



**AUSTRALIAN  
PRESS  
COUNCIL**

# **SUBMISSION**

**May 29, 2009**

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**Australian Press Council submission to  
the National Human Rights Consultation  
on the protection and promotion of human rights**

**Executive summary**

The Australian Press Council believes that civil and political rights including, but not limited to, the freedom of expression, and of the press, should be protected preferably by Constitutional entrenchment. As the Consultation is precluded by its terms of reference from recommending constitutional entrenchment of rights, the Council would support the enactment of a statutory Bill or Charter of Rights that includes, but is not limited to, a protection of the freedom of expression and that its formulation be modeled on Article 19 of the International Covenant of Civil and Political Rights (ICCPR).

## **Constitutional entrenchment**

The Australian Press Council is strongly committed to the continuation of Australia as a liberal democracy. The Council believes that checks and balances on power are an essential and necessary feature of a liberal democracy. The Council believes that an important check and balance on abuses of power can be effected by a constitutional entrenchment of the right of the people to be properly informed.

Former Prime Minister John Howard notes in a book published in late May on a putative Bill of Rights that a "free and sceptical press" is one of the cornerstones of Australian democracy. Without the ability of the press freely to report, and comment on, government, the ability of the electors to intelligently exercise their franchise is limited. And that press freedom needs to be wider than just on matters related to political discussions. The ability of the public to oversight public institutions and business is equally reliant on a free and inquiring press.

This proposition was readily understood and accepted at the formation of the United States. There the First Amendment to the US Constitution provides that Congress should make no law abridging, inter alia, the freedom of speech or of the press. As Justice Black outlined in *New York Times & Co. v United States* ("Pentagon Papers Case") 403 US 713 at 717 (1971):

In the First Amendment the founding fathers gave the press the protection it must have to fulfil its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.

There are already a number of express rights detailed in the Australian Constitution relating to matters such as property rights and trial by jury. However, freedom of speech and of the press, which provides the underpinning of a democracy, is not given any express protection in the Constitution. The High Court in 1992 held that the Constitution contains an implied freedom of political communication. This implied protection is limited in nature and does not fully encompass a right to information for the public. Additionally, changes in composition of the High Court have resulted to a large extent in a marginalising of this implied freedom.

In the absence of some guarantee of freedom of expression Australia compares poorly with other vigorous Western democracies. In addition to the First Amendment to the US Constitution, Canada has its constitutionally entrenched Charter of Rights and Freedoms 1982; the UK has now in operation has the *Human Rights Act* 1998; and New Zealand has the *New Zealand Bill of Rights Act* 1990. Today, Australia is the odd country out.

For those reason, the Council believes that the Constitution of Australia should be amended to entrench a Bill of Rights that includes, but is not limited to, a right to be informed by the guarantee of freedom of expression and of the press.

### **A statutory Bill of Rights**

Given that the National Human Rights Consultation is unable, because of its terms of reference, to recommend the constitutional entrenchment of rights, the Press Council will nevertheless support a statutory Bill or Charter of Rights that includes, but is not limited to, a right to be informed by the guarantee of freedom of expression and of the press.

It believes further that this Bill or Charter should be based on the provisions of the ICCPR, which has obtained almost universal recognition, and to which Australia is a party. The Council sees an advantage in any statute replicating the ICCPR, particularly as Australia has ratified the Optional Protocol to the ICCPR, which permits Australians access to the UN Committee on Human Rights.

The Council does not believe that Australia should continue to rely only on the common law for the protection of individual rights and freedoms as the Council believes this not to be adequate for a modern democratic society.

The Council supports the adoption of a statutory Bill of Rights, similar to those in the UK and in Victoria, which generally empowers the courts only to make a ‘declaration of incompatibility’ (s 4(2), *Human Rights Act* 1998 (UK); s36(2), *Charter of Human Rights and Responsibilities Act* 2006 (Vic)), leaving Parliament with the ultimate decision of whether to amend the impugned Act in the face of a declaration of incompatibility. Such a statute would not, as some critics have asserted, empower ‘unelected judges’ to trump the Parliament.

It is true that there are conflicting views about the constitutional validity of a federal provision empowering the courts to make a declaration of incompatibility. The Council supports exploration by the Consultation of alternative means for the making of a declaration of incompatibility that are secured against a challenge to their validity.

The Council regards the right to freedom of expression as a fundamental human right, one of the important category of civil and political rights. The Council believes that in the first instance the Bill of Rights should concentrate on such civil and political rights and believes that an attempt at this stage to introduce into a Bill of Rights economic, social and cultural

matters would result in lengthy debate and controversy which could delay or even defeat the introduction of the Bill itself.

Were the Consultation to explore the inclusion of economic, social and cultural rights in addition to political and civil rights, the Council itself is not an appropriate body to offer a value judgment on any proposed economic, social and cultural rights, and whether or not they should be included. Its Objects limit its purview in this area to the protection of the right to information, through freedom of expression, and of the press.

On other issues raised by the Consultation, the Council submits that

- at the very least, the protection offered by the proposed Bill of Rights should extend to any breach of those rights by government itself;
- the Bill could also create an obligation on the part of government to promote those rights; and
- a statutory Bill or Charter of Rights should be capable of enforcement by individuals.

## **The Australian Press Council**

The Australian Press Council is a voluntary association of organisations and persons established on 22 July 1976. The membership of the Council is set out in the attachment.

The objects of the Australian Press Council are to promote freedom of speech through responsible and independent print media, and adherence to high journalistic and editorial standards, by:

- considering and dealing with complaints and concerns about material in newspapers, magazines and journals, published either in print or on the Internet;
- encouraging and supporting initiatives by the print media to address the causes for readers' complaints and concerns;
- keeping under review, and where appropriate, challenging political, legislative, commercial or other developments which may adversely affect the dissemination of information of public interest, and may consequently threaten the public's right to know;
- making representations to governments, public inquiries and other forums as appropriate on matters concerning freedom of speech and access to information;
- undertaking research and consultation on developments in public policy affecting freedom of speech, and promoting public awareness of such issues;
- promoting an understanding of the Objects, Principles and workings of the Council especially among editors, journalists and journalism schools, through forums and consultations; and encouraging feedback for Council's consideration.

## **The Australian Press Council**

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**May 2009**

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Country Press Australia

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David Sommerlad

Zoltan Kovacs

Leonie Lamont

Bruce Morgan

Sharon Hill

#### **Panel of Public Members (9 members - 7 attend each meeting)**

Professor H P Lee (Vic)      Vice-Chairman

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Helen Edwards (SA)

John Fleetwood (SA)

Professor Ron Grunstein (NSW)

Brenton Holmes (ACT)

Katherine Sampson (Vic)

Lisa Scaffidi (WA)

Melissa Seymour-Dearnness (Qld)

#### **Panel of Independent Journalist Members (3 members - 2 attend each meeting)**

Bruce Baskett

Prue Innes

Adrian McGregor

#### **Journalist Member representing the Media Entertainment and Arts Alliance**

Alan Kennedy

#### **Panel of Editor Members (2 members of whom 1 attends each meeting)**

Warren Beeby

Gary Evans

#### **Executive Secretary (non voting)**

Jack R Herman

For details and biographies see:

*<http://www.presscouncil.org.au/pcsite/about/members.html>*