Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

Freedom of speech in Australia

Submission to Parliamentary Joint Committee on Human Rights

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Who we are

The Australian Lawyers Alliance is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence. While maintaining our plaintiff common law focus, our advocacy has since expanded to criminal and administrative law, in line with our dedication to justice, freedom and rights.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

[1] www.lawyersalliance.com.au

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Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the issues raised by the terms of reference of the inquiry currently being conducted by the Parliamentary Joint Committee on Human Rights into Freedom of Speech in Australia. This submission makes comments on all of the terms of reference.

2. The ALA is a strong supporter of freedom of speech, also referred to as freedom of expression in international law (the terms are used interchangeably in this submission). We believe it is fundamental in any society for individuals to be able to discuss all matters fully and frankly. Freedom of speech, however, carries with it special responsibilities, as outlined below. One of these responsibilities relates to racial discrimination, in recognition that racially discriminatory speech can have very serious consequences, both for the individuals concerned and the broader community. These responsibilities are founded in the understanding that speech can be incredibly powerful, and has the potential to undermine other human rights if not reasonably constrained in certain limited circumstances, as outlined below.

3. As such, we are particularly concerned that the terms of reference of this inquiry do not allow adequate examination either of freedom of speech or of the right to be free from discrimination, as protected by the *Racial Discrimination Act* 1975 (Cth) (RDA). Its limited scope risks failing to uncover the full spectrum of legislative inhibitions on freedom of speech, and does not adequately consider the aims of the RDA or the obligations that Australia has under international law that the RDA meets.

4. Any recommendations that do not consider the right to be free from discrimination when examining the RDA risk unintended consequences. They could shift rights from those suffering discrimination to those engaging in discrimination without adequately exploring what that shift might mean for broader social cohesion.

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1. Whether the operation of Part IIA of the *Racial Discrimination Act 1975* (Cth) imposes unreasonable restrictions upon freedom of speech, and in particular whether, and if so how, ss18C and 18D should be reformed

5. The ALA does not believe that there is any need to reform ss18C and 18D. This position was recently supported by the UN Special Rapporteur on the human rights of migrants.[2] These sections ensure that Australia complies with its international human rights obligations, including both the right to be free from discrimination and the right to freedom of speech.

6. There may, however, be a need to reform other legislation to meet our obligations in relation to freedom of speech and other human rights obligations Australia has agreed to be bound by. A selection of such legislation is briefly referred to below.

1.1 OBLIGATIONS UNDER INTERNATIONAL LAW

7. The tension between protections from discrimination and freedom of speech are well known. Under the *International Covenant on Civil and Political Rights* (ICCPR), by which Australia has agreed to be bound, article 19 outlines the right to freedom of expression as follows:

> '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 [or her] choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

[2] OHCHR, *UN Special Rapporteur on the human rights of migrants concludes his official visit to Australia*, 18 November 2016, http://un.org.au/files/2016/11/16.11-SRM-Australia-End-of-mission-Statement.pdf.

(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.'

8. This formulation specifically recognises the risks that can come with freedom of speech, noting the duties and responsibilities that must accompany the right. Article 20.2 of the ICCPR goes on to require that '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. Article 26 stipulates that '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'.

9. Australia has also agreed to be bound by the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD). Under the CERD, Australia is obliged to 'prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization' (article 2.1(d)), and to 'declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin' (article 4(a)). Further, the right to freedom of expression is to be afforded without discrimination as to race (article 5(a)(viii)).

10. The Human Rights Committee, the UN Committee which oversees implementation of the ICCPR, has clarified that '[i]t is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions'.[3]

11. In this context, restrictions on freedom of speech under ss18C and 18D of the RDA are perfectly in keeping with Australia's international obligations. In fact, they are required to meet other international obligations that Australia has agreed to be bound by. Any impediments on freedom of speech that are embodied in s18C are adequately accommodated by the exceptions that can be found in s18D. They also protect the right

[3] Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34 (2011), [52].

to enjoy freedom of expression free from racial discrimination, an equally important human right.

12. The vast majority of complaints arising under s18C are resolved by the valuable work of the Australian Human Rights Commission (the Commission) by conciliation, meaning that both the complainant and the respondent agree with the terms of the resolution, and that resolutions can be designed to best meet the needs of both parties to the complaint. The most severe penalty for infringing s18C is a fine. There is no risk of criminal sanction such as imprisonment.

1.2 RESTRICTIONS ON FREEDOM OF SPEECH IN DOMESTIC LAW

13. The ALA believes that a broader inquiry into limits on freedom of speech is warranted without any restriction as to the legislation examined. Some legislation of concern with regard to freedom of speech is briefly outlined below.

14. Freedom of speech is fundamental to the healthy function of any democracy. The Australian Law Reform Commission (ALRC), in its Report into Traditional Rights and Freedoms (Freedoms Report) identified a number of laws that infringe on freedom of speech. These include criminal laws, secrecy laws, court and tribunal orders, privilege and contempt laws, anti-discrimination laws, the RDA, media, broadcasting and communications laws, information laws, intellectual property laws and others.[4]

15. The Freedoms Report makes it clear that any inquiry seeking to remove unnecessary limitations on freedom of speech from Australian law should be unrestricted in terms of the laws considered. The ALA would support a comprehensive review of this legislation, with a view to removing unnecessary restrictions on freedom of expression while retaining protections that limit discrimination or other harms that speech in which speech can be implicated. Ultimately, we believe a Human Rights Act would be an appropriate mechanism to balance the right to freedom of speech with other rights.

16. A selection of the laws of concern identified in the Freedoms Report are outlined below. Any comprehensive inquiry into freedom of speech must include in its terms of reference how these and other laws limiting speech could be reformed.

[4] ALRC, *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws* (2016), https://www.alrc.gov.au/publications/freedoms-alrc129, Chapter 4: Freedom of Speech.

1.2.1 The *Australian Border Force Act* 2015 (Cth)

17. The *Australian Border Force Act* (ABF Act) severely restricts the freedom of speech of 'entrusted persons', who are defined to be anyone whose services are available to the Department of Immigration or Border Protection, including people employed by foreign governments, contractors and consultants: ss4, 5(2).

18. That Act makes it an offence, punishable by imprisonment for up to two years, to disclose 'protected information', being information that was obtained in a person's capacity as an 'entrusted person': ABF Act ss42, 4.

19. This Committee flagged concerns regarding unreasonable infringements of freedom of expression when it examined the Bill in 2015.[5] There is no suggestion that disclosure of this information fits within one of the permissible limits placed on the right to freedom of expression found in article 19.3 of the ICCPR. The Bill does not seek to protect the rights or reputations of others or national security. In fact, if a person was to disclose information that did undermine those things, they could contravene other legislation, such as the RDA, the *Criminal Code Act* 1995 (Cth) or the *Crimes Act* 1914 (Cth). The secrecy provisions of the ABF Act therefore appear to contravene Australia's obligations under the ICCPR.

20. The constitutionality of the ABF Act has been challenged on the basis that it conflicts with the implied right of freedom of political communication by Doctors 4 Refugees.[6] The matter has not yet been listed by the High Court. The Department exempted medical professionals from the definition of 'entrusted person' in the ABF Act, meaning that the secrecy provisions no longer apply to them, after the initial statement of claim was filed.[7]

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[5] Parliamentary Joint Committee on Human Rights, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 22nd Report of the 44th Parliament* (2015), [1.96].

[6] Ben Doherty, "Immigration detention doctors challenge Border Force Act's secrecy clause in court", *the Guardian*, 27 July 2016, https://www.theguardian.com/australia-news/2016/jul/27/immigration-detention-doctors-challenge-border-force-acts-secrecy-clause-in-court.

[7] Department of Immigration and Border Protection, *Determination of Immigration and Border Protection Workers, Amendment No. 1*, 30 September 2016, https://www.border.gov.au/AccessandAccountability/Documents/determination-workers-c.pdf.

The restrictions remain in place for others working in immigration detention. The constitutionality of this law remains in doubt.

1.2.2 The *Australian Security Intelligence Organisation Act* 1979 (Cth)

21. The *Australian Security Intelligence Organisation Act* (ASIO Act) contains restrictions on speech in relation to 'special intelligence operations' (SIOs), with penalties of up to five to 10 years in prison: s35P. These provisions were inserted by the *National Security Legislation Amendment Act (No 1)* 2014 (Cth). While these restrictions are ostensibly intended to protect national security, the reality is that they are much broader than any restrictions that would reasonably be required to achieve that purpose. There is no requirement that the speech be related to national security for such severe criminal penalties to apply, just that it relate to an SIO.

22. An SIO authority can be granted if the Minister is satisfied that it will assist the Australian Security Intelligence Organisation (ASIO) to perform a special intelligence function, which includes gathering, evaluating and communicating intelligence relevant to security, obtaining and communicating foreign intelligence, or to cooperate with or assist other agencies, including law enforcement and other intelligence agencies.

23. Outlawing speech in this way has the real potential of undermining accountability, as well as conflicting with Australia's international obligations in relating to freedom of speech. As noted by this Committee in its examination of the *National Security Legislation Amendment Bill (No. 1)* 2014, which introduced s35P:

> 'as the non-aggravated offence applies to conduct which is done recklessly rather than intentionally, a journalist could be found guilty of an offence even though they did not intentionally disclose information about a SIO. As SIOs can cover virtually all of ASIO's activities, the committee considers that these offences could discourage journalists from legitimate reporting of ASIO's activities for fear of falling foul of this offence provision. This concern is compounded by the fact that, without a direct confirmation from ASIO, it would be difficult for a journalist to accurately determine whether conduct by ASIO is pursuant to a SIO or other intelligence gathering power.'[8]

[8] Parliamentary Joint Committee on Human Rights, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 16th Report of the 44th Parliament* (2014), [2.108].

1.2.3 Counter-terrorism legislation

24. Numerous pieces of counter-terrorism legislation limit freedom of speech.[9] While the aim of such limitations is to enhance national security, it has been widely argued that they in fact limit speech in ways unrelated to national security and are thus an unjustified limitation on free speech.

25. In its scrutiny of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill* 2014 (Cth), this Committee noted that 'the advocating terrorism offence provision, as currently drafted, is likely to be incompatible with the right to freedom of opinion and expression'.[10] Despite this concern, the Bill was passed into legislation and the offence currently exists in Australian law.

26. The above pieces of legislation are just a selection of those identified in the Freedoms Report as undermining freedom of speech. They illustrate the value of introducing an enforceable Human Rights Act. An enforceable Human Rights Act would perform an invaluable role if it were able to disallow elements of legislation that unreasonably infringe on fundamental human rights such as freedom of speech.

1.2.4 Impact of attacks on statutory office-holders' freedom of speech

27. Attacks against well-respected statutory office holders appear to have been specifically designed to discourage those office holders from exercising their freedom of speech and their statutory duties. In particular, the treatment of Professor Gillian Triggs, President of the Commission, have been noted by domestic and international commentators to be of significant concern.

28. In his end of mission statement following a visit to Australia in October this year, the UN Special Rapporteur on the situation of human rights defenders, Michel Forst, noted his

[9] See, for example, the *Criminal Code Act* 1995 (Cth), ss80.2C (in relation to advocacy of terrorism), 102.1 (in relation to the Governor-General making a regulation that an organisation is a terrorist organisation if the organisation advocates the doing of a terrorist act).

[10] Parliamentary Joint Committee on Human Rights, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, 14th Report of the 44th Parliament* (2014), [1.259].

concern regarding 'government-led or supported harassment of [the Commission]', and the 'efforts to weaken its financial resources and capacity'.[11] This harassment and de-funding directly impacts on Professor Triggs' right to freedom of speech, as well as the ability of the Commission to perform its role in promoting this and other rights.

2. Whether the handling of complaints made to the Australian Human Rights Commission ("the Commission") under the *Australian Human Rights Commission Act* 1986 (Cth) should be reformed

29. The ALA is concerned about the focus of this term of reference on individuals who are the subject of complaints (respondents), with no reference to complainants. Where assessing impact, it would be more appropriate to consider the impact on all affected parties, including both complainants and respondents. Without assessing the impact on both, it is not possible to gain a clear picture of the impact of the Commission's work. A failure to establish even-handed terms of reference gives rise to an appearance that a particular outcome is being sought, and risks denying the Committee of valuable insight regarding the complete understanding of work of the Commission.

30. That being said, both complainants and respondents have reported high rates of satisfaction with their experiences of complaint conciliation with the Commission. In fact, respondents reported higher satisfaction rates than complainants. According to the Commission's 2015-16 *Annual Report*, 98 per cent of respondents and 88 per cent of complainants were satisfied with the service they received from the Commission in relation to complaints. Of these, respondents reported that the service was 'very good' or 'excellent' in 78 per cent of cases; complainants gave these responses 68 per cent of the time.[12]

[11] OHCHR, *End of mission statement by Michel Forst, United Nations Special Rapporteur on the situation of human rights defenders*, 18 October 2016, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20689&LangID=E.

[12] Australian Human Rights Commission, *Annual Report 2015 2016*, https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC%20Annual%20Report%202015-2016.pdf, 27.

31. Perhaps a reason that there is such a high satisfaction rate relates to the flexibility that a conciliated outcome can have. Both parties are able to explain their position in a non-confrontational way, including the impact that the actions or words of the other party to the complaint may have had. Creative outcomes have included apologies and public statements that discrimination is not appropriate, reform of workplace policy and financial compensation, including agreements to pay for training. Financial compensation is by no means a component of all conciliated outcomes. Such outcomes would not be possible in a more formal environment such as a court. Conciliations by the Commission, however, allow both parties to consider and achieve meaningful outcomes.

32. Complaints were finalised within 12 months in 98 per cent of cases. This indicates that unreasonable delay is not a concern of either respondents or complainants in nearly every case.

3. Whether the practice of soliciting complaints to the Commission (whether by officers of the Commission or by third parties) has had an adverse impact upon freedom of speech or constituted an abuse of the powers and functions of the Commission, and whether any such practice should be prohibited or limited

33. The ALA considers it appropriate for the Commission to make members of the public aware of the Commission and its role in conciliating complaints. It is difficult to see how making people aware of their rights and the role of the Commission in ameliorating experiences of discrimination could be seen as having an adverse impact upon freedom of speech. Any move to limit the ability of the Commission to promote human rights, or its role in conciliating complaints that those rights have been violated, would itself reduce free speech, both on the part of the Commission and of those individuals who believe their rights have been infringed.

34. This educative role forms an important part of the role of the Commission, as stipulated in the *Australian Human Rights Commission Act* 1986 (Cth) (AHRC Act). A function of the Commission is to 'promote an understanding and acceptance, and the public discussion,

of human rights in Australia': s11(g). Similarly, the RDA stipulates that one of the functions of the Commission is to 'to promote an understanding and acceptance of, and compliance with, this Act': s20(b). One of the most effective ways of performing this function is to promote the functions of the Commission itself.

35. Concerns regarding 'soliciting complaints' appear to be underpinned by a misunderstanding of the role of the Commission. The Commission conciliates complaints. It does not pass judgement, it does not hold hearings and it makes no findings as to whether rights were violated or not. Instead, the process employed by the Commission is about bringing the two parties together, the complainant and the respondent, to examine the speech or conduct in question and seek to arrive at a mutually satisfactory response. It is an opportunity for both parties to learn more about the other, and how the experiences of the complainants have been generated by what often amounts to a misunderstanding on the part of the respondent which has left the complainant feeling discriminated against.

36. Throughout the conciliation process, the Commission encourages confidentiality, which it has found supports good faith conciliation. It is only when a conciliation fails and a matter goes to court that proceedings become public. As such, the role played by the Commission in dissipating tensions and avoiding litigation is a valuable contribution to social cohesion. If the Commission did not provide this valuable service, individuals may be inclined to make their complaints that they had been discriminated against public more readily than they currently do. This would have the negative impacts of publicly airing complaints which are currently conciliated in private, or allowing grievances to fester and escalate.

4. Whether the operation of the Commission should be otherwise reformed in order better to protect freedom of speech and, if so, what those reforms should be

37. The ALA repeats its concern about an inquiry into freedom of speech that is only considering the impact of one law, the RDA. Likewise, the ALA is concerned that this examination of freedom of speech is not being combined with an equally important human right, the right to be free from racial discrimination. If the issue of freedom of speech is to be properly assessed, the appropriate forum would be a comprehensive assessment without restriction as to the specific legislation that might be considered.

We note, however, that the ALRC has recently completed such a review as a part of its 2016 Freedoms Report.

38. Freedom of speech is best protected as a component of the full suite of human rights that Australia has agreed to respect, protect and promote internationally, particularly given the particular responsibilities that accompany the right to free speech. As such, the ALA believes that the operation of the Commission would be enhanced by the introduction of a comprehensive Human Rights Act, incorporating all of the human rights that Australia has agreed to be bound by under international law.

39. Such legislation should be enforceable and justiciable, with regard to human rights violations committed by governments and in legislation, and infringements by non-government entities, including corporations and individuals. It would also be appropriate to vest the Commission or some other independent body with oversight powers in relation to other legislation, to ensure that legislation is not passed that infringes on international human rights obligations, including the right to freedom of speech. It would be important to retain the Commission's complaint handling and conciliation role, as this is a valuable mechanism for enhancing community cohesion and education regarding the impact of discrimination and other infringements of human rights.

5. Recommendations

The ALA makes the following recommendations:

- To achieve a comprehensive and balanced picture of how the right to freedom of speech and the right to be free from discrimination interact, a comprehensive inquiry would be more appropriate than the one currently underway. The ALA would support a comprehensive review of the right to freedom of speech across all Australian legislation, which should include how other human rights are affected, including the right to be free from discrimination.
- The Commission performs an invaluable role in enhancing community cohesion and educating the community regarding human rights. It should be supported in its work, including by ensuring that it is adequately funded to conciliate complaints and that public officials refrain from criticising the Commission for performing its role in educating the public about human rights.

- A comprehensive and enforceable Human Rights Act should be introduced federally to ensure that the rights to freedom of speech, freedom from discrimination and other human rights are protected in a fair and balanced way.