

National Human Rights Consultation Submission

AGWW-7RN8LM

Name: Sally Hawkins

Submission Text:

Dear Sir/Madam

Re: National Human Rights Consultation – Freedom of Expression

My name is Sally Hawkins, I am a PhD student and casual academic with the School of Law and Justice at Southern Cross University, Lismore NSW. I write further to the terms of reference for the National Human Rights Consultation with respect to Freedom of Expression.

As you are aware, at present Australia has an implied, limited right to freedom of expression by virtue of the High Court decisions in *R v Levy* [1997] HCA 31; *Nationwide News Pty Ltd v Willis* [1992] HCA 48; *Australian Capital Television Ltd and Ord v The Commonwealth* [1992] HCA 45.

Implied Nature

Indeed with respect to the implied nature of freedom of expression in this country, in *ACT v The Commonwealth Dawson J* at 16 stated:

...[T]he Australian Constitution, unlike the Constitution of the United States, does little to confer upon individuals by way of positive rights those basic freedoms which exist in a free and democratic society. They exist, not because they are provided for, but in the absence of any curtailment of them. Freedom of speech, for example, which is guaranteed in the United States by the First Amendment to the Constitution, is a concept which finds no expression in our Constitution, notwithstanding that it is as much the foundation of a free society here as it is there. The right of freedom of speech exists here because there is nothing to prevent its exercise and because governments recognize that if they attempt to limit it, save in accepted areas such as defamation or sedition, they must do so at their peril. Not only that, but courts recognize the importance of the basic immunities and require the clearest expression of intention before construing legislation in such a way as to interfere with them... The fact, however, remains that in this country the guarantee of fundamental freedoms does not lie in any constitutional mandate but in the capacity of a democratic society to preserve for itself its own shared values.

I submit that the implied nature of freedom of expression is insufficient. An express or positive right is fundamental to having certainty with respect to the law and to upholding human rights. It was the perspective of our forefathers that the system of representative government as established at the Federal level through the House of Representatives and the Senate would be adequate to protect the basic rights of citizens and to ensure accountability of the legislature. Since this time however there has been a dramatic increase in the complexity of Australian society, the emergence of a number of minorities and the recognition that the representative system of government largely works in favour of the majority and more commonly in the favour of those with large financial resources including corporations. It is my position that Australia should have an express right to freedom of expression contained in a Bill of Rights.

Scope

The limited scope of the current law with respect to freedom of expression, in contrast to other countries that have a positive right to such expression, is also problematic. At present the Australian Constitution only affords protection to speech and acts undertaken which have a connection to the election and operation of the government.

To date the only case in Australia to expand the right to freedom of speech to acts other than speech is R v Levy [1997] HCA 31 which concerned the actions of a protestor in relation to duck shooting. While this case has developed the law in this regard, it also serves as an example of the limited opportunities the High Court has had to consider the application of the implied right and the difficulties everyday citizens have with accessing the courts to ensure that the law is applied and developed to new circumstances.

Other countries such as the United States do not have the same limitations with respect to the scope of the Constitutional protections for freedom of expression. A broad right to freedom of expression is necessary, particularly as this country and the majority of the world move into the communication age where much of the speech that occurs is separate from the election and operation of the government.

One recent example of this is the intention of the Australian Government to enact compulsory censorship of the internet through filtering at an Internet Service Provider level. While all Australians concur that prohibition of child pornography is warranted, there remains ongoing concern about the extent to which this filtering may develop both now and into the future. Communication such as that relating to abortion, homosexuality or other more topical issues is a fundamental part of the nature of free society and yet Australia enters the information age without any Constitutional protection to ensure that this information and communication remains available. Simply put, it is not the place of the government to regulate or restrict communication on the internet particularly given that voluntary measures which can be employed in the home at the request of the account holder are available. This is but one example of the need for a Bill of Rights in Australia and the need to expressly protect a broad right to freedom of expression.

Thank you for taking the time to consider my submission. I urge both the committee and the Federal Government to show strong leadership, diligence and commitment to the preservation of our fundamental rights.

Yours sincerely

Sally J Hawkins
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