

3. Freedom of Speech

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The common law

3.1 Freedom of speech has been characterised as one of the ‘fundamental values protected by the common law’¹ and as ‘the freedom *par excellence*; for without it, no other freedom could survive’.²

3.2 This chapter discusses the source and rationale of the common law right of freedom of speech;³ how this right is protected from statutory encroachment; and when laws that interfere with freedom of speech may be considered justified, including by reference to the concept of proportionality.⁴

1 *Nationwide News v Wills* (1992) 177 CLR 1, 31.

2 Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 113.

3 Heydon J has observed that ‘there are many common law rights of free speech’ in the sense that the common law recognises a ‘negative theory of rights’ under which rights are marked out by ‘gaps in the criminal law’: *Attorney-General (South Australia) v Corporation of the City of Adelaide* (2013) 249 CLR 1, [145].

4 See Ch 1.

3.3 The High Court of Australia has stated that freedom of speech ‘is a common law freedom’ and that it ‘embraces freedom of communication concerning government and political matters’:

The common law has always attached a high value to the freedom and particularly in relation to the expression of concerns about government or political matters ... The common law and the freedoms it encompasses have a constitutional dimension. It has been referred to in this Court as ‘the ultimate constitutional foundation in Australia’.⁵

3.4 In Australian law, particular protection is given to political speech. Australian law recognises that free speech on political matters is necessary for our system of representative government:

Freedom of communication in relation to public affairs and political discussion cannot be confined to communications between elected representatives and candidates for election on the one hand and the electorate on the other. The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community.⁶

3.5 Free speech or free expression is also understood to be an integral aspect of a person’s right of self-development and fulfilment.⁷ Professor Eric Barendt writes that freedom of speech is ‘closely linked to other fundamental freedoms which reflect ... what it is to be human: freedoms of religion, thought, and conscience’.⁸

3.6 This freedom is intrinsically important, and also serves a number of broad objectives:

First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), ‘the best test of truth is the power of the thought to get itself accepted in the competition of the market’. Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.⁹

3.7 Freedom of speech has, of course, been defended and advocated in the works of leading philosophers and jurists from Aristotle in the 4th century BCE,¹⁰ John Milton

5 *Monis v The Queen* (2013) 249 CLR 92, [60] (French CJ).

6 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 108 (Mason CJ). See also, *Nationwide News v Wills* (1992) 177 CLR 1, 74 (Brennan J).

7 Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 13.

8 *Ibid.* See also United Nations Parliamentary Joint Committee, General Comment No 34 (2011) on Article 19 of the ICCPR on Freedoms of Opinion and Expression (CCPR/C/GC/34) [1].

9 *R v Secretary of State for the Home Department; Ex Parte Simms* [2002] 2 AC 115, 126 (Lord Steyn).

10 Aristotle, *Politics* (Hackett Publishing Company, 1998) Book 6.

in the 17th century,¹¹ J S Mill in the 18th century,¹² through to John Rawls, Ronald Dworkin and Eric Barendt in the 20th century.¹³

Protections from statutory encroachment

Australian Constitution

3.8 Beginning with a series of cases in 1992,¹⁴ the High Court has recognised that freedom of political communication is implied in the *Australian Constitution*. This freedom ‘enables the people to exercise a free and informed choice as electors’.¹⁵ The *Constitution* has not been found to protect free speech more broadly.

3.9 The *Constitution* does not protect a personal right, but rather, the freedom acts as a restraint on the exercise of legislative power by the Commonwealth.¹⁶

The freedom is to be understood as addressed to legislative power, not rights, and as effecting a restriction on that power. Thus the question is not whether a person is limited in the way that he or she can express himself or herself, although identification of that limiting effect may be necessary to an understanding of the operation of a statutory provision upon the freedom more generally. The central question is: how does the impugned law affect the freedom?¹⁷

3.10 The freedom is not absolute. For one thing, it only protects some types of speech—political communication.¹⁸ In *Lange v Australian Broadcasting Corporation* it was held that the freedom is ‘limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*’.¹⁹

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- 11 John Milton, ‘Areopagitica’, *Areopagitica, and Other Political Writings of John Milton* (Liberty Fund, 1644).
- 12 John Stuart Mill, *On Liberty* (London, 1859) in John Gray (ed) *On Liberty and Other Essays* (Oxford University Press, 1991).
- 13 John Rawls, *Political Liberalism* (Columbia University Press, 1993); Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury Publishing, 1978); Barendt, above n 7.
- 14 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1.
- 15 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 570.
- 16 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Nationwide News v Wills* (1992) 177 CLR 1; *Wotton v Queensland* (2012) 246 CLR 1; *Hogan v Hinch* (2011) 243 CLR 506. This ‘negative’ form of the right to freedom of speech is shared by the United States and other common law countries, where ‘constitutional rights are thought to have an exclusively negative cast’: Adrienne Stone, ‘The Comparative Constitutional Law of Freedom of Expression’ (2010), *University of Melbourne Legal Studies Research Paper*, No 476, 12.
- 17 *Unions NSW v New South Wales* (2013) 304 ALR 266, [36]. Also, the High Court said in *Lange*: ‘Sections 1, 7, 8, 13, 24, 25, 28 and 30 of the Constitution give effect to the purpose of self-government by providing for the fundamental features of representative government’: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557. Sections 7 and 24 do not ‘confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power’: *Ibid* 560.
- 18 Political communication includes ‘expressive conduct’ capable of communicating a political or government message to those who witness it: *Levy v Victoria* (1997) 189 CLR 579.
- 19 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561.

3.11 While the scope of the implied freedom is open to some interpretation, it does not appear to extend to non-political communication and non-federal communications concerning discrete state issues.²⁰

3.12 Chief Justice French has advocated a broader understanding of the meaning of ‘political communications’ to include ‘matters potentially within the purview of government’,²¹ but this interpretation has not commanded support of a majority of the High Court.²²

3.13 In *Lange*, the High Court formulated a two-step test to determine whether a law burdens the implied freedom. As modified in *Coleman v Power*,²³ the test involves asking two questions:

1. Does the law, in its terms, operation or effect, effectively burden freedom of communication about government or political matters?
2. If the law effectively burdens that freedom, is the law nevertheless reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government, and the procedure prescribed by s 128 of the *Constitution* for submitting a proposed amendment of the *Constitution* to the informed decision of the people?²⁴

3.14 The limited scope of the communications covered by the implied freedom are illustrated by the decision of the High Court in *APLA Ltd v Legal Services Commissioner (NSW)*.²⁵ This concerned whether prohibitions, in NSW legislation, on advertising by barristers and solicitors offended the *Constitution*. The High Court held that the prohibitions were not constitutionally invalid.

3.15 Kirby J, in dissent, held that as a matter of basic legal principle, a protected freedom of communication arises to protect the integrity and operation of the judicial branch of government, just as it does with regard to the legislature and executive branch.²⁶ The laws in question, he said, amounted to ‘an impermissible attempt of State law to impede effective access to Ch III courts and to State courts exercising federal

20 See George Williams and David Hume, *Human Rights under the Australian Constitution* (OUP, 2nd ed, 2013) 184. However, the High Court has stated that the ‘complex interrelationship between levels of government, issues common to State and federal government and the levels at which political parties operate necessitate that a wide view be taken of the operation of the freedom of political communication’: *Unions NSW v New South Wales* (2013) 304 ALR 266, [25].

21 *Hogan v Hinch* (2011) 243 CLR 506, [49]. French CJ has said that the ‘class of communication protected by the implied freedom in practical terms is wide’: *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, 43 [67] (French CJ). The case left open the possibility that religious preaching may constitute ‘political communication’.

22 See Williams and Hume, above n 20, 185. *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, 43 [67] (French CJ).

23 *Coleman v Power* (2004) 220 CLR 1.

24 *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, [67] (French CJ).

25 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.

26 *Ibid* [343].

jurisdiction’, which ‘cannot stand with the text, structure and implications of the Constitution’.²⁷

3.16 The constitutionality of provisions of the *Criminal Code* (Cth), concerning using a postal or similar service to menace, harass or cause offence,²⁸ was considered by the High Court in *Monis v The Queen*.²⁹

3.17 The High Court divided equally on whether s 471.12 of the *Criminal Code* exceeded the limits of the legislative power of the Commonwealth Parliament because it impermissibly burdens freedom of communication about government or political matters.³⁰

3.18 Three judges held that the provision was invalid on the basis that preventing offence through a postal or similar service was not a ‘legitimate end’, as referred to in the *Lange* test.³¹ The other judges read down s 471.12 as being ‘confined to more seriously offensive communications’ and aimed at the legitimate end of preventing a degree of offensiveness that would provoke a more heightened emotional or psychological response by a victim.³² Read this way, the law went no further than was reasonably necessary to achieve its protective purpose.³³

3.19 The freedom of political communication doctrine in Australia applies to a narrower range of speech, as compared to protections in other countries (including the United States, Canada, the UK and New Zealand). Australia is the only democratic country that does not expressly protect freedom of speech in its ‘national Constitution or an enforceable national human rights instrument’.³⁴

Principle of legality

3.20 The principle of legality provides some further protection to freedom of speech.³⁵ When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of speech, unless this intention was made unambiguously clear.³⁶

27 Ibid [272].

28 *Criminal Code Act 1995* (Cth) sch 1 (*Criminal Code*) s 471.12.

29 *Monis v The Queen* (2013) 249 CLR 92.

30 As a result, the decision of the Supreme Court of New South Wales (Court of Criminal Appeal)—that the provision was valid—was affirmed.

31 *Monis v The Queen* (2013) 249 CLR 92, French CJ [73]–[74], Hayne J [97], Heydon [236].

32 Ibid Crennan, Kiefel, Bell JJ [327]–[339].

33 Ibid [348].

34 George Williams, ‘Protecting Freedom of Speech in Australia’ (2014) 39 *Alternative Law Journal* 217, 218. Israel has an implied right: Adrienne Stone, ‘The Comparative Constitutional Law of Freedom of Expression’ (2010), *University of Melbourne Legal Studies Research Paper*, No 476 1.

35 The principle of statutory interpretation now known as the ‘principle of legality’ is discussed more generally in Ch 1.

36 *Attorney-General (South Australia) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 30–33 [42]–[46]; *Evans v State of New South Wales* (2008) 168 FCR 576, [72]; *R v Secretary of State for the Home Department; Ex Parte Simms* [2002] 2 AC 115, 130.

3.21 For example, in *Attorney-General (South Australia) v Corporation of the City of Adelaide*, French CJ said:

The common law freedom of expression does not impose a constraint upon the legislative powers of the Commonwealth or the States or Territories. However, through the principle of legality, and criteria of reasonable proportionality, applied to purposive powers, the freedom can inform the construction and characterisation, for constitutional purposes, of Commonwealth statutes. It can also inform the construction of statutes generally and the construction of delegated legislation made in the purported exercise of statutory powers. As a consequence of its effect upon statutory construction, it may affect the scope of discretionary powers which involve the imposition of restrictions upon freedom of speech and expression.³⁷

3.22 In *Monis*, Crennan, Kiefel and Bell JJ held:

The principle of legality is known to both the Parliament and the courts as a basis for the interpretation of statutory language. It presumes that the legislature would not infringe rights without expressing such an intention with ‘irresistible clearness’. The same approach may be applied to constitutionally protected freedoms. In such a circumstance it may not be necessary to find a positive warrant for preferring a restricted meaning, save where an intention to restrict political communication is plain (which may result in invalidity). A meaning which will limit the effect of the statute on those communications is to be preferred.³⁸

International law

3.23 International instruments provide for freedom of expression including the right, under art 19 of the *International Covenant on Civil and Political Rights* (ICCPR), to ‘seek, receive and impart information and ideas of all kinds regardless of frontiers’.³⁹ The UN Human Rights Committee provides a detailed list of forms of communication that should be free from interference:

Political discourse, commentary on one’s own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching and religious discourse.⁴⁰

3.24 The Castan Centre for Human Rights Law stated that common law ‘protection of free speech at the Commonwealth level essentially dates back to 1992, and is very limited compared with the equivalent protection under international law’.⁴¹

37 *Attorney-General (South Australia) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 32 [44] (French CJ).

38 *Monis v The Queen* (2013) 249 CLR 92, [331] (Crennan, Kiefel and Bell JJ).

39 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(2). The Universal Declaration of Human Rights also enshrines freedom of speech in its preamble: *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948).

40 United Nations Parliamentary Joint Committee, General Comment No 34 (2011) on Article 19 of the ICCPR on Freedoms of Opinion and Expression (CCPR/C/GC/34) [11].

41 Monash University Castan Centre for Human Rights, *Submission 18*. Referring to the decisions in *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1.

3.25 International instruments cannot be used to ‘override clear and valid provisions of Australian national law’.⁴² However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia’s international obligations.⁴³

Bills of rights

3.26 In other countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. Bills of rights and human rights statutes protect free speech in the United States,⁴⁴ United Kingdom,⁴⁵ Canada⁴⁶ and New Zealand.⁴⁷ For example, the *Human Rights Act 1998* (UK) gives effect to the provisions of the European Convention on Human Rights, art 10 of which provides:

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.⁴⁸

3.27 This legislative right may not necessarily be different from the freedom recognised at common law: several members of the House of Lords expressed the opinion ‘that in the field of freedom of speech there was in principle no difference between English law on the subject and article 10 of the Convention’.⁴⁹

3.28 The First Amendment to the *United States Constitution* provides significant protection to free speech. In *New York Times v Sullivan*, Brennan J spoke of a ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials’.⁵⁰

3.29 There are also protections for free speech in the Victorian *Charter of Human Rights and Responsibilities* and the *Human Rights Act 2004* (ACT).⁵¹

Laws that interfere with freedom of speech

3.30 A wide range of Commonwealth laws may be seen as interfering with freedom of speech and expression, broadly conceived. Some of these laws impose limits on freedom of speech that have long been recognised by the common law, for example, in relation to obscenity and sedition. Arguably, such laws do not encroach on the

42 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J).

43 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

44 *United States Constitution* amend I.

45 *Human Rights Act 1998* (UK) c 42, s 12 and sch 1 pt I, art 10(1).

46 *Canada Act 1982 c 11 s 2(b)*.

47 *New Zealand Bill of Rights Act 1990* (NZ) s 14.

48 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 10(1).

49 *Attorney General v Guardian Newspapers Ltd (No 2) (Spycatcher)* [1988] 1988 UKHL 6 283–4 (Lord Goff). This was approved in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 550–1 (Lord Keith); *R v Secretary of State for the Home Department; Ex Parte Simms* [2002] 2 AC 115.

50 *New York Times v Sullivan* 376 US 254 (1964) 270 (Brennan J, giving the opinion of the Court).

51 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15; *Human Rights Act 2004* (ACT) s 16.

traditional freedom, but help define it. However, these traditional limits are crucial to understanding the scope of the freedom, and possible justifications for new restrictions.⁵²

3.31 Commonwealth laws prohibit, or render unlawful, speech or expression in many different contexts, and include:

- criminal laws;
- secrecy laws;
- contempt laws;
- anti-discrimination laws;
- media, broadcasting and telecommunications laws;
- information laws; and
- intellectual property laws.⁵³

3.32 These laws are summarised below. Some of the justifications that have been advanced for laws that interfere with freedom of speech, and public criticisms of laws on that basis, are also discussed.

Criminal laws

3.33 A number of offences directly criminalise certain forms of speech or expression. Some of these have ancient roots in treason and sedition, which since feudal times punished acts deemed to constitute a violation of a subject's allegiance to his or her lord or monarch.

3.34 Following the demise of the absolute monarchy and the abolition of the Star Chamber by the Long Parliament in 1641, the law of sedition was developed in the common law courts. Seditious speech may, therefore, be seen as falling outside the scope of traditional freedom of speech. However, the historical offence of sedition would now be seen as a 'political' crime, punishing speech that is critical of the established order. Prohibiting mere criticism of government that does not incite violence reflects an antiquated view of the relationship between the state and society, which would no longer be considered justified.⁵⁴

52 In fact, freedom of speech has been said to represent the 'limits of the duty not to utter defamation, blasphemy, obscenity, and sedition': Glanville Williams, 'The Concept of Legal Liberty' [1956] *Columbia Law Review* 1129, 1130. See also Ch 1.

53 Other laws that interfere with freedom of speech include the uniform defamation laws: *Defamation Act 2005* (NSW); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA); *Civil Law (Wrongs) Act 2002* (ACT) ch 9; *Defamation Act 2006* (NT). As this Inquiry is concerned with Commonwealth laws, it will not be considering the operation of these state and territory laws.

54 Australian Law Reform Commission, *Fighting Words: A Review of Seditious Laws in Australia*, ALRC Report 104 (2006) rec 3–1. This followed an earlier recommendation of the Gibbs Committee that, given its similarity to the then existing treason offence, the offence of treachery should be repealed and a new provision created, making it an offence for an Australian citizen or resident to help a state or any armed force against which any part of the Australian Defence Force is engaged in armed hostilities: See

3.35 Offences that may restrict speech or expression include the modern offences of treason, urging violence, and advocating terrorism contained in the following provisions of the *Criminal Code* (Cth):

- s 80.1AA (Treason—materially assisting enemies);
- s 80.2 (Urging violence against the Constitution);
- s 80.2A (Urging violence against groups);
- s 80.2B (Urging violence against members of groups); and
- s 80.2C (Advocating terrorism).

3.36 In addition, the offence of treachery contained in s 24AA of the *Crimes Act 1914* (Cth) covers the doing of any act or thing with intent: to overthrow the *Constitution* of the Commonwealth by revolution or sabotage; or to overthrow by force or violence the established government of the Commonwealth, of a state or of a proclaimed country. In 2006, in the context of its review of sedition laws, the ALRC recommended that the treachery offence be reviewed to consider whether it merited retention, modernisation and relocation to the *Criminal Code*.

3.37 There are other terrorism-related offences that may involve speech or expression, such as providing training connected with terrorism, making documents likely to facilitate terrorism, and directing the activities of, recruiting for, or providing support to a terrorist organisation.⁵⁵ The power to prescribe an organisation as a ‘terrorist organisation’ under div 102 of the *Criminal Code*—which triggers a range of these offences—may also be seen as infringing rights to freedom of speech.⁵⁶

3.38 Counter-terrorism offences were criticised in some submissions on the grounds that their potential interference with freedom of speech is not justified.⁵⁷

In the context of counter terrorism, the pursuit of national security is quintessentially a legitimate aim. However, a number of provisions risk burdening free speech in a disproportionate way. The chilling effect of disproportionate free speech offences should not be underestimated, nor should the normalising effect of gradually limiting free speech over successive pieces of legislation.⁵⁸

Advocating terrorism

3.39 A number of stakeholders submitted, for example, that the scope of the ‘advocating terrorism’ offences in s 80.2C of the *Criminal Code* is an unjustified encroachment on freedom of speech.⁵⁹

H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991). This wording became part of the treason and sedition offences in the *Criminal Code*, as enacted in 2005.

55 *Criminal Code* (Cth) ss 101.2, 101.5, 102.2, 102.4, 102.5, 102.7.

56 Gilbert and Tobin Centre of Public Law, *Submission 22*.

57 See eg, Public Interest Advocacy Centre, *Submission 55*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

58 Public Interest Advocacy Centre, *Submission 55*.

59 National Association of Community Legal Centres, *Submission 66*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

3.40 Section 80.2C makes it an offence if a person advocates the doing of a terrorist act, or the commission of a terrorism offence, and is reckless as to whether another person will engage in that conduct as a consequence. A person ‘advocates’ the doing of a terrorist act or the commission of a terrorism offence if the person ‘counsels, promotes, encourages or urges’ the doing of it. A defence is provided covering, for example, pointing out ‘in good faith any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters’.⁶⁰

3.41 In relation to proportionality in restricting freedom of expression, the statement of compatibility with human rights stated:

The criminalisation of behaviour which encourages terrorist acts or the commission of terrorism offences is a necessary preventative mechanism to limit the influence of those advocating violent extremism and radical ideologies.⁶¹

3.42 The parameters of the offence were considered by the Parliamentary Joint Committee on Human Rights (the Human Rights Committee) and the Senate Standing Committee for the Scrutiny of Bills (the Scrutiny of Bills Committee) in their deliberations on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.⁶²

3.43 The Human Rights Committee concluded that the provision was ‘likely to be incompatible with the right to freedom of opinion and expression’.⁶³ In reaching this conclusion the Human Rights Committee noted that a number of existing provisions in the *Criminal Code* contain offences that may apply to speech that incites violence and expressed concern that, despite the good faith defences, this offence was ‘overly broad’ in its application:

This is because the proposed offence would require only that a person is ‘reckless’ as to whether their words will cause another person to engage in terrorism (rather than the person ‘intends’ that this be the case). The committee is concerned that the offence could therefore apply in respect of a general statement of support for unlawful behaviour (such as a campaign of civil disobedience or acts of political protest) with no particular audience in mind. For example, there are many political regimes that may be characterised as oppressive and non-democratic, and people may hold different opinions as to the desirability or legitimacy of such regimes; the committee is concerned that in such cases the proposed offence could criminalise legitimate (though possibly contentious or intemperate) advocacy of regime change, and thus impermissibly limit free speech.⁶⁴

60 *Criminal Code* (Cth) s 80.3(1)(d).

61 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [138].

62 The Bill also received scrutiny from the Parliamentary Joint Committee on Intelligence and Security: Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill* (October 2014).

63 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourteenth Report of the 44th Parliament* (October 2014) [1.259].

64 *Ibid* [1.258].

3.44 The Scrutiny of Bills Committee highlighted the definition of ‘advocates’ and stated that this is a broad definition that ‘may therefore amount to an undue trespass on personal rights and liberties as it is not sufficiently clear what the law prohibits, and have a ‘chilling effect on the exercise of the right of free expression’.⁶⁵ It also noted existing offences in the *Criminal Code* which may already cover conduct intended to be captured by the proposed offence.⁶⁶

3.45 The Attorney-General responded to these concerns by emphasising that terrorist offences generally require a person to have three things: the capability to act, the motivation to act, and the imprimatur to act (for example, endorsement from a person with authority).

The new advocating terrorism offence is directed at those who supply the motivation and imprimatur. This is particularly the case where the person advocating terrorism holds significant influence over other people who sympathise with, and are prepared to fight for, the terrorist cause.⁶⁷

3.46 In relation to the availability of other offences, the Attorney-General advised that where the Australian Federal Police (AFP) has sufficient evidence, the existing offences of incitement or the urging violence offences would be pursued. However, these offences require the AFP to prove that the person intended the crime or violence to be committed. There will not always be sufficient evidence to meet this threshold because ‘persons advocating terrorism can be very sophisticated about the precise language they use, even though their overall message still has the impact of encouraging others to engage in terrorist acts’.⁶⁸

It is no longer the case that explicit statements (which would provide evidence to meet the threshold of intention) are required to inspire others to take potentially devastating action in Australia or overseas. The cumulative effect of more generalised statements when made by a person in a position of influence and authority can still have the impact of directly encouraging others to go overseas and fight or commit terrorist acts domestically. This effect is compounded with the circulation of graphic violent imagery (such as beheading videos) in the same online forums as the statements are being made. The AFP therefore require tools (such as the new advocating terrorism offence) to intervene earlier in the radicalisation process to prevent and disrupt further engagement in terrorist activity.⁶⁹

3.47 The Scrutiny of Bills Committee acknowledged these points but concluded that, on balance, it would be appropriate to further clarify the meaning of ‘advocate’ to

65 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (October 2014) 795.

66 Ibid. Citing *Criminal Code* (Cth) ss 80.2, 80.2A, 80.2B, 101.5, 102.4.

67 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014*, (October 2014) 796.

68 Ibid.

69 Ibid.

assist people in ‘prospectively knowing the scope of their potential criminal liability’.⁷⁰ The Bill was not amended in this respect.

3.48 A number of stakeholders to this Inquiry raised concerns about the advocating terrorism offences. The Gilbert and Tobin Centre of Public Law submitted that s 80.2C directly infringes the right to freedom of speech as it ‘limits the capacity for individuals to voice their views and opinions on terrorism and overseas conflicts’. It observed that the offence goes beyond the concept of incitement by criminalising the ‘promotion’ of terrorism and by requiring only that the person is ‘reckless’ as to whether their words may result in terrorism (as opposed to intending that result).

The offence could apply, for example, to a person who posts online that they support the beheadings of hostages by Islamic State. Such a comment would be highly disagreeable, and it could legitimately attract the attention of the security services and law enforcement to ensure that the person does not become involved in terrorism. However, the law has not traditionally treated such actions as criminal acts unless the person encourages another person to commit an unlawful act, and intends that the unlawful act should be committed.⁷¹

3.49 The Gilbert and Tobin Centre stated that the broader approach adopted in the offence of advocating terrorism is unjustified because of its significant impact on free speech, and because it ‘may contribute to a sense of alienation and discrimination in Australia’s Muslim communities if they feel like the government is not willing to have an open discussion about issues surrounding terrorism and Islam’.⁷²

3.50 The Public Interest Advocacy Centre (PIAC) questioned the need for the new offence, in view of the offence in s 80.2 of the *Criminal Code* (criminalising ‘urging violence’ against the *Constitution* or a Commonwealth, state or territory government) and the offence of incitement, which covers urging another person to commit a terrorist act.⁷³ They also questioned the assertion that the provision is proportionate.

The new advocacy offence is far wider in scope than the targeted offence of incitement, requiring a person only to be reckless as to whether their expression of a view ‘counsels, promotes, encourages or urges’ another to commit a terrorist act, rather than intending them to do so.⁷⁴

3.51 The Law Council of Australia (Law Council) observed that div 80 and s 80.2C are framed broadly, and may have the ‘potential to unduly burden freedom of expression’. The good faith defence ‘may not address concern of criminal liability experienced by those engaged in publishing or reporting on matters that could potentially fall within the broad scope of the offences’.⁷⁵

70 Ibid 797. Consistently with Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill* (October 2014) rec 5.

71 Gilbert and Tobin Centre of Public Law, *Submission 22*.

72 Ibid.

73 *Criminal Code* (Cth) s 11.4.

74 Public Interest Advocacy Centre, *Submission 55*.

75 Law Council of Australia, *Submission 75*.

Prescribed terrorist organisations

3.52 Similar concerns about overreach have been identified in relation to prescribed terrorist organisations under div 102 of the *Criminal Code*. These provisions allow an organisation to be prescribed by regulations as a terrorist organisation where it is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or advocates the doing of a terrorist act.⁷⁶ Professor George Williams has commented that, while it is understandable that the law would permit groups to be banned that engage in or prepare for terrorism, ‘it is not justifiable to ban an entire group merely because someone affiliated with it praises terrorism’.⁷⁷

3.53 The Gilbert and Tobin Centre stated that, as a result, members of an organisation may be exposed to serious criminal offences for expressing radical and controversial (but not necessarily harmful) views about terrorism and religion.

An organisation may be proscribed on the basis of views expressed by some of its members, which means that other individuals may be exposed to liability when they do not even agree with those views. Indeed, an organisation may even be proscribed on the basis that the views it expresses might encourage a person with a severe mental illness to engage in terrorism.⁷⁸

Using a postal service to menace, harass or cause offence

3.54 Another provision of the *Criminal Code* that received comment in submissions was s 471.12, which provides that a person is guilty of an offence if the person uses a postal or similar service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive. This provision was the subject of the High Court’s deliberations in *Monis v The Queen*.⁷⁹

3.55 The University of Melbourne Centre for Comparative Constitutional Studies submitted that s 471.12 unjustifiably interferes with freedom of speech, and political communication in particular for the following reasons:

- application to core political speech—the broad scope of the provision means that it can operate to suppress core political speech; and

76 *Criminal Code* (Cth) s 102.1. Related criminal offences include those in relation to being a member of, training with, or providing support or resources to a terrorist organisation: Ibid ss 102.3, 102.5, 102.7.

77 Williams, above n 34, 220.

78 Gilbert and Tobin Centre of Public Law, *Submission 22*. Section 102.1(1A)(c) of the *Criminal Code* provides that an organisation advocates the doing of a terrorist act if it ‘directly praises the doing of a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment that the person might suffer) to engage in a terrorist act’. The notion of proscribing speech based upon a reaction of someone who suffers from a mental impairment is ‘extraordinary’ and a ‘radical departure from the normal, accepted legal standard of a “reasonable person”’: Williams, above n 34, 220.

79 *Monis v The Queen* (2013) 249 CLR 92.

- the ‘offensiveness’ standard is not sufficient to justify a law that criminalises political speech.⁸⁰

3.56 The Centre for Comparative Constitutional Studies suggested that s 471.12 should include ‘clear exceptions for communication pertaining to matters that are in the public interest in order to protect core political speech’ and that offensiveness should not be used as a criterion of the offence, leaving only ‘menacing’ and ‘harassing’.⁸¹ Alternatively, the provision could specify matters that the court must consider when determining whether the communication was offensive.⁸²

Other criminal laws

3.57 Many other *Criminal Code* provisions potentially engage with freedom of speech, including those creating offences in relation to providing false or misleading information or documents;⁸³ distributing child pornography material; and counselling the committing of suicide.⁸⁴

Incitement and conspiracy laws

3.58 The concepts of incitement and conspiracy have a long history in the common law. Traditional freedom of speech has never protected speech inciting the commission of a crime.

3.59 Under s 11.4 of the *Criminal Code* (Cth) a person who urges the commission of an offence is guilty of the offence of incitement. Incitement may relate to any offence against a law of the Commonwealth and is not limited to serious offences, such as those involving violence. Therefore, a person may commit the offence of incitement by urging others to engage in peaceful protest by trespassing on prohibited Commonwealth land.⁸⁵

3.60 Similarly, a person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence.⁸⁶

3.61 The Law Council observed that various features of the terrorism offences in div 101 of the *Criminal Code*—including the preparatory nature of some offences, and the broad and ambiguously defined terms on which the offences are based, when combined with the offence of incitement may ‘impact on freedom of speech more than

80 Cf *Racial Discrimination Act 1975* (Cth) s 18C. Unlike s 471.12, s 18C does not create a criminal offence and is subject to a number of broadly defined defences: Centre for Comparative Constitutional Studies, *Submission 58*.

81 Centre for Comparative Constitutional Studies, *Submission 58*.

82 Ibid. Cf *Criminal Code* (Cth) s 473.4.

83 *Criminal Code* (Cth) ss 136, 137.1, 137.2.

84 Ibid ss 471.12, 474.15, 474.17, 474.19, 474.22, 474.29A.

85 An offence under *Crimes Act 1914* (Cth) s 89. For the person to be guilty, the person must intend that the offence incited be committed: *Criminal Code* (Cth) s 11.4(2).

86 *Criminal Code* (Cth) s 11.5.

is necessary to achieve the putative objective and is not specific enough to avoid capturing less serious conduct'.⁸⁷

Secrecy laws

3.62 The secrecy of government information has a long history.⁸⁸ The notion that the activities of government should be secret goes back to a period when monarchs were motivated by a desire to protect themselves against their rivals and official information was considered the property of the Crown, to be disclosed or withheld at will. Two principal rationales for secrecy in the modern context are the Westminster system of government and the need to protect national security.⁸⁹

3.63 The exposure of state secrets may be seen as falling outside the scope of traditional freedom of speech. However, while the conventions of the Westminster system were once seen to demand official secrecy, secrecy laws may need to be reconsidered in light of principles of open government and accountability—and modern conceptions of the right to freedom of speech.

3.64 Many Commonwealth laws contain provisions that impose secrecy or confidentiality obligations on individuals or bodies in respect of Commonwealth information. Statutory secrecy provisions typically exhibit four common elements:

- protection of particular kinds of information;
- regulation of particular persons;
- prohibition of certain kinds of activities in relation to the information; and
- exceptions and defences which set out the circumstances in which a person does not infringe a secrecy provision.

3.65 In its 2009 report *Secrecy Laws and Open Government in Australia* (ALRC Report 112), the ALRC identified 506 secrecy provisions in 176 pieces of primary and subordinate legislation.⁹⁰

3.66 Provisions in Commonwealth legislation that expressly impose criminal sanctions for breach of secrecy or confidentiality obligations include, for example:

- *Crimes Act 1914* (Cth) s 70, 79;
- *Aboriginal and Torres Strait Islander Act 2005* (Cth) ss 191, 193S, 200A;
- *Aged Care Act 1997* (Cth) ss 86-2, 86-5, 86-6, 86-7;
- *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ss 121, 122, 123, 127, 128(5) and (10), 130, 131(4);

87 Law Council of Australia, *Submission 75*.

88 See Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) ch 2.

89 See *Ibid* [2.4].

90 *Ibid* Appendix 4.

- *Australian Border Force Act 2015* (Cth) s 24, pt 6;
- *Australian Prudential Regulation Authority Act 1998* (Cth) s 56;
- *Australian Securities and Investments Commission Act 2001* (Cth) s 127(4EA), (4F); and
- *Australian Security Intelligence Organisation Act 1979* (Cth) ss 18, 34ZS(1) and (2), 35P(1) and (2), 81, 92(1) and (1A).

3.67 Other provisions impose secrecy or confidentiality obligations but do not expressly impose criminal sanctions. Such provisions create a ‘duty not to disclose’, which may attract criminal sanctions under s 70 of the *Crimes Act 1914* (Cth). These include, for example:

- *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 189B, 251(3), 324R, 341R, 390R;
- *Export Finance and Insurance Corporation Act 1991* (Cth) s 87(4); and
- *Food Standards Australia New Zealand Act 1991* (Cth) s 114.

3.68 The ALRC recommended, among other things, that the general secrecy offences in ss 70 and 79 of the *Crimes Act* should be repealed and replaced by new offences that require that the disclosure of Commonwealth information did, or was reasonably likely to, or intended to cause harm.⁹¹

3.69 The ALRC concluded that specific secrecy offences are only warranted where they are ‘necessary and proportionate to the protection of essential public interests of sufficient importance to justify criminal sanctions’ and should include an express requirement that the unauthorised disclosure caused, or was likely or intended to cause, harm to an identified essential public interest.⁹² These recommendations have not been implemented.

3.70 PIAC endorsed, in the context of freedom of speech, the ALRC’s earlier recommendations with regard to reform of secrecy offences and observed:

Blanket restrictions on the dissemination of information regarding government activity should generally be viewed with a critical eye. Australia’s constitutionally-mandated system of democratic, responsible government requires transparency and openness and, as such, any such restrictions are only justifiable if they are tightly defined and closely tied to a legitimate purpose.⁹³

91 Ibid recs 4–1, 5–1.

92 Ibid recs 8–1, 8–2.

93 Public Interest Advocacy Centre, *Submission 55*.

Australian Border Force Act

3.71 The scope of secrecy and disclosure provisions enacted in the *Australian Border Force Act 2015* (Cth) have been criticised by the Law Council because the provisions ‘may discourage legitimate whistle-blowers from speaking out publicly’.⁹⁴

3.72 Part 6 of the *Australian Border Force Act* makes it an offence to record or disclose any information obtained by a person in their capacity as an entrusted person, punishable by imprisonment for 2 years.⁹⁵ An ‘entrusted person’ is defined to include the secretary, the Australian Border Force Commissioner and any Immigration and Border Protection Department worker.⁹⁶ The latter category of person may, by written determination of the secretary or Commission, include any consultant, contractor or service provider—such as a doctor or welfare worker in an offshore immigration detention centre.⁹⁷

3.73 Sections 42–49 of the Act provide an extensive range of exceptions. In summary, however, unauthorised disclosure is only permissible if it is ‘necessary to prevent or lessen a serious threat to the life or health of an individual’ and the disclosure is ‘for the purposes of preventing or lessening that threat’.⁹⁸

3.74 The Law Council submitted that the relevant provisions of the Bill should be amended to include a public interest disclosure exception; and that the secrecy offences should include an express requirement that, for an offence to be committed, the unauthorised disclosure caused, or was likely or intended to cause, harm to an identified essential public interest.⁹⁹

ASIO Act secrecy provisions

3.75 Particular secrecy provisions have been subject to criticism for interfering with freedom of speech or expression including, for example, in the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act), where secrecy offences have been extended to apply to the unauthorised disclosure of information relating to a ‘special intelligence operation’.¹⁰⁰

3.76 Section 35P(1) of the ASIO Act provides that a person commits an offence if the person discloses information; and the information relates to a ‘special intelligence

94 Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Customs and Other Legislation Amendment (Australian Border Force) Bill 2015 and the Australian Border Force Bill 2015*, 2015.

95 *Australian Border Force Act 2015* (Cth) s 24.

96 *Ibid* s 5.

97 *Ibid* ss 4, 5.

98 *Ibid* s 48.

99 Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Customs and Other Legislation Amendment (Australian Border Force) Bill 2015 and the Australian Border Force Bill 2015*, 2015. This was said to be consistent with the ALRC’s conclusion that, where no harm is likely, other responses to the unauthorised disclosure of Commonwealth information are appropriate—including the imposition of administrative sanctions or the pursuit of contractual or general law remedies: Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) [8.6].

100 *Australian Security Intelligence Organisation Act 1979* (Cth) s 35P.

operation’.¹⁰¹ Recklessness is the fault element in relation to whether the information relates to a special intelligence operation.

3.77 Section 35P(2) provides an aggravated offence where the person intends to endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation; or the disclosure of the information will endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation.

3.78 The Explanatory Memorandum stated that these offences are ‘necessary to protect persons participating in a [special intelligence operation] and to ensure the integrity of operations, by creating a deterrent to unauthorised disclosures, which may place at risk the safety of participants or the effective conduct of the operation’.¹⁰²

3.79 The Human Rights Committee examined provisions of the ASIO Act in its consideration of the National Security Legislation Amendment Bill (No. 1) 2014, and concluded that these offence provisions had not been shown to be a reasonable, necessary and proportionate limitation on the right to freedom of expression.¹⁰³ The provisions were incompatible with the right to freedom of expression because they appeared to impose disproportionate limits on that right.¹⁰⁴

3.80 While the statement of compatibility highlighted the existence of defences and safeguards, the Human Rights Committee observed that because s 35P(1) ‘applies to conduct which is done recklessly rather than intentionally, a journalist could be found guilty of an offence even though they did not intentionally disclose information about a [special intelligence operation]’.¹⁰⁵

As [special intelligence operations] can cover virtually all of ASIO’s activities, the committee considers that these offences could discourage journalists from legitimate reporting of ASIO’s activities for fear of falling foul of this offence provision. This concern is compounded by the fact that, without a direct confirmation from ASIO, it would be difficult for a journalist to accurately determine whether conduct by ASIO is pursuant to a [special intelligence operation] or other intelligence gathering power.¹⁰⁶

3.81 The Scrutiny of Bills Committee also considered these provisions and criticised the broad drafting:

First, they are not limited to initial disclosures of information relating to a [special intelligence operation] but cover all subsequent disclosures (even, it would seem, if the information is in the public domain). In addition, these new offences as currently drafted may apply to a wide range of people including whistleblowers and journalists.

101 ‘Special intelligence operation’ is defined in *Ibid* s 4.

102 Explanatory Memorandum, National Security Legislation Amendment Bill (No. 1) 2014 (Cth) [553].

103 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Sixteenth Report of the 44th Parliament* (November 2014) [2.107].

104 *Ibid* [2.112].

105 *Ibid* [2.107].

106 *Ibid*.

Second, the primary offence (unlike the aggravated version) is not tied to the underlying purposes of the criminalisation of disclosure. This means that the offence (under subsection 35P(1)) could be committed even if unlawful conduct in no way jeopardises the integrity of operations or operatives.¹⁰⁷

3.82 The Scrutiny of Bills Committee added that its concerns were heightened by the fact that the application of the offences depends on whether or not the information relates to a special intelligence operation, which in turn depends on an authorisation process which is internal to ASIO.¹⁰⁸

3.83 The Attorney-General provided a detailed response to these concerns, restating that the wrongdoing to which the offences are directed is the harm inherent in the disclosure of highly sensitive intelligence-related information; and that the provisions were ‘necessary and proportionate to the legitimate objective to which they are directed’. For example:

- the offences need to be capable of covering information already in the public domain because risks associated with disclosure of information about a special intelligence operation (including its existence, methodology or participants) are just as significant in relation to a subsequent disclosure as they are in relation to an initial disclosure;
- the offences need to be capable of applying to all persons, consistent with avoiding the significant risks arising from disclosure, and it would be contrary to the criminal law policy of the Commonwealth to create specific exceptions for journalists from legal obligations to which all other Australian persons and bodies are subject; and
- the policy justification for adopting recklessness as the applicable fault element is to place an onus on persons contemplating making a public disclosure to consider whether or not their actions would be capable of justification to this standard.¹⁰⁹

3.84 Section 35P of the ASIO Act was enacted unchanged.¹¹⁰ In December 2014, the Prime Minister announced that the newly appointed Independent National Security Legislation Monitor would review any impact on journalists of the provisions.¹¹¹

107 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Twelfth Report of 2014* (September 2014) 627–8.

108 Ibid 628.

109 See Ibid 628–34.

110 In response to recommendations made by the Parliamentary Joint Committee on Intelligence and Security, the Government amended the Explanatory Memorandum to the Bill to refer to the need for the Commonwealth Director of Public Prosecutions to consider the public interest in the commencement or continuation of a prosecution: Revised Explanatory Memorandum, National Security Legislation Amendment Bill (No. 1) 2014 (Cth) [582].

111 Prime Minister of Australia, the Hon Tony Abbott MP, ‘Appointment of Independent National Security Legislation Monitor’ (Press Release, 7 December 2014).

3.85 Stakeholders in this ALRC Inquiry expressed concerns about the secrecy provisions of the ASIO Act.¹¹² The Joint Media Organisations expressed a range of concerns about s 35P, including that it

- criminalises journalists for undertaking and discharging their role in a modern democratic society;
- does not include an exception for journalists and the media for public interest reporting; and
- further erodes the already inadequate protections for whistle-blowing and has a chilling effect on sources.¹¹³

3.86 Free TV Australia expressed concern that the offences remain capable of capturing ‘the activities of journalists reporting in the public interest’. Section 35P, it said, appears to capture circumstances where a person does not know whether the relevant information relates to an intelligence operation; or knows that the information relates to an intelligence operation but does not know it is a special intelligence operation.¹¹⁴ Free TV Australia wrote that problems with the provisions include that:

- It is unclear whether [special intelligence operation] status can be conferred retrospectively;
- It appears to apply regardless of who the disclosure is made to, for example, if a journalist discloses the material to his/her editor and the story is subsequently not published, the offence provision may still apply;
- If a number of disclosures are made in the course of preparing a story, it appears to apply to all disclosures (for example, it could apply to the source, the journalist and the editor, even if the story is not ultimately published);
- It applies to whistle-blowers, further discouraging whistleblowing.¹¹⁵

3.87 The Law Council stated that s 35P may not include sufficient safeguards for public interest disclosures, ‘suggesting a disproportionate infringement on freedom of speech’.¹¹⁶ The Human Rights Law Centre submitted that the offences in s 35P ‘disproportionately and unjustifiably limit freedom of speech and expression and should be repealed’.¹¹⁷

112 Law Council of Australia, *Submission 75*; Joint Media Organisations, *Submission 70*; Public Interest Advocacy Centre, *Submission 55*; Free TV Australia, *Submission 48*; Human Rights Law Centre, *Submission 39*; UNSW Law Society, *Submission 19*. See also submissions to the Independent National Security Legislation Monitor’s current review of s 35P of the ASIO Act: Australian Government Department of the Prime Minister and Cabinet, *Independent National Security Legislation Monitor* <<http://www.dpmc.gov.au/pmc/about-pmc/core-priorities/independent-national-security-legislation-monitor>>.

113 Joint Media Organisations, *Submission 70*.

114 Free TV Australia observed that the impact of s 35P may be ‘amplified in the context that information relating to SIOs is unlikely to be readily identifiable as such’, so that journalists reporting on intelligence and national security matters will not necessarily know whether or not information ‘relates to’ a special intelligence operation or not: Free TV Australia, *Submission 48*.

115 *Ibid.*

116 Law Council of Australia, *Submission 75*.

117 Human Rights Law Centre, *Submission 39*.

3.88 PIAC observed that the ‘natural and ordinary meaning of the provision suggests a broad scope: it could apply, for example, to a journalist publishing information in circumstances where there may well be an overriding public interest to do so’. PIAC recommended that s 35P be repealed.¹¹⁸

3.89 The UNSW Law Society stated that the lesser offence under s 35P(1) ‘unnecessarily restricts the freedom of communication’ because there is ‘no public interest defence for unauthorised disclosure, which is likely to restrict legitimate scrutiny of security agencies’,¹¹⁹ and because there is no harm element.

The prosecution has to prove that the accused was reckless as to whether the information related to a [special intelligence operation], and consequently a person can face up to 5 years imprisonment for disclosure that does not endanger lives or prejudice the [special intelligence operation].¹²⁰

Other secrecy provisions

3.90 Other provisions identified as raising freedom of speech concerns included:

- *Criminal Code* s 105.41, which provides for a range of offences in relation to disclosing that a person is in preventative detention;¹²¹
- *Criminal Code* s 119.7, which prohibits the advertising or publishing of material which discloses the manner in which someone might be recruited to become a foreign fighter;¹²²
- *Crimes Act* s 3ZZHA, which prohibits the unauthorised disclosure of information in relation to the application for or execution of a delayed notification search warrant;¹²³ and
- *Crimes Act* ss 15HK, 15HL, which prohibit the disclosure of information relating to a ‘controlled operation’.¹²⁴

Public interest disclosure

3.91 The *Public Interest Disclosure Act 2013* (Cth) is intended to encourage and facilitate the making of public interest disclosures by public officials and, in some circumstances, provides public officials with protection from liability under secrecy laws.

3.92 The Joint Media Organisations criticised this protection as inadequate, a problem that is ‘further exacerbated when laws, such as the three tranches of 2014–2015 national security laws, not only provide no protection but criminalise information

118 Public Interest Advocacy Centre, *Submission 55*.

119 However, s 35P(3) does provide for disclosure to the Inspector-General of Intelligence and Security in certain circumstances.

120 UNSW Law Society, *Submission 19*.

121 Australian Lawyers for Human Rights, *Submission 43*.

122 Joint Media Organisations, *Submission 70*; Free TV Australia, *Submission 48*.

123 Joint Media Organisations, *Submission 70*; Free TV Australia, *Submission 48*.

124 Joint Media Organisations, *Submission 70*.

disclosure (external or otherwise)—and therefore unjustifiably interfere with freedom of speech'.¹²⁵

Contempt laws

3.93 The law of contempt of court is a regime of substantive and procedural rules, developed primarily within the common law, whereby persons who engage in conduct tending to interfere with the administration of justice may be subjected to legal sanctions.¹²⁶ These rules may be seen as interfering with freedom of speech.

3.94 In addition, s 195 of the *Evidence Act 1995* (Cth) provides that a person must not, without the express permission of a court, print or publish any question that the court has disallowed nor any question in respect of which the court has refused to give leave under pt 3.7 (in relation to credibility). This is a strict liability offence.

3.95 A range of other legislative provisions protect the processes of tribunals, commissions of inquiry and regulators. These laws interfere with freedom of speech by, for example, making it an offence to use insulting language towards public officials or to interrupt proceedings, and include:

- *Administrative Appeals Tribunal Act 1975* (Cth) s 63;
- *Bankruptcy Act 1966* (Cth) s 264E;
- *Copyright Act 1968* (Cth) s 173;
- *Defence Act 1903* (Cth) s 89;
- *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 119;
- *Fair Work Act 2009* (Cth) s 674;
- *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 61;
- *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 94;
- *Royal Commissions Act 1902* (Cth) s 6O; and
- *Veterans' Entitlements Act 1986* (Cth) s 170.

3.96 Some of these same laws also make it an offence to use words that are false and defamatory of a body or its members; or words calculated to bring a member into disrepute.¹²⁷

125 Ibid.

126 Thomson Reuters, *The Laws of Australia* [10.11.140].

127 *Bankruptcy Act 1966* (Cth) s 264E; *Fair Work Act 2009* (Cth) s 674; *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 61; *Royal Commissions Act 1902* (Cth) s 6O; *Veterans' Entitlements Act 1986* (Cth) s 170.

3.97 The Centre for Comparative Constitutional Studies submitted that such laws unjustifiably interfere with freedom of speech—and may in some cases be unconstitutional—having regard to

- the content-based nature of the laws—that is, the laws regulate speech because of the harm caused by the communication of a message rather than being directed to the ‘time, place and manner’ in which speech occurs;
- the provisions directly target criticism of public officers engaged in performing public functions, affecting ‘core political speech’; and where
- less restrictive means are available to achieve the ends pursued by these laws, such as existing defamation law and powers to exclude individuals from proceedings.¹²⁸

3.98 The Human Rights Committee in its consideration of the Veterans’ Affairs Legislation Amendment (Mental Health and Other Measures) Bill 2014 requested further advice from the Minister for Veterans’ Affairs as to the compatibility of s 170 with the right to freedom of opinion and expression. In particular, the Committee asked whether the measure was rationally connected to its stated objective; and proportionate to achieving that objective.¹²⁹

3.99 The Minister responded that the provision was likely to be effective in achieving the objective of protecting the Board and its hearings because it would act as a deterrent to inappropriate and disruptive behaviour. As to the question of proportionality, it was noted that, on occasion, the Board operates from non-secure, non-government premises, and protections are required to ensure the safety and proper function of the Board and its members.¹³⁰

Anti-discrimination laws

3.100 Commonwealth anti-discrimination laws may interfere with freedom of speech by making unlawful certain forms of discrimination, intimidation and harassment that can be manifested in speech or other forms of expression. At the same time, such laws may protect freedom of speech, by preventing a person from being victimised or discriminated against by reason of expressing, for example, certain political or religious views.

3.101 The *Racial Discrimination Act 1975* (Cth) (RDA) makes unlawful offensive behaviour because of race, colour or national or ethnic origin.¹³¹ The *Sex*

128 Centre for Comparative Constitutional Studies, *Submission 58*.

129 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Ninth Report of the 44th Parliament* (July 2014) 111.

130 *Ibid* 111–112. However, the Board ‘would not use these provisions lightly’ as it would require an extreme event to warrant consideration of applying the contempt provisions and the decision to prosecute would be undertaken by the Commonwealth Director of Public Prosecutions on referral from the police.

131 *Racial Discrimination Act 1975* (Cth) s 18C. See also, exemptions in s 18D.

Discrimination Act 1984 (Cth) makes sexual harassment unlawful in a range of employment and other contexts.¹³²

3.102 The *Age Discrimination Act 2004* (Cth) and *Disability Discrimination Act 1992* (Cth) make it an offence to advertise an intention to engage in unlawful age and disability discrimination.¹³³ Each of these Acts also makes it an offence to victimise a person because the person takes anti-discrimination action.¹³⁴

3.103 More generally, these Acts, together with the *Australian Human Rights Commission Act 1986* (Cth), prohibit breaches of human rights and discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, age, medical record, criminal record, marital status, impairment, disability, nationality, sexual preference and trade union activity. The conduct prohibited may include speech or other forms of expression.

3.104 Similarly, the general protections provisions of the *Fair Work Act 2009* (Cth) provide protection from workplace discrimination because of a person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.¹³⁵

Racial Discrimination Act

3.105 There has been much debate over the scope of s 18C of the RDA. Section 18C provides that it is unlawful to 'do an act', otherwise than in private, if:

- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
- (b) 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.

3.106 Importantly, s 18C does not create a criminal offence. Under s 46P of the *Australian Human Rights Commission Act 1986* (Cth), a person may make a complaint about an unlawful act to the Australian Human Rights Commission. Where the complaint is not resolved, an application may be made to the Federal Court or the Federal Circuit Court. If the court is satisfied that there has been unlawful discrimination, the court may make orders, including for compensation.¹³⁶

3.107 Section 18D provides exemptions. It states that s 18C does not render unlawful anything said or done reasonably and in good faith for various purposes, including artistic work and reporting on events or matters of public interest.¹³⁷

132 *Sex Discrimination Act 1984* (Cth) pt II, div 3.

133 *Age Discrimination Act 2004* (Cth) s 50; *Disability Discrimination Act 1992* (Cth) s 44.

134 *Racial Discrimination Act 1975* (Cth) s 27(2); *Sex Discrimination Act 1984* (Cth) s 94; *Age Discrimination Act 2004* (Cth) s 51; *Disability Discrimination Act 1992* (Cth) s 42.

135 *Fair Work Act 2009* (Cth) s 351. See also civil remedy provisions concerning coercion, misrepresentations and inducements in relation to industrial activity, and the offence of intimidation: *Ibid* ss 348–350, 676.

136 *Australian Human Rights Commission Act 1986* (Cth) s 46PO.

137 These sections were inserted into the RDA in 1995 by the *Racial Hatred Act 1995* (Cth).

3.108 On 25 March 2014, the Attorney-General, Senator the Hon George Brandis QC, announced that the Government proposed amending the RDA to repeal s 18C and insert a new section prohibiting vilification and intimidation on the basis of race, colour or national or ethnic origin.¹³⁸ This announcement followed controversy about s 18C occasioned by the decision of *Eatoock v Bolt*.¹³⁹ On 6 August 2014, after consultation on an exposure draft Freedom of Speech (Repeal of s 18C) Bill, the Prime Minister, the Hon Tony Abbott MP, announced that the proposed changes to s 18C had been taken ‘off the table’.¹⁴⁰

3.109 A number of submissions to this ALRC Inquiry presented views on whether s 18C unjustifiably interferes with freedom of speech. Some stakeholders raised concerns about the breadth of s 18C.¹⁴¹

3.110 Professor Patrick Parkinson AM observed that s 18C is broader in its terms than art 20 of the ICCPR, which provides that any ‘advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’.¹⁴² In his view, s 18C should be similarly confined and not extend to matters likely only to offend.¹⁴³

3.111 FamilyVoice Australia submitted that s 18C does not fall within the ‘justifiable limitations of protecting personal reputation, national security, public order, public health or public morals’ set out in the ICCPR and, therefore, constitutes an unjustifiable limitation on freedom of speech.¹⁴⁴

3.112 The Church and Nation Committee submitted that the state ‘cannot legislate against offence and insult without doing serious damage to wide-ranging freedom of speech’.¹⁴⁵ The Wilberforce Foundation stated that s 18C is flawed because it ‘essentially makes speech and acts unlawful as a result of a subjective response of another or a group or others’. The flaw, it said, is compounded by s 18D, which does not make truth a defence.¹⁴⁶

3.113 Others submitted that the scope of the provision does strike an appropriate balance between freedom of speech and other interests, including the right to be free

138 See Australian Government, Attorney-General’s Department, *Amendments to the Racial Discrimination Act 1975* <www.ag.gov.au/consultations>; Exposure Draft, Freedom of Speech (Repeal of S 18C) Bill 2014.

139 *Eatoock v Bolt* [2011] 197 FCR 261.

140 Emma Griffiths, *Government Backtracks on Racial Discrimination Act 18C Changes; Pushes Ahead with Tough Security Laws* Australian Broadcasting Corporation <www.abc.net.au>. Submissions on the exposure draft Freedom of Speech (Repeal of s 18C) Bill are not made available on the Attorney-General’s Department’s website.

141 FamilyVoice Australia, *Submission 73*; Wilberforce Foundation, *Submission 29*; Church and Nation Committee, Presbyterian Church of Victoria, *Submission 26*; P Parkinson, *Submission 9*.

142 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

143 P Parkinson, *Submission 9*.

144 FamilyVoice Australia, *Submission 73*.

145 Church and Nation Committee, Presbyterian Church of Victoria, *Submission 26*.

146 Wilberforce Foundation, *Submission 29*.

from racial discrimination,¹⁴⁷ or should be extended to other forms of speech.¹⁴⁸ For example, the Law Society of NSW Young Lawyers (NSW Young Lawyers) submitted that s 18C of the RDA, as it currently stands, ‘finely balances fair and accurate reporting and fair comment with discrimination protections’.

The ‘reasonably likely’ test provided for in section 18C allows for an objective assessment to be made, and ensures that the threshold for racial vilification is appropriate. Section 18D of the RDA provides adequate safeguards to protect freedom of speech by imposing a list of exemptions for ‘anything said or done reasonably and in good faith’. The Australian Courts have historically interpreted sections 18C and 18D in a fair and reasonable manner, and with the public interest in mind.¹⁴⁹

3.114 NSW Young Lawyers considered that, rather than going too far, s 18C only limits freedom of speech to the extent required to ensure that communities are protected from racial vilification:

Racial vilification can have a silencing effect on those who are vilified. In the absence of a federal bill of rights and constitutional guarantees of human rights, the need to strike a clear and equitable balance between the right to free speech and the right to be free from vilification is obviously all the more pressing. Protection from racial vilification is key to the protection that underpins our vibrant and free democracy, and therefore its abolition cannot be seen as a reasonable or proportionate response to ‘restrictions’ on freedom of speech.¹⁵⁰

3.115 PIAC stated that s 18C is an example of a justifiable limitation of free speech, because the need to protect against harmful speech is clearly contemplated in international law.¹⁵¹ It observed that, in relation to racial vilification, ‘the law must strike a balance between permitting the expression of views that might be disagreeable or worse, but draw a line to prohibit speech that causes unreasonable harm to others’. One of the key motivations for PIAC’s opposition to the proposed rollback of restrictions on racist speech, in 2014, was said to be evidence of the wide-ranging impact of racially motivated hate speech on PIAC’s clients.¹⁵²

3.116 Jobwatch stated that s 18C should remain unchanged as it does not ‘unnecessarily restrict free speech, restrict fair comment or reporting of matters that are

147 Law Society of NSW Young Lawyers, *Submission 69*; National Association of Community Legal Centres, *Submission 66*; Public Interest Advocacy Centre, *Submission 55*; Arts Law Centre of Australia, *Submission 50*; Jobwatch, *Submission 46*; Kingsford Legal Centre, *Submission 21*; UNSW Law Society, *Submission 19*.

148 The NSW Gay and Lesbian Rights Lobby submitted that protection similar to that under the RDA should be available to LGBTI people under the *Sex Discrimination Act 1984* (Cth): NSW Gay and Lesbian Rights Lobby, *Submission 47*.

149 Law Society of NSW Young Lawyers, *Submission 69*.

150 *Ibid.*

151 Public Interest Advocacy Centre, *Submission 55*. In addition to art 20 of the ICCPR, art 4(a) of the *Convention on the Elimination of Racial Discrimination* states that signatory states should declare an offence ‘the dissemination of ideas based on racial superiority or hatred and declare an offence all other propaganda activities promoting and inciting racial discrimination’: *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969). In this regard, art 4 is not fully implemented because it does not create a criminal offence of racial incitement: Public Interest Advocacy Centre, *Submission 55*.

152 Public Interest Advocacy Centre, *Submission 55*.

in the public interest'.¹⁵³ The Law Council observed that, while there is a case for amendment of the current provisions of the RDA 'from a civil and political rights perspective', there is also 'a strong view among a number of constituent bodies of the Law Council that the balance was correctly struck in the existing legislation'.¹⁵⁴

3.117 Australian racial vilification laws have long been the subject of academic and other criticism. For example, in 2004, Dan Meagher found Commonwealth, state and territory laws, including s 18C of the RDA, lacked 'sufficient precision and clarity in key respects'. He stated that, as a consequence, an incoherent body of case law has developed, where too much is left open to the decision maker in each individual case.¹⁵⁵

3.118 Meagher concluded that the primary goal of racial vilification laws in Australia—to regulate racial vilification without curbing legitimate public communication—is compromised by this lack of precision and clarity.¹⁵⁶ In relation to s 18C specifically, he wrote that the critical problem is that its key words and phrases are 'sufficiently imprecise in both their definition and application as to make the putative legal standards they embody largely devoid of any core and ascertainable content'.¹⁵⁷

3.119 Meagher highlighted, in particular, that the meaning of the words 'offend' and 'insult' in s 18C of the RDA

is so open-ended as to make any practical assessment by judges and administrators as to when conduct crosses this harm threshold little more than an intuitive and necessarily subjective value judgement. The fact that an act must be 'reasonably likely' to cross this harm threshold, though importing an objective test of liability, does not cure the definitional indeterminacy of these words that a decision-maker must objectively apply.¹⁵⁸

3.120 More recently, Darryn Jensen has written that, under s18C, the reasonableness requirement works to demand that the court make what is essentially a 'political decision' about the boundaries of permissible speech. He highlights that, in contrast, Tasmanian anti-vilification legislation avoids this particular problem by confining the question to whether the speaker acted honestly in the pursuit of a permissible purpose.¹⁵⁹

3.121 Other common law countries have anti-vilification legislation. In New Zealand, the *Human Rights Act 1993* (NZ) makes it unlawful to use words in a public place which are 'threatening, abusive, or insulting' and 'likely to excite hostility against or

153 Jobwatch, *Submission 46*.

154 Law Council of Australia, *Submission 75*.

155 Dan Meagher, 'So Far So Good? A Critical Evaluation of Racial Vilification Laws in Australia' [2004] *Federal Law Review* 225, 227.

156 *Ibid* 228.

157 See, eg, Meagher, above n 155.

158 *Ibid* 231.

159 Darryn Jensen, 'The Battlelines of Interpretation in Racial Vilification' (2011) 27 *Policy* 14, 19; *Anti-Discrimination Act 1998* (Tas) ss 19, 55.

bring in contempt any group of persons ... on the ground of the colour, race, or ethnic or national origins of that group of persons'.¹⁶⁰

3.122 In the United Kingdom, it is an offence for a person to 'use threatening, abusive or insulting words or behaviour' if the person 'intends thereby to stir up racial hatred' or, having regard to all the circumstances, 'racial hatred is likely to be stirred up thereby'.¹⁶¹

3.123 The New Zealand and UK provisions seem narrower than the Australian provision—leaving aside the operation of the exemptions in s 18D. For example, the provisions do not cover offensiveness, and require that the person provoke hostility or hatred against a group of persons defined by race or ethnicity.

3.124 Before 2013, the *Canadian Human Rights Act 1985* (Can) prohibited the sending of messages 'likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination'.¹⁶²

3.125 The repeal of this provision, introduced by a private members' bill and subjected to a conscience vote,¹⁶³ was controversial.¹⁶⁴ Repeal was justified on a number of grounds, including that the provision conflicted with the 'freedom of thought, belief, opinion and expression' protected by s 2(b) of the *Canadian Charter of Human Rights and Freedom*;¹⁶⁵ and because provisions of criminal law were considered to be the 'best vehicle to prosecute these crimes'.¹⁶⁶

Media, broadcasting and communications laws

3.126 Obscenity laws have a long history in the common law,¹⁶⁷ and censorship of publications dates back to the invention of the printing press.¹⁶⁸

3.127 In Australia, freedom of expression is subject to the restrictions of the classification cooperative scheme for publications, films and computer games implemented through the *Classification (Publications, Films and Computer Games)*

160 *Human Rights Act 1993* (NZ) s 61.

161 *Public Order Act 1986* (UK) s 18(1). While this provision is framed as a criminal offence, proceedings can only occur with the prior consent of the Attorney General: *Ibid* s 27(1).

162 *Canadian Human Rights Act 1985* (Can) s 13 (repealed).

163 Jason Fekete, 'Tories Repeal Sections of the Human Rights Act Banning Hate Speech over Telephone or Internet' *National Post* (Canada), 7 June 2012.

164 Jennifer Lynch, 'Hate Speech: This Debate Is Out of Balance' *Globe and Mail* (Canada), 11 June 2009.

165 Brian Storseth, MP 'Bill C-304 Background' (17 October 2011).

166 Joseph Breaun, 'Repeal Controversial Hate Speech Law, Minister Urges' *National Post* (Canada) 18 June 2011. *Criminal Code 1985* (Can) s 319 provides for an indictable offence applying to anyone who 'by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace'.

167 See *Crowe v Graham* (1968) 121 CLR 375, 391; *Kneller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435, 471. Since 1727, it was an offence under the common law of England and Wales to publish an obscene libel: *R v Curl* (1727) 2 Str 788 (93 ER 849).

168 For example, by Star Chamber ordinances of 1586 and 1637, there were to be no presses in England, save those that were licensed by the Crown, and registered with the Stationers' Company: Garrard Glenn, 'Censorship at Common Law and Under Modern Dispensation' (1933) 82 *University of Pennsylvania Law Review* 114, 116.

Act 1995 (Cth) (Classification Act) and complementary state and territory enforcement legislation.¹⁶⁹

3.128 Under the classification cooperative scheme some publications, films and computer games may be classified as ‘RC’. In addition, s 9A of the *Classification Act* provides that a publication, film or computer game that advocates the doing of a terrorist act must be classified RC. The RC classification category is the highest classification that can be given to media content in Australia. Such content is effectively banned and may not be sold, screened, provided online or otherwise distributed.

3.129 The Law Council observed that s 9A of the *Classification Act* may ‘inadvertently capture genuine political commentary and education materials, and stifle robust public debate on terrorist-related issues’.¹⁷⁰

3.130 The *Broadcasting Services Act 1992 (Cth)* provides for restrictions on online content. The Act sets out provisions in relation to internet content hosted outside Australia, and in relation to content services, including some content available on the internet and mobile services hosted in or provided from Australia.¹⁷¹ Broadly, the scheme places constraints on the types of online content that can be hosted or provided by internet service providers and content service providers. This is expressed in terms of ‘prohibited content’.¹⁷²

3.131 Following the passage of the *Enhancing Online Safety for Children Act 2015 (Cth)*, these provisions, and a new scheme addressed at cyber-bullying material, are to be administered by the Children’s e-Safety Commissioner.

3.132 More generally, the *Broadcasting Services Act* regulates aspects of the ownership and control of media in Australia, including through licensing. These rules can also be characterised as interfering with freedom of expression.

3.133 Other communications laws place restrictions on freedom of speech and expression. For example, the *Do Not Call Register Act 2006 (Cth)*, *Spam Act 2003 (Cth)* and *Telecommunications Act 1997 (Cth)* all place restrictions on various forms of telephone and online marketing. The *Do Not Call Register Act* prohibits the making of unsolicited telemarketing calls and the sending of unsolicited marketing faxes to numbers on the Register (subject to certain exceptions) and, to this extent, may limit the rights of some people to impart information about commercial matters.

169 The *Classification Act* is supplemented by a number of regulations, determinations and other legislative instruments, including the: National Classification Code (May 2005); Guidelines for the Classification of Publications 2005 (Cth); Guidelines for the Classification of Films 2012 (Cth); and Guidelines for the Classification of Computer Games 2012 (Cth).

170 Law Council of Australia, *Submission 75*.

171 *Broadcasting Services Act 1992 (Cth)* schs 5, 7.

172 Schedule 7 defines ‘prohibited’ or ‘potentially prohibited’ content: *Ibid* sch 7 cls 20, 21. Generally, ‘prohibited content’ is content that has been classified by the Classification Board as X 18+ or RC and, in some cases, content classified R 18+ or MA 15+ where the content is not subject to a ‘restricted access system’.

3.134 The Human Rights Committee considered the *Do Not Call Register Act* in its examination of the Telecommunications Legislation Amendment (Consumer Protection) Bill 2013. The Committee sought clarification from the Minister for Broadband, Communications and the Digital Economy as to whether the prohibitions in the Act were compatible with the right to freedom of expression.¹⁷³

3.135 The Minister responded that under art 19(3) of the ICCPR, restrictions on the right to freedom of expression are permitted in limited circumstances, including to secure or promote the rights of others (but only to the extent necessary and proportionate). In this instance, the relevant right was the right to privacy protected by art 17.¹⁷⁴ The Minister observed:

While telemarketing and fax marketing are legitimate methods by which businesses can market their goods and services, the DNCR Act enables individuals to express a preference not to be called by telemarketers or receive marketing faxes. Notably, the DNCR Act does not prohibit the making of telemarketing calls, or the sending of marketing faxes, to a number on the Register where the relevant account-holder or their nominee has provided prior consent.¹⁷⁵

3.136 Australian Lawyers for Human Rights submitted that s 313 of the *Telecommunications Act* unjustifiably limits freedom of speech.¹⁷⁶ This section imposes obligations on telecommunications carriers, carriage service providers and carriage service intermediaries to do their best to prevent telecommunications networks and facilities from being used in the commission of offences against the laws of the Commonwealth or of the states and territories.

3.137 Commonwealth agencies have used s 313 to prevent the continuing operation of online services in breach of Australian law (for example, sites seeking to perpetrate financial fraud). The AFP uses s 313 to block websites which contain child sexual abuse and exploitation material. Questions about how government agencies use this provision to request the disruption of online services were the subject of a report, in June 2015, by the House of Representatives Standing Committee on Infrastructure and Communications.¹⁷⁷ The Committee recommended that the Australian Government adopt whole-of-government guidelines for the use of s 313, proposed by the Department of Communications.¹⁷⁸

3.138 Australian Lawyers for Human Rights suggested that only services established to be involved in serious crimes or that directly incite serious crimes should be covered by s 313. They stated that ‘blocking has resulted in the disruption of thousands of

173 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Tenth Report of 2013* (June 2013).

174 *Ibid.*

175 *Ibid.*

176 Australian Lawyers for Human Rights, *Submission 43*.

177 Parliament of Australia, House of Representatives Standing Committee on Infrastructure and Communications, *Balancing Freedom and Protection: Inquiry into the Use of Subsection 313(3) of the Telecommunications Act 1997 by Government Agencies to Disrupt the Operation of Illegal Online Services*, June 2015.

178 *Ibid* rec 1.

legitimate sites with completely legal content, to the commercial disadvantage and inconvenience of the owners'. They went on to argue that s 313 should be redrafted 'so as to draw a proper balance between the potential infringement of human rights and State interests', and made subject to new accountability and oversight mechanisms.¹⁷⁹

3.139 Finally, a number of stakeholders expressed concern about the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015 (Cth)—including in relation to its implications for journalism and the protection of media sources.¹⁸⁰ In March 2015, the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth) was enacted, including some safeguards applying to the release of metadata that might identify a journalist's source.

Information laws

3.140 In some circumstances, Commonwealth information laws, including the *Privacy Act 1988* (Cth) and *Freedom of Information Act 1982* (Cth) (FOI Act) may operate to interfere with freedom of speech and expression.

3.141 The *Privacy Act* regulates the handling of personal information about individuals by most Australian Government agencies and some private sector organisations, consistently with 13 Australian Privacy Principles. The application of these principles may sometimes limit freedom of speech and expression, because disclosure would breach privacy.

3.142 Free TV stated that the range of privacy-related laws and codes that apply across Commonwealth, state and territory jurisdictions, and at common law, 'collectively operate to limit the ability of the media to report on matters'.¹⁸¹

3.143 While the objectives of the *Freedom of Information Act* include promoting public access to information, the application of the exemptions may sometimes mean that information cannot be released, potentially restricting freedom of speech. Freedom of information has been recognised in international law as an 'integral part' of freedom of expression.¹⁸² For example, the ICCPR defines the right to freedom of expression as including freedom to 'seek' and 'receive' information.¹⁸³

3.144 Free TV identified aspects of the current FOI regime that may stifle 'the media's ability to report on government information in a timely way'. In particular, they identified

- routine delays past the 30 day time frame for decision making on FOI requests from media organisations;

179 Australian Lawyers for Human Rights, *Submission 43*.

180 Australian Privacy Foundation, *Submission 71*; Joint Media Organisations, *Submission 70*; Public Interest Advocacy Centre, *Submission 55*; Free TV Australia, *Submission 48*; Australian Lawyers for Human Rights, *Submission 43*.

181 Free TV Australia, *Submission 48*.

182 P Timmins, *Submission 27*.

183 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(2).

- agencies often advise journalists that an FOI request has been refused because of s 24AA of the FOI Act, which provides that the work would involve a substantial and unreasonable diversion of agency resources; and
- there is no direct right of appeal to the AAT except in the case of decisions made by the Minister or the head of an agency.¹⁸⁴

Intellectual property laws

3.145 Intellectual property laws, including the *Copyright Act 1968* (Cth), *Trade Marks Act 1995* (Cth) and *Designs Act 2003* (Cth) are intended to encourage creativity and innovation and protect businesses that develop original intellectual property by providing limited monopoly privileges.¹⁸⁵

3.146 While the history of intellectual property protection goes back to the 1710 *Statute of Anne*, intellectual property rights can be seen as affecting others' freedom of speech and expression.¹⁸⁶

3.147 A number of stakeholders commented on the impact of copyright law on freedom of expression. The Australian Digital Alliance and Australian Libraries Copyright Committee (ADA and ALCC) observed a 'fundamental tension' between copyright and free speech. The ADA and ALCC submitted that current copyright exceptions unjustifiably interfere with freedom of speech and should be repealed and replaced with a 'fair use' exception¹⁸⁷—as recommended by the ALRC in its 2014 report *Copyright and the Digital Economy*.¹⁸⁸

3.148 Other laws relating to intellectual property place restrictions on freedom of speech and expression, including those relating to the use of national and other symbols. In some cases, the use of certain words and symbols, such as defence emblems and flags, is an offence:

- *Defence Act 1903* (Cth) s 83;
- *Geneva Conventions Act 1957* (Cth);
- *Major Sporting Events (Indicia and Images) Protection Act 2014* (Cth);
- *Olympic Insignia Protection Act 1987* (Cth);

184 Free TV Australia, *Submission 48*. See also Australia's Right To Know, Submission No 24 to Senate Legal and Constitutional Affairs Legislation Committee, *Freedom of Information Amendment (New Arrangements) Bill 2014 [Provisions]* 2014. PIAC also expressed concern about the implications of the Freedom of Information Amendment (New Arrangements) Bill 2014: Public Interest Advocacy Centre, *Submission 55*.

185 Following amendments to the *Copyright Act* by the *Copyright Amendment (Online Infringement) Act 2015* (Cth) owners of copyright may now apply to the Federal Court for an order requiring a carriage service provider to block access to an online location that has the primary purpose of infringing copyright or facilitating the infringement of copyright.

186 1710, 8 Anne c 19.

187 ADA and ALCC, *Submission 61*. See also D Black, *Submission 6*.

188 Australian Law Reform Commission, *Copyright and the Digital Economy*, ALRC Report 122 (2014) rec 1.

- *Protected Symbols Determination 2013* (Cth); and
- *Protection of the Word ‘ANZAC’ Regulations 1921* (Cth).

3.149 The *Tobacco Advertising Prohibition Act 1992* (Cth) and *Tobacco Plain Packaging Act 2011* (Cth), prohibit the advertising of, and regulate the retail packaging and appearance of, tobacco products. The *Therapeutic Goods Act 1989* (Cth) regulates the advertising of therapeutic goods.¹⁸⁹

3.150 In a response to a question from the Human Rights Committee, the Minister for Health stated that, while the *Tobacco Advertising Prohibition Amendment Regulation 2012* (Cth) ‘could be said to engage the right to freedom of expression as it regulates advertising content’, art 19(3) of the ICCPR expressly permits restricting this right where necessary for protecting public health.¹⁹⁰

3.151 The Human Rights Committee also considered the Major Sporting Events (Indicia and Images) Protection Bill 2013 (Cth). The *Major Sporting Events (Indicia and Images) Protection Act 2014* (Cth) provides special protection in relation to the use for commercial purposes of indicia and images connected with certain major sporting events such as Cricket World Cup 2015 and the Gold Coast 2018 Commonwealth Games. In its report on the Bill, the Committee stated that it

accepts that the limitation on freedom of expression is proposed in pursuit of the legitimate objective of promoting or protecting the rights of others (being the right of people to participate in the events in question and the protection of the intellectual property of the event sponsors), and that the proposed restrictions are rationally connected to that objective in seeking to protect the financial interests of event sponsors and investors, and thereby the financial viability of such events.¹⁹¹

3.152 In relation to the proportionality of the restriction, the Human Rights Committee noted that exemptions were provided for the purposes of criticism, review or the provision of information.¹⁹²

Other laws

3.153 Many other Commonwealth laws may be characterised as interfering with freedom of speech and expression.

3.154 The *Competition and Consumer Act 2010* (Cth) places restrictions on engaging in secondary boycotts, including through activist campaigning. A secondary boycott—where a party engages with others in order to hinder or prevent a business from dealing with a third party—is prohibited by s 45D if the conduct would have the effect of causing substantial loss or damage to the business of the third person.

189 *Therapeutic Goods Act 1989* (Cth) ch 5.

190 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Sixth Report of 2012* (October 2012). See also Ch 7.

191 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Sixth Report of the 44th Parliament* (May 2014) [1.93].

192 *Ibid* [1.94].

3.155 The *Charities Act 2014* (Cth) provides that a charity cannot promote or oppose a political party or a candidate for political office.¹⁹³

3.156 The *Commonwealth Electoral Act 1918* (Cth) regulates the printing and publication of electoral advertisements and notices, requirements relating to how-to-vote cards, and prohibits misleading or deceptive publications and canvassing near polling booths.¹⁹⁴

3.157 Many laws impose prohibitions on forms of false, deceptive or misleading statements, including the *Competition and Consumer Act* (Cth) (Australian Consumer Law)¹⁹⁵ and the *Corporations Act 2001* (Cth).¹⁹⁶

3.158 Other laws impose restrictions on the use of certain words or expressions in various contexts. For example:

- *Commonwealth Electoral Act 1918* (Cth) s 129 (restrictions on political party names);
- *Business Names Registration Act 2011* (Cth) ss 27, 28 (restrictions on words that can be used in business names);
- *Banking Act 1959* (Cth) ss 66 and 66A (restrictions on the words ‘bank’, ‘building society’, ‘credit union’ or ‘credit society’); and
- *Corporations Act 2001* (Cth) ss 923A, 923B (restrictions on the use of the words ‘independent’, ‘impartial’ or ‘unbiased’, ‘stockbroker’, ‘sharebroker’ and ‘insurance broker’).

Justifications for encroachments

3.159 It is widely recognised that freedom of speech is not absolute. Even the First Amendment of the *United States Constitution* has been held not to protect all speech: it does not, for example, protect obscene publications or speech inciting imminent lawless action.¹⁹⁷

3.160 The difficulty is always balancing the respective rights or objectives. Barendt stated that it ‘is difficult to draw a line between speech which might appropriately be regulated and speech which in any liberal society should be tolerated’.¹⁹⁸

3.161 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and ‘demonstrably justified in a free and democratic society’.¹⁹⁹

193 *Charities Act 2014* (Cth) ss 5, 11.

194 *Commonwealth Electoral Act 1918* (Cth) pt XXI. See also *Broadcasting Services Act 1992* (Cth) sch 2, cl 3, 3A.

195 *Competition and Consumer Act 2010* (Cth) sch 2, s 18.

196 *Corporations Act 2001* (Cth) ss 1309, 1041E.

197 *Brandenburg v Ohio* 395 US 444 (1969).

198 Barendt, above n 7, 21.

3.162 Some of the principles and criteria that might be applied to help determine whether a law that interferes with freedom of speech is justified, including those under international law, are discussed below. However, it is beyond the practical scope of this Inquiry to determine whether appropriate justification has been advanced for particular laws.²⁰⁰

3.163 The literature on freedom of speech is extensive and there is considerable disagreement about the appropriate scope of the freedom. Professor Adrienne Stone observed that the 'sheer complexity of the problems posed by a guarantee of freedom of expression' makes it unlikely that a single 'theory' or 'set of values' might be appropriate in resolving 'the entire range of freedom of expression problems'.²⁰¹

3.164 In the United States, doctrine on the First Amendment is said to be characterised by a categorical approach, according to which freedom of expression law is dominated by relatively inflexible rules, each with application to a defined category of circumstances.²⁰²

3.165 However, the dominant alternative approach is to use a proportionality test. As discussed in Chapter 1, proportionality is the accepted test for justifying most limitations on rights, and is used in relation to freedom of speech.

3.166 For example, the Human Rights Committee in its examination of legislation, asks whether a limitation is aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is proportionate to that objective.²⁰³ A number of stakeholders expressly endorsed proportionality as a means of assessing justifications for interferences with freedom of speech.²⁰⁴

Legitimate objectives

3.167 Both the common law and international human rights law recognise that freedom of speech can be restricted in order to pursue legitimate objectives such as the protection of reputation and public safety. Many existing restrictions on freedom of speech are a corollary of pursuing other important public or social needs, such as the conduct of fair elections, the proper functioning of markets or the protection of property rights.

199 *Canada Act 1982 c 11 s 1*. See also, *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *New Zealand Bill of Rights Act 1990* (NZ) s 5.

200 See Ch 1.

201 Adrienne Stone, 'The Comparative Constitutional Law of Freedom of Expression' (2010), *University of Melbourne Legal Studies Research Paper*, No 476 21.

202 *Ibid* 8.

203 See Ch 1.

204 Law Council of Australia, *Submission 75*; Centre for Comparative Constitutional Studies, *Submission 58*; Public Interest Advocacy Centre, *Submission 55*; UNSW Law Society, *Submission 19*. FamilyVoice Australia referred to the 'harm principle', the ICCPR and the Siracusa Principles as providing a proper basis for determining whether limitations on freedom of expression are justified: FamilyVoice Australia, *Submission 73*. The harm principle was said to be derived from the work of JS Mill.

3.168 In its consideration of legislation, the Human Rights Committee sometimes simply asks whether a limitation of freedom of speech is aimed at achieving a ‘legitimate objective of promoting or protecting the rights of others’²⁰⁵—a quite open category of limitation. The Centre for Comparative Constitutional Studies agreed that the ‘concept of a legitimate end should encompass a wide range of laws and that only exceptionally would a law be considered not to pursue a legitimate end’.²⁰⁶

3.169 The power of Australian law-makers to enact provisions that restrict freedom of speech is not necessarily constrained by the scope of permissible restrictions on freedom of speech under international human rights law.²⁰⁷ However, in considering how restrictions on freedom of speech may be appropriately justified, one starting point is international human rights law, and the restrictions permitted by the ICCPR.

3.170 The ICCPR states that the exercise of freedom of expression ‘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 (*ordre public*), or of public health or morals.²⁰⁸

3.171 Many of the laws discussed above pursue these objectives. For example, many of the criminal laws—and incitement offences—clearly protect the rights of others, including the right not to be a victim of crime. Some criminal laws, such as counter-terrorism laws, are concerned with the protection of national security or public order.

3.172 The Siracusa Principles define ‘public order’, as used in the ICCPR, as ‘the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded’.²⁰⁹

3.173 Some secrecy laws prohibit the disclosure of information that has the potential to damage national security—such as those in the ASIO Act—or public order. It may be harder to justify secrecy offences where there is no express requirement that the disclosure cause, or be likely to cause, a particular harm.²¹⁰ Arguably, public order is not necessarily engaged where the objective of a secrecy offence is simply to ensure the efficient conduct of government business or to enforce general duties of loyalty and fidelity on employees.

205 See eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Sixth Report of the 44th Parliament* (May 2014) [1.93].

206 Centre for Comparative Constitutional Studies, *Submission 58*.

207 See Ch 1.

208 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(3).

209 United Nations Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985) cl 22. The Siracusa Principles also state that ‘respect for human rights is part of public order’.

210 See, eg, Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) ch 8.

3.174 On the other hand, some regulatory agencies, such as taxation, social security and health agencies, and regulatory and oversight bodies such as corporate regulators, need to strictly control disclosures of sensitive personal and commercial information provided to them by the public. For these agencies, the harm caused by the unauthorised disclosure of this information is not only harm to a person's privacy or commercial interests, but harm to the relationship of trust between the government and individuals which is integral to an effective regulatory or taxation system, and the provision of government services.²¹¹ Avoiding this harm may more easily be seen as implicating 'public order', in the sense used in the ICCPR.

3.175 To the extent that contempt laws may be characterised as limiting freedom of speech, the laws may be justified as protecting the rights or reputations of others, and public order, as protecting tribunal proceedings can be seen as essential to the proper functioning of society. However, a limitation to a human right based upon the reputation of others should not be used to 'protect the state and its officials from public opinion or criticism'.²¹²

3.176 Restrictions on freedom of speech under anti-discrimination laws may also be justified under the ICCPR as necessary to respect the rights or reputations of others, including the right to effective protection against discrimination, as provided by art 26.

3.177 Laws to prevent or restrict dissemination of indecent or classified material, such as the *Classification Act*, may be justified as protecting public health or morals. As discussed above, limitations on unsolicited telemarketing calls contained in the *Do Not Call Register Act* have been justified as protecting privacy; and tobacco advertising prohibitions as protecting public health.

3.178 There remain other laws restricting freedom of speech and expression that do not as obviously fall within the permissible restrictions referred to in art 19 of the ICCPR.

Proportionality and freedom of speech

3.179 Whether all of the laws identified above as potentially interfering with freedom of speech in fact pursue legitimate objectives of sufficient importance to warrant restricting speech may be contested. However, even if a law does pursue such an objective, it will be important to also consider whether the law is suitable, necessary and proportionate.

3.180 In relation to justifications for limiting freedom of expression, the UN Human Rights Committee has stated:

When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken,

211 Ibid [8.145].

212 United Nations Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985) cl 37.

in particular by establishing a direct and immediate connection between the expression and the threat.²¹³

3.181 The UN Human Rights Committee has also observed that the principle of proportionality must take account of the ‘form of expression at issue as well as the means of its dissemination’. For instance, the value placed on ‘uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain’.²¹⁴ This is consistent with the additional protection afforded under Australian common law to political communication.

3.182 The Centre for Comparative Constitutional Studies submitted that in applying the principles of proportionality to limitations on freedom of speech, regard should be had to the following:

- whether the law interfering with freedom of speech is ‘content-neutral’ or ‘content-based’;
- the extent to which the law interferes with freedom of speech including the availability of alternative, less restrictive means; and
- the nature of the affected speech.²¹⁵

3.183 In relation to the first of these criteria, a content-based law aims to address harms caused by the content of the message communicated. Defamation laws, hate speech laws, laws regulating obscenity or pornography, and laws directed at sedition were given as examples of content-based laws.

3.184 In contrast, a content-neutral law is directed towards some other purpose unrelated to the content of expression. Laws directed to the ‘time, place and manner’ in which speech occurs such as laws that regulate protest—by requiring that protest be limited to certain places or times—laws that impose noise controls, or a law that limits the distribution of leaflets directed at preventing litter were given as examples of content-neutral laws.²¹⁶

3.185 The Centre for Comparative Constitutional Studies submitted that content-based laws should, ‘as a general matter, be considered more difficult to justify than content-neutral laws’.²¹⁷ The Centre also submitted that, as a general matter, the more extensive the limitation on speech, the more significant the justification for that limitation must be. Therefore extensive or ‘blanket’ bans on speech in a particular context or of a particular kind, will be more difficult to justify than laws that apply in only some circumstances or in some places. Further, some speech should be regarded as especially valuable. In particular, speech about political matters, in various forms, was

213 United Nations Human Rights Committee, General Comment No 34 (2011) on Article 19 of the ICCPR on Freedoms of Opinion and Expression (CCPR/C/GC/34) [35].

214 Ibid [34].

215 Centre for Comparative Constitutional Studies, *Submission 58*.

216 Ibid.

217 Ibid.

said to require a higher level of protection, and laws that operate to interfere with political speech should require special justification.²¹⁸

Conclusions

3.186 Legislation prohibits, or renders unlawful, speech or expression in many different contexts. However, some of these provisions relate to limitations that have long been recognised by the common law itself, such as obscenity and sedition.

3.187 Numerous Commonwealth laws may be seen as interfering with freedom of speech and expression. There are, for example, more than 500 government secrecy provisions alone.²¹⁹

3.188 In the area of commercial and corporate regulation, a range of intellectual property, media, broadcasting and telecommunications laws restrict the content of publications, broadcasts, advertising and other media products. In workplace relations context, anti-discrimination law, including the general protections provisions of the *Fair Work Act*, prohibit certain forms of speech and expression.

3.189 Some areas of particular concern, as evidenced by parliamentary committee materials and other commentary, are:

- various counter-terrorism offences provided under the *Criminal Code* and, in particular, the offence of advocating terrorism;
- various terrorism-related secrecy offences in the *Criminal Code*, *Crimes Act* and *ASIO Act* and, in particular, that relating to ‘special intelligence operations’; and
- anti-discrimination laws and, in particular, s 18C of the *RDA*.

3.190 Aspects of Australia’s counter-terrorism laws might be reviewed to ensure that the laws do not unjustifiably interfere with freedom of speech.²²⁰ Such a task would fall within the role of the Independent National Security Legislation Monitor (INSLM), who reviews the operation, effectiveness and implications of Australia’s counter-terrorism and national security legislation on an ongoing basis. This role includes considering whether the laws contain appropriate safeguards for protecting the rights of individuals, remain proportionate to any threat of terrorism or threat to national security or both, and remain necessary.²²¹ The Acting INSLM, the Hon Roger Gyles AO QC, announced on 30 March 2015 that his first priority was to ‘review any impact on journalists’ of the operation of s 35P of the *ASIO Act*. The review of s 35P is now current.²²²

218 Ibid.

219 See Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009).

220 Aspects of these laws can also be considered as interfering with freedom of movement or freedom of association, discussed in Chs 5–6.

221 *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1)(b).

222 See Australian Government Department of the Prime Minister and Cabinet, above n 112.

3.191 Anti-discrimination law may also benefit from more thorough review in relation to implications for freedom of speech. In particular, s 18C of the RDA has been the subject of considerable recent controversy. Concerns about the operation of anti-discrimination law in relation to freedom of religion²²³ may also raise related freedom of speech issues.

3.192 There may also be reason to review the range of legislative provisions that protect the processes of tribunals, commissions of inquiry and regulators. As discussed above, these laws may unjustifiably interfere with freedom of speech—and may be unconstitutional—in prohibiting criticism of public officers engaged in performing public functions.

3.193 Finally, the Australian Government should give further consideration to the recommendations of the ALRC in its 2009 report on secrecy laws.²²⁴ In particular, the ALRC recommended that ss 70 and 79(3) of the *Crimes Act* should be repealed and replaced by new offences in the *Criminal Code*.²²⁵ For example, s 70 might be replaced with a new offence requiring that the disclosure of Commonwealth information did, or was reasonably likely to, or intended to:

- damage the security, defence or international relations of the Commonwealth;
- prejudice the prevention, detection, investigation, prosecution or punishment of criminal offences;
- endanger the life or physical safety of any person; or
- prejudice the protection of public safety.²²⁶

223 See Ch 4.

224 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009).

225 *Ibid* rec 4–1.

226 *Ibid* rec 5–1.