

20 August 2021

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

To the Committee,

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

1. Thank you for the opportunity to make a submission to this Inquiry. I am a Senior Lecturer in constitutional law at the University of Queensland TC Beirne School of Law, where my research primarily concerns national security, press freedom and Chapter III of the *Australian Constitution*. I make this submission in my personal capacity and am solely responsible for the views and content herein.
2. The Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019 (**the Bill**) proposes an amendment to the *Australian Constitution* to introduce a new Chapter and section that would protect (1) freedom of expression and (2) freedom of the press and other media. This protection would take the form of a limit on governmental power in the states, territories and Commonwealth, so that the identified freedoms could only be subject to limitations that are ‘reasonable and justifiable in an open, free and democratic society.’
3. This submission focuses on the Bill’s necessity and potential impacts on the second (related) freedom, namely, freedom of the press and other media.

4. The Importance of Press Freedom and Need for Reform

- 4.1. The Bill is aimed at addressing significant problems in Australian law, including the fragile state of press freedom and grave need to enhance legal protections for it. In 2021, Australia ranks 25th place on the *Reporters’ Sans Frontiers* Global Press

Freedom Index – down six places from 2018.ⁱ As the Senate Environment and Communications References Committee (**Senate Committee**) recently concluded:

[U]nlike its Five Eyes intelligence partners, Australia does not have explicit and overarching protection for the right to freedom of expression. In the committee's view, this lack of protection is not acceptable. In order to better protect a free press in Australia, the committee considers that federal legislation should be introduced to protect the right to freedom of expression and in so doing also guide Parliament in its consideration of intersecting criminal and national security laws.ⁱⁱ

- 4.2. The importance of a free and independent press in a liberal democracy cannot be overstated. It is fundamental to the rule of law and plays a vital 'fourth estate' role in supporting open and effective democracy.ⁱⁱⁱ As the United Nations Human Rights Committee recognised:

A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other [International Covenant on Civil and Political Rights ('ICCPR')] rights. It constitutes one of the cornerstones of a democratic society.^{iv}

- 4.3. Press freedom is closely related to the human right to free expression. This right is protected under art 19 of the ICCPR and in human rights instruments the world over, including in the United Kingdom,^v Canada,^{vi} New Zealand^{vii} and in the three human rights Acts in Australia: the *Human Rights Act 2004* (ACT),^{viii} the *Charter of Human Rights and Responsibilities Act 2006* (Vic)^{ix} and the *Human Rights Act 2019* (Qld).^x The United States ('US') Bill of Rights is but one example of an instrument that explicitly protects both freedom of speech and freedom of the press.^{xi}
- 4.4. Neither freedom of expression nor a free press is granted express protection under the *Australian Constitution* or federal human rights legislation. The closest protection arises from the implied freedom of political communication derived from ss 7, 24, 64 and 128 of the *Constitution*, which limits the scope of legislative power to effect unjustified or disproportionate burdens on political communication.^{xii} This limited freedom rests on shaky ground – rather than being an express right akin to trial by jury (s 80) and interstate trade (s 92), it was drawn by implication from the constitutional framework as recently as 1992.^{xiii} Just this year, Justice Steward of the High Court claimed 'it is still not yet settled law'.^{xiv}
- 4.5. The AFP Raids on the ABC and Annika Smethurst in June 2019, and the two parliamentary inquiries that followed, underscored the fragility of press freedom (and free speech) in Australia today. Those inquiries called for widespread law reform to better protect press freedom, including consideration of journalism-based defences to

prosecution, review of whistleblower protection laws, and harmonisation of evidentiary shield laws. The Australian Law Reform Commission further identified ‘press freedom and whistleblowers’ as one of five priority areas for ‘The Future of Law Reform’.^{xv} This was in addition to defamation – another area in which free expression is at risk.

5. The Form of Legal Protection

- 5.1. It is clear that broad-based, nationalised, legal protections for press freedom (and free expression) are sorely needed in Australia today. The Bill proposes to achieve this through constitutional amendment. This approach has advantages, which include: appropriate recognition of the vital importance of these democratic freedoms and alignment with global practice (including across comparable nations). The proposed protection would frame the freedom as a limit on legislative power. An individual right would provide a clearer and more appropriate degree of protection and recognition, as well as better-aligning with global practice and Australia’s three existing human rights charters. A relevant concern is also the difficulty in amending the *Constitution* through the process provided for in s 128.
- 5.2. In light of these factors, I would urge the Committee to consider legislative options for reform to better protect press freedom and free expression. First, **the recommendations of the Senate Committee and PJCIS Inquiries into Press Freedom ought to be considered and implemented as a matter of priority.**
- 5.3. Second, **consideration should be given to introducing a Media Freedom Act.**^{xvi} This Act could operate to:
 - a. Recognise and affirm the importance of press freedom in Australia, through
 - simple articulation of press freedom as a vital principle in Australian democracy, and
 - requiring that legislation be interpreted consistently with press freedom (insofar as compatible with legislative purpose).
 - b. Support the development of an appropriate culture of disclosure and open government across the public sector.
 - c. Protect press freedom by ensuring that legitimate public interest journalism was excluded from the scope of criminal offences.

5.4. The introduction of a Media Freedom Act would be a significant step-forward in the protection of press freedom, free expression and democracy in Australia, and go some way to addressing the grave problems Australia is presently facing in respect of this critical aspect of a healthy democracy.

Yours sincerely

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References

- ⁱ <https://rsf.org/en/australia>.
- ⁱⁱ Senate Environment and Communications References Committee, Parliament of Australia, *Freedom of the Press* (May, 2021) [7.73]
- ⁱⁱⁱ Tom Bingham, *The Rule of Law* (Penguin Books, 2011) 80–1.
- ^{iv} Human Rights Committee, *General Comment No 34: Article 19 — Freedoms of Opinion and Expression*, UN Doc CCPR/C/GC/34 (12 September 2011) 3–4 [13].
- ^v *Human Rights Act 1998* (UK) s 12.
- ^{vi} *Canada Act 1982* (UK) c 11, sch B pt I s 2(b).
- ^{vii} *New Zealand Bill of Rights Act 1990* (NZ) s 14.
- ^{viii} *Human Rights Act 2004* (ACT) s 16.
- ^{ix} *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15.
- ^x *Human Rights Act 2019* (Qld) s 21.
- ^{xi} *United States Constitution* amend I.
- ^{xii} See, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *McCloy v New South Wales* (2015) 257 CLR 178.
- ^{xiii} *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.
- ^{xiv} *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18 (16 June 2021) [249].
- ^{xv} Australian Law Reform Commission, *The Future of Law Reform: A Suggested Program of Work 2020-25* (December 2019) 42. See also broader concerns voiced in, eg: Fergus Hunter, ‘A culture of secrecy’: What is the Right to Know campaign about?, *The Sydney Morning Herald* (online, 21 October 2019) <<https://www.smh.com.au/national/a-culture-of-secrecy-what-is-the-right-to-know-campaign-about-20191018-p5323v.html>>; Alliance for Journalists’ Freedom, *Press Freedom in Australia* (White Paper, May 2019) <<https://www.journalistsfreedom.com/wp-content/uploads/2019/06/AJF-Press-Freedom-In-Australia-2019.pdf>>; Rebecca Ananian-Welsh, ‘Australia needs a Media Freedom Act. Here’s how it could work’, *The Conversation* (online, 22 October 2019); AJ Brown, ‘Safeguarding Our Democracy: Whistleblower Protection After the Australian Federal Police Raids’ (Speech, 130th Anniversary Henry Parkes Oration, Tenterfield, 26 October 2019).
- ^{xvi} See discussion in Senate Environment and Communications References Committee, Parliament of Australia, *Freedom of the Press* (May, 2021) [7.47]-[7.60].