



19 August 2021

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam

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

Christian Schools Australia (CSA) is the largest association of Christian schools in the country and has member schools educating over 70,000 students and employing nearly 10,000 staff at 170 locations across Australia. CSA is part of the global Association of Christian Schools International (ACSI) network of 24,000 schools educating in excess of 5.5 million students in over 108 countries world-wide.

Freedom of expression stands alongside freedom of religion at the very heart of international human rights law, and indeed in many ways at the heart of our humanity. It would be repugnant in our pluralist liberal democracy to suggest that we cannot hold a belief and then express it publicly.

General Support for the Bill

As the Committee would be well aware, the Australian Constitution does not explicitly protect freedom of expression. The recognition by the majority of the High Court that an implied freedom of political communication exists as an incident of the system of representative government established by the Constitution, in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106, provides only a limited protection. It operates as a freedom from government restraint, rather than a right conferred directly on individuals.

Subsequent cases have, at times, seemed to expand the scope of protections offered under this implied protection but then, more recently, limit it. Certainly, the decision of the High Court in *Clubb v Edwards Preston v Avery* [2019] HCA 11 evidences to many the limited application of the freedom.

The Australian Law Reform Commission identified in its Interim Report 127, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (July 2015) that there were '[n]umerous Commonwealth laws may be seen as interfering with freedom of speech and expression' ([3.187]) and recommending in its Report 129 (March 2016) that a number of Commonwealth laws be 'further reviewed to determine whether they unjustifiably limit freedom of speech' ([4.251]).

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Recent legislation passed in the ACT, *Sexuality and Gender Identity Conversion Practices Act 2020* (ACT) and Victoria, *Change or Suppression (Conversion) Practices Prohibition Act 2021* (VIC) also raise significant concerns regarding freedom of expression. In both acts, legal advice has confirmed that mere discussions of sexuality and gender within a family are potentially impacted. The Victorian legislation explicitly includes prayer within its scope, the most private of all speech. Indeed, the Explanatory Memorandum for the Victorian Bill indicated that ‘conversations with a community leader’ are within the definition of practices caught by the legislation.

In addition to these legislative changes the Victorian Parliament is considering modifications to the *Racial and Religious Tolerance Act 2001* (VIC) following an *Inquiry into anti-vilification protections* by the Legal and Social Issues Committee of the Legislative Assembly. The recommendations of the Committee, if adopted, are likely to result in a considerable further threat to freedom of expression in Victoria. The Legal Affairs and Safety Committee of the Queensland Parliament was also tasked earlier this year with reviewing anti-vilification laws in that state. While no report has yet been tabled, additional constraints on freedom of expression are proposed in the Options Paper that informed the review.

Against this background and context, the introduction of the proposed *Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019* bill is timely and welcomed.

Proposed Improvements to the Bill

As indicated above, freedom of expression stands alongside freedom of religion at the very heart of international human rights law. The First Amendment to the United State Constitution, to which Senator Patrick referred in his Second Reading speech, ties these two great freedoms together.

The Bill proposes the creation of a new Chapter IIIA which would sit between the chapters dealing with The Judicature and Finance and Trade, a seemingly odd juxtaposition. The Committee may want to consider as an alternative the creation of a new Chapter IX dealing with Fundamental Freedoms.

Under such a schema a new section 129 could deal with Freedom of Expression and the existing section 116 could be renumbered to section 130 and entitled Freedom of Religion. As part of such an approach there may be merit in considering taking a similar methodology in the new section 130 as is proposed in the Bill and, effectively, redrafting the existing section 116 to encompass the States and Territories –

The Commonwealth, a State or a Territory shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth or a State or a Territory.

In short, minor adjustments to the layout of the Constitution and an amendment to the text of the existing section 116 may greatly increase the utility of proposal.

Irrespective of whether such an approach it taken; it is important for the Committee to closely consider the proposed limitations on freedom of expression allowed for within the Bill. The Bill provides that it can be limited ‘if the limitation is reasonable and justifiable in an open, free and democratic society’. The phrase ‘reasonable and justifiable’ is a broad and ill-defined phrase, which would seem to open the door for considerable limitations to the freedom of expression. Certainly, the *Sexuality and Gender Identity Conversion Practices Act 2020* (ACT) and *Change or Suppression (Conversion) Practices*

Prohibition Act 2021 (VIC) referred to above were considered to meet the test of reasonableness against the respective jurisdictions' human rights legislation.

The phrase 'reasonable and justifiable' provides far too much scope for governments to impose severe limitations. By contrast, the International Covenant on Civil and Political Rights only allows for 'necessary' limits for both freedom of religion, Article 18, and freedom of expression, Article 19. This establishes a higher legal threshold providing greater protection against government incursions. This higher threshold seems far more appropriate for limiting what are fundamental human rights such as freedom of religion or freedom of expression.

It would certainly seem essential, if the aims of the Bill are to be achieved, for a higher test of 'necessary' to be applied to any allowable limitation.

We trust that these brief, and rather preliminary, comments and observations are helpful in the Committee's consideration of the Bill.

Yours faithfully

Mark Spencer
Director of Public Policy