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### **Upholding Australian Values (Protecting Our Flags) Bill 2015**

1. On 4 February 2015 the *Upholding Australian Values (Protecting Our Flags) Bill 2015* (Vic) (“the Bill”) was introduced into the Legislative Council by Mr Damon Young (MLC) of the Shooters and Fishers party. The Bill is introduced in the context of Australian flags being burnt at anti-racism protests.
2. The Bill would make it an offence to “dishonour” the Australian Flag (s.4(1)), the Australian Aboriginal Flag, the Australian Red Ensign Flag, and the Victorian Flag (see s.3). “Dishonour” is defined as to burn, damage, deface, or desecrate the flag. Under s.4(1) the maximum penalty would be two years in prison or a fine of 40 penalty units (approximately \$6000).<sup>1</sup>
3. The Bill restricts freedom of expression, its application is extremely broad, and it seeks to suppress dissent considered anti-patriotic.
4. Liberty Victoria is strongly opposed to the Bill.

### **Freedom of Expression**

5. The Victorian *Charter of Human Rights and Responsibilities* (“the Charter”) states that every Victorian has the right to freedom of expression in a “medium chosen by him or her” (s.15(2)(e)). The act of burning or defacing a flag is a medium to express

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<sup>1</sup> See Department of Justice, *Penalties and Values*, at <http://www.justice.vic.gov.au/home/justice+system/fines+and+penalties/penalties+and+values/> accessed on 28 February 2016.

a political viewpoint. It clearly falls within the Charter's protection for freedom of expression.

6. It is argued that the Bill does not limit freedom of expression, merely specific conduct. Victorians who wish to debate issues such as nationalism or racism may express their views through means other than by dishonouring the Australian flag.
7. The Charter protects both the right to speak and the speaker's choice of medium. The means by which a message is conveyed is often a part of the message itself. This is particularly the case when considering the provocative act of burning the Australian flag. Choosing to burn a flag in public communicates a degree of disdain and contempt for the institutions and values the flag represents. A law that prohibits burning a flag is, in effect, prohibiting that message.
8. It is precisely because desecrating the flag conveys a particular message that people call for prohibition of that conduct. Common arguments in favour of laws prohibiting desecration of the flag are that the act is offensive to returned servicemen, and Australians who revere the flag. Fundamentally these are arguments that the form of political expression, dishonouring the flag, should be prohibited because the message it conveys is disagreeable.
9. The choice of national flags for protection confirms that the Bill's target is a specific type of political message. Liberty accepts that many Victorians hold symbols such as the Australian flag in esteem, and they find the desecration of the flag deeply offensive. Other Victorians revere religious symbols and would find the desecration of those symbols offensive. The Bill identifies one type of symbol, national flags, for protection (and even then only four flags). It suggests the target is not "offensive conduct", but rather protesters who use the desecration of the flag to communicate an anti-nationalist or anti-racist message.
10. As stated earlier this debate arises in a context where the Australian flag has been burnt at anti-racism demonstrations. These rallies, however, have been

counter-demonstrations to anti-Islam protests organised by far-right nationalist groups Reclaim Australia and the United Patriots Front.<sup>2</sup> The nationalist groups rely on the flag to convey a message of intolerance; the anti-racists burn it in response. Many Australians would find both uses of the flag odious. The Bill would allow the nationalists to use the flag as a symbol, but prohibits the message conveyed by the anti-racists. The Bill, in effect, picks a side.

11. The principle underlying this Bill, that conduct offensive to patriotic Australians should be suppressed, is inherently a demand for the suppression of the political messages communicated by dishonouring the flag.
12. These issues were addressed by the United States Supreme Court in *Texas v. Johnson*.<sup>3</sup> While the US constitutional protection of freedom of expression is far more robust than Australia's, the Supreme Court's arguments in *Johnson* are applicable to this Bill. The Supreme Court found that burning the flag was constitutionally protected speech, and that to prohibit such speech involved the State seeking to censor those expressing anti-patriotic views.

### Scope

13. The Bill has emerged in the context of outrage at the public desecration of the Australian flag, often by flag burning. The prohibition has extremely wide application. The Bill would criminalise relatively innocuous alterations to one of the four flags.
14. Under the Bill the offence of "dishonouring" a flag includes to "deface" it (s.3). "Deface" is defined by the Oxford Dictionaries online as meaning "Spoil the surface or appearance of (something), for example by drawing or writing on it".<sup>4</sup> The only

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<sup>2</sup> Tom Cowie, *Bendigo mosque protest: Anti-mosque and anti-racism protesters clash* available at <http://www.theage.com.au/victoria/bendigo-mosque-protest-antimosque-and-antiracism-protesters-clash-20150829-gjaml8.html#ixzz41Xf1kZS5> accessed on 29 February 2016

<sup>3</sup> (1989) 491 U.S. 397.

<sup>4</sup> Oxford Dictionaries, *Oxford Advanced Learner's Dictionary*, available at [www.oxforddictionaries.com/definition/learner/deface](http://www.oxforddictionaries.com/definition/learner/deface) accessed on 1 March 2016.

exception in the Bill would be alterations for the purposes of a discussing a new design for the flag (s.4(2)(c)).

15. The Bill would restrict the capacity of Australians to use the national flag to express political ideas. The Bill contains no exception for artistic expression. The prohibition on defacing the flag could capture the acts such as:

- (a) writing a political message on a flag;
- (b) super-imposing a peace symbol over the Australian flag to communicate an anti-war message;
- (c) placing the Australian Aboriginal flag in the corner of the Australian flag to communicate an anti-colonialist message; or
- (d) altering the colours of an Australian flag to express a political message.

These are all clear expressions of free speech, and relatively innocuous acts to attract a two-year prison term.

16. The Bill is not confined to dishonouring the flag in a public space. It would apply to conduct in a private home. Under this Bill an artist who experiments with altering an Australian flag in her own home commits a crime.

17. While this Bill is a response to the highly provocative act of flag burning, it would apply to a wide range of political and artistic expression. It grants the exclusive right to decide what messages can be conveyed using the flag to the state. It denies Victorians the right to use *their* national symbol to express ideas about their society.

### **Proportionality**

18. The Charter permits “reasonable limits” on human rights such as freedom of expression that “can be demonstrably justified in a free and democratic society” (see s.7(2)).

19. The Charter requires consideration of the Bill’s purpose, and the nature of the limitation of the right.

20. As held by Chief Justice Warren in *Re an application under the Major Crime (Investigative Powers) Act 2004*,<sup>5</sup> “[i]n light of what must be justified, the standard of proof is high. It requires a degree of probability which is commensurate with the occasion”. Her Honour cited with approval the observations of Canada’s Chief Justice Dickson in the celebrated judgment of *R v Oakes*:<sup>6</sup>

There are... three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”.

21. The penalty in this case is up to two years’ imprisonment (see s.4(1)). Incarceration is a severe penalty to impose on someone merely for expressing views. The penalty would apply even where the act causes no harm to any person. Merely being "offended" in our view is not sufficient harm to warrant criminal penalties. While any prohibition on the desecration of flags is unreasonable to a democratic society, the penalty in this Bill is especially draconian.

22. The purpose of this Bill – to encourage respect for the Australian flag – could be achieved without recourse to criminal sanctions for those who refuse to respect the flag. The Bill represents a disproportionate limitation to the right to freedom of expression.

23. Accordingly, should the Bill be enacted, the Supreme Court of Victoria would be empowered to make a declaration of inconsistent interpretation pursuant to s.36(2) of the Charter.

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<sup>5</sup> (2009) 24 VR 415, [147]-[148].

<sup>6</sup> [1986] 1 SCR 10, [70] (citations omitted).

## Constitutionality

24. In the statement of compatibility it is dogmatically asserted the proposed law does not infringe the constitutional protection for freedom of political communication.<sup>7</sup>
25. The High Court of Australia has held the freedom to discuss political matters is necessary to our representative system of government.<sup>8</sup> A law restricting freedom of expression must have a legitimate end, as well as being compatible with our constitutional system of government and proportionate to that end.<sup>9</sup>
26. There is an argument that the Bill is inconsistent with our constitutional system of government. If the Australian flag is, as the Bill's proponents suggest, a powerful symbol of Australia, its institution and its history, then the freedom to criticise those institutions using the flag is an essential freedom. Moreover, the Bill's broad scope would catch a wide degree of political criticism using the flag. Liberty Victoria is confident that its passage will result in constitutional litigation at considerable public expense.

## Conclusion

27. As Mr Young MLC, the sponsor of the Bill, states, the national flag has special meaning to many Victorians as a symbol of Australian unity. However, a principle that unifies Australia is our commitment to liberal freedoms. In our society we are not compelled by the authorities to pledge allegiances, declare oaths, or show deference to national symbols.
28. Whether the Australian flag is a symbol of freedom, or colonialism, are legitimate matters for individuals to form their own opinions. Some may find dishonouring the flag offensive, others may consider it a worthwhile contribution to public discussion.

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<sup>7</sup> Mr. Young MLC, Hansard, Legislative Council 24 February 2016, p.7 available at: <http://hansard.parliament.vic.gov.au/isysquery/fa12d506-506a-4d08-9894-e23f65a5aae7/1/doc/> accessed on 29 February 2016.

<sup>8</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520

<sup>9</sup> *Ibid.* See further *Coleman v Power* (2004) 220 CLR 1.

Free and open debate is the best way to facilitate Victorians to form their own opinions.

29. This Bill seeks to deny Victorians the right to make up their own minds. The proponents seek to conclude the debate through legislation: the Australian flag and what it symbolises is beyond reproach.
30. The people of Victoria do not need to be shielded from offence. Nor does the Australian flag require the protection of the criminal law. If the Australian flag is a powerful and unifying symbol it will survive crude protests. If the Australian flag does symbolise a commitment to democratic principles, then those values should apply to protect those who would “dishonour” the flag.<sup>10</sup>
31. The Bill, if enacted, would undermine the Australian values it purports to protect.
32. The Bill should not be enacted.

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<sup>10</sup> See *Texas v Johnson* (1989) 491 U.S. 397, 421.