From the desk of Morgan Begg, Research Fellow

Institute of Public Affairs

1 February 2019

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Secretary

Submission to the inquiry into the Freedom of Speech Legislation Amendment (Censorship) Bill 2018, Freedom of Speech Legislation Amendment (Insult and Offend) Bill 2018, and Freedom of Speech Legislation Amendment (Security) Bill 2018

I refer to the above inquiry, and provide a submission to the Senate Standing Committee on Legal and Constitutional Affairs (the **Committee**) on behalf of the Institute of Public Affairs (**IPA**).

About this submission

This submission addresses the Bills that are the subject of this inquiry. The *Freedom of Speech Legislation Amendment (Insult and Offend) Bill 2018* attempts to remove restrictions on insulting or offensive speech from 23 separate Commonwealth Acts. The *Freedom of Speech Legislation Amendment (Censorship) Bill 2018* attempts address restrictions on content that adults can choose to read, watch, play, and listen to. The *Freedom of Speech Legislation Amendment (Security) Bill 2018* attempts to remove restrictions on speech in national security legislation that are unnecessary to ensure the security of Australians.

The Institute of Public Affairs supports any policy measure to remove restrictions on freedom of expression, and encourage parliament to be more sceptical of claims that such restrictions are justified to protect public safety, including for national security purposes. In particular, this submission focusses on freedom of speech generally and restrictions on offensive and insulting speech, but also briefly addresses classification laws and the election blackout period.

Freedom of speech

The groundwork of Australia's success as a multicultural society was laid in the 1950s and 1960s when people from all backgrounds were welcomed as Australians regardless of their national origins. At the time when Australia was welcoming unprecedented numbers of new arrivals to our shores it would have been inconceivable to suggest that the state should punish someone for uttering words that for instance offended or insulted another person. The attempt to police and regulate and control speech was characteristic of governments from which people were seeking refuge.

Australia could only offer that welcome because we were a free country, steeped in the political practice and cultural traditions of democracy, liberalism, and freedom. The most important of those freedoms being freedom of speech.

This issue is of great consequence to Australian democracy. Freedom of speech is not merely the human right to say something; it is the right to listen and hear what's being said. Freedom of speech is also the right to disagree and engage in debate.

From the desk of Morgan Begg, Research Fellow

Institute of Public Affairs

Freedom is essential to human dignity. Dignity only comes the ability to make choices. Without freedom of speech individuals are denied the opportunity to gain the dignity to which every human is entitled.

Laws restricting speech which insults and offends

The *Freedom of Speech Legislation Amendment (Insult and Offend) Bill 2018* intends to remove restrictions in 23 separate Commonwealth Acts on speech that is in some way deemed insulting or offensive. Although this particular Bill does not include section 18C of the *Racial Discrimination Act 1975*, section 18C does prohibit acts which are offensive or insulting based on the race of another person, and informs the wider debate about policies restricting offensive communications.

At a practical level, defining a word such as 'offend' is an inherently subjective exercise, and poses a significant conceptual difficulty with formulating a principle of 'offence' that can equitably limit freedom of speech. English jurist Sir William Blackstone said of offensive words that

> Their meaning depends always on their connection with other words and things; they may signify differently even according to the tone of voice, with which they are delivered; and sometimes silence itself is more expressive than any discourse. As therefore there can be nothing more equivocal and ambiguous than words, it would indeed be unreasonable to make them amount to any high treason.[1]

Laws which prohibit speech at such a low threshold violates the fundamental human right to freedom of speech. For human freedom to mean anything, it must mean the ability to express one's thoughts and feelings. The exercise of this right can only justifiably be limited only to the extent that it conflicts with the right of others. However, as former Chief Justice of the High Court Robert French noted in 2016, 'there is no generally accepted human right not to be offended.'[2]

There is evidence to suggest that the Australian public supports law reform to remove legislative restrictions on communications or language which is offensive or insulting. A series of opinion surveys revealed broad community support for reforming section 18C of the *Racial Discrimination Act 1975* so that it would be no longer unlawful to 'offend' or 'insult' someone because of their race or ethnicity. A Galaxy Research survey conducted in November 2016 of 1,000 Australians aged 18 years and older found 45 per cent approval, 38 per cent disapproval, with 23 per cent unsure.[3] The results of the Galaxy Research survey were consistent with two separate surveys conducted by Essential Research in September and November of 2016 based on the same questions. The September survey based on the same question of 1,019 Australians were 45 per cent approved, 35 per cent disapproved, and 21 per cent 'don't know'.[4] The results from the November 2016 survey based on the same question of 1,014 Australians were 44 per cent approved, 33 per cent disapproved, and 23 per cent 'Don't know'.[5]

[1] Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1769, reprinted 1983) Vol 81, quoted by Robert French, 'Giving and taking offence' (Speech delivered at The Samuel Griffith Society 28th Conference, Adelaide, 13 August 2016).
[2] Ibid.
[3] Joe Kelly, 'Most Support Free-Speech Overhaul, says Poll', *The Australian*, 10 November 2016.
[4] Essential Research, 'Racial Discrimination Act' (13 September 2016) *Essential Report*, 9 <https://www.essentialvision.com.au/wp-content/uploads/2016/09/Essential-Report_160913.pdf>.
[5] Essential Research, 'Racial Discrimination Act' (15 November 2016) *Essential Report*, 6 <https://www.essentialvision.com.au/wp-content/uploads/2016/11/Essential-Report_161115.pdf>.

The opposition to laws prohibiting language which offends or insults is not divided strictly along partisan lines. See the attached document to find an extensive list of statements from a diverse range of people across of the political spectrum in support of reform of section 18C of the *Racial Discrimination Act 1975*.

The Institute of Public Affairs supports the *Freedom of Speech Legislation Amendment (Insult and Offend) bill 2018*.

Classification laws

The inverse of freedom of speech is the freedom of the listener to receive speech. There is a litany of Commonwealth laws which restrict the content that Australians can choose to read, watch, play and listen to.

In particular, the Commonwealth's *Classification (Publications, Films and Computer Games) Act 1995* requires 'the standards of morality, decency and propriety generally accepted by reasonable adults' to be taken into account in making classification decisions. In order to determine what these standards of morality, decency and propriety are, the relevant Commonwealth department conducts reviews into what the 'community standards' of the day are.

However, the methodology is not particularly strong. The most recent review (May 2017) determined community standards based on a study of three panels of only 19-21 community members in three different locations. Ultimately, as IPA Senior Fellow Dr Chris Berg noted in 2013, the concept of "community standards" is hardly an objective or scientific measure:

> For all the verbiage poured out about community standards, censors rarely make any attempt to determine what the community's real standards are. If they did they would be confronted with a problem. Those who, in Bayle's words, "compose wanton verses" are surely part of that community, and contribute to its standards. Those who would eagerly read wanton verses are part of the community too.
>
> … Ultimately, any censorship that tries to test a cultural work by (in the words of the Classification Act) "the standards of morality, decency and propriety generally accepted by reasonable adults" will be built on sand - an unstable pile of assumptions and prejudices of the officials who make the final decision.[6]

The Institute of Public Affairs supports Schedule 1 of the *Freedom of Speech Legislation Amendment (Censorship) Bill 2018*.

Federal election blackout period

Clause 3A of Schedule 2 of the *Broadcasting Services Act 1992* bans broadcasters from broadcasting electoral advertising relating to a federal, state, territory or local election on election day or on the preceding Thursday or Friday.

The ban only applies to radio and television broadcasters, and does not apply to print media or, more significantly, online services. The proliferation of social media and the increased uptake in early voting has rendered this restriction on radio and television obsolete. As IPA executive director John Roskam noted in January 2015, the restrictions are "an anachronism" and "basically a relic of a bygone era, as well as being a complete aberration against free speech."[7]

[6] Chris Berg, 'Censorship Standards come from a Personal Place,' *The Drum*, 26 February 2013.
[7] Annabel Hepworth, 'Poll-eve Ad Ban Faces own Blackout,' *The Australian*, 12 January 2015.

From the desk of Morgan Begg, Research Fellow

The election blackout rule is commonly justified on the basis that voters should be allowed to weigh their voting options and to exercise their rights to vote with "undue pressure."[8] This is a paternalistic view of how voters exercise their right to vote. Rather than 'protect' voters, campaigning should be available to all prospective voters at all times before they cast their vote.

The Institute of Public Affairs supports Schedule 3 of the *Freedom of Speech Legislation Amendment (Censorship) Bill 2018*.

Conclusion

To assist the Committee in its deliberations, I enclose a major report by the IPA, *The Case for the Repeal of Section 18C*. The report explores general principles relating to freedom of speech and prohibitions on offensive or insulting speech. The report also includes a list of publications relating to the IPA's written works and research into many other policies affecting freedom of speech in Australia, including specific observations on a number of policies which are addressed by the Bills that are the subject of this inquiry.

The IPA trusts that this submission will be of assistance to the Committee.

Yours faithfully,

Morgan Begg
Research Fellow
Institute of Public Affairs

Encl.

[8] See Department of Prime Minister and Cabinet, *Electoral Reform Green Paper: Strengthening Australia's Democracy* (September 2009) 152.