19 July 2021

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

Dear Secretary

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

Thank you for the opportunity to make a submission to this inquiry. I do so in a personal capacity.

I welcome the proposal to hold a referendum to insert protection of freedom of speech and of the press in the Australian Constitution. If successful, this reform promises to halt the erosion of the basic rights and to fundamentally realign our democracy in favour of these values.

The list of infringements upon freedom of speech and of the press in Australia is long and well documented. For example, defamation laws remain unreformed and national security legislation imposes government secrecy such that whistleblowers and journalists can face imprisonment for revealing information that is clearly in the public interest.

Australia has also enacted new laws that make speech a criminal offence. A person can be jailed for up to 5 years for advocating terrorism, including speech in support of rebel groups in other countries. For example, an Australian can be imprisoned if they encourage those who want to topple the regimes in Syria or North Korea. The law applies regardless of whether a person is speaking in support of a freedom fighter or ISIS.

Organisations can also be banned because of the speech of their members. If an officeholder praises a person like Nelson Mandela for his fight against apartheid (which Australian law regards as terrorism), the organisation can be proscribed. Its members would face jail terms of up to 10 years, including members who said nothing, and perhaps even disagreed with what the organisation said on their behalf.

Laws like this give rise to nonsensical outcomes at odds with Australian values. To date, our enforcement agencies have exercised appropriate caution in not using them to restrict speech. However, the laws should not be on the books. They are an affront to freedom of speech and the risk remains that they will be invoked in the future. The recent raids on journalists show how laws seemingly directed elsewhere can be applied in unexpected ways.

The most well-known anti-speech measures are in national security laws enacted since 11 September 2001. The problem though goes much deeper. The intolerance for freedom of speech has become so routine as to become normal. As a result, such measures can be found throughout the law, including in lower order offences.

For example, in 2014 it became an offence to use indecent, obscene or insulting language at the Sydney Cricket Ground. The year before it became an offence to use offensive or insulting language at the Royal Botanic Gardens. NSW law even prevented such speech at the historic Speakers' Corner in the Domain in central Sydney, which has been a hotbed of soapbox oratory since 1878.

The list of speech offences in Australia is long and growing. Laws have included that a person cannot sing an obscene song or ballad in public in Victoria, use foul language on public transport in Tasmania or utter indecent or blasphemous words on a jetty in Western Australia. The law has also set out offences for insulting sex workers, teachers, TAFE employees, court staff, members of a Planning Panel, an administrative tribunal, the Copyright Tribunal or the Fair Work Commission. No doubt some regulation of speech is appropriate, but it has got out of hand.

These laws and policies reflect weaknesses in the current protection for freedom of speech and of the press in Australia. Australia is an outlier. We are unique in being the only democracy that fails to give national legal protection to this fundamental right. Sometimes we can take pride in being exceptional, but not on this occasion. There is nothing admirable about Australia having the weakest protection for speech and press freedom in the democratic world.

The best that the Australian Constitution provides is a freedom of political communication. This was first discovered by the High Court in 1992. The implication flows from the Constitution mandating that both Houses of the Federal Parliament must be 'directly chosen by the people'. The Court recognised that the people cannot fulfil their constitutional duty in making this choice unless they have information about candidates and parties.

The High Court has used the implied freedom to strike down laws restricting electoral communication, such as limits on political advertising or political donations. However, such cases are few and far between. The implied freedom is often invoked by litigants in the High Court, but rarely with any success. The freedom also has a narrow ambit in being focused upon political matters. It does not extend to artistic, religious, academic, commercial or other forms of speech unconnected with electoral processes.

The implied freedom is problematic because of its origins. The fact that it has been inferred from the Constitution, rather than being part of its text, has led people to question its legitimacy. Nearly 30 years after the freedom was identified, the debate continues on and off the Court. In the most recent High Court decision on the implication in June, Justice Simon Steward said that, 'with the greatest of respect, it is arguable that the implied freedom does not exist'. He asked whether the freedom is 'sufficiently supported by the text, structure and context of the Constitution' and said that ongoing division within the court about how the freedom should be applied meant that 'it is still not yet settled law'.

Australia would be better served by express protection of speech and of the press in the Constitution endorsed by the Australian people at a referendum. This would provide more effective and complete protection, as well as a better foundation from which the High Court can scrutinise the work of parliament. A referendum bringing about this change would also be a powerful statement about how our society values these freedoms.

The proposed section 80A is a good start to such a clause, but can be improved. There are many models for protecting speech and press rights in national constitutions. The most appropriate comparator is the protection found in the Canadian Constitution. It provides:

> **Fundamental Freedoms**
> 2 Everyone has the following fundamental freedoms:
> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> (c) freedom of peaceful assembly; and
> (d) freedom of association.

These rights can be limited as follows:

> **Guarantee of Rights and Freedoms**
> 1 The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Adapting this model would provide the following text for insertion into Australia's Constitution:

> **Freedom of Expression**
>
> 80A Everyone has the right to freedom of expression, including freedom of the press, subject only to reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society.

This amendment would prioritise speech and media freedom by putting these on a par with other rights and values enshrined in our Constitution, including freedom of interstate trade, the separation of powers and trial by jury.

The High Court would assess whether laws made by parliament comply with the new section. Parliament would need to convince the Court that a limitation on speech or press freedom meets the proviso. It might do so by arguing that the restriction fulfils an important public goal such as national security, community safety or the protection of a person's reputation. Even then, it would still need to be shown that the infringement by parliament goes no further than IS needed.

Yours sincerely

Professor George Williams AO