

I wish to make known my objection to any move by the parliament of Australia to curtail the rights of citizens of Australia to Freedom of Speech. The new powers being sought will enable the ACMA to monitor efforts and require digital platforms to do more, placing Australia at the forefront in tackling harmful online misinformation and disinformation, while balancing freedom of speech, or so the explanation proclaims. I would argue this is merely starts us down what will inevitably become an increasingly slippery slope – even if the consequences were unintended – and so we must avoid making these changes at all costs. The convenience of politicians and officials ought never be a factor in such deliberations. And the end never justifies the means.

In 1966 the UN General Assembly adopted the International Covenant on Civil Rights (ICCPR): <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

For you reference there are 53 Articles in the overall ICCPR text.

The IPCCR states:

1. Everyone shall have the right to hold opinions without interference.
2. 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 other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - ( a ) For respect of the rights or reputations of others;
  - ( b ) For the protection of national security or of public order, or of public health or morals.

### ***General comment 34 (open shut box)***

General Comment 34 emphasises that freedom of expression and opinion are the foundation stone for a free and democratic society and a necessary condition for the promotion and protection of human rights. This General Comment addresses in detail:

- freedom of opinion
- freedom of expression

- freedom of expression and the media
- the right to access to information
- the importance of freedom of expression in a democratic society
- the application of Article 19.3 on permissible limitations on freedom of information and expression
- the scope for limitations on freedom of expression in certain areas
- the relationship between articles 19 and 20.

## **Freedom of information, expression & democracy**

General Comment No. 25 deals with freedom of expression in the context of participation in public affairs and the right to vote. The Human Rights Committee has stated that:

Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association. ...

In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.

It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas.

**The Australian Human Rights Commission address the issue under Rights and Freedoms** <https://humanrights.gov.au/our-work/rights-and-freedoms/common-law-rights-human-rights-scrutiny-and-rule-law>

### **Common law rights, human rights scrutiny and the rule of law**

Australia is unusual among common law countries in not having a Constitutional Charter or Bill of Rights.

However, common law courts have power to provide significant protection of human rights principles including the rule of law, except where legislation specifically overrides this power.

### **Parliament presumed not to intend to limit fundamental rights**

A well-established principle of statutory interpretation in Australian courts is that Parliament is presumed not to have intended to limit fundamental rights, unless it indicates this intention in clear terms.

In *Coco v The Queen (1994) 179 CLR 427 at 437* the High Court restated this principle as follows:

The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language.

Although the presumption - that legislation is intended to be consistent with fundamental rights - can be overridden by sufficiently clear words, this presumption constitutes a substantial level of protection for what has been termed the "principle of legality".

In *Electrolux Home Products Pty Ltd v Australian Workers' Union*, Chief Justice Gleeson said:

The presumption is not merely a commonsense guide to what a parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.

This presumption includes fundamental rights recognised by the common law.

A similar presumption applies regarding consistency with international law obligations, including human rights treaty obligations, which came into force for Australia prior to the passage of the legislation concerned. As stated by High Court Chief Justice Mason and Justice Deane in the *Teoh* case:

Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law.

### **Positive measures**

Common law recognition of rights generally lacks the provisions contained in the human rights treaties for obligations on governments to take active measures to promote and protect human rights, in addition to refraining from acting inconsistently with rights.

Common law principles do contain concepts intended to provide protection regarding children and regarding people with disability in some areas, although in some instances this has led (because of relevant statutory provisions and lack of appropriate administrative and policy settings) to further breaches of human rights.

For example, a person with disability who is (in the interests of the right to a fair trial) found unfit to plead to criminal charges, may as a consequence be detained indefinitely, without the courts having found any capacity to remedy the obvious (and in some cases extremely severe) breaches of ICCPR Article 9 involved.

### **Personal liberty**

Common law principles in this area clearly cover the issues dealt with by ICCPR Article 9, although Article 9 provides more detail in some respects.

As with the common law principle, Article 9 includes a principle of legality, in requiring that any restrictions be specifically provided by law.

It is less clear how far the concept of personal liberty extends to cover other related rights and freedoms under the ICCPR.

### **Privacy**

The right to privacy under the ICCPR includes a right to private life (including intimate behaviour between consenting adults), as confirmed for example by the UN Human Rights Committee in [Toonen v Australia](#). There does not appear to be any correspondingly broad common law presumption yet identified specifically to restrict the extent to which the legislature may intrude into private life.

### **Freedom of association**

Freedom of association would appear to be included in common law, considering the views of the Full Federal Court in [Dr Haneef's](#) case. The present status at common law of rights to engage in trade union activity is less clear.

### **Slavery**

Having regard to Lord Mansfield's landmark judgment in [Somerset v Stewart](#) (1772) 98 ER 499, freedom from slavery (if not necessarily freedom from forced labour) appears to be included among fundamental common law freedoms.

A right to personal liberty appears naturally to encompass freedom from slavery and trafficking in persons.

### **Common law rights and parliamentary scrutiny**

Much of the debate in Australia about legislative recognition of human rights has been about how far human rights in Australia are protected by the role of Parliament and the common law.

The Commission regards the establishment of the Parliamentary Joint Committee on Human Rights in 2012, giving effect to the Human Rights (Parliamentary Scrutiny) Act 2011, as a very significant enhancement of the role of the Federal Parliament in human rights scrutiny.

The responsibilities of the Committee, and the requirements for legislation to be accompanied by Statements of Compatibility with human rights, are defined by reference to seven major human rights treaties to which Australia is a party:

- the International Covenant on Civil and Political Rights
- the International Covenant on Economic, Social and Cultural Rights
- the Convention on the Elimination of All Forms of Racial Discrimination

- the Convention on the Elimination of All Forms of Discrimination against Women
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- the Convention on the Rights of the Child
- the Convention on the Rights of Persons with Disabilities.

This presents the Committee with a wide-ranging mandate. Issues have also been raised within Parliament whether the mandate of the Committee should also include scrutiny of legislation regarding impact on rights from wider sources, and in particular common law rights.

Moreover:

The Universal Declaration was adopted by the General Assembly of the United Nations on 10 December 1948. Motivated by the experiences of the preceding world wars, the Universal Declaration was the first time that countries agreed on a comprehensive statement of inalienable human rights.

Australia played an important role in the development of the Universal Declaration. The Universal Declaration begins by recognising that ‘the inherent dignity of all members of the human family is the foundation of freedom, justice and peace in the world’.

It declares that human rights are universal – to be enjoyed by all people, no matter who they are or where they live.

The Universal Declaration includes civil and political rights, like the right to life, liberty, free speech and privacy. It also includes economic, social and cultural rights, like the right to social security, health and education.

- [Read the Universal Declaration of Human Rights](#)

The Universal Declaration is not a treaty, so it does not directly create legal obligations for countries.

However, it is an expression of the fundamental values which are shared by all members of the international community. And it has had a profound influence on the development of international human rights law. Some argue that because countries have consistently invoked the Declaration for more than sixty years, it has become binding as a part of customary international law.

Further, the Universal Declaration has given rise to a range of other international agreements which **are legally binding** on the countries that ratify them. These include

- the [International Covenant on Civil and Political Rights](#) (ICCPR) and
- the [International Covenant on Economic, Social and Cultural Rights](#) (ICESCR)

As it stands the proposed changes do not improve the original declaration of ICCPR. Therefore, any move by parliament to introduce changes to the Human Rights issues as Freedom of Speech under the context of the Covenant referred to herein, that have not been exhaustively discussed and scrutinised to the same degree as the 1966 ICCPDR Covenant, ought not be introduced as law. Only after such a proposal had been exhaustively discussed and scrutinised, and an election or Referendum held to decide the matter, could such a radical proposition be contemplated for actual legislation. That is not the case here. Even then, such legislation must accord with the 1966 UN General Assembly adopted International Covenant on Civil Rights (ICCPR) ICCPR, and the earlier 1948.

Yours faithfully

Anthony Carter Owen

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