

Free speech in the lucky country

Freedom of expression is under threat in Australia. So far, parliament, the judiciary, the press and the public have failed to fully secure free speech. Formally protecting freedom of expression in the Constitution or law would bring Australia in line with other Western democracies and help defend this fundamental right.

Submission to the inquiry into the Constitution Alteration
(Freedom of Expression and Freedom of the Press) Bill 2019

Bill Browne
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Summary

Freedom of expression is under threat in Australia, and that threat appears to be growing across multiple fronts: freedom of the press, whistleblowing, the right to protest, academic freedom, the public broadcasters and the public service, among others.

In June 2019, the Australian Federal Police raided the home of journalist Annika Smethurst. One day later, they raided the Sydney offices of the Australian Broadcasting Corporation. For reasons unknown, a planned raid on the Sydney offices of News Corporation the next day was aborted.

These raids are part of a broader pattern that has seen journalists' metadata accessed, the secret prosecution of a journalist for refusing to reveal a source, the arrest of a YouTube producer by the Fixated Persons Investigation Unit and threats of defamation suits against media companies.

Meanwhile, whistleblowers and a whistleblower's lawyer are being prosecuted for exposing wrongdoing, including multiple alleged murders, spying on an allied country (apparently for commercial gain) and dubious tactics against small business.

The exercise of freedom of conscience and the right to protest has been undermined across a variety of cases in recent years. Politicians have seemed open to withdrawing support for jobseekers who exercise their right to protest. The Australian Government has also proposed tightening Australia's secondary boycott laws to constrain the freedom of conscience of Australian workers and customers even further.

The power of government agencies and departments has been used to deter or retaliate against the exercise of free speech by those with relationships to those departments, including reportedly pressuring scientists to engage in academic misconduct, seemingly refusing to renew the contracts of those who criticise the government and scolding a media company over public interest reporting that broke no laws.

The ABC and SBS have been subject to undue comment and pressure from government ministers. This pressure has apparently led the public broadcasters to make employment and programming decisions that they otherwise would not have done.

Contrary to the principle of academic freedom, universities have put pressure on academics who express certain views, including those critical of the Chinese government.

Public servants are given confusing instructions on what political speech they can engage in. Rules about what can or cannot be said appear to be inconsistently enforced to the benefit of the government of the day.

These cases, and the many others like them, should raise serious concerns. The traditional champions of freedom of speech – parliament, the courts, the press and the public – are necessary, but clearly not sufficient. Formal protection of freedom of expression is needed.

Every other Western democracy formally protects civil rights, including freedom of expression. Three jurisdictions within Australia – the ACT, Victoria and Queensland – do so as well.

A constitutional amendment, like that proposed in the Constitution Alteration (Freedom of Expression and Freedom of the Press) Bill 2019, would protect freedom of expression and be a potential stepping stone to a full constitutional Bill of Rights. Alternatively, if this Bill is not supported then serious consideration should be given to how to legislate a Bill of Rights. In the meantime, creeping state censorship and restriction will be a growing threat to the liberties of Australians.

Introduction

We don't read about these secret trials in a country like Australia. I am not surprised when secret trials happen in North Korea, but in Australia that is really mind-boggling.

José Ramos-Horta, former President of Timor-Leste and Nobel Peace Prize laureate¹

The Australia Institute's Democracy & Accountability Program was founded in 2021 to improve the quality of Australian governance and heighten public trust in politics and democracy. Although the program is new, the Australia Institute has written about democracy and accountability issues since it was founded in 1994.

We welcome the opportunity to make a submission to the inquiry into the Constitution Alteration (Freedom of Expression and Freedom of the Press) Bill 2019. With freedom of expression under threat in Australia, Senator Rex Patrick's Bill is a timely intervention.

Some politicians and media commentators were affronted by the decision by Rugby Australia to sack Israel Folau over offensive social media posts. However, as observed by journalist Markus Mannheim, the speech of federal public servants is similarly limited.² The occasional high-profile case attracts attention, but unjust laws and unfair prosecutions have a chilling effect on tens of thousands of journalists, hundreds of thousands of public servants and ultimately tens of millions of Australians.

Our existing laws and constitutional protections have proven insufficient to secure free speech and free expression in this country. Federal and state governments and their departments and agencies, as well as publicly-funded institutions like universities, police and national broadcasters, have not only failed to safeguard freedom of expression in this country – they have at times actively undermined it.

A constitutional right to freedom of expression would help protect Australians from the improper exercise of government power, which has seen careers destroyed, academic speech bowdlerised, journalists raided, artworks removed, truth-tellers prosecuted, whistleblowers punished and victims of sexual assault silenced.

¹ Bennett (2020) *The government's lack of transparency can't go unchecked*, <https://www.canberratimes.com.au/story/6910215/the-governments-lack-of-transparency-cant-go-unchecked/>

² Mannheim (2019) *What if Israel Folau were a bureaucrat?*, <https://www.canberratimes.com.au/story/6246220/what-if-israel-folau-were-a-bureaucrat/>

Freedom of expression under threat

There have been worrying attacks on freedom of speech, particularly in the last decade. Raids on journalists' homes and workplaces and prosecutions of whistleblowers who exposed wrongdoing are some of the most prominent examples, but there is also evidence that the subtle power of the state has been used to encourage self-censorship.

Corporations, civil society and even social pressure can also quash freedom of expression. The employer–employee relationship is particularly vulnerable to undue suppression of speech, and social shaming can be unnecessarily and even cruelly punitive.³

However, given the scope of the Bill is limited to the Commonwealth and the states and territories, we have limited our case studies to risks from government. That is not to say that every case raised in this submission would be affected by a constitutional right to freedom of expression.

LEGAL THREATS TOWARDS JOURNALISTS

Serious concerns with the lack of protection for journalists under the law have been discussed in depth in Australia since 2019, when the Australian Federal Police (AFP) raided the home of journalist Annika Smethurst and the ABC's Sydney headquarters, after separate stories based on leaked documents. The AFP had also planned to raid the Sydney headquarters of News Corporation the day after it raided the ABC.⁴

The police sought the fingerprints of the two ABC journalists involved, Dan Oakes and Sam Clark, and confirmed that they were suspects in relation to three alleged offences. The AFP requested Oakes' travel details from Qantas, which Qantas apparently complied with – which may be in breach of privacy laws.⁵

These raids were not an aberration. In one year, the AFP used warrants to access journalists' communications metadata 58 times.⁶

³ See for example Bornstein (2019) *Did you cheer for Folau's sacking? Sorry, but you can't have it both ways*, <https://www.abc.net.au/news/2019-08-07/israel-folau-should-be-able-to-go-back-to-work/11386826>; Ronson (2015) *So You've Been Publicly Shamed*, Pan Macmillan.

⁴ Lyons (2019) *AFP wanted fingerprints of journalists behind ABC special forces investigation*, <https://www.abc.net.au/news/2019-07-15/abc-raids-australian-federal-police-press-freedom/11309810>

⁵ Lyons (2019) *AFP wanted fingerprints of journalists behind ABC special forces investigation*.

⁶ Shields (2019) *Federal police accessed the metadata of journalists nearly 60 times*, <https://www.smh.com.au/politics/federal/federal-police-accessed-the-metadata-of-journalists-nearly-60-times-20190708-p52598.html>

Nor are the problems limited to federal laws. Earlier this year, a Queensland journalist faced up to five years in jail for refusing to reveal his sources, in a secret prosecution that was not even listed in the daily court list.⁷ Meanwhile, Friendlyjordies YouTube channel producer Kristo Langker was arrested by the NSW Police Fixated Persons Investigation Unit, which former Director of Public Prosecutions Nicholas Cowdery warned did not seem to fit the unit's purpose. Friendlyjordies was critical of Deputy Premier John Barilaro.⁸

Ministerial discretion shows arbitrariness of prosecutions

Following the AFP raids on journalists, then Attorney-General Christian Porter required certain prosecutions of journalists to have his formal approval.⁹ While additional oversight is good, this discretion creates the risk that an Attorney-General could decide whether journalists are prosecuted in an arbitrary or partisan manner.

That a change in Attorney-General can dictate whether a person is prosecuted or not is demonstrated by the prosecution of Witness K and Bernard Collaery (discussed below), which was not authorised to proceed during George Brandis' tenure as Attorney-General despite Commonwealth prosecutors recommending prosecution.¹⁰

PROSECUTIONS OF WHISTLEBLOWERS

Recent years have seen the disturbing prosecution of whistleblowers, most notably secretive trials of whistleblower Witness K and his lawyer Bernard Collaery. The pair exposed the apparent misuse of Australian intelligence for commercial benefit at the expense of Timor-Leste. The prosecution has had a "chilling effect", discouraging others from blowing the whistle.¹¹

Prosecutors are also pursuing Richard Boyle who exposed "heavy-handed tactics to recover debts from small business owners" by the Australian Tax Office (ATO). Boyle's public interest

⁷ Wordsworth (2021) *Push for shield laws in Queensland as journalist faces possible jail for protecting sources in landmark court case*, <https://www.abc.net.au/news/2021-02-20/qld-analysis-the-mysterious-case-of-f-and-threat-to-journalism/13172604>

⁸ Knaus (2021) *Friendlyjordies arrest by NSW police fixated persons unit questioned by former top prosecutor*, <http://www.theguardian.com/australia-news/2021/jun/18/friendlyjordies-arrest-by-nsw-police-fixated-persons-unit-questioned-by-former-top-prosecutor>

⁹ Worthington (2019) *Attorney-General orders prosecutors seek his approval before charging journalists*, <https://www.abc.net.au/news/2019-09-30/attorney-general-grants-journalists-limited-protection/11560888>

¹⁰ Byrne (2021) *New documents shed light on the history of the man behind the moniker "Witness K,"* <https://www.abc.net.au/news/2021-07-04/court-document-witness-k-bernard-collaery-cleared-public-release/100263168>

¹¹ Knaus (2018) *Australia urged to drop Witness K prosecution due to "chilling effect" on democracy*, <http://www.theguardian.com/australia-news/2018/jul/24/australia-urged-to-drop-witness-k-prosecution-due-to-chilling-effect-on-democracy>

disclosure through the correct channels was given only a “superficial” investigation by the ATO. Prosecutors have already dropped 42 of the 66 charges they brought against Boyle, but the remaining charges could mean he spends the rest of his life in jail.¹²

David McBride is being prosecuted for providing information to the ABC on alleged war crimes committed by Australian soldiers, which resulted in the *Four Corners* story ‘The Afghan Files’.¹³ The Brereton inquiry subsequently identified 39 Afghan men and children allegedly killed by Australian soldiers, none of whom were combatants or killed in the heat of battle.¹⁴

SUPPRESSION OF THE RIGHT TO PROTEST

There are worrying examples of government interference in the right to protest:

- As of March 2021, the Australian Building and Construction Commission had spent almost \$500,000 suing Lendlease for displaying Eureka flags and posters on its sites, because “such practices can result in an implication that membership of the building association [trade union] is a mandatory requirement of employment”. The case arises because the Australian Government’s building codes for work which it funds forbid the display of “building association” symbols. The Eureka flag is associated with the construction union.¹⁵
- Australia has “ag-gag” laws that penalise standard animal advocacy to a disproportionate extent; these laws are “a serious threat to both freedom of speech and democratic debate”.¹⁶
- The City of Sydney removed a Black Lives Matter inspired mural on private property less than a day after receiving at least four calls from NSW Police pressuring them to remove it.¹⁷

¹² Khadem (2021) *Prosecutors refuse to drop case against ATO whistleblower Richard Boyle*, <https://www.abc.net.au/news/2021-04-29/prosecutors-proceed-case-against-ato-whistleblower-richard-boyle/100105710>

¹³ Kennedy (2019) *ABC seeks seat at table in alleged Afghan Files whistleblower’s trial*, <https://www.abc.net.au/news/2019-06-27/abc-seeks-access-to-alleged-whistleblower-david-mcbride-trial/11257662>

¹⁴ Brereton (2021) *Afghanistan Inquiry Report*, p. 29, <https://afghanistaninquiry.defence.gov.au/>

¹⁵ Bonyhady (2021) *Building watchdog spends almost \$500,000 challenging Eureka flag displays*, <https://www.smh.com.au/politics/federal/building-watchdog-spends-almost-500-000-challenging-eureka-flag-displays-20210324-p57dt6.html>

¹⁶ Gelber & O’Sullivan (2020) *Does democratic self-rule sometimes necessitate illegal activity?*, <https://www.abc.net.au/religion/democracy-free-speech-and-australian-ag-gag-laws/12713458>

¹⁷ Yussuf (2021) *“Need it done ASAP”: NSW Police pushed for Black Lives Matter mural on private property to be removed*, <https://www.abc.net.au/news/2021-06-04/nsw-police-pushed-for-black-lives-matter-mural-to-be-removed/13363898>

- Centrelink has leaked the personal data of critics.¹⁸
- In 2017, union leaders and elected politicians were banned from joining the picket line outside a stevedore company.¹⁹

There have been proposals to further limit rights.

- The Morrison Government’s proposed changes to charities regulation could “curb certain types of political protests and freedom of speech”, according to a Liberal-chaired parliamentary committee.²⁰
- During 2020, Liberal MP Andrew Laming called for Black Lives Matter protesters to be “stripped of their welfare payments”, with then Finance Minister Mathias Cormann saying, “that would be a conversation worth having”.²¹

SECONDARY BOYCOTT LAWS

Australia’s extremely restrictive “secondary boycott” laws have been in place since the 1970s, and in more limited form for many decades before that. The laws restrict people from working in concert to put pressure on one entity via another.

These laws restrict freedom of expression and conscience in violation of an international convention Australia is signatory to. Secondary boycotts have a proud history in Australia, being used against the Japanese war machine during World War II, developers planning to destroy heritage buildings and “ships of shame” that underpay workers.

In 2019, the Government flagged that it was considering how to make secondary boycotts even more restrictive. For more details, see *Secondary boycotts in Australia*.²²

¹⁸ Seccombe (2017) *Centrelink leaks more private data*,
<https://www.thesaturdaypaper.com.au/2017/04/08/centrelink-leaks-more-private-data/14915736004474>

¹⁹ Toscano (2017) *Union leaders banned from port picket line in rare court ruling*,
<https://www.smh.com.au/business/companies/union-leaders-banned-from-port-picket-line-in-rare-court-ruling-20171212-p4yxmg.html>

²⁰ Hurst (2021) *Liberal-led committee raises concerns about Morrison government’s charity crackdown*,
<http://www.theguardian.com/australia-news/2021/jul/17/liberal-led-committee-raises-concerns-about-morrison-governments-charity-crackdown>

²¹ Sky News Australia (2020) *Protesters must be stripped of welfare payments: Liberal MP*,
<https://www.skynews.com.au/australia-news/coronavirus/protesters-must-be-stripped-of-welfare-payments-liberal-mp/video/fd21ea0e3a6524eba7d2a7a56dd8debc>

²² Browne (2019) *Secondary boycotts in Australia - history and context*,
<https://australiainstitute.org.au/report/secondary-boycotts-in-australia-history-and-context/>

AUSTRALIAN GOVERNMENT INTERFERENCE

There are disturbing examples of government contracts either not being renewed or being threatened to not be renewed when those involved act in a way the government is unhappy with.

In 2018, the Department of Veterans Affairs refused to extend lawyer Greg Phillipson's contract one day after he said then Home Affairs Minister Peter Dutton's intervention in an au pair's visa application was "quite unusual".²³

In 2021, military sociologist Samantha Cromptvoets planned to release a book based on her interviews with Special Forces soldiers, which included disclosures of alleged war crimes. In response, Defence Minister Peter Dutton reportedly "suggested Samantha Cromptvoets would be cut off from receiving future contracts to research military culture."²⁴

These apparently retaliatory measures may explain why second parties respond to government pressure, even in the apparent absence of any explicit threat.

The government's Australian Antarctic Division (AAD) contacted P&O Maritime over a 2020 Facebook post by one of its employees which was critical of Prime Minister Scott Morrison's climate change policy. P&O Maritime "instructed" the employee to remove the post. The AAD claims it made "no specific request" about what P&O Maritime should do about the post.²⁵

Two speakers were "disinvited" from a cybersecurity event in 2019 at the last moment, apparently due to pressure from the government's Australian Cyber Security Centre.²⁶

In 2019, the Attorney-General's Department wrote to then Channel Nine CEO Hugh Marks encouraging the channel to do a "self assessment" over footage it aired showing then One Nation Queensland Leader Steve Dickson "making derogatory comments and groping

²³ Koziol (2018) *Lawyer who spoke out about au pair saga loses government contract the day after TV interview airs*, <https://www.smh.com.au/politics/federal/lawyer-who-spoke-out-about-au-pair-saga-loses-government-contract-the-day-after-tv-interview-went-to-air-20180906-p5024p.html>

²⁴ Galloway (2021) *War crimes study author Samantha Cromptvoets says fixing culture integral to national security*, <https://www.theage.com.au/politics/federal/i-won-t-be-bullied-or-intimidated-war-crimes-study-author-says-fixing-culture-integral-to-national-security-20210611-p5808s.html>

²⁵ Readfearn (2020) *Aurora Australis officer asked to remove post criticising Scott Morrison's climate policy*, <http://www.theguardian.com/world/2020/feb/19/aurora-australis-remove-social-media-post-criticising-scott-morrison-climate-policy-antarctica>

²⁶ Bogle (2019) *"Hypocritical and ironic": NSA whistleblower dropped from speaking at Melbourne cybersecurity conference*, <https://www.abc.net.au/news/science/2019-10-08/us-whistleblower-speech-cancelled-at-cybersecurity-conference/11581986>

dancers in a US strip club”. The department sent the “chilling” letter “despite no law being broken”. To its credit, Nine does not appear to have been influenced by the intervention.²⁷

After Australian of the Year Grace Tame spoke out, the Australian Government launched an “urgent review of the Australia Day Council”. The Government claims its urgent review was not related to Ms Tame’s speech.²⁸

Environment Department senior officials “spent months pressuring” scientists researching how much Australia spends on endangered wildlife. The scientists participate in a government-funded program. One of the department’s recommendations, to publish the paper under different names, “could have qualified as academic misconduct”. The scientists “ultimately agreed to distribute [the paper] only within the academic community, with no wider promotion through media”.²⁹

This is not an isolated incident. In a survey of Australian ecologists and conservation scientists working in government, industry and universities, one third of government scientists (34%) reported undue modification of their work by their employers. Over half (52%) of government scientists reported that they had been prohibited from communicating their work publicly. Even industry scientists reported less interference than government scientists.³⁰

Taken together, these cases paint a worrying picture of government interference. This interference sometimes unduly changes behaviour, even to the extent of academic misconduct, and it can be punitive and improperly broad, extending to speech that has not broken any laws.

²⁷ Mason (2019) *Government threatens Nine over Steve Dickson strip club story*, <https://www.afr.com/companies/media-and-marketing/government-threatens-nine-over-steve-dickson-strip-club-story-20190813-p52gj1>

²⁸ Middleton (2021) *Exclusive: government review follows Tame appointment*, <https://www.thesaturdaypaper.com.au/news/politics/2021/05/01/exclusive-government-review-follows-tame-appointment/161979120011566>

²⁹ Cox (2021) *Environment department tried to bury research that found huge underspend on Australian threatened species*, <http://www.theguardian.com/environment/2021/may/14/environment-department-tried-to-bury-research-that-found-huge-underspend-on-australian-threatened-species>

³⁰ Driscoll et al. (2020) *Consequences of information suppression in ecological and conservation sciences*, <https://conbio.onlinelibrary.wiley.com/doi/abs/10.1111/conl.12757>

PUBLIC SERVANTS' RIGHT TO FREE SPEECH

There is a crackdown occurring in the [Australian Public Service] around people's use of social channels and I think that's a worrying development.

We could end up with the only people willing to work in the public service being those willing to be silenced.

Craig Thomler, social media expert³¹

The suppression of public servants' free speech in Australia has gone too far, and could be moderated by constitutional protection of freedom of expression.

Constitutional protection of freedom of expression would not allow public servants to speak totally freely. First Amendment case law in the United States distinguishes between a public servant speaking as an "aggrieved employee" and one speaking as a "concerned citizen". There is also a balancing test between the interests of the employee as a citizen and the employer's interest in efficiency.³²

Chilling effect of policy

Anecdotally, many public servants report self-censoring well beyond what is legally required of them. The influence of social media policies, high-profile disciplinary action and informal warnings or instruction given by superiors is having a chilling effect on perfectly legal speech.

The vague, threatening social media guidance prepared by the Australian Public Service Commission (APSC) is a classic demonstration of why and how public servants would feel censored.

As just one example, the guidance on signing petitions only identifies petitions that are "critical of a government policy, an agency, or the Government" as a potential problem. This behaviour "may pose a higher or lower risk, having regard to all the circumstances". What

³¹ Anderson & Mannheim (2013) *Public servants warned: watch what you say*, <https://www.smh.com.au/public-service/public-servants-warned-watch-what-you-say-20130813-2rt6e.html>

³² See for example Legal Information Institute (n.d.) *Government as employer: Free expression generally*, <https://www.law.cornell.edu/constitution-conan/amendment-1/government-as-employer-free-expression-generally>; Renner (n.d.) *Retaliation - public employees and First Amendment rights*, <https://www.workplacefairness.org/retaliation-public-employees>; for detailed background, see Dallago (2016) *Silence or noise?: The future of public employees free speech rights and the United States Supreme Court's jurisprudence on the scope of the right*, <https://scholarlycommons.law.wlu.edu/crsj/vol22/iss1/9>

circumstances? The reader is only told: “This may have a different risk profile than starting or sharing a petition, and will need to be assessed having regard to all the risk factors.”³³

The guidance does not even say that signing a petition *does* have a different risk profile than starting a petition (which the reader was told earlier is “higher risk behaviour”), just that it *might*. The guidance contains no guidance on what the “different risk profile” of signing a petition might be. The different risk profile cannot be that there are different “risk factors”, because the public servant is told that “all the risk factors” must be regarded.

The risk factors are equally opaque. The “Connection between the topic and your work” risk factor does not even say that posting about political matters *is* riskier than posting about one’s pets or the football, only that it may be viewed as inherently riskier.

In practice, public servants report that not only is the guidance confusing, but also that their managers are unable or unwilling to tell them what speech is or is not permissible.³⁴

As journalist Markus Mannheim argues, taken to its logical conclusion, the APSC’s attitude to public servant speech would extend to a ban on public servants joining political parties.³⁵

Journalist and former public servant Greg Jericho, whose own case is discussed below, warns:

The consequence of these guidelines is that it gives departments and supervisors the ability to use an employee’s social media life for personal reasons.

If you have a work conflict with someone, there is now the opportunity for departments and supervisors to go through someone’s social media and find reasons to discipline them when there is nothing actually wrong with their work.

I am certainly aware of incidents where that has occurred and where people are worried about it occurring.³⁶

That the social media “guidance” for public servants provides no actual guidance is not an accident, nor is it a quaint example of overly bureaucratic language. It is a deliberate

³³ Australian Public Service Commission (2020) *Social media: guidance for Australian Public Service employees and agencies*, <https://www.apsc.gov.au/working-aps/integrity/social-media-guidance-australian-public-service-employees-and-agencies>

³⁴ The following source is from 2016, but there is no reason to believe that conditions have improved: Easton (2016) *Public servants feel oppressed by social media rules*, <https://www.themandarin.com.au/72799-public-servants-feel-oppressed-by-social-media-rules/>

³⁵ Mannheim (2014) *Impartial public servants deserve their freedom of tweets*, <https://www.canberratimes.com.au/story/6143262/impartial-public-servants-deserve-their-freedom-of-tweets/>

³⁶ Roberts (2019) “Killing the headache by cutting off the head”: Groggs Gamut writer weighs in on Banerji case, <https://the-riotact.com/killing-the-headache-by-cutting-off-the-head-groggs-gamut-writer-weighs-in-on-banerji-case/317116>

attempt to muddy the waters, to chill public servant speech well beyond what employment law allows. It makes a mockery of the legal principle that “everything which is not forbidden is allowed” by refusing to explain what is forbidden – and, by extension, what is allowed.

Change in approach

The current social media guidance is part of a decade-long trend. The public service culture to blogging was described as “crazy” by economist and Chair of the Government 2.0 Taskforce Nicholas Gruen as early as 2010.³⁷ In 2012, the Gillard Government’s new social media guidelines were described as “laughable” by journalist Greg Jericho, and as a retrograde step.³⁸

While the 2012 code is unnecessarily restrictive, it was clearer than the current social media guidance and struck a very different tone. The 2012 code says:

... online engagement by public servants, involving robust professional discussion as part of their duties or as private citizens, benefits their agencies, their professional development, those with whom they are engaged and the Australian public. This engagement should be enabled and encouraged.³⁹

There is no acknowledgement in the current social media guidance that online engagement by public servants is good, or that there is a responsibility to enable and encourage it. The closest the guidance comes is in acknowledging that public servants “have a right to participate in online society [and] engage in community life”.⁴⁰

Supporters not penalised like critics

In Australia, a worrying trend is emerging: only public servants who are critical of government policy and administration face consequences for their speech. ‘Too much’ praise of government policy or the Australian Government is no more impartial than ‘too much’ criticism, but there are no records of public servants losing their jobs for praising the government too enthusiastically.

While government sources sometimes acknowledge this point, they frequently slip back into treating only criticism as worthy of sanction. For example, the social media guidance does

³⁷ Sharma (2010) *Public servant blog mentality “crazy”*: Gruen, <https://www.zdnet.com/article/public-servant-blog-mentality-crazy-gruen/>

³⁸ Simmons (2012) *Social media rules for public servants “laughable,”* <https://www.abc.net.au/news/2012-01-19/new-public-service-social-media-rules-27laughable27/3780926>

³⁹ Australian Public Service Commission (2012) *APS Values and Code of Conduct in practice (archived)*, <https://web.archive.org/web/20120316183237/http://www.apsc.gov.au/values/conductguidelines5.htm>

⁴⁰ Australian Public Service Commission (2020) *Social media: guidance for Australian Public Service employees and agencies*

say “extreme pro-Government posts raise the same concerns as those that are extremely anti-Government”, but most risky behaviours identified in the guidance involve criticising the government, not praising it.

Likewise, in 2013, senior public servant John Sheridan specifically said: “If you spend time bagging your organisation online or offline, you should not think that your employment is going to continue unconditionally”.⁴¹

Public servants critical of the government have identified this discrepancy. In two cases discussed in the examples below, public servants working in the Immigration Department lost their jobs because they criticised immigration policy. They described a double-standard between how the department handled their critical posts, and how it handled those of Sandi Logan, then the department’s national communications manager. One claimed that the department “wilfully ignore[d]” the *Public Service Act* as it would have applied to Logan.⁴²

Logan had “been a fiery presence on Twitter for several years, using his account to make announcements, defend the conduct of his department and to clash with journalists and other critics”. He also called two foreign journalists “crazy” ahead of the 2013 election.⁴³ Among Logan’s tweets was one that said that in his role, “politeness is optional extra” and another calling those discussing self-harm in Nauru detention “irresponsible”.⁴⁴

This year, Home Affairs Secretary Mike Pezzullo circulated an extraordinary Anzac Day message to staff, with dark warnings about how “the drums of war beat” and opinions on when and why Australia should go to war and how people on the home front should conduct themselves. The letter has been criticised by the Labor Opposition, for not being sufficiently sober and not necessarily being in line with government policy, but the government has supported Pezzullo.⁴⁵

⁴¹ Towell (2013) *Public servants bagging employers to suffer severe consequences*, <https://www.canberratimes.com.au/story/6151337/public-servants-bagging-employers-to-suffer-severe-consequences/>

⁴² Robinson (2013) *Critical tweets cited in unfair dismissal claim*, <https://www.theaustralian.com.au/business/media/critical-tweets-cited-in-unfair-dismissal-claim/news-story/1ffe3a0029de5d39e1aca4e197cc80d4>

⁴³ Towell (2013) *Sandi’s Twitter services no longer required: Coalition*, <https://www.canberratimes.com.au/story/6151370/sandis-twitter-services-no-longer-required-coalition/>

⁴⁴ Robinson (2013) *Critical tweets cited in unfair dismissal claim*

⁴⁵ Galloway (2021) *Labor criticises Home Affairs boss’ ‘drums of war’ Anzac Day message*, <https://www.smh.com.au/politics/federal/labor-criticises-home-affairs-boss-drums-of-war-anzac-day-message-20210427-p57mbv.html>; Karp (2021) *Home affairs secretary Mike Pezzullo urged to ‘tone it down’ after ‘drums of war’ speech*, <http://www.theguardian.com/australia-news/2021/apr/27/home-affairs-secretary-mike-pezzullo-says-australia-cant-avoid-drums-of-war-at-cost-to-liberty>; Pezzullo (2021) *ANZAC Day message*, <https://www.homeaffairs.gov.au/news-media/speeches/2021/25-april-anzac-day-message>

Until earlier this year, Parliamentary Library researcher Geoff Wade had been a prolific Twitter user. Wade has written many tweets critical of the Chinese government and people he believes to be influenced by China. Wade and the Department of Parliamentary Services are now being sued for defamation and copyright infringement by news proprietor Marcus Reubenstein for tweets apparently made while Wade was at work. Critics of Wade's posts, including Reubenstein, see a double standard in how the government allowed Wade to continue to post for years while other public servants lost their jobs for their social media activities.⁴⁶

John Wilson observed in *The Mandarin* ahead of the High Court hearing for the dismissed public servant Michaela Banerji:

The fact that her employment with the Commonwealth was terminated because she failed to uphold the 'good reputation ... of the APS' leads unavoidably to the conclusion that she would not have lost her job if she supported the Government's refugee policies.

This is chilling.⁴⁷

Examples of public servant speech under threat

Parliamentary employees reminded they could go to jail after talking to journalists (2021):

Brittany Higgins was allegedly raped in Parliament House in 2019. Prime Minister Scott Morrison claimed that there was a security breach at Parliament House on that night. On the 'Don't Ask, Don't Tell' episode of *Four Corners*, a Parliament House security guard questioned Morrison's claim because, in her view, it wrongly implied that the guards did not follow correct procedures on that night.⁴⁸

Five days before the episode aired, the Department of Parliamentary Services released a media contact policy that warned employees should "exercise extreme caution" when talking to journalists and refer inquiries to the media team, or be at risk of breaching the

⁴⁶ Bonyhady (2021) *A Chinese Communist Party watcher in Parliament tweeted 42,000 times. Now he's been told to take a break*, <https://www.smh.com.au/politics/federal/a-chinese-communist-party-watcher-in-parliament-tweeted-42-000-times-now-he-s-been-told-to-stop-20210428-p57n1y.html>; Mitchell (2021) *Parliamentary researcher, Commonwealth sued for defamation over tweets*, <https://www.smh.com.au/national/nsw/parliamentary-researcher-commonwealth-sued-for-defamation-over-tweets-20210806-p58gkf.html>; Reubenstein (2021) *Department of Parliamentary Services and its privilege*, <https://apac.news/department-of-parliamentary-services-and-its-privilege/>

⁴⁷ Wilson (2018) *LaLegale's speech case: the snowball that will start an avalanche?*, <https://www.themandarin.com.au/96071-banerji-and-comcare-compensation-the-snowball-that-will-start-an-avalanche/>

⁴⁸ Nicholls, Koloff, Selvaratnam, & Russell (2021) *Security guard who found Brittany Higgins on night of alleged rape speaks out*, <https://www.abc.net.au/news/2021-03-22/four-corners-security-guard-brittany-higgins/13259262>

code of conduct or facing up to two years in jail. The department “unequivocally” denies any connection between the updated policy and the *Four Corners* episode.⁴⁹

Auditor-General gagged from reading publicly available document (2021): Before a Senate committee hearing, it emerged that the Auditor-General was subject to a certificate issued by Christian Porter when he was Attorney-General. The certificate bars the Auditor-General from reading aloud a public document which he wrote. As of May 2021, Attorney-General Michaelia Cash had not lifted the gag order.⁵⁰

Public servant told to remove blog post or be sacked (2020): Public servant Josh Krook was told he must either remove a blog post “arguing social isolation was good for big tech companies” or be sacked. The blog post was not critical of the government or government policy. He was asked to remove text from another blog post that reiterated sentiments already expressed by Health Minister Greg Hunt and former Chief Medical Officer Brendan Murphy. He was also told any future public writing he did would have to be vetted.

The supervisor reportedly told Krook that the blog post “risked damaging the relationship the government has with the big tech companies”, and that “it would have been fine to write [the article], had [Krook] been positive about the big tech companies”.⁵¹

Public servant stood down over activism links (2020): A Department of Foreign Affairs and Trade senior public servant was stood down while her links to her son’s animal rights activism were investigated. The public servant was sanctioned after an investigation by Clayton Utz and resigned soon afterwards.⁵²

⁴⁹ Canales (2021) *Parliament staff gagged from speaking to media*,

<https://www.canberratimes.com.au/story/7220606/parliament-staff-gagged-from-speaking-to-media/>

⁵⁰ Patrick (2021) *It’s a public document. You and I can read it aloud. Everyone can read it aloud - except the Auditor-General, who wrote it, and his @ANAO_Australia staff. Why? Because @cporterwa improperly issued a censoring certificate to hide embarrassing failures by the Government. #auspol* <https://t.co/jBFSetdCEV>, https://twitter.com/Senator_Patrick/status/1395205595674808322

⁵¹ Knaus (2020) *Australian public servant condemns censorship after blogpost cost him his job*, <http://www.theguardian.com/australia-news/2020/aug/24/australian-public-servant-condemns-censorship-after-blogpost-cost-him-his-job>

⁵² Sullivan (2019) *DFAT investigates senior employee’s alleged links to animal activist websites*, <https://www.abc.net.au/news/2019-11-13/julie-delforce-stood-down-from-dfat/11699860>; (2020) *Activist’s mother resigns from DFAT following investigation into Aussie Farms website connections*, <https://www.abc.net.au/news/2020-05-18/julie-delforce-resigns-from-dfat-following-investigation/12260092>

Constitution does not protect public servant over sacking for anonymous tweets (2019):

The High Court found that the implied freedom of political communication did not protect public servant Michaela Banerji from being sacked for criticising government policy.⁵³

Banerji's Twitter posts were anonymous, and did not reveal anything not already on the public record. Nor did she identify herself as a public servant. The Twitter posts were made on a private device, mostly outside of work hours. Nonetheless, in 2013 she was fired from her job in the Department of Immigration and Border Protection after departmental executive Sandi Logan "raised concerns". Ironically, it was the department that made public the fact that the Twitter posts were from a public servant.⁵⁴

While Logan agrees with the finding in Banerji's case, he does say that the APSC's social media guidance goes too far.⁵⁵

Centrelink employee dismissed for helping people navigate Centrelink (2015): Centrelink employee Daniel Starr spent a decade posting about Centrelink on internet forums, including providing information on how long claims processing was going to take and correcting misinformation from the department's social media officer. Starr also made some offensive and ableist comments.⁵⁶

Starr was found to have breached the APS code, including by "criticising the government", "encouraging members of the public to complain to their local MPs about [Centrelink] service levels" and making "negative comments about the policies and programs of the department".⁵⁷

⁵³ Hayne (2019) *A public servant was fired for social media posts her employer disagreed with — sound familiar?*, <https://www.abc.net.au/news/2019-08-08/high-court-free-speech-banerji-folau-public-service/11392974>

⁵⁴ Byrne (2019) *"A loss for all of us": Public servant loses landmark free speech High Court case*, <https://www.abc.net.au/news/2019-08-07/high-court-free-speech-public-service--banerji-decision/11377990>; Pender (2019) *"A powerful chill"? Comcare v Banerji [2019] HCA 23 and the political expression of public servants – AUSPUBLAW*, <https://auspublaw.org/2019/08/a-powerful-chill-comcare-v-banerji-2019-hca-23/>; Pender & Wilson (2020) *The new APS social media policy in practice*, <https://www.canberratimes.com.au/story/6950707/the-new-aps-social-media-policy-in-practice/>; Wilson (2018) *LaLegale's speech case: the snowball that will start an avalanche?*

⁵⁵ Mannheim (2019) *Banerji's ex-boss "satisfied" by ruling but warns against overreach*, <https://www.canberratimes.com.au/story/6317113/banerjis-ex-boss-satisfied-by-ruling-but-warns-against-overreach/>

⁵⁶ Wilson (2016) *Daniel Starr v Department of Human Services: we need clearer laws on public servants' free speech*, <https://www.smh.com.au/public-service/daniel-starr-v-department-of-human-services-we-need-clearer-laws-on-public-servants-free-speech-20160426-gof3nf.html>

⁵⁷ Pender & Wilson (2020) *The new APS social media policy in practice*; Wilson (2016) *Daniel Starr v Department of Human Services: we need clearer laws on public servants' free speech*

The Fair Work Commission ordered Starr to be reinstated.⁵⁸

Robin Reich docked pay for telling minister to resign; fired for blog posts (2011–2013): In 2011, Department of Immigration and Citizenship officer Robin Reich had his pay docked by \$1,280 for writing a letter to then Immigration Minister Chris Bowen that did not show sufficient “courtesy” or “respect” (the letter said Bowen should resign).⁵⁹

Reich was later stood down for a blog post critical of Serco, but an investigation found no breach of the code. He was then fired in 2012 for a subsequent blog post, which was supposedly a “general breach” of the *Public Service Act*.⁶⁰

Anonymous blog author outed by *The Australian* (2010): The anonymous public servant author of popular blog “Grog’s Gamut” was revealed in *The Australian* to be Greg Jericho. While Jericho was cleared of wrongdoing,⁶¹ the APS code was subsequently modified in a manner seemingly designed specifically to capture cases like Jericho’s in the future.⁶²

PUBLIC BROADCASTERS

Commentators and politicians have made a habit of criticising political speech by Australian Broadcasting Corporation (ABC) and Special Broadcasting Service (SBS) employees and contractors, including calling for the curtailing of free speech rights of journalists.

The public broadcasters have at times appeared to succumb to political pressure in their employment and programming decisions – which is understandable, though not acceptable, given the financial power over the broadcasters that the government wields.

Perceived government pressure

There is a particularly worrying trend of ministers applying pressure to the public broadcasters. It is not inappropriate for anyone, including ministers, to complain if they believe that the ABC or SBS has reported something inaccurately. However, ministers have

⁵⁸ Wilson (2016) *Daniel Starr v Department of Human Services: we need clearer laws on public servants’ free speech*

⁵⁹ Daily Telegraph (2011) *Public servant fined for “rude” email*, <https://www.dailytelegraph.com.au/youve-got-mail-public-servant-fined-for-email-to-immigration-minister-chris-bowen-/news-story/57dc5317ba212cdd3e3caf578c827b08>

⁶⁰ Robinson (2013) *Critical tweets cited in unfair dismissal claim*

⁶¹ Mannheim (2016) *Government reconsiders its muzzle on public servants’ personal opinions*, <https://www.smh.com.au/public-service/government-reconsiders-its-muzzle-on-public-servants-personal-opinions-20161115-gspohb.html>

⁶² Simmons (2012) *Social media rules for public servants “laughable”*

at times complained about articles without inaccuracies or expressed their concerns so forcefully that they may be misinterpreted as commands or threats.

There is a real cost to the public from a cowed broadcaster. In 2018, the ABC returned thousands of pages of documents to the Australian Government after limited reporting.⁶³ With these government documents never properly scrutinised, the public is kept in the dark about the operations of its government. It also encourages others who subsequently come across confidential documents to share them with other journalists, who may not have the ABC's rigorous and fair policies.

Dismissal of Michelle Guthrie; Emma Alberici redundancy (2017–2020): In September 2018, then ABC Chair Justin Milne asked then Managing Director Michelle Guthrie to resign, apparently criticising her “leadership style”.⁶⁴ When she refused, the ABC Board voted to fire her.⁶⁵ Milne is a friend of Malcolm Turnbull, who was Prime Minister during some of the events leading up to Guthrie's dismissal.

It emerged that Guthrie had been subject to concerning comments from Milne.

Milne had ordered Guthrie to fire economics correspondent Emma Alberici, who had drawn the ire of the government based on what she had written about the government's proposed company tax cuts. Milne wrote:

They [the government] hate her.

We are tarred with her brush. I think it's simple. Get rid of her. We need to save the ABC - not Emma. There is no guarantee [the Coalition] will lose the next election.⁶⁶

Prime Minister Malcolm Turnbull had also complained to Guthrie about then 7:30 chief political correspondent Andrew Probyn. Turnbull was reportedly “particularly angry” when Probyn was promoted to political editor later that year. Milne reportedly told Guthrie: “You just have to shoot him [Probyn]”. Milne denies saying this.⁶⁷

⁶³ Keane (2018) *ABC admits it ignored “thousands of pages” of Cabinet files*, <https://www.crikey.com.au/2018/04/11/abc-admits-it-ignored-thousands-of-pages-of-cabinet-files/>

⁶⁴ Duke, Carmody, & Koziol (2018) *Michelle Guthrie: the inside story behind her sacking*, <https://www.smh.com.au/business/companies/michelle-guthrie-the-inside-story-behind-her-sacking-20180924-p505ok.html>

⁶⁵ Meade (2018) *Why the ABC board sacked Michelle Guthrie*, <http://www.theguardian.com/media/2018/sep/25/why-the-abc-board-sacked-michelle-guthrie>

⁶⁶ Koziol & Duke (2018) *“They hate her”: emails show ABC chairman told Michelle Guthrie to fire Emma Alberici*, <https://www.smh.com.au/politics/federal/they-hate-her-emails-show-abc-chairman-told-michelle-guthrie-to-fire-emma-alberici-20180925-p505z4.html>

⁶⁷ Banger (2018) *‘Shoot him’: ABC chairman to Guthrie over Andrew Probyn*, [Free speech in the lucky country](https://thewest.com.au/business/media/you-just-have-to-shoot-him-abc-chairman-justin-milnes-order-to-michelle-guthrie-about-political-editor-andrew-probyn-because-malcolm-turnbull-hated-him-ng-b88973555z; Duke et al. (2018) Michelle Guthrie: the inside story behind her sacking; Meade (2018) Mitch</p></div><div data-bbox=)

Guthrie reports that Milne warned her that she was “‘putting the future of the ABC at risk’ and jeopardising ‘half a billion dollars’ in funding for [Milne’s] digitisation scheme”. Turnbull claims “I gave no instructions to the ABC chairman on any matter”.⁶⁸

Milne also warned the ABC against moving the day of the Triple J Hottest 100 on the grounds that “Malcolm [Turnbull] will go ballistic”.⁶⁹

Soon after the dismissal of Guthrie, Milne resigned after it appeared he had lost the confidence of the government.⁷⁰

A departmental inquiry into editorial interference by the ABC Board found there was “no request or suggestion” from Turnbull or ministers for the ABC to fire journalists. However, it did find that Milne and Guthrie believed concerns expressed by ministers “would affect the ABC’s standing, relationships and support within government, including for future investment and funding support”.⁷¹

The ABC made Alberici redundant in 2020, with Simon Benson describing her as “targeted in a recent purge of 250 staff”.⁷² Paul Barry on *Media Watch* said Alberici’s redundancy “sends a bad message to ABC viewers and ABC journalists”.⁷³

Alberici’s lawyers allege other government interference, including: “that Mr Turnbull had lobbied then managing director Mark Scott to have Ms Alberici sacked”, that then Communications Minister Paul Fletcher intervened “to cancel a \$20,000 commission the NBN had offered to Alberici” and that, regarding a piece of Alberici’s on the NBN, “The Current Affairs boss at the time, Bruce Belsham, decided that the piece should not be published until after the election so as not to upset the Coalition ahead of the election.”⁷⁴

Fifield knew ABC was going to sack Michelle Guthrie two weeks beforehand,
<http://www.theguardian.com/media/2018/oct/15/mitch-fifield-knew-abc-was-going-to-sack-michelle-guthrie-two-weeks-beforehand>

⁶⁸ Doran (2018) *Turnbull denies telling ABC chairman to order the sacking of journalists*,
<https://www.abc.net.au/news/2018-09-27/turnbull-denies-issuing-direction-to-abc-chairman/10309270>;

Woods (2018) *Crikey Worm: Milne accused of pushing to sack political editor*,
<https://www.crikey.com.au/2018/09/27/milne-accused-of-pushing-to-sack-political-editor/>

⁶⁹ Meade & Davies (2018) *Justin Milne “would intervene” with ABC executives about stories he disliked, sources say*, <http://www.theguardian.com/media/2018/sep/26/justin-milne-would-intervene-with-abc-executives-about-stories-he-disliked-sources-say>

⁷⁰ Meade (2018) *Justin Milne resigns and denies government interference in ABC*,
<http://www.theguardian.com/media/2018/sep/27/justin-milne-resigns-and-denies-government-interference-in-abc>

⁷¹ Meade (2018) *Mitch Fifield knew ABC was going to sack Michelle Guthrie two weeks beforehand*

⁷² Benson (2020) *ABC kowtowed to Malcolm Turnbull: Emma Alberici*,
<https://www.theaustralian.com.au/business/media/abc-kowtowed-to-malcolm-turnbull-over-me-emma-alberici/news-story/c606842c84f04cd30eccc7bc3177e532>

⁷³ Barry (2020) *Ep 29 - Alberici & the ABC*, <https://www.abc.net.au/mediawatch/episodes/emma/12590640>

⁷⁴ Benson (2020) *ABC kowtowed to Malcolm Turnbull: Emma Alberici*

Yassmin Abdel-Magied’s show cancelled by ABC (2017): The ABC cancelled a show hosted by Yassmin Abdel-Magied after she made a social media post on Anzac Day drawing attention to the mistreatment of refugees, Palestinians and people caught in the Syrian civil war. The ABC claims the decision was unrelated to the social media post.⁷⁵

After the ABC cancelled the show, then Immigration Minister Peter Dutton said it was a “good start” but more employees should be fired: “One down, many to go.”⁷⁶

Scott McIntyre seemingly wrongfully dismissed by SBS (2015): The SBS fired sports journalist Scott McIntyre over anti-war tweets he made on Australia Day. Then Communications Minister Malcolm Turnbull had contacted SBS management over McIntyre’s tweets, although he denied “influencing” McIntyre’s dismissal. The SBS settled a wrongful dismissal case brought by McIntyre.⁷⁷

ABC and SBS limit employee free speech

Journalists and hosts who make controversial public statements appear to have been censured even in the absence of direct government pressure.

This year, there were reports that journalists were pressured by the SBS to remove their signatures from an open letter calling for “balanced coverage of Palestinian perspectives in the current Middle East conflict”. The SBS later said that no disciplinary action would be taken against staff who had signed the open letter.⁷⁸

Also this year, the ABC threatened to enforce social media rules against staff that bring the broadcaster into “disrepute”, seemingly prompted by senior journalist Laura Tingle describing the Australian Government’s staffing cuts at the ABC as “ideological bastardry”. Other tweets that seem to fall foul of the policy include ones defending colleague Michael

⁷⁵ Baxendale (2017) *Yassmin Abdel-Magied’s ABC show Australia Wide axed*, <https://www.theaustralian.com.au/business/media/yassmin-abdelmagieds-abc-show-axed/news-story/ca014c3a23de97ff5dbdce630d16a26f>

⁷⁶ Lewis (2017) *One down, many to go at ABC*, <https://www.theaustralian.com.au/business/media/one-down-many-to-go-at-abc/news-story/83ae4991fabcfaff4590bee20a22277>

⁷⁷ news.com.au (2016) *Lawyer blasts ‘hypocrites’ as Scott McIntyre settles his unfair dismissal case with SBS*, <https://www.news.com.au/finance/business/media/lawyer-blasts-hypocrites-as-scott-mcintyre-settles-his-unfair-dismissal-case-with-sbs/news-story/1d3cb9e2906b3de4b44329ebae298368>; Sydney Morning Herald (2016) *Sacked reporter Scott McIntyre and SBS resolve dispute over Anzac Day tweets*, <https://www.smh.com.au/business/companies/sacked-reporter-scott-mcintyre-and-sbs-resolve-dispute-over--anzac-day-tweets-20160411-go37vt.html>; Zielinski (2015) *Malcolm Turnbull denies influencing SBS sacking of Scott McIntyre over anti-Anzac tweets*, <https://www.news.com.au/national/malcolm-turnbull-denies-influencing-sbs-sacking-of-scott-mcintyre-over-antianzac-tweets/news-story/e808e42265677b8e2464908fb79ed9d0>

⁷⁸ MEAA (2021) *Statement on freedom of expression at SBS*, <https://www.meaa.org/mediaroom/statement-on-freedom-of-expression/>

Rowland from Minister Greg Hunt’s unfounded accusations that Rowland “identif[ies] with the left” and that Rowland’s criticism of Hunt’s Twitter messaging was contrived.⁷⁹

Free speech for some

Political commentators have argued for journalists to have their freedom of speech limited.

Former ABC director Janet Albrechtsen called for journalists at the ABC to have their free speech curtailed, saying “If ever there was a case for an employee to park some of their civil liberties at the door of their workplace, it’s ABC journalists”.⁸⁰

Former Communications Minister Richard Alston wrote in the *Australian Financial Review* that the ABC delights at “being at war with middle Australia”, and recommended the ABC follow the BBC “crackdown” on its employees’ expression of personal opinions.⁸¹

No Australian should be subject to a “crackdown” by their employer or have to “park some of their civil liberties” anywhere.

ACADEMIC FREEDOM AND UNIVERSITIES

Universities are the site of a particular form of the freedom of expression, “academic freedom”. This typically refers to “the right of academics to speak and to publish without the threat of intimidation or legal sanction”.⁸² The right has two prongs: the right for universities as institutions to be free from undue influence and the right for academics to be free from undue influence, even from their university.

Right-wing activists called for universities to be “brought to account” for the courses lecturers choose to teach.⁸³ This is part of what Senior Lecturer in Australian history Hannah Forsyth describes as a “fake ‘free speech crisis’” manufactured by conservatives who want not just to be able to express their views (which they are entitled to do), but to avoid the

⁷⁹ Tabakoff (2021) *Laura Tingle’s tweet trolling Scott Morrison and an ABC crackdown*, <https://www.theaustralian.com.au/business/media/its-my-party-and-ill-cry-foul-if-i-want-to-peter-fitzsimons-pulls-stan-grants-invitation/news-story/bc59b8af9f9a0ea5c5f3311388fa054a>

⁸⁰ Albrechtsen (2021) *Shock treatment to tame a taxpayer-funded beast*, <https://www.theaustralian.com.au/inquirer/shock-treatment-to-tame-a-taxpayerfunded-beast/news-story/c00fd6b1084b58288c22b5252f6a8574>

⁸¹ Alston (2021) *Left-wing bias proves it is clearly “their ABC,”* <https://www.afr.com/companies/media-and-marketing/left-wing-bias-proves-it-is-clearly-their-abc-20210111-p56taq>

⁸² Australian Senate (2008) *Allegations of academic bias in universities and schools*, p. ix, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_Employment_and_Workplace_Relations/Completed_inquiries/2008-10/academic_freedom/report/index

⁸³ Urban (2021) *Ideology strangles university courses, audit finds*, <https://www.theaustralian.com.au/higher-education/ideology-strangles-university-courses-audit-finds/news-story/4f9a495967cfd8652939e50769f8f2f4>

social consequences for doing so. That said, there are genuine academic freedom concerns in Australia, particularly with universities increasingly subject to commercial pressures.⁸⁴

One of those commercial pressures was laid bare in 2016, when La Trobe University suspended academic Roz Ward following a campaign by *The Australian*. Ward had joked that the Australian flag should be replaced by the (socialist) red flag. Former Premier and then Chair of Beyond Blue Jeff Kennett threatened to “personally argue against any further funding” to one of the university’s research centres unless Ward lost her job.⁸⁵

Not all university interference with its employees is as a result of external influence. Last year, Murdoch University sought to remove an academic from the university’s Senate after he “raised concerns about student welfare and admission standards in a Four Corners program”. The university later withdrew its motion.⁸⁶

Deference to the Chinese government

Several incidents in recent years have drawn attention to a perceived deference to the Chinese government from university administrators.

In 2021, an Australian National University art gallery removed artworks critical of authoritarian Chinese leaders after what appears to be coordinated complaints.⁸⁷

Student Drew Pavlou claims to have been targeted by the University of Queensland due to his criticism of the university’s relationship with the Chinese government, although he did lose the appeal against his suspension in 2020.⁸⁸

⁸⁴ Forsyth (2020) *How a fake “free speech crisis” could imperil academic freedom*,

<http://theconversation.com/how-a-fake-free-speech-crisis-could-imperil-academic-freedom-144272>

⁸⁵ Graham (2016) *Latrobe Suspends Safe Schools Co-Founder and Academic Roz Ward for Criticising “Racist” Australian Flag*, <https://newmatilda.com/2016/06/01/latrobe-suspends-safe-schools-co-founder-and-academic-roz-ward-for-criticising-racist-australian-flag/>

⁸⁶ Worthington (2020) *University withdraws case against Four Corners whistleblower*, <https://www.abc.net.au/news/2020-06-12/murdoch-university-withdraws-legal-action-against-whistleblower/12348012>

⁸⁷ Birtles (2021) *Canberra gallery takes down three artworks on China after ‘bullying, targeted attack’ on artist*, <https://www.abc.net.au/news/2021-03-26/chinese-censorship-concerns-after-three-artworks-taken-down/100032128>

⁸⁸ Molloy (2020) *Brisbane uni student Drew Pavlou loses appeal against suspension at The University of Queensland*, <https://www.news.com.au/national/queensland/brisbane-uni-student-drew-pavlou-loses-appeal-against-suspension-at-the-university-of-queensland/news-story/4c7caae14d508ecddb5da62e6b4c434>

In 2020, the University of New South Wales deleted a tweet quoting an expert who spoke critically of the Chinese government. It also temporarily deleted and permanently moved the full article.⁸⁹

STATE GOVERNMENT INTERFERENCE

There are also concerns about how state and territory governments use their influence.

News site *NT Independent* was banned from a 2020 press conference held by NT Chief Minister Michael Gunner and from “seeking information from government departments to report to the public” because owner Owen Pike has an anti-government Facebook page.⁹⁰

In 2019, the NSW Department of Education ordered a public school to remove letters on climate change written by students from an online newsletter, because publishing letters written to the Prime Minister critical of government policy “breached the Controversial Issues in Schools policy” even though the letters and the lesson were not in breach.⁹¹

The Perth Theatre Trust has proposed a policy that would stop organisations “identifying with countries whose political status is unclear or in dispute” (for example, Tibet and Taiwan) from hiring major performance venues. It also would not permit individuals or organisations “where the content of the event does not represent the views of the West Australian government or the vast majority of Western Australians”, including the Australian Christian Lobby. The trust’s chair indicated that the policy would be revised.⁹²

⁸⁹ Pearson (2020) *Critical test of academic freedom for Australian universities*, <https://www.smh.com.au/national/critical-test-of-academic-freedom-for-australian-universities-20200804-p55iec.html>

⁹⁰ Barry (2020) *Ep 19 - Darwin barney*, <https://www.abc.net.au/mediawatch/episodes/nt/12357282>

⁹¹ Fitzsimmons (2019) *We underestimate young people because it’s convenient*, <https://www.smh.com.au/environment/climate-change/we-underestimate-young-people-because-it-s-convenient-20190424-p51gy2.html>

⁹² Fernandez (2021) *Calls to scrap Perth Theatre Trust policy that experts say allows “discrimination” of persecuted groups*, <https://www.abc.net.au/news/2021-07-16/perth-theatre-trust-accused-of-censorship/100297804>; Garvey (2021) *McGowan venue edict bans Christian lobbyists*, <https://www.theaustralian.com.au/nation/mcgowan-venue-edict-bans-christian-lobbyists/news-story/d1eacd37df917019bb6ccf98eb6f416c>; (2021) *State’s venue policy and China link an arts-breaker in Western Australia*, <https://www.theaustralian.com.au/nation/states-venue-policy-and-china-link-an-artsbreaker-in-western-australia/news-story/2adacf08c27fc06a085871df4ca7faf3>

OTHER ISSUES

This submission focuses on a few key areas where there are multiple serious examples of threats to freedom of speech and expression. However, these are far from the only areas of concern. Other issues and incidents that the Australia Institute has identified are:

- Australia’s defamation laws silence victims of sexual harassment and assault.⁹³
- Prime Minister Scott Morrison’s Chief Press Secretary Andrew Carswell called Network Ten and raised the spectre of defamation based on Waleed Aly’s emotional editorial about the Christchurch massacre.⁹⁴
- The common law offence of blasphemy may still exist in several states and territories, although it has not been enforced since before Federation.⁹⁵
- Until April 2020, Tasmanian law forbade naming sexual assault victims, even if the victim wanted to be identified. Most notably, Grace Tame was not able to identify herself as the 15-year-old victim of grooming and sexual assault by her teacher. Her teacher was able to tell his side of the story to commentator Bettina Arndt.⁹⁶
- Treasurer Josh Frydenberg is consulting on laws that would limit proxy advisers, including forcing them to disclose advice prepared for clients, which Ownership Matters Director Dean Paatsch described as a “dark cloud” for free speech.⁹⁷
- The Institute of Public Affairs has called for the academic theory of “critical race theory” to be “banned” from Australian schools.⁹⁸

⁹³ Maley (2019) *#MeToo founder says Australia’s defamation laws silence victims*, <https://www.smh.com.au/politics/federal/metoo-founder-says-australia-s-defamation-laws-silence-victims-20191022-p532zg.html>; Rigby (2018) *Australia’s defamation laws are failing women who want to say #MeToo*, <https://www.smh.com.au/lifestyle/life-and-relationships/australia-s-defamation-laws-are-failing-women-who-want-to-say-metoo-20180504-p4zddn.html>; UTS (2018) *#MeToo exposes problems with Australia’s defamation laws*, <https://www.uts.edu.au/partners-and-community/initiatives/social-justice-uts/news/metoo-exposes-problems-australias-defamation-laws>

⁹⁴ Maiden (2019) *Furious PM threatens Ten over Waleed Aly’s emotional Christchurch plea*, <https://thenewdaily.com.au/news/national/2019/03/18/morrison-waleed-aly-muslim/>

⁹⁵ Ruddock (2018) *Expert panel report: Religious Freedom Review*, pp. 86–88, <https://www.ag.gov.au/rights-and-protections/publications/expert-panel-report-religious-freedom-review>

⁹⁶ Stephens (2018) *A teacher sexually assaulted a 15yo girl. But he thinks you should feel sorry for him*, <https://www.mamamia.com.au/nicolaas-bester-jane-doe/>; Tasmanian Department of Justice (2020) *Fact sheet on changes to the Tasmanian Evidence Act 2001*, <https://www.justice.tas.gov.au/publications2/fact-sheet-on-changes-to-the-tasmanian-evidence-act-2001-section-194k>

⁹⁷ Khadem (2021) *“Restricting free speech”: Super fund advisers fear being silenced on CEO pay and climate change*, <https://www.abc.net.au/news/2021-06-08/regulation-proxy-advisers-superannuation-investing-governance/100192278>

⁹⁸ d’Abrera (2021) *Critical race theory must be banned in Australian schools*, <https://ipa.org.au/research/australian-way-of-life/critical-race-theory-must-be-banned-in-australian-schools>

- Acting Immigration Minister Alan Tudge introduced legislation that would allow ministers to ban people in onshore immigration detention centres from having mobile phones.⁹⁹
- The Queensland Parliament ruled advertising executive Dee Madigan in contempt in 2018 after she tweeted a video of an LNP frontbencher tearing up sheets of paper, which she attributed to a “toddler tantrum”.¹⁰⁰
- An Australian Parliament House security guard reportedly ordered an apprentice to take her shirt off because it had a small union logo on it.¹⁰¹
- The Labor Opposition has said the Australian Government’s proposed anti-encryption laws are a “clear threat to press freedom”.¹⁰²

⁹⁹ Ryan (2020) *Dutton’s bid to ban mobile phones in immigration detention centres could be unconstitutional*, <http://www.theguardian.com/australia-news/2020/jun/25/duttons-bid-to-ban-mobile-phones-in-immigration-detention-centres-could-be-unconstitutional>

¹⁰⁰ Nothling (2018) *“I won’t remove it”: Dee Madigan ruled in contempt of Parliament over Bleijie “tantrum” tweet*, <https://www.abc.net.au/news/2018-12-10/dee-madigan-ruled-in-contempt-of-queensland-parliament/10603252>

¹⁰¹ Workman (2018) *This young woman was told to take off her union t-shirt in a busy public area at Parliament House*, <https://www.buzzfeed.com/aliceworkman/this-young-woman-was-told-to-take-off-her-union-t-shirt-in>

¹⁰² Koziol (2018) *“Obviously dangerous”: Labor doubles down on encryption bill with press freedom warning*, <https://www.smh.com.au/politics/federal/dangerous-labor-encryption-bill-press-freedom-20181201-p50jll.html>

The case for an amendment to the Constitution

The threats outlined above – some anticipated, others realised – demonstrate that the current legal settings are insufficient to protect freedom of expression in Australia.

An amendment to the Constitution is not the only way freedom of expression can or should be protected. Many of the threats will only be resolved with changes to law and political culture. However, an explicit constitutional or statutory right to freedom of expression would be an important shield against government overreach.

PROTECTIONS AROUND THE WORLD

The Law Council of Australia states unequivocally:

Australia is the only western democracy without a Charter or Bill of Human Rights.¹⁰³

Countries that Australia regularly compares itself to, like the United Kingdom, the United States, New Zealand and Canada, all have statutory or constitutional protections for freedom of expression. Members of the Council of Europe and the European Union also inherit free speech protections through those organisations, as well as often having explicit protections of their own.

The first amendment of the United States Bill of Rights has provided constitutional protection for freedom of speech since 1791.

Canada has had a Charter of Rights and Freedoms in its constitution since 1984, replacing a more limited statutory protection in place since 1960. The Charter explicitly protects freedom of the press alongside “freedom of thought, belief, opinion and expression”.¹⁰⁴

New Zealand has had a Bill of Rights since 1990, with freedom of expression including “the freedom to seek, receive, and impart information and opinions of any kind in any form.”¹⁰⁵

¹⁰³ Law Council of Australia (n.d.) *Charter or Bill of Rights: questions & answers*, <http://lca.lawcouncil.asn.au/lawcouncil/images/Factsheet-QA.pdf>

¹⁰⁴ *Canadian Charter of Rights and Freedoms 1982* (Canada), sec.2, <https://laws-lois.justice.gc.ca/eng/const/>

¹⁰⁵ *Bill of Rights Act 1990* (NZ), sec.14,

<https://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

Forty-seven countries are members of the Council of Europe, which subjects them to the jurisdiction of the European Court of Human Rights with regards to the European Convention on Human Rights.¹⁰⁶

The United Kingdom is a signatory to the European Convention on Human Rights, and replicates its right to freedom of expression in the *Human Rights Act 1998*.¹⁰⁷

The 27 member states of the European Union are subject to the Charter of Fundamental Rights of the European Union, as well as being members of the Council of Europe. The Charter recognises freedom of expression, explicitly including freedom of the press.¹⁰⁸

FREEDOM OF SPEECH PROTECTIONS IN AUSTRALIA

Three Australian jurisdictions have a Bills of Rights. The ACT has had a *Human Rights Act* since 2004, including freedom of expression.¹⁰⁹ Since 2006, the Victorian Charter of Human Rights and Responsibilities has recognised freedom of expression.¹¹⁰ The charter has already been used in Victoria to protect protesters charged with trespass.¹¹¹ Most recently, Queensland passed its *Human Rights Act* in 2019 that recognises freedom of expression.¹¹²

A BILL OF RIGHTS

The introduction of constitutional protections for freedom of expression would be welcome. However, it is worth considering whether such a right should be accompanied by others, in a comprehensive Bill of Rights that is either separately legislated, or entrenched in the Constitution.

A Bill of Rights can be assembled incrementally. While the United States only describes its first 10 constitutional amendments as the “Bill of Rights”, its 13th, 14th, 15th, 19th, 24th and 26th amendments also secure or expand civil rights. There is a 180-year gap between the original Bill of Rights and the 26th Amendment.

¹⁰⁶ United Nations (1950) *Convention for the Protection of Human Rights and Fundamental Freedoms*, https://treaties.un.org/Pages/showDetails.aspx?objid=080000028014a40b&clang=_en

¹⁰⁷ *Human Rights Act 1998* (UK), <https://www.legislation.gov.uk/ukpga/1998/42/contents>

¹⁰⁸ *Charter of Fundamental Rights* (EU), https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights_en

¹⁰⁹ *Human Rights Act 2004* (ACT), sec.16, <http://www.legislation.act.gov.au>

¹¹⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic), sec.15, <https://www.legislation.vic.gov.au/in-force/acts/charter-human-rights-and-responsibilities-act-2006/014>

¹¹¹ Queensland Human Rights Commission (2019) *Right to freedom of expression*, <https://www.qhrc.qld.gov.au/your-rights/human-rights-law/right-to-freedom-of-expression>

¹¹² *Human Rights Act 2019* (Qld), sec.21, <https://www.legislation.qld.gov.au/view/html/asmade/act-2019-005>

It is better to entrench one protection in the Constitution than none, and this incremental approach could make it easier to implement other constitutional rights in the future.

Conclusion

Then Opposition Leader Tony Abbott observed in 2013 that the Institute of Public Affairs:

campaigned against the bill of rights because [they] understood that a democratic parliament, an incorruptible judiciary and a free press — rather than mere law itself — were the best guarantors of human rights.¹¹³

There is no doubt that a democratic parliament, an incorruptible judiciary and a free press are more important than “mere law”. To that, we would add a politically active, informed and coordinated public. Research shows that the “qualities of democracy” can be more important than technical, economic or resource considerations in determining policy.¹¹⁴

However, what Abbott elided is that the law is a powerful tool, created by democratic parliaments, interpreted by incorruptible judiciaries, and protecting and protected by a free press. Constitutional protections help secure freedom of speech and expression, as the implied freedom of political communication in the Constitution has done.

This submission hopefully makes clear that freedom of expression is under threat, and that threat appears to be growing. So far, parliament, the judiciary, the free press and the public have failed to fully secure free speech and free expression. Something more is needed.

Other jurisdictions like Australia, and some jurisdictions in Australia, have formally protected freedom of expression – either in their constitutions or in statute. There is no reason why Australia could not do the same.

¹¹³ Knott (2013) *Tony Abbott talks God and Western values behind closed doors*, <https://www.crikey.com.au/2013/04/05/tony-abbott-talks-god-and-western-values-behind-closed-doors/>

¹¹⁴ See for example Johnstone & Stirling (2015) *Comparing nuclear power trajectories in Germany and the UK: From “regimes” to “democracies” in sociotechnical transitions and discontinuities*, <https://papers.ssrn.com/abstract=2744549>