Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Parliament House
Canberra ACT 2600

20 August 2021

Inquiry into the Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019

The Arts Law Centre of Australia (**Arts Law**) is pleased to make a submission to the Senate Legal and Constitutional Affairs Committee's inquiry into a proposed constitutional amendment, by way of referendum, to enshrine freedom of expression and freedom of the press into the Australian Constitution.

Our submissions focus on the impact of the proposed amendments for Australian artists working across all media, including writers, cartoonists and photographers (among others) engaged in media reporting and commentary; as well as artists, writers and performers whose political, religious and other views may be expressed in their work. For years, Arts Law has advocated for the right to freedom of expression as an indispensable protection for artists to express themselves freely and openly for the fostering of cultural growth in Australia – including the delivery of messages that can be challenging, difficult and controversial.

This submission outlines Arts Law's support for constitutional recognition of freedom of expression and freedom of the press. It will examine and offer comment on the current proposed wording and note the similarities and differences with existing laws and comparable protections in other jurisdictions. Our submissions will focus in particular on our concerns around the language of the limitation to the proposed constitutional freedoms. Lastly, given Arts Law's experience engaging with Aboriginal and Torres Strait Islander artists, the submission will address how the cultural expressions of Australia's First Peoples should be protected under the proposed reforms.

Who are we?

Arts Law is a not-for-profit national community legal centre for the arts, actively protecting the rights of artists since 1983. Our dedicated service for Aboriginal and Torres Strait Islander artists, Artists in the Black (**AITB**), was established in 2004, providing targeted legal services for Aboriginal and Torres Strait Islander artists and arts organisations across Australia.

Arts Law has a consistent record of support for constitutional recognition of freedom of expression, including submissions to related freedom of expression inquiries, including the 2016 Parliamentary

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Joint Committee on Human Rights' inquiry into "Freedom of speech in Australia" around Part IIA of the *Racial Discrimination Act 1975* (Cth),[1] and the 2014-15 Australian Law Reform Commission's "Freedoms Inquiry" in response to the Commission's "Traditional Rights and Freedoms – Encroachments by Commonwealth Laws Issues Paper (IP46)",[2] which included discussion of freedom of expression encroachments in Commonwealth legislation.

Pre-existing constitutional rights

Australia's Constitution has few expressly enumerated rights. As noted in the Explanatory Memorandum to the present proposed alteration, s 116 of the Commonwealth Constitution is a notable exception, providing that the Parliament "shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion …".[3] The High Court has held this freedom is limited to protection of religious observance from government interference and cannot serve as an excuse for evading legal duties.[4] There is not even an express "right to vote" included in the Constitution.[5]

Just like the comparable rights of freedom of religion and freedom from religion conferred upon citizens of the United States in the First Amendment to the United States Constitution,[6] the defining character of s 116 is that it is phrased negatively and is directed as a prohibition upon the legislature rather than a positive grant of a particular right upon the people. This is because, in the view of the Founders of the United States, freedoms were not something able to be granted by the State. Rather, they are "inalienable" rights – things that cannot be bestowed, granted or traded (like other proprietary "rights").[7] Hence, the crucial, proscriptive, opening words of the First Amendment: "*Congress shall make no law* …".[8]

The implied freedom of political communication

The Australian Constitution has at present one known "implied freedom" – that is, the implied freedom of political communication.[9] The implied freedom has as its source the text and structure of the Constitution, particularly ss 7 and 24 which require free and fair elections of Senators and House

[1] Arts Law, *Submission 27*, "Freedom of speech in Australia", Parliamentary Joint Committee on Human Rights, 8 December 2016.
[2] Arts Law, *Submission 50*, "Submissions to Interim Report (IR 127)", *Encroachments on Freedoms – The ALRC Freedoms Inquiry*, 20 February 2015.
[3] *Commonwealth Constitution*, s 116.
[4] See *Krygger v Williams* (1912) 15 CLR 366 where freedom of religion did not allow for evasion of peacetime conscription). Constitutional freedom of religion also failed to stop the Adelaide chapter of the Jehovah's Witnesses from being compulsorily dissolved by the government with its property compulsorily acquired during the Second World War as an organisation that was "prejudicial to the defence of the Commonwealth": *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116.
[5] Cf. *Commonwealth Constitution* s 41: *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 (Brennan, Deane and Dawson JJ); *King v Jones* (1972) 128 CLR 221 (Gibbs CJ).
[6] *United States Constitution* amend I.
[7] *United States Declaration of Independence*.
[8] *United States Constitution* amend I.
[9] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

of Representative members by way of a fully informed voting public.[10] While a welcome recognition in the Constitution by the High Court, there are several limiting factors to the implied freedom that an express constitutional freedom would correct.

First, the freedom is very limited in its scope. It only applies to "political" communication, though where the boundaries lie is open for dispute. We know, for example, that it applies to printed and broadcasted news media,[11] political protest[12] and political donations.[13] But there is no definite line as to the boundaries of the implied freedom for when the personal and the political overlap – for example, when or whether a parliamentarian's financial affairs or personal relationships and behaviour become a matter of the public interest.

Second, there has been recent doubt cast by the newly appointed Steward J of the High Court on the very existence of the implied freedom.[14] This is all the more reason for an express constitutional amendment to clarify the situation and provide certainty to the public on the substance of the freedom.

Third, as emphasised by the High Court "repeatedly", the implied freedom "is not a personal right of free speech", but merely a restriction on legislative power with no underlying or express right or freedom.[15]

Last, the nature of the implied freedom also lacks an appreciation of the significance of this right to Australia's character as a liberal democracy. Constitutions are practical documents that govern the procedures of political and judicial institutions. But they are also symbolic documents that embody the aspirations of the nation and the values of the polity. A constitution that fails to enshrine fundamental civil and political rights is one that projects ambiguity as to centrality of those values to the nation as a whole. It is our view that a nation that views political communication as something implied – or that "goes without saying" – is a nation that risks erosion of its freedom over time.

The Text of the Amendment – Schedule 1

We now turn to the nature of the text itself as presented in the Schedule.

The Commonwealth, a State or a Territory must not limit freedom of expression, including freedom of the press and other media.

[10] *Commonwealth Constitution* ss 7 and 24. See also ss 64 and 128: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Comcare v Banerji* (2019) 267 CLR 373 [20] (Kiefel CJ, Bell, Keane and Nettle JJ).
[11] For example, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[12] *Brown v Tasmania* (2017) 261 CLR 328.
[13] *McCloy v New South Wales* (2015) 257 CLR 178.
[14] *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18; 95 ALJR 490 [249] (Steward J).
[15] *Comcare v Banerji* (2019) 267 CLR 373 [2019] HCA 23, 9 [20] (Kiefel CJ, Bell J, Keane J and Nettle JJ); *Brown v Tasmania* (2017) 261 CLR 328.

We believe that this is an appropriate wording for the freedoms of expression, including freedom of the press, for Australian constitutional conditions save for the addition of the words "**opinion and** expression" as discussed below. We note in particular the fact that the provision is couched broadly enough to capture not just the lawmaking powers of the Parliament, but also any Executive action that would infringe this provision. And we note its broad compliance with the standards set in key international instruments. The only addition or clarification to add is to protect the "freedom of **opinion and** expression", as articulated in the Universal Declaration of Human Rights[16] and the International Covenant on Civil and Political Rights,[17] an addition which would be fully in the spirit of the free, open and democratic society envisioned by the amendment. For our artist clients, this is particularly important given the broad range of views expressed in their images, writings, films and songs. It is not just the right to expression that these artists need, but the right for their social, political and personal commentary to be shared with the public, and the right of the public to hear it.

Couching the provision in such broad terms that it includes federal as well as State and Territory laws and actions is commendable and necessary to ensure consistency nationwide. This also ensures that there is to be no doubt about this constitutional protection prevailing over a State or Territory law that invalidly curtails the constitutional freedom.

Lastly, we are pleased that the express inclusion of freedom of the press is joined by freedom of *other media*. It may well be that a general freedom of expression would incorporate freedom of the press and other media by implication. However, it would be inadvisable to risk this implication and it is important that freedom of the press and other media is expressly included in the proposed amendment.

Further, the emergence of Internet-based, non-traditional media has rapidly changed the way we all consume news, current affairs, criticism, satire and entertainment, and the ways in which artists and creatives are able to express these ideas. We have observed our clients grappling with the Internet, social media and most recently non-fungible tokens and emerging digital platforms as new methods for creating and distributing their art. More than this, the ways in which generations to come will communicate their artworks are wholly unpredictable. As such, a constitutional amendment should be couched in language broad enough to be relevant in all places and all times, including all Internet-based media and, indeed, media consumed by way of new technologies that have yet to be invented.

However, a law of the Commonwealth, a State or a Territory may limit the freedom if the limitation is reasonable and justifiable in an open, free and democratic society.

Part of the reason why the United States is referred to so frequently in any discussion on constitutional free speech is not merely because they were one of the earliest adopters of the concept, but also because their Constitution is strict in its drafting. There is no limitation or exception to free speech protection enshrined in the document itself. As such, the United States

[16] For example, *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 19.
[17] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(1) and (2).

Supreme Court has only acknowledged a few narrow categories of speech which it is permissible to restrict as so-called "unprotected speech".[18] These categories have included obscenity,[19] incitement of immediate breaches of the peace[20] and, more controversially, laws suppressing political dissidents in times of war.[21]

Any limiting provision on free expression should, therefore, be treated as seriously, or indeed more seriously than the freedom itself, for it is the exception to the rule upon which most of the debate and the litigation around this provision will ultimately revolve. All major international human rights instruments to which Australia has assented that concern free speech clearly anticipate legitimate restrictions being made, either in general or during emergencies or times of crisis.[22]

The current phrasing exhibits a number of key features that will make its application a success, however we suggest caution around the phrasing of the limitation as, while it is necessary, it risks being applied to a broad range of circumstances that defeats the purpose of the freedom.

First, the limitation appropriately requires objective reasons for any law or action that limits free expression. *Reasonableness* has a long legal history and it is a concept very familiar to the courts. By it, we understand notions of objective belief in the view of "the man on the Clapham omnibus",[23] or more particularly in other contexts, the belief of an ordinary person in the shoes of a decision-maker or actor. *Justifiability*, however, adds an element that is novel and unfamiliar to current discourse on political communication. It puts an appropriate emphasis upon Parliament or the Executive to explain why a particular limitation is put in place – and to do so expressly. This allows full scrutiny by the public and by the courts of the *bona fides* of a restriction and whether it is appropriate and adapted to the stated need. However, a limitation based on what is "justified" runs a serious risk of allowing the Parliament a blank cheque to self-justify its own actions – for example, by stating that the mere fact of a parliamentary majority is in itself evidence of a law being "justified" as reflecting the views of democratically elected representatives. It should be made clear that the test is an objective one.

Second, the limitation correctly explains that the reasonableness and justifiability of the law needs a reference point – namely, that it must be compatible with Australia's character as an "open, free and democratic society". A test of this sort appears quite similar on its face to the way in which the implied freedom of political communication has been interpreted to-date by the High Court. Until now, this has required a limiting law to be "compatible" with the system of representative and responsible government for which the Constitution provides.[24] The proposed amendment broadens

[18] *United States v. Stevens* 559 U.S. 460 (2010).
[19] *Roth v. United States*, 354 U.S. 476 (1957).
[20] *Chaplinsky v. New Hampshire* 315 U.S. 568 (1942).
[21] Ibid.; *Schenck v. United States* 248 U.S. 47 (1919).
[22] For example, *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 29(2); *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(3).
[23] *McQuire v Western Morning News* [1903] 2 KB 100, 109 (Collins MR).
[24] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567*;* as modified by *Coleman v Power* (2004) 220 CLR 1; *McCloy v New South Wales* (2015) 257 CLR 178, 193–94 (French CJ, Kiefel, Bell and Keane JJ); and *Brown v Tasmania* (2017) 261 CLR 328, 363–64 [104].

the test to ask whether a limiting law is compatible with the express freedom of expression and of the press and other media in an open, free and democratic society for which the Constitution provides. Clearly, this captures the full scope of the implied freedom of political communication and more.

One point of clarification should be made, however. The current judicial test for the implied freedom of political communication is stronger than the proposed constitutional amendment. It is a fine distinction perhaps, but the current test requires that a law which burdens the implied freedom of communication must be "legitimate" or "compatible with the constitutionally prescribed system of representative government" and "reasonably appropriate and adapted."[25] This in turn requires a law to be suitable, necessary and adequate in its balance in what is referred to as a "structured proportionality" approach.[26] Perhaps the addition of "reasonable **and justifiable**" introduces a similar strength, but this is unclear and would need judicial scrutiny from the High Court to understand how broad or narrow this protection could be, and whether it embraces the idea of being necessary, legitimate or compatible with the implied freedom of political communication.

An altered wording that requires a limiting law to be "reasonable **and necessary**" or "reasonable**, necessary and compatible**" perhaps will avoid this potential weakness and allow the High Court to refer to existing jurisprudence in this field. Referring to necessity would also bring the alteration in line with the International Covenant on Civil and Political Rights, which only permits limitations on speech "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 (ordre public), or of public health or morals."[27]

The Positioning of the Amendment in the Text and Structure of the Constitution

An element of the proposed amendment – and one which obviously has received much deliberation – is where and how to position the amendment in the body of the Constitution. The decision to create a new Chapter IIIA is a fitting place for such an amendment for several reasons.

First, by placing the provision in the body of the Constitution, there is a clear signal to the polity at large that the new freedoms would be part of the fabric of Australian society and identity. From the pre-Federation constitutional conventions through to a number of significant judgments of the High Court, there has been a clear focus on the "text and structure of the Constitution" as reflecting certain unenumerated constitutional values (for example, separation of powers and the principles of responsible government).[28] By creating a new Chapter following Chapters I, II and III on the three

[25] Ibid. See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106
[26] *McCloy v New South Wales* (2015) 257 CLR 178; Ingmar Duldig and Jasmyn Tran, "Proportionality and Protest: *Brown v Tasmania* (2017) 261 CLR 328", 39 *Adelaide Law Review* 493 (2018), 500ff; Shipra Chordia *Proportionality in Australian Constitutional Law*, 2020, The Federation Press.
[27] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(3).
[28] George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983) 1.

branches of government respectively, there is a clear emphasis on the primacy of this right as a cornerstone of Australian society.

Second, by creating a new Chapter in this way, there would be a clear constitutional precedent set for other core human rights to be enshrined in the Constitution by future amendments. We understand that this is not under discussion at this time, but Chapter IIIA could in years to come – and with only a variation to its title – be Australia's own constitutional bill of rights, enumerating core civil and political rights in our nation's most important political instrument.

Prospects for the referendum

It is important to reflect on the poor success rate of referenda put to the Australian people for constitutional reforms – just eight passed from 44 attempts. The most analogous historical precedent for this reform is the unsuccessful 1988 referendum that included, among four questions, the following: "*A Proposed Law: To alter the Constitution to extend the right to trial by jury, to extend freedom of religion, and to ensure fair terms for persons whose property is acquired by any government. Do you approve this proposed alteration?*" The political discussion of the time, particularly around the vexed question of religious freedom, meant that this referendum not only failed, but received the lowest support of any referendum question ever posed in the history of the Commonwealth (30.79%).[29]

It is vital to the success of any amendment such as the one proposed that it be allowed to sit in isolation with as simple a question as possible to allow the Australian people to consider this reform singularly. It is difficult to believe that only 30.79% of the Australian people believed in 1988 in enshrining trial by jury – rather, it was the context of a suite of rights mixed together that confounded the electorate and muddied the political waters. Even so, the risk of failure is no reason not to proceed with an amendment that is fit for purpose and holds substantive value to Australian democracy and Australian citizens.

There is a risk, in the current political and media climate, that the articulation of "fake news" or inaccurate news and distrust of media more broadly could hamper efforts to pass an amendment protecting free expression, including a free press concurrently.

Impact of the reform on Aboriginal and Torres Strait Islander cultural expressions

Any creation of freedom of expression has a direct impact on artists and creatives in Australia, irrespective of their medium or discipline. Already the implied freedom of political communication has been known to protect non-verbal and artistic communication.[30] As Arts Law has noted in previous submissions, we accept that there should be clearly defined limits on the exercise of freedom of expression for artists, including defamation laws, classification laws and laws that

[29] Parliament of Australia, "Part 5: Referendums and Plebiscites," *44th Parliamentary Handbook of the Commonwealth of Australia*, 402.
[30] *Levy v The State of Victoria* (1997) 189 CLR 579.

address discrimination, harassment and vilification on the basis of race, sex, disability, sexuality or other statuses.[31]

The constitutional amendment would have significant implications for Aboriginal and Torres Strait Islander artists and our view is that it is necessary to ensure constitutional reform works meaningfully for First Peoples' interests. Among the areas of curtailment of free expression that we believe necessary is the introduction of laws that restrict the manufacture and sale of fake or inauthentic Aboriginal and Torres Strait Islander art and craft objects.[32] We have submitted to numerous inquiries on this point, advocating for amendments to the Australian Consumer Law, among other things, to curb these practices.[33] The last thing we would want is for a freedom of expression protection to inadvertently protect the "freedom" of a non-Aboriginal business to steal the cultural expressions of First Nations artists and communities. Indeed, our position is that one of the "reasonable and justifiable" limitations on any new freedom of expression would be to ensure against the use and communication by non-Indigenous entities to the general public of Aboriginal and Torres Strait Islander traditional knowledge and cultural and intellectual property that inheres in customary rights and laws.

If you require further information about this submission, please contact Robyn Ayres CEO, Arts Law at , Donna Robinson Senior Solicitor, Arts Law at , or Jack Howard Paralegal, Arts Law/Artists in the Black at or by phone on .

Arts Law is grateful to the Hon Alan Robertson SC for his comments on an earlier draft.

Yours faithfully,

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[31] Arts Law, *Submission 50*, "Submissions to Interim Report (IR 127)", *Encroachments on Freedoms – The ALRC Freedoms Inquiry*, 20 February 2015.
[32] See the "Fake Art Harms Culture" campaign spearheaded by Arts Law, the Indigenous Art Code and the Copyright Agency < https://www.artslaw.com.au/fake-art-harms-culture/>
[33] See, most recently, Arts Law, "Submission to the Consultation Paper on Growing the Indigenous Visual Arts Industry", 18 December 2020.