

18 September 2015

Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

Dear Sir/Madam,

Re: Traditional Rights and Freedoms (ALRC Interim Report 127)

The Australia/Israel & Jewish Affairs Council (AIJAC) welcomes the opportunity to make a submission to the Australian Law Reform Commission's 2015 Traditional Rights and Freedoms inquiry following the publication of Interim Report 127.

AIJAC is committed to preserving and strengthening the traditional rights and freedoms exemplified by Australian democracy while ensuring that Commonwealth Laws both account for and protect the interests of minority groups within Australia.

AIJAC believes strongly in the protection of religious minorities and religious freedoms without unreasonable interference and the ability of all religious groups to live and practice their beliefs in peace without fear of harm or violence.

1. Section 18C of the Racial Discrimination Act

This interim report has again raised the highly publicized issue of section 18C, a matter that was subject to significant public debate throughout 2014, following which the Federal government determined that reform to the section was "off the table."

AIJAC recommends that the Commonwealth government maintain effective laws against hate speech including protections against racial discrimination. Section 18C fulfils the legitimate objective of providing legal redress to victims of racial discrimination while not disproportionality affecting freedom of speech considerations as advocates of repeal have falsely argued.

Any attempt to either repeal or "water down" Section 18C must account for the widespread support within the broader Australian community for its retention and the surge of objection and disappointment most evident amongst ethnic, cultural and religious representative institutions and communities when these reforms were proposed initially, communities that are still vulnerable and continue to benefit from the retention of this provision.

As noted in the interim report, by organisations including NSW Young Lawyers, section 18C only affects speech to the extent required to protect vulnerable communities from racial vilification.

AIJAC has previously submitted an extensive report on the issues relating to freedom of speech and section 18C, the report is available [here](#), as are selected extracts relevant to the current inquiry:

AIJAC maintains that the provisions of Part IIA of the RDA have worked effectively for nearly 20 years, and that there is not a compelling reason for repeal or wholesale reform. The legislation under section 18C has allowed people to have recourse when they have been the victims of acts that offend, insult, humiliate or intimidate on the grounds of race, while freedom of speech is protected through the wide ranging exemption under section 18D. While on the whole Australia is a proud, tolerant multicultural society, many Australians continue to be affected by racism. An appendix to this report documents physical attacks

against Jewish Australians, which is an ongoing concern. According to the AHRC there was a 59 per cent rise in racial hatred complaints in 2013, and a 5 per cent rise in general race-based complaints. The RDA was introduced as a response to a documented problem of racism, which had diminished the rights of many Australians. The provisions of Part IIA of the RDA were drafted to best balance the twin goals of maintaining maximum freedom of expression consistent with maintaining freedom from racial vilification. They were the product of widespread public consultation and debate in response to the recommendations of major inquiries including the 1991 National Inquiry into Racist Violence and the 1998 Royal Commission into Aboriginal Deaths in Custody.

As set out in the 1991 National Inquiry into Racist Violence - which documented the extent of racist violence in Australia, particularly against Aboriginal and Torres Strait Islander people, and the connection between that violence and racist propaganda, intimidation and harassment - this is first and foremost to ensure that:

“no person in Australia is subject to violence, intimidation or harassment on the basis of race”

Similarly, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), to which Australia is a signatory, creates an obligation in Article 4(a), for signatories to:

“Declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;”

Freedom of expression is also an important international human right under Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which states, that (1), “Everyone shall have the right to hold opinions without interference” and that (2), “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” However, freedom of expression is not an absolute right, and is limited by both Article 19 (3a) “For respect of the rights or reputations of others”; (3b) “For the protection of national security or of public order (ordre public), or of public health or morals”, as well as Article 20 which (1) prohibits propaganda for war, and (2) states that “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” The sections 18C and 18D of the RDA appear to have struck the right balance between freedom of expression and protecting people from racial vilification, as should any reforms made to the legislation.

2. Sections 80.2A, 80.2B and 80.2C of the Criminal Code

The federal government should consider amendments to section 80.2A and 80.2B in the Commonwealth Criminal Code to improve its ability to be effective against incitement to racially motivated violence and racial hatred including on online platforms.

Currently the legislation requires a prosecutor to prove that an accused person: “intentionally urges another person, or a group, to use force or violence against” a targeted group or person, and that the person does so “intending that force or violence will occur”.

The requirement of intention and the ‘good faith’ defences under section 80.3 severely restrict the ability of this legislation to be effective. In a time of heightened incitement to violence by extremist groups, hate speech preachers must be prosecuted for reckless/negligent behaviour without their

prosecution being unduly restricted by the high burden of proof required in establishing intention or defence of “good faith”.

For example, the NSW Anti-Discrimination Act, since its introduction, has never resulted in a successful prosecution, nor has the Director of Public Prosecutions ever laid a charge under the Act, despite more than 30 cases being referred by the Anti-Discrimination Board for attention. This year, it has been widely reported that Ismail Al-Wahwah, a leader of extremist group Hizb ut-Tahrir in Australia, stated (in videos uploaded to Youtube) that Jews are “the most evil creatures of Allah,” and that “The ember of jihad against Jews will continue to burn ... tomorrow you Jews will see what will become of you — an eye for an eye, blood for blood, destruction for destruction.”

The NSW Jewish Board of Deputies lodged a complaint under section 20D of the Anti Discrimination Act (NSW) 1977. However, given the strict requirements under section 20D, al-Wahwah was not prosecuted. In 2013, it was also reported that the Director of Public Prosecutions indicated that they did not believe that the burden of proof required by the legislation would have been met in any of the then 27 complaints on record which were referred to their office. Recently, NSW Attorney General Gabrielle Upton indicated the government was “considering” recommended changes to the laws, adding that “people, communities and governments need to be vigilant to, and guard against, the spread of religious or racial vilification.”

Currently, the Commonwealth, States and Territories all provide distinct, different protections against hate speech. AIJAC recommends that there be consideration of providing a consolidated, uniform law applicable throughout Australia, which proscribes public incitement of racial hatred. The Federal Government should consider adopting the Western Australian legislation - Chapter XI of the Criminal Code Act (1913) as a model, as it has proven effective in prosecuting incitement to racial hatred.

The Federal government should also consider the framing of section 80.2C of the Criminal Code as a guide for reform. Section 80.2C states that a person commits an offence if the person advocates “the doing of a terrorist act” or the “commission of a terrorism offence” and engages in that conduct “reckless” as to whether or not someone will engage in a terrorist act or commit a terrorism offence.

It is our submission that the current legislative framework does not provide a significant enough disincentive for hate preachers, radicals or extremists to refrain from urging violence against groups or members of a group given that the offence described does not account for the reckless disregard for public safety and the safety of individuals exhibited by the proliferation of such statements.

Statements such as those discussed above, regardless of their demonstrable level of intent, clearly represent a prima facie callous, irresponsible and wholly reckless disregard for the outcome or follow-on effects of such rhetoric. The incendiary nature of such speech can have an as significant if not greater impact on sympathizing extremists given its indistinguishable character from speech advocating a terrorism offence or violence against a group or members of a group, regardless of whether the notion of intent can be proven as required in the current legislative framework.

It is our further submission that incorporating consideration of the accused’s recklessness when urging violence against groups or members of a group is not disproportionate to the legitimate goal of maintaining freedom of speech. In the event that the defence of ‘good faith’ were to be maintained in any legislative review, the various defences codified in Section 80.3 already provide significant restrictions on the operation of section 80.2 in addition to accounting for wide-ranging freedom of speech considerations. The amended sections 80.2A and 80.2B in such a circumstance would operate to serve the legitimate objective of both prosecuting and dissuading extremists urging violence against a group or members of a group while not impinging on the legitimate freedom of speech considerations highlighted later in the Code.

3. Freedom of Religion

AIJAC notes the interim report's chapter on 'Religious Freedom' and believes that, as expressed in the report, regard must be had to both considerations of religious freedom and practice as well as legitimate considerations of freedom from discrimination, both values which AIJAC believes are core to a democratic society.

Certain religious groups and organisations have historically and continued to operate along similar lines to voluntary associations. In certain circumstances, their retaining their discretion to set criteria for selecting members, representatives, best practices and in many respects those associated with the organisation in question are crucial to the continued, unhindered and free practice of a diversity of religions within Australia.

The continued free and open observance of both religious beliefs and customs is a legitimate objective identified in the report, along with being recognised as such within wider Australian society and similar democratic societies. It is therefore essential that any review of legislative provisions pertaining to certain religious exemptions in pursuit of ensuring freedom from discrimination, a goal shared by religious institutions around Australia including Jewish communal bodies, does not disproportionately affect the ability of religious groups and institutions to fairly practice and conduct themselves according to their beliefs, or in fact discriminate against the legitimate pursuit of peaceful religious observance. The Freedom for religious groups to both observe their religious traditions and rituals and conduct themselves according to their beliefs must continue to be a bedrock of Australia's multicultural society – only to be limited in the most extreme cases, such as the promulgation of violence.

Yours sincerely



Colin Rubenstein AM
Executive Director
Australia/Israel & Jewish Affairs Council (AIJAC)