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Senate Legal and Constitutional Affairs Committee  
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Canberra ACT 2600

By email: [LegCon.Sen@aph.gov.au](mailto:LegCon.Sen@aph.gov.au)

Dear Mr Turner

#### **Freedom of Speech Bills**

Free TV Australia (Free TV) welcomes the opportunity to provide this submission in relation to the *Freedom of Speech Legislation Amendment (Censorship) Bill 2018*, the *Freedom of Speech Legislation Amendment (Insult and Offend) Bill 2018* and the *Freedom of Speech Legislation Amendment (Security) Bill 2018*.

Free TV is the peak industry body representing Australia's commercial free-to-air television broadcasting licensees. At no cost to the public, our members provide diverse content across a broad range of genres, as well as rich online and mobile offerings.

Free TV members play a critical role in enabling members of the public to exercise their right to freedom of speech. The right to freedom of speech includes the freedom to express and receive information and ideas, over a range of different media. The information rights of the media and individuals are inherently related, and ensuring that the media is not unreasonably constrained in reporting is critical to maintaining a robust democracy.

#### **The Right to Freedom of speech**

The right to freedom of speech (or freedom of expression), is fundamental to an open and democratic society, and to responsible and accountable government. As a signatory to the International Covenant on Civil and Political Rights, Australia is obligated to ensure that freedom of speech is not unreasonably encroached upon. Article 19(2) provides that:

*"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."*

The free flow of information and exchange of ideas makes for better democratic decision-making by government, improves transparency and accountability and provides citizens with the ability to make informed political choices. Freedom of speech also plays a critical role in ensuring that law makers



can obtain an accurate picture of the views and preferences held by those whose interests they represent.<sup>1</sup>

Free TV acknowledges that freedom of expression is not absolute and that it must be balanced against other competing rights and values of a democratic multicultural society. However, it is critical to bear in mind in this balancing exercise that freedom of speech underpins our democratic system and any exceptions should be limited to those necessary to balance these competing rights.

### **Offensive and insulting speech (or other material)**

The *Freedom of Speech Legislation Amendment (Insult and Offend) Bill 2018*, identifies a number of pieces of legislation which proscribe offensive and insulting speech. 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. Speech which may be viewed by some as offensive goes to the heart of free speech. The right to freedom of speech is most important, and only becomes necessary, when the views expressed by someone do not align with our own views. Protecting speech that some might find offensive is the price free societies must be prepared to pay in order to ensure the protection of other types of speech – such as the right to criticise governments and public officials, or to express other views that might be unpopular or confronting to some.

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. As the Honourable James Spigelman AC QC has said "there is no right not to be offended."<sup>2</sup>

The relevant question for lawmakers is, at what point is it appropriate for the law to intervene to censor a view or expression. Free TV's view is that the law should not proscribe behaviour which is merely hurtful or offensive. It should only outlaw such behaviour if it goes further and encroaches on competing rights, for example, if the behaviour is intimidating, incites violence, constitutes an assault or vilifies another person.

### **Blackout period which applies to broadcasters**

Schedule 3 of the *Freedom of Speech Legislation Amendment (Censorship) Bill 2018* proposes to remove a ban on broadcasting electoral advertising relating to a federal, state, territory or local election on election day or on the preceding Thursday or Friday. Free TV strongly supports this proposal.

Under section 3A of Schedule 2 of the BSA, broadcasters are currently prohibited from broadcasting an election advertisement during the "relevant period", being the period commencing on midnight on the Wednesday before polling day in a licence area where an election to a Parliament will be held, and ending on the close of polling on election day.

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.

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<sup>1</sup> A Flahvin, "Can Legislation Prohibiting Hate Speech be Justified in Light of Free Speech Principles?", *UNSW Law Journal* (1995) Volume 18(2) at 327; W Sadurski, "Offending with Impunity: Racial Vilification and Freedom of Speech" (1992) 14 *Sydney Law Review* 163 at 191.

<sup>2</sup> J Spigelman AC QC, 2012, Hate Speech and Free Speech: Drawing the line, A Human Rights Day Oration, see: <https://www.humanrights.gov.au/news/speeches/human-rights-day-oration-delivered-honourable-james-spigelman-ac-qc>



In today's media landscape, these rules prohibiting advertisements during the blackout period are no longer effective or relevant, and unfairly disadvantage commercial broadcasters. With a shift to a 24-hour news cycle and the popularity of online content services (such as news sites and apps), voters can, and do, readily access election advertising (including audio-video advertising) online. On commencement of the blackout period, political parties simply transfer their advertising from television to other digital media platforms that are not regulated, such as digital news media sites and social media.

### **Previous examination by Joint Select Committee on Electoral Reform**

A report by the Joint Select Committee on Electoral Reform, appointed by the Commonwealth Parliament in 2013 (2013 JSCER) considered these matters and as part of its report published in April 2015 (2015 Report).

The 2015 Report noted the rise of social media and reliance on the internet and mobile communication.<sup>3</sup> It highlighted that continued political advertising and campaigning on these forms of non-traditional media during the blackout period undermined the intention of the blackout provisions by allowing candidates to campaign right up to, and including on, election day.<sup>4</sup>

The 2015 Report cited complaints made to the Australian Electoral Commission in relation to campaigning via text messages, advertisements on social media and other websites, banner advertisements on non-media websites and mobile phone applications, during the election period.<sup>5</sup>

In practice, due to the current multi-platform media landscape, election advertising is available until and including polling day. There is no public interest in maintaining a blackout period for broadcasters. The removal of these prohibitions will provide voters with greater access to information about candidates and political parties right up until polling day, as well as addressing the current regulatory disparity that disadvantages Australian commercial broadcasters.

### **Laws that criminalise journalists for doing their jobs**

The *Freedom of Speech Legislation Amendment (Security) Bill 2018* recognises that journalists and whistle-blowers should not be treated as criminals for doing their jobs. Free TV agrees with the intent behind this Bill and in particular, the recognition that balancing freedom of speech and public interest reporting with the protection of Australia's national security is critical to ensuring these laws operate effectively.

National security laws should not criminalise the media and Free TV is concerned that existing s 35P of the ASIO Act, and s 3ZZHA and ss 15HK and 15HL of the Crimes Act are uncertain in scope and expose journalists to an unacceptable level of risk. These provisions have a chilling effect on the reportage of intelligence and national security material.

Free TV has previously supported the submissions of the Joint Media Organisations in relation to its submissions on these national security laws and in particular, the need for appropriate media exemptions to apply to these provisions.

Free TV remains of the view that in order to appropriately balance public interest reporting with national security concerns, existing national security laws should include media exemptions which

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<sup>3</sup> Paragraph 4.134 of the 2015 Report.

<sup>4</sup> Paragraph 4.135 and 4.143 of the 2015 Report.

<sup>5</sup> Paragraph 4.137 of the 2015 Report.



are sufficiently broad to cover the legitimate activities of journalists in performing their roles in our democracy.

**Further information**

Please contact me on  
these issues.

if you require further information or would like to discuss any of

Yours sincerely

Bridget Fair  
CEO  
Free TV Australia