Judges Must Protect Free Speech

Australian Press Council News

In 1994, the High Court applied the implied freedom of speech found in the Australian Constitution to defamation law. Now it is going to review those decisions. **Warren Beeby**, Group Editorial Manager of News Limited, looks at some of the issues.

Freedom is a fragile thing. When taken for granted, it is often lost.

The freedom to speak out on political matters has only been officially acknowledged for a few years in Australia, and already is under threat.

The threat stems, ironically, from a case brought in the High Court by an animal liberationist, Laurie Levy, who is trying to extend the concept of free political comment to encompass his protests against duck shooting which involve unauthorised entry into duck shooting areas to recover wounded birds.

During the conduct of this case earlier this month, one of the High Court judges, Sir Daryl Dawson, invited the Victorian Solicitor General, Mr Douglas Graham, to seek leave to reopen and re-argue the principles enunciated in a string of free speech cases in the early '90s.

Thus the free speech laws are squarely in the judicial gunsight, although this concept of entrenched freedom has only been around since 1992. Its catalyst was a move by the then Hawke government in 1991 to ban political advertising on television during federal election campaigns to save the ALP millions in advertising dollars.

There was an immediate angry reaction. Critics said the government of the day was trying to stifle political debate in a most blatant assault on the basic right of free speech. The trouble was that Australia's then 88-year-old Constitution contained no Bill of Rights like America, and thus the "basic right of free speech" that we all held so dear was just a myth.

The only rights that existed for Australians were those that successive governments had not yet legislated away. Now it seemed Bob Hawke was about to wipe out an important element of political comment.

Television stations and the NSW government joined forces to oppose Canberra's ban. They had been given comfort by a recent case in the High Court - *Wills v Nationwide News Pty Ltd* - which was completed other than for delivery of the judgment.

In this case, *The Australian* had been prosecuted in the Federal Court in NSW under the *Industrial Relations Act* for publishing comment which the authorities deemed was "likely to bring into disrepute" a member of the Arbitration and Conciliation Commission.

The newspaper took the case to the High Court to challenge the validity of the legislation which virtually gave members of the Commission immunity against adverse comment. It argued that the law was unconstitutional and therefore in excess of Commonwealth powers, and it raised the issue of an inherent right of freedom of speech in the Australian Constitution.

While the seven High Court judges were still considering their decisions in The Australian case, the television stations and the NSW government issued their challenge to Hawke's ban.

The two judgements were delivered simultaneously in August 1992.

Both challenges were upheld: a right to free speech on political matters was implicit in the Australian Constitution.

All but two of the seven judges wrote individual judgments, and because most of them took slightly different views on what could be implied from the Constitution, the extent of the freedom was unclear.

However, its effect was to enshrine the idea of representative government. Governments could no longer justify making laws that took away fundamental rights to discuss and criticise the activities of governments, politicians and public officials.

The implied free speech judgments led to another outcry from politicians and many members of the legal fraternity who argued that the High Court had entered the political realm and usurped the rights of the elected parliaments by implying rights which were not expressly stated in the Constitution.

In 1994, two landmark defamation test cases came before the High Court. In these, the defendant newspapers for the first time relied on the defence of free speech, and the High Court articulated a new "constitutional defence".

The first involved The Herald and Weekly Times against a federal politician, Dr Andrew Theophanous, and the second, *The West Australian*, against Mr Tom Stephens and five other WA politicians. The newspapers won both cases.

The victory also extended the existing defamation defence of Qualified Privilege because the concept of representative democracy conferred on all readers, viewers and listeners of media a "valid legal interest" in receiving information on "political matters".

Suddenly it was possible to speak out and criticise in the court of

political discussion with some degree of protection. This protection of course came nowhere near the absolute protection afforded to statements by politicians in Parliament.

The result was a greater freedom than ever before for writers to analyse, criticise and hold public figures accountable. There is no doubt that political debate has become more lively and penetrating in the past few years as a result of this.

One immediate flow-on was that the stream of defamation actions by politicians against newspaper companies slowed considerably. The constitutional defence meant they were able to publish penetrating political comment as long as it was reasonable and without malice.

Now the "Duck Shooters Case" has focused attention on the implicit right of free speech at precisely the time when resignations and appointments to the High Court have not only changed its composition, but also its thinking. Chief Justice Sir Anthony Mason and Justice Sir William Deane, who both supported the concept of free political speech based on the notion of representatives government, have gone. Given that the Theophanous and Stephens cases were narrowly won (4-3) by the newspapers with the support of Mason and Deane, the approach of the new appointees is crucial. The first is Mr Justice William Gummow, who most commentators believed would interpret the Constitution literally, and who they say is not likely to be a devotee of the implied freedom school. The second is Mr Justice Michael Kirby, who could take a similar stance.

Thus, a vote today on representative democracy's implied free speech might possibly swing the other way by 4-3 or even to the extent of 5-2. This would be a tragic outcome for media outlets. Hopefully, though, the judges might take the view that certainty in constitutional law dictates that they should leave in place laws

entrenched by four successive landmark judgments. Chop and change should not be a characteristic of law at this level.

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