Submission to Senate Legal and Constitutional Affairs Legislation Committee on Constitutional Freedom of Expression

Research Expertise in this area

My name is Dr Alex Deagon. I am a Senior Lecturer in the School of Law at the Queensland University of Technology, and my expertise includes freedom of religion and freedom of expression in Australia. In regard to these issues I have published peer-reviewed journal articles, presented at national and international conferences, and have written opinion pieces and provided expert commentary to the media. Some relevant publications are listed below. For a full catalogue of my experience and publications in this area, please see https://staff.qut.edu.au/staff/alex.deagon. I have also coordinated and taught the subject of 'Constitutional Law' in the QUT School of Law since 2017.

- Principles, Pragmatism and Power: Another Look at the Historical Context of Section 116 (2020) 43(3) *Melbourne University Law Review* 1033-1068. (with Benjamin Saunders)
- Equal Voice Liberalism and Free Public Religion: Some Legal Implications in Michael Quinlan, Iain Benson and Keith Thompson (eds) *Religious Freedom in Australia: A new* Terra Nullius*?* (Connor Court Publishing, 2019) 292-332.
- A Christian Framework for Religious Diversity in Political Discourse in Michael Quinlan, Iain Benson and Keith Thompson (eds) *Religious Freedom in Australia: A new* Terra Nullius*?* (Connor Court Publishing, 2019) 130-162.
- Summary and critique of the High Court's decision in the implied freedom 'abortion exclusion zone' cases (Clubb; Preston) on the *Australian Public Law Blog* (UNSW), May 2019: https://auspublaw.org/2019/05/there-and-back-again-the-high-courts-decision-in-clubb-v-edwards-preston-v-avery/
- Liberal Secularism and Religious Freedom in the Public Space: Reforming Political Discourse (2018) 41(3) *Harvard Journal of Law and Public Policy* 901-934.
- Liberal Assumptions in Section 116 Cases and Implications for Religious Freedom (2018) 46(1) *Federal Law Review* 113-137.
- Defining the Interface of Freedom and Discrimination: Exercising Religion, Democracy and Same-Sex Marriage (2017) 20 *International Trade and Business Law Review* 239-286.

I have contributed significantly to law and policy in Australia relating to freedom of speech and religion. My submissions have been cited in multiple Federal Government reviews and inquiries, including the Australian Law Reform Commission Freedoms Inquiry (2015), the Australian Senate Select Committee Inquiry into the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill (2016), the Joint Standing Committee on Foreign Affairs, Defence and Trade (Human Rights Sub-Committee) Inquiry into the status of the human right to freedom of religion or belief (2017), the Legal and Constitutional Affairs References Committee Inquiry on Religious Exemptions for Religious Educational Institutions (2018), and the Legal and Constitutional Affairs Legislation Committee on Religious Exemptions for Religious Educational Institutions (2019). I was also invited to appear before the Ruddock Religious Freedom Review Panel (2018) to give expert oral

evidence, one of only 21 academics around Australia to appear. My research has also been quoted in the proceedings of the Commonwealth Parliament by a Government Minister during a Senate debate on the religious exemptions (Senate Hansard, p 2, 3/12/18).

Freedom of Expression: The Constitutional Position

There is no explicit constitutional protection for freedom of expression in Australia. There is only a freedom of political communication which is implied through the text and structure of the Constitution. An explicit protection for religious expression can be derived through Section 116 of the Constitution, which prohibits the restriction of free exercise of religion. Hence, free exercise of religion and the implied freedom of political communication intersect to protect the public expression of religious speech which may affect voting.[1] Ultimately, it is the substance of these communications which enables a voter to assess a government. For example, 'people may form their political opinions by discussion of matters not on the political agenda, including matters like religion and philosophy that develop more fundamental commitments'.[2] Since voters' political predilections may be fundamentally influenced by their religious convictions and the expression of religious perspectives, it follows that the implied freedom of political communication operates to protect religious speech. Aroney also reasons that just as commercial and entertainment speech may possess a relevantly political dimension attracting the constitutional protection, so may religious speech.[3] He contends that 'the free exercise clause in s 116 undoubtedly protects at least some (if not most) forms of religiously motivated speech, and may also protect communication about religion even if such speech is not religiously motivated'.[4]

Indeed, as their justification for implying the freedom of political communication, the judges in the leading cases rely on the 'principle that free speech will facilitate the discovery of truth and the influencing of values and will thus assist the voters to make a meaningful choice'.[5] Free communication provides a broad scope of opinions on an even broader range of topics, all of which enable voters to discover truth and implement their associated values in the political context: electing members of particular parties advocating particular policies.

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[1] For background to the implied freedom, see *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *AustralianCapital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. For analyses of the judgments, see Nicholas Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1994) 18 *University of Queensland Law Journal* 249, 249–251; Arthur Glass, 'Freedom of Speech and the Constitution: *Australian Capital Television* and the Application of Constitutional Rights' (1995) 17 *Sydney Law Review* 29, 32–35; Jeremy Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23 *Federal Law Review* 37, 38–41. For reasoning consistent with an intersection between the implied freedom and the free exercise of religion, see e.g. *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 125–126 (Latham CJ) where Latham CJ mentions the effect of faith on politics; Cf Mason CJ in *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 138–139 (Mason CJ); Nicholas Aroney, 'The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation' (2006) 34 *Federal Law Review* 287, 303; D Meagher, 'What is "Political Communication"? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) 28 *Melbourne University Law Review* 438.

[2] Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 *Melbourne University Law Review* 374, 389–390.

[3] Aroney, above n 1, 297.

[4] Ibid 303.

[5] Kirk, above n 1, 52. See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138–140 (Mason CJ), 211–212 (Gaudron J), 230–232 (McHugh J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 47–50 (Brennan J), 72 (Deane and Toohey JJ).

Deane and Toohey JJ argued as part of the majority in *Nationwide News* that the doctrine of representative government (government by representatives elected by and responsible to the Australian people) implicitly undergirds the Constitution.[6] The justices contended that voters would be unable to discharge their constitutional obligation to choose their representatives if they were unable to communicate with each other about the background, qualifications and policies of the candidates and the 'countless number' of other factors which are relevant to consideration of the interests of the nation and the people.[7] Consequently, Deane and Toohey JJ concluded that in the doctrine of representative government incorporated in the Constitution there exists an implication of free communication of information relating to the government of the Commonwealth.[8] Since the Constitution operates based on a system of representative government and representative government requires free communication to properly function, it follows that the Constitution implies a guarantee of free political communication so that responsible government can successfully occur.

Chief Justice Mason for the majority in *Australian Capital Television Pty Ltd v Commonwealth* ('*Australian Capital Television*')[9] accepted the plaintiffs' argument that since the Constitution assumes and effectively prescribes the doctrine of representative government, free political communication is necessarily implied by the Constitution as an essential corollary of that system.[10] It is only by exercising this freedom that citizens can communicate their views 'on the wide range of matters that may call for, or are relevant to, political action or decision', and 'criticise government actions' and 'call for change', in this way influencing the policies and decisions of the elected representatives.[11]For Mason CJ, the scope of communication covered and the freedom of various communicators is necessarily broad, and 'in a representative democracy public participation in political discussion is a central element of the political process'.[12] This representative sample of statements by the High Court indicates that the functioning of a representative democracy is a primary consideration in the development of the implied freedom. There must be a space for people to freely communicate politically relevant views, and this may entail disagreement, offence and irrationality. However, these are necessary elements of a functioning democracy and are consistent with the Constitutional framework.[13]

In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, the High Court first articulated the precise test for determining whether a law breaches the implied freedom:

> First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfillment of which is compatible with the maintenance of the constitutionally prescribed system of

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[6] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70 (Deane and Toohey JJ).
[7] Ibid 72 (Deane and Toohey JJ).
[8] Ibid 72–73 (Deane and Toohey JJ).
[9] (1992) 177 CLR 106.
[10] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136.
[11] Ibid 138.
[12] Ibid 139, 142.
[13] *Levy v State of Victoria* (1997) 189 CLR 579, 622–623 (McHugh J); *Roberts v Bass* (2002) 212 CLR 1, 44 [110] (Gaudron, McHugh and Gummow JJ).

> representative and responsible government… if the first question is answered "yes" and the second is answered "no", the law is invalid.[14]

In *Coleman v Power* (2004) 220 CLR 1 a majority of the High Court recast the second limb of this test (the compatibility and proportionality aspects) to state that the question is whether the impugned law is 'reasonably appropriate and adapted to serve a legitimate end *in a manner which* is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government…' In *McCloy v New South Wales*, the majority of the High Court (French CJ, Kiefel, Bell and Keane JJ) observed that the test from *Lange* remained authoritative, but the way the proportionality aspect had been phrased and executed was vague and based on holistic 'impressions', subject to 'value judgments', and lacked 'generally applicable', 'objective criteria'.[15] However, proportionality testing retained 'evident utility as a tool for determining the reasonableness of legislation which restricts the freedom and for resolving conflicts between the freedom and the attainment of legislative purpose'.[16]

Therefore, the High Court articulated three specific criteria to give substance and objectivity to the proportionality analysis – the law must be suitable, necessary and adequate in its balance; all three criteria must be satisfied. The law is suitable if it has a rational connection to the purpose of the provision; the law is necessary if there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose with a less restrictive effect on the freedom; and the law is adequate in its balance if a value judgment consistent with the judicial function describes the importance of the purpose served by the restrictive measure as greater than the extent of the restriction it imposes on the freedom.[17] This test has been affirmed in subsequent cases.[18]

An Explicit Protection?

However, in the recently decided case of *LibertyWorks Inc v Commonwealth*, the freshly appointed Steward J (in dissent on this point) called into question the existence of the implied freedom:

> Thirdly, for my part, and with the greatest of respect, it is arguable that the implied freedom does not exist. It may not be sufficiently supported by the text, structure and context of the Constitution and, because of the continued division within this Court about the application of the doctrine of structured proportionality, it is still not yet settled law. The division within the Court over so important an issue may justify a reconsideration of the implication itself. In that respect, it is one thing to proclaim the necessity of a freedom of political discourse given the type of representative and responsible government created by the Constitution; it is another thing entirely to make an implication about when and how that freedom may be legitimately limited.

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[14] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567–568 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow, Kirby JJ).
[15] (2015) 325 ALR 15, 32 [66], 35 [74]–[76] (French CJ, Kiefel, Bell and Keane JJ).
[16] *McCloy v New South Wales* (2015) 325 ALR 15, 35 [73] (French CJ, Kiefel, Bell and Keane JJ).
[17] *McCloy v New South Wales* (2015) 325 ALR 15, 18 [2] (French CJ, Kiefel, Bell and Keane JJ).
[18] See e.g. *Brown v Tasmania* (2017) 261 CLR 328; *Clubb v Edwards; Preston v Avery* [2019] HCA 11; *Comcare v Banerji* [2019] HCA 23.

> The continued division in this Court about how that latter task is to be undertaken is telling. It may suggest that the implied freedom cannot be adequately defined. However, no party submitted that the implied freedom did not exist. In such circumstances, it is my current duty to continue to apply it faithfully. Any consideration of the existence of the implied freedom should, if necessary, be a matter for full argument on another occasion.[19]

In my opinion, Steward J is incorrect on this point. It does not follow from the fact there is a division about how and whether the freedom of political communication may be limited (specifically, whether structured proportionality analysis is appropriate) that there is a division about the existence and operation of the implied freedom. The implied freedom of political communication is settled law. And, furthermore, there is and has been clear majority support for the tool of structured proportionality analysis since *Brown*.[20]

Nevertheless, the fact the implied freedom is being questioned is cause for concern.

Consequently, I support the constitutional amendment to provide explicit protection for freedom of expression in the Constitution, with some minor amendments to the proposed provision.

The implied freedom is limited by only applying to 'political' communication, and protection should be for all expression generally. However, it should not mention 'the press' specifically. Rather it should be a general protection for all citizens to communicate ideas using mass media, social media and associated technologies.

The phrase 'reasonable and justifiable' is too ambiguous and could provide too much discretion for governments to impose severe limitations. For example, the *International Covenant on Civil and Political Rights* refers to 'necessary' limits for both freedom of religion (Article 18) and freedom of speech (Article 19), which is a higher threshold appropriate for limiting what is a fundamental human right. The term 'necessary' is also reflected in the proportionality analysis for the implied freedom, which could be subsumed under the rubric of 'justification'. So, for example, the 'compatibility' and 'proportionality' aspects of the test could be read as equivalent to 'justifiable' and 'necessary' in the provision, and burden would obviously fall under the first part where freedom of expression is 'limited'.

It is also unclear from the second reading speech why the amendment is placed as s 80A, but my assumption is it was associated with the right of trial by jury. However, given the similarities in substance with s 116 of the Constitution on freedom of religion, it would be more coherent to place it there.

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[19] [2021] HCA 18 [249]. Justice Steward develops these arguments at [298] – [304].
[20] As I point out here: https://auspublaw.org/2019/05/there-and-back-again-the-high-courts-decision-in-clubb-v-edwards-preston-v-avery/.

Hence:

116A Freedom of expression

The Commonwealth, State or a Territory must not limit freedom of expression.

However, a law of the Commonwealth, a State or a Territory may limit the freedom only if the limitation is necessary and justifiable in an open, free and democratic society.

This formulation has the benefit of clarity and parsimony, which are essential for passing constitutional amendments. It also, as mentioned, can be more easily reconciled with existing jurisprudence.

I thank the Committee for considering my submission.

Kind regards,

Dr Alex Deagon