Free Speech and the Constitution

International Background
In 1948 the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR). Article 19 affirms the right to free speech:

Article 19. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Members of the Commonwealth Parliament reaffirmed the principles of the Declaration during a sitting on 10 December 1998 to mark the 50th anniversary of the UDHR and pledged to give wholehearted support to the principles enshrined in the Declaration.

Article 19 of the 1966 United Nations International Covenant on Civil and Political Rights (ICCPR) states that:

Everyone shall have the right to freedom of expression ...

Australia is a signatory to this treaty and, in order to incorporate treaties and conventions into Australian law, governments must pass a specific Act of Parliament. Although some parts of the treaty have been implemented into law, such as the Human Rights Commission Act 1981, no government has implemented the free speech provisions and therefore they are not enforceable by Australian courts.

Freedom of Speech and the Constitution
The Australian Constitution does not have any express provision relating to freedom of speech. In theory, therefore, the Commonwealth Parliament may restrict or censor speech through censorship legislation or other laws, as long as they are otherwise within constitutional power. The Constitution consists mainly of provisions relating to the structure of the Commonwealth Parliament, executive government and the federal judicial system. There is no list of personal rights or freedoms which may be enforced in the courts. There are however some provisions relating to personal rights such as the right to trial by jury (section 80), and the right to freedom of religion (section 116).

Since 1992 decisions of the High Court have indicated that there are implied rights to free speech and communication on matters concerning politics and government, e.g. permitting political advertising during election campaigns. This is known as the 'implied freedom of political communication'. Issues arising from these decisions include defining when communication is 'political' and when the freedom should prevail over competing public interests.

In 1942 a Constitutional Convention held in Canberra recommended that the Constitution be amended to include a new section 116A preventing the Commonwealth or a State passing laws which curtailed freedom of speech or of the press.

The government did not accept this proposal and it was not included in the referendum on 19 August 1944, when other constitutional amendments were proposed.

The advantage of having such rights written into the Constitution is that they are 'entrenched' and cannot be amended or removed by any government without the overwhelming approval of the people voting at a referendum to amend the Constitution. Rights contained in other legislation, such as the Racial Discrimination Act 1975, are not entrenched. They may be amended or repealed by any government with the consent of Parliament.

Freedom of Speech and a Bill of Rights
Proposals for legislating for freedom of speech have been made mainly in the context of legislating for a Bill of Rights. Since 1973 at the Commonwealth level there have been attempts to legislate for a Bill of Rights which would incorporate provisions of the ICCPR, including Article 19, into Australian law.

Various governments, parliamentary parties and individual members of parliament have introduced legislation to establish a statutory Bill of Rights, which would include the right to freedom of speech. While lacking constitutional force, such an Act of Parliament would list various rights which could be enforced in the courts in many situations. The less complicated option of legislation, rather than amending the Constitution, has been preferred by proponents of a Bill of Rights.

More recently at the State level Parliamentary Committees in Queensland and New South Wales have considered a Bill of Rights but neither has recommended such a proposal. In 2002 the Australian Capital Territory government established a non-parliamentary committee to inquire into a Bill of Rights for the ACT.

Professor George Williams has summarised the arguments for and against the introduction of a Bill of Rights:

It is interesting to note that not only is there no legislation providing for freedom of speech either in the Constitution or in other legislation, but Governments have passed legislation to prevent free speech in certain circumstances. Examples include the various State and
which is separate from their of speech, mainly in legislation legislated more recently for freedom of speech Victoria campaign for defamation reform at http://www.fsvonline.org/ Overseas Comparisons

The United States incorporated a Bill of Rights into its Constitution in 1789. Other countries have legislated more recently for freedom of speech, mainly in legislation which is separate from their constitutions: Ireland in 1937, Canada in 1982, New Zealand in 1990, South Africa in 1996, and the United Kingdom in 1998. The European Union has included freedom of expression and information in its Draft Charter of Fundamental Rights for possible adoption by member states. This makes Australia alone among like-minded countries not to provide for freedom of speech in legislation or the national constitution.

Further Reading

The above material has been drawn from the following sources:

1. The text of the Declaration may be found at: http://www.unhchr.ch/udhr/lang/eng.htm
3. The text of the Covenant may be found at: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm
8. For example see Coleman v P and Anor [2001] QCA 539, Queensland Court of Appeal. The Court upheld the right of Townsville City Council to fine Patrick Coleman for addressing a crowd in a shopping mall, despite Coleman’s defence of a constitutional right to free speech. In January 2002 Coleman applied to appeal to the High Court. (http://www.adaactive.org.au/adelaide/news/display.php3?article_id=143)
10. Section 123 of the Constitution.
15. George Williams, A Bill of Rights for Australia, University of NSW Press, Sydney, 2000, p. 35.
16. For example see the Free Speech Victoria campaign for defamation reform at http://www.fsvonline.org/
17. Amendment 1 states that Congress shall make no law ‘abridging the freedom of speech’.