is found to be invalid (unconstitutional) and is declared to no longer be a law.

Responsible government - that members of the executive (who run the country) are held to account by the legislature (who make the laws).

Representative government - that the people of Australia elect people to the Parliament to represent them.

Glossary

2 The Lange Test

The Lange Test was defined in *Lange v Australian Broadcasting Corporation* [1997] HCA 25, a case that dealt with freedom of political communication and defamation laws. It set out the way in which a Court decides whether a law burdens the freedom of political communication. If person wishes to challenge a law or a decision of government as taking away their freedom of political communication, the Court may apply the Lange Test to decide whether or not a law or decision is invalid. Laws found to be invalid can be struck down, or read down so they are no longer invalid. The Lange Test has developed and expanded over time and now contains three questions. The following diagram gives examples of what each question in the Lange Test means and how it has been applied using case law. However, it does not cover all the intricacies which judges deal with in their full judgments.

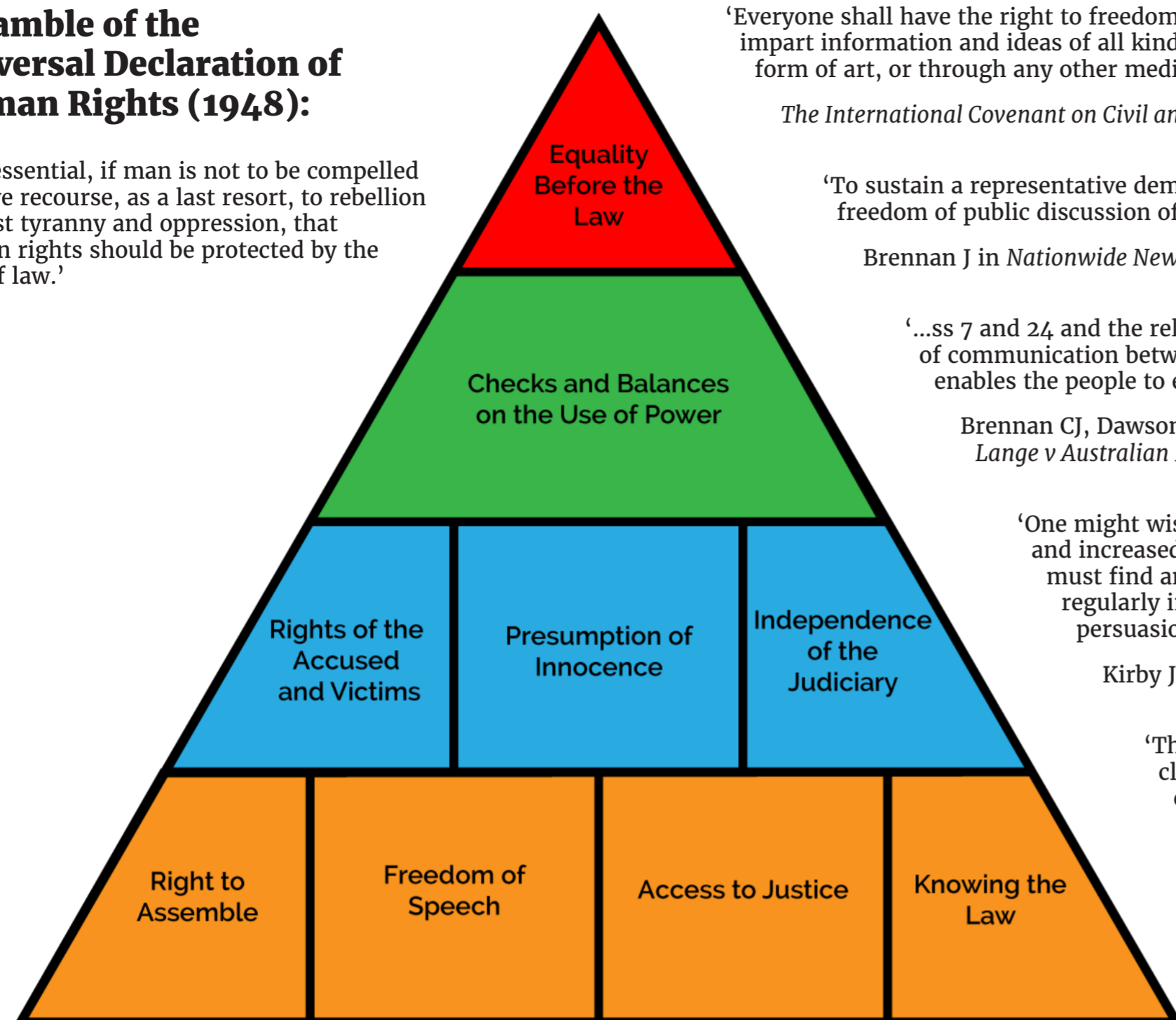
What is the Rule of Law?

Preamble of the Universal Declaration of Human Rights (1948):

'it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.'

'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.'

The International Covenant on Civil and Political Rights (1966)



'To sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential'

Brennan J in *Nationwide News Pty Ltd v Wills* [1992] HCA 46

'...ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.'

Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ in *Lange v Australian Broadcasting Corporation* [1997] HCA 25

'One might wish for more rationality, less superficiality, diminished invective and increased logic and persuasion in political discourse. But those of that view must find another homeland. From its earliest history, Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion[229]. They are part and parcel of the struggle of ideas.'

Kirby J at 239 in *Coleman v Power* [2004] HCA 39

'The implied freedom of political communication has never been clear. If there were a federal bill of rights, the implied freedom of communication about government and political matters would be listed. "Bills of rights are not moral or even political philosophies. They are, at best, bullet points from such philosophies." [222] Like other philosophical bullet points, the unclarity of the implied freedom gives the courts virtually untrammelled power to make of it what each judge wills.'

Heydon J at 244 in *Monis v the Queen* [2013] HCA 4

Cases About the Freedom of Political Communication

Coleman v Power [2004] HCA 39

Patrick Coleman was charged and convicted for using insulting words under the *Vagrants Gaming and Other Offences Act 1931* (Qld) for handing out leaflets in Townsville Mall stating "Get to know your corrupt type coppers" and identifying local police officer Constable Brendan Power as one of the "slimy lying bastards". He was also convicted of assaulting and obstructing a police officer after a scuffle between him and Constable Power.

The High Court applied the Lange Test and found that criticising police was protected by the freedom of political communication and dismissed the charge. The High Court read down the *Vagrants Act* so that it did not apply to political communication. This meant that the "insulting words" offence remained law, but established a precedent which all lower courts in Queensland would be required to follow in cases similar to *Coleman v Power*.

The High Court did not interfere with Mr Coleman's conviction for assault and obstructing police.

Attorney-General for the State of South Australia v Corporation of the City of Adelaide [2013] HCA 3 - "The Street Preachers Case"

The Street Preachers case concerned two brothers who were preachers of the "Street Church", Caleb and Samuel Corneloup, who preached their religion in the middle of Rundle Mall in the centre of Adelaide.

They were fined for breaching a by-law of the Adelaide City Council which prohibited people from haranguing, canvassing or preaching on a road without a permit or distributing printed matter on any road to passers-by. The same by-law also prohibited using roads to repair vehicles, collect donations, leading or driving livestock and erecting structures such as fences, hoardings, ladders and trestles.

The by-law was challenged in the High Court as being invalid because it interfered with the freedom of political communication. Applying the Lange Test, a majority of the Court found that while the by-law did burden the freedom of communication, its purpose was to prevent roads being obstructed and to ensure safety. This, according to the majority of the court, was a legitimate purpose for the by-law and it was therefore compatible with the freedom of political communication found in the Australian Constitution.

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Monis v the Queen [2013] HCA 4

The Monis case dealt with whether a criminal offence, under s471.12 of the *Criminal Code Act 1995* (Cth) Using a postal or similar service to menace, harass or cause offence, was invalid under the Australian Constitution.

The appellants Monis and Droudis were placed on trial in the NSW District Court for the offence after sending offensive letters to the relatives of Australian soldiers killed in Afghanistan. They argued in the High Court that the offence itself was invalid because it interfered with the freedom of political communication in the Australian Constitution.

The court applied the Lange Test and did not come to an agreement about whether the law had a legitimate purpose. Three justices found that the offence was compatible with the Constitution, three found that it was not. A critical issue was the extent to which freedom of political communication protects offensive communications.

When the High Court is divided in opinion the decision of the lower court stands. The decision of the NSW Criminal Court of Appeal to reject their appeal stood and the District Court heard the case. Monis and Droudis plead guilty and were each sentenced to 300 hours community service in September 2013.

Unions NSW v New South Wales [2013] HCA 58

In the Unions Case, a law of NSW which restricted non-electors (people or organisations not on the electoral roll) from donating money to political parties, and limited the amount of money a political party could spend on electioneering was challenged by Unions NSW. The Unions case was the first time since 1992 that a law was struck down by the High Court for interfering with the freedom of political communication.

In Unions, the Court found that the law of NSW limited the flow of political communication because there was a link between the amount of money a political party could get and the amount of advertising it could afford. If the law limited the amount of money and spending a political party could get, then this limited its ability to put across its political ideas through advertising and other means.

The Court then considered if these were reasonable and proportionate limits to political communication given their stated purpose: to prevent corruption. The High Court found that restricting non-electors from donating to political parties, as well as limiting the money that a political party could spend on electioneering would not fulfill the purpose of an anti-corruption law.

The court declared the laws were invalid.

McCloy v NSW [2015] HCA 34

Jeff McCloy, a property developer, challenged the law of NSW as burdening the freedom of political communication because it prevented property developers from donating money to political parties.

McCloy's case was unsuccessful, the High Court finding that the laws which placed a cap on political donations, and those which specifically prevented property developers 'not only do not impede the system of representative government provided for by the Constitution, but enhance it.'

The Lange Test was refined in McCloy and a three stage proportionality test which asked if the law was justified was applied in this case. The court found that the laws about donating money to political parties were suitable, necessary and adequate in balance.

Chief of Defence Force v Gaynor [2017] FCAFC 41

Bernard Gaynor was dismissed from his position in the Army Reserve for publicly expressing his opinion via social media and on his website about Australian Defence Force (ADF) Members who participated in the Sydney Gay and Lesbian Mardi Gras. Gaynor also made comments objecting to ADF policies supporting transgender people. Gaynor's comments were found to be against ADF policies and after a process of review he was dismissed.

Gaynor in *Gaynor v Chief of the Defence Force (No 3)* [2015] challenged the ADF regulations that gave the Chief of the Defence Force the power to dismiss him. He argued that the decision to dismiss him was contrary to the implied freedom of political communication in the Australian Constitution.

Justice Buchanan of the Federal Court considered the ADF regulations according to the Lange Test, and whether Gaynor's dismissal had a legitimate purpose.

Buchanan J ordered that Gaynor should be reinstated.

The Chief of the Defence Force appealed this decision to the Full Bench of the Federal Court. Justices Perram, Mortimer and Gleeson disagreed with Buchanan J and held that Gaynor's dismissal was lawful.

The implied freedom is concerned with law and not rights, any assessment of whether the implied freedom is limited by the law not whether someone's personal rights have been effected. The Full Bench found that "the implied freedom does not involve, nor does it recognise or confer, any personal rights on individuals..."[48].