NEW SOUTH WALES BAR ASSOCIATION SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Freedom of Speech Legislation Amendment (Insult and Offend) Bill 2018

Introduction

1. The New South Wales Bar Association welcomes the opportunity to make a submission to the to the Legal and Constitutional Affairs Legislation Committee on the *Freedom of Speech (Insult and Offend) Bill 2018* (**Bill**).

2. The New South Wales Bar Association opposes the enactment of the Bill. The Bill seeks to remove protections against speech that is insulting or offensive from 23 Commonwealth Acts.

3. The *Explanatory Memorandum* to the Bill justifies these amendments on the basis that they would re-introduce freedom of speech into Acts where that freedom has been stifled, and that this is necessary because freedom of speech is fundamental to a free and prosperous society.

4. The *Explanatory Memorandum* also argues that social forces 'can prompt people to moderate their speech voluntarily' and that 'enlisting the coercive powers of the state is an attempt to moderate speech.'[1] It further justifies the Bill on the basis that its enactment will 'promote debate that helps arrive at the truth'. Other main justifications include that insulting or offensive speech will 'serve as a prophylactic against more harmful behaviour' and 'help bring people to the attention of law enforcement bodies'. No evidence is offered in support of these latter claims.

5. The Bill is thus based on the premise that any restrictions involving criminal or civil liability on the making of statements that are 'offensive' or insulting' are per se objectionable because they limit freedom of expression. While such restrictions do limit the exercise of freedom of expression, that is not the end of the matter in human rights terms.

6. Freedom of speech is not some unfettered right to do and say what one wants, irrespective of the sensibilities of others. It is a personal right which, in any civilized society, carries with it, the corresponding duty to consider the rights of others. Freedom of speech is therefore a qualified right, not an absolute right, in accordance with international human rights law. As Article 19(3) of the International Covenant on Civil and Political Rights provides, the exercise of freedom of speech 'carries with it special duties and responsibilities'. The *Explanatory Memorandum* itself notes that 'Legislative restraints on free speech should only be considered to protect other freedoms.'

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[1] *Explanatory Memorandum*, p 1.

7. Under Article 19(3) of the ICCPR, restrictions on the exercise of freedom of expression are permissible under certain circumstances:

> 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:
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> (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. Accordingly, the assumption that these provisions are automatically objectionable on human rights grounds fails to take into account other individual rights and public interests that may be legitimately and appropriately protected by the restrictions. Conversely, the removal of these restrictions may in fact lead to infringements on other human rights including, for example, the right to a fair hearing.

9. It is for this reason that human rights are indivisible, interrelated and interdependent, and it is insufficient to respect some human rights and not others.

The need for individual contextual assessments

10. Any assessment of the (in)compatibility of the provisions in question with internationally guaranteed human rights requires an individualised contextual assessment of each piece of legislation, its purpose and its operation. That will involve, among other matters, identifying the meaning of 'offensive' and 'insult' in a particular statutory context, and how high the bar of 'insulting' and 'offensive' is set under individual statutes. It would be expected that a court interpreting such restrictions would interpret them in accordance with Australia's obligations under Article 19 of the ICCPR (and the implied constitutional guarantee of freedom of political communication which would override any provision that was inconsistent with the implied freedom).[2]

11. The analysis put forward by the proponent of the Bill fails to undertake the task of assessing the human rights compatibility either of the provisions it proposes to amend or repeal, or the impact on human rights that the removal of those provisions might have. The *Statement of Compatibility with Human Rights* that accompanies the Bill asserts simply that the proposed amendments are compatible with human rights because they enhance freedom of expression.[3] An earlier section of the *Explanatory Memorandum*, after arguing that 'insulting' and 'offensive' statements can have beneficial results on occasion, states:[4]

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[2] For an example in relation to offences of using offensive language and conducting oneself in an offensive manner under the *Summary Offences Act 1988 (NSW),* see *Lim v R* (2017) 25 DCLR(NSW) 253, [2017] NSWDC 231.

[3] Statement of Compatibility of Human Rights, in *Explanatory Memorandum*, p 14.

[4] *Explanatory Memorandum*, p 1.

> Many of the amendments in the Bill remove bans on insulting or offending executive tribunals and their officials. These bans are not necessary for these tribunals and officials to operate effectively.
>
> The Bill leaves in place bans on disturbing, interfering with, or being contemptuous of these tribunals and officials.

12. The *Explanatory Memorandum* then goes on to list a number of other restrictions on speech that are contained in Commonwealth laws that are left unaffected by this and related Bills.[5]

13. Our view of the limitations in the human rights analysis of the Bill is similar to that of the Parliamentary Joint Committee on Human Rights of this Bill and related Bills:[6]

> 1.303 . . .While the right to freedom of expression may be subject to permissible limitations providing particular criteria are met, measures which remove or limit provisions which restrict communication, such as those contained in these bills, engage and may promote the right to freedom of expression.

14. Each of the statutory provisions sought to be amended was adopted to pursue a particular objective that would likely fall under one of the categories of legitimate objective set out in article 19(3) of the ICCPR. It would be necessary to separately assess the compatibility of each statutory provision with the freedoms expressed in the ICCPR. Such an assessment would require an evaluation of the proportionality of the measure to the achievement of the legitimate goal set out.

Provisions protecting the operation of courts, tribunals and other public bodies

15. Many of the provisions that would be amended by the Bill create offences of insulting or using insulting or offensive language towards a person performing a statutory function, whether that be a person presiding over a court, tribunal, commission or other public body. If the Bill is passed, it will for example no longer be an offence for a person to insult a Registrar or Magistrate conducting an examination under the Bankruptcy Act; to insult a member of a court martial, a Judge-Advocate or defence force magistrate in the exercise of their powers. Similarly, the Bill will repeal the offence of insulting officials, parties and representatives taking part in Trans-Tasman proceedings. Further, persons will be able to intentionally insult or use insulting language towards a Royal Commission without suffering any consequence (unless this amounted to an intentional contempt of the Commission).

16. The Bill would also repeal the offence of insulting a person in the exercise of the person's powers with respect to the Veterans' Review Board. Similarly, the existing offence of insulting members of the Australian Competition tribunal, the Australia

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[5] *Explanatory Memorandum*, p 2.

[6] PJCHR, *Report 7 of 2018*, 14 August 2018, 85 at 88.

Competition and Consumer Commission, the Australian Energy Regulator, the Copyright tribunal, the Defence Force Discipline Appeal Tribunal, a Fair Work Commission member exercising the powers of the office or of a member of a Parliamentary Commission, the Law Enforcement Integrity Commissioner. Persons performing functions under the Sex Discrimination Act will no longer be protected from insult; this might include persons inquiring into allegations of sex discrimination or seeking to conciliate such complaints.[7]

17. In each of these cases unrestricted freedom of expression is limited in order to permit a person tasked with duties by statute to perform those duties without being subjected to personal or institutional verbal abuse. That would fall within the legitimate objects of protecting *ordre public*, as well as the rights of the persons concerned to fair and reasonable conditions of employment and the right to fair hearings of those involved in such proceedings.[8] Depending on how low the bar of insult and offensiveness is set, one could make a strong argument that the different offences and penalties are a proportionate means of achieving these goals.[9]

18. While both international human rights law and the implied constitutional freedom guarantee the right to criticize robustly institutions that perform public functions,[10] they limit this right in a number of respects where attacks on the individuals constituting those bodies go beyond certain bounds. The extent of some traditional common law approaches to contempt have been successfully challenged under the implied constitutional guarantee and human rights laws, yet there is still a core zone of protection for members of such bodies from serious personal attacks and denigration. What constitutes an 'insult' or is 'offensive' may vary according to context,[11] however, it would normally have to reach a reasonably high threshold before these provisions would be engaged.

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[7] In its *Final Report Traditional Freedoms – Encroachments by Commonwealth Laws*, ALRC Report 129, December 2015, the Australian Law Reform Commission considered the compatibility of a number of such provisions – including some targeted by this Bill – for their consistency with human rights: paras 4.159-4.166 While the ALRC accepted that it may be appropriate to review the operation of some of these types of laws, its concern appears to have been related mainly to those that restrict criticism of the body as an institution or the content of particular decisions rather than provisions protecting against insulting or offensive statements or conduct directed at member of such bodies acting in the performance of their duties: ibid para 4.166.

[8] See, eg, the discussion by the Parliamentary Joint Committee on Human Rights of the provision of the *Veterans' Entitlements Act 1986,* which the Bill proposes to repeal: PJCHR, *Sixth Report of the 44th Parliament*, 14 May 2014, paras 1.144-1.154 and *Ninth Report of the 44th Parliament*, 15 July 2014, paras 1.7-1.9

[9] The proponent of the Bill argues that 'many of the amendments in the bill remove bans on insulting or offending executive tribunals and their officials' because 'these bans are not necessary for these tribunals and officials to operate effectively.' *Explanatory Memorandum*, p 1.

[10] See *Nationwide News Ltd v Wills* (1992) 177 CLR 1, [1992] HCA 46.

[11] The author of the Bill argues in its favour on the basis that the legislation sought to be amended is oppressive, as it outlaws speech just because 'someone finds [it] insulting or offensive', and generates uncertainty because one will never know when someone will find something offensive. This implies that the test for whether speech is insulting or offensive is a subjective one, whereas it is usually an

Other provisions proposed for repeal

19. The Bill also proposes the repeal of a variety of other provisions. Some of these empower public officials to refuse to exercise a power on the basis that doing so would put into the public domain material that is 'offensive'. For example, if the Bill passes, it will not be possible to prevent the registration of an offensive business name. The Registrar under the *Personal Properties Securities Act* will be required to register a financing statement or financing change statement in accordance with the application, even if the application is offensive. The power of the Secretary of the responsible Department to refuse an application for a plant breeder's rights with respect to a particular plant variety if the proposed name contains offensive matter will also be repealed.

20. Under the *Australian Passports Act 2005* the power of the Minister to refuse to include a name in Australian travel documents because the Minister considers the name to be offensive will be removed, though the Minister would still have the power to do so on the basis that a name was unacceptable or inappropriate.[12] Equally the power of the Commonwealth Electoral Commissioner may refuse to include in the electoral roll a person's name if the Commissioner considers that the name is offensive.

21. Further changes which the Bill would implement include removing the offence of using the postal service or a carriage service to send offensive material;[13] and removing protections against person engaging in offensive or insulting behaviour in relation to various internationally protected persons such as diplomats and members of international organisations (standards which have been generally interpreted by Australian courts in favour of free speech and the ability to express criticism of foreign governments and their actions).[14]

22. The Bill also proposes the repeal of provisions of the *Public Order (Protection of Persons and Property) Act 1971* which make it an offence to behave in an offensive

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objective test based on reasonableness. The clarity of the standard is a relevant factor in assessing the human rights compatibility of a restriction on freedom of expression.

[12] For an example under previous legislation, see *Prime Minister John Piss the Family Court & Legal Aid v Minister for Foreign Affairs & Trade (No.1)* [2003] FMCA 90 (20 March 2003) (refusing to issue a passport in the name of 'Prime Minister John Piss the Family Court and Legal Aid' on the grounds that it was offensive.

[13] The provision relied on *Monis v the Queen* (2013) 249 CLR 92, [2013] HCA 4. which saw the High Court divided over the consistency of the provision with the implied guarantee of freedom of political communication.

[14] See, eg, the discussion in the analogous context considered in *Re Minister of Foreign Affairs and Trade; the Commissioner of the Australian Federal Police and the Commonwealth of Australia v Geraldo Magno and Ines Almeida* (1992) 37 FCR 298, [1992] FCA 566 (26 November 1992)

or disorderly manner while trespassing on premises in a Territory or while in or on Commonwealth premises, offences which include but go beyond mere speech.[15]

Conclusion

23. While this submission has not discussed every provision that this Bill proposes to repeal, it is clear that the Bill proceeds on the basis of an assumption that is inconsistent with applicable constitutional and international human rights law -- namely, that speech that is 'insulting' or 'offensive' may never permissibly be restricted or penalised on that basis alone. As a consequence, the Bill's proposal to eliminate all such language from Commonwealth legislation is a blunt instrument that fails to undertake an assessment of whether particular restrictions on such conduct are permissible insofar as they are a proportionate means of pursuing legitimate social objectives. Furthermore, removal of some provisions may have implications for the enjoyment of other human rights if they permit infringements on those rights.

24. While the New South Wales Bar Association accepts the need to scrutinise carefully restrictions on freedom of expression, especially those that may have been put in place, no case of principle for the proposed amendments has been made out nor has it been established that specific provisions in the current legislation are impermissible restrictions under applicable constitutional or international law standards.

25. The New South Wales Bar Association opposes the Bill in its current form.

Dated: 25 September 2018

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[15] See, eg, cases decided under similar provisions, *Ball v McIntyre* (1966) 9 FLR 237, *Commissioner of Police v Allen* (1984) 14 A Crim R 244, 246; *R v Smith* [1974] 2 NSWLR 586, *Ellis v Fingleton* (1972) 3 SASR 437.