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AJF Submission: regarding proposed Constitutional Alteration (Freedom of Expression and Freedom of the Press) 2019, by Senators Patrick & Griff

AJF

The Alliance for Journalists' Freedom (AJF) is an organisation that advocates for press freedom, founded by Peter Greste, Chris Flynn and Peter Wilkinson, working in Australia and the Asia-Pacific.

The AJF works with governments to ensure press freedom is supported in legislation, policy and society generally. We campaign throughout the Asia-Pacific region wherever journalists have been censored, threatened, imprisoned or killed.

In early 2019, three weeks before the AFP raids on media, the AJF released a [White Paper](#), which details 7 recommendations for legislative change to support press freedom in Australian law.

The key recommendation of the White Paper is for a *Media Freedom Act*, to positively enshrine press freedom and the function journalism has in Australia's democracy, in legislation. This work includes designing a fit-for-purpose definition of journalism, which we have done, and included in this submission. We are also currently drafting the *Act* with law firm, Gilbert + Tobin.

It's worth noting that separate to this but related — and necessarily independent of government — we are also designing a Voluntary Certification Program for journalists, in order to distinguish the best in the craft, raise standards and rebuild trust in the industry.

We mention this program because with rights come responsibilities, so where legislative protections are introduced to support press freedom, the recipients of those protections must be clearly defined in law, and must themselves uphold the standards that are required for that democratic institution to perform its function.

It is our belief that all sides must come to the table to instate, strengthen and preserve one of the fundamental tenets of Australia's democracy.

This submission will address the following:

- *The fact that we welcome this amendment*
- *Why we see a need for it*
- *Two recommendations:*
 1. *The amendment to be redrafted as a positive guarantee of a fundamental right to freedom of expression; and*
 2. *The urgent need for a Media Freedom Act.*
- *Concluding remarks*



We welcome this Constitutional Alteration

The AJF wholeheartedly welcomes the proposed Constitutional Alteration from Senators Patrick and Griff. The Constitutional Alteration would enshrine the freedom of expression, including the principle of press freedom, in Australian democracy.

Australia stands alone in advanced democracies for not having rights and freedoms enshrined in our constitution including freedom of expression and freedom of the media. In 1992, the High Court issued a ruling (*Australian Capital Television Pty Ltd v Commonwealth*), which recognised that our Constitution contains an implied freedom to discuss political matters. Without an explicit guarantee, however, we have seen a steady stream of laws undermining that principle.

We agree with groups like the Index on Censorship that argue that freedom of expression is the most fundamental right, because without it others such as freedom of thought, religion or association are rendered meaningless.

As an organisation that advocates for press freedom, we welcome the explicit acknowledgement of media freedom in the proposed Alteration. While we support the overall intent of the Alteration to protect freedom of *expression*, from here on, we will limit our comments to press freedom.

Why we need it

To date, the lack of any basic protection for press freedom has, unintentionally, given parliament the space to pass many pieces of legislation that directly and indirectly restrict the ability of the media to perform its natural function in a democracy.

We appreciate that laws like the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018 (EFI Act)* and the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 (Assistance and Access Act)* address the increasingly sensitive national security landscape, but they are framed in a way that also limits journalists' abilities to report matters in the public interest, as outlined in Recommendation 2 of our 2019 White Paper (linked above). We submit that if security laws designed to protect the integrity of our political system and way of life ultimately damage one of the key pillars that have made it so successful, they are ultimately if inadvertently *undermining* national security.

The AJF's White Paper more fully explores the impact of those laws, along with others, and makes a series of recommendations including a *Media Freedom Act*. We address the relevance of the Act to the Constitutional Alteration later in this submission.

In 2019 the AFP raids on journalists from two media houses demonstrated the urgent need for an amendment along the lines that the senators propose. In both cases, the police were investigating stories that were widely acknowledged to be in the public interest, and in respect of which the journalists involved did not expose any information that compromised national security. Both were examples of journalists exercising their professional responsibilities, yet the law placed the journalists and their sources in grave legal peril. Had the proposed Constitutional Alteration been in



place, it would likely have given due protection to all involved in producing those stories.

Reports from subsequent inquiries by both the *Parliamentary Joint Committee for Intelligence and Security* and the *Senate Environment and Communications References Committee* clearly recognised the way national security legislation has needlessly intruded on press freedom in Australia. While we broadly applauded their recommendations, we submit that the proposed Alteration would establish a necessary and appropriate Constitutional backstop.

Recommendations

The AJF makes two recommendations which we believe will enable the Constitutional Alteration to achieve its purpose.

1. We recommend the Senators re-frame the Alteration from a restriction to legislative power, to a statement confirming the right of all Australians to freedom of expression, including press freedom.

The current drafting is framed in the negative, creating a limitation on what laws parliament should be allowed to pass. That places the focus on government actions, rather than the real purpose of the Alteration which is to protect the rights of all Australians to freedom of expression.

We submit that the Canadian Charter of Rights and Freedoms is an example of positive framing which would provide the support needed in Australia's Constitution:

- Section 2 of the Canadian Charter says,
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."
- Section 1 of the Canadian Charter then gives parliament the power to restrict those freedoms though only in a limited way, subject to the overall principle:
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.

We believe this is the appropriate way to describe the right of all Australians to freedom of expression, including the right of journalists to practice their craft freely and appropriately, whilst retaining the necessary ability of parliament to define the limits to those rights.

2. While the Alteration is intended to guarantee freedom of expression to all Australians, media freedom is acknowledged as a subset because of the special role it plays in our democracy, setting it apart from all other forms of expression.



As such, it also comes with important responsibilities. We believe those roles and responsibilities should be described in a separate *Media Freedom Act* (MFA) that would work as a necessary companion to the Alteration, giving clearly articulated force to its guarantees.

The digital revolution has made it possible for anyone with a keyboard to produce *journalism-like* content that might not meet the ethical standards and obligations that underpin traditional media. That is why it has become vitally important to more clearly distinguish between journalism that fulfills its democratic role, and all other forms of expression.

For this reason, the AJF also believes any MFA should include an appropriate definition to clearly describe who and what those legislative protections should apply to. In creating a draft MFA, the AJF has defined it in this way:

The act protects a person engaged in journalism. Journalism means:

- I. *the practice of investigating, collecting, verifying and/or preparing, or editing, for dissemination of information, commentary, opinion or analysis, including but not limited to news or current affairs;*
- II. *for the purpose of making that information, commentary, opinion or analysis available to the public, or a section of the public; and*
- III. *in respect of which a relevant person or persons abides by a journalists' code of practice, or the organisation for which they work is governed by, or submits to, a published journalists' code of practice.*

AJF's proposed MFA compliments the Constitutional Alteration by providing detail essential to preserving and strengthening the role of journalism in our liberal democracy.

In the event the proposed Alteration fails to win the support of parliament or the Australian people, we still believe that an MFA is urgently needed. It does not require constitutional reform to be enacted, and it positively enshrines the function of a free media in law. The two together, however, would produce the ideal outcome, providing a clear, unequivocal positive constitutional guarantee for media freedom, with enough detail to clearly identify who and what it should apply to.

Conclusion

We wholeheartedly support the proposal for this Constitutional Alteration. It would successfully elevate our laws to meet the global democratic standard and, importantly, to the standard set by Australia's Five Eyes security partners.

The recommendations we've made — that the Alteration be framed in the positive, and that parliament pass an MFA as a companion — enable this Alteration to achieve what it sets out to do, in a way that also provides the necessary detail to ensure the craft of journalism is distinguished from other forms of information.

This detail is necessary, otherwise we risk making our information landscape more vulnerable to misinformation and disinformation, due to a lack of clarity on what journalism actually is. A MFA achieves this distinction with its definition of journalism.



A Constitutional Alteration with an MFA working alongside it would provide an important foundation for press freedom in Australian law and would cement what is an essential tenet of any liberal democracy. For this reason, we strongly support this proposal.

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