



Victorian Council for Civil Liberties Inc
Reg No: A0026497L
GPO Box 3161
Melbourne, VIC 3001
t 03 9670 6422
info@libertyvictoria.org.au

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The Hon. Michael Kirby AC CMG

5 August 2024

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
legcon.sen@aph.gov.au

Dear Committee Members,

Inquiry into Right Wing Extremist Movements in Australia

Response to Questions on Notice

1. On 17 June 2024, we had the honour of giving evidence to the Commonwealth Senate's Legal and Constitutional Affairs References Committee (**the Committee**).
2. When giving evidence we took three questions on notice:
 - (1) Responding to the submission by the Australian Security Intelligence Organisation (**ASIO**) on the topic of encrypted messaging services;
 - (2) The extent of limits that may be placed on speech to prevent and deter hate speech and violent extremism; and
 - (3) Providing our position on the best practice regarding the oversight of police powers.

3. Questions 1 and 3 are interconnected and will be dealt with first, and then we will address question 2.

Questions 1 and 3 – Responding to ASIO’s Submission

4. Liberty Victoria was asked to consider the submission from ASIO, where it is stated, amongst other things:

ASIO has seen an exponential uptake of encrypted and secure communication platforms by violent extremists. Individuals of security concern are routinely using secure messaging apps, virtual private networks and fake emails to avoid detection.

- End-to-end encryption damages intelligence coverage in many priority counter-terrorism cases.
5. This raises questions about how to draw appropriate limits on the right to privacy in circumstances where private content is said to have the potential to pose a threat to national security and the safety of the public. This also requires consideration of safeguards that ought to be placed on any powers given to police and other security agencies that may infringe upon the right to privacy.
 6. This issue is of even great significance in circumstances where, today, the Albanese Government lifted the terror threat level from ‘possible’ to ‘probable’ in light of what has been described by security services as an increased risk of violence “across all ideological spectrums”.
 7. We note that ASIO gave evidence on the second day of public hearings, but the transcript is not yet available. As such, our response is limited to what has been submitted by ASIO in writing.
 8. In submitting that encrypted messaging services, VPNs and fake email accounts impact ASIO’s capacity to properly address threats to national security, it is implied that proposed solutions might include giving police and other security agencies increased powers in order to better surveil encrypted communications, and/or to regulate access to VPNs.
 9. It appears clear that any increased powers would engage the right to privacy, a well-recognised human right under international law,¹ sometimes described as the right to be let alone.²

¹ See, eg, Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights 1966.

² See, eg, Warren and Brandeis, “The Right to Privacy”, (1890) Vol IV (No 5) Harvard Law Review. https://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy_brand_warr2.html.

10. As we submitted to the Committee, this is concerning because there are examples of encrypted platforms being used for legitimate and important purposes, such as public interest journalism and whistleblowing.
11. It should also be noted that many alleged acts of politically motivated violence have been intercepted by authorities in Australia without recourse to increased powers, and to our knowledge no example has been provided demonstrating how the current suite of powers to police and other security agencies – including the dramatic increase in powers in the fairly recently enacted *Surveillance Legislation Amendment (Identify and Disrupt) Act 2021 (Cth) (the Act)* – are inadequate.
12. Notably, the Department of Home Affairs has stated that the Act was intended to address the situation whereby:

Encryption and anonymising technologies allow criminals to hide their identities and activities from law enforcement agencies. An obstacle to investigating these crimes has been attributing criminal activity to particular individuals, organisations, premises or devices, especially on the dark web, or where an offender is using a dedicated, encrypted communications platform.³

13. Those new powers drew significant criticism from leading human rights and civil society organisations before they were enacted,⁴ and in these circumstances the Committee should be slow to conclude that existing powers are inadequate. Liberty Victoria shares these concerns, including what Digital Rights Watch has described as the concerning shift in oversight of these powers from Superior Courts to the Administrative Appeals Tribunal (AAT).
14. In 2020, the Attorney-General released an unclassified report documenting the findings from the Richardson Review of national intelligence legislation.⁵ The unclassified report is broad in scope and its contents will not be repeated here, but one finding of particular relevance is that the report notes in its Executive Summary that the Australian Signals Directorate can and does provide key support in de-encrypting data and other devices seized under warrant. It finds: “[w]e do not think the lack of legislative tools is what holds the AFP back from being effective in disrupting online crime”. Rather, it recommends

³ Department of Home Affairs, <https://www.homeaffairs.gov.au/about-us/our-portfolios/national-security/lawful-access-telecommunications/surveillance-legislation-amendment-identify-and-disrupt-act-2021>

⁴ See, eg, Digital Rights Watch, “Australia’s new mass surveillance mandate”, <https://digitalrightswatch.org.au/2021/09/02/australias-new-mass-surveillance-mandate/>; See further Human Rights Law Centre, “Insufficient Safeguards in New Surveillance Law”, <https://www.hrlc.org.au/news/2021/8/25/insufficient-safeguards-in-new-surveillance-law>, referring to its submission: <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/60349b7a9f95cf2bdc3f4c8c/1614060411448/Sub+15+-+Human+Rights+Law+Centre.pdf>

⁵ *Report of the Comprehensive Review of the Legal Framework of the National Intelligence Community*: <https://www.ag.gov.au/national-security/publications/report-comprehensive-review-legal-framework-national-intelligence-community>

changes in agency structuring and funding to maximise efficiency in deployment of already existing powers.⁶

15. We note that there exists a classified version of this report that may deal in more detail with online surveillance capabilities and operations.

Consequences of Data Collection and Surveillance

16. Liberty Victoria opposes the use of increased surveillance and erosions of privacy for the purpose of increasing prosecutions and a carceral response directed towards earlier and earlier stages of alleged involvement in extremism. As we explained to the Committee we giving evidence, we are already deeply concerned by examples of entrapment of vulnerable children and other young people and the danger of these powers being disproportionately utilised against minority groups.
17. Terrorist or other extremist violence is understandably shocking to the public and impacts victims, their families, friends and the wider community. However, there is a danger that the fear of such violence can be used to justify ever-expanding tranches of legislation and increased executive power and may see the legislature conflate criminal acts of violence with speech acts and ideologies that espouse or endorse, or are seen to endorse, ideologically motivated violence. In this environment there is a constant danger of mission creep and overreach.
18. The response to the problem of right-wing extremism, and the contemplation of appropriate responses to private online messaging forums, should distinguish between the harm of speech acts representing potentially abhorrent ideas, and the harm entailed by acts of physical violence. In the vast majority of circumstances these kinds of speech should not be treated with the same punitive sanctions as acts of violence or criminal damage to property of infrastructure.
19. Liberty Victoria is opposed to the increased use of surveillance for the purpose of increasing prosecutions and a carceral approach directed toward speech acts. Part 5.3 of the *Criminal Code Act 1995 (Cth) (the Code)*, including recent amendments to the *Code* such as the expanded criminalisation of the possession of violent extremist material, provides a broad framework that can respond to the threat of violent extremism in circumstances where there is a real risk of harm. The danger, including in light of recent amendments of the *Code* in relation to the criminalisation of the advocacy of hatred

⁶ *Report of the Comprehensive Review of the Legal Framework of the National Intelligence Community: Volume 1: Recommendations and Executive Summary; Foundations and Principles; Control, Coordination and Cooperation* (Dec 2019), p 48, [3.84]-[3.85].

towards certain groups, is that extraordinary powers used to address real threats in their infancy now become directed at harmful ideology rather than harmful actions.

Proportionate and Effective Responses to Different Levels of Risk

20. When assessing the appropriate legislative response to online extremism, law-makers should maintain a nuanced understanding of the nature of the risk presented in these spaces.
21. The connection between online forums and the process of radicalisation is not substantively explored in the ASIO submission. Indeed, the submission conflates the terminology of “violent extremism” with “radicalisation”, whereas it is now generally understood that radicalisation does not entail a commitment to violence, and in the vast majority of cases does not lead to violence at all. As we said when giving evidence to the Committee, the legislative response to this issue should not be based on the erroneous foundation that there is some kind a “conveyor belt” from the exposure of an individual to extremist material to radicalisation and then to committing acts of violence.
22. When considering the appropriate response to the dangers of online extremism and radicalisation, in many cases other forms of intervention should be prioritised above prosecution and incarceration. One response that has been tested with positive results is the deployment of counternarratives. An example is the “Escape Hate Counternarrative Project” run by the International Centre for the Study of Violent Extremism.⁷ This project is designed to intervene in online spaces in order to delegitimise violent extremist ideologies. This is one example of a non-coercive and non-carceral intervention to combat the spread of online hatred.
23. In our experience, as practitioners working with clients who have been persons of interest for national security reasons, in many cases therapeutic avenues are simply not available. In those circumstances it was concerning to hear, today, the Prime Minister emphasise the availability of such services. Rather, our experience over at least the past decade has been that persons of interest can be driven by heavy-handed security interventions further into the fringes of society. In many cases, these kinds of interventions do nothing to discourage the person of interest from their commitment to an extremist ideology. Further, examples of entrapment have caused mistrust within some already overpoliced communities, which is the opposite of what we should be aiming for if we want to build

⁷ International Center for the Study of Violent Extremism, “Escape Hate Counternarrative Project”: <https://icsve.org/escape-hate-counternarrative-project/> . See also, “Breaking the ISIS Brand—the ISIS Defectors Counter-Narrative Brand” at <https://icsve.org/about-breaking-the-isis-brand> .

social cohesion and take a preventative rather than punitive approach to the threat of extremism.

The Right to Privacy

24. While privacy is an important human right, it is not absolute. Article 17 of the *International Covenant on Civil and Political Rights*, of which Australia is a signatory, provides:

(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.

25. The right to privacy guards against arbitrary interference, which the United Nations Human Rights Committee has explained extends to interference provided for under law, noting that “[t]he introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances”.⁸

26. In the Victorian case of *Kracke*,⁹ Bell J explained:

The purpose of the right to privacy is to protect people from unjustified interference with their personal and social individuality and identity. It protects the individual’s interest in the freedom of their personal and social sphere in the broad sense. This encompasses their right to individual identity (including sexual identity) and personal development, to establish and develop meaningful social relations and to physical and psychological integrity, including personal security and mental stability.

The fundamental values which the right to privacy expresses are the physical and psychological integrity, the individual and social identity and the autonomy and inherent dignity of the person.

27. There are important reasons why we should protect confidential communications from disproportionate monitoring and interference by the State. Public interest journalism and whistleblowers are essential to our ensure that our democracy is protected. People’s capacity to protect their identity whilst conveying critical information to appropriate agencies is a necessary mechanism to ensure that relevant information is assessed, and appropriate actions are taken, when there are abuses of power.

28. In conclusion, we note that the submission by ASIO does not expressly call for increased surveillance powers. It is the case that ASIO and other security and intelligence agencies already possess vast powers to monitor online communications.

⁸ Human Rights Committee, General Comment 16, (Twenty-third session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1994), [4].

⁹ *Kracke v Mental Health Review Board (General)* [2009] VCAT 646; (2009) 29 VAR 1, [619]–[620].

29. Where there is to be surveillance by executive agencies, Liberty Victoria remains of the firm view that such powers should be overseen by the judiciary, and not be authorised “internally” by police or other security agencies or by tribunal members on short-term appointments, which raises an obvious risk of politicisation and forum shopping with regard to the issuing of warrants. These powers require robust oversight by a suitable independent umpire, and this is best done by the Superior Courts. Liberty Victoria has been concerned, for quite some time, about the removal of the oversight of these kinds of powers from the judicial arm of government.

Question 2 – The Limits of Hate Speech

30. Liberty Victoria does not generally support the increasing use of the criminal law and carceral sanctions to respond to speech acts, including the prohibition on the use of certain symbols or gestures.¹⁰ As we have explained in other submissions, we are of the view that such prohibition is likely to be ineffective at dealing with the threat of extremism given the amorphous nature of extremist symbols and gestures, and may be actively counterproductive in giving attention to extremists and extremist ideology. It is also potentially a band-aid solution to a much deeper societal problem.

31. As we say in our primary submission to this Committee, we have repeatedly called for a preventative rather than reactionary response to far-right extremism that addresses the drivers as to why some people are drawn to extremism in the first place; one that focuses on improving social cohesion and trust in institutions, including trust in government and the media, rather than focussing on expanding censorship and surveillance. Such a response, as foreshadowed in the Christchurch Call, recognises the importance of freedom of expression and the utility and potential of online spaces.

32. The question of where to draw the line with regard to hate speech is a difficult one. It is a question that should be cognisant of the potential for hate speech laws to be utilised against some of the very people they were designed to protect. We must take great care that such laws do not become used as tools to silence dissent and protest.

33. It is important, in a robust democracy, that we do not criminalise or otherwise prohibit speech that could have a chilling effect on our democratic discourse. Sometimes, that involves tolerating speech that is offensive.

34. Liberty Victoria has previously submitted that “offend” and “insult” should be removed from s 18C of the *Racial Discrimination Act 1975* (Cth), while the prohibition of speech that

¹⁰ See Liberty Victoria’s primary submission to this Inquiry, and our previous submissions referred to at footnotes 1 to 5.

would be reasonably likely to “humiliate” and “intimidate” should remain.¹¹ In our view that would better get this balance right, and would still result in action being able to be taken against those who had engaged in vilifying hate speech.

35. An example of this kind of test being sufficient was the successful prosecution in Victoria under s 25 of the *Racial and Religious Tolerance Act 2001 (Vic)* in *Blair Cottrell v Erin Ross* [2019] VCC 2142. In that judgment, his Honour Chief Judge Kidd observed:

[T]he offence [of serious religious vilification] does not capture mere contempt, distaste and ridicule. I reject the appellant’s suggestion, for example, that the section will capture ‘seriously unkind’ conduct or ‘bad thoughts’. Such arguments ignore the plain words of the statutory text, and the relevant legislative context.¹²

36. His Honour observed, amongst other things:

The legislation reflects an earnest and considered attempt by the legislature to balance or weigh the policies of preventing vilification and allowing appropriate avenues of free speech. On its face, it has sought to ensure that any restriction occasioned by s 25(2) on the freedom of expression would be limited only to the extent necessary to prevent that harm (serious vilification), and to achieve those social benefits. In that sense the legislature has strived to tailor s 25(2) to its purpose... The field of operation of s 25(2) is narrow, it being directed only towards the most extreme, obnoxious and intentional forms of vilifying conduct.¹³

37. Having noted the above, Liberty Victoria strongly supports improved anti-vilification protections for the LGBTIQ+ community, including the trans and gender-diverse communities. Those communities should be protected from hate speech.

38. We also support an approach to vilification and hate speech that focuses on the *harm* caused by such speech. To that end, please see the submission prepared by Jamie Gardiner OAM, our Vice-President, to the Victorian Department of Justice and Community Safety.¹⁴

Conclusion

39. Thank you for the opportunity to respond to these questions on notice. Please do not hesitate to contact Michael Stanton, Immediate Past President of Liberty Victoria, Isabelle Skaburskis, or Jonathan Cooper, Chair of our Criminal Law Workgroup, through the Liberty Victoria office at info@libertyvictoria.org.au.

¹¹ Liberty Victoria, Submission on Freedom of Speech and the Racial Discrimination Act, 23 December 2016, <https://libertyvictoria.org.au/sites/default/files/Lib%20Vic%20sub%20Freedom%20of%20Speech%20%26%20RDA%2023122016%20web.pdf>

¹² At [38].

¹³ At [64].

¹⁴ Submission of Liberty Victoria to the consultation on Strengthening Victoria's Anti-Vilification Laws, 15 October 2023, https://libertyvictoria.org.au/sites/default/files/20231015%20Strengthening%20anti-vil%20laws%E2%80%94LV%20sub%2028Oct_0.pdf