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**Public Submission - Senate Standing Committee on Legal and Constitutional Affairs -
Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019**

Submission made on behalf of
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Introduction

We wish to thank the Committee for the opportunity to provide this public submission to inform the Parliament's consideration of this important proposed amendment to the Australian Constitution in relation to the protection of freedom of speech. This submission seeks to outline for the Committee national security considerations pertinent to the proposed amendments to the Constitution, as based on our combined expertise and experience in relation to Australia's national security. For the avoidance of doubt, the views conveyed in this submission are those of the authors alone and should not be taken to represent an institutional position on behalf of the National Security College, nor the Australian National University.

In particular, in this submission we advocate that the Bill should incorporate a clear distinction between 'freedom of speech' and 'freedom of information'. We outline how a constitutional protection of free speech may operationally affect Australia's national security agencies and we offer some assessment of how the contemporary security environment should alter how the Australian Government considers the balance between the imperative of security and the imperative of free speech. Elsewhere in this submission, we also present the argument that protecting freedom of speech may improve public trust in Australia's national security institutions whilst also bolstering Australia's information resilience. Finally, we suggest that constitutionally protected free speech may also harden Australian democracy against maladministration and bad-faith actors by bolstering the capacity of Commonwealth public servants to inform Australia's political debate and speak out against activities antithetical to the national interest.

Should it benefit the Committee's further consideration of this amendment, we would be happy to make ourselves available to attend any public hearings the Committee may wish to convene.

Sincerely,

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Freedom Speech versus Freedom of Information

In interpreting this constitutional amendment, we offer a deliberate distinction between ‘freedom of speech’ on the one hand, and what may be called ‘freedom of information’ on the other. Freedom of speech encompasses the right of individuals to speak and express themselves in good faith regarding their political opinions, estimations, and concerns. In contrast, freedom of information concerns the extent to which individuals have a right to access and share data and information, including information that in some contexts may be privileged.

In practical terms, this distinction assumes that the proposed amendment would ensure Australian citizens would be ‘free’ to communicate openly regarding things such as political events, personal concerns, and opinions, but would not be constitutionally protected when openly sharing or disclosing otherwise privileged or protected information. We submit that maintaining this distinction would be a crucial to maximising the benefit of the constitutional amendment to national security, as it would protect the essential Australian value of free expression, whilst ensuring the disclosure of protected national security information, namely classified government material, would remain unlawful. As we outline below, constitutionally protected free speech would likely improve public trust in national security institutions and may indeed improve Australia’s resilience to foreign interference and political instability as a result.

Conceptualising Free Speech for the Modern Security Environment

We note the distinction outlined in the Bill’s explanatory memorandum that freedom of speech may need to be regulated by the Commonwealth in different ways in times of war and peace, respectively. We contend that distinctions between wartime and peacetime are no longer applicable to the foreseeable strategic environment in which Australia must seek its security. The weaponisation of information enabled by the Internet, the emergence of the cyber domain as a battlespace, and the proliferation of non-military malicious actors will be enduring features of the future, creating a spectrum of conflict and insecurity that makes the distinction between peace and war less discernible and less meaningful for decisions of policy. Accordingly, the explanatory memorandum that will guide any constitutional codification of Australians’ freedom of speech should acknowledge that there will be a continual tension between civil liberties and national security regardless of Australia being in a formal state of war or not.

Furthermore, to aid future judicial interpretation that will doubtless occur should this amendment be enacted, the explanatory memorandum would do well to express that in a liberal democratic society Australian Governments have an obligation to promote and protect free speech as part of their security mission. Put simply, as a liberal democracy, our security services exist to secure the essential values of our society – free speech among them – and that therefore security measures should never permanently or irreversibly restrict free speech in such a way that the Australian Government would be stifling the very way of life we seek to protect. Acknowledging this expressly is vital precisely because distinctions between peace and war are less feasible and so our society is exposed to the risk of creeping securitisation propelled by the inertia of an international system that will forever be, to some extent, hostile.

Operational Considerations

In relation to national security operations, some will likely contend that codifying the right of free speech in Australia’s constitution may apply unwelcome, detrimental constraints on the way law enforcement and intelligence agencies are currently able to investigate and curb national security threats. From an operational

point of view, Australia's hitherto unwritten implied right of free speech has provided a degree of useful ambiguity, which has allowed agencies to curb things like vilification, harassment, and incitements to violence more easily than in comparable jurisdictions such as the United States. However, this ambiguity has also likely hindered operational planning by making it harder for agencies' legal advisers to determine the lawful application of some powers in all instances.

To this end, a codified right of free speech may in fact make operational planning easier by clearly demarcating the extent of agencies' investigative powers in relation to speech. An example of this would be investigations by the Australian Federal Police (AFP) or Australian Security Intelligence Organisation (ASIO) in relation to the publication of national security information by journalists who claim free speech protections. In recent times there has been consternation about what kind of journalistic activity in relation to national security information should be considered protected free speech. A codified right of free speech would likely resolve this as it would make journalistic expression informed by national security information clearly lawful, whilst leaving little doubt that undertaking the verbatim disclosure of otherwise classified material is unlawful, such as the publishing a top secret document online.

On the balance of probabilities, it should be assumed that a constitutional right to free speech will lead to more journalistic expression concerning national security information because sources and journalists themselves will likely feel more protected to engage. Accordingly, the possibility cannot be ruled out that as a result of this amendment, some speech may occur that brings national security information into the public domain in a manner that harms the national interest, potentially negatively impacting active national security operations. Despite this, we do not believe this possibility is sufficient justification to resist the enactment of this amendment. As a liberal democratic society that values the free press as a basis for disseminating knowledge, truth, and exercising external accountability of those in power, we should be confident that on balance those engaged in journalism in Australia will do so ethically and with a responsible assessment of national and public interest. In a free society we cannot regulate away the chance of bad or irresponsible journalism, so neither should we use the possibility of such practices as a basis to leave undefined the free speech of all Australians.

In terms of other operational considerations, members of Australia's national security community are naturally subject to a range of unique restrictions on their free speech owing to their access to highly sensitive national security information, including information that if publicised would damage Australia's national interests. At their most severe, such restrictions include penalties of imprisonment for the unauthorised identification of members of the Australian intelligence community, particularly employees of ASIO and the Australian Secret Intelligence Service (ASIS). Our view is that the constitutional amendment proposed in this Bill would not, nor should not, alter in any way these important restrictions on the free speech of a select few Australians. Such restrictions are justifiable given the sensitivity of the information that is seeking to be protected and moreover they are restrictions willingly entered into by the individuals who choose to undertake this work. As such, we anticipate that this Bill would have no meaningful operational impact in regard to these restrictions.

Freedom of Speech and Public Trust in National Security Institutions

The most far-reaching benefit that a constitutionally protected freedom of speech would likely bring to Australia's national security is the bolstering of public trust in Australia's national security institutions. In recent times, changing threats to Australia's national security as well as broadening interpretations of the concept of national security, has seen the scale and powers of Australia's security institutions grow markedly. The proliferation of cyber-enabled crime, the emergence of Internet-enabled violent extremists, and Australians engaging in foreign conflicts has prompted the enactment of additional intrusive powers for national security

agencies to undertake new forms of electronic surveillance, interception of telecommunications, and even the removal of citizenship, in the case of terrorist foreign fighters with dual nationality. Such additional powers paired with the operational secrecy adopted by such agencies, has allowed some in the Australian community to regard Australia's national security agencies as being overly intrusive and insufficiently transparent. These agencies rely on public trust and forbearance not only to sustain their mandate to exist, but for agencies upholding domestic security such as the AFP and ASIO, they also depend greatly on the cooperation of the community to provide information and assistance to enable their operations. Mistrust and suspicion of national security agencies can therefore be a critical obstacle to operational success.

Furthermore, today Australia's institutions, including national security agencies, are actively being targeted by foreign actors seeking to use disinformation and interference to undermine their integrity and stability. Sustaining public confidence in their purpose and work is therefore an urgent and existential task for Australia's national security agencies. To that end, with a constitutionally protected right to voice an opinion or concern, citizens may be able to place greater trust in national security institutions because they will have a clearer sense of how their personal liberties will be uninhibited by extraordinary powers exercised by Australia's security agencies. At the same time, with constitutionally defined boundaries regarding what freedom of speech entails, governments will likely have a clearer basis to concisely explain to the community what speech should be restricted or prohibited based on harm to Australia's national security. Safeguarding speech that demonstrates Australia's commitment to open, democratic governance will strengthen that governance, while also giving legitimacy to the restriction or removal of acts that harm it.

Information Resilience

A flow-on benefit from protecting free expression in Australia could be a corresponding rise in Australia's information resilience, that is, the resilience of public information, especially information disseminated by Australian Governments, from being degraded, dismissed or interfered with. As mentioned earlier, for the last decade or so Australian society has been subject to mis- and disinformation, including that being deliberately disseminated by foreign governments, terrorists and extremist groups. Usually comprising deliberate falsehoods, incomplete information, and conspiracy theories, such weaponised information is corrosive to social cohesion and institutional integrity. Sadly, this is highly likely to be a consistent feature of Australia's security environment given the threat posed by political interference is unlikely to recede in coming years.

However, expressly protecting Australians free speech could be part of an approach to bolstering Australia's information resilience. In particular, where malicious actors seek to disseminate disinformation, such as conspiracy theories, to undermine faith in Australian democracy and law, or otherwise show that Australia's liberal values ring hollow, it will likely be harder for such ideas to proliferate widely in a context where Australian citizens know that unlike alternative political models, their liberal democratic system gives them a constitutional unimpeachable right to free speech.

In this regard, enacting a constitutional protection of free speech in our current geo-political context may indeed offer a significant soft power dividend for Australia. Authoritarian states, namely China and Russia, are presently undertaking coercive strategies to make the international system more permissive for their models of authoritarian governance. Their respective strategies involve concerted information campaigns to discredit liberal democratic ideas and institutions as a means to show that ultimately, Western democratic nations are inherently unstable, unequal, and hypocritically illiberal. Choosing to enact a constitutional protection of Australians' free speech at this time would send a powerful message to the international community about

the democratic values of Australian society and hold in stark relief for domestic and international observers the comparative absence of such civil liberties in other states, particularly the People's Republic of China.

Freedom of Speech and Structural Resilience of the Public Service

The constitutional protection of free political speech would likely have a positive effect on the resilience and security of the structures of Australian governance, especially the bureaucracy, judiciary and other aspects of the Australian civil service. By providing clear protections for public servants, they can be better empowered to voice concerns and appraisals of the political considerations of public administration.

While Australia has traditionally urged its public servants to be apolitical in all aspects of public life, recent events in the United States have demonstrated the importance of a politically valid public service, especially when the instruments of state are threatened by maladministration and internal bad-faith actors. If public servants lack robust protections for free political speech, their capacity to speak out against antidemocratic activities within government and to generally contribute to the democratic process is harmed. Given that they are often the best placed individuals to inform democratic polities of executive breaches of public trust, of maladministration and corruption, failing to protect the free political speech of public servants means that they must choose between their career (or in some cases, criminal prosecution) in order to better inform the public of political concerns.

As such, the Committee may wish to consider the additional harm that could otherwise have recently come to the democratic government of the United States had its civil servants not enjoyed free political speech. From high level bureaucrats supplying public testimony such as former National Security Advisor, John Bolton, and Former Director of National Intelligence, James Clapper, to the myriad of Department of Justice employees that resigned in the face of pressure from bad faith actors within the political system; American civil servants could rely on a tradition of political legitimacy to ensure that their efforts to better inform and preserve their nation's democracy did not come at the cost of their careers or freedom. Indeed, for many their right to free speech compelled them with a responsibility to exercise it.

To be clear, we here reaffirm the difference between 'freedom of speech' and 'freedom of information' – public servants should not be free to disclose protected information to which they have privileged access. Instead, we suggest that following the American example, they should be able to exercise their position as free citizens to take part in, and help inform discourse that is already public, especially regarding issues of democratic governance and institutional integrity. Given the unique threats democratic governments face from manipulated public opinion and their susceptibility to bad-faith actors, a politically valid and resilient public service would be an important source of national security, especially against domestic instability and maladministration.

About the Authors

Dr. James Mortensen

Dr. James Mortensen is a Lecturer at the National Security College. He completed his PhD through the NSC in 2020, and currently lectures postgraduate courses on critical technology, and the environment and national security.

His research and publications explore the philosophy and ethics of security, critical technology, social and political cohesion, and environmental security, especially in the context of freshwater systems in Australia.

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Dr. Stoltz's own research explores options for Australia to shape and influence international security, as well as Australia's policy responses to a breadth of domestic national security challenges.

He holds a PhD and Advanced Masters of National Security Policy from the Australian National University as well as a Bachelor of Arts from the University of Melbourne.