The Rule of Law Institute of Australia is an independent not-for-profit organisation which promotes discussion of rule of law issues in Australia. It seeks to uphold transparency and accountability in government and strongly supports the presumption of innocence, independence of the judiciary and procedural fairness in the Australian legal system.

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The rule of law is a legal concept which requires the use of power to be controlled by the law to ensure equality before the law.

Maintaining the rule of law is often noted as being the best way to preserve human rights.

If people believe the law is unjust, they may not want to follow it. Ideally people should feel the law is just and want to follow it.

The process of changing the law through democratic processes ensures that the law remains up to date with the needs of society.

The separation of powers in Australia ensures that power is balanced between the three arms of government and that there are checks on their use of power.

The Judiciary is especially important in ensuring the integrity of the Australian Constitution and that the Legislature and Executive act according to the law.

The principles in the pyramid are essential parts of the rule of law in Australia.

All are important in promoting confidence in Government, and protecting the rights of individuals.

Operation of the rule of law promotes a stable economy and happy citizens.

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RULE OF LAW = RIGHTS WITH RESPONSIBILITIES

The rule of law provides the best way for rights to be protected. All rights come with responsibilities, which means following the law.

Formal processes exist to deal with situations where the law is broken. It is one of the most important aspects of the legal system in Australia that a person should not be punished unless they have been found guilty of breaking the law.

A person has the right to do what they want, as long as they do not break the law. If they are found guilty of breaking the law their freedoms can be taken away.

International agreements such as the Universal Declaration of Human Rights (UDHR) promote human rights standards. The UDHR suggests that the rule of law and legal processes are the best way to protect human rights.

The purpose of human rights is to promote laws and legal processes which enforce rights and responsibilities that prevent suffering, ensure people are treated with fairness, and maintain a just society.

EXPRESS AND IMPLIED RIGHTS

There are two ways rights can exist in law:

**EXPRESS RIGHTS**

- rights which are written into law and are clearly defined as ‘right to have’ or ‘freedom to do’ something, or right not to be treated in a certain way.

**IMPLIED RIGHTS**

- rights which are not defined in law, but exist because they are an assumption on which a law and the legal system are based.

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**Article 6.1 of the International Covenant on Civil and Political Rights:**

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his [or her] life.

What is the express right in the law above?

The right to ____________________.

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**Section 18 - Murder and Manslaughter Defined - Crimes Act 1900 (NSW):**

(1) (a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person...

What right is implied by the law above?

If _________________ is a crime then it is implied that a person has the right to ____________________.

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**QUESTIONS**

Label the following statements as express or implied rights. If implied, what right does it imply?

- Everyone has the right to recognition as a person before the law (Article 6 - UDHR)
- Whosoever commits larceny, or any indictable offence by this Act made punishable like larceny, shall, except in the cases hereinafter otherwise provided for, be liable to imprisonment for five years. (s117 Crimes Act 1900 (NSW))
- ‘The employee may refuse to work additional hours...if they are unreasonable.’(Fair Work Act 2009 (Cth))
Legal Protections of Human Rights in Australia

1. The Universal Declaration of Human Rights (1948) - UDHR

**SOFT LAW**

Laws which are not legally binding but promote protection of human rights.

The UDHR was written in 1948 as a response to the horrors of the Second World War.

Australia signed the UDHR in 1948 to promote the importance of human rights.

While it is a soft law, it is widely recognised as a cornerstone of human rights law.

2. The International Covenant on Civil and Political Rights (1966) - ICCPR

**HARD LAW**

Laws which are legally binding on sovereign states and aim to enforce protection of rights.

Signed by Australia in 1972, ratified in 1980.

How do international agreements become law in Australia?

When an international agreement is ratified by Australia, it does not immediately become law. Australia has a dualist system which means the Parliament of Australia must pass it as a statute before it has effect in Australian law.

How is the ICCPR legally binding on Australia?

Australia must report to the United Nations Human Rights Committee every four years on how the rights in the ICCPR are being implemented under Australian law.

3. Human Rights and Australian Statute Law

- Sex Discrimination Act 1974 (Cth)
- Racial Discrimination Act 1975 (Cth)
- Disability Discrimination Act 1992 (Cth)
- Age Discrimination Act 2004 (Cth)

Human Rights vs Anti-Discrimination Laws

Anti-discrimination laws provide a legal process for seeking compensation if an individual feels they have been treated unfairly because of their sex, race, age or disability.

Definitions of what constitutes discrimination are narrow. This limits the situations in which they can be used. Discrimination laws concerned with racial vilification have come into conflict with the right to ‘free speech’.

Enforcement and protection of a right occurs when a person brings a complaint.

4. Australian Human Rights Commission (AHRC)

Under the Human Rights Commission Act 1986 (Cth) the AHRC is the first place a person must take their discrimination complaint. If the AHRC cannot resolve a complaint made under one of the discrimination acts then a person can pursue their complaint in the Courts.

In the Federal Court a judge can hear anti-discrimination cases and award damages if a complaint is successfully proven.

Developing Recognition of Human Rights in International Law

Year = when the instrument was adopted by the UN

1948 - The Universal Declaration of Human Rights
1966 - International Covenant on Civil and Political Rights
1966 - International Covenant on Economic, Social and Cultural Rights
1969 - International Convention on the Elimination of All Forms of Racial Discrimination
1975 - Declaration on the Rights of Disabled Persons
1979 - Convention on the Elimination of All Forms of Discrimination Against Women
1984 - UN Convention Against Torture
1989 - Convention on the Rights of the Child
2007 - Convention on the Rights of Persons with Disabilities
THE RIGHT TO ASSEMBLE

To understand the relationship between rights and responsibilities it is essential to understand how laws and legal processes define and protect rights, as well as enforce the responsibilities which go along with them.

Under the law of NSW there is no clearly defined right to assemble, although there is a legal process which can give a public assembly legal protections.

WHAT IS A PUBLIC ASSEMBLY?
A public assembly is defined as a group of people who gather in a public place for a common purpose. The purpose of an assembly could be to celebrate or commemorate an event, to protest, or for a variety of other reasons.

In NSW the Summary Offences Act 1988 (NSW) provides a legal process for applying to have a public assembly which gives legal protection that prevents those involved from being prosecuted for obstructing traffic or people, and other offences to deal with unlawful assemblies.

THE PURPOSE OF LAW
Laws and legal processes exists to protect rights and enforce responsibilities.

The rule of law is concerned with ensuring all receive equal access to rights given to them by law and that legal responsibilities are enforced according to the law.

WHY IS THE RIGHT TO ASSEMBLE IMPORTANT?
The right to assemble is important because it allows people to gather in public and express their opinion about an issue, provided protests are peaceful and comply with the law. A principle of the Rule of Law Institute of Australia is that people should be able to assemble without fear for the purpose of criticising the administration of the law. Free and open criticism of the law is an essential aspect of democratic life, and can influence the direction of law reform.

Allowing people to assemble in public to protest, and the need to control such protests to ensure public safety are two competing interests which affect the right to assemble.

WHEN ASSEMBLIES GO BAD
Some assemblies turn violent, unlawfully obstruct people or vehicles, or create public safety issues. These assemblies are subject to a range of consequences under the law of New South Wales and can be broken up by the police using powers and offences which are designed specifically for dealing with ‘public order’ issues.

QUESTIONS

1. Define ‘public assembly’.
___________________________________________________
___________________________________________________
___________________________________________________

2. What protection does the Summary Offences Act 1988 (NSW) offer in terms of the right to assemble?
___________________________________________________
___________________________________________________
___________________________________________________
___________________________________________________

3. Why is the right to assemble important to the rule of law and democracy?
___________________________________________________
___________________________________________________
___________________________________________________
___________________________________________________
The right to peaceful assembly is not an express right in the law of NSW. Legal protections exist for groups who apply to have their public assembly authorised by the Commissioner of Police or a Court.

A person must fill out a form called a ‘Notice of Intention to Hold a Public Assembly’ (see next page) and submit it to the NSW Commissioner of Police. If the Police Commissioner does not oppose the assembly those participating cannot be found guilty of offences relating to obstructing people or vehicles in public spaces, provided they act in accordance with the Notice of Intention.

Legal processes that exist to allow for a peaceful assembly imply there is a right to peaceful assembly - this implied right is strictly defined and subject to the approval of the Police Commissioner and the Courts.

**RIGHTS AND PROTECTIONS**
- the right to apply to hold a public assembly under the *Summary Offences Act 1988* (NSW)
- protection from prosecution for offences relating to obstruction of people or vehicles provided the NSW Police approve and the assembly complies with the Notice of Intention.

**RESPONSIBILITIES**
- the organiser of the assembly under the *Summary Offences Act (1988)* is responsible for ensuring the assembly takes place in the way described on the Notice of Intention (see next page).
- If the assembly does not take place according to the Notice of Intention those involved in the assembly loses its legal protections.

What if the Police oppose an assembly?

If the Police Commissioner opposes the assembly a meeting between the organiser and the Police must be arranged. If the Commissioner still opposes the assembly, the Police can apply to a Court to have the assembly ‘prohibited.’ If the court orders the assembly to be prohibited there is no right to appeal this decision.

**QUESTIONS**
1. What rights do people in NSW have in relation to public assemblies?
2. What responsibilities are involved in receiving legal protection for an assembly?
3. What details must be included in a Notice of Intention to Hold a Public Assembly?
NOTICE OF INTENTION TO HOLD A PUBLIC ASSEMBLY

Summary Offences Act 1988

To the Commissioner of Police

1 I, .............................................

Name

of .............................................

Address

on behalf of ..............................................

Organisation

notify the Commissioner of Police that on the

day of .............................................

Month/Year

it is intended to hold:

either:

(a) a public assembly, not being a procession, of approximately ............................................. persons which will assemble

Number

at ..........................................................

Place

at approximate .............................................

Time

and disperse at approximately .............................................

Time

or

(b) a public assembly, being a procession of approximately ............................................. persons which will assemble

Number

at ..........................................................

Place

at approximate .............................................

Time

and at approximately ............................................. the procession will

Time

This document is a Notice of Intention which is completed by the organiser of a public assembly and sent to the NSW Police Commissioner. It becomes an agreement between the police and the organiser that the assembly will be conducted in a certain way.

2 The purpose of the proposed assembly is...

State purpose

The following special characteristics associated with the assembly would be useful for the Commissioner of Police to be aware of in regulating traffic or in regulating the assembly:

* (i) There will be .................. (number) of vehicles and/or floats involved and their type and dimensions are as follows:

* (ii) There will be ........................... (number) of bands, musicians, entertainers etc entertaining or addressing the assembly

* (iii) The following number and type of animals will be involved in the assembly

* (iv) Other special characteristics of the proposed assembly are as follows:

4 I take responsibility for organising and conducting the proposed public assembly.

5 Notices for the purposes of the Summary Offences Act 1988 may be served on me at the following:

Address
REMOVAL OF A PUBLIC ASSEMBLY

OCCUPY SYDNEY PROTESTS

Legislation

*Local Government Act 1993 (NSW)*

22 October 2011
Police Remove an Illegal Occupy Sydney Campout

Occupy Sydney Tents and camping equipment removed by police from Martin Place at 5am in the morning. Some participants charged with an offence under the *Local Government Act 1993 (NSW)*

5 November 2011
Police Allow Occupy Sydney to Hold a Public Assembly

Occupy Sydney protesters march from Town Hall to Martin Place in the Sydney CBD after negotiating a compromise with the NSW Police.

The police used their discretion and allowed the march to occur legally as a public assembly.

COUNCIL SIGN IN MARTIN PLACE, SYDNEY CBD

The *Local Government Act 1993 (NSW)* makes it an offence to disobey a notice such as a sign in a public place, see below:

Section 632.1

1) A person who, in a public place within the area of a council, fails to comply with the terms of a notice erected by the council is guilty of an offence.

DISCUSSION QUESTIONS

1. What are some of the laws that impact on the right to assemble in a public place?
2. Discuss the use of police powers were used in the case of Occupy Sydney?
3. Explain the circumstances that police can use “move on” directions. Refer to legislation in your answer.
4. Discuss how police discretion is relevant to the use of their powers.

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Police Powers: ‘Move on’ Directions

The NSW Police have the power to issue ‘move on’ directions under the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW). This is the main law which defines the powers and responsibilities of police in NSW.

The penalty for disobeying a ‘move on’ direction is a fine of 2 penalty units.

1 penalty unit = $ ____

Police can give a direction to a person who...

Section 197 - Directions generally relating to public places

(1) A police officer may give a direction to a person in a public place if the police officer believes on reasonable grounds that the person’s behaviour or presence in the place (referred to in this Part as “relevant conduct”):

- a) is obstructing another person or persons or traffic, or
- b) constitutes harassment or intimidation of another person or persons, or
- c) is causing or likely to cause fear to another person or persons, so long as the relevant conduct would be such as to cause fear to person of reasonable firmness, or
- d) is for the purpose of obtaining, procuring or purchasing any prohibited drug that it would be unlawful for the person to possess.

(2) A direction given by a police officer under this section must be reasonable in the circumstances for the purpose of:

- a) reducing or eliminating the obstruction, harassment, intimidation, or fear, or
- b) stopping the supply, or soliciting to supply, of the prohibited drug, or
- c) stopping the obtaining, procuring, or purchasing of the prohibited drug

Section 200 Limitation on exercise of police powers

This Part does not authorise a police officer to give directions in relation to:

- (a) an industrial dispute, or
- (b) an apparently genuine demonstration or protest, or
- (c) a procession, or
- (d) an organised assembly.

Police Discretion and Public Assemblies

LEPRA gives police the power to move on people at their discretion. The reason for this is that it would be impractical and impossible to define and list every situation where a police officer could issue a move on direction.

These laws give police officers general principles they must follow, under the rule of law the use of discretionary power is acceptable provided it is well defined. Section 200 provides limits to this discretionary power, and a process exists for challenging the actions of police in relation to the use of this power.

The limitations to this power recognise that organised assemblies and apparently genuine demonstrations or protests should not be subject to ‘move on’ directions.
Freedom of Speech and Political Communication

Freedom of speech is not broadly defined under Australian law.

Australia’s laws do not provide an express freedom of speech. The High Court has found that the Australian Constitution implies that there should be freedom of political communication, however this is narrower than what people commonly understand as freedom of speech.

Political communication is limited to people being free to discuss political and economic matters and the actions of Federal Parliamentarians which relate to performance of their duties.

In Australia the courts make decisions with regard to enforcing rights and responsibilities about freedom of speech and political communication.

The High Court makes decisions that relate to the constitution and specific points of law. Case 1, Monis v The Queen [2013] HCA 4 is an example of a High Court decision which deals with the freedom of political communication.

Offensive language is a criminal offence under the Summary Offences Act 1988 (NSW). R v Grech [2010] (NSW) Local Court - 3 May 2010 is an example of how the courts deal with language which may or may not be considered as offensive.

In both cases the courts decided to what extent it would allow ‘free speech’ and whether the people concerned had fulfilled their responsibility to follow the law.
FREEDOM OF POLITICAL COMMUNICATION - MONIS v THE QUEEN [2013]

Case: Monis v the Queen & Anor; Droudis v the Queen & Anor [2013] HCA 4

This case dealt with whether a criminal offence, s471.12 of the Criminal Code Act (Cth) - Using a postal or similar service to menace, harass or cause offence (see below), was consistent with the implied constitutional freedom of political communication in the Constitution.

The appellants Monis and Droudis were placed on trial for the offence after sending letters to the relatives of Australian soldiers killed in Afghanistan. The letters started with expressions of sympathy for their loss but then criticised and condemned the deceased person.

The High Court unanimously held that the criminal offence restricted political communication.

The court did not come to an agreement on whether the offence was compatible with the constitution or not. Three justices found that the offence was compatible with the Constitution, three found that it was not. When the High Court is divided in opinion the decision of the lower court stands.

This means that the Monis and Droudis’ appeal against the offence was dismissed and that they will go on trial for the offence in the District Court of NSW.

Summary

This case looked at whether this offence was compatible with the Australian Constitution. The court’s opinion was equally divided so this offence remains.

If a majority of justices had found this offence was not compatible with the Constitution it would declared invalid and could not be used.

Using a postal or similar service to menace, harass or cause offence - Criminal Code Act (Cth) s471.12:

‘A person is guilty of an offence if:

(a) the person uses a postal or similar service; and

(b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.’

Penalty: Imprisonment for 2 years.

Questions

1. Define freedom of political communication under Australian law.

2. What offence were Monis and Droudis charged with? Why were they appealing the validity of the offence?

3. What was the decision of the High Court in this matter? What will happen to Monis and Droudis?
OFFENSIVE LANGUAGE AND FREEDOM OF SPEECH

R v Grech [2010] (NSW) Local Court - 3 May 2010

This case dealt with whether the language used by the accused Mr Grech when fined by a police officer for public transport fare evasion was ‘offensive language’ under the Summary Offences Act 1988 (NSW) s4A.

Using offensive language in a public place such as a train station is breaking the law and carries a criminal penalty. This case concerns what is considered offensive language by the court. It also highlights the fact that a person is not free to use whatever language they like and that the courts can decide what a ‘reasonable person’ would find offensive.

In R v Grech [2010] the Magistrate made the decision that the word used by the accused was not offensive language, and dismissed the charge. The offensive language charge was dismissed by the Magistrate. Undoubtedly, the NSW Police were not happy with this result.

Under the Summary Offences Act 1988 (NSW) offensive language is a criminal offence which carries a fine of up to $660 or up to 100 hours of community service.

The accused, Mr Grech was arrested at a train station in Sydney’s Eastern Suburbs for fare evasion where upon he called a police officer a ‘pr**k’. In the case of offensive language the court must make a decision about whether a word is offensive according to a ‘reasonable person’. There is some disagreement in the community over what words are considered offensive.

The Magistrate was not satisfied that the word was offensive for the following reasons:

- a ‘reasonable person’ would not be offended by the word pr**k in general conversation
- the word is considered to be of a ‘less derogatory nature than other words and...is in common usage in this country.’
- that the police officer would hear offensive language as part of their work and that they would be accustomed to bad language

Case law on offensive language suggests that words such as pr**k and others that are usually considered more offensive are not unlawful for the purposes of offensive language.

This does not mean that words which may be considered offensive by people are allowed to be used in places like a school or workplace, but that use of such words is not necessarily a case of offensive language as a criminal offence.

Summary Offences Act 1988 (NSW) - Section 4a - Offensive Language

‘(1) A person must not use offensive language in or near, or within hearing from, a public place or a school.

Maximum penalty: 6 penalty units.

(2) It is a sufficient defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant had a reasonable excuse for conducting himself or herself in the manner alleged in the information for the offence.’

s4A also allows a penalty of up to 100 hours community service to be given for this offence.

What is a reasonable person?

A ‘reasonable person’ is a legal fiction to allow for an explanation of expectations of behaviour in a given situation.

The question to ask is “would a reasonable person behave in the same way as the accused in the same situation?”

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**Questions**

1. What were the Magistrate’s reasons for dismissing the charge?

_____________________________________________________________________________________
_____________________________________________________________________________________
_____________________________________________________________________________________

2. Why do you think the police would be unhappy with the decision in this case?

_____________________________________________________________________________________
_____________________________________________________________________________________
_____________________________________________________________________________________
_____________________________________________________________________________________

3. Why would there be disagreement in the general community about what words are considered offensive?

_____________________________________________________________________________________
_____________________________________________________________________________________
_____________________________________________________________________________________
_____________________________________________________________________________________
_____________________________________________________________________________________

4. Discuss the ‘reasonable person’ test and the importance of case law and judicial discretion in its use.

_____________________________________________________________________________________
_____________________________________________________________________________________
_____________________________________________________________________________________
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**Further Reading**

**Media Article**


**Papers**


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