

Media Law II (Freedom of Speech)

INTRODUCTION

- The right to freedom of expression is the right to hold expressions without interference, and cannot be subject to any exception or restriction.
- The right is not absolute. It carries with it special responsibilities, and may be restricted on several grounds.
- Media law therefore a useful term to describe the checks and balances- not only by the law per se, but in recent times also by way of industry self regulation placed upon the otherwise free speech exercised by the media.
- Laws that potentially restrict freedom of speech:
 - Racial discrimination, administration of justice, economic development and security, not allowed to name children involved in child abuse, not to reveal the victim name of sexual assault, defamation, prior conviction of the accused (do not want to prejudice the juries), confidential information etc
- *Ballina Shire Council v Ringland (1994)* 33 NSWLR 680 Mahoney J:
 - “The right to speak freely is a universally (or at least a widely) recognized good. Subject to proper qualifications it is enshrined in international instruments. ... It is recognized by the natural law and the common law.
 - But free speech is not a slogan, the articulation of which makes thought unnecessary. It is a value to be measured and weighed against other ends which the citizens of a society desire to achieve. To decide what freedom of speech requires, it is necessary to decide what it is.”

WHAT IS SPEECH?

- ‘Speech’ is not limited to public speaking and is generally taken to include other forms of expression.
 - i. In terms of its form:
 - Oral and written communication, artistic works (sculpture, cartoon, painting), broadcasting, photographs, symbol (Arabic symbol, tattoo(?))
 - Conducts that intended to convey and idea or opinion.
 - Action of inactivity may also be a form of expression.
 - ii. In terms of its content:
 - Moral, political (critical to the state)
 - iii. In terms of whose speech:
 - Not only freedom of speech but also the freedom to receive information
- What do mean by free?
 - Free from legal regulations and state interference and possibly private interference (such as multinational corporation)
- Freedom of speech vs freedom of the press
 - Mass media facilitate free speech. They bring in information that public want to know.
 - However, they are doing for profit. Information is filtered through to media before reaching the public – they make choices of what is news worthy.
- Issue: is the line drawn at the right place between free speech and the competing consideration?

WHY PROTECT FREEDOM OF SPEECH?

1. The argument from self-fulfillment and autonomy

- The primary argument is that speech is a uniquely human activity. It is the expression of thought and in speaking we fulfill and live out our humanity.
- Because autonomous human beings have a right to make up their own minds they also have a right to all the information that is necessary for them to do that (*Scanlon*).

2. The argument from truth

- John Milton *Areopagitica* (1644) & John Stuart Mill *On Liberty*
 - The argument is that speech should be protected because truth can only be discovered where there is a circulation of all ideas, regardless of their perceived value at any given time.
 - If the circulation of ideas is restricted, truth may be displaced by falsehood.
 - Free press was vital in circulating ideas and truth would always prevail regardless of what other ideas might be circulated.
 - The rationale relies on the human faculty of reasons; in short we will recognise truth when we see it.
- *Abrams v United States* 260 US 616 (1919) per Justice Oliver Wendell Holmes: ‘the best test of truth is the power of the thought to get itself accepted in the competition of the market.’

3. The argument from democracy/ self government

- Democracy argument considers the content of the speech as information: access to information enables citizens to access the workings and outcomes of the democratic processes and accordingly, the quality of democracy will be improved.
- The content of speech as normative or political opinion, where more speech will provide a wider of political views and ethical alternatives.

HOW IS FREEDOM OF SPEECH PROTECTED IN AUSTRALIA?

- The Australian Constitution does not have any express provision protecting freedom of speech.
- However there are other forms of protections:

(a) The CL and Statute

- CL offers negative protection- a person has a certain extent of protection until it is taken away
- The underlying rationale is that freedom is valued but not fully developed
- It protects freedom of expression to a point but also leave room for other competing considerations

(b) International covenants and treaties

- In 1980 Australia became a signatory to the International Covenant on Civil and Political Rights.
- Article 19(2) of the ICCPR provides:
 - Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.
- The Covenant is not directly enforceable in Australia, however its provisions support a number of domestic laws which confer enforceable rights on individuals.
- It does not create separate legal rights unless Parliament legislate it as domestic law.

(c) Express freedoms

Other countries

- United State of America
 - *First Amendment of the US Constitution (USA)*: “Congress shall make no law abridging freedom of speech or of the press ...”
 - It is constitutionally protected.
- United Kingdom
 - *European Convention for the Protection of Human Rights and Fundamental Freedoms* Article 10
 - UK has incorporated Article 10(1) into its *Human Rights Act* 1988 (UK):
 - Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- Canada
 - *Canadian Charter of Rights and Freedoms* (1982) s 2(b)
 - Constitutional protection against political government
 - S 2: Everyone has the following fundamental freedoms:
 - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication
- New Zealand
 - *Bill of Rights Act* 1990
 - S 3: This Bill of Rights applies only to acts done
 - a. By the legislative, executive or judicial branches of the government of New Zealand; or
 - b. By any person or body in the performance of any public function, power or duty conferred or imposed on that person or body by or pursuant to law.
 - S 14: Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form.
 - Bill of Rights can be repealed or amended – not constitutionally entrenched

Within Australia

- i. Australia Capital Territory
 - *Human Rights Act 2004* (ACT) s 16:
 - a. Everyone has the right to hold opinions without interference.
 - b. Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.
 - ii. Victoria
 - *Charter of Human Rights and Responsibilities 2006* (Vic) s 15:
 - (1) Every person has the right to hold an opinion without interference.
 - (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether (a) orally (b) in writing (c) in print (d) by way of art, or (e) in another medium chosen by him or her.
 - The charter acknowledges freedom of speech but it is not constitutionally entrenched. Parliament can amend anytime.
 - All proposed law have to be checked against the Charter to be issued with statement of compatibility.
 - Charter does not give personal rights – can't bring a lawsuit for breaching. It aims to get things right at the planning state.
- on lawsuits.