

Chapter 5

Other reforms to better protect freedom of speech

Introduction

5.1 This chapter focuses on the fourth term of reference of the inquiry:

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

5.2 Related to this question, the terms of reference also require the committee to:

...consider the recommendations of the Australian Law Reform Commission [(ALRC)] in its *Final Report on Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* [ALRC Report 129 – December 2015], in particular Chapter 4 – "Freedom of Speech".¹

5.3 The committee received relatively little evidence in relation to these aspects of the terms of reference and given their open-ended nature the views expressed varied widely.

AHRC's engagement in freedom of speech issues

5.4 In addressing the question of whether the operation of the AHRC should be otherwise reformed in order to better protect freedom of speech, the AHRC noted that it has undertaken a wide range of activities in relation to freedom of speech or freedom of expression and the freedom to participate in public affairs. These activities include:

- making submissions on proposed legislation which has the potential to impact on the right to freedom of speech;
- in response to complaints from members of the public, conducting inquiries into acts and practices of the Commonwealth that may be inconsistent with or contrary to the right to freedom of speech;
- intervening as amicus curiae in court proceedings that raise freedom of speech issues in order to provide assistance to the court in applying the law in a way that sufficiently takes this right into account; and

1 Parliamentary Joint Committee on Human Rights, *Inquiry report: Freedom of speech in Australia*, Terms of Reference, Chapter 1 at paragraph [1.1].

- convening public forums to discuss freedom of speech issues that arise in a range of areas including media and internet regulation, intellectual property and defamation laws.²

5.5 The AHRC noted that these activities have been carried out in accordance with the AHRC's existing statutory functions. These current functions include:

- to examine enactments and proposed enactments, for the purpose of ascertaining whether they are inconsistent with or contrary to any human right;³
- to inquire into any act or practice by or on behalf of the Commonwealth or under a Commonwealth enactment that may be inconsistent with or contrary to any human right;⁴
- to intervene in court proceedings that involve human rights issues where the AHRC considers it is appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court;⁵
- to promote an understanding and acceptance, and the public discussion, of human rights in Australia;⁶ and
- to undertake research and educational programs for the purpose of promoting human rights.⁷

5.6 The AHRC noted that it will continue to promote an understanding and acceptance, and the public discussion, of all human rights including the right to freedom of speech. The AHRC considers that its existing functions are sufficient for it to carry out this work.⁸

5.7 The Human Rights Law Centre noted the work that the AHRC has undertaken in relation to promoting freedom of speech and concluded that it 'supports the [AHRC], as our national human rights institution, being properly resourced to continue to protect and promote freedom of speech in Australia'.⁹

2 Australian Human Rights Commission (AHRC), *Submission 13*, 73–76.

3 *Australian Human Rights Commission Act 1986* (AHRC Act), paragraph 11(1)(e).

4 AHRC Act, paragraph 11(1)(f).

5 AHRC Act, paragraph 11(1)(o).

6 AHRC Act, paragraph 11(1)(g).

7 AHRC Act, paragraph 11(1)(h).

8 AHRC, *Submission 13*, 76.

9 Human Rights Law Centre, *Submission 136*, 17.

5.8 Similarly, the Australian Council of Human Rights Authorities submitted that there 'is no evidence to suggest that the [AHRC]'s operation should be otherwise reformed to better protect freedom of speech'.¹⁰

5.9 Equal Opportunity Tasmania, in noting that the AHRC is responsible for public education on human rights including international human rights obligations, suggested that:

Preparation and publication of guidelines on forms of public expression that meet obligations under sections 18C and 18D of the [*Racial Discrimination Act 1975* (RDA)] would assist in increasing community understanding of the rights and freedoms recognised in international human rights obligations and how to exercise and enjoy those rights.¹¹

5.10 On the other hand, several submissions were critical of the operation of the AHRC, suggesting that it has not protected freedom of speech.¹² Part of the concern expressed related to the current terms of section 18C. For example, Mr Graham Young, the Executive Director of the Australian Institute for Progress, noted, '[t]his section is not about racism; it is about censorship'.¹³

5.11 For several submitters the view that the AHRC had not protected freedom of speech was also related to their experiences with the AHRC's complaints handling process.¹⁴ Both of these issues are discussed in detail in chapter 3 above.

Committee view

5.12 The committee received relatively little evidence in relation to the question of 'whether the operation of the [AHRC] should be otherwise reformed in order better to protect freedom of speech and, if so, what those reforms should be'.¹⁵

5.13 The AHRC indicated to the committee that it considers that its existing functions are sufficient for it to carry out its work in relation to freedom of speech

10 Australian Council of Human Rights Authorities, *Submission 149*, 27. See also Amnesty International, *Submission 151*, 23–24; Australian Lawyers Alliance, *Submission 35*, 14.

11 Equal Opportunity Tasmania, *Submission 167*, 46.

12 Australian Liberty Alliance, *Submission 14*, 2; Australian Institute for Progress, *Submission 24*, 4; Australian Taxpayers Alliance, *Submission 110*, 6.

13 Mr Graham Young, Executive Director, Australian Institute for Progress, *Committee Hansard*, 10 February 2017, 17.

14 For example, Mr Paul John Zanetti, *Committee Hansard*, 10 February 2017, 83 and Mr Graham Young, Executive Director, Australian Institute for Progress, *Committee Hansard*, 10 February 2017, 17.

15 Parliamentary Joint Committee on Human Rights, *An inquiry into Freedom of Speech*, Terms of Reference, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia/Terms_of_Reference.

issues. Process issues for complaint handling have been the subject of detailed consideration in chapter 3.

5.14 The committee considers that broader questions in relation to the operation of the AHRC would be best addressed in a targeted inquiry focusing on specific future proposals for reform. In this way such proposals could be carefully examined separately from considerations relating to the operation of Part IIA of the RDA, which has been the focus of this inquiry.

The ALRC Freedoms Inquiry and other laws impinging on freedom of speech

5.15 This section relates to the recommendations of the ALRC in its *Final Report on Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Freedoms Inquiry Report) insofar as they relate to freedom of speech and the terms of reference for this inquiry.

5.16 On 11 December 2013, the Attorney-General asked the ALRC to review Commonwealth legislation to identify provisions that unreasonably encroach upon traditional rights, freedoms and privileges.¹⁶ The terms of reference identified what constituted traditional rights or freedoms for the purposes of the inquiry, and included amongst these freedom of speech.

5.17 The ALRC accepted submissions relevant to the terms of reference of the inquiry and held consultations with a number of stakeholders with relevant knowledge or expertise. An interim report was released on 3 August 2015, and the final Freedoms Inquiry Report was tabled by the Attorney-General on 2 March 2016.

Laws which may unjustifiably limit freedom of speech

Commonwealth laws

5.18 The ALRC's final report identified a number of Commonwealth laws which may be said to interfere with the common law rights and freedoms listed in the inquiry's terms of reference. While not making conclusive judgments about these laws, the report provided an extensive survey of the relevant laws and highlighted laws that may unjustifiably limit common law rights and freedoms and may therefore warrant further review. Laws suggested for review to determine whether they unjustifiably limit freedom of speech included:

- Part IIA of the RDA (in conjunction with consideration of anti-vilification laws more generally);

16 Senator the Hon George Brandis QC, Attorney-General, *New Australian law reform inquiry to focus on freedoms*, Media Release, 11 December 2013, <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Fourth%20quarter/11December2013-NewAustralianLawReformInquiryToFocusOnFreedoms.aspx>.

- legislative provisions that protect the processes of tribunals, commissions of inquiry and regulators, for example section 170 of the *Veterans' Entitlements Act 1986*;
- secrecy offences, including the general secrecy offences in sections 70 and 79 of the *Crimes Act 1914*;
- various provisions of the *Criminal Code* including section 80.2C (advocating terrorism), sections 102.1, 102.3, 102.5 and 102.7 (prescribed terrorist organisations), and section 105.41 (preventative detention orders) (the ALRC noted that these provisions are reviewed by the Independent National Security Legislation Monitor (INSLM) and the Parliamentary Joint Committee on Intelligence and Security (PJCIS) as part of their ongoing roles); and
- section 35P of the *Australian Security Intelligence Organisation Act 1979* relating to special intelligence operations (these provisions are also reviewed by the INSLM and the PJCIS).¹⁷

5.19 The ALRC also suggested that the government give further consideration to recommendations that it made in its 2009 report on secrecy laws,¹⁸ and to whether Commonwealth secrecy laws—including the *Australian Border Force Act 2015*—provide for proportionate limitations on freedom of speech.¹⁹

5.20 Few submissions to this inquiry considered whether these laws (other than Part IIA of the RDA) unjustifiably limit freedom of speech.

5.21 The laws identified by the ALRC for review to determine whether they unjustifiably limit freedom of speech are significant and, as the Law Council of Australia noted, a balance must be struck between open government and freedom of speech on the one hand and the protection of sensitive and classified information from disclosure on the other:

Secrecy provisions such as those above are generally in pursuit of a legitimate objective to ensure the limitation of disclosures that would endanger the health or safety of any person or prejudice Australia's interests or criminal prosecutions. The question, however, is whether these provisions are proportionate vis-à-vis that objective and whether they are necessary.²⁰

17 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachment by Commonwealth Laws*, Final Report, December 2015, 126–127.

18 Australian Law Reform Commission (ALRC), *Secrecy Laws and Open Government in Australia*, December 2009.

19 ALRC, *Traditional Rights and Freedoms—Encroachment by Commonwealth Laws*, Final Report, December 2015, 79.

20 Law Council of Australia, *Submission 123*, 7.

5.22 Noting the significant number of laws identified by the ALRC as infringing on freedom of speech,²¹ the Australian Lawyers Alliance suggested that 'a broader inquiry into limits on freedom of speech is warranted without any restriction as to the legislation examined'.²²

5.23 The AHRC suggested that if further inquiry is needed into freedom of speech issues as they arise in other areas of law the AHRC would be well placed to undertake such an inquiry.²³

Committee view

5.24 In its Freedoms Inquiry Report the ALRC identified a number of significant laws that it considers warrant review to determine whether they unjustifiably limit freedom of speech. The committee agrees with the sentiments expressed by the Law Council of Australia that in relation to these laws a balance must be struck between open government and freedom of speech on the one hand and other important objectives.

5.25 Noting the significance of these matters and the significant questions to be examined to determine where the appropriate balance lies in this regard, the committee considers that a further inquiry may be warranted into Commonwealth laws generally to build on the work of the ALRC to identify which laws may unjustifiably impinge on freedom of speech and to make specific recommendations for reform.

Mr Ian Goodenough MP

Chair

21 These laws included criminal laws, secrecy laws, court and tribunal orders, privilege and contempt laws, anti-discrimination laws, the *Racial Discrimination Act 1975*, media, broadcasting and communications laws, information laws, intellectual property laws, and other laws. See ALRC, *Traditional Rights and Freedoms—Encroachment by Commonwealth Laws*, Final Report, December 2015, chapter 4.

22 Australian Lawyers Alliance, *Submission 35*, 7. Other submissions also canvassed further laws which may potentially impact of freedom of speech. See, for example, Professor George Williams, *Submission 6*, 2–3; and Amnesty International, *Submission 151*, 10–13.

23 AHRC, *Submission 13*, 77–78; Professor Gillian Triggs, President, and Mr Ed Santow, Human Rights Commissioner, AHRC, *Committee Hansard*, 17 February 2017, 70–71.