



**JOURNALISM EDUCATION
& RESEARCH ASSOCIATION
OF AUSTRALIA**
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Submission from the Journalism Education & Research Association of Australia (JERAA) to the Legal and Constitutional Affairs Legislation Committee re: Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019 Bill

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**This submission was commissioned and is endorsed by the 2021 JERAA executive Alexandra Wake
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Introduction

The Journalism Education and Research Association of Australia Incorporated (JERAA Inc.) is the peak body of Australian journalism educators and researchers from tertiary education and industry organisations. JERAA's primary aim is to raise the standard of teaching and training in journalism in order to foster excellence and integrity in the future generation of journalism practitioners. JERAA also supports research, with the understanding that research can help communities to identify trends and issues, resolve problems, and promote or celebrate excellence in journalism and journalism education. JERAA runs annual awards and grants for journalism students and journalism researchers to recognise and encourage quality in journalism practice, study and research. JERAA made submissions to both recent parliamentary inquiries on this issue and welcomes this opportunity to have input into the proposed legislation.

As many observers and scholars have pointed out for many years, at the core of the freedom of expression and freedom of the press issues in Australia lies the absence of enshrinement of the freedom of expression ideal in the nation's Constitution, a Bill or Charter of Rights or similar overarching instrument. Centre Alliance Senators Rex Patrick and Stirling Griff should be commended on this bold attempt at remedying this issue by introducing the *Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019 Bill*. The concerns raised by this Bill have been previously addressed by JERAA through submissions to the two parliamentary inquiries into media freedom in Australia: one, on the Inquiry into the Impact of

the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press;¹ and the other, on The Adequacy of Commonwealth Laws and Frameworks Covering the Disclosure and Reporting of Sensitive and Classified Information.² This JERAA submission should be read in conjunction with the two submissions referred to above. We would also like to refer the committee to the Senate submission by Associate Professor Lidberg and Dr Denis Muller as a useful reference strongly related to this submission.

This submission is set out as follows: (a) comments on the Bill; (b) a consideration of the Australian freedom of expression and freedom of the press backdrop, including the two existing human rights instruments in Australia; (c) a consideration of freedom of expression protections in leading democracies; and (d) a suggested ‘Plan B’ if the present Bill is not passed.

The Bill

The Bill’s Explanatory Memorandum provides an idea as to the “purpose” of the Bill, which is “to enshrine the right of freedom of expression including freedom of the press and other media within the Constitution”.³ Some key bases for the proposed constitutional amendment, as cited in the Explanatory Memorandum, are: (a) despite the High Court of Australia’s recognition of an “implied freedom of communication” under the Commonwealth Constitution in relation to political and government matters, this freedom is “far more restricted than guarantees provided by other jurisdictions” such as the First Amendment in the United States and in Article 19 of the Universal Declaration of Human Rights; (b) the need to “put a constitutional brake on efforts to suppress the freedom of expression to the detriment of our democratic and open society”; (c) the need to protect the media to enable it to “continue to contribute to a free and democratic society”; and (d) to allow limitations on individual freedom of expression “only where the restriction is on balance reasonable and justifiable”. Senator Patrick, in his Second Reading Speech, said “it is obvious that freedom of expression and freedom of the press are under significant challenge...and require Constitutional protection”.⁴ Senator Patrick added that an explicit statement of the fundamental principles of freedom of expression and freedom of the press “is long overdue”.

JERAA concurs with the foregoing identification of purposes of the Bill and with the proposal to constitutionally entrench such protections for freedom of expression and freedom of the press. The Bill came in the wake of two heavy handed police raids on the home of a prominent Australian journalist in Canberra, Annika Smethurst, and the Australian Broadcasting Corporation headquarters in Sydney in June 2019. A number of scholars and researchers (the present two authors included) had for more than a decade warned about such raids being

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https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/FreedomofthePress

2

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/PressFreedom

³ Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019, Explanatory Memorandum.

⁴ Senator Rex Patrick. (2019, July 4). Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019, Second Reading Speech. Commonwealth of Australia, Senate. Hansard, p. 208.

inevitable given the tightening of the Australian national security legal framework in the aftermath of the September 11, 2001 terror attacks in the US. For further background please see the previous JERAA submissions referred to above. In summary: the submissions and the reports from the two inquirers identified, across party lines, that the delicate balance between national security and a strong independent media reporting public interest stories, had tipped, significantly, in favor of national security. The question to address is – will this Bill address this and other constraints on freedom of expression in Australia?

In our assessment the introduction of the *Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019 Bill* would be a good start. But the initiative is also a missed opportunity to address the wider issue – the lack of a proper Bill of Rights functioning as a set of rules and agreements between the rights of citizens and the reach and roles of governments. As pointed out below, Australia is the only liberal democratic country in the world without an overarching Bill of Rights. As the committee would be well aware, successful changes to the constitution are rare in Australia. Of the 44 suggested changes or amendments to the constitution, only eight have been passed. It would therefore seem logical to add to the freedom of expression/press other basic human rights that are universally agreed upon and over which Australian governments have direct influence such as: freedom of assembly, freedom of religion, right to personal security, etc. We suggest that the freedoms and rights should be based on the United Nations Universal Declaration of Human rights where the principal themes are identified and then listed in the Bill.

One of our key reservations with the current wording of the Bill is the following, as stated in the Bill's Explanatory Memorandum:

The proposed alteration to the Constitution includes necessary provision for limitation of freedom of expression when, and only when, such limitation is “reasonable and justifiable” in an open, free and democratic society. It is important that the alteration contains provision for limitation, however any limitation must be consistent with the values and freedoms enjoyed within Australia. What is “reasonable and justifiable” will be a matter for the Commonwealth, State and Territory legislatures, but will be subject to potential constitutional review by the High Court of Australia.

How will “reasonable and justifiable” be defined and determined? The Bill envisages the role that will be played by a multitude of legislatures who, as we well know, do not always take an identical approach or demonstrate the same level of urgency. For example, while the Commonwealth responded to the need for journalists' shield laws a decade ago, the States and Territories did not demonstrate the same extent of urgency or need for uniformity for the protection of journalists' confidential sources. One State legislature, Queensland, is only now considering such law. The courts will have an important role to play in construing what is “reasonable and justifiable” and a stronger affirmation of the freedom of expression ideal in the Constitution will serve to minimise uncertainty. JERAA submits that the Bill should contain a clearer commitment to the ideal of freedom of expression with competing considerations being narrowly defined so as to ensure that freedom of expression is abridged only when the public interest clearly militates for the freedom to be so abridged or limited. This can be done, for instance, through clear and forceful explanatory notes that embody the intent behind the constitutional protection (for example, see the Denmark explanatory notes below). Guidance

on achieving such an objective through clear and forceful explanatory notes could also be obtained, for instance, by looking at the Commonwealth *Freedom of Information Act 1982*. In that Act, section 3(4) sets out Parliament’s clear intention that the “functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost”. Furthermore, section 11B of the Commonwealth *FOI Act*, lists the *public interest exemption factors* that favour information access. Factors that favour document access in the public interest include whether the access would promote the objects of the Act and inform debate on a matter of public importance: section 11B(3). Factors that are irrelevant and “must not be taken into account” include whether access could result in embarrassment to the government or cause a loss of confidence in the government: section 11B(4)(a). JERAA submits that the phrase “reasonable and justifiable” in the Bill is far too vague and that it would be open to unduly curtailing freedom of expression. JERAA acknowledges the merits of a “reasonable and justifiable” limitation but submits that the potential for doubt about the limits on freedom of expression and press be more clearly circumscribed. Further guidance in defining “reasonable and justifiable” – for example, the need for demonstrable justifications to curb the freedom of expression right – can also be found in the discussions below on the US First Amendment; the *Canadian Charter of Rights and Freedoms*; and the *New Zealand Bill of Rights Act 1990*.

Freedom of speech versus freedom of the press:

The terms *freedom of expression* and *freedom of the press* appears in the Bill’s title. A threshold question needs to be addressed. Are *freedom of expression* and *freedom of the press* the same thing and, if not, what do each of these terms mean? The distinction between the two terms has been described as “[o]ne of the central difficulties in discussing journalism and freedom of speech”.⁵ “Freedom of the press is very different from freedom of speech, yet the two are so often conflated.”⁶ Aspects of the distinction, as identified by theorists, briefly stated are: the divergence between the two terms becomes apparent when one focusses on the issue of media ownership and control; the overriding commercial imperatives of the news media can often serve to undermine freedom of speech in democratic societies; largely given the press’s commercial orientation, the press and the mass media have the capacity to stifle debate and undermine freedom of speech; and freedom of speech has “an inherently democratic imperative”.⁷ This submission does not examine this issue in detail and merely posits the view that it merits close consideration, similar to the widening of the Bill to include the general basic human freedoms and rights mentioned above.

Is freedom of expression/freedom of speech absolute? No:

The federal Attorney-General’s Department in a public sector guidance sheet, under the heading “What is the right to freedom of opinion and expression” makes the following opening statement:

⁵ Steel, J. (2012). *Journalism & Free Speech*. London: Routledge, p. 4.

⁶ Steel, J. (2012). *Journalism & Free Speech*. London: Routledge, pp. 4–5.

⁷ Steel, J. (2012). *Journalism & Free Speech*. London: Routledge, p. 5.

“The right to freedom of opinion is the right to hold opinions without interference, and cannot be subject to any exception or restriction.”⁸

However, in the very next paragraph, the guidance sheet states:

“The right is not absolute.”⁹

Likewise, it is also acknowledged in the US that freedom of speech is not absolute.

“Freedom of speech is not absolute. Even the First Amendment of the United States Constitution has been held not to protect all speech: it does not, for example, protect obscene publications or speech inciting imminent lawless action.”¹⁰

How freedom of expression is captured in various instruments (Constitutions, Charters, Bills of Rights etc):

The following varying characteristics can be observed from the various modes of phrasing of the freedom of expression provision found in constitutions and other instruments around the world:

- (a) The provision is sparsely worded.
- (b) The provision is forceful in encapsulating the freedom of expression ideal.
- (c) The provision is open to being diluted or defeated as a result of various competing considerations.
- (d) The provision as set out within the clause or article itself does not go beyond the reference to the right to freedom of expression.
- (e) The provision as set out within the clause or article itself goes beyond the reference to freedom of expression and mentions associated rights or ideals.

As noted by the Australian Law Reform Commission (ALRC) in a report on encroachments by Commonwealth laws on traditional rights and freedoms, “Bills of rights and human rights statutes protect free speech in the US, UK, Canada and New Zealand”.¹¹ The following discussion is developed from the ALRC’s Report, including footnotes 43–46 in the report.

- US Constitution: The First Amendment contains five rights of which freedom of speech is one:

⁸ Attorney-General’s Department. (Cth). Right to freedom of opinion and expression: Public sector guidance note. Retrieved from <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-freedom-opinion-and-expression>

⁹ Attorney-General’s Department. (Cth). Right to freedom of opinion and expression: Public sector guidance note. Retrieved from <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-freedom-opinion-and-expression>

¹⁰ Australian Law Reform Commission. (2016). *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*. Report 129, para 4.16. Retrieved from https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_129_final_report_.pdf

¹¹ Australian Law Reform Commission. (2016). *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*. Report 129, para 4.37. Retrieved from https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_129_final_report_.pdf

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Although the First Amendment appears to provide an ironclad protection for freedom of speech, in reality freedom of speech is not absolutely protected and the level of protection can vary according to who the speaker is and what category of speech is involved. Despite the categorical language of the First Amendment prohibiting abridgments of free expression, the US Supreme Court has structured a hierarchy of protected expression.¹² Political and social commentary sit at the top of the hierarchy, enjoying the most protection under the First Amendment while lower down and protected under a more relaxed constitutional scrutiny are commercial speech and non-obscene sexual expression. Excluded or enjoying no protection under the First Amendment are obscenity, false advertising, fighting words, and true threats.¹³ The courts have ruled that different speakers enjoy different levels of First Amendment protection, just as different categories of speech are protected differently.¹⁴ This provides potent guidance for the “reasonable and justifiable” wording of the current Bill discussed above.

– UK: *Human Rights 1998* (UK)

The *Human Rights Act 1998* (UK) gives effect to the provisions of the European Convention of Human Rights, Article 10(1):

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.¹⁵

Article 10(2), however, sets out some restraints or qualifications on the freedom:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹⁶

– Canada: *Canadian Charter of Rights and Freedoms*

¹² Middleton, K. R., Lee, W. E., & Stewart, D. R. (2017). *The law of public communication*. New York: Routledge, p. 55.

¹³ Middleton, K. R., Lee, W. E., & Stewart, D. R. (2017). *The law of public communication*. New York: Routledge, p. 55.

¹⁴ Middleton, K. R., Lee, W. E., & Stewart, D. R. (2017). *The law of public communication*. New York: Routledge, p. 55.

¹⁵ *Human Rights Act 1998* (UK), Schedule 1, The Articles, Part 1, The Convention Rights and Freedoms. Retrieved from <https://www.legislation.gov.uk/ukpga/1998/42/schedule/1>

¹⁶ *Human Rights Act 1998* (UK), Schedule 1, The Articles, Part 1, The Convention Rights and Freedoms. Retrieved from <https://www.legislation.gov.uk/ukpga/1998/42/schedule/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.¹⁷

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 communication; (c) freedom of peaceful assembly; and (d) freedom of association.¹⁸

– New Zealand: (*New Zealand Bill of Rights Act 1990* (NZ))

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.¹⁹

The Act, however, sets out as follows on ‘justified limitations’:

Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.²⁰

Section 4 addresses the question of any inconsistency in provisions between the *Bill of Rights* and “any enactment” made before or after the commencement of the Bill. The Bill also provides that an existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill or included only in part.²¹

Australia and the Bill of Rights debate:

Australia does not have a Bill of Rights at Commonwealth level although this has been the subject of much consideration and discussion. Australia is the only democratic nation in the world without a national bill or charter of rights.²² Australia is a party to the seven core international human rights treaties, including the International Covenant on Civil and Political Rights, which contains a freedom of expression clause (Article 19). Australia was one of eight nations involved in drafting the Universal Declaration on Human Rights,²³ which contains a freedom of expression clause (Article 19). Australia is said to be “a supporter of human rights throughout international treaty negotiations” and “has ratified almost all of the major

¹⁷ *Canadian Charter of Rights and Freedoms*, Article 1.

¹⁸ *Canadian Charter of Rights and Freedoms*, Article 2.

¹⁹ *New Zealand Bill of Rights Act 1990*, section 14. Retrieved from <https://www.legislation.govt.nz/act/public/1990/0109/latest/DLM225513.html>

²⁰ *New Zealand Bill of Rights Act 1990*, section 5. Retrieved from <https://www.legislation.govt.nz/act/public/1990/0109/latest/DLM225513.html>

²¹ *New Zealand Bill of Rights Act 1990*, section 28. Retrieved from <https://www.legislation.govt.nz/act/public/1990/0109/latest/DLM225513.html>

²² Williams, G. (2006). George Williams “Victoria’s Charter of Human Rights and Responsibilities: Lessons for the National Debate”. Papers on Parliament No 46. Retrieved from https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/~/~/~link.aspx?_id=A20FB46F919D44A68AF6D8CB54EE2076&_z=z

²³ Australian Attorney-General’s Department. (No date). International human rights system. Retrieved from <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/international-human-rights-system>

international human rights instruments”.²⁴ Whether the introduction of a Bill of Rights in Australia is desirable “is widely debated”.²⁵ One State and a Territory have enacted such instruments – the Australian Capital Territory (*Human Rights Act 2004*); and Victoria (*Charter of Human Rights and Responsibilities Act 2006*), each with provisions on freedom of expression – sections 15²⁶ and 16,²⁷ respectively.

The freedom of expression section 16 of the ACT *Human Rights Act* provides:

- (1) Everyone has the right to hold opinions without interference.
- (2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

The right is not qualified within the section itself but stand-alone provisions protect other rights that may collide with the freedom of expression right – for example, section 12 protects privacy and reputation; and section 21 provides that the press and public may be excluded from all or part of a trial to protect morals, public order, national security, personal privacy, and the interests of justice.

Section 15 of the Victoria *Charter of Human Rights and Responsibilities Act 2006* titled ‘freedom of expression’ provides:

- (1) Every person has the right to hold an opinion without interference.
- (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether—
 - (a) orally; or
 - (b) in writing; or
 - (c) in print; or
 - (d) by way of art; or
 - (e) in another medium chosen by him or her.
- (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—
 - (a) to respect the rights and reputation of other persons; or
 - (b) for the protection of national security, public order, public health or public morality.

²⁴ Australian Human Rights Commission. (No date). Australia and the Universal Declaration on Human Rights. Retrieved from <https://humanrights.gov.au/our-work/publications/australia-and-universal-declaration-human-rights>

²⁵ Australian Law Reform Commission. (2016). *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*. Report 129, para 2.9. Retrieved from https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_129_final_report_.pdf

²⁶ *Charter of Human Rights and Responsibilities Act 2006* (Victoria). Retrieved from <https://content.legislation.vic.gov.au/sites/default/files/2020-04/06-43aa014%20authorised.pdf>

²⁷ *Human Rights Act 2004* (Australian Capital Territory). Retrieved from <https://www.legislation.act.gov.au/View/a/2004-5/current/PDF/2004-5.PDF>

Unlike the ACT Act, the Victoria Act sets out some of the limitations on freedom of expression within the freedom of expression section itself, in section 15(3) which provides that special duties and responsibilities are attached to the right of freedom of expression, and that this right may be subject to “lawful restrictions reasonably necessary”. Section 24(2) provides that despite the Charter’s provision on a fair and public hearing by a court or tribunal, the court or tribunal “may exclude members of media organisations from all or part of a hearing if permitted to do so by a law other than this charter”.

The view that protections enshrined in Bills of Rights and such instruments actually help

Chief Justice French in *Momcilovic v The Queen* (2011), a case on appeal from the Supreme Court of Victoria, cited with approval what the Law Lords said in the UK case of *Wilkinson*,²⁸ and French CJ said section 32(1) of the Victorian *Charter* does what section 3 of the *Human Rights Act* (UK) does – **it requires statutes to be construed against the background of human rights and freedoms set out in the Charter**.²⁹ His Honour noted that the human rights and freedoms set out in the Charter “in significant measure incorporate or enhance rights and freedoms at common law”.³⁰ In *Momcilovic*, the Victoria Court of Appeal held that when it is contended that a statutory provision infringes a Charter right, “the correct methodology” includes a consideration of whether “the relevant provision beaches a human right protected by the Charter” and if so, “determine whether the limit imposed on the right is justified”.³¹ French CJ held that the Victorian Court of Appeal was “essentially correct in its treatment of section 32(1)”.³²

The impact of the Victorian charter has also helped Victoria navigate the COVID-19 pandemic. “For example, the Melbourne curfew was ended after it was made clear that it could not be maintained as a proportionate measure to protect public health in accordance with the charter,” according to Professor George Williams.³³

It [the Charter] influences the making of policy and the drafting and enactment of laws. It provides a framework that influences the actions of all government agencies by putting the rights and dignity of people at the forefront of decision-making.³⁴

The Victorian Equal Opportunity and Human Rights Commission has expressed a similar view, noting that the Victorian Charter is playing an important role in safeguarding human rights in the Covid-19 pandemic era. The Commission views the role of the Charter during this period as “more vital than at any other time” and has warned that it is closely monitoring the steps

²⁸ *R (Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718, at 1723–1724.

²⁹ *Momcilovic v The Queen* (2011) 245 CLR 1, para 51, emphasis added.

³⁰ *Momcilovic v The Queen* (2011) 245 CLR 1, para 51.

³¹ *R v Momcilovic* [2010] VSCA 50, para 35.

³² *Momcilovic v The Queen* (2011) 245 CLR 1, para 51.

³³ Quoted in Stansfield, E. (2020, September 30). Fourteen years on: The Victorian Charter of Human Rights. UNSW Newsroom. Retrieved from <https://newsroom.unsw.edu.au/news/business-law/fourteen-years-victorian-charter-human-rights>

³⁴ Quoted in Stansfield, E. (2020, September 30). Fourteen years on: The Victorian Charter of Human Rights. UNSW Newsroom. Retrieved from <https://newsroom.unsw.edu.au/news/business-law/fourteen-years-victorian-charter-human-rights>

taken by the government and other public authorities to meet their responsibilities under the Charter.³⁵

During a state of emergency, the Charter continues to apply – in fact, it’s more vital than at any other time. When making new laws, the Victorian government must report on how the proposed law is compatible with the rights protected by the Charter – the ‘statement of compatibility’ that accompanies a new law must explain how any restrictions on the human rights protected by the Charter are reasonable and justified. Public authorities – including all staff who work in state government departments, agencies and local government – also have to properly consider and act compatibly with human rights when carrying out their work... The Commission closely monitors the steps taken by the government and other public authorities to meet their responsibilities under the Charter.³⁶

The above provides strong empirical evidence of the importance and functionality of human rights and freedom instruments. This further underscores both the importance of the *Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019 Bill*, but also the above argument as to the need to widen the scope of the Bill to cover more than just freedom of expression and freedom of the press.

Selected countries in the RSF global freedom of the press ranking:

The countries selected for consideration below are those with constitutional and other express freedom of expression protections.³⁷ This look at the position occupied by various countries in the Reporters Without Borders annual global press freedom rankings provides an insight into these countries’ rankings and how well freedom of expression is protected in the respective countries. All of these countries have some form of explicit freedom of expression protection, but a range of approaches are evident, including as to: (a) the strength of the freedom of expression commitment; (b) the extent of elaboration of the freedom; (c) the extent of recognition for rights that nurture freedom of expression (e.g. the right to information; the need for curbs on the freedom only when strongly justifiable; and the need for the nurturing of enlightened public discourse). Vital cues can be taken from the ‘best practice’ shown in the progressive democracies when considering the introduction of a freedom of expression provision in the Australian Constitution. For example, Denmark’s explanatory notes on the freedom of expression provision (see below) are worth embracing to reflect a strong constitutional commitment to freedom of expression in Australia. Similarly, the spirit of the protection in Sweden where freedom of expression is recognised as one of the “four fundamental laws” merits deeper consideration for Australia’s constitutional reform purposes.

Norway (RSF Ranking 2021, No 1)

The Constitution of the Kingdom of Norway provides as follows in Article 100:

³⁵ Victorian Equal Opportunity and Human Rights Commission. Embedding human rights during COVID-19. Retrieved from <https://www.humanrights.vic.gov.au/legal-and-policy/covid-19-and-human-rights/embedding-human-rights-during-covid-19/>

³⁶ Victorian Equal Opportunity and Human Rights Commission. Embedding human rights during COVID-19. Retrieved from <https://www.humanrights.vic.gov.au/legal-and-policy/covid-19-and-human-rights/embedding-human-rights-during-covid-19/>

³⁷ Drawn from RSF’s global rankings: see <https://rsf.org/en/ranking/2021>

There shall be freedom of expression.

No one may be held liable in law for having imparted or received information, ideas or messages unless this can be justified in relation to the grounds for freedom of expression, which are the seeking of truth, the promotion of democracy and the individual's freedom to form opinions. Such legal liability shall be prescribed by law.

Everyone shall be free to speak their mind frankly on the administration of the State and on any other subject whatsoever. Clearly defined limitations to this right may only be imposed when particularly weighty considerations so justify in relation to the grounds for freedom of expression.

Prior censorship and other preventive measures may not be applied unless so required in order to protect children and young persons from the harmful influence of moving pictures. Censorship of letters may only be imposed in institutions.

Everyone has a right of access to documents of the State and municipalities and a right to follow the proceedings of the courts and democratically elected bodies. Limitations to this right may be prescribed by law to protect the privacy of the individual or for other weighty reasons.

The authorities of the state shall create conditions that facilitate open and enlightened public discourse.³⁸

Finland (RSF Ranking 2021, No 2):

In Finland, freedom of expression is safeguarded by the Constitution. Section 12 of the Constitution reads:

Everyone has the freedom of expression. Freedom of expression entails the right to express, disseminate and receive information, opinions and other communications without prior prevention by anyone. More detailed provisions on the exercise of the freedom of expression are laid down by an Act. Provisions on restrictions relating to pictorial programmes that are necessary for the protection of children may be laid down by an Act.

Documents and recordings in the possession of the authorities are public, unless their publication has for compelling reasons been specifically restricted by an Act. Everyone has the right of access to public documents and recordings.³⁹

The Finnish system connects extensive access to government information to freedom of expression.

Sweden (RSF Ranking 2021, No 3):

³⁸ The Constitution of the Kingdom of Norway (Kongeriket Norges Grunnlov). Article 100. Ministry of Justice and Public Scrutiny. Retrieved from https://lovdata.no/dokument/NLE/lov/1814-05-17/KAPITTEL_5#KAPITTEL_5

³⁹ The Constitution of Finland. 11 June 1999. (Translation). Retrieved from <https://finlex.fi/en/laki/kaannokset/1999/en19990731.pdf>

The Constitution of Sweden has “four fundamental laws”.⁴⁰ These are: the Instrument of Government (IG), the Act of Succession (AS), the Freedom of the Press Act (FPA), and the Fundamental Law on Freedom of Expression (FLFE). Together they make up the Constitution of Sweden.

What they have in common is that their passage into law is a different and more complicated process than that required for ordinary laws. The Instrument of Government is a general fundamental law which lays down how the country is to be governed. The Freedom of the Press Act regulates the use of the freedom of expression in printed media and the principle of public access to official documents. The Fundamental Law on Freedom of Expression regulates the use of the freedom of expression in non-printed media. The Act of Succession lays down how the Swedish throne is inherited between members of the Bernadotte family.⁴¹

The Swedish FLFE contains protection of whistleblowers and confidential sources, meaning that whistleblowers have constitutional protection in Sweden allowing for extensive flow of public information working as a potent limitation of corruption and maladministration. In Sweden the cases of the kind seen in Australia’s Witness K and Bernard Collaery could not happen.⁴² Such cases would be in breach of the Swedish constitution.

Denmark (RSF Ranking 2021, No 4):

In Denmark the Constitutional Act is said to be the foundation of Danish democracy.⁴³ Section 77 provides as follows:

Any person shall be at liberty to publish his ideas in print, in writing, and in speech, subject to his being held responsible in a court of law. Censorship and other preventive measures shall never again be introduced.⁴⁴

One explanatory text for the provision states (opening para):

All citizens may give expression to whatever they wish. People are permitted to say, write or otherwise express their ideas publicly. But at the same time they must also take responsibility for what they say or write. Legislation imposes some limits on what people are permitted to say or write publicly. If people are very impolite and offend another person publicly they risk legal proceedings being taken against

⁴⁰ The Constitution of Sweden: The Fundamental Laws and the Riksdag Act. (2016). Stockholm, Sweden: Sveriges Riksdag, p. 27. Retrieved from <https://www.riksdagen.se/globalassets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf>

⁴¹ The Constitution of Sweden: The Fundamental Laws and the Riksdag Act. (2016). Stockholm, Sweden: Sveriges Riksdag, p. 27. Retrieved from <https://www.riksdagen.se/globalassets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf>

⁴² Zifcak, S. (2020, July 3). Why Bernard Collaery’s case is one of the gravest threats to freedom of expression. *The Conversation*. Retrieved from <https://theconversation.com/why-bernard-collaerys-case-is-one-of-the-gravest-threats-to-freedom-of-expression-122463>

⁴³ My Constitutional Act With Explanations. 12th Edition. (2014). The Danish Parliament, *Foreword*. Retrieved from https://www.thedanishparliament.dk/-/media/pdf/publikationer/english/my_constitutional_act_with_explanations.ashx

⁴⁴ My Constitutional Act With Explanations. 12th Edition. (2014). The Danish Parliament. Retrieved from https://www.thedanishparliament.dk/-/media/pdf/publikationer/english/my_constitutional_act_with_explanations.ashx

them for slander. And if people write something that threatens the security of Denmark, for instance, they can be charged, tried and sentenced by the Courts.⁴⁵

New Zealand (RSF Ranking 2021, No 8):

See above section entitled **How freedom of expression is captured in various instruments (Constitutions, Charters, Bills of Rights etc)** for details on the freedom of expression protection in New Zealand.

UK (RSF Ranking 2021, No 33)

See above section entitled **How freedom of expression is captured in various instruments (Constitutions, Charters, Bills of Rights etc)** for details on the freedom of expression protection in the UK.

US (RSF Ranking 2021, No 44)

The country's First Amendment (see above section entitled **How freedom of expression is captured in various instruments (Constitutions, Charters, Bills of Rights etc)**) is widely touted as the beacon of freedom of expression protection in the world, yet it occupies the lowest rank in the group of selected countries above.

In the Reporters Without Borders 2021 Press Freedom Index Australia ranked 25th in the world. Australia was ranked higher, at No 21 in 2019. Various assaults on media freedom over the years, including the Australian Federal Police raids of 2019 on the media, can be blamed for the decline. If Australia does not address the media freedom issues, it risks falling further in the index. The *Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019 Bill* is a step in the right direction, but much remains to be done to give stronger effect to the Bill's objective of enhancing freedom of expression protections.

Assaults in Australia on freedom of expression and associated rights

There is ample evidence of assaults on rights and freedoms in Australia, including on the freedom of expression right. The Australian Law Reform Commission in an extensive report in 2016 entitled *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, made several observations and recommendations that reinforce the justification for the *Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019 Bill*. The ALRC in that report aimed at identifying and critically examining Commonwealth laws that encroach upon traditional rights and freedoms and privileges recognised by the common law, noted in the report's chapter on Freedom of Speech, that freedom of speech is “the freedom *par excellence*; for without it, no other freedom could survive”.⁴⁶ Likewise, the global media

⁴⁵ Communications Section, Danish Parliament. *My Constitutional Act with Explanations. 12th Edition*. Retrieved from https://www.thedanishparliament.dk/-/media/pdf/publikationer/english/my_constitutional_act_with_explanations.ashx

⁴⁶ Australian Law Reform Commission. (2016). *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*. Report 129, para 4.1, citing Eric Campbell and Harry Whitmore. (1966). *Freedom in Australia* (Sydney University Press), p. 113. Retrieved from https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_129_final_report_.pdf

freedom NGO, Reporters Without Borders, which has consultative status with the United Nations, has declared:

Freedom of expression and information will always be the world's most important freedom.⁴⁷

The ALRC report identified a raft of laws that “interfere with freedom of speech” and listed the following: criminal laws; secrecy laws; privilege and contempt laws; anti-discrimination laws; media, broadcasting and communication laws; information laws; intellectual property laws; and other laws.⁴⁸ The ALRC also found “reason to review the range of legislative provisions that protect the processes of tribunals, commissions of inquiry and regulators. Some of these laws may unjustifiably interfere with freedom of speech – and may be unconstitutional – in prohibiting criticism of public officers engaged in performing public functions.”⁴⁹ The ALRC noted:

Numerous Commonwealth laws may be seen as interfering with freedom of speech and expression. There are, for example, more than 500 government secrecy provisions alone. In the area of commercial and corporate regulation, a range of intellectual property, media, broadcasting and telecommunications laws restrict the content of publications, broadcasts, advertising and other media products. In the context of workplace relations, anti-discrimination law – including the general protections provisions of the Fair Work Act 2009 (Cth) – prohibit certain forms of speech and expression.⁵⁰

The Media, Entertainment and Arts Alliance (MEAA) annual Press Freedom Reports provide a useful catalogue of assaults on press freedom in Australia. The picture over the years has been consistently grim. In the latest report, the MEAA Chief Executive Paul Murphy noted as follows:

For 20 years MEAA has examined, catalogued, reported and responded to the attacks on press freedom in Australia. Sadly, over those two decades the freedom of journalists to report matters of legitimate public interest have diminished. The first press freedom report, *Turning Up The Heat: The decline of press freedom in Australia 2001-2005*, examined issues that perpetuate today: laws that criminalise journalism; excessive and secretive anti-terror and “national security” powers; the pursuit and prosecution of whistleblowers; inadequate journalist “shield” laws; the misuse of defamation laws and suppression orders; cuts to the funding of public broadcasters; ongoing job losses and concentration of media ownership; bans on reporting Australia’s immigration activities; and impunity for the killers of our colleagues. The past 12 months, like the past two

⁴⁷ Reporters Without Borders (RSF). Presentation – Reporters Without Borders (RSF), for freedom of information. Retrieved from <https://rsf.org/en/presentation>

⁴⁸ Australian Law Reform Commission. (2016). *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*. Report 129, para 4.67. Retrieved from https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_129_final_report_.pdf

⁴⁹ Australian Law Reform Commission. (2016). *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*. Report 129, para 4.11. Retrieved from https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_129_final_report_.pdf

⁵⁰ Australian Law Reform Commission. (2016). *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*. Report 129, para 4.5. Retrieved from https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_129_final_report_.pdf

decades, are no different. If anything, the press freedom climate has worsened – to Australia’s great shame...Australia’s reputation on press freedom is tarnished.⁵¹

The critical role the media plays in enlivening democracy, transparency and accountability cannot be overstated. As the OECD has noted in the context of combatting corruption:

The media and investigative journalism play a crucial role in bringing allegations of corruption to light and fighting against impunity... Media reporting is an essential – albeit untapped – source of detection in corruption cases.⁵²

The same can be said of the media’s role in every other human endeavour. Free speech considerations may in fact present themselves in virtually every category of public life.⁵³ Professor Michael Chesterman noted more than two decades ago in the context of the High Court’s recognition of the implied freedom of political communication, that constitutionally speaking “the genie is out of the bottle” and free speech considerations must “continually be reckoned with”.⁵⁴ That time for reckoning has arrived. The *Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019 Bill* would go some way in addressing the problems afflicting Australian society when it comes to the media’s and citizens’ ability to speak freely on matters of legitimate concern.

Conclusion and a Plan B

As evident from previous submissions from JERAA, and other stakeholders, to the two parliamentary inquiries referred to above, Australia stands out, starkly, when compared to its international liberal democratic peers when it comes to media freedom. Therefore, the reform reflected in the *Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019 Bill* is urgently needed. JERAA fully endorses and backs the Bill, noting our reservations above.

JERAA acknowledges the serious challenge of bringing about constitutional reform in Australia. Paying heed to such a challenge and the potential for the proposed reform to fail, JERAA proposes that if the present reform initiative fails, Parliament (including the option of a private member Bill or a Senator Bill) should consider the introduction of a *Media Freedom Act*. Several submissions to the parliamentary inquires referred to above, contain detailed suggestions for the introduction of a *Media Freedom Act*, with a similar purpose as the current Bill. JERAA supports the introduction of a *Media Freedom Act*.

⁵¹ Media, Entertainment and Arts Alliance. (2021). *Unsafe at Work: Assaults on Journalists – The MEAA Report into the State of Press Freedom in Australia in 2021*. Retrieved from <https://www.meaa.org/download/unsafe-at-work-assaults-on-journalists-the-mea-report-into-the-state-of-press-freedom-in-australia-in-2021/>

⁵² OECD (2018). *The Role of the Media and Investigative Journalism in Combating Corruption*. Report. *Foreword*. Retrieved from <https://www.oecd.org/corruption/The-role-of-media-and-investigative-journalism-in-combating-corruption.htm>

⁵³ Chesterman, M. (2000). *Freedom of Speech in Australian Law*. Hants, England: Ashgate, p. 77.

⁵⁴ Chesterman, M. (2000). *Freedom of Speech in Australian Law*. Hants, England: Ashgate, p. 77.

In line with the discussion above (in 'The Bill' section), parliament may want to consider extending such a suggested act to a *Media Freedom and Civil Liberties Act*, acknowledging the fact that this issue extends beyond freedom of expression and media freedom. It would seem logical to also include other basic human rights and freedoms such as the right to peaceful assembly, the right to worship and the right to personal security. Further details can be found in Associate Professor Lidberg's and Dr Denis Muller's submission to the Senate inquiry. JERAA submits that such an extension of the proposed act would most likely be more engaging and appealing to the general public, rather than an instrument that appeared to limit its reach or concern to the media only. A *Media Freedom and Civil Liberties Act* would have the added advantage of being potentially easier to pass and enact compared to an amendment to the Commonwealth Constitution.