Senate Legal and Constitutional Affairs Committee

PO Box 6100

Parliament House

Canberra ACT 2600

17 August 2021

Dear Officer,

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

The Australian National University Law Reform and Social Justice Research Hub ('ANU LRSJ Research Hub') welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Committee, responding to the *Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019* inquiry.

The ANU LRSJ Research Hub falls within the ANU College of Law's Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are students who are engaged with a range of projects with the aim of exploring the law's complex role in society, and the part that lawyers play in using and improving law to promote both social justice and social stability.

Summary of Recommendations:

1. The amendment should instead be adopted as a statute for interpretation of legislation to better give effect to competing interests which exist in rights-based frameworks.
2. The exception in the proposed amendment should be altered to better reflect the High Court's proportionality approach to the existing implied freedom of political communication.

If further information is required, please contact us at

On behalf of the ANU LRSJ Research Hub,
Authors: Jae Brieffies, Isabella Keith and Sebastian Mazay
Editor(s): Dr Jelena Gligorijević, Alexandra Kemp, Jessica Hodgson and Amogh Ananth

Introduction

This submission is about ensuring a balanced approach to freedom of expression and freedom of the press in Australia. Whilst we believe that freedom of expression plays an integral role in the maintenance of a healthy democracy, recent history has shown that unbridled freedom of expression encroaches on other fundamental rights and is potentially harmful to the values the freedom seeks to protect.

Similarly, recent controversies involving the media industry in Australia have demonstrated that the press also requires regulation. Ultimately, the proposed amendment and its exception of laws limiting the freedom only when they are 'justifiable and reasonable in an open, free and democratic society' creates too broad a freedom. The following recommendations propose alternatives that better reflect balancing requirements for freedom of expression and freedom of the press.

1. Constitutional Human Rights Models versus Statutory Alternatives

When introducing the *Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019* ('the Proposed Alteration'),[1] Senator Rex Patrick suggested the alteration would 'give constitutional recognition and expression to the "open, free and democratic" character of Australian society.'[2]

Similarly, the lens of deliberative constitutionalism recognises this character of Australian society.[3] Deliberative constitutionalism argues that a constitution's overriding objective should be to establish an institutional framework for protracted and collaborative deliberation to work through controversies within a polity.[4] Courts sit at the centre of this deliberative system, but they are not the only institution involved in the discussion.[5] Instead, they are part of a two-way dialogue between themselves and broader society; courts influence and inform debate, allowing it to be more deliberative - and courts also learn from groups and individuals who have perspectives to offer in the debate.[6]

Deliberative constitutionalism sees rights as opportunities for discussing key controversies within a polity; disagreements can be resolved through working through these controversies until an agreeable outcome is reached. Unlike competing constitutional theories such as

[1] Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019 (Cth).
[2] Explanatory Memorandum, Constitutional Alteration (Freedom of Expression and Freedom of the Press) 2019 (Cth) 2 [3].
[3] Hoi Kong and Ron Levy, 'Deliberative Constitutionalism', in André Bächtiger, John Dryzek, Jane Mansbridge and Mark Warren (eds), *The Oxford Handbook of Deliberative Democracy* (Oxford University Press, 2018) ('Deliberative Constitutionalism').
[4] Ibid.
[5] Ibid.
[6] Ibid.

proceduralism or minimalism, deliberative constitutionalism recognises the importance of institutions such as civil society groups, academics, the media, and ordinary citizens in informing discussions about rights.[7]

Deliberative constitutionalism tends not to favour constitutional processes which set substantive rights in stone.[8] This is because these processes are more likely to leave deliberation about rights largely in the hands of courts, rather than encouraging broad systemic deliberation across a polity.[9] This is likely to also be the case with the Proposed Alteration in practice, as a constitutionally entrenched provision means that its final interpretation ultimately lies with the High Court. While justices can look to contemporary consensus in making their judgments,[10] this is not a guaranteed process. It is also not effectively codified in the Proposed Alteration as it stands.[11]

Referenda also provide a platform for broad societal deliberation about the Constitution, however they are not the only platform. To hold a referendum, the Australian public needs to be well-educated on the issue at hand and prepared to cast an informed vote. For example, the Expert Panel on Constitutional Recognition of Indigenous Australians recommended that '[b]efore the referendum is held, there should be a properly resourced education and awareness program'.[12] Therefore, it is necessary to carefully consider whether a referendum is the best method by which to achieve the desired outcome. We posit that, instead of a referendum, adopting the amendment as a statute for the interpretation of legislation would better address Australia's current constitutional context and more effectively allow for consideration of the competing interests which exist in rights-based frameworks.

1.1 Constitutional Human Rights Models

Australia's model of human rights protection exists as a system of constitutional, statutory, and common law provisions. A mere scattering of rights are embedded explicitly in the Constitution, and other rights are present by implication, as recognised by the High Court of Australia. As identified by Senator Patrick in his relevant Second Reading speech for the Bill, the right to free political communication falls into this latter category - implicitly embedded in the Constitution.[13] The right to free political communication, as identified by the Senator, is not unqualified. In *Lange v Australian Broadcasting Corporation* (1997), the Court set out that any law that interferes with political communication must be 'reasonably appropriate and adapted to serve a

[7] Ibid.
[8] Ibid.
[9] Ibid.
[10] See, eg, *Roach v Electoral Commissioner* (2007) 233 CLR 162.
[11] Constitution Alteration (Freedom of Expression and Freedom of the Press) (n 1).
[12] Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (Report, January 2012) 227.
[13] *David Lange v Australian Broadcasting Corporation (ABC)* (1997) 189 CLR 520.

legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.'[14]

The proposed Bill seeks to entrench the principle of freedom of speech and freedom of the press into the Australian Constitution, thereby locating it out of reach of legislative and executive interference.

Constitutional rights models, like that of the United States' Bill of Rights, strongly empower the judicial arm of government almost exclusively to determine the content and application of rights. This model interrupts the deliberative democratic process associated with human rights protections in Australia's system of rights, whereby the fusion of statutory, common law, and Constitutional rights, engage all arms of government and the wider public in a deliberative process of rights balancing. The Australian model enables the elected legislature to determine questions of conflicting rights and duties - such as freedoms from discrimination, and freedom of speech, or freedom of the press, and the requirement of national security - in a manner which is proportionally appropriate for the protection of the rights of all persons.

The elevation of the right to free speech and press to a constitutional status risks disrupting these balancing processes, restricting the deliberative processes surrounding considerations of human rights, and empowering an unelected judiciary at the expense of the adaptive capacity of rights over time.[15] Changes in values, and balancing of considerations of conflictual rights and duties may see calls for the adaptation of rights over time, a task which is more effectively performed by an elected legislature than trickled down through judicial precedent.

Acknowledging the unprecedented threats to press freedom in Australia, as well as the limitations of constitutional models of rights protections, we recommend statutory protection schemes for rights to free speech and press, in order to provide sufficient protections against infringement on such freedoms, whilst facilitating deliberative processes surrounding rights, and enabling adaptivity and balancing of rights and duties by the legislature.

1.2 Statutory Alternatives

Statutory human rights protections are present at both federal and state/territory level in Australia.[16] Most often, they operate by instituting a series of accountability measures for different arms of government, encouraging legislative consistency with human rights. For instance, a human rights Act may require the legislature to provide justification in the form of a 'statement of compatibility' should an Act infringe on human rights.[17] In this way, statutory rights schemes preserve the ability of the elected legislature to undertake rights balancing exercises,

[14] *David Lange v Australian Broadcasting Corporation (ABC)* (1997) 189 CLR 520.
[15] George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights,' (2015) 41(2) Monash University Law Review.
[16] See, eg, *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).
[17] See, eg, *Human Rights Act 2004* (ACT).

for instance where significant national security imperatives may conflict with absolute freedom of speech.

Furthermore, statutory rights schemes may require an additional degree of accountability for the legislature, through the form of judicial review. By instructing courts to interpret the law in a manner that is presumably consistent with human rights, as outlined by the Act, and to issue a 'declaration of inconsistent interpretation'.[18] In the event of a conflict, the courts act to encourage an active rights culture within the parliament and wider community, and seek to include citizens into the deliberation process surrounding rights as dialogue is exchanged between the parliament, the courts and society.[19] Demonstrating this impact of statutory rights on wider rights culture, in the United Kingdom, which has possessed a statutory Human Rights Act since 1998, the British Institute of Human Rights has reported numerous cases of elderly persons employing the ideas and language of the Human Rights Act to defend their dignity to services providers.[20]

In the Australian Capital Territory, henceforth ACT, the Human Rights Act 2004 set out a statutory Bill of Rights with appropriate parliamentary and judicial accountability mechanisms through the requirement of 'statements of compatibility' and 'declarations of inconsistent interpretation' at the territory level.[21] Additionally, the Act provides for the balancing of rights and duties in section 28, which provides that rights '...may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society', a standard of reasonableness which is determined by the 'nature of the right', 'importance of the purpose' and 'extent' of the limitation, as well as 'any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve'.[22] This structure is consistent with the need for adaptive capacity within rights determinations, whilst also providing thorough measures for the protection of rights at the territory level.

In providing an evaluation of the Bill's effectiveness, the ACT Human Rights Commission noted that '...[b]y all accounts, the [Human Rights] Act's main influence remains clearest within the Legislature, where there are signs that it has made a genuine cultural difference to the way the Assembly goes about its work'.[23] The effectiveness of the Act in protecting rights and encouraging a strong rights culture, as well as its capacity to provide flexibility for complex situations of rights balancing, particularly in the case of protections of free speech, is demonstrated in the case of *Daniel Emlyn-Jones and Federal Capital Press* .[24] This case was about vilification in the form of anti-LGBTQI+ comments in a section of a local Canberra newspaper, the court pointed out the function of the Human Rights Act in informing rights deliberations, protecting free speech, and undertaking balancing exercise in regards to rights:

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[18] See, eg, *Human Rights Act 2004* (ACT).
[19] Hoi Kong and Ron Levy, 'Deliberative Constitutionalism'.
[20] Australian Human Rights Commission, 'About a Human Rights Act for Australia,' (n.d.).
[21] *Human Rights Act 2004* (ACT).
[22] Ibid.
[23] ACT Human Rights Commission, 'Look Who's Talking: A Snapshot of Ten Years of Dialogue under the Human Rights Act 2004,' (2014).
[24] *Daniel Emlyn-Jones and Federal Capital Press* [2009] ACTDT 2.

> 'It appears to me that in referring to the ACT Human Rights Act the Respondent wants to impress upon me that in the ACT the right to freedom of expression should receive a higher consideration than in other jurisdictions when considering the question of vilification, similar to the higher level of consideration that right received in cases from the United States. Freedom of expression is in the fabric of the democracy in all Australian jurisdictions, and is an implied right in the Australian Constitution. I will have regard to the requirement under section 30 of the Human Rights Act in interpreting [the legislation at hand] in a way that is compatible with human rights…'.[25]

At the federal level, the Human Rights (Parliamentary Scrutiny) Act 2011 provides that the Parliamentary Joint Committee on Human Rights (PJCHR) is created to scrutinise and provide statements of compatibility with human rights for all Acts passed by the Parliament.[26] However, this model of rights protections requires strengthening in order to adequately safeguard against legislative infringement of rights. At present, the PJCHR's issuing of statements of compatibility has been found to have little impact on the outcome of the Bill's passage. As of 2016, records demonstrate that 73 per cent of the time, the outcome of the Committee's assessment of consistency with human rights had no impact on the ultimate passage of the Bill.[27] Furthermore, the Act falls short at the federal level in that it provides little mechanism of judicial scrutiny of legislative consistency with human rights.[28]

With this in mind, we recommend that the Parliament consider applying a stronger statutory rights scheme, modelled on those implemented in the ACT, Victorian, and Queensland jurisdictions, at a federal level, in order to remedy the identified weaknesses of the *Human Rights (Parliamentary Scrutiny) Act 2011*, and to strengthen protections for freedom of speech and press. This would work to not only provide stronger safeguards for rights from infringement by legislative and executive arms, by providing additional mechanisms of accountability, a priority identified by the Senators, but also to provide for adaptivity and balancing of rights and duties through an elected legislature. Furthermore, extending the scope of a federal statutory human rights scheme to encompass judicial review of human rights compliance would strengthen deliberative democratic processes in regards to rights, fostering a culture of rights protection, without the significant costs of undertaking referenda, and the notably inflexible, static, and litigious nature of constitutional rights models.

Recommendation 1: The amendment should instead be adopted as a statute for interpretation of legislation to better give effect to competing interests which exist in rights-based frameworks.

[25] Ibid.
[26] *Human Rights (Parliamentary Scrutiny) Act* 2011.
[27] George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights,' (2015).
[28] Ibid.

2. The Benefits of Adopting a Proportionality Approach

If the amendment is to proceed, it should be altered to better reflect a proportionality approach to the freedoms of expression and the press. This section will demonstrate that the High Court's approach to the existing implied freedom of political communication is flexible enough to compensate for other fundamental rights. This flexibility is essential for protecting the values of equality, accountability and dignity which underpin the freedom of expression itself.

Due to existing concerns over media diversity in Australia and the need to regulate misinformation, we should not seek to replicate the overly broad freedom of expression existing in the United States of America.[29] The freedom of expression there is inclusive of electoral campaign donations.[30] This breadth arises from an unqualified freedom.[31] Placing restrictions on campaign funding balances political influence, reduces corruption and increases accountability.[32] These outcomes are all consistent with the values underpinning the freedom of expression.[33] Furthermore, the steady move towards a polarised political landscape in the United States has resulted in dangerous misinformation from some press organisations and radical protests which have challenged the democracy, which the freedom of expression seeks to maintain.[34] We should not replicate this broad approach to the freedom of expression in Australia as it can quickly become a defence for similar actions. This is particularly problematic with existing concerns over media diversity in Australia.[35] The proposed exception of laws which are 'justifiable and reasonable in an open, free and democratic society,' is not sufficiently clear on its approach to balancing these complex interests.[36] Our concern is that laws which impose important restrictions on campaign financing, media standards and discrimination may fall within the broad ambit of not consistent with a free, open and democratic society.

In contrast, Australia's current approach to a freedom of expression is balanced, adequately accounts for competing rights, and gives effect to the values which underpin the freedom in the first instance. There is some justification to enshrine an express provision in the *Constitution* similar to the proposed section 80A to provide a stronger basis for the freedom, although the operation of Australia's implied freedom of political communication should not change.[37] As Steward J noted in *Libertyworks Inc v Commonwealth*:

> [I]t is arguable that the implied freedom [of political communication] does not exist. It may not be sufficiently supported by the text, structure and context of the Constitution and, because of the

[29] See, eg, Kevin Rudd, Submission No 52 to Senate Standing Committees on Environment and Communication, *Inquiry into Media Diversity in Australia* (2020).
[30] See *Citizens United v Federal Electoral Commission* 558 US 310 (2010).
[31] See *United States Constitution* amend I.
[32] See *McCloy v NSW* (2015) 257 CLR 178, 202-8.
[33] See ibid, 208.
[34] See, eg, Emily Bazelon, 'Free Speech Will Save Our Democracy', *New York Times* (online, 23 October 2020) <https://www.nytimes.com/2020/10/13/magazine/free-speech html>.
[35] See eg, Kevin Rudd (n 29).
[36] Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019 (Cth) s 80A.
[37] Ibid.

> continued division within this Court about the application of the doctrine of structured proportionality, it is still not yet settled law.[38]

Enshrining an express provision as opposed to implication from requirements of informed voting under sections 7 and 24 of the *Constitution* will give a stronger basis for the freedom.[39] In saying this, there are no issues with the operation of the existing implied freedom of political communication ('IFPC'). The IFPC has been understood as a restriction on legislative authority. It operates through a proportionality assessment; balancing the burden imposed on this freedom, the legitimate object of the legislation, and ensuring that it is 'reasonably appropriate and adapted' to achieving those ends.[40]

Whilst the adoption of structured proportionality is not unanimous as of yet, both proportionality approaches account for the competing interests. Notably, recent impositions on press freedom in Australia such as the Australian Federal Police raids on the ABC in 2019 and the raids on journalist Anika Smethurst's home were likely already inconsistent with the operation of the IFPC.[41] In *Smethurst v Commissioner of Police*, the High Court refused to apply the IFPC because the problematic legislation had already been repealed and the Court could invalidate the warrants on other grounds.[42] The legislation which granted the authority to issue such warrants was repealed shortly after the raids likely due to public concern. Whilst the Court did not apply the IFPC, the legislative repeal evidenced that it would likely have been invalidated regardless. Thus, fears of lacking press freedom in light of these raids should be alleviated as the existing IFPC sufficiently protects the press.

Importantly, the balancing exercise that a proportionality approach to the IFPC brings allows for the High Court to consider competing rights and giving greatest effect to the freedom. For example, the cases of *Brown v Tasmania* and *Clubb v Edwards* both considered legislation which banned protesting in certain areas.[43] Despite the similarity in their operation, the High Court reached different outcomes. In *Brown v Tasmania*, the legislation operated to prevent protesting within designated logging areas by allowing the arrest of protestors who failed to comply with move on orders.[44] The purpose of such legislation could only be said to protect forestry operations rather than protect public safety because it singled out protesters.[45] As such, the High Court found that this impermissibly burdened the IFPC as the restrictions imposed by Tasmanian legislation were 'greater than is reasonably necessary' to protect Forestry Tasmania from conduct that seriously interferes with carrying out forest operations.[46] Hence, the Tasmanian legislation was invalidated.

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[38] *Libertyworks Inc v Commonwealth* (2021) 95 ALJR 490, 546 (Steward J).
[39] See *Australian Constitution* ss 7, 24.
[40] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562.
[41] See 'ABC Raid: Outcry as Australian Police Search Public Broadcaster', *British Broadcasting Corporation News* (online, 5 June 2019) <https://www.bbc.com/news/world-australia-48522729>.
[42] See *Smethurst v Commissioner of Police (Cth)* 94 ALJR 502, 506, 530.
[43] See generally *Brown v Tasmania* (2017) 261 CLR 328; Cf *Clubb v Edwards* (2019) 267 CLR 171.
[44] *See Brown v Tasmania* (n 43) 348.
[45] See ibid, 383.
[46] See ibid, 390-1 (Gageler J).

Similarly, the legislation in *Clubb v Edwards* prevented abortion-related campaigning within 150 metres of abortion clinics in New South Wales.[47] In contrast, the purpose of the legislation was expressed to protect the dignity of individuals who were seeking medical assistance from the clinics. Whilst the effect of the legislation was largely similar to that in *Brown v Tasmania*, the underlying purpose was different. As the plurality said in *Clubb v Edwards*:

> Proportionality testing is an assessment of the rationality of the challenged law as a response to a perceived mischief that must also respect the implied freedom. A law which allows a person to be shot and killed in order to prevent damage to property can be seen as having a connection to the purpose of preventing damage to property. It may also be accepted that other means of protecting damage to property would not be as effective. Nevertheless, the law is not a rational response to the mischief because it is manifestly disproportionate in its effect on the peace, order and welfare of the community.[48]

The plurality acknowledged that preventing certain forms of expression, even political expression, in a proportionate manner may be necessary to give effect to competing rights or other forms of expression. The central distinction is the legislation in *Clubb v Edwards* was directed at protecting the individual dignity of individuals seeking help and did so in a proportionate manner.[49] The Court was able to apply a flexible proportionality approach to the IFPC such that freedom of expression did not constitute freedom to harass. This proportionality approach is essential to balancing the freedom of expression with other significant competing rights. As such, the proposed exception to the freedom should be amended to reflect this flexibility and prevent imposing an overly broad freedom of expression and freedom of the press.

Recommendation 2: The exception in the proposed amendment should be altered to better reflect the High Court's proportionality approach to the existing implied freedom of political communication.

3. Conclusion

In this submission, we have outlined our suggestions to ensure a balanced approach to freedom of expression and freedom of the press in Australia. We believe the proposed amendment and its exceptions of laws limiting the freedom are ultimately too broad, and that the alternatives we propose better reflect this balanced approach. Therefore we submit that the amendment should take the form of a statute for interpretation of legislation, or, if the proposed amendment takes the form of a Constitutional amendment, that the exception be altered to better reflect the High Court's proportionality approach to the existing implied freedom of political communication. We

[47] See *Clubb v Edwards* (n 43) 204-8.
[48] Ibid, 200-1 (Kiefel CJ, Bell and Keane JJ).
[49] See ibid, 205.

believe that these proposed alternatives reflect the balancing exercise that is necessary when weighing up freedom of expression and freedom of the press with other fundamental rights.