



## Free Speech and the Constitution



### International Background

In 1948 the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR). Article 19 affirms the right to free speech:

*Article 19.* Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.<sup>1</sup>

Members of the Commonwealth Parliament reaffirmed the principles of the Declaration during a sitting on 10 December 1998 to mark the 50th anniversary of the UDHR and pledged to give wholehearted support to the principles enshrined in the Declaration.<sup>2</sup>

Article 19 of the 1966 United Nations *International Covenant on Civil and Political Rights* (ICCPR) states that:

Everyone shall have the right to freedom of expression ...<sup>3</sup>

Australia is a signatory to this treaty<sup>4</sup> and, in order to incorporate treaties and conventions into Australian law, governments must pass a specific Act of Parliament. Although some parts of the treaty have been implemented into law, such as the *Human Rights Commission Act 1981*,<sup>5</sup> no government has implemented the free speech provisions and therefore they are not enforceable by Australian courts.

### Freedom of Speech and the Constitution

The Australian Constitution does not have any express provision relating to freedom of speech. In theory, therefore, the Commonwealth Parliament may restrict or censor

speech through censorship legislation or other laws, as long as they are otherwise within constitutional power. The Constitution consists mainly of provisions relating to the structure of the Commonwealth Parliament, executive government and the federal judicial system.<sup>6</sup> There is no list of personal rights or freedoms which may be enforced in the courts. There are however some provisions relating to personal rights such as the right to trial by jury (section 80), and the right to freedom of religion (section 116).

Since 1992 decisions of the High Court have indicated that there are implied rights to free speech and communication on matters concerning politics and government, e.g. permitting political advertising during election campaigns.<sup>7</sup> This is known as the 'implied freedom of political communication'. Issues arising from these decisions include defining when communication is 'political' and when the freedom should prevail over competing public interests.<sup>8</sup>

In 1942 a Constitutional Convention held in Canberra recommended that the Constitution be amended to include a new section 116A preventing the Commonwealth or a State passing laws which curtailed freedom of speech or of the press.<sup>9</sup> The government did not accept this proposal and it was not included in the referendum on 19 August 1944, when other constitutional amendments were proposed.

The advantage of having such rights written into the Constitution is that they are 'entrenched' and cannot be amended or removed by any government without the overwhelming approval of the people voting at a referendum to amend the Constitution.<sup>10</sup> Rights contained in other legislation, such as the *Racial Discrimination Act*

1975, are not entrenched. They may be amended or repealed by any government with the consent of Parliament.

### Freedom of Speech and a Bill of Rights

Proposals for legislating for freedom of speech have been made mainly in the context of legislating for a Bill of Rights. Since 1973 at the Commonwealth level there have been attempts to legislate for a Bill of Rights which would incorporate provisions of the ICCPR, including Article 19, into Australian law. Various governments, parliamentary parties and individual members of parliament have introduced legislation to establish a statutory Bill of Rights, which would include the right to freedom of speech.<sup>11</sup> While lacking constitutional force, such an Act of Parliament would list various rights which could be enforced in the courts in many situations. The less complicated option of legislation, rather than amending the Constitution, has been preferred by proponents of a Bill of Rights.

More recently at the State level Parliamentary Committees in Queensland<sup>12</sup> and New South Wales<sup>13</sup> have considered a Bill of Rights but neither has recommended such a proposal. In 2002 the Australian Capital Territory government established a non-parliamentary committee to inquire into a Bill of Rights for the ACT.<sup>14</sup> Professor George Williams has summarised the arguments for and against the introduction of a Bill of Rights:<sup>15</sup>

It is interesting to note that not only is there no legislation providing for freedom of speech either in the Constitution or in other legislation, but Governments have passed legislation to prevent free speech in certain circumstances. Examples include the various State and

FOR
Australian law does not protect fundamental freedoms
A Bill of Rights would give power of action to Australians who are otherwise powerless
A Bill of Rights would bring Australia into line with the rest of the world
A Bill of Rights would enhance Australian democracy by protecting the rights of minorities
A Bill of Rights would put rights above politics and arbitrary governmental action
A Bill of Rights would improve government policy making and administrative decision making
A Bill of Rights would serve an important educative function
A Bill of Rights would promote tolerance and understanding in the community
AGAINST
Rights are already well protected in Australia
The High Court is already protecting rights through its interpretation of the Constitution and the common law
Rights listed in the Constitution or Acts actually make little or no difference in protecting rights
The political system itself is the best protection of rights in Australia
A Bill of Rights would actually restrict rights, that is, to define a right is to limit it
A Bill of Rights would be undemocratic by giving unelected judges the power to override the judgment of Parliament
A Bill of Rights would politicise the judiciary
A Bill of Rights would be very expensive given the amount of litigation it would generate
A Bill of Rights would be alien to our tradition of Parliamentary sovereignty
A Bill of Rights would protect rights (e.g. the right to bear arms) which might not be so important to future generations

Territory defamation laws,<sup>16</sup> and racial vilification laws. Censorship laws may also be used to prevent freedom of speech by restricting distribution of certain films and publications, although these laws now serve mainly to classify publications according to the age groups which can see them, rather than preventing their publication.

### Overseas Comparisons

The United States incorporated a Bill of Rights into its Constitution in 1789.<sup>17</sup> Other countries have legislated more recently for freedom of speech, mainly in legislation which is separate from their

constitutions: Ireland in 1937, Canada in 1982, New Zealand in 1990, South Africa in 1996, and the United Kingdom in 1998.<sup>18</sup> The European Union has included freedom of expression and information in its *Draft Charter of Fundamental Rights* for possible adoption by member states. This makes Australia alone among like-minded countries not to provide for freedom of speech in legislation or the national constitution.

### Further Reading

The above material has been drawn from the following sources:

Aroney, Nicholas, 'A Seductive plausibility: freedom of speech in the Constitution', *University of Queensland Law Journal*, vol. 18, no. 2, 1995, pp. 249–74.

Chesterman, Michael, *Freedom of speech in Australian law: a delicate plant*, Ashgate, Aldershot, England, 2000.

Kinley, David, ed., *Human rights in Australian law: principles, practice and potential*, Federation Press, Leichhardt, NSW, 1998.

Williams, George, *A Bill of Rights for Australia*, University of NSW Press, Sydney, 2000.

Williams, George, *Human rights under the Australian Constitution*, Oxford University Press, Melbourne, 1999.

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- The text of the Declaration may be found at: <http://www.unhchr.ch/udhr/lang/eng.htm>
- House of Representatives, *Debates*, 10 December 1998, p. 1811.
- The text of the Covenant may be found at: [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)
- Australian Treaty Series*, 1980, no. 23.
- Now the *Human Rights and Equal Opportunity Act 1986* (Cth)
- For the text of the Constitution, see <http://scaletext.law.gov.au/html/pasteact/1/641/top.htm>
- Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1993–1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1993–1994) 182 CLR 211; *Cunliffe v The Commonwealth* (1993–1994) 182 CLR 272; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579.
- For example see *Coleman v P and Anor* [2001] QCA 539, Queensland Court of Appeal. The Court upheld the right of Townsville City Council to fine Patrick Coleman for addressing a crowd in a shopping mall, despite Coleman's defence of a constitutional right to free speech. In January 2002 Coleman applied to appeal to the High Court. ([http://www.active.org.au/adelaide/news/display.php3?article\\_id=143](http://www.active.org.au/adelaide/news/display.php3?article_id=143))
- Convention of Representatives of the Commonwealth and State Parliaments on proposed alteration of the Commonwealth Constitution, held at Canberra, 24 November to 2 December 1942, *Record of proceedings*, Government Printer, Canberra, 1942, p. 12.
- Section 128* of the Constitution
- Links may be found on the Parliamentary Library's *Civil and Human Rights Internet Resource Guide* at <http://www.aph.gov.au/library/intguide/law/civlaw.htm#bill>
- Queensland, Parliament, Legal, Constitutional and Administrative Review Committee, *The preservation and enhancement of individuals' rights and freedoms in Queensland: Should Queensland adopt a bill of rights?* The Committee, Brisbane, 1998. (Report no. 12).
- New South Wales, Parliament, Legislative Council, Standing Committee on Law and Justice, *A NSW Bill of Rights*, The Committee, Sydney, 2001 (Parliamentary paper no. 893) (Report 17, October 2001).
- The Bill of Rights Consultative Committee chaired by Professor Hilary Charlesworth. For terms of reference see: <http://www.act.gov.au/rights/>
- George Williams, *A Bill of Rights for Australia*, University of NSW Press, Sydney, 2000, p. 35.
- For example see the Free Speech Victoria campaign for defamation reform at <http://www.fsvonline.org/>
- Amendment 1* states that Congress shall make no law 'abridging the freedom of speech'.
- Constitution of Ireland 1937, Article 40 (6)(1)*. A similar provision was inserted in Article 9 of the original 1922 Constitution; *Canadian Charter of Rights and Freedoms, Article 2(b)*; *New Zealand Bill of Rights Act 1990 (NZ), section 14*; *Constitution of the Republic of South Africa 1996, section 16*; *Human Rights Act 1998 (UK), Schedule 1, Part 1, article 10*; *Draft Charter of Fundamental Rights of the European Union, Article 11, Official Journal of the European Communities*, 18 December 2000, C364.