The Senate

# Legal and Constitutional Affairs Legislation Committee

## Freedom of Speech Legislation Amendment (Censorship) Bill 2018

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

## Freedom of Speech Legislation Amendment (Security) Bill 2018

March 2019

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**Recommendation 1**

**2.34 The committee recommends that the Government review the appropriateness of Part 10 of the *Classification (Publications, Films and Computer Games) Act 1995*.**

**Recommendation 2**

**2.35 The committee recommends that the government give consideration to amending the provisions in the *Broadcasting Services Act 1992* that prohibit broadcasters showing any election advertisements in the three days prior to an election.**

**Recommendation 3**

**2.36 The committee recommends that the bills not be passed.**

# Chapter 1

# Introduction

1.1 On 16 August 2018, the Senate referred the following three bills to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 3 December 2018:

- Freedom of Speech Legislation Amendment (Censorship) Bill 2018 (the censorship bill).
- Freedom of Speech Legislation Amendment (Insult and Offend) Bill 2018 (the insult and offend bill).
- Freedom of Speech Legislation Amendment (Security) Bill 2018 (the security bill).[1]

1.2 This report presents the committee's consideration of all three bills (which throughout this report are referred to collectively as the 'freedom of speech bills').

## Purpose of the bills

1.3 The freedom of speech bills were introduced in the Senate by Senator David Leyonhjelm on 27 June 2018.[2]

1.4 The explanatory memorandum for each bill opens with the same statement regarding freedom of speech:

> Free speech is fundamental to a free and prosperous society. All Australians, regardless of their political inclinations, benefit from being able to freely express their views. The process of arriving at the truth relies on debate, which relies upon free speech.
>
> The right to free speech is not a creation of government, but it can be thwarted by government. Legislative restraints on free speech should only be considered to protect other freedoms.[3]

1.5 Each explanatory memorandum also states that the bills are 'part of a suite of four bills that amount to a comprehensive defence of free speech in Commonwealth law'.[4] The fourth bill in the suite is the Racial Discrimination Law Amendment (Free Speech) Bill 2016, which Senator Leyonhjelm introduced into the Senate on

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1 *Journals of the Senate [Proof]*, No. 109, 16 August 2018, pp. 3491–3492.

2 *Journals of the Senate [Proof]*, No. 104, 27 June 2018, pp. 3334–3335.

3 Explanatory Memorandum, Freedom of Speech Legislation Amendment (Censorship) Bill 2018 (Censorship Explanatory Memorandum), p. 1; Explanatory Memorandum, Freedom of Speech Legislation Amendment (Insult and Offend) Bill 2018 (Insult and Offend Explanatory Memorandum), p. 1; Explanatory Memorandum, Freedom of Speech Legislation Amendment (Security) Bill 2018 (Security Explanatory Memorandum), p. 1.

4 Censorship Explanatory Memorandum, p. 1; Insult and Offend Explanatory Memorandum, p. 1; Security Explanatory Memorandum, p. 1.

15 September 2016. This fourth bill, which would have repealed section 18C of the Racial Discrimination Act, was not referred to the committee and is not being considered as part of this inquiry.

1.6 While the question of section 18C is not addressed in the package of bills before the committee, it was a point of discussion during the hearing. The comments related to broader discussion about role of government in protecting and restricting different types of speech (as explored in the explanatory memoranda to the bills).[5]

## Key provisions of the censorship bill

1.7 The censorship bill contains three schedules:

- Schedule 1 relates to 'bans on publications, films and computer games'.
- Schedule 2 relates to 'bans on broadcasting, datacasting and online access'.
- Schedule 3 relates to the election blackout period.

1.8 The key provisions of the censorship bill are outlined in general terms below.[6]

### *Schedule 1 of the censorship bill*

1.9 Schedule 1 of the bill would amend the *Classification (Publications, Films and Computer Games) Act 1995* (Classification Act).

*Repeal provisions for the prohibition of material in parts of the Northern Territory*

1.10 Part 10 of the Classification Act currently provides for the Indigenous Affairs Minister to determine that an area of the Northern Territory is a 'prohibited material area'. In these areas, there are prohibitions on certain material that is not prohibited in other parts of Australia, such as films classified X 18+. Offences apply for breaches of these prohibitions, punishable by fines or up to two years' imprisonment (depending on the severity of the offence).[7]

1.11 The censorship EM calls these arrangements 'thinly-veiled racism',[8] and states:

> The people of an area of the Northern Territory selected by the Indigenous Affairs Minister should not face criminal penalties for possessing, controlling or supplying material that it is legal to possess, control and supply elsewhere in Australia.[9]

1.12 The bill would repeal the relevant part of the Classification Act.[10]

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5 The IPA reiterated their objection to the Racial Discrimination Act 1975 whilst the NSW Bar Association noted their previous objections to any changes to the Act. *Proof Committee Hansard,* 15 February 2019, pp. 12–13, and 19.

6 The Censorship Explanatory Memorandum further detail about the proposed amendments.

7 See Part 10 of the Classification Act; Censorship Explanatory Memorandum, p. 5.

8 Censorship Explanatory Memorandum, p. 2.

9 Censorship Explanatory Memorandum, p. 5.

10 See Items 1 and 7 of Schedule 1 of the censorship bill.

*Narrow the circumstances in which publications, films or computer games are 'refused classification'*

1.13 Under the National Classification Code (the Code), publications, films or computer games are to be classified as 'refused classification' if they:

- describe, depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified;
- describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or
- promote, incite or instruct in matters of crime or violence.

1.14 Currently, the Minister may only amend the Code with the agreement of each participating state or territory. The Censorship EM states that this material is effectively banned, because state and territory law does not allow the sale of material that is 'refused classification'.[11]

1.15 The bill would enable the Minister to amend the Code without the agreement of each participating state or territory. The Censorship EM acknowledges that, if a participating state or territory disagrees with the proposed amendments, that state or territory may decide to 'no longer confer classification responsibilities on bodies established by [the Classification Act]'.[12]

1.16 The bill would require the Minister to cause the Code to be amended such that material may only be 'refused classification' if it:

- depicts or describes in a way that is likely to cause offence to a reasonable adult a person who is, or appears to be, a minor engaged in sexual activity; or
- promotes, incites or instructs in matters of crime.

1.17 Further, the bill would narrow the current requirements by removing criteria 1, removing references to descriptions or depictions of children *not* engaged in sexual activity, and removing references to *non-criminal* violence.

*Remove the specific ban on publications, films and computer games that advocate terrorism*

1.18 The censorship EM highlights two overlapping prohibitions in existing law:

- The Classification Code requires material that promotes, incites or instructs in matters of crime be refused classification.
- The Classification Act requires material that advocates the doing of a terrorist act to be refused classification.

11 Censorship Explanatory Memorandum, p. 5.

12 Censorship Explanatory Memorandum, p. 6.

1.19 The censorship EM states that these prohibitions overlap because the 'doing of a terrorist act' is a crime.[13]

1.20 The censorship bill would maintain the first prohibition (in the Classification Code) but repeal the second prohibition (in the Classification Act; section 9A). Given the meaning of 'material that advocates the doing of a terrorist act', the censorship EM states the effect of the bill would be to no longer 'refuse classification' to material that:

> … does not promote, incite or instruct in terrorism, but nonetheless still advocates terrorism (at least from the perspective of a mentally impaired person). Such material could be said to include Michael Collins and Rambo III (which was original dedicated to 'the brave Mujahideen fighters of Afghanistan').[14]

1.21 The EM states refusing classification for such material is excessive and that '[p]raising or indirectly promoting terrorism is disagreeable, but free speech means little if only agreeable speech is protected'.[15]

***Schedule 2 of the censorship bill***

1.22 Schedule 2 of the censorship bill would amend the *Broadcasting Services Act 1992* (Broadcasting Services Act).

*Limit the broadcasts that may be prevented by codes of practice*

1.23 Currently, codes of practice may relate to preventing the broadcast of programs that, in accordance with community standards, are not suitable to be broadcast by a certain section of the industry. The censorship EM states:

> This guidance may be appropriate for broadcasting that is particularly susceptible to unsolicited or underage viewing or listening. However, this guidance could prompt unnecessary constraint on subscription broadcasting, which is not so susceptible to unsolicited and underage viewing or listening.[16]

1.24 The bill would limit the existing provision (relating to community standards) to non-subscription services. However, codes of practice could still relate to preventing the broadcast of programs classified as 'refused classification', regardless of whether the service is a subscription service.[17]

1.25 In addition, the bill makes similar amendments regarding codes of practice for datacasting services.[18]

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13 Censorship Explanatory Memorandum, p. 6.

14 Censorship Explanatory Memorandum, p. 7.

15 Censorship Explanatory Memorandum, p.7.

16 Censorship Explanatory Memorandum, pp. 8–9.

17 See Item 1 of Schedule 1 of the censorship bill, p. 3; Censorship Explanatory Memorandum, p. 8.

18 See Items 4 and 5 of Schedule 2 of the censorship bill; Censorship Explanatory Memorandum p. 9.

*Reduce restrictions on R 18+ and X 18+ content*

1.26 Currently, subscription television broadcasters may broadcast R 18+ programs under certain requirements, but may not broadcast X 18+ programs at all (X 18+ programs are programs containing depictions of actual, consensual, non-violent, non-demeaning sex).[19] The censorship EM states that:

> X 18+ programs should not be subject to a blanket ban with respect to subscription television broadcasts, while R 18+ programs are not: depictions of sex do not warrant greater restriction than depictions of violence. Programs under either classification should be able to be broadcast on subscription television provided that access to such programs is restricted by disabling devices acceptable to the regulator.[20]

1.27 The bill would:

- remove an existing requirement for Parliament to approve the broadcast of R 18+ programs following research on community standards conducted by, and a recommendation from, the ACMA, and
- allow X 18+ programs, as well as R 18+ programs, to be broadcast on subscription services under these amended requirements—that is, broadcast is permitted only if access is restricted by disabling devices.[21]

1.28 As well as the amendments relating to subscription television, the bill makes similar amendments relating to content services (which deliver text, music, images, or other content by means of a carriage service). The bill would make amendments so that, in line with the current treatment of R 18+ content, X 18+ content is only subject to take-down notices if the content is not subject to a restricted access system.[22]

*Remove restrictions on electronic editions and audio recordings of certain content*

1.29 The censorship EM states that state and territory law permits the sale of publications classified as category 2 restricted or category 1 restricted, subject to certain conditions (such as being contained in a sealed package).[23]

1.30 However, electronic editions or audio recordings of publications with these classifications are subject to take-down notices. The censorship EM states that these editions and recordings:

> …should not be subject to a blanket online ban, when the corresponding publications are not subject to a blanket ban in the physical world of paper

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19 See subclause 10(1) of Schedule 2 of the Broadcasting Services Act; Censorship Explanatory Memorandum pp. 8–9.

20 Censorship Explanatory Memorandum, p. 8.

21 See Items 2 and 3 of Schedule 2 of the censorship bill.

22 See Items 6 and 8 to 14 of Schedule 2 of the censorship bill; Censorship Explanatory Memorandum, p. 10.

23 Censorship Explanatory Memorandum, p. 10. The censorship EM provides further detail on the differences between category 1 and 2 classifications.

> and packaging. Such electronic editions and audio recordings should not be susceptible to 'take-down' notices provided that access to those electronic editions and audio recordings is subject to a restricted access system.[24]

1.31 The bill would make amendments so that electronic editions or audio recordings of category 1 restricted and category 2 restricted publications are only subject to take-down notices if access to the editions or recordings is not subject to a restricted access system.[25]

### *Schedule 3 of the censorship bill*

1.32 Schedule 3 of the censorship bill would also amend the Broadcasting Services Act by removing the prohibition on electoral advertising that currently applies in the three days prior to an election (the election 'blackout' period).[26] The censorship EM states that the current prohibition:

> …does nothing to stop broader electioneering on those days. Moreover, many voters cast their votes before election day, and voters need not be shielded from electioneering in order to make well-considered votes. If there were a need to ensure that votes are more carefully considered, the best course of action would be to make voting voluntary.[27]

## Key provisions of the insult and offend bill

1.33 The Insult and Offend EM explains the rationale for this bill:

> Speech that someone finds insulting or offensive should not be against the law.
>
> Social forces can prompt people to moderate their speech voluntarily. Enlisting the coercive powers of the state in an attempt to moderate speech is oppressive.[28]

1.34 The insult and offend bill would amend 23 Commonwealth Acts to remove restrictions relating to insulting or offensive speech. These amendments include, for example:

- removing the ability of the Commissioner of the Australian Charities and Not for profits Commission to exclude information from the register of charities if the Commissioner considers that the information is likely to offend a reasonable person,[29] and

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24 Censorship Explanatory Memorandum, p. 10.

25 See Items 7 and 15 of Schedule 2 of the censorship bill.

26 See Items 1 and 2 of Schedule 3 of the censorship bill; Censorship Explanatory Memorandum, p. 12.

27 Censorship Explanatory Memorandum, p. 12.

28 Insult and Offend Explanatory Memorandum, p. 1.

29 See Item 1 of Schedule 1 of the insult and offend bill, which amends the *Australian Charities and Not-for-profits Commission Act 2012*; Insult and Offend Explanatory Memorandum, p. 3.

- removing the offence, punishable by up to three months' imprisonment, of intentionally insulting or using any insulting language towards a Royal Commission.[30]

1.35 Many of the amendments would remove restrictions on insulting or offending members of tribunals or similar bodies.[31] The EM states that the existing restrictions 'are not necessary for these tribunals and officials to operate effectively', and notes that restrictions on 'disturbing, interfering with, or being contemptuous of these tribunals and officials' would remain in place. It further states that the bill 'has no impact on the judiciary'.[32]

1.36 While the bill seeks to remove restrictions on offensive or insulting speech, it would maintain restrictions on other types of speech. The EM states that the bill would leave in place restrictions on speech that is commercially sensitive, defamatory or obscene.[33]

1.37 As a further example, the bill would amend section 474.17 of the *Criminal Code Act 1995* which currently makes it an offence, punishable by up to three years' imprisonment, to use a carriage service to menace, harass, or cause offence. The bill would remove reference to causing offence, but maintain the terms 'menacing' and 'harassing'.[34]

## Key provisions of the security bill

1.38 The security bill, according to the EM, 'removes restrictions on speech in national security legislation that are unnecessary to ensure the security of Australians'.[35]

1.39 The security bill contains one schedule:

- Part 1 relates to proposed amendments for the following acts: *Australian Security Intelligence Organisation Act 1979* (ASIO Act); *Crimes Act 1914* (Crimes Act); and the *Criminal Code Act 1995* (Criminal Code Act).
- Parts 2 and 3 relate to the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017.
- Part 4 relates to the repeal of advocacy offences in the *Criminal Code Act 1995*.

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30 See Item 44 of Schedule 1 of the insult and offend bill, which amends the *Royal Commissions Act 1902*; Insult and Offend Explanatory Memorandum, p. 12.

31 See, for example, amendments relating to the Copyright Tribunal of Australia (Item 12 of Schedule 1), the Australian Commission for Law Enforcement Integrity (Item 37 of Schedule 1), and the Fair Work Commission (Items 32 to 34 of Schedule 1).

32 Insult and Offend Explanatory Memorandum, pp. 1–2.

33 Insult and Offend Explanatory Memorandum, p. 2.

34 See Items 20 to 22 of Schedule 1 of the insult and offend bill; Insult and Offend Explanatory Memorandum, p. 6.

35 Security Explanatory Memorandum, p. 1.

***Part 1***

*Inserting exemptions to disclosure and communication offences*

1.40 Under current law there are several offences for disclosing or communicating information related to a range of operations (including special intelligence operations, delayed notification search warrants, controlled operations, integrity operations, and preventative detention orders).[36] The EM states 'there should be no offence in the absence of harms with respect to human health or safety'.[37]

1.41 The security bill would insert the following exemptions to these offences in the ASIO Act, the Crimes Act, and the Criminal Code Act:

- Offences will not apply if the communication is of information that had already been communicated, or made available, to the public.[38]
- Offences will not apply if the communication is made reasonably, in good faith and in the public interest.[39]

1.42 Further exceptions are proposed if the information concerns corruption or misconduct, if the relevant operation has ceased, notification has been received by the relevant senior official, and the communication does not identify participants in the operation(s).[40]

*Disclosure and communication offences by entrusted and other persons*

1.43 The bill aims to distinguish disclosures by entrusted persons from communications by others.[41] The bill would insert a definition of entrusted persons applicable to the following three disclosure offence provisions: delayed notification search warrants, controlled operations and integrity testing operations.

1.44 It introduces offences for entrusted persons and other persons disclosing information 'where the discloser intends to endanger the health or safety of any person, or where the disclosure will endanger the health or safety of any person and the discloser is reckless as to the risk of this'.[42]

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36 The Security Explanatory Memorandum provides detailed lists of the relevant subsections for each act examined (*Australian Security Intelligence Organisation Act 1979; Crimes Act 1914;* and the *Criminal Code Act 1995*) and the current disclosure and communication offences and penalties.

37 The Security Explanatory Memorandum explains the premise of some amendments is to remove disclosure offences in the absence of harm. For this specific example see Security Explanatory Memorandum, p. 4.

38 See Items 6, 13, 19 and 32 of part one of the Security Bill; Security Explanatory Memorandum, pp. 5–6, 8–9, 11, and 15.

39 See Item 6 of the Security Bill; Security Explanatory Memorandum p. 5–6.

40 See Items 6, 13, 19 and 32 of part one of the Security Bill; Security Explanatory Memorandum, pp. 5–6, 8–9, 11, and 15. These exceptions would also apply to proposed changes in Part 3 of Schedule 1, see items 48–50 of the Security Bill and the Security Explanatory Memorandum, pp. 201–21.

41 Security Explanatory Memorandum, pp. 7–10.

42 See Items 11 and 17 of the Security Bill; Security Explanatory Memorandum, p. 10.

1.45 The effect of these changes is that lower maximum penalties would apply for some communication and disclosure offences where the person making the disclosure is not an entrusted person and where the disclosure did not endanger the health or safety of any person.[43]

*Additional changes to the Criminal Code Act 1995*

1.46 There are a range of offences relating to the communication of a preventative detention order. A detainee under 18 years of age or incapable of managing their affairs is entitled to have contact with parents or guardians, however it is an offence for the detainee to communicate that they are detained, that they are detained for the purpose of a preventative detention order, or the period of detention.[44]

1.47 The EM states:

> The offence is a particularly cruel violation of free speech, amounting to entrapment by offering a distressed detainee contact with a family member while maintaining an offence of the detainee telling the family member that the detainee is being detained. It should be noted that the detainees in question are not under any charge and many not be suspected of any crime.[45]

1.48 The bill would also insert obligations on police officers to inform parents or guardians about the relevant communications offences.[46]

1.49 Further, the bill would limit certain offences to where there is an intention or knowledge that the communication endangers the health or safety of any person.

***Parts Two and Three***

*Amendments to the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017* (Crimes Bill)

1.50 At the time of introduction of the security bill, the Crimes Bill had yet to pass both houses. Parts 2 and 3 of the security bill propose amendments dependent on the status of the Crimes Bill. The proposed amendments in Part 2 would apply if the Crimes Bill is yet to commence, and Part 3 would apply if the Crimes Bill had come into effect.

1.51 The Crimes Bill received Royal Assent on 24 August 2018; therefore Part 2 of the security bill would not apply.

1.52 Part 3 of schedule 1 seeks to amend disclosure offences in regards to controlled operations. Similar to part one, the bill would remove disclosure offences where there is an absence of harm.[47]

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43 See Item 11 of the Security Bill; Security Explanatory Memorandum, p. 8.

44 See section 105.39 of the *Criminal Code Act 1995*; Security Explanatory Memorandum, p. 12.

45 See Security Explanatory Memorandum, p. 13.

46 See Item 28 of the Security Bill; Security Explanatory Memorandum, pp. 12 and 14.

47 See paragraphs 1.36 and 1.37 for further information.

### *Part Four*

*Repeal of advocacy offences in the Criminal Code Act 1995*

1.53 Part 4 of the security bill would be repeal sections 80.2C and 80.2D of the *Criminal Code Act 1995.*

1.54 Under section 80.2C of the Criminal Code it is an offence, punishable by up to five years' imprisonment, to advocate terrorism and be reckless as to whether another person will engage in terrorism. A similar offence, relating to genocide is at section 80.2D of the Criminal Code.

1.55 However, the security EM draws attention to the existing offence of incitement at section 11.4 of the Criminal Code, which would not be repealed. The security EM states that:

> Given section 11.4, which would remain unchanged under this Bill, section 80.2C only serves to ban speech other than speech that urges terrorism with an intention that terrorism be committed. Such a ban is excessive.[48]

1.56 The bill would repeal these offences.

## Consideration by other committees

### *Standing Committee for the Scrutiny of Bills*

1.57 The Standing Committee for the Scrutiny of Bills (Scrutiny Committee) provided no comment on the censorship bill or the insult and offend bill.[49]

1.58 Regarding the security bill, the Scrutiny Committee made comment on the reversal of evidential burden of proof.

1.59 Under subsection 13.3(3) of the *Criminal Code Act 1995* the defendant bears the burden of proof for offence-specific defences. The Scrutiny Committee noted that the bill inserts a number of new offence-specific defences. [50]

1.60 The Scrutiny Committee raised concerns about the implications of these provisions for the common law right of the presumption of innocence.[51] The report stated 'provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right'.[52]

1.61 The Scrutiny Committee drew its scrutiny concerns to the attention of senators and left to the Senate as a whole 'the appropriateness of reversing the evidential burden of proof in relation to matters that do not appear to be peculiarly within the knowledge of the defendant'.[53]

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48 Security Explanatory Memorandum, p. 22.

49 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2018*, 15 August 2018, p. 36.

50 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2018*, 15 August 2018, p. 18.

51 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2018*, 15 August 2018, p. 18.

52 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2018*, 15 August 2018, p. 18.

53 Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2018*, 15 August 2018, p. 19.

### *Parliamentary Joint Committee on Human Rights*

1.62 The PJCHR made comments on all three bills[54] and stated that 'the measures in all three bills engage the right to freedom of expression'.[55]

1.63 However, the report noted that the statements of compatibility 'do not address other rights potentially engaged by the bills, including the rights of children, the right to privacy and the right to equality and non-discrimination'.[56]

1.64 The PJCHR indicated that 'if the bills proceed to further stages of debate, the committee may request information from the legislation proponent with respect to the compatibility of each bill with human rights'.[57]

## Conduct of this inquiry

1.65 Details of the inquiry were advertised on the committee's website, including a call for submissions to be received by 20 September 2018. The committee also wrote directly to a number of relevant organisations inviting them to make a submission. The committee received 6 submissions, which are listed at Appendix 2 of this report. All submissions are available in full on the committee's website.[58]

1.66 The committee conducted one public hearing for this inquiry on 15 February 2019 (Canberra). Witnesses appearing at the hearing are listed at Appendix 3.

1.67 Senator Leyonhjelm provided his views on the freedom of speech bills to the committee. Given that he resigned from the Senate on 1 March 2019, the committee has agreed to include his views in this report as an appendix (see Appendix 1).

## Structure of this report

1.68 This report consists of 2 chapters. In addition to this introductory chapter, chapter 2 outlines the key issues raised in evidence to the committee and provides the committee's view.

## Acknowledgements

1.69 The committee thanks all organisations that made submissions to this inquiry, as well as those that gave evidence at the public hearing.

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54 Parliamentary Joint Committee on Human Rights, *Report 7 of 2018*, 14 August 2018, pp. 85–89.

55 Parliamentary Joint Committee on Human Rights, *Report 7 of 2018*, 14 August 2018, p. 87.

56 Parliamentary Joint Committee on Human Rights, *Report 7 of 2018*, 14 August 2018, p. 88.

57 Parliamentary Joint Committee on Human Rights, *Report 7 of 2018*, 14 August 2018, p. 89.

58 See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/FreedomofSpeech (accessed 31 October 2018).

# Chapter 2

# Key issues

2.1 As outlined in Chapter 1, the bills seek to enhance freedom of speech by making various amendments to a broad array of legislative provisions. While there was general discussion about the principle of free speech, the committee only received comment on a small number of the specific proposed amendments.

2.2 The following key issues were raised regarding each bill:

- Freedom of Speech Legislation Amendment (Censorship) Bill 2018 (censorship bill):
    - The repeal of provisions for the prohibition of certain material in certain parts of the Northern Territory.
    - Concerns regarding how ideas of 'community standards' influence the classification of certain media.
    - The appropriateness of the 'electoral advertising blackout' in a changing media landscape.
- Freedom of Speech Legislation Amendment (Insult and Offend) Bill 2018 (insult and offend bill):
    - Whether 'insult and offend' provisions are sufficiently objective.
    - Proposed amendments relating to 'insulting' or 'offensive' speech in tribunals and similar institutions.
- Freedom of Speech Legislation Amendment (Security) Bill 2018 (security bill):
    - The appropriateness of exempting journalists reporting on issues of national security from restrictions on speech.

2.3 This chapter provides a summary of the above matters as addressed in evidence to the committee. In turn, this chapter provides the committee's views and recommendations on the bills.

## Key issues regarding the censorship bill

### *Repeal of provisions for the prohibition of material in parts of the Northern Territory*

2.4 As noted in Chapter 1, Part 10 of the *Classification (Publications, Films and Computer Games) Act 1995* (Classification Act) provides for the Indigenous Affairs Minister to determine areas of the Northern Territory as 'prohibited material areas',

which means that certain material is prohibited in those areas even though it is not prohibited elsewhere in Australia.[1]

2.5 The Eros Association (Eros) supported the repeal of Part 10 of the Classification Act, as proposed by the censorship bill, on the grounds that the current law constitutes discrimination against Indigenous persons.[2] Eros also cast doubt on the existence of a link between consuming sexually explicit material and committing sexual offences. Mr Jarryd Bartle, Policy and Campaigns Adviser, told the committee:

> We do not agree that there is a causal link between viewing sexually explicit material and sexual violence, nor do we think that Indigenous and Torres Strait Islander populations are somehow more susceptible to committing violence after viewing sexually explicit material.[3]

### *Community standards and content classified as 'refused classification'*

2.6 A number of witnesses suggested that 'community standards' should not be determinative in the classification of content.

2.7 For example, the Institute of Public Affairs (IPA) argued that it is difficult for censors to understand and appropriately judge community standards. As Mr Daniel Wild, Director of Economics at the IPA, stated, '[w]e are inherently sceptical about the ability of central government to know what community standards are…'. Mr Wild added that:

> …we're in favour of individuals, as far as possible, and families and community organisations and so forth being [able] to police and set up their own community standards.[4]

2.8 Similarly, Eros expressed concerns regarding the application of community standards to content regulation:

> [Consent] should be the focus of any content regulation. Currently that is not the focal point. Indecency seems to be more of the focal point of current content regulation.[5]

2.9 Eros further noted that adult content can be refused classification not because it is illegal but because it has been deemed to be against the standards of morality, decency and propriety.[6] Mr Bartle of Eros stated that current ideas of community standards lead to overly restrictive classifications on adult media:

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1 See Chapter 1, p. 6; also see Part 10 of the *Classification (Publications, Films and Computer Games) Act 1995*.

2 The Eros Association, *Submission 2*, p. 2.

3 Mr Jarryd Bartle, Policy and Campaigns Adviser, the Eros Association, *Proof Committee Hansard*, 15 February 2019, p. 1.

4 Mr Daniel Wild, Director of Economics, Institute of Public Affairs, *Proof Committee Hansard*, 15 February 2019, p. 9.

5 Mr Bartle, the Eros Association, *Proof Committee Hansard*, 15 February 2019, p. 5.

6 Ms Rachel Payne, General Manager, the Eros Association, *Proof Committee Hansard*, 15 February 2019, p. 5.

> Many forms of consensual sadomasochistic sexual acts between two consenting adults, that might, from an incorrect outside perception, be perceived as violent are currently banned. Fetishes are deliberately listed under the classification code as something that would turn something that would otherwise be X18+ into 'refused classification'…In fact, one of the fetishes that the classification guidelines specifically note is the dripping of candle wax—as being something that shifts something from X18+ to refused classification.[7]

2.10 Mr Bartle also stated that:

> …once something has reached the threshold of being designed for adults and oriented for adults, there doesn't seem to be much of a need for it to go through the classification branch and get a classification.[8]

### *Electoral advertising blackout*

2.11 A number of witnesses and submitters supported the removal of the prohibition on electoral advertising in the three days immediately prior to an election (the election 'blackout' rule).[9]

2.12 Free TV Australia (Free TV) argued in support of the removal of the electoral advertising blackout due to the changing nature of the media environment and current 'multi-platform media landscapes'. Free TV's submission stated:

> These rules apply to both free-to-air and pay television as well as radio, however they do not apply to other forms of electronic media such as internet or mobile advertising. They were passed by the Parliament in 1992, prior to widespread internet access in Australia…On commencement of the blackout period, political parties simply transfer their advertising from television to other digital media platforms that are not regulated…[10]

2.13 The IPA also supported the removal of the electoral advertising blackout:

> 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.[11]

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7 Mr Bartle, the Eros Association, *Proof Committee Hansard*, 15 February 2019, pp. 4–5.

8 Mr Bartle, the Eros Association, *Proof Committee Hansard*, 15 February 2019, p. 2.

9 Clause 3A of Schedule 2 to the *Broadcasting Services Act 1992* requires that a broadcaster must not broadcast an election advertisement from the end of the Wednesday before polling day until the close of the poll on polling day, where an election is to be held in an area which relates to a licence area, or an area where a broadcast can normally be received. This only applies for elections to a Parliament. Australian Communications and Media Authority, 'Election and political matter guidelines', https://www.acma.gov.au/theACMA/political-matter-tv-content-regulation-i-acma (accessed 4 March 2019).

10 Free TV Australia, *Submission 3*, pp. 2–3.

11 Institute of Public Affairs, *Submission 6*, p. 3.

## Key issues regarding the insult and offend bill

2.14 Submitters and witnesses raised a range of issues regarding the insult and offend bill, as summarised below.

2.15 First, some inquiry participants submitted that the terms 'insult' and 'offend' are subjective and impose an unnecessary restriction on freedom of speech in current law. However, others argued that 'insult' and 'offend' are objective terms, at least inasmuch as they are defined within the context of individual statutes.

2.16 For its part, Free TV argued in support of removing 'insult' and 'offend' provisions:

> Free TV's view is that 'offence' and 'insult' are generally not of sufficient magnitude to justify constraining freedom of speech.
>
> Freedom of speech should not be encroached upon for speech which is merely offensive.
>
> …
>
> Laws curtailing hate speech are justifiable where they are directed to protecting people from serious harm, such as intimidation, discrimination, or violence. But the suppression of speech purely to protect people, or groups of people, from being offended is not an appropriate objective for the law.[12]

2.17 Similarly, Mr Wild of the IPA stated:

> What someone thinks about what someone else says is irrelevant to the rights of that person to speak. But it's also inherently subjective….The idea that government needs to protect people from 'harmful' speech is dehumanising and disempowering.[13]

2.18 In contrast, others argued that although freedom of expression is a fundamental human right, it is not an absolute right, and it must be considered against other rights. For example, the NSW Bar Association opposed the bill on the basis that it 'proceeds on the basis of an assumption that is inconsistent with applicable constitutional and international human rights law'.[14] A representative of the NSW Bar Association stated:

> [A]n assessment of the compatibility with freedom of expression of the laws in question must assess whether they are provided by law and are a necessary and proportionate way of achieving a goal that falls within permissible and legitimate objectives. Assuming from the outset that restricting insulting or offensive language or conduct is per se impermissible fails to undertake a proper inquiry and it may lead to the

12 Free TV Australia, *Submission 3*, p. 2

13 Mr Wild, Institute of Public Affairs, *Proof Committee Hansard*, 15 February 2019, p. 7.

14 New South Wales Bar Association, *Submission 4*, p. 6.

> lifting of restrictions on speech that properly protect other people's rights or which are justified in the broader public interest.[15]

2.19 The NSW Bar Association concluded that the removal of 'insult' and 'offend' provisions in the bill's proposed form is a 'blunt instrument' and does not adequately justify the removal of the words in context of the individual Acts. The Association noted it is important to identify the meaning of 'insult' and 'offend' in the specific statutory context in which those terms appear.[16]

2.20 The Australian Charities and Not-for-profits Commission (ACNC) commented specifically on Item 1 of the bill, which would repeal the ACNC Commissioner's discretion to decline to include information on the Charity Register, or to remove information from the Register, if the information 'is likely to offend a reasonable individual'.[17] The ACNC argued against this proposal, submitting that the Register is a platform for information, rather than expression:

> The purpose of the Register is not to provide a platform for the expression of views, but rather to provide information to the public about registered charities. It is not unreasonable that the information on a public Register maintained by a statutory regulator should not include material that is likely to offend a reasonable person.[18]

### *Proposed amendments relating to tribunals and similar institutions*

2.21 Inquiry participants expressed competing ideas on the proposed amendments to remove insulting or offensive language in tribunals and similar institutional settings.

2.22 Mr Kurt Wallace, Research Fellow at the IPA, expressed concern that public officials may have greater protections from insulting and offensive speech than individuals:

> I think the principle of free speech is completely undermined by having clauses of 'insult and offend' because of the subjective nature of those things. We obviously don't believe that there's a distinction between public servants and the rest of us in terms of having rights to stop speech because of our feelings. So we would support removing subjective elements such as those things. We also note that these bills still maintain a number of other restrictions on speech in terms of obscenity and other things like that, so there's no need to have this subjective feelings-based restriction.[19]

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15 Ms Naomi Sharp, Co-Chair, Human Rights Committee, New South Wales Bar Association, *Proof Committee Hansard,* 15 February 2019, p. 16; also see p. 19.

16 New South Wales Bar Association, *Submission 4,* p. 2.

17 See Item 1of the insult and offend bill, which would repeal paragraph 40-10(2)(c) of the *Australian Charities and Not-for-profits Commission Act 2012.*

18 Australian Charities and Not-for-profits Commission, *Submission 1*, p. 2.

19 Mr Kurt Wallace, Research Fellow, Institute of Public Affairs, *Proof Committee Hansard,* 15 February 2019, p. 10.

2.23 In contrast, the NSW Bar Association stated that the purpose of these protections are not for a specific individual or officer but for the institution and the administration of justice:

> [T]he protection against insulting or offensive conduct towards a court or a judicial officer is not for the protection of the individual person and his or her feelings; it's for the protection of the institution…[20]

2.24 Further, in its submission, the NSW Bar Association explained:

> 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 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.[21]

2.25 The Department of Veterans' Affairs made comment specifically regarding the proposed repeal of an offence relating to insulting conduct at the Veterans' Review Board (VRB).[22] It submitted that this would lower the standards of acceptable conduct and behaviour in a VRB review. The department suggested that the current subsection recognises the seriousness of the role of the VRB, and its repeal would remove an important element of contemptuous conduct.[23]

## Key issues regarding the security bill

2.26 There was limited evidence provided to the committee regarding the security bill. Only one submitter, Free TV, commented on its provisions and argued in favour of the proposed changes to the relevant sections of the *Australian Security Intelligence Organisation Act 1979* and the *Crimes Act 1900*.[24]

2.27 As discussed in Chapter 1, there are a range of communication and disclosure offences regarding special intelligence operations, delayed notification search warrants, controlled operations, integrity operations, and preventative detention orders. The offences also apply to journalists.

2.28 Free TV raised concerns regarding the level of risk journalists undertake in reporting on national security issues. It submitted that:

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20 Professor Andrew Byrnes, Member – Human Rights Committee, New South Wales Bar Association and Professor of Law, Faculty of Law, University of New South Wales, *Proof Committee Hansard*, 15 February 2019, pp. 18–19.

21 New South Wales Bar Association, *Submission 4*, p. 4.

22 See Item 47 of the insult and offend bill, which would repeal subsection 170(1) of the *Veterans' Entitlements Act 1986*.

23 Department of Veterans' Affairs, *Submission 5*, p. 1.

24 Free TV Australia, *Submission 3*; also see Items 2–7 of the security bill.

> …existing national security laws should include media exemptions which are sufficiently broad to cover the legitimate activities of journalists in performing their roles in our democracy.[25]

**Committee view**

2.29 The committee views freedom of speech as a fundamental element of a free and democratic society. However, it notes that freedom of speech must be balanced with other rights and examined in relation to existing legislation.

2.30 In regards to the censorship bill, the committee acknowledges concerns that provisions enabling the prohibition of certain adult media in certain parts of the Northern Territory may be racially discriminatory. However, the committee also notes that this particular matter is only one of many raised by the package of bills, and the committee did not receive evidence from the relevant government agencies or community groups on the matter. While the committee considers the matter deserving of further review, it considers that such a review would need to take account of the views and expertise that might be provided by the relevant government agencies, community groups and other stakeholders.

2.31 The committee acknowledges the concerns expressed by several inquiry participants regarding the current prohibition of electoral advertising on television and radio in the three days prior to an election—the advertising 'blackout' rule. The committee notes that the blackout rule, which was introduced in 1992, does not apply to internet and mobile advertising (or, for that matter, print media), and may not be relevant or appropriate in light of changes in the media and technological landscape over the last 27 years. The committee also notes the growing uptake in pre-poll voting in recent years, and considers this trend underlines the need for a review of the ongoing relevance and efficacy of the blackout rule.

2.32 In regards to the insult and offend bill and the security bill, the committee agrees with the broad objective of the bills of removing any unnecessary constraints on freedom of speech. However, the committee also considers that each of the legislative provisions that the bills propose to amend or remove need to be considered in detail on their own merits, rather than as part of a 'catch all' approach.

2.33 While the committee did not receive evidence in relation to each and every one of the individual legislative changes proposed by the bills, it notes that whatever evidence it did receive suggests there are sound reasons for the limits on certain speech in existing legislation.

**Recommendation 1**

2.34 **The committee recommends that the Government review the appropriateness of Part 10 of the *Classification (Publications, Films and Computer Games) Act 1995*.**

25 Free TV Australia, *Submission 3*, pp. 3–4.

**Recommendation 2**

2.35 **The committee recommends that the government give consideration to amending the provisions in the *Broadcasting Services Act 1992* that prohibit broadcasters showing any election advertisements in the three days prior to an election.**

**Recommendation 3**

2.36 **The committee recommends that the bills not be passed.**

**Senator the Hon Ian Macdonald**
**Chair**

# Appendix 1

## Dissenting Report from Senator David Leyonhjelm

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

*Freedom of Speech Legislation Amendment (Censorship) Bill 2018*

*Freedom of Speech Legislation Amendment (Security) Bill 2018*

Committee reports on private bills almost invariably recommend that the bills not be passed, irrespective of their merits. This dissenting report is presented on the assumption that the report on these bills will be no exception.

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

This bill would amend 23 existing Acts with the result that it would no longer be an offence to hurt the feelings of various public officials.

Free speech is not an unqualified right; it is legitimate for the law to prevent such things as incitement to break the law, for example.

However, it is not a legitimate function to protect feelings. It is especially not legitimate to protect the feelings of only certain people, particularly those in privileged positions.

The arguments presented by the NSW Bar Association are without merit. Its submission argues that freedom of speech carries "a corresponding duty to consider the rights of others", citing the ICCPR as support. However, there is no mention of feelings, or anything equivalent, in the ICCPR.

There is also no basis for the suggestion that public order will be jeopardised by removing protection for the feelings of public officials. As the Explanatory Memorandum makes clear, the bill leaves in place numerous existing restrictions in Commonwealth law on speech, some of which relate to public order. The feelings of officials do not.

### Freedom of Speech Legislation Amendment (Censorship) Bill 2018

This bill removes bans based on morality, decency and propriety, so that adults may have access to previously banned material under specific conditions.

It does not change existing laws with respect to promoting, inciting or instructing in crime, or that portray children engaged in sexual activity or subject to torture. Moreover, it does not alter the classification rules that restrict access by minors.

The bill also seeks to remove a ban on certain publications that only applies in parts of the Northern Territory. This ban operates from the assumption that pornography results in sexual crimes, and that indigenous people in certain areas are more susceptible to this effect than others. This is indefensible racism.

The bill also allows for changed technology so that broadcasting, datacasting and online content can be made available to adults via access-control systems. This reflects the community expectation that the public should not be confronted with certain material inadvertently, but that adults who choose to access that material should not be prevented from doing so.

**Freedom of Speech Legislation Amendment (Security) Bill 2018**

This bill removes restrictions on speech in national security legislation that are unnecessary to ensure the security of Australians.

Journalists should not be at risk of criminal charges for doing their job.

People who are not suspected of a crime should not be subject to criminal conviction and enduring imprisonment for letting someone know they have been detained without charge. That such a provision exists on the statutes is an abomination.

**Recommendation: That the bills be passed**

# Appendix 2

## Submissions

### Submissions

1. Australian Charities and Not-for-profits Commission
2. The Eros Association
3. FreeTV Australia
4. New South Wales Bar Association
5. Department of Veterans' Affairs
6. Institute of Public Affairs

# Appendix 3

## Public Hearings

***Canberra ACT, 15 February 2019***

**Members in attendance:** Senators Leyonhjelm, Ian Macdonald, Pratt.

BARTLE, Mr Jarryd, Policy and Campaigns Adviser, Eros Association

BYRNES, Professor Andrew, Member, Human Rights Committee, New South Wales

Bar Association; Professor of Law, Faculty of Law, University of New South Wales

PAYNE, Ms Rachel, General Manager, Eros Association

SHARP, Ms Naomi, Co-Chair, Human Rights Committee, New South Wales Bar Association

WALLACE, Mr Kurt, Research Fellow, Institute of Public Affairs

WILD, Mr Daniel, Director of Economics, Institute of Public Affairs