

Submission on Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019 Bill

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The NSW Young Lawyers Human Rights Committee & Communications, Entertainment and Technology Law Committee (**the Committees**) make the following submission on the Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019 Bill (**the Bill**).

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The NSW Young Lawyers Human Rights Committee comprises of all those interested in human rights law, including lawyers working in academia, for government, private and the NGO sectors and other areas of practice that intersect with human rights law, as well as barristers and law students. The objectives of the Human Rights Committee are to raise awareness about human rights issues and provide education to the legal profession and wider community about human rights and their application under both domestic and international law. Members of the Human Rights Committee share a commitment to effectively promoting and protecting human rights and to examining legal avenues for doing so. The Human Rights Committee takes a keen interest in providing comment and feedback on legal and policy issues that relate to human rights law and its development and support.

The NSW Young Lawyers Communications, Entertainment and Technology Law Committee (**CET Committee**) aims to serve the interests of lawyers, law students and other members of the community concerned with areas of law relating to information and communication technology (including technology affecting legal practice), intellectual property, advertising and consumer protection, confidential information and privacy, entertainment, and the media. As innovation inevitably challenges custom, the CET Committee promotes forward thinking, particularly with respect to the shape of the law and the legal profession.

Summary of Recommendations

1. The Committees recommend the following amendments to section 80A as proposed by the Bill:
 - a. The inclusion of a definition section that provides the meaning of 'reasonable' and 'justifiable', and therefore what this limitation is intended to encompass;
 - b. Further clarity in the Second Reading Speech and/or Explanatory Memorandum to assist in the interpretation of 'an open, free and democratic society' for the purposes of assessing what is reasonable and justifiable in that context;
 - c. An amendment of the wording of proposed section 80A to read as 'reasonable, proportionate and justifiable' in order to import the existing considerations at common law (both state and federal), and from international jurisdictions that have legislated explicit freedoms of expression in similar terms; and
 - d. The incorporation of an explicit provision ensuring that protections against hate speech are not overridden.
2. The Committees recommend that the Senate Standing Committee ensure that any legal protection of freedom of expression complies with Australia's obligations under international human rights conventions, including, but not limited to, the ICCPR.
3. The Committees recommend that proposed section 80A be a part of a comprehensive charter of human rights.

Part One: Section 80A of the Bill — What is the scope of 'reasonable and justifiable'? How does this interact with the pre-existing implied freedom of political communication? Does it expand it? Limit it?

A constitutional protection for freedom of expression is essential to democracy. As mentioned in the Explanatory Memorandum to the Bill, freedom of expression is important to enable progress and development in society, and to hold power to account. Theorists propound that freedom of expression is important for the discovery of truth,¹ to enable and encourage widespread participation in representative government,² and as essential to human autonomy and dignity.³ The scope of this protection for freedom of expression needs to be appropriately drafted to ensure it is neither too restrictive, thus limiting its effect; nor too broad, thereby

¹ See, for example, John Stuart Mills, 'On Liberty' in John Gray (ed), *On Liberty and Other Essays* (Oxford University Press, 1998).

² See, for example, David Rolph, *Media Law* (Oxford University Press, 2nd ed, 2015) 21.

³ See, for example, Thomas Scanlon, 'A Theory of Freedom of Expression', in Ronald Dworkin (ed), *The Philosophy of Law* (Oxford University Press, 1977), 163, 167; Ronald Dworkin cited in Harry Melkonian, *Freedom of Speech and Society: A Social Approach to Freedom of Expression* (Cambria Press, 2012) 129.

limiting the rights and protections of others in society, particularly vulnerable or minority groups (for example, by enabling hate speech).

I. The interpretation of the phrase ‘reasonable and justifiable’ domestically and internationally

1. The Bill as currently drafted allows freedom of expression to be limited when a law ‘is reasonable and justifiable in an open, free and democratic society’. Neither the Bill, nor the Explanatory Memorandum, explain what is meant by this phrase. However, the Explanatory Memorandum provides some examples of what might be encompassed within the meaning of a ‘reasonable and justifiable’ limitation on freedom of expression, including censorship of national security information.⁴
2. To establish how such a limitation may be interpreted if incorporated into the Australian Constitution (**Constitution**) the interpretation of terms and phrases such as ‘democracy’ and ‘reasonable and justifiable’ in different jurisdictions are considered below.

Australia

3. The wording in the Bill models words used in each of the Human Rights Acts enacted in Queensland and Victoria.⁵
4. The limitation on freedom of expression in the *Human Rights Act 2019* (Qld) (**HRA (Qld)**) extends only to ‘reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom’.⁶ While similar in terms to the language of the Bill, this phrasing also includes further explanation that what is reasonable and justifiable in a ‘free and democratic society’ can be assessed by considering the impact on human dignity, equality and freedom. In particular, the *HRA (Qld)* provides a non-exhaustive list of the factors that may be relevant in determining if a limitation is ‘reasonable and justifiable’ in subsection 13(2), including:⁷
 - a) the nature of the human right;
 - b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
 - c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
 - d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
 - e) the importance of the purpose of the limitation;

⁴ Explanatory Memorandum, Constitution Alteration (Freedom of Expression and Freedom of the Press), 3.

⁵ *Human Rights Act 2019* (Qld) s 8(b); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

⁶ *Human Rights Act 2019* (Qld) s 13(1).

⁷ *Human Rights Act 2019* (Qld) s 13(2).

- f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right; and
 - g) the balance between the importance of the limitation and the importance of the human right.
5. Section 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**CHRRRA (Vic)**) has a similar list of relevant considerations, and also introduces these considerations by reference to ‘reasonable limits as can be demonstrably justified in a free and democratic society **based on human dignity, equality and freedom**’ (emphasis added). Again, an additional explanation like this as to how the limitation should be interpreted is currently missing in the Bill at present.
6. In determining proportionality under s 7(2) of the *CHRRRA (Vic)*, the High Court of Australia (**High Court**) approved the test used by the Canadian Supreme Court in *R v Oakes* [1986] 1 SCR 103 (**Oakes**).⁸ This was summarised in *R v Chaulk* [1990] 3 SCR 1303 as follows:⁹

The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:

- (a) *be 'rationally connected' to the objective and not be arbitrary, unfair or based on irrational considerations;*
 - (b) *impair the right or freedom in question as 'little as possible'; and*
 - (c) *be such that their effects on the limitation of rights and freedoms are proportional to the objective.*
7. While the Queensland and Victorian Acts provide more guidance on the limitations that may be considered ‘reasonable and justifiable’ than the constitutional amendment proposed in the Bill, even those Acts arguably do not go far enough. In *Momcilovic v The Queen* [2011] HCA 34, Heydon J criticised the limitation clause in section 7(2) of the *CHRRRA (Vic)* because it ‘contemplates the making of laws by the judiciary, not the legislature’ and ‘will lead to debates in which many different positions could be taken up.’¹⁰ It may therefore be prudent for the Bill to be amended to provide clearer guidance on the specific circumstances that would lead to a ‘reasonable and justifiable’ limitation on freedom of expression. This may better ensure the protection operates as is intended. While this poses the corollary risk that the limitation cannot be as flexibly applied to future changes as otherwise might be

⁸ *Momcilovic v The Queen* [2011] HCA 34 at [550] (*‘Momcilovic’*).

⁹ *R v Oakes* [1990] 3 SCR 1303, [1335]-[1336].

¹⁰ *Momcilovic*, [431].

possible (e.g. technology developments or societal values), any limitation on human rights should be limited to only the most necessary of circumstances.

Canadian Charter of Rights and Freedoms

8. The *Canadian Charter of Rights and Freedoms* limits freedom of expression, using similar phraseology to that proposed in the Bill, and in the *HRA (Qld)* and *CHRR (Vic)*, by reference to ‘reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’.¹¹
9. In addition to the proportionality test used in *Oakes*, the Supreme Court of Canada has long limited the protection of freedom of expression for the purpose of suppressing hate speech to protect members of identifiable groups.¹² These limitations were considered necessary and justifiable in a multicultural nation such as Canada.

European Convention on Human Rights

10. The European Convention on Human Rights (**ECHR**) goes further than the current terms of the Bill by specifying the situations in which freedom of expression may be limited. Article 10 of the *ECHR* allows for limitations if it is ‘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’.¹³ What is ‘necessary in a democratic society’ may therefore be limited to those examples provided in the *ECHR*.
11. Under the *ECHR*, democracy has been characterised as the protection of the rights and interests of others.¹⁴ Therefore, the substance of the limitation in the *ECHR* may be interpreted as ensuring expression does not unduly infringe upon the rights and freedoms of others.
12. In the case of *Perinçek v Switzerland*, the European Court of Human Rights emphasised the importance of freedom of expression as an ‘essential [foundation] of a democratic society and one of the basic conditions for its progress’.¹⁵ Only in extremely limited circumstances will restrictions on the freedom be upheld.

¹¹ *Canada Act 1982* (UK) c 11, sch B pt I (‘*Canadian Charter of Rights and Freedoms*’) s 1.

¹² *R v Andrews* [1990] 3 SCR 870.

¹³ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 10 (‘*ECHR*’).

¹⁴ Muhammad Ali Nasir, ‘Negative Governmentality through Fundamental Rights: The Far Side of the European Convention on Human Rights’ (2018) 24(4-5) *European Law Journal* 297, 310.

¹⁵ *Perinçek v Switzerland* (European Court of Human Rights, Grand Chamber, Application No 27510/08, 15 October 2015), [196] (‘*Perinçek*’).

13. The European Court of Human Rights considered that ‘necessary’ required a ‘pressing social need’.¹⁶ Further, any restriction on the protection of freedom of expression must be proportionate to the legitimate aim the restriction is seeking to achieve. Significantly, the Court also stated that restrictions on ‘political expression or debates on questions of public interest’ would rarely be upheld.¹⁷
14. While the wording of the current Bill uses ‘reasonable and justifiable’ instead of ‘necessary’, the reasoning of the European Court of Human Rights provides important insight into how a court in Australia may interpret the limitations of the protection afforded by the Constitutional amendment.

II. Implied freedom of political communication – history & development

15. Prima facie, section 51 of the Constitution does not refer to a freedom of political communication. Nevertheless, the High Court has interpreted the Constitution as providing an *implied* freedom of political communication¹⁸ in cases such as *Nationwide News v Wills* [1992] HCA 46 and *Australian Capital Television Pty Ltd v Commonwealth* [1992] HCA 45 (**ACTV**), and then clarified the textual foundation for the implied freedom in later cases that such as *Lange v Australian Broadcasting Corporation* [1997] HCA 25 (**Lange**) and *McGinty v Western Australia* [1996] HCA 48.¹⁹
16. Despite these common law authorities, recognition and development of the implied freedom of political communication has been described as ‘controversial’ and there is ‘uncertainty about the foundation for, and nature and extent of, the’ implied freedom.²⁰ Indeed, Stewart J has concerningly gone so far as to say that it is ‘arguable that the implied freedom does not exist’.²¹
17. The implied freedom of political communication acts as a limitation on Parliament’s legislative powers, ensuring that laws made by Parliament do not inhibit ‘freedom of discussion of political and economic matters which is essential to sustain the system of representative government prescribed by the Constitution’.²² The High Court’s unanimous landmark judgment in *Lange* clarified the freedom was implied based on a reading of sections 7, 24, 64 and 128 of the Constitution, which, when taken together, indicated that:²³

¹⁶ *Perinçek*, [196].

¹⁷ *Perinçek*, [197].

¹⁸ Jamie Blaker, ‘The hard problem of legality’ (2019) 46(1) *University of Western Australia Law Review* 1, 36.

¹⁹ Chris Bleby, ‘Implied freedom of Political Communication - development of the test and tools’, *Hanson Chambers* (Article, 2019) 1-4 <<https://www.hansonchambers.com.au/wp-content/uploads/2019/11/Implied-freedom-of-Political-Communication-CPD.pdf>> (*‘Implied freedom of Political Communication’*); James Stellios, ‘Using Federalism to protect political communication: implications from Federal Representative Government’ (2007) 31 *Melbourne University Law Review* 239, 240 (*‘Using Federalism to protect political communication’*).

²⁰ Stellios, ‘Using Federalism to protect political communication’, 240.

²¹ *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18, [249] (*‘LibertyWorks’*).

²² *Australian Capital Television Pty Ltd v Commonwealth* [1992] HCA 45, [5]; Bleby, ‘Implied freedom of Political Communication’, 1.

²³ Stellios, ‘Using Federalism to protect political communication’, 243, citing *Lange*.

1. The Constitution creates a system of 'Commonwealth governmental institutions and processes: representative and responsible government and referenda';
 2. The freedom of political communication is an 'indispensable incident' of such processes; and
 3. The judiciary is responsible for enforcing a limitation on legislative and executive power to protect this freedom, necessary for those institutions and processes to work.
18. The High Court's test, as articulated in *Lange*, modified in *Coleman v Power* (2004) 220 CLR 1, and clarified in *McCloy v NSW* (2015) 257 CLR 178 is as follows:²⁴
- a) Does the law in question burden this freedom about government or political matters, in its terms, operation or effect?
 - b) If so, is the purpose of the law and the means adopted to achieve that purpose legitimate, meaning are they compatible with the maintenance of representative government?
 - c) If so, is the law reasonably appropriate and adapted to serve that legitimate purpose (i.e. considering whether the limitation on the freedom is proportionate by reference to the extent of the burden effected by the impugned provision on freedom, including whether the law is suitable, necessary and adequate in its balance)?
19. If the answer to the first two questions is 'yes', and the answer to the third is 'no', then the law will exceed the implied limitation of legislative power. However, the second and third questions provide some leeway. Thus, a law may somewhat limit one's freedom of political communication, but the burden must be compatible and proportionate with the Constitution (e.g., the law furthers a public purpose, such as the 'maintenance and protection of an apolitical and professional public service').²⁵

III. How does the proposed constitutional amendment interact with this implied political freedom?

20. To date, the implied freedom of political communication has only appeared in proceedings relating to government or political contexts. For example, cases have involved consideration of political advertising, state electoral funding laws, broadcasting, postal service, restriction on funds available to political parties and candidates to meet the costs of political communication, and what Australian Public Service employees are permitted to communicate.²⁶
21. Such jurisprudence is unsurprising given that the drafting of the Constitution itself was driven by financial and trade issues, as well as demarcating relations between the states and federal Parliament,

²⁴ Bleby, 'Implied freedom of Political Communication', 3, 5-7.

²⁵ Bleby, 'Implied freedom of Political Communication', 14, 19, 21-22; *Comcare v Banjeri* [2009] 93 ALJR 900, [31].

²⁶ Bleby, 'Implied freedom of Political Communication', 3, 5, 9-10, 14-15.

rather than being concerned with human rights.²⁷ Dawson J (as he was then) has pointed out that the founders of the Constitution ‘deliberately rejected the proposal to include a Bill of Rights, believing that the better safeguard for the liberties of Australians would be found in a democratic Parliament’.²⁸

22. The proposed constitutional amendment therefore reflects a significant departure from the intention of the original drafters of the Constitution. Not only does the Bill explicitly recognise freedom of expression, but this freedom would be a significant expansion beyond the implied freedom of political communication currently read into the text of the Constitution. The language included in the Bill suggests that the proposed freedom of expression would not be limited to any particular context and, as such, would not be restricted to political expression. Furthermore, and quite importantly, the proposed amendment expressly acknowledges the value of the freedom of the press and other media.
23. Section IV below outlines the benefits of the proposed constitutional amendment, and the limitations it would provide on Commonwealth legislative powers to protect freedom of expression in Australia. However, it should also be noted that there is a possibility the amendment proposed in the Bill could interact with other areas of law, including defamation and privacy law. This submission does not deal with these possible flow-on effects but should be considered by the legislature if the Bill passes.

IV. How does the text of the Bill enshrine a constitutional freedom of expression and what are the limitations on Commonwealth legislative powers?

24. The proposed amendment will insert a new Chapter IIIA and section 80A titled ‘Freedom of expression’ into the Constitution. The proposal is further defined as a ‘Bill for an Act to alter the Constitution to expressly protect freedom of expression, including freedom of the press’.
25. The formulation of this legislative prohibition is outlined below by reference to specific phrases used in the constitutional amendment proposed in the Bill, dealing first with the express provision for the freedom of expression in subsection A, and then dealing with the circumstances in which that freedom may be curtailed in subsection B.

²⁷ George Williams, ‘The Australian Constitution and Human Rights: A Centenary View’ in Research School of Pacific and Asian Studies, Division of Pacific and Asia History, The Australian National University, *Constitutions and Human Rights in a Global Age Symposium: An Asia-Pacific Perspective* (2001) 1, 2, 3.

²⁸ The Honourable Justice Michael Kirby, ‘The Australian Constitution - A Centenary Assessment’ (1997) 17 *Monash University Law Review* 229, 234-235.

A. The Commonwealth, a State or a Territory must not limit freedom of expression, including freedom of the press and other media

i) 'must not limit'

26. There will be a constitutional prohibition on legislation that places a 'limit' on freedom of expression, as described below. According to the Oxford Dictionary definition, a 'limit' stops something from increasing beyond a particular amount or level. In essence, the language of the amendment suggests an intention to prohibit the imposition of a threshold or restriction on freedom of expression. This prohibition is to apply to Commonwealth, state and territory legislative arms of Government.
27. A similar limitation exists at section 116 of the Constitution, which imposes a legislative restriction on any laws that prohibit the 'free exercise of any religion'.²⁹ However, section 116 does not apply to state legislative powers and was inherently meant to allow for state regulation of religious expression and practice.
28. Notably, the general limitation set out in proposed section 80A is not accompanied by a sub-clause allowing retrospective application; this could arguably preserve the prevailing nature of any federal legislation made under section 80A over state equivalents that are inconsistent.³⁰

ii) 'freedom of expression'

29. The Attorney-General's Department states that a right to 'freedom of expression' extends to any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.³¹
30. In the Explanatory Memorandum, reference is made to the First Amendment to the Constitution of the United States of America (**US Constitution**) which provides that Congress 'shall make no law ... abridging the freedom of speech, or of the press'.³² While this reference draws attention to American case law that may be used to assist in the interpretation of section 80A as proposed in the Bill, there is a significant discord in the language used to establish the right under the US Constitution and the language that would establish a freedom of expression pursuant to the constitutional amendment proposed in the Bill.

²⁹ *Australian Constitution*, s 116.

³⁰ *Ibid*, s 109.

³¹ Attorney General's Department, Australian Government, 'Right to freedom of opinion and expression', *Attorney-General's Department* (Webpage) <<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#what-is-the-right-to-freedom-of-opinion-and-expression>>.

³² Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019, Explanatory Memorandum, Senators Patrick and Griff, 1 ('*Explanatory Memorandum*').

31. Additionally, the Committees recommend consideration be had to misinformation and hate speech. In the absence of protections for other fundamental human rights, a constitutionally enshrined right to freedom of expression could result in the proliferation of misinformation and hate speech. Concerningly, in international jurisdictions, misinformation and hate speech have been linked to both electoral interference³³ and a rise in violent attacks.³⁴
32. The Committees recommend that proposed section 80A should contain an explicit provision ensuring that protections against hate speech are not overridden.

iii) *'including freedom of the press and other media'*

33. The Explanatory Memorandum justifies this specific reference to 'freedom of the press and other media' as recognising the 'vital importance of journalism and publishing in all its forms for the functioning of an open, free and democratic society'.³⁵ It follows that the provision is not to be read as exhaustive and 'does not limit who may be afforded these protections'.³⁶

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

i) *'may limit the freedom'*

34. Pursuant to the Bill, the constitutional freedom of expression will be qualified. This phrase acts as a proviso such that limits that would otherwise be impermissible, as described above will be permitted in specified circumstances.

ii) *'only if the limitation is reasonable and justifiable'*

35. 'Reasonable' has been the subject of judicial scrutiny across many areas of law. In an administrative law context, it is closely associated with an action being just, proportionate and for legitimate reasons. Every word in a provision has work to do,³⁷ and the inclusion of this phrase is particularly important. The use of the word 'reasonable' could be read as an incorporation of the three-part proportionality test in *Lange* into proposed section 80A.

³³ Samantha Bradshaw, Hannah Bailey and Phillip N Howard, *Industrialized Disinformation 2020 Global Inventory of Organized Social Media Manipulation* (Report, 2020) <https://demtech.oii.ox.ac.uk/wp-content/uploads/sites/127/2021/01/CyberTroop-Report20-FINALv.3.pdf>.

³⁴ Zachary Laub, 'Hate Speech on Social Media: Global Comparisons', *Council on Foreign Relations* (Report, 7 June 2019) <<https://www.cfr.org/backgrounder/hate-speech-social-media-global-comparisons>>.

³⁵ Explanatory Memorandum, 3.

³⁶ *Ibid.*

³⁷ *Clyne v Deputy Federal Commissioner of Taxation* (1981) 150 CLR 1.

36. The Explanatory Memorandum provides guidance as to what subject matter could be considered as providing for a ‘reasonable and justifiable’ exception, including ‘censorship of military secrets ... in time of war to protect Australia’s democratic system of government’, or the ‘publication of national security information ... to ensure the Australian Government can fulfil its responsibilities in relation to national defence’.³⁸ However, there is no specific definition of ‘reasonable and justifiable’ provided in the Bill or its accompanying materials, which may lead to uncertainty. In the absence of further guidance for statutory interpretation in the Bill, or in the Explanatory Memorandum and Second Reading Speech, further clarification is likely to be sourced from international jurisdictions. However, it would be beneficial to include further guidance in the text of proposed section 80A similar to the guidance provided in the section 13(2) of the *HRA (Qld)* and section 7(2) of the *CHRRRA (Vic)*.

iii) *‘in an open, free and democratic society’*

37. This phrase provides a counter-balance to the exception of ‘reasonable and justifiable’ by citing democratic values and principles of public interest in a society being “open” and “free”. The phrase therefore acts, to some extent, as a safeguard, preventing the passing of legislation that may abrogate freedom of expression if doing so would run contrary to the very intent behind the constitutional amendment.

38. However, the terms are highly subjective and a test of what is democratic, and what is not, will be a difficult exercise for policymakers, citizens, and the judiciary alike. The Explanatory Memorandum only provides that ‘[a]ny limitations on freedom of expression must be consistent with and supportive of Australia’s democratic system of government and the open and free nature of Australian society’.³⁹ There is no further description of how this is to be assessed, and against what standard.

³⁸ Explanatory Memorandum, 3.

³⁹ Explanatory Memorandum, 3.

Recommendation 1

The Committees recommend the following amendments to section 80A as proposed by the Bill:

- a. The inclusion of a definition section that provides the meaning of ‘reasonable’ and ‘justifiable’, and therefore what this limitation is intended to encompass;
- b. Further clarity in the Second Reading Speech and/or Explanatory Memorandum to assist in the interpretation of ‘an open, free and democratic society’ for the purposes of assessing what is reasonable and justifiable in that context;
- c. An amendment of the wording of proposed section 80A to read as ‘reasonable, proportionate and justifiable’ in order to import the existing considerations at common law (both state and federal), and from international jurisdictions that have legislated explicit freedoms of expression in similar terms; and
- d. The incorporation of an explicit provision ensuring that protections against hate speech are not overridden.

Part Two: International Best Practice

Understanding freedom of expression in international human rights law

39. Freedom of expression, often coupled with freedom of opinion, is a human right that is “indispensable ... for the full development of the person”, “essential for any society” and a “foundation stone for every free and democratic society”.⁴⁰
40. Freedom of expression might be considered a threshold right, in that it is necessary for the enjoyment and enhancement of other rights, including the right to vote,⁴¹ the right to protest,⁴² and the twin freedoms of assembly and association.⁴³

⁴⁰ Human Rights Committee, *General Comment No 34, Article 19, Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011), 1 [2].

⁴¹ Human Rights Committee, *General Comment No 34, Article 19, Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011), 1 [3]; Human Rights Committee, *General Comment No. 25, Article 25, Participation in Public Affairs and the Right to Vote*, 57th session, UN Doc CCPR/C/21/Rev.1/Add.7 (12 July 1996), 3 [12].

⁴² Emily Howie, ‘Protecting the human right to freedom of expression in international law’ (2018) 20(1) *International Journal of Speech-Language Pathology* 12, 13-14.

⁴³ Human Rights Committee, *General Comment No 34, Article 19, Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011), 1 [3].

41. The freedom is set out in Article 19 of two key international human rights conventions, namely the *Universal Declaration of Human Rights (UDHR)*⁴⁴ and the ICCPR.⁴⁵

UDHR Article 19 expresses the freedom of expression in the following, uninhibited, terms:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.⁴⁶

ICCPR Article 19 expresses the freedom in slightly more confined terms:

“2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. 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.”*⁴⁷

42. Freedom of expression is *not* an absolute right and can be restricted where it is necessary and proportionate to do so.⁴⁸ While the scope of ‘necessary restrictions’ is inherently undefined, some guidance is afforded by the *ECHR* which, at Article 10, states that “formalities, conditions, restrictions or penalties ... [that] are necessary in a democratic society” may be: “*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*”.⁴⁹

43. Elsewhere, the United Nations Human Rights Committee has stated that ‘necessary’ restrictions must consider the form and means of expression,⁵⁰ must be for a legitimate purpose,⁵¹ and must be

⁴⁴ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) Art. 19.

⁴⁵ *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Art. 19.

⁴⁶ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) Art. 19.

⁴⁷ *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Art. 19(2)-(3).

⁴⁸ Emily Howie, ‘Protecting the human right to freedom of expression in international law’ (2018) 20(1) *International Journal of Speech-Language Pathology* 12, 13.

⁴⁹ *ECHR*.

⁵⁰ Human Rights Committee, *General Comment No 34, Article 19, Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011), 8 [34].

⁵¹ *Ibid*, [33].

“appropriate to achieve their protective function ... the least intrusive instrument amongst those which might achieve their protective function.”⁵²

44. Australia ratified the ICCPR in 1980,⁵³ including the freedom of expression, but is yet to adopt any of its provisions in its domestic legislation. The Committees note that an express freedom of expression is otherwise effectively non-existent in the Australian regulatory and common law landscape, save for the limited implied freedom of political communication.⁵⁴ The Committees suggest that an express legal protection of freedom of expression, such as that contemplated by proposed section 80A, invites the formal adoption of the ICCPR into domestic legislation.

Recommendation 2

The Committees recommend that the Senate Standing Committee ensure that any legal protection of freedom of expression complies with Australia’s obligations under international human rights conventions, including, but not limited to, the ICCPR.

Leading jurisdictions

45. The Senate Standing Committee ought to look to leading international jurisdictions for guidance in formulating and applying legal protection for freedom of expression. In the absence of an international index of freedom of expression best practice, Reporters Without Borders (**RSF**) 2021 World Press Freedom Index⁵⁵ may be the most reliable indicator of free expression available.
46. The three leading jurisdictions on that index are Norway (6.72), Finland (6.99) and Sweden (7.24).⁵⁶

Norway

47. Part E of the Norwegian Constitution (*‘Kongeriket Norges Grunnlov’*) entrenches a number of human rights including freedom of expression.⁵⁷ At Article 100, the freedom is expressed in extensive terms and includes express provision for criticism of the State, censorship, and access to State and municipal documentation. Article 100 also stipulates a positive duty upon authorities of the State to “create conditions that facilitate open and enlightened public discourse”.⁵⁸

⁵² Ibid, [34] citing Human Rights Committee, *General Comment No 27, Article 12, Freedom of Movement*, 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) 3 [14].

⁵³ *International Covenant on Civil and Political Rights* [1980] ATS 23.

⁵⁴ See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 250; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 300-339 [337]-[348] (Callinan J); *Monis v The Queen* (2013) 249 CLR 92, 181-184 [243]-[251] (Heydon J); [2021] HCA 18, 113-114 [300]-[304].

⁵⁴ [2021] HCA 18, 113-114 [300]-[304].

⁵⁵ Reporters Without Borders, ‘2021 World Press Freedom Index’ (Web Page, 2021) <<https://rsf.org/en/ranking>>.

⁵⁶ Ibid.

⁵⁷ *Kongeriket Norges Grunnlov 1814* [Constitution of Norway 1814], Part E, Article 100.

⁵⁸ Ibid.

48. Beyond the Constitution, the Norwegian Government has developed a formal strategy against hate speech⁵⁹ and has been otherwise encouraged by the UN Human Rights Committee for its legislative efforts to diversify media ownership and ensure editorial freedom.⁶⁰

Finland

49. Freedom of expression in Finland is jointly protected by Section 12 of the Constitution ('*Suomen Perustuslaki*') and the *Act on the Exercise of Freedom of Expression in Mass Media 2003* (Finland). The latter expressly provides that "interference with the activities of the media shall be legitimate only in so far as it is unavoidable, taking due note of the importance of the freedom of expression in a democracy subject to the rule of law".⁶¹ Interestingly, the law of criminal defamation is limited in its application to corporations and generally applies only to natural persons.⁶²
50. However, while hate speech is forbidden, the prohibiting law is relatively ineffectual and does not expressly prohibit criticism or expression of opinion against people on the basis of sexual orientation, race, skin colour, places of birth, ethnic origin, religion or belief, or disability.⁶³

Sweden

51. The protection of freedom of expression in Sweden is tripartite and constitutionally enshrined.⁶⁴ Sweden was the first country to include freedom of the press in its constitution, in 1766.⁶⁵ Consistent with international norm, freedom of expression in Sweden may be restricted in relation to high treason, war mongering, espionage, classified information, insurgency, inciting crime and obstructing civil liberties.⁶⁶
52. Further, media ownership is highly concentrated in Sweden, with more than 90% of daily press controlled by just six owners.⁶⁷

⁵⁹ Norwegian Ministry of Children and Equality, 'The Government's Strategy against Hate Speech 2016-2020' (Strategy, November 2015).

⁶⁰ Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant, Norway*, 103rd sess, UN Doc. CCPR/C/NOR/CO/6, 1-2 [3].

⁶¹ *Act on the Exercise of Freedom of Expression in Mass Media 2003* (Finland) s 1.

⁶² *Criminal Code of Finland 2015* (Finland) Art. 24(9).

⁶³ *Criminal Code of Finland 2015* (Finland) ch 11 s 11.

⁶⁴ *Regeringsformen* [Fundamental Rights and Freedoms] (Sweden), Ch 2; *Tryckfrihetsförordningen 1949* [Freedom of the Press Act 1949] (Sweden); *Ytrandefrihetsgrundlagen* [Fundamental Law on Freedom of Expression] (Sweden).

⁶⁵ Government of Sweden, 'Openness in Sweden: Free speech, free press and overall transparency are key to Swedish society' (Web Page, 1 June 2021) <<https://sweden.se/life/democracy/openness-in-sweden>>.

⁶⁶ *Tryckfrihetsförordningen 1949* [Freedom of the Press Act 1949] (Sweden) ss 11-14.

⁶⁷ Reporters Without Borders, 'Sweden' (Web Page, 2021) <<https://rsf.org/en/sweden>>.

53. While the protection of freedom of expression is incomplete in every jurisdiction, the Committees suggest that an Australian approach to protecting and ensuring the freedom should be informed by the aforementioned leading international approaches.

Part Three: Source, form and other considerations

Source of protection

54. The source, constitutional or otherwise, of a protection of the freedom of expression will significantly alter its effect in relation to legislative contraventions by the State. This is evident in comparable jurisdictions, such as Canada and the United Kingdom, and should inform the Australian approach.

Canada

55. The *Canadian Charter of Rights and Freedoms* (**Charter**) is constitutionally enshrined,⁶⁸ and includes freedom of expression.⁶⁹
56. The protection of *Charter* rights is tempered, however, by section 1 of the *Charter*, which provides that all rights and freedoms guaranteed by it are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁷⁰ The Committees note that the text of proposed section 80A contains a similar condition.
57. Accordingly, where there is a contravention of a *Charter* right, the Courts consider that contravention by reference to this test of reasonableness and demonstrable justification. This is a balancing test, weighing the objectives of the contravening party against the interests of the individual claiming that a *Charter* right has been violated.
58. If a legislative contravention of a *Charter* right is deemed to be in excess of “reasonable limits” by virtue of the *Charter’s* constitutional entrenchment, then the Courts may invalidate that legislation. This provides powerful and practical effect to human rights protections in the Canadian jurisdiction.

United Kingdom

59. In contrast, human rights are protected by statute in the United Kingdom (**UK**), namely the *Human Rights Act 1988* (UK). Consistent with Article 10 of *ECHR*,⁷¹ sections 1 and 12 of the *Human Rights Act* protect freedom of expression in that jurisdiction.⁷²

⁶⁸ *Canadian Charter of Rights and Freedoms*.

⁶⁹ *Ibid*, s 2(b).

⁷⁰ *Constitution Act 1982*, s 1.

⁷¹ *ECHR* Art 10.

⁷² *Human Rights Act 1988* (UK) ss 1, 12.

60. As is the case in Canada, Article 10 of the *ECHR*, as replicated in Schedule 1 of the *Human Rights Act*, tempers this protection, stating that the exercise of the freedom of expression “may be subject to formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society”.⁷³
61. These formalities, conditions, restrictions or penalties are defined non-exhaustively, and may be “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”.⁷⁴
62. Importantly, however, where a legislative contravention of the *Human Rights Act* exceeds those restrictions that are “necessary in a democratic society”,⁷⁵ the UK Courts are not afforded the power to invalidate, bind or otherwise affect the enforcement of the contravening legislation.⁷⁶ Of the 43 declarations of incompatibility made since the introduction of the *HRA* on 2 October 2000,⁷⁷ only 26 have resulted in a governmental response,⁷⁸ with a further 10 overturned on appeal.⁷⁹ Even where a declaration of incompatibility is upheld, remedial responses from the legislature can take many years, meaning that contravening legislation remains in effect until it is amended or revoked.⁸⁰
63. This is a significantly weaker protection of the freedom of expression that undermines the primacy of human rights.

Form of protection

64. The Committees suggest that the protection of freedom of expression, in isolation from other related freedoms, is inappropriate and may compromise the effectiveness of proposed section 80A. As a

⁷³ *ECHR*, Art. 10(2); *Human Rights Act 1988* (UK) Sch 1, Art. 10.

⁷⁴ *ECHR*, Art. 10(2); *Human Rights Act 1988* (UK) Sch 1, Art. 10.

⁷⁵ *Ibid.*

⁷⁶ *Human Rights Act 1988* (UK) s 4(6).

⁷⁷ Ministry of Justice (UK), ‘Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government’s response to human rights judgments 2019-2020’ (CP 347, December 2020) (‘Responding to human rights judgments’) 30.

⁷⁸ Ministry of Justice (UK), ‘Responding to human rights judgments’, 30; see, e.g., *R (on the application of H) v Mental Health Review Tribunal for the North and East London Region & The Secretary of State for Health* [2001] EWCA Civ 633; *McR’s Application for Judicial Review* [2002] NIQB 58; *Smith v Scott* [2007] CSIH 9.

⁷⁹ Ministry of Justice (UK), ‘Responding to human rights judgments’, 30; see, e.g., *R (on the application of Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions* [2001] HRLR 2; *Wilson v First County Trust Ltd (No. 2)* [2001] EWCA Civ 415; *R (on the application of the Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2019] EWHC 452 (Admin).

⁸⁰ See, e.g., *Smith v Scott* [2007] CSIH 9; Edward Bates, ‘Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg’ (2014) 14(3) *Human Rights Law Review* 503.

result, the proposed section should form one part of a comprehensive charter of human rights, such that the protection of one right is not compromised by the absence of protection for another.

65. The Committees suggest that the separation of freedom of expression from freedom of assembly, for example, is artificial and impractical. While these two freedoms are, theoretically and normatively, separate, the frequency with which they coincide cannot be ignored.
66. In the context of protest, for example, freedom of expression and freedom of assembly necessarily coexist. Without protecting freedom of assembly, any shelter provided by proposed section 80A will be rendered ineffectual.
67. The Committees suggest that protecting a multitude of rights within a larger charter strengthens the protection of each individual right therein.

Recommendation 3

The Committees recommend that proposed section 80A be a part of a comprehensive charter of human rights.

Other considerations

Freedom of the Press and media diversity

68. In the context of the Australian media, proposed section 80A may fail to effectively protect freedom of expression without the removal of other barriers to freedom of expression.
69. While media diversity is key to a well-functioning democracy,⁸¹ ownership of Australian newspapers and other media industries is among the most concentrated in the world.⁸² resulting in reported biased and unreliable coverage in Australian commercial media.⁸³ This is reflected in public mistrust of the media, with only 43% of Australians stating that they trust the news and 64% expressing concern over misinformation in digital news media.⁸⁴

⁸¹ Ross Thorley, 'Intervene: How the Government can secure media diversity', *Independent Australia* (online, 20 Jul 2019) <<https://independentaustralia.net/business/business-display/intervene-how-government-can-secure-media-diversity,12920>>.

⁸² Nick Evershed, 'Australia's newspaper ownership is among the most concentrated in the world', *The Guardian* (online, 14 Nov 2020) <<https://www.theguardian.com/news/datablog/2020/nov/13/australia-newspaper-ownership-is-among-the-most-concentrated-in-the-world>>.

⁸³ Centre for Media Transition, *News in Australia Impartiality and commercial influence: Review of literature and research* (January 2020), <https://www.acma.gov.au/sites/default/files/2020-01/News%20in%20Australia_Impartiality%20and%20commercial%20influence_Review%20of%20literature%20and%20research.pdf>; The AIM Network, 'Democracy and diversity: media ownership in Australia', *Council on Foreign Relations* (23 June 2014) <<https://theaimn.com/democracy-diversity-media-ownership-australia/>>.

⁸⁴ Sora Park, Caroline Fisher, Kieran McGuinness, Jee Young Lee and Kerry McCallum, *Digital News Report: Australia 2021* (Report, June 2021) 11 <https://apo.org.au/sites/default/files/resource-files/2021-06/apo-nid312650_0.pdf>.

70. The Committees support calls for an inquiry into the concentration of media ownership in Australia, and reaffirm the necessity of transparency in media ownership and advertising to improve media diversity in Australia.

Concluding Comments

NSW Young Lawyers, as well as the Human Rights and Communications, Entertainment and Technology Committees, thank you for the opportunity to make this submission. If you have any queries or require further submissions, please contact the undersigned at your convenience.

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