
# Australia

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**Country Summary**

Australia lacks explicit constitutional protection for freedom of expression, relying on an implied right linked to representative government. Advocates call for constitutional recognition due to concerns over laws restricting free speech. Defamation law poses a significant challenge for media, with dwindling resources making defense against claims difficult, while the decline of mainstream media has led to increased legal action, impacting press freedom. Online defamation and trolling issues have sparked discussions about online speech regulation. 3 pieces of legislation implemented between 2015 and 2022 have raised concerns about stifling speech and criminalizing journalism: The Racial Discrimination Act's section 18c, the Espionage Act (2018), and the Data Retention Act (2015). The 2019 Australian Federal Police (AFP) raids on journalists highlighted worries about press freedom and whistleblower safeguards. Opaque national security and counter-terrorism laws have fueled anxiety, potentially expanding their application beyond their intent. Suppression orders at state and federal levels affect open justice and expression, sometimes being used to expedite cases, or protect defendants. Proposed Privacy Act amendments raise further concerns about privacy outweighing public interest, potentially impacting investigative journalism and information sharing. Balancing free speech against other societal interests remains contentious in Australia's intricate legal landscape.

## Introduction

The Australian Constitution[38] does not expressly protect freedom of expression. Instead, the Australian high courts at both state and federal levels hold that an implied freedom of expression exists as an indispensable part of representative government enshrined in the Australia Constitution. This implied protection is not always ensured and has led free speech advocates to call for freedom of expression to be enshrined in the Australian constitution. These calls have been especially loud from press freedom advocates, academics, and activists, who argue press freedom has been under attack by successive Australian state and federal governments through the imposition of laws that, in some cases, have the capacity to criminalize journalism, journalists, and the sources journalists rely upon. This will be discussed later in this analysis.

Australia has not yet reached the upper echelons of free speech indexes. Across organizations that evaluate freedom of expression, freedom of speech, and press freedom, Australia lags behind Scandinavian countries, the United States of America, Canada, and its closest neighbor, New Zealand. For example, in the Reporters Without Borders 2023 World Press Freedom Index, Australia ranked 27 out of 180 countries;[39] 11th out of 33 countries on Justitia's 2021 Free Speech Index on the public's support for free speech with a score of 69;[40] 31st out of 161 countries on Article 19's 2022 Global Expression report[41] and 10th out of 70 countries on the 2022 Freedom House Freedom on the Net report.[42]

Traditionally, legal threats to the concept of freedom of expression in Australia have been based on the following:

1. Defamation law;
2. Discrimination and anti-vilification laws;
3. Classification and censorship of obscenity and offensive behavior;
4. The treason and urging violence (formerly, sedition) offenses;
5. Defenses to treason and urging violence offenses;
6. Current debate surrounding the treason and urging violence legislation;
7. Disclosure of sensitive government information;
8. Whistleblowing and disclosures in the public interest;
9. Disclosures of confidential information in the public interest; and
10. Contempt of court and non-publication or suppression orders.

[38] https://www.aph.gov.au/constitution
[39] https://rsf.org/en/index
[40] https://justitia-int.org/report-who-cares-about-free-speech-findings-from-a-global-survey-of-free-speech/
[41] https://www.article19.org/wp-content/uploads/2022/06/A19-GxR-Report-22.pdf
[42] https://freedomhouse.org/sites/default/files/2022-10/FOTN2022Digital.pdf

Not all of the above have made an impact during the 2015-2022 period, and not all of the categories saw additional laws added. It is important to note that the COVID-19 period did not see additional laws that impinged on freedom of expression.

## I. Legislation

Defamation

Defamation continued to be a thorny issue for news organizations and journalists with defamation claims often being viewed as undefendable by the press, especially when these kinds of suits are launched by those for whom money is not an issue. The decline of Australia's mainstream news media over the past decade in terms of money, influence and power has seen an increase in the number of lawsuits brought against these organizations. It is widely held both within journalism as well as across the Australian public that defamation is a tool that can be employed to stop or derail a story in the media. It is important to note that in the Australian context, defamation is a civil matter. This is different to places like the Republic of Korea where defamation can be both a civil and criminal matter.

The apparent inequities to Australia's defamation regime have prompted the sitting federal government to review these laws. At the time of writing, a review into defamation laws as well as a review into whistleblower protections were underway.

Despite the perception that Australia's defamation laws privilege the rich and powerful, the recent case of *Ben Roberts-Smith v Fairfax Media Publications Pty Ltd*[43] bucked this trend. Fairfax Media journalists Nick McKenzie and Chris Masters published a series of articles revealing the alleged war crimes of former Special Air Service (SAS) trooper special forces soldier, and Medal of Gallantry and Victoria Cross recipient, Ben Roberts-Smith. The articles implicated Roberts-Smith in war crimes during two of his deployments to Afghanistan. During one of these deployments, Roberts-Smith had been awarded Australia's highest military honor, the Victoria Cross. After leaving the SAS, Roberts-Smith had been lionized as the embodiment of the ANZAC (Australian and New Army Corps) spirit as well as being awarded Australian father of the year. In exposing Roberts-Smith, McKenzie and Masters were also challenging public perceptions of the values and conduct of the Australian military which was at first wildly unpopular. However, in winning this trial, McKenzie and Masters forced the Australian military, government, and society to confront the excesses of overseas military expeditions. Also, the unlikely result of this matter, reminded the Australian public of the value of a free press and free expression.

Another area that deserves consideration here is online trolling and defamation. As is the case in many other countries, Australia has struggled to legislate the limits and freedoms of online

[43] https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files/ben-roberts-smith

communication in the face of a push to regulate online speech. This issue came to prominence in Australia in 2016 after the Australian Broadcasting Corporation (ABC) broadcasted a report entitled "Australia's Shame" that exposed the abuse of Indigenous youth inmates at the Don Dale Youth Detention Centre in Darwin in the Northern Territory. The report focused on the treatment of inmate Dylan Voller who, as an eleven-year-old at the facility, was restrained by the neck, stripped naked, thrown into a cell, isolated, and tear-gassed. After the report aired, other media outlets published stories on Voller that were also shared across the respective media organization's social media. Many of the ensuing comments on the posts vilified Voller and defamation proceedings took place. In *Voller v. Nationwide News Pty Ltd, Fairfax Media Publications Pty Ltd*, *and Australian News Channel Pty Ltd,* the Court of Appeal of the Supreme Court of New South Wales ruled in 2019 that the news organizations were liable for the comments readers posted on news organizations' Facebook pages.[44] The High Court of Australia dismissed the appeal made by the news organizations, concurring with the judgment of the lower court. [45]

The *Voller* case inspired a royal commission into the treatment of Australia's Indigenous youth in detention. The case also forced online and social media communication into the national spotlight. In response, the former Federal Government led by conservative Scott Morrison, introduced the Social Media (Anti-Trolling) Bill (2022) in the Australian House of Representatives in March 2022, where it stalled and was not passed. The bill established a framework relating to "potentially defamatory content posted on social media." [46]The bill was widely viewed as a cynical attempt by former Prime Minister Morrison and his colleagues to stifle online freedom of expression. It was also heavily criticized for widening the scope of defamation in Australia as well as not respecting the privacy and anonymity of those communicating online.

National Security

When it comes to the codification of laws that impinge on concepts and ideas of freedom of speech and freedom of expression, these laws seldom fit into simple and clear categories. A good example of this can be seen in Australian national security and counter-terror laws that are as opaque as they are complex. Australia has more national security and counter-terrors than any other country with, at the time of writing, 92 codified federal laws of this type since 2001. What makes this perplexing is there has yet to be a terror attack on Australian soil.

At first blush, the link between the freedoms that this piece focuses on and national security and counter-terror laws may not be obvious. However, the opaque nature of many of these laws has fueled significant anxiety among some academics, journalists, activists, policy

[44] https://globalfreedomofexpression.columbia.edu/cases/voller-v-nationwide-news-pty-ltd-fairfax-media-publications-pty-ltd-and-australian-news-channel-pty-ltd/
[45] https://www.hcourt.gov.au/cases/case_s236-2020
[46] https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6831

analysts, and other observers as to the possible application of these laws beyond their stated aims. Indeed, these laws constitute part of a suite of laws Swedish-Australian journalism researcher Johan Lidberg has termed "lawfare"[47] the slow and sustained creep of Australian laws (also including defamation laws, privacy laws, contempt and suppression orders) at the cost of press freedom and freedom of expression.

Since 2015, in the national security law space, the laws that have caused the most concern have been clause 35p of the Australian Security Intelligence Organisation Act (ASIO) Act (1979), the Espionage and Foreign Interference Act (2018) and a cluster of laws related to meta-data surveillance enacted under the auspices of national security. These include the Data Retention Act (2015), the Assistance and Access Act (2018), the Identify and Disrupt Act (2021), and the International Production Orders Act (2020).

The Data Retention Act (2015) signaled a sea change in the way the Australian Federal Government was to deal with surveillance. For the first time, the Australian Government was focusing on association over content through meta-data. Meta-data is the information that surrounds communication content. This includes the time a communication took place, the length of the communication, the location of the actors involved in the communication exchange, and, most importantly, who the actors involved in the communication are. The actual contents of an electronic communication exchange are not of interest here.

The Espionage Act (2018) has also been seen to have had a chilling effect on Australian speech freedoms again. "Chilling effect" refers to a cultural shift within journalism whereby journalists, and the organizations they work for, suppress or change a story out of fear they will face repercussions from the government or, sometimes corporate, agents of the day. This has resulted in high risk aversion on the part of journalists and the organizations they serve. The Espionage Act (2018) has been singled out for criticism because it has the capacity to criminalize journalism, with those found guilty of leaking or sharing information in the national interest facing up to 25 years in prison. The National Security Legislation Amendment (Espionage and Foreign Interference) Bill (2018) updated secrecy laws and placed them in the Criminal Code Act (1995).

Group Characteristics and Protected Characteristics

Although issues of press freedom loom large, there have been other, more visible, infringements of freedom of expression. Briefly, although it falls outside of the temporal scope of this report, the Queensland Vicious Lawless Association and Disestablishment (VLAD) Act (2013) is an interesting example. After a string of very well publicized brawls between rival "bikie gangs" at the Surfers Paradise party precinct in Gold Coast City in Southeast Queensland, the Queensland State Government rushed through the VLAD laws. While touted by the

[47] https://www.crikey.com.au/2023/05/03/public-interest-journalism-victim-lawfare-globally/

Queensland Government to get tough on motorcycle gang organized crime, the laws were opaque, raising concerns about their potential application. As well as targeting association, the act made the display of gang insignia on clothing and skin (tattoos) a crime. In passing the VLAD laws, the Queensland Government restricted freedom of expression, and while very popular with the public of the time, these laws set a dangerous precedent on how members of a targeted group could be imprisoned for associating with one another and expressing themselves within broader society.

The Racial Discrimination Act (1975) Section 18c continues to be a lightning rod for those on all sides of the freedom of expression argument in Australia. 18c stipulates, "it is unlawful for a person 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." Under the former conservative federal government, there was considerable desire to change this act as it was seen to restrict freedom of expression and free speech. However, under the current federal government, calls for change to 18c have diminished.

In relation to discrimination, the Australian Capital Territory amended The Discrimination Act 1991 in 2016 to include a proscription of actions inciting hatred toward, revulsion of, serious contempt for, or severe ridicule of a person or group of people on the ground of any of the following(a) disability; (b) gender identity; (c) HIV/AIDS status; (d) race; (e) religious conviction; (f) sexuality. In New South Wales, in 2018 amendments to the Anti-Discrimination Act 1977 (Crimes Amendment (Publicly Threatening and Inciting Violence 2018) were rushed through parliament, to repeal vilification laws within the act and replace them with a term of up to three years imprisonment under the act.

## II. Non-Legislative Developments

Suppression orders continue to impede freedom of expression and open justice in Australia at both the state and federal levels. Although still germinal, research findings suggest that suppression orders in some Australian courts are being applied outside their intended spirit.[48] This includes the application of suppression orders to ensure systemic expedience. By shifting the media and public glare away from certain cases, the courts can process more cases. In addition, there has been a cynical application of suppression orders to protect the reputation of some defendants in some cases.

Further, across the Australian states and territories, as well as at the federal level, there has been widespread and sustained abuse of freedom of information and right to information regimes on the part of local, state and federal governments. This has contributed to what Henninger[49] called a "culture of secrecy" within the Australian government. This abuse involves

[48] Murray, R. & Ananian-Welsh, R., (forthcoming) *Chilling Effect: Australian Journalists, Lawyers, and the Law*, The University of Queensland Press (UQP), Brisbane.
[49] https://www.sciencedirect.com/science/article/abs/pii/S0740624X17303763

redacting all requested information as well as slowing down processing times to the point that if timeliness is a factor in the utility of the requested information, the information becomes useless. The government's culture of secrecy is further enhanced by non-disclosure agreements built into bureaucrats' contracts making disclosures of any government related information perilous.

## III. Enforcement

The most visceral act of enforcement and application of the Espionage Act (2018) in conjunction with the Data Retention Act (2015) came in 2019. First, the AFP executed a search warrant on the home of News Corp journalist Annika Smethurst after an April 2018 report in which she exposed government intentions to spy on citizens. The following day, AFP officers executed a warrant at the ABC's Sydney office over a 2017 article on military misconduct. These events are referred to as the AFP raids. In both cases, it was later revealed that warrantless searches of the journalists involved meta-data under the Data Retention Act (2015) had taken place to establish who the journalists had been communicating with and to ultimately identify who was leaking information to the journalists.

The case of the ABC AFP raids: the AFP were most interested in the identifying who was the source of information about Australian military misconduct in Afghanistan, including unlawful killings, that formed the basis of an ABC report broadcast in 2017 entitled "The Afghan Files". The AFP were able to identify Australian military lawyer, David McBride, as the source of the disclosures. McBride has pleaded not guilty to five charges, including the unauthorized disclosure of information, theft of commonwealth property and breaching the Defense Act. McBride has subsequently become Australia's most high-profile whistleblower with his case refocusing public attention on the lack of whistleblower protections in Australia. At the time of writing, McBride is awaiting trial, and the Federal Labor Government is conducting a review of whistleblower laws in Australia.

## Conclusion

Turning to the future, there is growing concern over the impact mooted privacy laws could have on freedom of expression. Proposed amendments to the Privacy Act (1988) have alarmed press freedom and freedom of speech advocates who argue some of the amendments will result in an environment similar to the UK where concerns for privacy outweigh the public interest and create an environment where stories and information in the public interest will be further degraded. Australia is experiencing sustained legislative change that impacts its citizens. At the same time, concerns over freedom of expression in the framework of the Racial Discrimination Act have been diluted by the current government. Further, 2016 and 2018 marked developments in the prohibition of, amongst others, several ridicule of protected characteristics on a state level. As Australia's middling rankings across different freedom of expression, speech, internet, and press indices suggest, the nation's law makers and law

enforcers could do more to respect these fundamental freedoms. However, given the erosion of these freedoms globally and an increasingly entrenched culture of secrecy at the highest levels of Australian society, this appears unlikely.