



Australian
Human Rights
Commission

Contemporary community safeguards inquiry

**AUSTRALIAN HUMAN RIGHTS COMMISSION
SUBMISSION TO THE AUSTRALIAN COMMUNICATIONS
AND MEDIA AUTHORITY**

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Table of Contents

<i>Australian Human Rights Commission Submission to the AUSTRALIAN COMMUNICATIONS AND MEDIA AUTHORITY.....</i>		1
1	Introduction.....	3
2	Summary	3
3.	ACMA’s roles engage human rights	4
4.	Freedom of information and expression	5
4.1	<i>Obligations are not restricted to central government.....</i>	5
4.2	<i>Importance of freedom of expression and information for democracy.</i>	6
4.3	<i>Freedom of information and expression is not confined to political discussion.....</i>	6
4.4	<i>Freedom of information and expression are not absolute rights</i>	7
4.5	<i>Limitations are required to be “provided by law”</i>	8
4.6	<i>Limitations are required to be on permissible grounds</i>	9
(a)	<i>Respect for the rights or reputations of others.....</i>	9
(i)	<i>Freedom from discrimination.....</i>	10
(ii)	<i>Freedom from cruel, inhuman and degrading treatment</i>	12
(iii)	<i>Right to privacy</i>	13
(iv)	<i>Rights of the child.....</i>	15
(b)	<i>Public morals</i>	15
(c)	<i>Public order</i>	16
5	Restrictions must be “necessary” for a permitted purpose	16
6	Recommendations.....	17

1 Introduction

1. The Australian Human Rights Commission makes this submission to the Australian Communications and Media Authority (ACMA) in its Inquiry into Contemporary Community Safeguards.

2 Summary

2. The Commission welcomes ACMA's decision to conduct this inquiry into the core principles that should guide the content of broadcasting Codes of Practice.
3. The Commission's comments relate to principles relevant to Code provisions regarding
 - decency and
 - vilification.
4. The Commission submits that, in view of ACMA's status as a body performing functions and exercising powers under Commonwealth law, which engage human rights, core principles applied by ACMA are required to reflect, and should expressly refer to, Australia's international obligations on human rights.
5. The Commission submits that international commitments on human rights which the Australian Government has accepted, form a substantial part of relevant community standards, by reference to which the *Broadcasting Services Act* gives ACMA powers and responsibilities.
6. The Commission submits that express reference should be made to relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC) in guidance material on development of, and compliance with, codes.
7. The Commission submits that the right to freedom of information and expression imposes a substantial burden of justification on government agencies before restrictions on these rights can be accepted as permissible.
8. Having regard to the specific expertise and roles of ACMA, the Commission does not make specific recommendations regarding the content of material which should or should not be including in registered codes. Rather the Commission suggests issues which should be considered by parties involved in development of codes and by ACMA in development of guidance material and in decisions regarding registration of and compliance with codes.
9. In particular, the Commission encourages ACMA to consider incorporating a requirement for submission and consideration of a Statement of Compatibility with human rights in its procedures for registration of codes, modelled on the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

3. ACMA's roles engage human rights

10. The Commission welcomes ACMA's decision to conduct this inquiry into the core principles that should guide the content of broadcasting codes of practice.
11. In view of ACMA's status as a body performing functions, and exercising powers, under Commonwealth law, principles promoted and applied by ACMA should reflect, and should expressly refer to, Australia's international obligations on human rights.
12. The Commission considers that international commitments on human rights which the Australian Government has accepted, form a substantial part of relevant community standards, by reference to which the *Broadcasting Services Act* gives ACMA powers and responsibilities.
13. As noted by the Discussion Paper:

The co-regulatory approach embodied in the Act requires that various sectors of the broadcasting industry are responsible for developing their own codes. Although the codes are developed by industry, the Federal Court recently reiterated that:

Parliament intended the ACMA to play an important and prominent role in ensuring that regulations affecting broadcasting provide appropriate community safeguards in respect of the subject matter of such regulations.¹

The ACMA has a key role in the development, registration and interpretation of broadcasting codes of practice.

14. Although compliance with registered codes is not mandatory, ACMA is empowered and required under the *Broadcasting Services Act 1992*² to investigate complaints about compliance. Financial and other costs of complaints being made, and particularly complaints being upheld, are likely to deter broadcasters from broadcasting material regarded as likely to be found to be non-compliant.
15. Development and registration of, and compliance with, codes are also relevant under the *Broadcasting Services Act* to ACMA decisions on whether, and if so in what terms, to develop more fully regulatory standards.
16. Codes developed by broadcasters are thus not wholly self regulatory, nor wholly voluntary in nature.³
17. Conversely, although registered codes do not as a matter of law exclude liability under anti-discrimination or other laws, in practice codes are likely to constitute a major reference point for broadcasting organisations on what is

¹ *Harbour Radio Pty Ltd v ACMA* [2012] 202 FCR 525 at 552.

² Part 11

³ In contrast, for example, with the purely self regulatory codes of the Advertising Standards Bureau: <http://www.aana.com.au/pages/codes.html> .

and is not permissible. As a result the content and limitations of codes may have a significant impact on compliance with these other laws.

18. Accordingly, ACMA activities regarding development and registration of codes have a degree of regulatory impact on broadcasters, and are likely to have impact on what material is and is not broadcast. In turn, this may have human rights impacts, including in relation to:
- the right to freedom of information and expression⁴
 - the right of children to special protection⁵.

4. Freedom of information and expression

19. ICCPR Article 19 states:
1. Everyone shall have the right to hold opinions without interference.
 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.
20. Extensive commentary⁶ on this Article has been provided by the United Nations Human Rights Committee in its *General Comment number 34: Freedoms of opinion and expression*. The Committee is the international monitoring body established under the ICCPR, and is comprised of independent experts elected by the parties to the ICCPR (including Australia). This General Comment was prepared having regard to the Committee's experience as the body which receives complaints (or "communications") regarding alleged human rights breaches involving parties (including Australia) which have agreed to this procedure.⁷

4.1 *Obligations are not restricted to central government*

21. The Committee has noted that obligations of parties to the ICCPR are not restricted to actions by the central government, but extend to all areas and all levels of government. This would clearly include statutory authorities, including when engaged in regulatory or co-regulatory activities:

The obligation to respect freedoms of opinion and expression is binding on every State party as a whole. All branches of the State (executive, legislative and judicial) and

⁴ ICCPR Article 19

⁵ ICCPR Article 24; Convention on the Rights of the Child (CRC)

⁶ Human Rights Committee *General Comment number 34* is available at

<http://www2.ohchr.org/english/bodies/hrc/docs/CCPR-C-GC-34.doc>. References in this submission to comments by the Human Rights Commission refer to this document except where otherwise indicated.

⁷ The full text of *General Comment number 34* includes references to the jurisprudence of the Committee on relevant individual communications on which the statements in the General Comment are based.

other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party. Such responsibility may also be incurred by a State party under some circumstances in respect of acts of semi-State entities. The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.

Recommendation: The Australian Human Rights Commission recommends that ACMA refer to the United Nations Human Rights Committee’s *General Comment number 34: Freedoms of Opinion and Expression* in developing principles and guidance material for development of codes, and in decisions regarding registration of, and compliance with, codes.

4.2 Importance of freedom of expression and information for democracy

22. The Human Rights Committee has emphasised the importance of press and media freedom for a democratic society:

A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society. ... The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output.

4.3 Freedom of information and expression is not confined to political discussion

23. The Committee has also noted that freedom of information and expression, while central to democratic governance, are not restricted in their scope to political information and expression:

Paragraph 2 requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one’s own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It may also include commercial advertising.

24. The freedom of political communication found by the High Court of Australia to be implicit in the Constitution⁸ is unlikely to have the same breadth of subject matter as ICCPR Article 19(2). It should be noted however that restrictions on freedom of expression on other subjects – including on grounds such as

⁸ [Australian Capital Television Pty Ltd & New South Wales v Commonwealth](#) (1992) 177 CLR 106 and subsequent cases

decency - may in some instances itself give the restricted or prohibited expression the status of political communication.

25. While regulatory agencies (including ACMA) are required to act consistently with implied constitutional rights regarding political communication, the Commission submits that the broader range of subject matters covered by ICCPR Article 19(3) as indicated by the Human Rights Committee provides an appropriate additional reference point for ACMA's roles regarding codes.

4.4 Freedom of information and expression are not absolute rights

26. Freedom of information and expression under the ICCPR are not absolute rights. Limitations however are subject to strict conditions and have to be justified. ICCPR Article 19 (3) states:

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.

27. As noted on the Commission's web page regarding permissible limitations⁹, any measures restricting rights need to

- be prescribed by law;
- be on grounds permitted in relation to the right concerned; and
- be a reasonable, necessary and proportionate means for pursuit of a legitimate objective.

28. The Commission emphasises that the right to freedom of information and expression imposes a substantial burden of justification on government agencies before restrictions on these rights can be accepted as permissible.

29. In the submission prepared by the Commission on the Media Reform Bills Package¹⁰ the Commission noted:

It is clear that a Party to the Covenant, limiting the right to freedom of expression and claiming that the limitation is necessary on one of the permissible grounds, must evidence, rather than simply assert, that necessity: see *Pietroroia v. Uruguay* (Views Adopted by the Human Rights Committee, U.N. Doc A/36/40 p.150).

⁹ <http://www.humanrights.gov.au/permissible-limitations-rights>

¹⁰ This submission was not able to be transmitted to the Committee considering the Bills within the extremely short time provided but is available on the Commission website at <http://www.humanrights.gov.au/sites/default/files/document/page/13.03.18%20Media%20reform%20Bills%20package.docx>

30. Australia’s Joint Parliamentary Committee on Human Rights made the same point in its submission on the Media Reform Bills Package¹¹:

1.9 Given the fundamental nature of this right, international human rights bodies have scrutinised with great care any limitations on freedom of expression, including the introduction of regulatory schemes for media. They have insisted that States demonstrate convincingly the need for measures which prevent or restrict the operation of a free and independent media, and have been especially concerned about content-based restrictions and restrictions which might inhibit the expression of views that contribute to public and political debate.

31. The United Nations Human Rights Committee has also emphasised that article 19(3) is not to be interpreted as a blank cheque for limitations on the rights recognised in Article 19(2):

... when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The Committee recalls that the relation between right and restriction and between norm and exception must not be reversed. The Committee also recalls the provisions of article 5, paragraph 1, of the Covenant according to which “nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant”.

32. The Human Rights Committee’s *General Comment number 34* goes on to state:

Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be “provided by law”; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality. ... Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.

33. The Commission acknowledges that registration of codes does not have direct legal effect. The Commission submits, however, that in view of the regulatory effects which the *Broadcasting Services Act* does give to registered codes, it would be appropriate to apply the requirements for permissible limitations as set out in ICCPR Article 19(3).

4.5 Limitations are required to be “provided by law”

34. The requirement for limitations regarding freedom of information and expression to be “provided by law” is an important guarantee of the rule of law. It includes a formal requirement of legality - that is, that there be a legal basis for restrictions. It also includes substantive requirements. The Human Rights Committee has noted:

For the purposes of paragraph 3, a norm, to be characterized as a “law”, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those

11

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctt_e/reports/2013/4_2013/c03.htm

charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.

35. The Commission submits that it would be appropriate for ACMA to consider to what degree general references to community standards in relation to decency satisfy the requirements of ICCPR Article 19(3) in this respect.

Recommendation: The Commission recommends that ACMA consider means by which standards regarding decency may provide sufficient guidance to decision makers and to persons and organisations required to comply.

4.6 Limitations are required to be on permissible grounds

(a) *Respect for the rights or reputations of others*

36. Freedom of expression, including in broadcasting, may permissibly be limited where limitations can be demonstrated to be necessary for ensuring “respect for the rights and reputations of others”.
37. In relation to “reputation”, Code provisions requiring that broadcast material not be defamatory, and providing for broadcast of corrections of defamatory statements, would appear to be consistent in principle with this provision and to provide an alternative to legal action in protecting the right under ICCPR Article 17 to freedom from arbitrary interference with reputation. This is of course subject to defamation laws themselves being consistent with ICCPR Article 19¹².
38. A range of other rights may also present possible justifications for limitations on freedom of expression regarding broadcasting, including:
- Freedom from discrimination (ICCPR Article 2)
 - Freedom from cruel, inhuman or degrading treatment (ICCPR Article 7)
 - Right to freedom from arbitrary interference with privacy (ICCPR Article 17)
 - The right of children to special protection (ICCPR Article 24 and CRC including Article 3).
39. Whether particular restrictions on these grounds are or would be justifiable depends on more specific consideration of the restrictions concerned and the circumstances, rather than being able to be specified here by the Commission. The Commission submits that it would be appropriate for ACMA to include detailed assessment in this respect
- in subsequent stages of the current review; and

¹² The Human Rights Committee discusses this issue in General Comment number 34.

- through conducting human rights impact analysis in considering registration of particular codes, including in its consultation with interested parties.

Recommendation: The Commission recommends that ACMA consider incorporating a requirement for submission and consideration of a Statement of Compatibility with human rights in its procedures for registration of codes, modelled on the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

40. The Commission provides below some brief comments (rather than detailed recommendations) on issues regarding relevant human rights

(i) Freedom from discrimination

41. ICCPR Article 2.1 requires parties to ensure the rights it recognises to all individuals

without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2.2 of the International Covenant on Economic, Social and Cultural Rights is to similar effect. In addition, ICCPR Article 26 states:

the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

42. Article 20 of the ICCPR further states:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

43. It should be noted that Australia has made (and maintains) the following interpretative declaration and reservation regarding Article 20:

Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interest of public order (ordre public), the right is reserved not to introduce any further legislative provision on these matters.

44. The Human Rights Committee has similarly indicated that ICCPR Article 20 is required to be interpreted consistently with Article 19:

Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3.

45. The principal provision in Federal law addressing the requirements of ICCPR Article 20 is section 18C of the Racial Discrimination Act (RDA). This provision

- refers to an act which is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate; and

- which is done because of the race, colour or national or ethnic origin of the other person or group of people;
 - subject to a wide range of exceptions (in RDA 18D) for anything said or done reasonably and in good faith.
46. The Commission notes that the current Commercial Radio Broadcasting Code states that a licensee must not broadcast a program which in all the circumstances
- is likely to incite hatred against, or serious contempt for, or severe ridicule of, any person or group of persons because of age, ethnicity, nationality, race, gender, sexual preference, religion, transgender status or disability
47. The Code is similar to the discrimination laws of most States and the ACT in the model of incitement used. The range of grounds covered in these discrimination laws varies as discussed below.
48. The Commission notes (but in this respect makes no recommendation) that
- provisions referring to “incitement” of “hatred, severe contempt or severe ridicule” may be seen as setting a higher threshold for complaints than provisions referring to an act likely to “offend, insult, humiliate or intimidate”;
 - the commercial radio broadcasting Code lacks the express provisions seeking to protect legitimate expression by way of the exceptions which are contained in RDA s.18D;
 - the commercial radio broadcasting Code covers a broader range of grounds than any of the Federal, State or Territory discrimination laws.
49. At the Federal level
- as noted, the RDA (section 18C) prohibits racial vilification
 - the Sex Discrimination Act (SDA), Disability Discrimination Act (DDA) and Age Discrimination Act (ADA) do not prohibit vilification in express terms
 - the DDA and the general discrimination provision of the RDA cover incitement or promotion of doing an unlawful act, rather than referring to incitement of hatred, contempt or ridicule in itself
 - the ADA and SDA do not include “incitement” in express terms. They do, however, make it unlawful to cause or instruct an unlawful act (in common with other discrimination laws). Accordingly, under these Acts there is liability if (but only if) the act incited actually occurs and causation can be demonstrated between what was said and the act which occurred
 - from the commencement of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*, the SDA will also cover sexual orientation, gender identity and intersex status, as well as relationship status.

50. At the State level:
- Victoria, Queensland and Tasmania each cover religious vilification.
 - NSW, Queensland, Tasmania and the ACT each cover vilification on grounds of sexual orientation or gender identity.
 - NSW and the ACT cover vilification on grounds of HIV/AIDS status.
 - Tasmania alone in anti-discrimination law expressly covers disability vilification more generally.
51. No jurisdiction appears to cover vilification on the basis of sex (or related grounds such as pregnancy or breastfeeding) although sex discrimination is unlawful in all jurisdictions.
52. Noting that ICCPR Articles 2 and 26 require protection against discrimination regarding a broader range of grounds than are covered in vilification provisions under any Australian anti-discrimination law, the Commission submits that
- the breadth of coverage of the vilification provisions in broadcasting Codes of Practice is not in itself inconsistent with human rights
 - subject to demonstration that the particular provisions meet the requirements of ICCPR Article 19(3) including the requirements of necessity and proportionality.
53. The Commission notes that particular caution is required in design and administration of any provisions regarding vilification on the basis of religion and belief in order to avoid impermissible limitation of the right to freedom of expression and information. The Human Rights Committee has indicated:
- Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant
- (ii) Freedom from cruel, inhuman and degrading treatment
54. The Commission notes that rights and obligations under ICCPR Article 7
- are not confined to freedom from torture, but include freedom from the less extreme manifestations of ill-treatment referred to as cruel, inhuman and degrading treatment;
 - are not confined to actions affecting people in prison, in detention or in institutional environments; and
 - are not confined to actions by or on behalf of the State itself.

55. The Commission’s strategic priorities include violence, harassment and bullying.¹³ Bullying in particular can be regarded as reflecting conduct (in whatever context) which could in more technical terms be referred to as “cruel, inhuman and degrading”.
56. The Commission does not at this point have to hand resources of its own, or of other organisations, to which ACMA might refer on the relationship between Articles 7 and 19 of the ICCPR.
57. However, the right to freedom from cruel, inhuman or degrading treatment is also recognised by the Convention on the Rights of the Child¹⁴ regarding children (defined as persons under 18 years of age).
58. The Committee on the Rights of the Child has described¹⁵ cruel inhuman or degrading treatment in relation to children as including treatment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child.
59. This view (which the Commission endorses in relation to children) needs to be interpreted in application to particular restrictions on freedom of expression together with
- the requirement for particular restrictions of ICCPR Article 19 rights to be only as provided by law and only such as are demonstrated to be necessary and proportionate; and
 - higher levels of restriction regarding conduct in relation to children being justifiable having regard to the rights of children to special protection under the ICCPR and CRC (as well as the rights of children to freedom of expression and information.
60. The Commission understands the present effect of registered Codes and their interpretation and application by ACMA to be consistent with this position but submits that express confirmation of this view would be appropriate.

Recommendation: The Commission recommends that ACMA refer to the *Committee on the Rights of the Child General Comment number 8* in its roles in development, registration and administration of Codes.

(iii) Right to privacy

61. ICCPR Article 17 states:

¹³ See the Commission’s Violence, Harassment and Bullying page: <http://bullying.humanrights.gov.au/>

¹⁴ Article 37(a)

¹⁵ General Comment No. 8 (2006): The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment. Available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=CRC/C/GC/8&Lang=E>

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Everyone has the right to the protection of the law against such interference or attacks.

62. The Human Rights Committee has indicated¹⁶ that

In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons.

63. The Committee has also observed that

As all persons live in society, the protection of privacy is necessarily relative.

64. Balancing the right to privacy with the rights to freedom of information and expression presents challenges. It is clear that measures to protect privacy which limit freedom of expression and information must comply with the requirements of ICCPR Article 19(3)

65. The Commission submits, however, that broadcast of material regarding a person's private life and obtained by deception, coercion or unlawful interception is unlikely to be capable of justification in most circumstances (whether in broadcasting or in print or other media). In this respect the Commission refers to the particular obligation to provide special protection to children.

66. In one recent case, ACMA quite rightly found, and the broadcaster concerned conceded, that it was a breach of community standards of decency to broadcast a clearly unwilling young person under sixteen being questioned about her sexual history.

67. ACMA also correctly pointed to instances where discussion of the same issues with willing participants, appropriately informed of and supported in the exercise of their rights, might be an entirely legitimate part of beneficial discussion of serious issues.

68. Neither relevant Code provisions nor the decision concerned address, however, how this fits with Australia's human rights obligations. The Commission submits that express reference to relevant aspects of the ICCPR and the Convention on the Rights of the Child would be appropriate.

¹⁶ General Comment 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation: available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/23378a8724595410c12563ed004aeecd?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/23378a8724595410c12563ed004aeecd?Opendocument)

(iv) Rights of the child

69. ICCPR Article 24 states that children are entitled to necessary measures of protection, on the part of family, society and the State. Article 3(2) of the Convention on the Rights of the Child (CRC) restates this right and requires parties to take all necessary legislative and administrative measures for its realisation.
70. Earlier sections of this submission discuss restrictions on freedom of expression and information based on the rights of children to freedom from cruel, inhuman and degrading treatment and the right to privacy.
71. CRC Article 13 confirms the rights of the child to freedom of information and expression, in similar terms and subject only to the same limitations as set out in ICCPR Article 19.
72. CRC Article 17 recognises the importance of access to information and material through the mass media and (among other provisions) requires parties to
- Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 [freedom of information and expression] and 18 [recognition of responsibilities of family].
73. In summary, while restrictions on access by children to some material can be justified and in fact regarded as required, justification is nonetheless required. The Commission refers in this respect to its recommendations regarding human rights analysis in development, registration and administration of broadcasting Codes.

(b) *Public morals*

74. Respect for “public morals” is a permissible ground for restrictions on the right to freedom of expression and information, subject to compliance with the conditions provided by ICCPR Article 19(3).
75. The Commission notes and endorses the view indicated in current codes that standards of decency need to be interpreted as standards applying in an open and pluralistic society.
76. In its General Comment number 34 the Human Rights Committee stated:
- The Committee observed in general comment No. 22, that “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition”. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.
77. As discussed earlier in this submission the Commission emphasises that restrictions on this ground are also required to be sufficiently certain to comply with the requirement that restrictions be “provided by law”.

78. The Commission notes and endorses decisions by ACMA that discussions of political figures in offensive terms does not necessarily breach community standards of decency. The Human Rights Committee in its *General Comment number 34* comments as follows on this issue:
79. The Committee has observed that in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high. Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition.

(c) *Public order*¹⁷

80. Article 19(3) permits restrictions based on public order (*ordre public*). The Commission has noted¹⁸ that this concept

is clearly wider than the concept of “public order” in the sense usually understood in Anglo-Australian law (dealing with prevention of breaches of the peace, offensive behaviour etc). It extends to the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. It equates with the “police power” in United States jurisprudence, permitting regulation in the interests of legitimate public purposes. This power must itself, however be exercised in a manner consistent with human rights.

81. Restrictions on promotion of unlawful activity would be permissible under this heading, subject to the other requirements being met for permissible limitations under ICCPR Article 19(3) including necessity and proportionality. The Human Rights Committee has made the same point more specifically in relation to counter-terrorism measures such as offences of “encouraging”, “praising” or “justifying” terrorism.

5 Restrictions must be “necessary” for a permitted purpose

82. The Human Rights Committee has made clear that this provision means that the right to freedom of information and expression imposes a substantial burden of justification on government agencies before restrictions on these rights can be accepted as permissible:

Restrictions must not be overbroad. The Committee observed in general comment No. 27 that “restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected ... The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law”. The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For

¹⁷ Restrictions on grounds of public health or national security are also permitted but are not discussed here as they do not appear relevant.

¹⁸ Initial submission on proposed ban on political advertising (1991). References in original omitted here for reasons of space. Available at <http://www.humanrights.gov.au/sites/default/files/91.05.09%20Political%20advertising%20first%20letter%20to%20Ministers.docx>

instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.

When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.

6 Recommendations

83. The Commission recommends that ACMA refer to the United Nations Human Rights Committee's *General Comment number 34: Freedoms of Opinion and Expression* in developing principles and guidance material for development of codes, and in decisions regarding registration of, and compliance with, codes.
84. The Commission recommends that ACMA consider means by which standards regarding decency may provide sufficient guidance to decision makers and to persons and organisations required to comply with codes.
85. The Commission recommends that ACMA consider incorporating a requirement for submission and consideration of a Statement of Compatibility with human rights in its procedures for registration of codes, modelled on the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011*.
86. The Commission recommends that ACMA refer to the *Committee on the Rights of the Child General Comment number 8* in its roles in development, registration and administration of Codes.