

**VITALISING INTERNATIONAL HUMAN RIGHTS LAW AS  
LEGAL AUTHORITY: FREEDOM OF EXPRESSION ENJOYED  
BY AUSTRALIAN PUBLIC SERVANTS AND ARTICLE 19 OF  
THE *INTERNATIONAL COVENANT ON CIVIL AND POLITICAL  
RIGHTS***

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*Michaela Banerji was a Commonwealth public servant when she was fired for sending up to 9000 messages on the public platform Twitter criticising her employer; Australia's human rights record; politicians; and public servants. The tweets did not disclose Ms Banerji's name or occupation and all tweets (except for one) were sent in Ms Banerji's private time. In 2019, the High Court confirmed that Ms Banerji's tweets were not protected by the implied freedom of political communication in the Australian Constitution. Ms Banerji is not alone in having her ability to communicate her political views limited by her employment with the Australian Public Service. All Commonwealth public servants are bound by a legal framework that curtails their ability to criticise government policies. This article argues that the current regime restricting political communication by public servants in Australia is excessive and is not consistent with Australia's international obligations under article 19 of the International Covenant on Civil and Political Rights.*

## I INTRODUCTION

Michaela Banerji was a public servant working within the Commonwealth Department of Immigration and Citizenship when she was fired for sending up to

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† This article is written in loving memory of Roozi Araghi, an exemplary public servant and a fearless advocate. His influence and legacy will continue in those of us that had the privilege of being exposed to his remarkable courage, fierce mind and extraordinary vision.

9,000 messages on the public platform Twitter. The tweets were sent under the handle @LaLegale, which did not disclose her name or her occupation. Almost all the tweets (bar one) were sent in Ms Banerji's private time outside work hours. Many of Ms Banerji's tweets were critical of Australia's human rights record and its treatment of refugees and asylum seekers, the Department of Immigration and Citizenship, the Australian government as a whole, the Opposition, individual politicians and internal departmental policies.<sup>1</sup>

Ms Banerji is not alone in having her ability to communicate her political views limited by her employment with the Australian Public Service ('APS').<sup>2</sup> All Commonwealth public servants are bound by the legal framework that curtailed Ms Banerji's capacity to criticise government policies.<sup>3</sup> Restrictions on the freedom of public servants to express their political views in certain situations have been enacted to ensure the APS remains 'apolitical, performing its functions in an impartial and professional manner'.<sup>4</sup> According to the High Court, the integrity and good reputation of the APS is

not only ... consistent with, but is a defining characteristic of, the constitutionally prescribed system of representative and, in particular, *responsible* government. Such values directly promote the internal character and functioning of the APS and public confidence in its capacity to serve the government of the day.<sup>5</sup>

Australia has signed and ratified the *International Covenant on Civil and Political Rights* ('ICCPR'),<sup>6</sup> under which article 19(2) offers public servants the protection of their freedom of expression. Any freedom of expression, however, can be curtailed by Australian law per article 19(3) of the ICCPR if it compromises public order. As international law, including the ICCPR, is not a legal authority relied on by the Australian courts, and freedom of expression under article 19(2) has not been translated into national law, the ICCPR provides little relief for public servants wishing to challenge the restrictions on their political expression.<sup>7</sup>

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1 *Comcare v Banerji* (2019) 372 ALR 42, 42 ('Banerji').

2 As Barry notes, the erosion of free expression in employment is not unique to the Australian Public Service: see Bruce Barry, *Speechless: The Erosion of Free Expression in the American Workplace* (Berrett-Koehler Publishers, 1<sup>st</sup> ed, 2007).

3 242,100 people were employed by the Commonwealth Public Service in June 2019: Australian Bureau of Statistics, *Employment and Earnings, Public Sector, Australia, 2018–19* (Catalogue No 6248.0.55.002, 7 November 2019) <<https://www.abs.gov.au/ausstats/abs@.nsf/mf/6248.0.55.002>>.

4 *Public Service Act 1999* (Cth) s 10(1)(a), as at 5 August 2011.

5 *Banerji* (2019) 372 ALR 42, 75 [111] (Gordon J) (emphasis in original).

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

7 This article will not discuss the contention that legitimate expectations may arise upon the executive's act of ratifying a treaty in international law (*Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 ('Teoh')), because the High Court explicitly doubted the correctness of the decision in *Teoh* in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 ('Lam'). As Wendy Lacey has argued '[t]hrough the critique on *Teoh* offered in *Lam* is contained in obiter comments only, the principle that ratification of a treaty may give rise to a legitimate expectation that administrative decision-makers will act in accordance with the terms of the treaty, has been seriously called into question': Wendy Lacey, 'A Prelude to the Demise of *Teoh*: The High Court Decision in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*' (2004) 26(1) *Sydney Law Review* 131, 131.

This article asks if Commonwealth public servants governed by the *Public Service Act 1999* (Cth) (hereby after referred to as ‘public servants’) would enjoy greater freedom of expression if article 19 of the *ICCPR* was considered legal authority by Australian courts. This article is not concerned with public disclosure of privileged information by public servants or whistleblowing.<sup>8</sup> It is also not concerned with prohibited speech, such as expression barred under section 18C of the *Racial Discrimination Act 1975* (Cth).<sup>9</sup> Rather, this article is concerned with the expression of political views and opinions by public servants in their capacity as private citizens.<sup>10</sup> This article will only discuss speech that is limited in the case of public servants but would be permissible if engaged in by others.

The article begins in Part II by outlining the historical and legislative framework for the restrictions upon the expression of political opinion by Australian public servants. It will then question the conformity of such restrictions with the implied freedom of political communication under the *Australian Constitution*, outlining the position in Australian law following the High Court’s 2019 decision in *Comcare v Banerji* (‘*Banerji*’).<sup>11</sup>

In Part III, this article will analyse the right to freedom of expression under article 19(2) of the *ICCPR* and the restrictions placed on this right under article 19(3). This will include an analysis of the jurisprudence of the European Court of Human Rights in its examination of article 10 of the *European Convention on Human Rights* (‘*ECHR*’),<sup>12</sup> an analogous treaty to the *ICCPR*. It will then assess whether the restrictions placed on the expression of public servants in Australia could constitute a violation of article 19 of the *ICCPR* under international law.

In Part IV, this article will analyse the lack of incorporation of article 19 of the *ICCPR* in Australian municipal law. This article will conclude in Part V with a call for the full enactment of article 19 of the *ICCPR* into domestic law. It will argue that whilst international law does not prohibit limitations on the freedom of

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8 Whistleblowing in Australia has been the subject of substantive study: see, eg, Keiran Hardy and George Williams, ‘Terrorist, Traitor, or Whistleblower? Offences and Protections in Australia for Disclosing National Security Information’ (2014) 37(2) *University of New South Wales Law Journal* 784; Marcia P Miceli and Janet P Near, ‘An International Comparison of the Incidence of Public Sector Whistleblowing and the Prediction of Retaliation: Australia, Norway, and the US’ (2013) 72(4) *Australian Journal of Public Administration* 433; Peter Fieger and Bridget S Rice, ‘Whistle-Blowing in the Australian Public Service: The Role of Employee Ethnicity and Occupational Affiliation’ (2018) 47(3) *Personnel Review* 613.

9 For commentary on section 18C of the *Racial Discrimination Act 1975* (Cth), see Katharine Gelber, ‘Norms, Institutions and Freedom of Speech in the US, the UK and Australia’ [2019] *Journal of Public Policy* 1; Katharine Gelber and Luke J McNamara, ‘Evidencing the Harms of Hate Speech’ (2016) 22(3) *Social Identities* 324; Anne Susskind, ‘Hidden Faces of Hate Speech’ [2011] (221) *Ethos: Official Publication of the Law Society of the Australian Capital Territory* 10.

10 See discussion of non-whistleblowing speech categorised as personal and political opinion in Lucy Vickers, *Freedom of Speech and Employment* (Oxford University Press, 2002) 7–9.

11 (2019) 372 ALR 42.

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

expression of public servants, Australia's current regime goes too far and is not consistent with its international law obligations. Greater allowances for freedom of expression in the public service are not incompatible with the Westminster system of responsible government, and a politically engaged public service can contribute to the health and wellbeing of a thriving democracy.

The High Court has argued that the limits on the freedom of expression of public servants 'are directed wholly to maintenance of an apolitical public service'.<sup>13</sup> The Westminster tradition of responsible government 'is part of the fabric on which the written words of the [*Australian*] *Constitution* are superimposed'.<sup>14</sup> As Chairman Coombs argued in the opening of the report of the Royal Commission on Australian Government Administration: 'The Westminster model envisages a government chosen from elected representatives and responsible and accountable to them. It presents the bureaucracy as simply an extension of the minister's capacity ...'.<sup>15</sup>

The British Public Service, on which the Australian model is based, has not always been defined by its political neutrality. The diminishing power of the monarch in the 18<sup>th</sup> century led to the increasing exercise of prerogative powers by ministers of the Crown, including in the areas that dictated the machinery of government.<sup>16</sup> The model of an apolitical public service can be traced back to the Northcote and Trevelyan *Report on the Organisation of the Permanent Civil Service* of 1853, which advocated for a politically neutral, secure and merit selected public service to enhance efficiency and ensure the provision of frank and fearless advice to governments of any political persuasion.<sup>17</sup>

## II HISTORICAL LEGAL FRAMEWORK OF PUBLIC SERVICE SPEECH RESTRICTIONS IN AUSTRALIA

Attempts to legislate political neutrality have been a feature of Australia's regulation of its bureaucracy from the beginning. Of the Australian colonies,

13 *Banerji* (2019) 372 ALR 42, 85 [156] (Gordon J).

14 *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393, 413 (Isaacs J). For a discussion of the legal structures of responsible government, see Charles Lawson, 'The Legal Structures of Responsible Government and Ministerial Responsibility' (2011) 35(3) *Melbourne University Law Review* 1005.

15 *Royal Commission on Australian Government Administration* (Final Report, August 1976) 11–12 [2.1.4] ('*Coombs Report*'). It should be noted that Coombs did not believe Australia's Public Service adhered to the traditional Westminster model.

16 Sylvia Horton, 'The Public Service Ethos in the British Civil Service: An Historical Institutional Analysis' (2006) 21(1) *Public Policy and Administration* 32, 33.

17 Stafford H Northcote, CE Trevelyan and Benjamin Jowett, *Report on the Organisation of the Permanent Civil Service* (Report, 23 November 1853). For a discussion of steps taken to ensure that the United Kingdom Civil Service remained politically neutral, see G Kitson Clark, "'Statesmen in Disguise': Reflexions on the History of the Neutrality of the Civil Service' (1959) 2(1) *Historical Journal* 19; Douglas Wass, 'The Public Service in Modern Society' (1983) 61(1) *Public Administration* 7; David E Marion, 'The British Civil Service: A Political Excavation and Review' (1993) 24(4) *Administration and Society* 470.

Victoria was the first to pass comprehensive legislation to establish and govern a permanent public service in 1862.<sup>18</sup> Regulations, empowered by section 28 of the *Civil Service Act 1862* (Vic),<sup>19</sup> attempted to preserve the political neutrality of the public service by prohibiting any public comment about any government matter by public servants.<sup>20</sup>

The ban on public comment by public servants was also reiterated under regulation 41 of the *Public Service Regulations* (Cth) which were authorised under the *Commonwealth Public Service Act 1902* (Cth).<sup>21</sup> Under this regulation, public servants were ‘expressly forbidden to publicly discuss or in any way promote political movements’.<sup>22</sup> The regulation was the topic of heated debate in the relatively new parliament of 1903.<sup>23</sup> Senator McGregor from South Australia questioned whether it was justified

to prevent men and women who probably have as much interest in the welfare of the country as have others from expressing their opinions and taking part in political movements so long as it does not interfere with the proper execution of their public duties? ... the time has arrived when public servants should be put in exactly the same position as other citizens.<sup>24</sup>

The express prohibition on all political public speech by public servants was to continue, however, and was reiterated in a new form in 1922. Regulation 34(a) of the *Public Service Regulations* (Cth), which was in force until 1987, stated that an ‘officer shall not publicly comment upon any administrative action or upon administration of any Department’.<sup>25</sup>

This prohibition on political speech by public servants was not sufficient to remove accusations of political partiality by the Labor Government in the early 1970s. The then Prime Minister, Gough Whitlam, viewed the Public Service as overtly political and a conservative obstacle to his Government’s attempts to implement a more progressive social and economic agenda.<sup>26</sup> As Prime Minister,

18 *Civil Service Act 1862* (Vic). The Victorian legislation was in fact the first of its kind to be passed in any English-speaking jurisdiction.

19 Section 28 of the *Civil Service Act 1862* (Vic) permitted the Governor in Council to make regulations ‘concerning the duties to be performed by officers of the Civil Service and the discipline to be observed in the performance of such duties’.

20 *Civil Service Regulations 1867* (Vic) reg 23.

21 Cited in Attorney-General (Cth), ‘Submissions of the Attorney-General of the Commonwealth (Intervening)’, Submission in *Comcare v Banerji*, C12/2018, 7 November 2018, 11–12 [31].

22 Ibid.

23 Commonwealth, *Parliamentary Debates*, Senate, 12 June 1903, 842 (Gregor McGregor).

24 Ibid 843.

25 Attorney-General (Cth) (n 21) 12 [32]. The regulation was repealed by the *Public Service Regulations (Amendment) 1987* (Cth). For some examples of public servants caught by the provision, see Jim Spigelman, ‘Free Speech and the Public Service Act’ (1970) 22(9) *Journal of the Australian National University Students’ Association* 7 <<https://archive.org/stream/woroni/1970-06-18#page/n5/mode/2up/search/free>>.

26 Barry Ferguson, *Competing for Influence: The Role of the Public Service in Better Government in Australia* (Australian National University Press, 2019); Kathy MacDermott, *Whatever Happened to*

Whitlam commissioned Herbert Cole ‘Nugget’ Coombs to chair the Royal Commission on Australian Government Administration (‘the Coombs Royal Commission’).<sup>27</sup> Coombs conceded in the final report (‘*Coombs Report*’) that ‘the commission cannot dismiss as trivial the influences to conformity and conservatism bearing upon senior officials. It believes these influences to be real’.<sup>28</sup>

The *Coombs Report* made a number of recommendations that were not acted on by the subsequent Fraser government. However, the report was the impetus for changes to the APS under subsequent governments, including the Hawke government in 1987.<sup>29</sup> Significantly, recommendation 197 of the Coombs Royal Commission provided:

[E]xcept as expressly provided by an Act or regulation made under that Act, or as is necessary for the proper performance of his [or her] duties, a government employee should be free to exercise the civil and political rights, liberties and privileges generally enjoyed by citizens.<sup>30</sup>

This recommendation led to the removal of the outright prohibition on public comments from public servants. The new regulation 8A(i) of the *Public Service Regulations (Amendment) 1987* (Cth), stated that ‘[a]n officer shall ... at all times behave in a manner that maintains or enhances the reputation of the Service’.

The Coombs Royal Commission recommended ‘against any official attempt to codify standards of behaviour beyond those appropriate in general conditions of employment’.<sup>31</sup> Nevertheless, the Coombs Royal Commission was in part used as justification for sweeping changes to the APS in the late 1990s, which saw the institution change from a centralised bureaucracy to a value-based administration.<sup>32</sup> Legally enforceable values and codes, strongly championed by the then Minister for Industrial Relations and Minister Assisting the Prime Minister for the Public Service, Peter Reith,<sup>33</sup> were introduced under the *Public Service Act 1999* (Cth).<sup>34</sup>

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*Frank and Fearless?: The Impact of New Public Management on the Australian Public Service* (ANU E Press, 2008).

27 See discussion of the report by Justice Edelman in *Banerji* (2019) 372 ALR 42, 89 [172].

28 *Coombs Report* (n 15) 19 [2.3.10].

29 Keri Spooner and Ali Haidar, ‘Implications of the *Coombs Commission Report* for HRM in the Public Service’ (2008) 14(1) *International Employment Relations Review* 39. See also Elaine Thompson, ‘Democracy Undermined: Reforms to the Australian Public Service from Whitlam to Hawke’ (1991) 63(2) *Australian Quarterly* 127.

30 *Coombs Report* (n 15) 233 [8.5.55].

31 *Ibid* 25 [2.4.16].

32 John Wanna, ‘Public Service, Public Values: The Implementation of a Charter of Values in the Australian Public Service’ (Conference Paper, Australasian Political Studies Association Conference, 2005); Jennifer Curtin, ‘New Public Management Meets Civic Discontent? The Australian Public Service in 1999’ (2000) 59(1) *Australian Journal of Public Administration* 115.

33 Peter Reith, ‘Towards a Best Practice Australian Public Service’ (Discussion Paper, Australian Government Publishing Service, 1996).

34 Peter Shergold, ‘A New Public Service Act: The End of the Westminster Tradition?’ [1997] (85) *Canberra Bulletin of Public Administration* 32.

The changes to the *Public Service Act 1999* (Cth) of particular relevance to the freedom of political expression of public servants were the codification of values under sections 10(1)(a), 13(7), 13(11) and 15 (quoted below as they appeared at enactment).

Section 10(1)(a) of the *Public Service Act 1999* (Cth) provided:

the APS is apolitical, performing its functions in an impartial and professional manner ...

Section 10(1)(g) of the *Public Service Act 1999* (Cth) stated that:

the APS delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public ...

A Code of Conduct is located in section 13 of the *Public Service Act 1999* (Cth). Subsection (7) stated:

An APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.

Under section 13(11), it was stated:

An APS employee must *at all times* behave in a way that upholds the APS Values and the integrity and good reputation of the APS.<sup>35</sup>

Sanctions for the violation of the Code of Conduct are found under section 15(1), which stated:

An Agency Head may impose the following sanctions on an APS employee in the Agency who is found (under procedures established under subsection (3)) to have breached the Code of Conduct:

- (a) termination of employment;
- (b) reduction in classification;
- (c) re-assignment of duties;
- (d) reduction in salary;
- (e) deductions from salary, by way of fine;
- (f) a reprimand.

The Public Service Commissioner and relevant departments now also provide public servants with guidelines to assist in the interpretation of the *Public Service Act 1999* (Cth), including the enumerated values and Code of Conduct. One such guideline is the 'Making Public Comment on Social Media: A Guide For Employees' which provides that 'criticising the work, or the administration, of your agency is almost always going to be seen as a breach of the Code'.<sup>36</sup>

35 (Emphasis added).

36 Australian Public Service Commission, 'Making Public Comment on Social Media: A Guide for Employees' (Guidelines, 16 September 2019) <<https://www.apsc.gov.au/making-public-comment-social-media-guide-employees>>. For a discussion of the development of the guidance on the use of social media by public servants between 2012–14, see Dennis C Grube, 'Rules, Prudence and Public Value: Public Servants and Social Media in Comparative Perspective' (2017) 52(1) *Government and Opposition* 75, 90–5. For a discussion of social media and the law, particularly in the context of employment law, see David Mangan and Lorna E Gillies, *The Legal Challenges of Social Media* (Edward Elgar Publishing, 2017).

## A Judicial Scrutiny of the Freedom of Expression of Public Servants

As has been recognised by others, Australian courts have engaged in surprisingly little scrutiny of the freedom of expression of public servants.<sup>37</sup> In 2003, Finn J in the Federal Court of Australia struck down regulation 7(13) of the *Public Servants Regulations 1999* (Cth). The regulation provided:

An APS [Australian Public Service] employee must not, except in the course of his or her duties as an APS employee or with the Agency Head's express authority, give or disclose, directly or indirectly, any information about public business or anything of which the employee has official knowledge.<sup>38</sup>

The case concerned Mr Bennett, a public servant employed in the Australian Customs Service and the Federal President of the Customs Officers Association, a union registered under the *Workplace Relations Act 1996* (Cth). Mr Bennett made public comments to the media in his capacity as the president of a trade union about proposed cuts to the number of customs officers on the barrier at Australian ports and airports. He was also critical of the limited inspection of containers in the waterfront.<sup>39</sup> Mr Bennett was charged under section 56 of the *Public Service Act 1992* (Cth) for his failure to comply with regulation 7(13) of the *Public Service Regulations 1999* (Cth).

In striking down the impugned regulation, Finn J found that the regulation burdened the implied freedom of political communication and was not 'reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government ...'<sup>40</sup> Finn J found that the impugned regulation did not differentiate between the type and quality of information protected, and the consequences of disclosure.<sup>41</sup> As Erskine points out, the decision 'sent shockwaves around the Commonwealth public service'.<sup>42</sup> The case had the potential to have broad implications with regard to the free expression of public servants.<sup>43</sup> However, this was not to be realised as the Full Court of the Federal Court and the High Court, in cases discussed below, were more willing to recognise the legitimacy of statute limiting the free expression of public servants.

37 Kieran Pender, 'Comcare v Banerji: Public Servants and Political Communication' (2019) 41(1) *Sydney Law Review* 131, 131.

38 *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334, 337 [3] ('*Bennett*').

39 For a discussion of the facts surrounding the case, see Christopher Erskine, 'The *Bennett* Decision Explained: The Sky is Not Falling!' (Seminar Paper, Australian Institute of Administrative Law Seminar, 27 April 2005) 15–16.

40 *Bennett* (2003) 134 FCR 334, 353 [76]. The Court applied the test first articulated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 discussed below.

41 Regulation 7(13) of the *Public Service Regulations 1999* (Cth) was repealed and replaced by regulation 2.1. This new provision was found to be constitutionally valid in the case of *R v Goreng-Goreng* (2008) 220 FLR 21.

42 Erskine (n 39) 15.

43 Ian Holland and Peter Prince, 'Public Servants Speaking Publicly: The *Bennett* Case' (Research Note No 31, Parliamentary Library, Parliament of Australia, 10 February 2004).



In *Gaynor v Chief of Defence Force [No 3]*,<sup>44</sup> Mr Gaynor argued that the termination of his service in the Army reserve due to comments on social media critical of the LGBTQI+ community, trans people and Muslims, was a violation of the implied freedom of political communication. Mr Gaynor was not governed by the *Public Service Act 1999* (Cth). The impugned provision was regulation 85 of the *Defence (Personnel) Regulations 2002* (Cth), which conferred the power of termination. Buchanan J found at first instance that Mr Gaynor's speech was protected by the implied freedom of political communication as he was expressing his views as a private citizen.<sup>45</sup>

The Full Court of the Federal Court, however, found Mr Gaynor's dismissal to be constitutional.<sup>46</sup> The Court confirmed that 'the implied freedom does not involve, nor does it recognise or confer, any personal rights'.<sup>47</sup> The Full Court of the Federal Court rejected the primary judge's 'individually-based analysis' and 'incorrect focus on the respondent's "right" to communicate'.<sup>48</sup> The Court found that

the learned primary judge moved to an analysis of the termination decision which treated the respondent as having a constitutional right to express himself on political matters, which right had been unduly infringed (in his Honour's view) by the termination decision. That was not the analysis the constitutional question called for.<sup>49</sup>

The Court noted that there is no federal anti-discrimination law prohibiting discrimination on the ground of political opinion, nor was the case a claim of unlawful discrimination.<sup>50</sup> The correct test is directed at the exercise of legislative power. That is, the lower court needed to ask if the empowering Act and the regulations made pursuant to the *Public Service Act 1999* (Cth) infringe the implied freedom. The Full Court of the Federal Court found that the impugned regulation is 'directed at the suitability (including suitability of character) of individuals to remain as officers in the ADF'.<sup>51</sup> The Court conceded that the scope of the power in the impugned regulation was wide but concluded that '[i]t was sufficiently confined by the objects and purposes of the statutory scheme in which it appears that it can properly be described as suitable, necessary, and adequate in balance with respect to any burden it imposes on the implied freedom'.<sup>52</sup>

The reasoning of the Full Court of the Federal Court in *Chief of Defence Force v Gaynor* is not confined to the politically contentious expression of military personnel. The rejection that the implied freedom of political communication

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44 (2015) 237 FCR 188.

45 Ibid 255–6 [284].

46 *Chief of Defence Force v Gaynor* (2017) 246 FCR 298, 315 [72].

47 Ibid 310 [48].

48 Ibid 313 [60].

49 Ibid 313–14 [63].

50 Ibid 314 [66].

51 Ibid 323 [108].

52 Ibid 324 [112].

protects speech made in a private capacity, foreshadows the High Court's decision in *Banerji* in the context of Australian public servants.

### B *Comcare v Banerji* (2019) 372 ALR 42

The High Court did not consider the limitations on the speech of public servants under the *Public Service Act 1999* (Cth) until its 2019 decision in *Banerji*.

Ms Banerji was employed at the then Department of Immigration and Citizenship within the Ombudsman and Human Rights and Equal Opportunity Commission section, when she tweeted comments critical of the Department of Immigration and Citizenship, departmental policies and administration, departmental employees, government and opposition immigration policies, and government and opposition members of parliament.<sup>53</sup> Tweets included comments such as 'Where states fail to offer legal asylum to refugees, that state fails', 'Neither of the parties get it: What are our obligations under international law? #auspol' and 'When a nation state permits eighty-six percent of detainees to suffer mental health problems, it #fails'.<sup>54</sup>

Ms Banerji was found to have breached the APS Code of Conduct by her employer in October 2012.<sup>55</sup> Reasons given for the decision were outlined in a letter to Ms Banerji from the Departmental Secretary's Delegate which provided:

[B]y making inappropriate online comments which were harsh and extreme in their criticism of the Government and DIAC administration to over 700 followers, many of whom are from the journalistic and political arena and by not declaring your outside employment you have failed to:

behave with honesty and integrity in the course of your APS employment and in a way that upholds the APS Values and the integrity and good reputation of the APS; and take reasonable steps to avoid any conflict of interest (real or apparent) in connection with APS employment.

... you state there is no evidence that the account is yours, I disagree. I am satisfied that, on the balance of probabilities, the evidence provided, although circumstantial, does support the conclusion that the LaLegale twitter account is yours.<sup>56</sup>

Ms Banerji's contract was terminated on 13 September 2013. She lodged a claim for compensation, within the meaning of section 5A(1) of the *Compensation Act 1988* (Cth). A delegate of Comcare rejected her application in February 2014, a decision which was affirmed by a further Comcare delegate in August of the same year. Ms Banerji sought a review of the decision before the Administrative Appeals Tribunal, which found in her favour. The Tribunal held that sections 10(1), 13(1) and 15(1) of the *Public Service Act 1999* (Cth) (as at 15 October 2012) imposed an unjustified burden on the implied freedom of political communication. Comcare appealed the decision to the High Court.

53 *Banerji* (2019) 372 ALR 42, 42.

54 *Banerji and Comcare (Compensation)* [2018] AATA 892, [9] (Deputy President Humphries and Member Hughson).

55 *Ibid* [12]–[13] (Deputy President Humphries and Member Hughson).

56 *Ibid* [12] (Deputy President Humphries and Member Hughson).

### 1 *The High Court and the Implied Freedom of Political Communication*

The High Court disagreed with the Tribunal decision. It found that the Tribunal had wrongly construed the implied freedom of political communication as a personal freedom.<sup>57</sup> The High Court clarified that

the implied freedom of political communication is not a personal right of free speech. It is a restriction on legislative power which arises as a necessary implication from ss 7, 24, 64 and 128 and related sections of the *Constitution* and, as such, extends only so far as is necessary to preserve and protect the system of representative and responsible government mandated by the *Constitution*.<sup>58</sup>

The High Court contrasted the narrow scope of the implied freedom of political communication in Australia, with the freedom of expression provisions in the *Canadian Charter of Rights and Freedoms*<sup>59</sup> or those under the First Amendment of the *United States Constitution*. It reiterated that the implied freedom of political communication in the *Australian Constitution* only protects speech when there is ‘a material unjustified effect on political communication as a whole’ and not when an individual has been denied the opportunity to express a political point of view.<sup>60</sup>

To determine if the laws in question infringed the implied freedom of political communication, the Court used a proportionality test first adopted unanimously by the court in *Lange v Australian Broadcasting Commission*,<sup>61</sup> slightly altered in *Coleman v Power*<sup>62</sup> and amended once more in *Brown v Tasmania*.<sup>63</sup> The Court asked:

1. Does the law effectively burden the implied freedom of political communication?<sup>64</sup>
2. If the answer to the above is yes, is the purpose of the law legitimate?<sup>65</sup>
3. If the purpose of the law is legitimate, is the law reasonably appropriate and adapted to advance that legitimate purpose in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?<sup>66</sup>

With regard to question one, the majority conceded that the law imposed an effective burden on political communication.<sup>67</sup> However, the majority reasoned that this burden was for a legitimate purpose, finding that: ‘There can be no doubt

57 *Banerji* (2019) 372 ALR 42, 50–1 [19] (Kiefel CJ, Bell, Keane and Nettle JJ).

58 *Ibid* 51 [20] (Kiefel CJ, Bell, Keane and Nettle JJ).

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

60 *Banerji* (2019) 372 ALR 42, 51 [20] (Kiefel CJ, Bell, Keane and Nettle JJ).

61 (1997) 189 CLR 520. For commentary, see Adrienne Stone, ‘*Lange, Levy and the Direction of the Freedom of Political Communication under the Australian Constitution*’ (1998) 21(1) *University of New South Wales Law Journal* 117.

62 (2004) 220 CLR 1, 50 (McHugh J), 77–8 (Gummow and Hayne JJ), 82 (Kirby J).

63 (2017) 261 CLR 328, 368–70 (Kiefel CJ, Bell and Keane JJ), 416–7 (Nettle J).

64 *Banerji* (2019) 372 ALR 42, 81–2 [136]–[141] (Gordon J).

65 *Ibid* 82–5 [142]–[155] (Gordon J).

66 See discussion of ‘Justification’ in *ibid* 85–6 [156]–[161] (Gordon J).

67 *Ibid* 54 [29] (Kiefel CJ, Bell, Keane and Nettle JJ).

that the maintenance and protection of an apolitical and professional public service is a significant purpose consistent with the system of representative and responsible government mandated by the *Constitution*'.<sup>68</sup>

With regard to question three, the majority found that the impugned provisions 'present as a plainly reasoned and focussed response to the need to ensure that the requirement of upholding the APS Values and the integrity and good reputation of the APS trespasses no further upon the implied freedom than is reasonably justified'.<sup>69</sup>

The majority also found that the law was suitable because it had 'a rational connection to its purpose'.<sup>70</sup> The restrictions on public servants in question were deemed necessary as there was no 'obvious and compelling alternative which is equally practicable'.<sup>71</sup>

The Court dismissed Ms Banerji's claims regarding her anonymity and her use of the unidentified handle @LaLegale, which did not disclose her name or her occupation. The majority stated that: '[A]s a rule of thumb, anyone who posts material online, particularly on social media websites, should assume that, at some point, his or her identity and the nature of his or her employment will be revealed'.<sup>72</sup>

According to the High Court, therefore, limitation of all communications by public servants, anonymous or otherwise, at all times, which fails to 'uphold the APS values and the integrity and good reputation of the APS' is consistent with the constitutionally protected implied freedom of political communication. Whilst, as the majority reasoned, the *Public Service Act 1999* (Cth) does not purport to limit all speech,<sup>73</sup> this significant limitation on the private and purportedly anonymous speech of public servants in their own capacity is significant, and as shown below, inconsistent with developments globally.

As Gelber points out, the case highlights the insufficiency of existing constitutional protection for freedom of expression in Australia.<sup>74</sup> This is particularly true in the case of personal freedoms as Gordon J reaffirmed that the implied freedom of political communication 'does not give political communication "transcendent value" equivalent to individual liberty'.<sup>75</sup> As her Honour has pointed out previously, the freedom of political communication is 'not a right'.<sup>76</sup> The case of *Banerji* highlights the difficulty when attempting to use the implied freedom like a personal right rather than what it truly is, an implication from a particular system of government.

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68 Ibid 54 [31] (Kiefel CJ, Bell, Keane and Nettle JJ).

69 Ibid 58–9 [42] (Kiefel CJ, Bell, Keane and Nettle JJ).

70 Ibid 55 [33] (Kiefel CJ, Bell, Keane and Nettle JJ).

71 Ibid 56 [35] (Kiefel CJ, Bell, Keane and Nettle JJ).

72 Ibid 52 [24] (Kiefel CJ, Bell, Keane and Nettle JJ).

73 Ibid 53 [25] (Kiefel CJ, Bell, Keane and Nettle JJ).

74 Katharine Gelber, 'The Precarious Protection of Free Speech in Australia: The *Banerji* Case' (2019) 25(3) *Australian Journal of Human Rights* 511, 511 ('The *Banerji* Case').

75 See *Brown v Tasmania* (2017) 261 CLR 328, 475 [465].

76 *Clubb v Edwards* (2019) 93 ALJR 448, 530 [393].

### III FREEDOM OF POLITICAL EXPRESSION UNDER INTERNATIONAL LAW

#### A Freedom of Expression under the *ICCPR*

This narrow construction of the implied freedom of expression under the *Australian Constitution* is in contrast with the understanding of freedom of expression in international law. The United Nations Human Rights Committee ('Human Rights Committee') is responsible for the monitoring of the *ICCPR* and considers individual complaints that allege a violation of an individual's rights under the *ICCPR* if the state is a party to the *Optional Protocol to the International Covenant on Civil and Political Rights* ('*First Optional Protocol*').<sup>77</sup> Australia acceded to the *First Optional Protocol* on 25 September 1991. It should be noted that freedom of expression is 'universally acknowledged as a primary human right of fundamental importance'.<sup>78</sup>

The Human Rights Committee has not had an opportunity to consider Ms Banerji's case or to examine a complaint by any Australian public servants aggrieved by the limits on their freedom of expression. If the Human Rights Committee has the opportunity to express its views in Ms Banerji's case, it is highly likely that it would come to a different conclusion than the High Court.

In any examination of the right of a public servant to freedom of political expression, the Human Rights Committee will consider article 19(2) of the *ICCPR*. The article provides: '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'.

Unlike the implied freedom of political communication in the *Australian Constitution*, the freedom of expression under the *ICCPR* is a personal right and is not tied to any particular system of government. The United Nations Human Rights Committee has highlighted the integral nature of freedom of expression to other socio-political rights such as freedom of assembly and association, and the exercise of the right to vote.<sup>79</sup> The Special Rapporteur on the promotion and protection of

77 *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*First Optional Protocol*').

78 Vickers (n 10) 14. In addition to the *ICCPR*, freedom of expression is protected under article 19 of the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948); article 10 of the *ECHR* (n 12); article 13 of the *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978).

79 Human Rights Committee, *General Comment No 34: Freedoms of Opinion and Expression (Article 19 of the International Covenant on Civil and Political Rights)*, 102<sup>nd</sup> sess, UN Doc CCPR/GC/34 (11–29 July 2011) 1 [4] ('*General Comment No 34*').

the right to freedom of opinion and expression has emphasised that freedom of expression is a ‘core’ right under the *ICCPR*.<sup>80</sup>

The freedom of expression provision under article 19(2) applies to all forms of communication, including tweets.<sup>81</sup> The Human Rights Committee has expressed the view, in a number of decisions, that the protected speech includes political speech, of the kind that Ms Banerji engaged in.<sup>82</sup>

### B Limits on the Freedom of Expression under the *ICCPR*

In any hearings before the Human Rights Committee, Australia may wish to defend the limits on the expression of public servants by invoking the limits found in article 19(3). The article 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.

The first test in article 19(3) is that the restriction be provided by law. The law in question is likely to be section 13(11) of the *Public Service Act 1999* (Cth), which requires public servants to uphold the values, integrity and reputation of the APS at all times. The Human Rights Committee has clarified in *General Comment No 34: Freedoms of Opinion and Expression* that the ‘law’ for the purposes of article 19(3), must be ‘formulated with sufficient precision to enable an individual to regulate his or her conduct’.<sup>83</sup> Furthermore, ‘[l]aws must provide sufficient guidance to those charged with their execution to enable them to ascertain what

80 Abid Hussain, *Promotion and Protection of the Right to Freedom of Opinion and Expression: Report of the Special Rapporteur, Mr Abid Hussain, Pursuant to Commission on Human Rights Resolution 1993/45*, UN Doc E/CN.4/1995/32 (14 December 1994) 5 [14].

81 *General Comment No 34* (n 79) 3 [12]; Human Rights Council, *First Resolution on Internet Free Speech*, 20<sup>th</sup> sess, UN Doc A/HRC/20/L.13 (29 June 2012). See also Jake McDermott, ‘Freedom of Tweet: Wireless Shutdowns in the Wake of the Arab Spring’ (2013) 11(1) *International Journal of Civil Society Law* 11.

82 Human Rights Committee, *Views under Article 5, Paragraph 4, of the Optional Protocol*, 27<sup>th</sup> sess, UN Doc CCPR/C/27/D/138/1983 (26 March 1986) (*Mpandanjila et al v Zaïre*); Human Rights Committee, *Views under Article 5, Paragraph 4, of the Optional Protocol*, 48<sup>th</sup> sess, UN Doc CCPR/C/48/D/326/1988 (2 August 1993) (*Kalenga v Zambia*); Human Rights Committee, *Views under Article 5, Paragraph 4, of the Optional Protocol*, 24<sup>th</sup> sess, UN Doc CCPR/C/24/D/132/1982 (1 April 1985) (*Jaona v Madagascar*); Human Rights Committee, *Views under Article 5, Paragraph 4, of the Optional Protocol*, 50<sup>th</sup> sess, UN Doc CCPR/C/50/D/412/1990 (31 March 1994) (*Kivenmaa v Finland*); Human Rights Committee, *Views under Article 5, Paragraph 4, of the Optional Protocol*, 57<sup>th</sup> sess, UN Doc CCPR/C/55/D/422-424/1990 (8–26 July 1996) (*Aduayom et al v Togo*); Human Rights Committee, *Decisions of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights*, 104<sup>th</sup> sess, UN Doc CCPR/C/104/D/1634/2007 (12–30 March 2012) (*Korneenko v Belarus*). For commentary, see Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 2013) 593 [18.09].

83 *General Comment No 34* (n 79) 6–7 [25].

sorts of expression are properly restricted and what sorts are not'.<sup>84</sup> This has been understood to mean that laws limiting freedom of expression must not be vague and should be properly promulgated.<sup>85</sup>

The values of the APS, such as neutrality, have been codified under the *Public Service Act 1999* (Cth). The terms 'integrity' and 'reputation', whilst open to interpretation, are likely to be found to be formulated with sufficient precision to guide behaviour. It is therefore likely that the laws limiting the political expression of public servants will be deemed to satisfy the requirement that the restriction be provided by law.

The Human Rights Committee has expressed the view that:

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.<sup>86</sup>

The permissible threats that may justify limiting expression are listed under articles 19(3)(a) and (b) quoted above. Article 19(3)(a) has two elements. Australia may wish to argue that in situations such as that of Ms Banerji, the freedom of expression of public servants should be restricted first for the respect of the rights of those criticised, such as senior public servants and politicians and secondly of the reputations of senior public servants and politicians.

Article 19(3)(a) does permit limits on the freedom of expression to protect the rights of the persons affected by speech; however, the 'rights' referred to are the human rights of the individuals implicated in the expression.<sup>87</sup> Politicians and senior members of government do not have a human right to be free of criticism. Therefore, criticism from the Public Service, that does not constitute hate speech, does not impinge on their human rights. In fact, political debate at times necessitates the questioning and challenge of individuals in positions of power.

Secondly, it will be difficult for Australia to argue that the expression should be limited because of the damage it does to the reputation of senior public servants and politicians. The Human Rights Committee has expressed the view that the *ICCPR* places great value on the 'uninhibited expression ... in the circumstances of public debate in a democratic society concerning figures in the public and political domain'.<sup>88</sup> The political expression engaged in by Ms Banerji does not cause greater damage to the reputation of the individuals named in her tweets than comments made by other participants in public life. This includes other concerned

84 Ibid.

85 Evelyn Aswad, 'To Protect Freedom of Expression, Why Not Steal Victory from the Jaws of Defeat?' (2020) 77(2) *Washington and Lee Law Review* 609.

86 *General Comment No 34* (n 79) 8 [35].

87 Human Rights Committee, *Views under Article 5, Paragraph 4, of the Optional Protocol*, 81<sup>st</sup> sess, UN Doc CCPR/C/81/D/927/2000 (8 July 2004) ('*Svetik v Belarus*').

88 *General Comment No 34* (n 79) 8 [33]–[34].

Australians on Twitter, politicians, the media and other interest groups.<sup>89</sup> As such, it is highly unlikely that the Human Rights Committee will accept that limiting expression of public servants in the manner envisioned by section 13(11) of the *Public Service Act 1999* (Cth) is necessary for the purposes of the rights and reputation of others. Even if such a limitation was accepted, it would only affect tweets that directly attacked individuals rather than those that criticised policy or law.

Article 19(3)(b) can also be broken down into four categories: protection of national security; protection of public health; protection of public morals; and the protection of public order [*ordre public*]. It is unlikely that Ms Banerji's tweets can be framed as a threat to national security. This analysis is concerned with political expression in the form of critiques of governmental and opposition policies and questioning members of the executive. Such criticism may hurt the feelings of individuals concerned and may contribute to public debate about political issues, but it cannot be considered a danger to national security. The expression is also unlikely to affect public health or morals.

Australia may have more success in any argument regarding restriction of expression because of public order. Authoritative guidelines provided by the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*,<sup>90</sup> have defined 'public order' as 'the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded'.<sup>91</sup> Under such a definition, preserving the apolitical nature of the Public Service as an element of responsible government, may be accepted as a fundamental principle on which Australia is founded.

The question remains, however, if the extreme measures taken by Australia are necessary to preserve responsible government. The Human Rights Committee uses the test of proportionality to determine if a restriction on expression is justified.<sup>92</sup> That is the committee will determine if limiting all communications which fail to 'uphold the APS values and the integrity and good reputation of the APS' by public servants, anonymous or otherwise, at all times, is proportionate to the aim of preserving the ideals of 'representative and responsible government mandated by the *Constitution*',<sup>93</sup> and is the least intrusive measure.<sup>94</sup>

It is likely that the Human Rights Committee would reject the argument that it is necessary, proportionate and the least intrusive measure to limit the freedom of expression of anonymous public servants because 'communication may damage

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89 Gelber, 'The *Banerji* Case' (n 74) 6.

90 Commission on Human Rights, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN ESCOR, 41<sup>st</sup> sess, UN Doc E/CN.4/1985/4 (28 September 1984) annex.

91 *Ibid* 7 cl 22.

92 *General Comment No 34* (n 79) 8 [33]–[34].

93 *Banerji* (2019) 372 ALR 42, 56 [35] (Kiefel CJ, Bell, Keane and Nettle JJ).

94 *General Comment No 34* (n 79) 8 [34].



the good reputation of the APS even while it remains anonymous'.<sup>95</sup> It is notable that the restrictions only apply to criticism of the Public Service or government policy and do not apply when public servants are supportive of policy.<sup>96</sup> '[R]epresentative and responsible government mandated by the *Constitution*'<sup>97</sup> cannot require the silencing of all criticism against the government and the Public Service. The criticism of anonymous public servants has no more damaging impact on representative and responsible government than criticism from any other person in the Australian community. To silence dissent even when a public servant's expression cannot be traced back to his or her occupation hampers the vigorous public discussion that democracy requires. As the Human Rights Committee has stated:

Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association.<sup>98</sup>

Ms Banerji's case also highlights the rather indiscriminate application of the restrictions to freedom of expression to all public servants irrespective of their rank. Three of the judges in the case specifically addressed the issue of seniority among public servants. Justices Gageler,<sup>99</sup> Gordon,<sup>100</sup> and Edelman,<sup>101</sup> all found that the more senior a public servant, the more circumspect they must be in their expression. The issue was not addressed by the majority decision of Kiefel CJ and Bell, Keane and Nettle JJ. Despite Gageler, Gordon and Edelman JJ's comments regarding seniority, the unanimous finding that Ms Banerji, who was not a senior public servant, was required to refrain from expressing her opinions on Twitter demonstrates that if any assessment of rank exists in assessing the permissible level of freedom of expression for public servants in Australia, it is very limited.

The Human Rights Committee would be unlikely to find valid an indiscriminate application of the limits on freedom of expression, which does not take into consideration a significant individual circumstance such as seniority. If the concern is the damage done to the reputation of the APS, criticism from a senior public servant is much more likely to have an impact on the Australian public than a more junior member of staff. In order to be proportionate, therefore, there must be a much more nuanced appreciation of the individual circumstance of each

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95 *Banerji* (2019) 372 ALR 42, 56 [36] (Kiefel CJ, Bell, Keane and Nettle JJ).

96 Dennis Grube, 'Responsibility to Be Enthusiastic? Public Servants and the Public Face of "Promiscuous Partisanship"' (2015) 28(3) *Governance: An International Journal of Policy, Administration, and Institutions* 305.

97 *Banerji* (2019) 372 ALR 42, 56 [35] (Kiefel CJ, Bell, Keane and Nettle JJ).

98 Human Rights Committee, *General Comment No 25, The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 57<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.7 (12 July 1996) 4 [8].

99 *Banerji* (2019) 372 ALR 42, 71 [93].

100 *Ibid* 82 [140].

101 *Ibid* 93 [183].

public servant, in particular the rank of each individual deemed to have put the reputation of the public service in disrepute.

Whilst the Human Rights Committee is likely to accept that the limits on the expression of public servants are done by law and are for a legitimate end, they are unlikely to accept that these limits are necessary in their current form or the least intrusive means of protecting representative and responsible government. It is, therefore, highly likely that Australia would need to amend its existing legislation to ensure that anonymous public servants and low-level bureaucrats are exempt from the application of the restrictions on political expression. Australia would also need to have a more nuanced approach to the application of the restrictions to ensure that expression is only limited when it is truly necessary for the protection of representative and responsible government.

### C Jurisprudence from the European Court of Human Rights

Further guidance on the requirements of international human rights law with regards to freedom of expression of public servants may be found in the jurisprudence of the European Court of Human Rights. Although findings of regional human rights bodies are not binding on the Human Rights Committee in its interpretation of the *ICCPR*, and are not applicable to Australia, which is outside their jurisdiction, analogous treaties can shed light on what the views of the Human Rights Committee may be on such cases and can assist in the interpretation of the *ICCPR*.

Article 19 of the *ICCPR* is very similar to article 10 of the *ECHR*, which provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

It should be noted that article 10(2) of the *ECHR* provides a greater range of justifications for the limitations of expression than article 19(3) of the *ICCPR*. For example, the *ECHR* permits limits on expression for preserving territorial integrity, preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The European Court of Human Rights has found that freedom of expression, as outlined in article 10 of the *ECHR*, applies to all in the workplace. It has

explicitly stated that the right applies to public servants.<sup>102</sup> The leading case in the freedom of expression of public servants from the European Court of Human Rights is *Vogt v Germany*,<sup>103</sup> where the European Court of Human Rights considered section 61(2) of the *Lower Saxony Civil Service Act* (Germany). The impugned legislation prohibited political activities by public servants. Ms Vogt was fired as a public servant (a teacher) because she engaged in various political activities on behalf of the *Deutsche Kommunistische Partei* [German Communist Party] and had stood as a candidate for that party in an election.

The European Court of Human Rights found that ‘a democratic State is entitled to require civil servants to be loyal to the constitutional principles on which it is founded’.<sup>104</sup> However, the court was concerned about the indiscriminate nature of the prohibition which applied ‘equally [to] every civil servant, regardless of his or her function and rank’;<sup>105</sup> the lack of distinction between service and private life and the fact that the ‘duty is always owed, in every context’.<sup>106</sup> The Court therefore found that Ms Vogt’s dismissal was not necessary and was disproportionate to its aims.

Like the impugned German provision considered in *Vogt v Germany*, section 13(11) of the *Australian Public Service Act 1999* (Cth) has proven to be largely indiscriminate in its application applying equally to every civil servant regardless of his or her rank. The prohibition on expression of public servants in Australia does not make a distinction between service and private life and the duty is always owed, in every context.

Australia may have some support for its limits on the expression of public servants in *Karapetyan v Armenia*.<sup>107</sup> In that case, the European Court of Human Rights considered the dismissal of employees of the Ministry of Foreign Affairs in Armenia who made a statement expressing their concern with regard to elections in Armenia. The public servants in question were very senior diplomats holding the roles of Head of Press and Information Department, Head of NATO Division of Arms Control and International Security Department, Counsel of the European Department and Head of USA and Canada Division of the American Department. The public servants referred to their occupation as Armenian diplomats in the

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102 See *Vogt v Germany* (1995) 323 Eur Court HR (ser A) [53]; *Fuentes Bobo v Spain* (European Court of Human Rights, Fourth Section, Application No 39293/98, 29 February 2000); *Kudeshkina v Russia* (European Court of Human Rights, First Section, Application No 29492/05, 26 February 2011) [85]. See also *Peev v Bulgaria* (European Court of Human Rights, Fifth Section, Application No 64209/01, 26 July 2007); *Heinisch v Germany* [2011] V Eur Court HR 229; *Palomo Sánchez v Spain* [2011] V Eur Court HR 145; *Karapetyan v Armenia* (European Court of Human Rights, First Section, Application No 59001/08, 17 November 2016) [47].

103 (1995) 323 Eur Court HR (ser A).

104 *Ibid* [59].

105 *Ibid*.

106 *Ibid*.

107 *Karapetyan v Armenia* (European Court of Human Rights, First Section, Application No 59001/08, 17 November 2016) [49].

statement and expressed their support for ‘compatriots who have risen to struggle for freedom, protection of the right to a fair election and establishment of true democracy in Armenia’.<sup>108</sup> The names of the diplomats with the indication of their office appeared under the statement.<sup>109</sup>

The senior public servants were dismissed from employment following this public statement on the grounds that they had engaged in political activities and made use of their official capacity. The domestic legislation in question required ‘proper and consistent representation of the rights and interests of the Republic of Armenia before the international community and protection of the rights and statutory interests of the nationals of the Republic of Armenia and its legal entities’.<sup>110</sup>

The state of Armenia argued that their action in dismissing the public servants had a legitimate aim, namely ‘the aim of guaranteeing the neutrality of civil servants, including diplomatic corps’.<sup>111</sup>

The European Court of Human Rights found that ‘it is a legitimate aim in any democratic society to have a politically neutral body of civil servants’.<sup>112</sup> The Court also reasoned that

In view of the particular history of some Contracting States, the national authorities of these States may, so as to ensure the consolidation and maintenance of democracy, consider it necessary to have constitutional safeguards to achieve this aim by restricting the freedom of civil servants to engage in political activities ... A democratic State is thus entitled to require civil servants to be loyal to the constitutional principles on which it is founded.<sup>113</sup>

The Court found for the government of Armenia but made clear that it had paid ‘particular importance to the office held by the applicants, the form and content of their statements and, in particular, the context in which they were made’.<sup>114</sup> The Court emphasised the particular importance it placed on the fact that the applicants ‘occupied high-ranking positions’; that ‘their names, with an explicit reference to their official titles, appeared on the impugned statement’;<sup>115</sup> that they had involved themselves in the political process;<sup>116</sup> and that the statement was made amidst a political crisis.<sup>117</sup>

108 Ibid [8].

109 Ibid [11].

110 Դիվանագիտական ծառայության մասին [Diplomatic Services Act 2001] (Armenia) art 4, cited in *Karapetyan v Armenia* (European Court of Human Rights, First Section, Application No 59001/08, 17 November 2016) [20].

111 *Karapetyan v Armenia* (European Court of Human Rights, First Section, Application No 59001/08, 17 November 2016) [34].

112 Ibid [49].

113 Ibid.

114 Ibid [51].

115 Ibid [54].

116 Ibid [55].

117 Ibid.

Ms Banerji's situation is very different to that of the senior public servants in question.<sup>118</sup> She did not occupy a high-ranking position, her name or her official title did not appear on the impugned tweets, she had not involved herself in the political process directly and her tweets were not made amidst a political crisis. Therefore, whilst Australia may wish to use *Karapetyan v Armenia* to support their claim that the human rights of Ms Banerji were not compromised, the facts of the case would not support Australia's position.

In *Karapetyan v Armenia*, the European Court of Human Rights reiterated 'that as civil servants enjoy the freedom to express their opinions and ideas ... like all other individuals'.<sup>119</sup> Importantly, the Court found that:

Contracting States must allow a certain space in domestic public debate, even in difficult times, for the participation of civil servants, in particular where their experience and expertise may be conducive to an informed debate on issues of public interest and importance.<sup>120</sup>

The decision would not support, therefore, limits on anonymous communication by junior members of the Public Service.

In *Fuentes Bobo v Spain*,<sup>121</sup> the European Court of Human Rights held that the state television company's dismissal of Mr Fuentes Bobo after he made critical comments of his employer was a disproportionate interference with his right to freedom of expression. Mr Fuentes Bobo's employment as a producer for Spain's state-run television station, TVE, was terminated after he wrote an article criticising the television station and subsequently giving further critical media interviews. The European Court of Human Rights found that the firing of Mr Fuentes Bobo was disproportionate. In its finding, the Court reiterated 'that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment'.<sup>122</sup>

International human rights law does not prohibit Australia from limiting the freedom of expression of public servants. Although there is no jurisprudence from the Human Rights Committee on the question of the freedom of speech of public servants under the *ICCPR* directly, European jurisprudence on the analogous *ECHR* suggests that in some circumstances, limiting the freedom of expression of public servants may be a permissible means of protecting public order. What is unlikely to be permitted, however, is a blanket prohibition on expression from

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118 On the issue of senior public servants, see also *Ahmed v United Kingdom* (1982) 4 EHRR 126 where the restrictions on the involvement of senior local government officers in certain types of political activity were not seen to be a violation of article 10 of the *ECHR*. The Court accepted that the restrictions were legitimate because they went to the political impartiality of civil servants.

119 (European Court of Human Rights, First Section, Application No 59001/08, 17 November 2016) [58].

120 *Ibid.*

121 (European Court of Human Rights, Fourth Section, Application No 39293/98, 29 February 2000).

122 *Ibid* [43]. The original judgment provides in French: 'La liberté d'expression constitue l'un des fondements essentiels d'une société démocratique et l'une des conditions primordiales de son progrès et de l'épanouissement de chacun'.

public servants regardless of their rank. It is also unlikely that limiting the speech of public servants publishing their opinions anonymously would be found permissible under article 19(3) of the *ICCPR*.

#### IV WHAT IF ARTICLE 19 OF THE *ICCPR* WAS CONSIDERED LEGAL AUTHORITY BY AUSTRALIAN COURTS?

Australia signed the *ICCPR* in 1972 and ratified the Covenant in 1980. Nevertheless, the High Court did not refer to Australia's obligations under the *ICCPR* in its decision regarding Ms Banerji. This is because Australia has not adopted the *ICCPR* into domestic law at the federal level. The *Australian Human Rights Commission Act 1986* (Cth) empowers the Human Rights Committee to investigate alleged breaches of human rights under the *ICCPR* but it has no power of penalty or enforcement and its findings are non-binding.<sup>123</sup>

The Human Rights Committee has noted Australia's failure to abide by article 2(2) of the *ICCPR* which requires state parties to the Covenant 'to take the necessary steps ... to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant'. In its 2009 concluding observations on the fifth periodic report submitted by Australia, the Human Rights Committee noted that: 'the Covenant has not been incorporated into domestic law and that the State party has not yet adopted a comprehensive legal framework for the protection of the Covenant rights at the Federal level ...'.<sup>124</sup>

This concern was repeated in the Human Rights Committee's 2017 *Concluding Observations on the Sixth Periodic Report of Australia*. The Human Rights Committee observed 'that gaps in the application of Covenant rights still exist'<sup>125</sup> in Australia and reiterated its recommendation that Australia 'should adopt comprehensive federal legislation giving full legal effect to all Covenant provisions across all state and territory jurisdictions'.<sup>126</sup>

Unlike the implied freedom of political communication in the *Australian Constitution*, freedom of expression under article 19 of the *ICCPR* is a personal right. There is a much greater emphasis on the protection of the freedom of expression itself under article 19 in contrast with Australia's implied constitutional freedom that is concerned with the protection of its system of representative and responsible government.

There is no evidence, however, that limiting the anonymous expression of public servants who do not occupy senior roles within the Public Service would

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123 *Australian Human Rights Commission Act 1986* (Cth) sch 2.

124 Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee*, 95<sup>th</sup> sess, UN Doc CCPR/C/AUS/CO/5 (7 May 2009) 2 [8].

125 Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Australia*, 102<sup>nd</sup> sess, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) 2 [5].

126 *Ibid* 2 [6].

compromise the system of representative and responsible government. The limits placed on the expression of public servants arguably goes too far in curbing the speech of a significant number of Australians. Public servants are often well informed about Australian politics and have important contributions to make to Australian debate.

## V CONCLUSION

As Senator Staniforth Smith of Western Australia argued in 1903 when debating the first incarnation of limits on the public expression of public servants:

It must be remembered that to prevent civil servants from publicly discussing political questions will not stop them from discussing such questions in private, thus probably giving rise to secret meetings and cabals, and tending to bring about a condition of affairs infinitely worse than that which the framers of the regulation are trying to avert.<sup>127</sup>

The same arguments may continue to be made today. As Chairman Coombs stated in his report in 1976, ‘awareness of their own convictions, respect for ministerial and other political authority, and a professional attitude provided a better guarantee of integrity than a specious pretence of neutrality’.<sup>128</sup> Recommendation 197 of the Coombs Royal Commission that Australian public servants should be free to exercise their civil and political rights, unless such rights interfere with the proper performance of duties,<sup>129</sup> is more aligned with international norms and Australia’s obligations under the *ICCPR* than the current legislative regime which has been interpreted broadly by the High Court.

International law does not require Australia to compromise its system of responsible government. It does, however, provide a better balance between the rights of public servants and the needs of a neutral public service than Australia’s existing municipal law. The incorporation of article 19 of the *ICCPR* into domestic law would lead to a stronger public service and one where public servants can better contribute to a healthy democracy.

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127 Commonwealth, *Parliamentary Debates*, Senate, 12 June 1903, 848.

128 *Coombs Report* (n 15) 24 [2.4.9].

129 *Ibid* 233 [8.5.55].