

1 October 2024

Freedom of expression crucial to democracy

A delicate balance must be maintained between freedom of expression and protecting the Australian community from discrimination and hate.

“Maintaining freedom of expression is crucial to maintaining our character as a liberal democratic society and the rule of law,” Law Council of Australia President, Mr Greg McIntyre SC said.

“However, the need for carefully framed criminal laws proscribing speech to prevent radicalisation, violence and activities that incite hatred must also be acknowledged.

“We are mindful of the need to preserve social cohesion in our multicultural society as we navigate entrenched disagreement, and the specific harms of hateful speech on vulnerable groups.

“In certain circumstances, the right to freedom of expression may be subject to limitation, for example, advocacy of hatred that constitutes incitement to discrimination. At the Commonwealth level, there are a range of criminal offences, significantly amended by legislation in 2023, proscribing certain types of speech to prevent radicalisation, violence and activities that incite hatred.

“For example, Section 80.2HA, established recently by *Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Act 2023*, makes it an offence for a person to knowingly display a prohibited terrorist organisation symbol if certain criteria are met. This includes where the display of the prohibited terrorist organisation symbol occurs where a reasonable person would consider that the conduct involves advocacy of hatred of a targeted group distinguished by race, religion or nationality; and constitutes incitement of another person or group of persons to offend, insult, humiliate, intimidate or use force or violence against the targeted group or a member of the targeted group.

“There is a public interest defence to this offence. There are also related powers for law enforcement to make directions to cease display of prohibited symbols in public. It is a criminal offence to breach those directions.

“There is also an offence in section 80.2C that makes it an offence for a person to advocate terrorism, this offence was recently expanded by the same legislation in 2023. That offence is subject to a good faith defence. The purpose of that defence, among other things, is to ensure any limitation on freedom of speech is proportionate.

“We do not make any comment on recent events because they could be the subject matter of future legal proceedings.

“However, respect for the rule of law underlines the special responsibility of our politicians to respect the independent functions of law enforcement agencies in enforcing the law, and the independence of prosecutors in deciding when to commence prosecutions.

“It is the job of our law enforcement agencies, and not politicians, to make decisions about whether to commence an investigation and any subsequent actions, for example, whether to

The Law Council of Australia is the national voice of the legal profession, promoting justice and the rule of law.

Media Release



arrest and charge, or proceed on summons or court attendance notice. In making these decisions, law enforcement agencies appropriately consider their law enforcement strategy and the Commonwealth Director of Public Prosecution's [Prosecution Policy](#). These decisions require careful consideration of how strong the case is likely to be when presented in Court; the elements of the offence and potential defences; and whether the public interest requires a prosecution to be pursued.

“Under the *Australian Federal Police Act 1979* (Cth), it is the function of the Australian Federal Police to enforce laws of the Commonwealth. While the Minister may issue a direction under section 37 the *Australian Federal Police Act 1979* (Cth) about the general policy to be pursued in relation to the performance of the functions of the Australian Federal Police – it would be unlawful and undermine the independence of the AFP for the Minister to be issuing directions about investigation decision making in a particular case.

“At the time the *Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Act 2023* was scrutinised in Parliament, in our [submission](#) we expressed caution about whether the proposed thresholds for the offences for public display of prohibited symbols, and directions to cease public display of prohibited symbols, are proportionate limitations on the right to freedom of expression.

“In that context of navigating a difficult balance in enforcing these types of offences, we reiterate our recommendation underlining the importance of law enforcement training and publicly available guidelines explaining how the Commonwealth Director of Public Prosecutions and AFP, and where relevant state agencies, will interpret and apply these laws to ensure that any imposition on freedom of speech is proportionate.”

“Beyond criminal law measures, we add that a cautious approach is needed with respect to the design and exercise of existing character cancellation powers under the *Migration Act 1958* (Cth). The Law Council reiterates its longstanding concerns about the breadth of these powers, their low cancellation thresholds and the insufficient safeguards involved.”

Contact: Kristen Connell, P. 0400 054 227, E. kristen.connell@lawcouncil.au

The Law Council of Australia is the national voice of the legal profession, promoting justice and the rule of law.