Proposal for an Act to alter the Constitution to expressly protect freedom of expression, including freedom of the press

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We are grateful for the opportunity to contribute this submission.

I Executive summary

This submission:

- Supports the proposal to amend the Australian Constitution, subject to qualifications below and insofar as it endeavours to enhance freedom of expression in Australia and to that end would prohibit the Commonwealth, States and Territories from making laws that impair that freedom.
- Submits that the definition of the right to freedom of expression should be articulated in terms that include the full range of expression that must be protected in order for Australia to comply with its international obligations under article 19(1) and 19(2) of the UN International Covenant on Civil and Political Rights (ICCPR) (see Part III, section 1 below).
- Submits that the limitation provision in the proposal should be made consistent with the limitation terms of article 19(3) of the ICCPR, to ensure that the freedom of expression is upheld, not eroded (see Part III, section 2 below).
- Draws attention to important features of the freedom of expression that still need to be implemented in Australian law in order to comply with Australia's article 19 obligations (see Part III, section 3 below).

II Proposed revision to the constitutional amendment

Revised section 80A:

> The Commonwealth, a State or a Territory must not limit freedom of expression, including freedom of the press and other media, except to the extent necessary and strictly proportionate:
>
> (a) to respect the rights or reputations of others;
>
> (b) to protect national security, public order or public health.

III Reasons

The following discussion elaborates on our reasons for proposing this change and suggests further material that could be included in an Explanatory Memorandum.

1. Definition of freedom of expression (article 19(2))

Article 19(2) of the ICCPR provides that freedom of expression includes "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 of [a person's] choice".

Australia will remain in contravention of its international obligations if it fails to provide adequate protection to freedom of expression in terms which effectively include these aspects of freedom of expression.

While inserting a full definition of the right to freedom of expression in the proposed s 80A would be inconsistent with the drafting stye of the Australian Constitution, we submit that recognition of these aspects of freedom of expression should made explicit in a revised Explanatory Memorandum, which should include an express statement that the term "freedom of expression" is intended to "include" the forms of expression referred to in article 19, namely "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 of [a person's] choice".

2. The criteria for limitations on freedom of expression (article 19(3))

We submit that the limitation clause in the proposed constitutional amendment would authorise restrictions on freedom of expression on grounds which are non-compliant with international human rights standards because they are drawn too widely.

The proposed limitation clause would allow restrictions on the freedom 'if the limitation is reasonable and justifiable in an open, free and democratic society'.

This is excessively vague. It authorises much wider restrictions than are allowed by ICCPR article 19(3), which *only* permits restrictions which are 'provided by law' and are 'necessary' for 'respect of the rights or reputations of others' or for 'the protection of national security or of public order (ordre public), or of public health or morals.'"

The terms of limitation specified for each ICCPR right were carefully crafted. There is a vast difference between a general limitation provision of the kind proposed and the specific, individualised requirements that must be laid down in domestic law in order to protect freedom of expression in accordance with the ICCPR. As one renowned international law commentator has explained, the 'several particular formulas' in the ICCPR "reflected a desire to tailor limitations to the extent strictly necessary so as to assure maximum protection to the individual… In providing for possible limitations on relatively well-defined rights and

freedoms … it was considered important to provide limitation clauses that were more stringent and pointed to the particular right'.[1]

In this key respect the proposal falls short of the intended degree of protection for freedom of expression. This is no small thing.

Limitation provisions for fundamental rights cannot simply be home-made. In fact, the ICCPR monitoring body, the Human Rights Committee, has repeatedly stressed the importance of carefully observing the ICCPR limitation provisions. For example, it has recommended that particular countries undertake a review of their domestic law to ensure compliance with '*all* the requirements of the Covenant' and in particular that 'the limitations imposed on the exercise of rights and freedoms under national legislation do not go beyond those permitted under the Covenant'.[2] The Committee has also expressed concern in situations where a country's legal system does not contain 'all the necessary safeguards required to prevent the restriction of Covenant rights beyond the limits permissible under the Covenant'[3] and it has recommended 'that attention be paid in … legislation, and in practice to ensure that any limitations on human rights are strictly in conformity with those permissible under the Covenant'.[4] Moreover, the Committee has been especially sensitive to the chilling effect of measures which create a situation of uncertainty or of legislation restricting freedom of expression through the use of key terms that are vague, broad and open-ended.[5]

In our respectful submission, if Australia was to amend the Constitution in the manner proposed, the Human Rights Committee is likely to criticise the amendment for its failure to comply with Australia's ICCPR obligations along these lines.[6]

Violation of an ICCPR right occurs when the right has been restricted in excess of the limitations permitted by the relevant article of the ICCPR.[7] The State bears direct responsibility for violation that results from it permitting (as the proposal would if enacted) restrictions on freedom of expression which do not accord with article 19(3).

A number of important principles are applied by the Human Rights Committee when assessing restrictions alleged to constitute a violation. Firstly, States must demonstrate their *necessity*. It is not enough that a law is considered 'reasonable' or 'justifiable'. Secondly, restrictions must

[1] Andre-Charles Kiss, *Permissible Limitations on Rights* in Louis Henkin (at), *The International Bill Of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), at 291.
[2] E.g. Jordan CCPR A/49/40 (1994) 237; Morocco CCPR A/50/40 (1995) 115; Grenada CCPR/C/GRD/CO/1 (2009) 6.
[3] E.g. Sri Lanka CCPR A/50/40 (1995) 445; Sri Lanka CCPR CCPR/CO/79/LKA (2003) 7. See also Slovakia CCPR/C/79/Add.79 (1997) 22.
[4] E.g. Hungary CCPR/C/79/Add.22 (1993) 11.
[5] E.g. China (Macau) CCPR/C/CHN-MAC/CO/1 (2013) 15; Israel CCPR/C/ISR/CO/4 (2014) 22; Russian Federation CCPR/C/RUS/CO/7) (2015) 19; Rwanda CCPR/C/RWA/CO/4 (2016) 39.
[6] The importance of incorporating limitation terms with precision also caused the Human Rights Committee to remind European Convention Contracting States that permissible restrictions under the ICCPR are 'less broad-based' than under the European Convention. E.g. Denmark CCPR A/52/40 (1997) 65; Malta A/49/40 (1994) 125; Iceland CCPR A/49/40 (1994) 76.
[7] General Comment No. 31 [80], *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* 29 March 2004 [5] and [6].

conform to the principle of proportionality. This means that they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; and they must be proportionate to the interest to be protected. Moreover, the principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.[8] Thirdly, a restriction must not be applied in a discriminatory way.[9] Above all the State must remain the impartial guarantor of rights in such a process.

The Human Rights Committee has also stressed the importance of being guided by the aim of facilitating a right, rather than seeking unnecessary or disproportionate limitations to it;[10] that content restrictions, aimed at the message itself, are particularly egregious;[11] and that it is difficult to find any justification for restrictions on freedom of expression imposed on someone solely for exercising their rights under the ICCPR. In connection with freedom of assembly the Committee has emphasised the need to identify 'a specific and significant threat to public order and safety', to avert real (not merely hypothetical) dangers, and that the mere existence of reasonable and objective justifications for limiting rights is not enough.[12] It has also often reiterated certain fundamental principles concerning the meaning of a democratic society,[13] including that it is a cornerstone of a democratic society to be able to peacefully promote ideas that are not necessarily favourably viewed by the government or by the majority of the population.[14] Similar principles should guide the interpretation of the article 19(3) text which we recommended be adopted in place of the existing limitation provision.

For these reasons, we respectfully submit that the limitation clause in the proposed constitutional amendment should be revised so that it accords more closely with the requirements of article 19(3) of the ICCPR in the revision proposed in Part II.

3. Existing deficiencies in protection for freedom of expression in Australia

We consider that such an amendment would result in incremental improvement in protection for freedom of expression in the Constitution—that is, *if* the article 19(3) limitation criteria apply—but we stress that inadequate protection would still remain for freedom of expression in Australia, measured against international standards.

[8] General Comment No. 34, *Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34 [22] and [34].
[9] *Irina Fedotova v. Russian Federation*, CCPR/C/106/D/1932/2010 (2012).
[10] *Kirsanov v. Belarus*, CCPR/C/110/D/1864/2009, 20 March 2014 [9.7].
[11] *Alekseev v. Russian Federation*, Communication No 1873/2009, CCPR/C/109/D/1873/2009, Views of 25 October 2013 [9.6]; *Kirsanov v. Belarus*, Communication No 1864/2009, CCPR/C/110/D/1864/2009, Views of 20 March 2014 [9.7].
[12] *Jeong-Eun Lee v. Republic of Korea*, Communication No. 1119/2002, CCPR/C/84/D/1119/2002, Views of 23 August 2002 [7.2]-[7.3].
[13] *Zvozskov et al. v. Belarus*, CCPR/C/88/D/1039/2001, 17 October 2006 [7.2]; *Korneenko et al. v. Belarus*, CCPR/C/88/D/1274/2004 31 October 2006 [7.3].
[14] *Kungurov v. Uzbekistan*, CCPR/C/102/D/1478/2006, 20 July 2011 [8.4].

Existing protection in Australia for freedom of expression

Only certain aspects of the freedom of expression (understood in ICCPR terms) find protection in Australia. They exist in the following sources, and will benefit from incremental improvement by the proposal, as follows.

- The implied freedom of political communication.
  - 'Political communication,' though broadly construed by the High Court, represents a small subset of the range of subject matter protected by freedom of expression conventionally understood.
  - To help address this, as noted above, the proposed s 80A of the Constitution and the Explanatory Memorandum should be altered to include express statements that 'freedom of expression' is *intended* to embrace the forms of expression referred to in article 19, namely that it includes '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 of [a person's] choice'.
- Section 116 of the Constitution.
  - This simply precludes the Commonwealth making laws for establishing any religion, or imposing any religious observance. It is only directed at laws that have such an aim or purpose.[15] The proposed s 80A, with the changes we recommend, is likely to be construed analogously, which would limit its impact, exacerbating its non-compliance with article 19 of the ICCPR.
  - Section 116 has little practical efficacy in support of freedom of religion, recognised in terms of article 18 of the ICCPR.
  - Section 116 does nothing at all to prevent States and Territories enacting laws that restrict freedom of religion. In this particular the proposal offers greater protection for freedom of expression than exists under Section 116, by limiting the legislative power of States and Territories.
- The principle of legality.
  - This requires an intention on the part of the legislature to interfere with fundamental rights and freedoms to be clearly manifested by unmistakable and unambiguous language.[16] It offers no protective force in the face of legislation which unmistakably and unambiguously interferes with freedom of expression. The proposed s 80A would allow legislation to be struck down which is contrary to its terms. The limitation text is therefore critical to whether freedom of expression to article 19 standards is upheld.
- The human rights charters of the ACT, Victoria and Queensland.[17]
  - Based on the 'dialogue model' these statutes do not guarantee rights substantively in the way the ICCPR requires. They do other things which fall

[15] *Kruger v Commonwealth* (1997) 190 CLR 1, 40 (Brennan CJ), 86 (Toohey J).
[16] *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).
[17] *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld); *Human Rights Act 2004* (ACT).

well short of that, such as by requiring statutes to be interpreted, so far as possible, in a way that is compatible with human rights; requiring public authorities to act consistently with human rights; and making provision for the scrutiny of legislation.

  - The 'human rights' defined in the charters are largely taken from the ICCPR. However, in their adaptation for the charters, the rights are stripped of their limitation provisions and other qualifications. They are instead collectively construed as if subjected to a single limitation formula which is much looser than stipulated in the ICCPR, even those rights which are subject to no form of limitation in their original ICCPR form.[18]
  - While such an omnibus limitation is clearly undesirable, the impact is confined, given the marginal operation of the charters. The limitation formula chosen for the proposal bears some similarity to the limitation terms of the charters. The charter texts are not considered appropriate for this purpose, for the reasons elaborated above.

- The common law principle that "everybody is free to do anything, subject only to the provisions of the law."[19]
  - This principle is overridden e.g. by anti-vilification civil legislation at Commonwealth, State and Territory levels[20] (which offers support for freedom of expression only within confined exclusions), as well as criminal anti-vilification legislation, and also antidiscrimination legislation in so far as it impacts freedom of expression. At international law article 19 standards are to be preserved notwithstanding any hate speech, anti-vilification and other discrimination-based measures, even those mandated by the ICCPR and by the International Convention on the Elimination of Racial Discrimination.
  - To the extent that the proposed s 80A would permit greater legislative restriction on freedom of expression than article 19 allows, this source of protection would be eroded rather than enhanced.

Protection for the freedoms of opinion and expression should fulfil Australia's ICCPR obligations

The piecemeal protection just described is meagre when measured against the protection which Australia is already duty-bound to guarantee to those under its jurisdiction, under ICCPR article 19. Constitutional amendment is not the most appropriate means for securing protection of freedom of expression in a manner that is fully compliant with article 19. We would therefore recommend that the limits of the proposed s 80A be acknowledged, to prevent it being mistaken

[18] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2); *Human Rights Act 2019* (Qld) s 13; *Human Rights Act 2004* (ACT) s 28.
[19] E.g. *Coleman v Power* (2004) 220 CLR 1, [239], per Kirby J: 'everybody is free to do anything, subject only to the provisions of the law'.
[20] *Racial Discrimination Act 1975* (Cth) s.18C; *Discrimination Act 1991* (ACT) s.67A; *Anti-Discrimination Act 1977* (NSW) ss. 20C(1), 38S, 49ZT, 49ZXB; *Racial and Religious Tolerance Act 2001* (Vic), ss. 7 and 8; *Anti-Discrimination Act 1991* (Qld) s. 124A; *Anti-Discrimination Act 1998* (Tas) ss. 17 and 19; *Civil Liability Act 1936* (SA) s.73(1).

for purported implementation of the ICCPR's freedom of expression, and we urge that consideration be given separately to implementing article 19 more completely, including by the inclusion of 'the right to hold opinions without interference' in article 19(1).

There is one particular area to which we wish to draw attention in which freedom of expression is currently restricted in Australia in a manner that is non-compliant with Australia's obligations under article 19.

Article 19 conceives generously framed, justiciable rights against the State, in the hands of the individual.

By virtue of Article 2(1) of the ICCPR, article 19 rights are to be given 'full effect' by Australia in domestic law or other measures, against violation from private, as well as public sources.[21] Australia is to 'respect and to ensure' ICCPR rights 'without distinction of any kind', on the various listed grounds. This is a vital additional qualification when implementing article 19, especially given the propensity, borne out in history, of public and private actors to resort to reprisals against their critics or ideological opponents, or suppression of those whose religious or political views are not mainstream or are unpopular. Unless freedom of expression is secured for everyone on equal terms (as required by article 2), it has the potential to become repressive of certain viewpoints over others. It can also have a discriminatory effect on cultural minorities. Examples include action brought against members of indigenous communities merely for protesting or demanding the protection of their land rights,[22] and restrictions on indigenous peoples expressing themselves in their own languages and in promoting their cultures.[23]

Article 2(3) requires an effective remedy to those whose rights have been violated. It is not suggested here that article 19 rights be implemented by enabling private actions – merely that individuals be entitled to a remedy against the State for violations from public or private sources. The status of the ICCPR in any system of law should at least secure the means for proper resolution of conflict between national law and the ICCPR (in favour of the latter) and to enable challenges to be made domestically in instances of non-compatibility. The Human Rights Committee has already expressed concern to Australia that in the absence of comprehensive incorporating legislation in Australia there remain lacunae in the protection of ICCPR rights,[24] as well as in the provision of an effective remedy for violation.[25]

[21] One reason why the First Amendment to the US Constitution is an inadequate model (even though the Bill's Explanatory Memorandum treats it as inspirational) is that it fails to offer any protection against private sources of violation, a shortcoming highlighted recently by the in the US concerning the regulation of social media platforms. Furthermore, the US is in a very different position from Australia as far the ICCPR is concerned. At the time of ratification, the US entered a reservation preserving its own constitutional standards for free speech over ICCPR article 19. Australia has no option to resort to anything but full article 19 compliance.
[22] E.g. Chile CCPR/C/CHL/CO/5 (2007) 7.
[23] E.g. Guatemala CCPR/C/GTM/CO/4 (2018) 38.
[24] Australia CCPR/C/AUS/CO/6 (2017) 5.
[25] Australia CCPR A/55/40 (2000) 514.

Conclusion

In our view, existing protection for freedom of expression would be somewhat improved by the proposed Constitutional amendment, but *only* if the article 19(3) text were adopted in place of the limitation provision proposed. The proposed text stands to diminish rather than enhance freedom of expression. The generous protection for the freedoms of opinion and expression demanded by article 19 remains to be addressed separately.

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