



NSWCCL SUBMISSION

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

CONSTITUTION ALTERATION (FREEDOM OF EXPRESSION AND FREEDOM OF THE PRESS) 2019 INQUIRY

20 August 2021

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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The NSW Council for Civil Liberties (NSWCCL) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee in regard to the Inquiry into the *Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019* (Constitutional Alteration).

The NSWCCL endorses wholeheartedly the proposed Constitutional Alteration which aims to enshrine the right of freedom of expression, including freedom of the press and other media, in the Constitution. This will be achieved by inserting a new Chapter IIIA and section 80A in the *Commonwealth of Australia Constitution Act 1900*.

NSWCCL further recognises that this freedom may be limited, in certain circumstances, by a law of the Commonwealth, State or Territory if that limitation is proportionate to the legitimate ends that are sought to be achieved.

Introduction

1. The Constitutional protection of free expression is necessary and desirable for Australian citizens individually and for Australian society collectively. Providing greater protection of free expression also accords with Australia's obligations under article 19 of the *International Covenant on Civil and Political Rights (ICCPR)* as an extension of freedom of thought and conscience.
2. While all civil liberties are vital to a well-functioning community, the right to free expression may be regarded as the foundation of all other rights, allowing as it does the transmission of ideas between people whether through speeches, books, art, media or performance. Enshrining such a fundamental freedom within the Constitution, therefore, serves an important expressive function in demonstrating the importance which is afforded to this right to all within Australia.
3. This right benefits both the producer and consumer of free expression. It is the right to hear, see and understand as much as the right to speak, show and be understood which underpins the transmission, interrogation and improvement of the ideas from which society evolves its form.
4. The prospect of democracy working at all – let alone well – rests on the ability of citizens to share information about the performance of government, available alternatives and the opinions of their fellow citizens about both.
5. Australia has ratified seven international human rights conventions. We have an obligation to enshrine them within Australian law and promote their respect internationally and domestically. The absence of a protection of free expression in Australia is inconsistent with Australia's international obligations and undermines our ability to be a global role model for liberal democracy.

Professor George Williams, rightly in our view, has stated that "Australia stands alone amongst democracies in lacking solid legal and constitutional protection for freedom of speech ... We are unique in being the only democracy that fails to give national legal protection to this fundamental right. ... There is nothing admirable about Australia having the weakest protection for speech and press freedom in the democratic world."¹

6. Australia's integrity as a global actor is jeopardised by a failure to protect freedom of expression. Protecting our democratic customs and institutions with constitutional recognition can only improve our ability to promote peaceful prosperity globally.

¹ Professor George Williams in Patrick, R (13 July 2021) Freedom of speech can not be taken for granted <https://www.canberratimes.com.au/story/7335980/free-speech-can-not-be-taken-for-granted/>

Implied Freedom of Political Communication

7. Under Australia's current law there are limited protections for freedom of expression. The primary vehicle through which it is protected is the implied freedom of political communication. The High Court has described the implied freedom as 'an indispensable incident of that system of representative government' created by the Australian Constitution'.² However the implied freedom cannot be seen as complete protection of expression and speech, it instead operates as 'a restriction on legislative power...[which] extends only so far as is necessary to preserve and protect the system of representative and responsible government'.³ Moreover, the freedom is concerned with the existence of a burden on political communication as a whole, and not just a discrete group or set of individuals within society.⁴
8. The test concerning whether the implied freedom of political communication has been infringed has three steps:
 - a. Is there an effective burden created by the law over the freedom in terms, operation or effect?
 - b. If so, is the law's purpose legitimate? Is it compatible with maintaining responsible and representative government?
 - c. If so, is the law reasonably appropriate and adapted to advance a legitimate object whilst maintaining compatibility with the Australian system of representative and responsible government?⁵

If the Court answers the first question in the affirmative and either the second or third question in the negative, the law is invalid.

9. The High Court has elaborated on the third question by developing a structured proportionality test which considers whether the law is suitable, necessary, and adequate in the balance.⁶ If the Court does not find that the law meets all three criteria, then the answer to the third question must be no.⁷
10. The recent decision of the High Court in the *Libertyworks* case has cast doubt on the existence of the implied freedom, and therefore emphasised the need for clearer protection of freedom for expression. In that case Justice Steward stated "... for my part, and with the greatest of respect, it is arguable that the implied freedom [of political communication] does not exist."⁸

Lack of clarity

11. For a people to enjoy the rights and responsibilities of an open democratic society, our civil liberties must be clear in law and clearly understood by the people subject to the rules. As it stands, many Australians believe they have a right to free speech, when in fact that right remains at best implied and partial, as explained above.
12. The lack of a clear right to free expression exposes those less adept at appreciating Australia's constitutional framework to legal recourse by the state or civil parties. This leads to both uncertainty and resentment about who may communicate their views with the protection of the law and who may not and begs the broader question as to why there remains no protection for free expression.

² *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559

³ *Comcare v Banerji* (2019) 93 ALJR 900, [20].

⁴ *Ibid* [20].

⁵ *Lange* [567]-[568]; *McCloy v New South Wales* (2015) 257 CLR 178 [2]; *Brown v Tasmania* (2017) 261 CLR 328, [104].

⁶ *McCloy* [2].

⁷ *McCloy* [2].

⁸ *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18

13. The Commonwealth Attorney-General's department describes the tension in our current arrangements, asserting:

The right to freedom of expression extends to any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.

...then cautioning:

The right is not absolute. It carries with it special responsibilities and may be restricted on several grounds. For example, restrictions could relate to filtering access to certain internet sites, the urging of violence or the classification of artistic material.⁹

While this duality may be reasonable in principle, it is too vague a description of our rights to guide citizens in their attempt to balance these factors when regulating their self-expression.

14. The community should not have to defend the principle of freedom of expression so regularly and with such uncertainty against restrictions, in a growing range of public and private activities.

Efforts to suppress the freedom of expression in Australia

Diminished rights to protest

15. The right to political protest is a fundamental right in a mature democracy. However, recent regulations have created wide powers to disperse or ban protests, rallies, and public gatherings.

Meanwhile, proposed regulations may empower the regulator to deregister a charity for attending or promoting protests (notwithstanding remedies already existing for any misconduct to be addressed, including through the criminal law) and would ban protesters from boycotting companies.

Increased recourse to defamation law to silence critics

16. The escalation in legal sanctions faced by journalists in the course of their work, as highlighted by the recent high profile Friendlyjordies case and the escalating use by politicians of defamation law against journalists and critics is equally of concern. While people must be accountable for their speech, the current law is too much determined on a case-by-case basis and does not in practice apply equally to all citizens.

It should be noted that laws leading to these outcomes are not presently subject to review by the High Court for their express constitutionality. This is a major role of the High Court in respect of other laws made by our parliament and an important check on parliamentary over-reach.

Increasing recourse to the law to police incivility is a worrying trend which would be greatly remedied by the creation of a clear and constitutionally entrenched right to free speech. When all people know what is permissible and what is not, there will be less opportunity for the well-resourced to seek remedy in civil suits. Equally, the courts will find consideration of such matters that do still warrant review to be far simpler.

Increasing corporate and employer policing of private speech

⁹ Attorney-General's Department, Australian Government <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-freedom-opinion-and-expression#what-is-the-right-to-freedom-of-opinion-and-expression> accessed 13 August 2021

17. In 2015 NSWCCCL expressed concern with SBS's decision to sack a journalist for a series of tweets critical of the ANZAC tradition.¹⁰ While NSWCCCL is not endorsing the content of those remarks, free speech is sometimes offensive and that should be openly acknowledged. Tolerating only what one agrees with is not 'free' speech at all.

The Media, Entertainment & Arts Alliance (MEAA) has expressed concerns regarding the increasing pressure placed on journalists to build a personal 'brand' on social media crafting a profile of their private life and opinions which is aligned to the employer's brand. The limits to such behaviour need to be clearer.

NSWCCL is also concerned that corporate entities can and do restrict free speech as much as governments. A clearly expressed right to free expression would support clearer and more consistent moderation of speech on social media platforms and in other privately controlled populated spaces.

Freedom of expression is best achieved with a Bill of Rights

18. The NSW Council for Civil Liberties supports a constitutionally-entrenched federal Bill of Rights that appropriately restricts legislative powers from being able to be used to infringe human rights, and give individuals enforceable rights and open standing to challenge legislation which is seen to infringe upon such rights. It is regrettable that the proposal before the Committee is not such a proposal but rather one which instead seeks to only enshrine a very limited freedom within the Constitution.
19. However, in the absence of a comprehensive law, the Council supports the constitutional protection of free expression as a step in the right direction. The challenge of balancing each person's rights with everyone else's rights is best served by recognising a suite of liberties.

Recommendations

20. NSWCCCL supports the passage of the *Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019*.
21. NSWCCCL urges the Government and Opposition to support the proposed Constitutional alteration being put to a referendum of the people.
22. NSWCCCL urges the Committee to recommend in strong and unqualified terms that the Government take urgent action to bring a proposal for a constitutionally entrenched bill of rights to the Parliament for consideration at the earliest available opportunity.

This submission was prepared by
Civil Liberties.

on behalf of the New South Wales Council for

Yours sincerely,

Michelle Falstein
Secretary
NSW Council for Civil Liberties

¹⁰ NSWCCCL (29 April 2015) https://www.nswccl.org.au/scott_mcintyre_150429