

Freedom of information, opinion and expression

Rights and Freedoms

The UN General Assembly adopted the [International Covenant on Civil and Political Rights](http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx) (http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx) (ICCPR) on 16 December 1966.

ICCPR Article 19 states:

1. Everyone shall have the right to hold opinions without interference.
2. 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.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order, or of public health or morals.

General comment 34 (open shut box)

General Comment 34 emphasises that freedom of expression and opinion are the foundation stone for a free and democratic society and a necessary condition for the promotion and protection of human rights. This General Comment addresses in detail:

- freedom of opinion
- freedom of expression
- freedom of expression and the media
- the right to access to information
- the importance of freedom of expression in a democratic society
- the application of Article 19.3 on permissible limitations on freedom of information and expression
- the scope for limitations on freedom of expression in certain areas
- the relationship between articles 19 and 20.

Freedom of information, expression & democracy

General Comment No. 25 deals with freedom of expression in the context of participation in public affairs and the right to vote. The Human Rights Committee has stated that:

Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association. ...

In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.

It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election

and to advertise political ideas.

Common law protection

A well-established principle of statutory interpretation in Australian courts is that Parliament is presumed not to have intended to limit fundamental rights, unless it indicates this intention in clear terms. This includes freedom of expression. See our page on [common law rights and parliamentary scrutiny \(https://www.humanrights.gov.au/common-law-rights-human-rights-scrutiny-and-rule-law\)](https://www.humanrights.gov.au/common-law-rights-human-rights-scrutiny-and-rule-law).

Constitutional law protection

The Australian Constitution does not explicitly protect freedom of expression. However, the High Court has held that an implied freedom of political communication exists as an indispensable part of the system of representative and responsible government created by the Constitution. It operates as a freedom from government restraint, rather than a right conferred directly on individuals.

In [Nationwide News Pty Ltd v Wills \(http://www.austlii.edu.au/au/cases/cth/HCA/1992/46.html\)](http://www.austlii.edu.au/au/cases/cth/HCA/1992/46.html) (1992) 177 CLR 1 and [Australian Capital Television Pty Ltd v the Commonwealth \(http://www.austlii.edu.au/au/cases/cth/HCA/1992/45.html\)](http://www.austlii.edu.au/au/cases/cth/HCA/1992/45.html) (1992) 177 CLR 106, the majority of the High Court held that an implied freedom of political communication exists as an incident of the system of representative government established by the Constitution. This was reaffirmed in [Unions NSW v New South Wales \(http://www.austlii.edu.au/au/cases/cth/HCA/2013/58.html\)](http://www.austlii.edu.au/au/cases/cth/HCA/2013/58.html) [2013] HCA 58.

Protection in State and Territory human rights laws

Section 16 of the Human Rights Act 2004 (ACT) states that:

1. Everyone has the right to hold opinions without interference.
2. Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

The rights in this act are subject to section 28:

1. Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.
2. In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
3. the nature of the right affected;
 - b. the importance of the purpose of the limitation;
 - c. the nature and extent of the limitation;
 - d. the relationship between the limitation and its purpose;
 - e. any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

Section 15 of the Charter of Human Rights and Responsibilities Act 2006 (Vic) provides:

1. Every person has the right to hold an opinion without interference.
2. Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether-

(a) orally; or

(b) in writing; or

(c) in print; or

(d) by way of art; or

(e) in another medium chosen by him or her.

1. Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary-

- (a) to respect the rights and reputation of other persons; or
- (b) for the protection of national security, public order, public health or public morality.

Freedom of expression in other instruments

Convention on the Rights of the Child

The Convention on the Rights of the Child recognises the right to freedom of expression and information in the same terms as ICCPR Article 19. As with other rights recognised in the CRC this provision should be read with Article 5, which states:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 17 goes on to state:

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children's books;
- (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
- (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities recognises that people with disability have the rights to freedom of expression and information which are recognised for all people in ICCPR Article 19. The CRPD also goes on to

- make clear that positive measures and not only non-interference are needed to ensure the enjoyment of these rights and
- specify some of the measures needed.

Article 21 states that:

States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:

1. Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;
2. Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;
3. Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;
4. Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;
5. Recognising and promoting the use of sign languages.

European Convention

Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

United States Constitution

The First Amendment to the Constitution of the United States states a right to freedom of speech and press freedom in more absolute terms than Article 19 of the ICCPR or the equivalent provision of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

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

The text is unqualified. However, the United States Supreme Court has interpreted the right as subject to some restrictions:

'the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent': Schenck v United States (http://www.law.cornell.edu/supct/html/historics/USSC_CR_0249_0047_ZO.html) 249 US 47 at 52 (1919). This was later refined to the extent that free speech could be restricted without contravening the First Amendment where it is likely to incite or produce imminent lawless action: Brandenburg v Ohio (http://www.law.cornell.edu/supct/html/historics/USSC_CR_0395_0444_ZO.html) 395 S 444 at 447 (1969).

The Supreme Court has held that defamation law is subject to the principles of the First Amendment. Criticism of public officials and public figures will not give rise to liability in an action for defamation in the US, unless 'actual malice' can be proved against the defendant: New York Times Co v Sullivan (http://www.law.cornell.edu/supct/html/historics/USSC_CR_0376_0254_ZS.html) 376 US 254 (1964).

However, the First Amendment protection afforded to criticism of public officials and public figures does not extend to defamatory statements made in relation to private individuals. Public figures 'invite attention and comment', whereas private individuals 'have not accepted public office or assumed an influential role in ordering society'. See Gertz v Robert Welch, Inc (http://www.law.cornell.edu/supct/html/historics/USSC_CR_0418_0323_ZS.html) 418 US 323 at 341–46 (1974).

More information: UNESCO program on freedom of expression (<http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/>).