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30 November 2016

Committee Secretary
Parliamentary Joint Committee on Human Rights
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Dear Secretary

INQUIRY INTO THE FREEDOM OF SPEECH IN AUSTRALIA

Thank you for the opportunity to make a submission, which I do in a personal capacity. A focused examination of freedom of speech in Australia is long overdue. I set out three points below.

1. Section 18C of the *Racial Discrimination Act 1975* (Cth) should be amended

In a democracy such as Australia, the law should proscribe extreme forms of speech such as racial vilification and incitement to violence. Despite the importance of freedom of speech, such laws are necessary to protect other important interests.

In general terms, it is appropriate that Parliament enact a law dealing with speech that causes harm on the basis of a person's race, colour or national or ethnic origin. However, section 18C does not achieve the right balance in this respect. Even despite narrow interpretations by the courts, the wording of the section is overbroad and has too great an impact upon freedom of speech.

Parliament should amend the section in line with the proposals put forward by acting NSW Supreme Court Justice Ronald Sackville AO. The section should be altered to substitute the words 'offend, insult, humiliate or intimidate' with a more demanding standard such as 'to degrade, intimidate or incite hatred or contempt'. In addition, references to the subjective responses of groups targeted by the speech should be replaced with an objective test having reference to the standards of a reasonable member of the community.

2. Freedom of speech more generally is under threat

The focus on section 18C neglects the fact that it is an example of a much larger problem. Australian parliaments have in the past exercised self-restraint in enacting laws that limit freedom of speech. In recent years, this caution has been replaced with a sense of permissiveness, and as a result a large and growing number of laws are now on the statute book that undermine freedom of speech.

I recently conducted a survey of Australian statutes to identify laws that impinge upon democratic standards such as freedom of speech. Disturbingly, I was able to pinpoint 350 examples of such laws ('The Legal Assault on Australian Democracy' (2016) 16 *QUT Law Review* 19). Others have also identified a long list of problematic laws, including the Australian Law Reform Commission.

A number of these laws are similar to section 18C. In 2014, it became an offence to use indecent, obscene or insulting language at the Sydney Cricket Ground,[1] taking its cue from an offence created the year before of using offensive or insulting language at the Royal Botanic Gardens and the Domain in Sydney.[2] As a result, if a person uses language that offends or insults while giving a speech, for example, at the historic Speakers' Corner (which has been a hotbed of soapbox oratory since 1878), that person will now be guilty of an offence and liable to pay a fine. Similarly, a person commits an offence if they sing an obscene song or ballad in public in Victoria,[3] use foul language on public transport in Tasmania,[4] or utter indecent or blasphemous words on a jetty in Western Australia.[5] People must also take care as to who they insult: there are offences for insulting, or acting in an insulting manner towards, people performing their duties, including sex workers,[6] teachers,[7] TAFE employees,[8] court staff,[9] or members of a Planning Panel,[10] an administrative tribunal,[11] a Royal Commission,[12] the Copyright Tribunal,[13] or the Fair Work Commission.[14]

Other laws represent a more serious infringement of freedom of speech. A number enable the jailing of journalists for reporting on matters in the public interest. For example, s 35P of the *Australian Security Intelligence Organisation Act 1979* (Cth), even as recently amended, enables journalists to be jailed for publishing material revealing misconduct by government agencies. That Act also provides for the jailing of journalists where they disclose 'operational information' about a person's detention by ASIO within two years of that person being detained. A journalist revealing such information, including the mere fact that someone was detained, can be imprisoned for up to five years. There are no exceptions for fair reporting or if a media story reveals that ASIO has misused its powers or mistreated detainees.

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[1] *Sydney Cricket Ground and Sydney Football Stadium By-Law 2014* (NSW) r 19.
[2] *Royal Botanic Gardens and Domain Trust Regulation 2013* (NSW) r 65.
[3] *Summary Offences Act 1966* (Vic) s 17(1).
[4] *Passenger Transport Services Regulations 2013* (Tas) r 16(1)(g).
[5] *Jetties Regulations 1940* (WA) r 45(b).
[6] *Sex Work Act 1994* (Vic) s 16(2).
[7] See, eg, *Education Act 1972* (SA) s 104.
[8] See, eg, *Technical and Further Education 1975* (SA) s 40A.
[9] See, eg, *Justices Act 1886* (Qld) s 40.
[10] See, eg, *Planning and Environment Act 1987* (Vic) s 169.
[11] See, eg, *Administrative Appeals Tribunal Act 1975* (Cth) s 63.
[12] *Royal Commissions Act 1902* (Cth) s 6O.
[13] *Copyright Act 1968* (Cth) s 173.
[14] *Fair Work Act 2009* (Cth) s 674.

Other laws impact on freedom of speech in disturbing and novel ways. For example, the *Criminal Code* permits the Commonwealth Attorney-General to proscribe a body as a terrorist organisation not only because the government believes that it is engaged in preparing, planning or performing a terrorist act, but also because it 'advocates the doing of a terrorist act.' In other words, organisations can be banned not just for their actions but also because of what is said on their behalf. Once an organisation is banned, severe penalties of up to 25 years in jail apply to people who are members of the organisation or provide support for its activities.

The Criminal Code states that an organisation 'advocates the doing of a terrorist act' if:

> (a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or
> (b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or
> (c) the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment … that the person might suffer) to engage in a terrorist act.

Subsection (c) is especially problematic. It does not require an organisation to encourage someone to undertake a terrorist act, but is more indirect. It extends to where an organisation 'praises' someone else's terrorist act and there is a mere 'risk' that this might lead another person again to commit such an act (including where that person is very young or of unsound mind). An extreme example could be where an organisation's executive or membership praises Nelson Mandela resistance against apartheid in South Africa, acts which amount to terrorism under Australian law.

While it is understandable that the law would permit groups to be banned that engage in or prepare for terrorism, it is not justifiable to ban an entire group merely because someone affiliated with it praises terrorism. This can have the effect of not only leading to the jailing of the person who said the words, but also other members of the organisation, including where they disagree with the comments.

The notion of proscribing speech based upon a reaction of someone who suffers from a 'mental impairment' is also extraordinary. It is a radical departure from the normal, accepted legal standard of the 'reasonable person'. Departure from the standard is not, however, limited to provisions that enable the banning of organisations. Section 9A of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) provides that a publication may be refused classification, that is, banned, if it 'directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment … that the person might suffer) to engage in a terrorist act'.

As these examples show, freedom of speech may have a respected status in Australia, but many examples exist of where laws impinge upon the freedom. In the main, freedom of speech exists only so far as the right is not taken away by parliaments. Too often, the right is given great rhetorical importance, but diminished in legislation.

3. What needs to be done?

The statute book reveals many existing laws that unduly impinge upon freedom of speech, and that more such laws are being enacted at a rapid rate. It is not possible to deal with these problems by way of ad hoc amendment to federal laws. Instead, a more holistic response is required that gives legal recognition to freedom of speech consistent with community standards and its importance to Australian democracy.

Other democratic systems, indeed every other democratic system in the world, gives due weight to freedom of speech by setting out a general protection of the right in national law. This might be via a bill of rights, charter of rights, or other instrument.

Australia lacks a comprehensive national human rights law, but is able to move even in the absence of such a law to provide appropriate protection to freedom of speech. This could occur by way of a new provision in the Constitution. Such a change would need to be passed by the Australian people voting at a referendum. With only 8 out of 44 proposals being passed since 1901, and none since 1977, this would pose a formidable challenge.

A better, immediate option is to enact a freedom of speech statute that provides strong, general protection to the right. Protection is already provided in federal law for a wide range of rights in the field of anti-discrimination or for more specific rights such as via the *Human Rights (Sexual Conduct) Act 1994* (Cth). Indeed, a central problem with rights protection at the federal level, including for freedom of speech, is that other rights are now protected (including via section 18C), and so achieve pre-eminence over freedom of speech in the absence of like protection.

Parliament should move now to enact a statute that provides general protection for freedom of speech. This would act as a much-needed counterweight to federal and state statutes that infringe the right, including section 18C of the *Racial Discrimination Act.*

Yours sincerely

George Williams