



4 August 2021

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

By electronic submission

Dear Committee,

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

The Australian Human Rights Commission (the Commission) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019 Bill (the Bill).

Freedom of expression, inclusive of freedom of the press, is a vital safeguard for human rights, and is essential to the functioning of our democracy. It has been described as 'the freedom par excellence; for without it, no other freedom could survive'.¹ The Commission has long advocated in favour of strengthening the right to freedom of expression in Australia, including by:

- making submissions on proposed legislation which has the potential to affect the right to freedom of expression
- in response to complaints from members of the public, conducting inquiries into acts and practices of the Commonwealth that may be inconsistent with or contrary to the right to freedom of expression
- intervening as amicus curiae in court proceedings that raise freedom of speech issues in order to provide assistance to the court in applying the law in a way that sufficiently takes this right into account
- convening public forums to discuss freedom of expression issues that arise in a range of areas including media and Internet regulation, intellectual property and defamation laws.

The Commission supports stronger protections for freedom of expression, however, ideally, these protections would be advanced in the context of comprehensive

human rights protections that integrate other rights and freedoms currently absent from, or only partially protected in, Australian law.

Freedom of expression under the International Covenant on Civil and Political Rights

The right to freedom of expression is enshrined in international and regional human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR), which Australia has ratified.²

The right as guaranteed by article 19(2) of the ICCPR includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media. Article 19(1) provides that everyone has the right to hold opinions without interference.

Like many human rights, the right to freedom of expression is not absolute, and it 'carries with it special duties and responsibilities'. Because of these duties and responsibilities to others and to society in general, freedom of expression 'may therefore be subject to certain restrictions'.³

The scope of permissible restrictions to the right to freedom of expression is set out in article 19(3) of the ICCPR. Restrictions must be provided for by law and pursue one of the legitimate aims set forth in the article, namely: respect of the rights or reputations of others; the protection of national security or public order; or the protection of public health or morals. Restrictions must be necessary. The term 'necessary' has been interpreted as meaning that any proposed restriction is pursuant to a legitimate aim, is proportionate to that aim and is no more restrictive than is required for the achievement of the aim.⁴

Certain specific limitations are legitimate if they are necessary in order for the State to fulfil an obligation to prohibit certain expressions on the grounds that they cause serious injury to the human rights of others.⁵ These include restrictions required by article 20 of the ICCPR, which states that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law', and similar obligations contained in Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.⁶

Freedom of expression in Australia

Australia is the only Western democracy without a Constitutional or statutory bill or charter embedding internationally recognised human rights.⁷ The Australian framework relies on the common law and a handful of limited rights within the Australian Constitution. As a result, Australia's rights protections are piecemeal, with many gaps. While Australia has expressed its commitment to the value of freedom of expression by ratifying the ICCPR and other international treaties that protect this

right, it has not taken the step of implementing those obligations fully into domestic law.

The High Court has held that there is an implied freedom of political communication in the Constitution, as an incident of the system of representative and responsible government established by the Constitution.⁸ The implied right is necessary to ensure that the public can ‘exercise a free and informed choice as electors’.⁹ However the High Court has affirmed that this does not confer an individual right to free speech—rather it operates as a limit on the exercise of legislative power by the Commonwealth. As such:

the freedom is to be understood as addressed to legislative power, not rights, and as effecting a restriction on that power. Thus the question is not whether a person is limited in the way that he or she can express himself ... The central question is: how does the impugned law affect the freedom?¹⁰

Additionally, the implied right only protects some kinds of speech—political communication.¹¹

The common law recognises freedom of speech as a fundamental right.¹² However it is a ‘residual’ freedom that can be quashed by the clear intention of Parliament.¹³ All common law rights can be overridden by legislation, which occurs routinely—and frequently without sufficient scrutiny or public debate.¹⁴

Freedom of expression is essential to democracy and the rule of law. As the United Nations Human Rights Council has stated:

The exercise of the right to freedom of opinion and expression is one of the essential foundations of a democratic society, is enabled by a democratic environment, which offers, inter alia, guarantees for its protection, is essential to full and effective participation in a free and democratic society, and is instrumental to the development and strengthening of effective democratic systems.¹⁵

Australian society values freedom, openness and democracy, but without legal protection, the right to freedom of expression is tenuous and contingent. The Commission has regularly expressed concern about legislative and policy decisions that have chipped away at the enjoyment of freedom of expression in Australia. For example:

- In 2019, the Commission made submissions to the High Court about why it should use free speech principles to narrowly interpret the offence that was the basis for the Australian Federal Police’s raids on the home of News Corp journalist Annika Smethurst.¹⁶ The High Court ultimately held that the warrant to search Smethurst’s property was invalid under the

Australian Human Rights Commission

Crimes Act 1914 (Cth), because it failed to properly identify the offence, and it was therefore unnecessary for the Court to consider additional arguments on freedom of political communication.¹⁷

- The Commission made a related submission to the Parliamentary Joint Committee on Intelligence and Security's inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press. In its submission, the Commission urged the Committee to scrutinise closely those laws, policies, practices and procedures which permit the investigation and prosecution of journalists, their sources, and their employers; and to recommend that these be revised to ensure they do not impermissibly limit the right to freedom of expression.¹⁸
- In 2019, the Commission intervened in a High Court case challenging laws that limited the speech of public servants, particularly on social media. The Commission pointed to cases from the United States that recognised the specialised knowledge of public servants and the value of the public being allowed to hear what they have to say.¹⁹ Justice Edelman referred to those cases and said that Australian restrictions on the speech of public servants 'would be struck down as unconstitutional in a heartbeat' in the United States. However, in the absence of Constitutional or other legislative protections, the wide laws limiting the free speech of public servants in Australia were upheld.²⁰
- In 2017, the Commission advised the Government that it intended to intervene in a High Court case challenging secrecy provisions in the *Australian Border Force Act*. At the time, employees, contractors and consultants to the Department of Immigration and Border Protection were prevented from disclosing any information they learned at work, subject to some limited exceptions. The secrecy provisions inhibited doctors in regional processing centres from speaking publicly about the living conditions of detainees, or the standard of health provided at the centres. Following the commencement of those proceedings the Government took welcome steps to amend the provisions.²¹

These instances form part of concerning trends associated with the passage of laws and the development of policies that undercut freedom of expression. In 2016, Professor George Williams conducted a survey of laws which undermine fundamental democratic values, including freedom of speech, and identified '350 instances of laws that arguably encroach upon rights and freedoms essential to the maintenance of a healthy democracy' most of which had been introduced after September 11.²² In 2015 the Australian Law Reform Commission's inquiry into *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* also identified many laws that interfered with traditional common law rights.²³

In 2020, Human Rights Watch's World Report identified that 'freedom of expression [has] come under unprecedented pressure' in Australia, including through 'overly broad national security laws [that] are open to misuse'.²⁴ In 2019, the CIVICUS monitor downgraded Australia's democracy from open to narrow, citing the Australian Federal Police's raids on the home of Annika Smethurst, among other free speech-related indicators.²⁵ Such developments highlight the urgent need for stronger protections of freedom of expression in Australia.

Need for comprehensive human rights protections

The Commission considers that a focus on entrenching only one human right is a missed opportunity to ensure comprehensive reflection of other rights and freedoms, whether via Constitutional or legislative means. The Commission has long advocated for the introduction of a Federal Human Rights Act that embeds Australia's international human rights obligations. It is currently developing a model through its *Free & Equal* project, which will be released within the year.²⁶

Freedom of expression is one of many ICCPR rights that lack full realisation in Australia's domestic legal system. For example, the ICCPR requires protection of freedom of religion, the right to privacy and freedom of association, all of which do not find corresponding strong domestic coverage. Legislative implementation of Australia's international human rights obligations have been described as 'faltering, sporadic and inconsistent', and the ICCPR as having 'a small and almost random presence in Australian law'.²⁷ These rights are often taken for granted as given protections in a democratic society, yet they cannot be relied upon by Australians when they are infringed. As such, Australia's commitment to essential democratic rights and liberties remains largely confined to rhetoric.

In addition to the ICCPR, Australia has ratified the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities—which include education, health, equality and participation rights, amongst others that reflect important Australian values—yet the rights within these instruments are often wholly absent or only minimally reflected in domestic laws.

Human rights do not exist in isolation from one another. A central principle of human rights law is that human rights are 'universal and inalienable, indivisible, interdependent and interrelated'.²⁸ There is no hierarchy of rights, and where rights conflict with other rights, these are balanced and resolved in accordance with the particular facts and legal contexts, through established legal proportionality tests.

Very few rights are absolute. The right to freedom of expression is not one of these, and it can be justifiably limited when it conflicts with other rights, including reputational and privacy rights and in accordance with protections against hate

Australian Human Rights Commission

speech and incitement to discrimination. This is one of many examples of rights co-existing alongside each other, with overlapping applications and built-in limitations to accommodate other human rights and important interests.

The right to freedom of expression is also itself closely linked to promotion and protection of other human rights. As the UN Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion has stated:

The importance of the right to freedom of opinion and expression for the development and reinforcement of truly democratic systems lies in the fact that this right is closely linked to the rights to freedom of association, assembly, thought, conscience and religion, and participation in public affairs. It symbolizes, more than any other right, the indivisibility and interdependence of all human rights. As such, the effective enjoyment of this right is an important indicator with respect to the protection of other human rights and fundamental freedoms.²⁹

When rights coverage is not comprehensive, the balancing act conducted by the courts and government becomes lopsided, and may overlook key rights and related considerations. A comprehensive rights framework would include a limitation or proportionality clause that would enable a balancing test to be conducted. This would engender a consistent and principled approach to the conflicts between different individual rights and countervailing public interests that inevitably arise in a democracy.

Additionally, a fragmented rights landscape breeds confusion and stokes unnecessary, artificial conflicts between perceived clashes of rights and between different sectors of the community. The Law Council, in its submission to the *Free & Equal* project, observed that:

it may not always be well understood that while some human rights are absolute, others may be limited provided that certain conditions are met. Instead, specific rights are sometimes raised by different community sectors in isolation, to the detriment of other rights and in a manner which can distort the debate. This reinforces the need for rights and freedoms to be protected in a coherent legal framework.³⁰

Comprehensive rights protections would help to enhance community understanding of rights and enable a cohesive approach to rights protections in a manner consistent with Australian values, our democratic framework and federal structure.

Individual recourse for rights infringements must be embedded into Australian laws, both as a means to ensure access to justice and as an essential accountability

measure. Crucially, comprehensive human rights law would ensure that government considers and applies human rights as part of ordinary law, policy making and administrative decisions, which would enable the prevention of breaches before they occur.

Formulation of freedom of expression protection

The formulation of the right to freedom of expression in the proposed new s 80A to be inserted into the Constitution is as follows:

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

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

The Explanatory Memorandum explains that ‘this alteration to the Constitution will protect freedom of expression more broadly along similar lines to the First Amendment to the United States Constitution’.³¹

If the right to freedom of expression were to be included in the Constitution as a standalone right, the Commission considers that it is preferable for the wording to mirror the wording in international human rights instruments, following Australia’s international obligations. This will enable courts to draw on international jurisprudence about the nature of the right, permissible limitations and factors to draw upon when making proportionality assessments. The ICCPR articulation of the right to freedom of expression has been adopted in ACT, Victorian and Queensland human rights legislation.³² The Commission considers that it is useful to have similar rights articulation across Australian jurisdictions to enable consistent application to the broader Australian public, noting also that a body of caselaw has developed in those states and territories that is also transferable to the federal context.

The Commission suggests that an audit of existing laws should accompany the passage of this Bill as a parallel measure. If the Constitution were altered to protect freedom of expression, laws that infringe upon the right would be inconsistent with the Constitution and may be found invalid by the High Court. It would therefore be necessary to bring those laws into compliance with freedom of expression alongside the passage of a Constitutional amendment. This process would also help to ensure consistent protection of freedom of expression throughout Australia and address any current infringements. The Australian Law Reform Commission’s inquiry into *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* identified a wide range of Federal laws which may be seen as interfering with freedom of expression, which would provide a useful starting point.³³

Australian Human Rights Commission

Recommendation 1

- The Commission recommends that protection for the right to freedom of expression be incorporated in context with comprehensive human rights protections, such as through a Federal Human Rights Act.

Recommendation 2

- If freedom of expression is incorporated into the Constitution as a standalone right, it should be:
 - Worded to align with Article 19 of the International Covenant on Civil and Political Rights.
 - Accompanied by an audit of existing legislative instruments that interfere with the right to freedom of expression.

Yours faithfully

Emeritus Professor Rosalind Croucher AM
President

¹ Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 113.

² In addition to article 19 of the International Covenant on Civil and Political Rights, see, e.g., United Nations Convention on the Rights of Persons with Disabilities, article 21; United Nations Convention on the Rights of the Child article 13; Universal Declaration of Human Rights, article 19; European Convention on Human Rights, article 10; American Convention on Human Rights, article 13; African Charter on Human and Peoples' Rights, article 9; ASEAN Human Rights Declaration, article 23.

³ International Covenant on Civil and Political Rights, article 19(3).

⁴ Frank La Rue, *Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, UN Doc A/HRC/14/23, 20 April 2010, [79-81]. See also United Nations Human Rights Committee, *General Comment 34 – Article 19: Freedom of opinion and expression*, UN Doc CCPR/C/GC/34, 12 September 2011 [22].

⁵ See Frank La Rue, *Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, UN Doc A/HRC/14/23, 20 April 2010, [77].

⁶ Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination requires States Parties to condemn all propaganda and all organizations which are based on ideas or theories of racial supremacism, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt positive measures designed to eradicate all incitement to, or acts of, such discrimination.

⁷ Gillian Triggs, 'Why an Australian charter of rights is a matter of national urgency' *The Conversation* (13 August 2019) <<https://theconversation.com/why-an-australian-charter-of-rights-is-a-matter-of-national-urgency-121411>>.

⁸ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106; *Unions NSW v New South Wales* [2013] HCA 58.

⁹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 [560]; *McCloy v New South Wales* [2015] HCA 34.

¹⁰ *Unions NSW v State of New South Wales* (2013) 88 ALJR 227 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

¹¹ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Final Report no 129, 2015) [3.11].

¹² *Nationwide News v Wills* (1992) 177 CLR 1, 32 (Mason CJ); *Attorney-General (South Australia) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 67 [151].

¹³ The principle of legality presumes that Parliament 'does not intend to interfere with common law rights and freedoms except by clear and unequivocal language' and that 'statutes be construed ... to avoid or minimise their encroachment upon rights and freedoms at common law'. Dan Meagher, 'The Common Law Principle of Legality in an Age of Rights' (2011) 35 *Melbourne University Law Review* 449-478, 351; *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 130.

¹⁴ See, eg, Law Council of Australia, 'Rushed encryption laws create risk of unintended consequences and overreach' (Press Release, 7 December 2018) <<https://www.lawcouncil.asn.au/media/media-releases/rushed-encryption-laws-create-risk-of-unintended-consequences-and-overreach->>.

¹⁵ United Nations Human Rights Council, *Resolution 12/16, Freedom of opinion and expression*, UN Doc A/HRC/RES/12/16, 12 October 2009, preamble.

¹⁶ Australian Human Rights Commission, 'Submission of the Australian Human Rights Commission seeking leave to appear as amicus curiae' submission in *Smethurst v Commissioner of Police* (2020) S196 of 2019, 9 October 2019.

¹⁷ *Smethurst v Commissioner of Police* (2020) 376 ALR 575.

¹⁸ Australian Human Rights Commission, submission to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press* (25 July 2019).

¹⁹ Australian Human Rights Commission, 'Submission of the Australian Human Rights Commission seeking leave to appear as amicus curiae' submission in *Comcare v Banerji* (2019) 267 CLR 373, No. C12 of 2018, 12 December 2018.

²⁰ *Comcare v Banerji* (2019) 267 CLR 373 [164] (Edelman J, dissenting); Rosalind Croucher, 'Australians expect freedom of speech, so let's make it our right' *The Australian* (Online, 14 November 2019) <<https://www.theaustralian.com.au/commentary/australians-expect-freedom-of-speech-so-lets-make-it-our-right/news-story/8be42ad9952fc2e004a8493ed8baa069>>.

²¹ Rosalind Croucher, 'Australians expect freedom of speech, so let's make it our right' *The Australian* (Online, 14 November 2019) <<https://www.theaustralian.com.au/commentary/australians-expect-freedom-of-speech-so-lets-make-it-our-right/news-story/8be42ad9952fc2e004a8493ed8baa069>>.

²² George Williams, 'The Legal Assault on Australian Democracy' [2016] 16(2) *QUT Law Review* 19, 23.

²³ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Final Report no 129, 2015)

²⁴ Human Rights Watch, *World Report 2020* (Report, January 2020) <<https://www.hrw.org/world-report/2020/country-chapters/australia>>.

²⁵ CIVICUS, *Global Report 2019*

<<https://civicus.contentfiles.net/media/assets/file/GlobalReport2019.pdf>>

²⁶ See Free & Equal discussion papers: <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/discussion-paper-model-positive-human-rights-reform-2019>

²⁷ Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011), 356.

²⁸ United Nations General Assembly, Vienna Declaration and Programme of Action, A/CONF.157/23 (12 July 1993).

²⁹ Frank La Rue, *Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, UN Doc A/HRC/14/23, 20 April 2010 [27].

³⁰ Law Council of Australia, Submission to Australian Human Rights Commission, *Free & Equal* (13 November 2019) [88].

³¹ Explanatory Memorandum, Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019 Bill, 1.

³² *Human Rights Act 2004* (ACT) s 16. *Human Rights Act 2019* (Qld) s 21; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15. Note that Victoria is the only jurisdiction of the three that includes the full ICCPR limitations rather than relying on an overarching limitation clause.

³³ See Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Final Report no 129, 2015) 90-126.