



Electronic Frontiers
AUSTRALIA

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19 August 2021

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By Email: legcon.sen@aph.gov.au

Dear Committee,

RE: Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019

Electronic Frontiers Australia ("**EFA**") appreciates the opportunity to provide this submission in relation to the Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019 ("**the Bill**") inquiry. EFA's submission is contained in the following pages.

Established in January 1994, EFA is a national, membership-based non-profit organisation representing Internet users concerned with digital freedoms and rights. EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting civil liberties in the digital context. EFA members and supporters come from all parts of Australia and from diverse backgrounds. Our major objectives are to protect and promote the civil liberties of users of digital communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political and civil liberties issues involved in the use of digital communications systems.

We trust that these submissions are of assistance.

Yours sincerely,

Angus Murray
Chair of the Policy Committee of
Electronic Frontiers Australia

Submissions

1. At the outset, it has been EFA's long-standing position that Australia lacks an enforceable human rights framework expressed at a Federal level and we welcome an informed consultation regarding Constitutional reform.
2. As the Committee would likely appreciate, the conceptual basis for the Bill is only one of a myriad of issues that warrant consideration. In this context, we do not consider that the Bill goes far enough nor should it be adopted.
3. Our concern with the Bill is primarily that this consultation ought to occur at a broader and more substantive level. In this regard, the Committee would appreciate that the context of the Bill may be cast in the light of the recent High Court decision in *LibertyWorks*¹. In that decision, the majority of the High Court effectively held that the registration of activities by LibertyWorks on behalf of a foreign conference called the "Conservative Political Action Conference" was not an infringement of an implied right to political speech and that no such right existed in Australian Constitutional law.
4. Of particular relevance, in that decision, recently appointed Justice Steward held that:

"The divergence of views in this Court concerning the test for the application of the implied freedom perhaps may illustrate the tenuous nature of that implication. If the content of the implied freedom cannot even now be agreed upon, then, for my part, that may demonstrate that it was never justified. In Theophanous v Herald & Weekly Times Ltd, Dawson J rejected the existence of the implied freedom and said:

"Whilst it may disappoint some to find that the Australian Constitution provides no guarantee, express or implied, of freedom of speech, that is because those who framed the Constitution considered it to be one of the virtues of representative government that no such guarantee was needed. I have elsewhere dealt with the manner in which the founding fathers placed their faith in the democratic process rather than constitutional guarantees to secure those freedoms regarded as fundamental in any democratic society. They took the view that constitutional guarantees operate as a fetter upon the democratic process and did not consider it necessary to restrict the power of Parliament to regulate those liberties which the common law recognizes and nurtures. If a constitutional guarantee of freedom of speech or of communication is to be implied, the implication must be drawn from outside the Constitution by reference to some such concept as 'the nature of our society'. That is not an implication which can be drawn consistently with established principles of interpretation.

The Engineers' Case may have given rise to the misconception that no implications may be drawn from the Constitution and to have led to some imbalance in the interpretation of the federal division of powers. But it is now clear that implications can and must be drawn in the interpretation of the

¹ *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18.

Constitution to give effect to its intention. However, it has never been thought that the implications which might properly be drawn are other than those which are necessary or obvious having regard to the express provisions of the Constitution itself. To draw an implication from extrinsic sources, which the first defendant's argument necessarily entails, would be to take a gigantic leap away from the Engineers' Case, guided only by personal preconceptions of what the Constitution should, rather than does, contain. It would be wrong to make that leap."

I am afraid that I still respectfully agree with much of the foregoing".²

5. In this regard, much needed alteration of the Australian Constitution requires a greater review into the adequacy of the common law and the current social and legal norms that underpin our legal tradition.
6. We respectfully consider that this also ought to include discussion about First Nations people and the broader rights contained within the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.
7. Indeed, it is the writer's opinion that Constitutional amendment ought to be in the form of a requirement that Australian law ratifies and maintains legislation that aligns with the broader rights contained within the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.
8. In more specific consideration of the Bill, we consider that:
 - a. the use of "and other media" in proposed s. 80A is inappropriate as this *significantly* expands the scope of the freedom to include social media and emerging media platforms whereas the right should be reserved to individuals; and
 - b. the proposed legislative carve out that "however, a law of the Commonwealth, a State or a Territory may limit the freedom only if the limitation is reasonable and justifiable in an open, free and democratic society" places an inappropriately broad and ambiguous caveat upon the freedom of speech and effectively serves only to entrench uncertainty into the Constitution.
9. We trust that these submissions are useful and please do not hesitate to contact us should you require any further information.

² *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18 at [297] - [299] per Steward J.