



Australian
Human Rights
Commission

Media Reform Bills Package

**AUSTRALIAN HUMAN RIGHTS COMMISSION
SUBMISSION TO THE SENATE STANDING COMMITTEES
ON ENVIRONMENT AND COMMUNICATIONS**

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Standing Committee on Environment and Communications in its Inquiry into the Media Reform Bills Package.
2. Within the time available, the Commission seeks to provide comments to assist the Committee and the Parliament in considering the human rights impacts of the Bills which comprise the package:
 - The Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013;
 - the Broadcasting Legislation Amendment (News Media Diversity) Bill 2013;
 - the Television Licence Fees Amendment Bill 2013
 - the News Media (Self-regulation) Bill 2013
 - the News Media (Self-regulation) (Consequential Amendments) Bill 2013; and
 - the Public Interest Media Advocate Bill 2013.

2 Summary

- 3 The Commission is concerned by the limited time and processes for consideration and consultation proposed by the Government on the package of Bills under consideration. The Commission notes the comments in this respect made by the Parliamentary Joint Committee on Human Rights in its report on this package of Bills, in relation to ICCPR Article 25 which recognises the right of citizens to participate in the conduct of public affairs.
- 4 The Commission has found the Statements of Human Rights Compatibility accompanying the Bills helpful in assessing the issues particularly in the restricted time available, while considering that on a number of points further information would be required before the conclusions presented in those Statements could be accepted.
- 5 The Commission has also identified a number of respects in which the Statements of Human Rights Compatibility appear incomplete, and recommends that the Committee request further information on relevant points.
- 6 Each Bill in the package is addressed in turn in this submission.

3 Recommendations

Recommendation 1: The Commission recommends that the Committee consider the impact of, and justification for, restrictions on datacasting as relevant to the proportionality of restrictions on broadcasting under the Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013

Recommendation 2: The Commission recommends that the Committee consider the human rights impacts of Australian content requirements and that it request further information from government to assist in such consideration.

Recommendation 3: The Commission recommends that the Committee seek information from the Government regarding human rights impacts, including positive impacts, of provisions regarding the ABC and SBS Charters in relation to digital content.

Recommendation 4: The Commission recommends that the Committee seek further information on proposed arrangements for review of decisions by the Public Interest Media Advocate to approve, or not to approve, transactions, and procedural requirements for making these decisions including procedural fairness and requirements for consultation with affected parties.

Recommendation 5: The Commission recommends that the Committee consider the necessity for approval processes to apply to transactions involving control of online media.

Recommendation 6: The Commission recommends that the Committee seek further information on the impact of a continued 50% reduction in commercial television license fees on freedom of expression and information.

Recommendation 7: The Commission recommends that the Committee seek further information on justification for changes proposed in the Bill to existing self regulatory arrangements, whether in a supplementary Explanatory Memorandum or by other appropriate means.

Recommendation 8: The Commission recommends that the Committee seek further information on the need for declaration of a particular body as a 'news media self-regulation body' by the Public Interest Media Advocate to be mandatory rather than simply available.

Recommendation 9: The Commission recommends that the Committee seek further information on the necessity of creation of strict liability offences in the Bill.

Recommendation 10: The Commission recommends that the Committee request further information from the Government to clarify

whether the combined effect of this and other Bills within the package is consistent with the right not to be compelled to incriminate oneself.

4 Overall comments on human rights and freedom of the press

7 The Commission commends to the Committee's attention the Committee's General Comment 34 on Freedom of Expression and the Media (available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm> and reproduced below in relevant part).

13. A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society. [See communication No. 1128/2002, *Marques v. Angola*, Views adopted on 29 March 2005.] The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function. [See communication No. 633/95, *Gauthier v. Canada*.] The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. [See the Committee's general comment No. 25 (1996) on article 25 (Participation in public affairs and the right to vote), para. 25, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40, vol. I (A/51/40 (Vol. I)), annex V.*] The public also has a corresponding right to receive media output.¹ [See communication No. 1334/2004, *Mavlonov and Sa'di v. Uzbekistan*.]

14. As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media.

15. States parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.

8 As these comments make clear, ICCPR Article 19.2 recognises the importance of free and independent media, with a diverse range of sources, as part of a free and democratic society.

9 Equally clearly, freedom of information and expression are not absolute rights which ratify what any particular media organisation, whether with a dominant position in a particular country or location or globally might choose to do or assert.

10 ICCPR Article 19.3 notes that

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

- 11 Reference to respect for the rights of others includes the rights recognised in ICCPR Article 17, which states:
- 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
 - 2. Everyone has the right to the protection of the law against such interference or attacks.

5 Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013

12. The Statement of Compatibility in most, but not all, respects provides a helpful basis for discussion both in indicating relevant rights and in setting out the Government's view on why it considers that limitations on rights contained in the Bill, including in the interests of balancing competing rights, are proportionate and permissible.
13. The Commission notes however that some relevant material in this respect is contained only in the main body of the Explanatory Memorandum rather than being reproduced or referred to in the Statement of Compatibility.
14. The Commission notes and broadly agrees with the views published by the Joint Parliamentary Committee on Human Rights that decisions reflected in this Bill not to issue additional commercial television broadcasting licences, and to have regard to the need to ensure that at least one of the non-executive Directors of the SBS be a qualified person of Indigenous background, are consistent with human rights.
15. The Commission considers however that at some points further information would be useful in considering the correctness of the Government's assessment that the Bill is consistent with human rights.

5.1 Freedom of expression and information

(a) Restrictions on licences for use of broadcast spectrum

16. The Statement of Compatibility for this Bill correctly identifies the Bill as engaging the rights to freedom of expression and information under ICCPR Article 19.

17. The Bill would continue current limitations on the number of terrestrial television services using broadcast spectrum in an area. The Statement of Compatibility acknowledges that these limitations engage the rights to freedom of expression and information. The Statement notes however that permissible limitations on freedom of expression include limitations which are considered proportionate to the goals of protecting the right to freedom of expression and information for others.
 18. The Commission agrees that this approach to permissible limitations is correct in principle, both as confirmed by the Human Rights Committee in its General Comment 10 on freedom of expression and information in article 19 of the ICCPR, and as indicated by more detailed jurisprudence from the European Court on Human Rights with regard to comparable provisions in the European Convention on Human Rights.
 19. As indicated by the travaux préparatoire for the ICCPR, broadcast licensing requirements, particularly for technical purposes, were contemplated in the drafting of the ICCPR as permissible under the provision of Article 19.2, which permits limitations necessary for "public order (ordre public)", so long as these requirements are consistent with the right itself. (See M. Bossuyt, Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights, 1987; in particular pp. 384-5.)
- The concept of "public order (ordre public)" is clearly wider than the concept of "public order" in the sense usually understood in Anglo-Australian law, which deals with prevention of breaches of the peace, offensive behaviour and similar concepts. These concepts are themselves not uncontroversial - having regard to Australian legal and political history more and less recently regarding matters such as deployment of charges of resisting arrest and offensive behaviour against Aboriginal people in daily life as well as these and other regulatory measures against persons more generally exercising rights of freedom of assembly, association and expression) In this respect the Commission refers to and endorses the views indicated by the Human Rights Law Centre (<http://www.hrlc.org.au/high-court-decision-highlights-lack-of-protections-for-free-speech>) regarding *Attorney-General for South Australia v Corporation of the City of Adelaide and Ors.*
20. The concept of public order (ordre public) in the ICCPR extends to "the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded" (Siracusa Principles, Principle 22; and see A. Kiss, "Permissible Limitations on Rights" in Henkin (ed.) The International Bill of Rights, 1981). It equates with the "police power" in United States jurisprudence, permitting regulation in the interests of legitimate public purposes. This power must itself, however be exercised in a manner consistent with human rights (see Lockwood, Finn and Lubinsky, "Working Paper on Limitation Provisions", (1985) 7 Human Rights Quarterly 35, at 59).
 21. Similarly in *Groppera Radio A.G. v. Switzerland* [(1990)12 European Human Rights Reports 321 at 339] the Court emphasised that the European Convention permitted licensing restrictions, but only to the extent that these are consistent with the object and purpose of Article 10 (the Article recognising freedom of expression) as a whole.

22. It is clear that a Party to the Covenant, limiting the right to freedom of expression and claiming that the limitation is necessary on one of the permissible grounds, must evidence, rather than simply assert, that necessity: see *Pietroroia v. Uruguay* (Views Adopted by the Human Rights Committee, U.N. Doc A/36/40 p.150).
23. The "Siracusa Principles" (Principle 10) indicate that a limitation required to be necessary must:
- be based on a permissible ground of limitation;
 - pursue a legitimate aim;
 - respond to a pressing public or social need; and
 - be proportionate to the legitimate aim pursued.
24. These principles reflect those which have been applied by the European Court of Human Rights in interpreting the comparable limitation provision regarding freedom of expression in the European Convention: see for example *Handvside v U.K.* (1979) 1 European Human Rights Reports 737; *Sunday Times v. U.K.* (1979) 2 European Human Rights Reports 245; *Barthold v. Germany* (1985) 7 European Human Rights Reports 383; *Lingens v. Austria* (1986) 8 European Human Rights Reports 103
25. On the basis of the material provided in the Statement of Compatibility, the requirements for a permissible ground of limitation; legitimate aims; and pressing social need, appear to be satisfied in relation to licensing and broadcast spectrum management.
- (i) Proportionate means: Is the restriction only what is necessary?
26. Article 19.3 states that restrictions "shall only be such as ... are necessary" for the permitted purposes. If a restriction is over-inclusive - that is, restricts the right in question beyond what is necessary for the permitted purpose - it should be regarded as impermissible.
27. If means are reasonably available to achieve the permitted purpose which impose less restriction on the rights concerned than the measure proposed or adopted, it cannot be said that the restriction is only such as is necessary.
28. The Commission does not have technical expertise sufficient to enable it to comment on whether the restrictions in the Bill on licencing of use of broadcast spectrum are only such as are necessary for the purposes of effective spectrum management. The Commission notes, however, that datacasting does not use the same constrained broadcast spectrum resource, and appears to provide means to mitigate such limitations as may be necessary on channels for freedom of expression and information through broadcasting because of the technical limitations of broadcast spectrum.
29. The Commission acknowledges that the Broadcasting Legislation Amendment (Digital Dividend) Bill 2013 would amend the Broadcasting Services Act 1992

and the Radiocommunications Act 1992 with respect to the licensing of datacasting services, to limit the scope of datacasting regulation so that only certain datacasting services are required to be provided in accordance with a datacasting licence under the Broadcasting Services Act. The Commission suggests that the scope of services remaining subject to licensing requirements should be considered by the Committee in this context.

Recommendation

- 30. The Commission recommends that the Committee consider the impact of, and justification for, restrictions on datacasting as relevant to the proportionality of restrictions on broadcasting under the Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013**

(b) Australian content requirements

31. Proposed amendments to the Australian content requirements applicable to broadcasters are set out in the body of the Explanatory Memorandum.
32. The Commission notes that minimum requirements for access to Australian content in television broadcasting may have impacts both in restricting and in promoting freedom of expression and information. Australian content requirements are also likely to have impacts in promoting freedom of expression by producers of Australian content, and exercise of rights to participate in cultural life under article 15 of the International Covenant on Economic Social and Cultural Rights.
33. These impacts are not addressed however in the Statement of Compatibility for the Bill.

Recommendation

- 34. The Commission recommends that the Committee consider the human rights impacts of Australian content requirements and that it request further information from government to assist in such consideration.**

(c) ABC and SBS charters regarding digital content

35. The Commission notes that the Statement of Compatibility for the Bill does not address these provisions. The Commission has not to this point identified any limitations on human rights in this Bill, but refers to its general view, as indicated to the Joint Parliamentary Human Rights Committee, that it would be appropriate on all occasions for Statements of Compatibility to address any respects in which a Bill is regarded as promoting human rights.

Recommendation

- 36. The Commission recommends that the Committee seek information from the Government regarding human rights impacts, including positive impacts, of provisions regarding the ABC and SBS Charters in relation to digital content.**

5.2 Equality before the law

37. As indicated in the Statement of Compatibility, the requirement in the Bill that the SBS board include an Indigenous person engages (which for clarity does not mean is inconsistent with) the right to equality before the law (ICCPR Article 26).
38. For completeness, the Commission would add that the provisions which engage ICCPR Article 26 also engage ICCPR Articles 2.1 and 25 (non-discrimination in the right to access to public service). The Commission agrees with the assessment in the Statement of Compatibility that any limitations which might be found regarding the rights of non-Indigenous persons in this respect would be justifiable as special measures and not constituting racial discrimination, and as legitimate and proportionate measures more generally. These provisions could also be regarded as legitimate measures for promoting rights of minorities under ICCPR Article 27.

6 Broadcasting Legislation Amendment (News Media Diversity) Bill 2013

39. As indicated in the Explanatory Memorandum, this Bill would insert a new Part 5A in the Broadcasting Services Act dealing with news media diversity. Under the new Part, changes of control of significant news media voices would require approval by the Public Interest Media Advocate (to be created by the Public Interest Media Advocate Bill 2013) applying a new public interest test.
40. Comments on the Public Interest Media Advocate Bill 2013 are made separately in other sections of this submission.
41. The public interest test to be applied by the Public Interest Media Advocate is:
- the change of control will not result in a substantial lessening of diversity of control of registered news media voices; or
 - the change of control is likely to result in a benefit to the public, and that benefit outweighs the detriment to the public constituted by any lessening of diversity of control of registered news media voices.
42. News media voices would include commercial television and radio and subscription television services that provide news or current affairs programs, subscription television platforms that include such services, and print publications and online services that have news or current affairs content. News media voices would be registered if their audience or customer base exceeds 30 per cent of the average metropolitan commercial television evening news audience.
43. The Statement of Compatibility for the Bill acknowledges that these measures may limit the rights of natural persons to exercise freedom of expression as outlined in Article 19.2 of the ICCPR by precluding a person from being in a position to control a registered news media voice or listed news media voice.

44. In the Commission's view this acknowledgment is correctly made – since while companies in themselves do not have any human rights under instruments such as the ICCPR, natural persons, not excluding media proprietors, clearly do.
45. For completeness, the Commission notes that Australia is not only a signatory to the ICCPR, as stated by the Statement of Compatibility for the Bill, but is also a party.
46. Article 19.2 of the ICCPR protects freedom of expression, including the right to seek, receive and impart information and ideas of all kinds, and their means of dissemination.
47. Freedom of means of dissemination of information and ideas under the ICCPR clearly includes what is referred to in United States constitutional law and in popular discourse more generally as the freedom of the press. As the ICCPR is a 20th century rather than 18th century instrument and is thus drafted in more format neutral terms, it also includes new media technologies.
48. ICCPR Article 19 expressly includes rights to receive as well as impart information.
49. The Statement of Compatibility states:

The Bill contains measures placing limits on the ability of companies and individuals to control a registered news media voice or listed news media voice where that ownership is likely to result in a lessening of diversity of controllers of registered news media voices or listed news media voices ...

As a consequence of the nature of the media market in Australia, economies of scale dictate that media ownership tends to result in the concentration and monopolisation of media operations. Such concentration of ownership and control can lead to the dissemination of more limited points of view, with the corollary of limiting citizens' access to multiple points of view or opinion.

The measures in the Bill are designed to mitigate the risks associated with media concentration. Diversity in the media contributes to a well-functioning democratic society by providing citizens with a range of informed points of view and preventing any one media owner from exercising too much influence over public opinion or the political agenda. The United Nations has noted that it is also of the view that positive measures are in some circumstances necessary to prevent control of the media where that control would lead to interference with the freedom of expression of others (UN Human Rights Committee, General Comment 10, paragraph 2).

50. The Commission accepts this as correctly stating relevant principles regarding ICCPR Article 19, but has some concerns regarding their application.

(a) *Decision making by Public Interest Media Advocate*

51. Approval by the Public Interest Media Advocate is required for transactions involving changes of control of registered news media voices or listed news media voices.

52. In giving its approval, the Public Interest Media Advocate must be satisfied that where a transaction will result in a substantial lessening of diversity, it will result in a net benefit to the public and that the benefit will outweigh any detriment associated with a lessening of diversity. The Public Interest Media Advocate may take into consideration undertakings made by the applicant to mitigate the impact of the lessening of diversity.
53. As noted above, the Commission agrees that access to diverse sources of information is a legitimate aim under ICCPR Article 19, and that in some circumstances legislative or other positive measures may be necessary to achieve this aim.
54. The Commission also notes, however, that well established Australian Senate practice indicates that rights should not be unduly dependent on executive discretion.
55. This important aspect of the role of the Parliament in human rights scrutiny, which responds to requirements in provisions including ICCPR Article 19.3 for limitations to be “provided by law”, is reinforced in guidance material for the public sector issued under the Human Rights Framework which emphasises that
- limitations on rights should be accompanied by safeguards to ensure the limitations are exercised in a way that is transparent and accountable. You should consider whether there are appropriate provisions for procedural fairness and, where appropriate, judicial oversight.
- <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/HumanRightsInOurHands.aspx#flowchart>)
56. The Commission notes concerns in this respect expressed in more detail by the Parliamentary Joint Committee on Human Rights regarding this Bill.
57. The Commission notes that the Public Interest Media Advocate would be required to consult publicly before making a decision to approve or refuse a transaction. The Commission also notes, however, that there do not appear to be specific provisions made regarding review of decisions and that the explanatory memorandum indicates a decision to exclude merits review.

Recommendation

- 58. The Commission recommends that the Committee seek further information on proposed arrangements for review of decisions by the Public Interest Media Advocate to approve, or not to approve, transactions, and procedural requirements for making these decisions including procedural fairness and requirements for consultation with affected parties.**

(b) Coverage of online services

59. The Commission notes that an important part of the justification for taking measures to promote or require diversity of ownership in broadcast media and in television delivered through cable services, is the level of constraint applying to broadcast spectrum and to currently available cable infrastructure.

60. These constraints do not appear to apply to online services.
61. While this may mean that the Public Interest Media Advocate would in practice be likely to approve transactions involving online media, having regard to the criteria indicated in the Bill for decision making in this respect the Commission questions the basis on which the Bill needs to apply to these transactions in this respect.

Recommendation

The Commission recommends that the Committee consider the necessity for approval processes to apply to transactions involving control of online media.

(c) *Strict liability offences*

62. The Commission endorses the comments made by the Parliamentary Joint Committee on Human Rights regarding strict liability offences in the Bill. Offences of this kind engage rights recognised in ICCPR Article 14 but are not addressed in the Statement of Compatibility. The Commission notes that such offences may be justifiable but considers that further information should be provided on why strict liability offences in this case are legitimate and proportionate.

Recommendation

63. **The Commission recommends that the Committee seek further information on the necessity of creation of strict liability offences in the Bill.**

7 **Television Licence Fees Amendment Bill 2013**

64. This Bill would make permanent a temporary 50% rebate on commercial television license fees.
65. The Statement of Compatibility on this Bill indicates that the Bill does not engage human rights.
66. This appears to be on the basis that as indicated in the Statement of Compatibility:

The measures in the Bill apply only to corporations, as natural persons are not eligible to hold a commercial television broadcasting licence.

67. The Commission notes that measures applying directly only to corporations may nonetheless engage human rights for individuals. Information from the Government on whether a reduction in commercial television broadcasting licence fees is expected to promote freedom of expression and information, would appear relevant in this respect for example.

Recommendation

- 68. The Commission recommends that the Government provide further information on the impact of a continued 50% reduction in commercial television license fees on freedom of expression and information.**

8 News Media (Self-regulation) Bill 2013

69. The Explanatory Memorandum for this Bill and the associated News Media (Self-regulation) (Consequential Amendments) Bill 2013 appears to accurately summarise what would be the effects of these Bills as follows:

The Self-regulation Bill allows the Public Interest Media Advocate to declare a specified body corporate to be a ‘news media self-regulation body’. In practice, a specified body is expected to be a self-regulatory industry body. The Public Interest Media Advocate would be appointed under the proposed *Public Interest Media Advocate Act 2013*.

The Public Interest Media Advocate must not make a declaration unless the body corporate meets a number of basic eligibility criteria, including a requirement that it be a registered company limited by guarantee; and a requirement that it has a binding ‘news media self-regulation scheme’ applying standards to its ‘news media organisation members’ in relation to their ‘news or current affairs activities’.

In deciding whether to declare that a particular body is a ‘news media self-regulation body’, the Public Interest Media Advocate must have regard to a number of matters including the extent to which the body corporate has arrangements in place to deal effectively with complaints; and the extent to which the body corporate’s standards deal with privacy, fairness, accuracy and other matters relating to the professional conduct of journalism.

A specified ‘news media organisation’ will only continue to qualify for the ‘Journalism’ exemption from the privacy obligations imposed under the *Privacy Act 1988* (the Privacy Act), if it is a member of a declared ‘news media self-regulation body’ and has not had its rights as a member suspended (see below under the heading ‘News Media (Self-regulation) (Consequential Amendments) Bill’).

A ‘news media organisation’ is defined by reference to its ‘news or current affairs activities’. A number of activities are excluded, including activities relating to material disseminated by a broadcasting or datacasting service. A small business operator (within the meaning of the Privacy Act) is also excluded from the definition of ‘news media organisation’.

Membership of a ‘news media self-regulation body’ would be voluntary. However, as noted above, a ‘news media organisation’ (as defined), would lose the Privacy Act exemption if it failed to become a member by a specified date.

70. The Statement of Compatibility for the Bill indicates the Bill as engaging the prohibition on arbitrary or unlawful interferences with privacy; the right to freedom of expression; the right to freedom of association, and the right to take part in public affairs. The Statement of Compatibility indicates the Government’s view that the Bill is consistent with these rights. This assessment is, of course not conclusive for the Committee or the Commission’s purposes.

71. In its terms the Bill appears largely to maintain the existing self-regulatory approach to media, rather empowering a Minister or any other official to direct the content of newspapers or other news media.
72. However, given the very strong expressions of concern which have been made by a number of media organisations and by members of the Parliament, and given strong statements in response by other members of the Parliament, including Ministers, to the effect that the Government's proposals are considerably less intrusive on press freedom than those reportedly approved on a cross party basis in the United Kingdom, a country which of course is subject to the jurisdiction of the European Court of Human Rights, the Commission makes some more detailed comments below on potential effects of the Bill.

(a) *Substantive criteria for news media self regulation bodies*

73. As noted earlier in this submission, rights of any person to freedom of expression and information under ICCPR Article 19.2 are not absolute, but rather must be considered in conjunction with rights of others and with other ICCPR rights.
74. The Commission has not at this point identified anything in the substantive criteria for what is a "news media self regulation body" which appear to impose requirements necessarily beyond those consistent with ICCPR Article 19.3 or which would necessarily be disproportionate to protection of rights under ICCPR Article 17.
75. However, the Commission notes and endorses the comments of the Parliamentary Joint Committee on Human Rights that Governments proposing restrictions on rights should demonstrate the necessity of those restrictions, and that further information in this respect should be provided in the Statement of Compatibility.

Recommendation

- 76. The Commission recommends that the Committee seek further information on justification for changes proposed in the Bill to existing self regulatory arrangements, whether in a supplementary Explanatory Memorandum or by other appropriate means.**

(b) *Operation of self regulation bodies*

77. The Statement of Compatibility correctly notes that there is some degree of risk that a self regulation body might give excessive weight to rights to freedom of expression and information at the expense of rights to privacy, or alternatively that it might give excessive weight to rights to privacy at the expense of freedom of expression and information.
78. The Commission notes that maintenance of a self-regulatory approach to ensuring respect by a free press for rights of other persons under ICCPR Article 17 appears necessarily to involve acceptance of some degree of risk of infringements of those rights.

79. The fact that membership of a particular media self regulation body is voluntary, and that media organisations dissatisfied with the approach of a particular body are free to establish or join another body meeting the criteria for such bodies, appears likely to mitigate these risks so far as the rights of journalists and media proprietors are concerned.
80. This is subject to possible issues raised below regarding recognition by the Public Interest Media Advocate
81. Any corresponding mitigation of these risks regarding the rights of persons who are not owners or employees of, or otherwise engaged with, media organisations is less readily identified, other than through continued oversight of the operation of the legislative scheme by the Parliament, by existing statutory bodies with responsibilities regarding rights to privacy and freedom of information, and by the proposed Public Interest Media Advocate.

(c) *Freedom of association*

82. ICCPR Article 22 recognises the right to freedom of association. Although not stated expressly in the text of ICCPR Article 22, this right includes the right not to belong to an association. This right as indicated by ICCPR Article 22.2 is permitted to be subject only to those restrictions which
- are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.
83. Membership of a news media self-regulation body, while voluntary, would be mandatory in order for news media organisations to retain the benefit of the exceptions for journalism under the Privacy Act 1988.
84. The Statement of Compatibility thus appears to be correct in identifying the right to freedom of association as engaged.
85. The Commission does not regard the requirement in this Bill for a news media organisation to be a member of a news media self-regulation body meeting the substantive criteria for such a body, as an inherently disproportionate response to protection of rights under ICCPR Article 17 or as exceeding the permissible limits on freedom of expression and association as set out in ICCPR Articles 19.3 and 22.2 respectively.
86. The Commission has some concerns regarding the need for declaration of a particular body as a 'news media self-regulation body' by the Public Interest Media Advocate.

(d) *Requirement for declaration of a particular body as a 'news media self-regulation body' by the Public Interest Media Advocate*

87. The Commission appreciates that there may be advantages for all parties concerned, in certainty and clarity in having available a procedure to provide for certification of a body as meeting the criteria for a news media self-regulation body.

88. It is not clear however why this certification procedure needs to be mandatory rather than simply available; such that, if in error or through oversight, a body which in fact meets the criteria for a news media self-regulation body has not been declared as such by the Public Interest Media Advocate can nonetheless be established to be such a body in the event of a complaint under the Privacy Act.

Recommendation

89. The Commission recommends that the Committee seek further information on the need for declaration of a particular body as a 'news media self-regulation body' by the Public Interest Media Advocate to be mandatory rather than simply available.

(e) *Derogation and public emergency*

90. Measures in the Bill have been described in Parliament as being proposed "for the first time in our peacetime history" (Mr Turnbull, Member for Wentworth, House of Representatives Hansard, p.50, 18 March 2013). Without pursuing issues as to whether it is wholly accurate to describe as peacetime a period when Australian armed forces remain engaged in hostilities in Afghanistan, this point has possible relevance to assessment of the Bill for compatibility with human rights in the following manner.

91. Emergency situations, where less precise tailoring of measures may be accepted as possible compared to other situations, are catered for by the derogation provisions in Article 4. This Article requires a "public emergency which threatens the life of the nation", and advice to the United Nations of this and the derogation from rights - rather than by the more routine limitation provisions contained within Article 19. It is clear that the conditions for derogation are not met here. Nor is it asserted in the Statement of Compatibility that the conditions for derogation are met. It is clear accordingly that any restrictions on freedom of expression and information must be permissible under Article 19.3 (including through its reference to other rights) to be permissible.

9 Public Interest Media Advocate Bill 2013

92. This Bill would establish the office of Public Interest Media Advocate, on which other Bills in the package would assign a range of functions. The human rights implications of those functions are discussed earlier in this submission by reference to those Bills.

93. The Explanatory Memorandum indicates that this office is to operate independently and without direction by the Minister or the Government. This appears to be an accurate reflection of the provisions of the Bill in this respect.

94. The Joint Parliamentary Committee on Human Rights has raised a concern that, notwithstanding indications in the Statement of Compatibility that this Bill is consistent with the right not to be compelled to incriminate oneself under ICCPR Article 14, the combined effect of provisions in this Bill permitting

compulsion to provide information, and in other Bills within the package providing for offences, may not be consistent with this right. The Commission agrees that further information should be provided in this respect.

Recommendation

- 95. The Commission recommends that the Committee request further information from the Government to clarify whether the combined effect of this and other Bills within the package is consistent with the right not to be compelled to incriminate oneself.**