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Committee Secretary
Parliamentary Joint Committee on Human Rights
PO Box 6100
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Canberra ACT 2600

By email: 18Cinquiry@aph.gov.au

Dear Secretary

Re: Freedom of Speech in Australia Inquiry

Thank you for the opportunity to make a submission to the Parliamentary Joint Committee on Human Rights. We are writing this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law, at the Faculty of Law, University of New South Wales. We are solely responsible for the views and content in this submission.

Primary submission

It is our view and primary submission that the current statutory protections contained in ss 18C and 18D of the *Racial Discrimination Act 1975* (Cth), when read in the context of their judicial interpretation, provide an appropriately robust protection for vulnerable racial minority groups against hate speech while also providing appropriate exemptions for free and fair speech on race-related topics.

A statutory protection against racial hate speech is important – both as a matter of social symbolism and substantial protection – in a liberal democratic society that values and recognises the strengths of multiculturalism and diversity. The *Racial Discrimination Act*

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provides a broad, civil protection against such speech in s 18C with appropriately crafted exemptions for reporting, commentary and other forms of expression in s 18D. When read together with the judicial interpretation of s 18C (particularly the standard the Court has held must be satisfied), the regime in Part IIA of the *Racial Discrimination Act* strikes an appropriate balance between these two, sometimes, competing objectives.

We also believe that the current statutory framework for the receipt and processing of complaints by the Australian Human Rights Commission appropriately equips the President of the Commission to dismiss complaints. In particular, we note the ability of the Commission to dismiss a complaint under s 46PH(1)(a) of the *Australian Human Rights Commission Act 1986* (Cth) on the basis that it does not constitute unlawful discrimination; under s 46PH(1)(c) on the basis that it is either trivial, vexatious, misconceived or lacking in substance; and under s 46PH(1)(i), on the basis that there is no reasonable prospect of the matter being settled by conciliation.

Some will have an *a priori* disagreement with our view on Part IIA because of the extremely high priority they attach to free speech. However, we also believe that in much of the recent public debate on this issue, a singular focus on the term 'offend' and/or 'insult' in s 18C, divorced from the statutory context (including s 18D) and from judicial interpretation, has fed an exaggerated perception amongst many about the impact that s 18C has on free speech.

We acknowledge that this misperception may be having two detrimental effects that undermine the objectives of the provision. The first is that the protections given to minorities by s 18C – both in their symbolic and substantive forms – are being undermined because of the ongoing, albeit misconceived, political and public controversy. It is important to preserve, and to preserve the credibility of, strong national laws against racial hate speech. An exaggerated sense of the inhibition on free speech threatens to obscure and discredit the careful balance that has been struck by Parliament in Part IIA of the Act, as interpreted by the Federal Court. The second risk is that this misperception may be 'chilling' political speech that is actually permitted under ss 18C and 18D because of a misunderstanding of what it allows and prohibits, although such an effect is hard to prove or disprove.

One way of redressing these detrimental effects is to address the misconception, through, for example, sustained public education campaigns as to the accurate scope of the s 18C and 18D protections, and the powers and functions of the Commission. This is, undoubtedly, an important part of reframing the debate. However, we believe that attempts to reorientate the debate through education alone will, unfortunately, be insufficient.

Against this background, we make two suggestions for legislative reform that provide a stronger intervention in the debate and might operate as a trigger for greater understanding of the true scope of the protections. The first is a substantive reform to ss 18C and 18D of the *Racial Discrimination Act* to clarify the scheme's intended operation. The second is a suggested procedural reform to clarify the powers of the Commission under s 46PH of the *Australian Human Rights Commission Act*.

Substantive reform

Australia has signed and ratified the *Convention on the Elimination of all forms of Racial Discrimination* (CERD). Under Art 4 of CERD, Australia has a clear and affirmative obligation to prohibit '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'.

Preserving s 18C in a robust form is thus not only a matter of providing important protection to racial minorities within our community, and to their sense of belonging or confidence in the legal and political system. It is also a matter of international legal obligation.

In meeting its obligations under the CERD through s 18C, Australia is stating its values on both a global and domestic stage. Section 18C serves as a statement of values for Australian society in relation to racial hatred. Any amendments to the section could be viewed as reflecting a shift in the values of Australian society. As such, if it is deemed necessary to change the language of s 18C to reflect judicial interpretation of its current form, the purpose for the reform should be expressed in a way that avoids misinterpretation of the motives behind the change, restates the importance of social cohesion and emphasises the continued rejection of racial hate speech.

***Recommendations for amendment to ss 18C and 18D**:*

As a threshold issue we recommend a reform to the current *form* of ss 18C and 18D. We recommend that the two provisions be brought together into a single provision, to emphasise the relationship between the *protections* in s 18C and the *exemptions* in s 18D. We believe this would be an important statutory intervention in the current education campaign about the true scope of s 18C, as it must be properly understood by reference to the carve-outs in s 18D.

In addition, we recommend that s 18C(1)(a) be amended in one of two ways, either of which would have similar consequences. First, it might be amended to reflect the judicial interpretation of the current language, which would read:

> the act is reasonably likely, in all the circumstances, seriously to offend~~,~~ or insult, or humiliate or intimidate another person or a group of people; and[1]

Or, alternatively, it could be amended to reflect the language of international and domestic prohibitions on racial hate speech. In making this recommendation, we have intentionally avoided the language of 'vilification' seen in some prohibitions on the basis this is a legally technical term that may not be readily understood in the wider community. Given the motive of clarifying the scope and intention of the provision, we therefore recommend more commonly used and understood language such as: 'demean, degrade, humiliate or intimidate' or 'racial hatred':

> the act is reasonably likely, in all the circumstances, to ~~offend, insult~~ demean, degrade, humiliate or intimidate another person or group of people, or to promote hatred; and[2]

[1] (Recommended amendments underlined).
[2] (Recommended amendments underlined).

Adopting either of these recommended amendments to s 18C would:

(a) Reflect the judicial interpretation of the provision

As explained above, there is a misconception held by some in the community as to the true scope of the protections in 18C, and, specifically, that it prohibits speech that is merely offensive or insulting to a particular individual. This misconception is encouraged by the text of s 18C itself. The text appears to prohibit public acts that are 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate' another person or group of persons on the basis of race, colour, or national or ethnic origin.

However, the courts have consistently interpreted the words narrowly, that is, the judicial interpretation sets a high standard before s 18C will be breached. Judicial authority has consistently emphasised that s 18C does *not* apply to a 'mere slight or insult'[3]; that it applies only where the acts have 'profound and serious effects, not to be likened to mere slights';[4] and that it applies to consequences 'more serious than mere personal hurt, harm or fear' that are 'injurious to the public interest … in a socially cohesive society'.[5] In *Eatock v Bolt*, Justice Bromberg explained the terms, and their relationship, as follow:

> The definitions of 'insult' and 'humiliate' are closely connected to a loss of or lowering of dignity. The word 'intimidate' is apt to describe the silencing consequences of the dignity denying impact of racial prejudice as well as the use of threats of violence. The word 'offend' is potentially wider, but given the context, 'offend' should be interpreted conformably with the words chosen as its partners.[6]

The judicial approach to the provision is consistent with its statutory intention, which was to apply to serious incidents only.[7]

This interpretation, in our view, appropriately achieves the balance that the Commonwealth Parliament intended between protecting racial minorities and allowing reasonable public debate. To address the misconception that is currently created and/or exacerbated by the text of s 18C, we recommend the text of 18C(1)(a) be changed so as to reflect its judicial interpretation, with its focus on language that would be threatening to a socially cohesive society.

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3 *Kelly-Country v Beers* (2004) 207 ALR 421, [87] (Brown FM).

4 *Creek v Cairns Post* (2001) 112 FCR 352, [16] (Kiefel J).

5 *Eatock v Bolt* [2011] FCA 1103 [263] (Bromberg J).

6 Ibid [265].

7 Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1994, 3341. Also, and again in accordance with the original intention expressed by the Attorney-General's Second Reading Speech, the words 'reasonably likely' have been consistently interpreted to require an objective test, not merely attention to the subjective perceptions of the complainant: *Hagan v Toowoomba Sports Ground Trust* [2000] FCA 1615 [15] (Drummond J), endorsed by Kiefel J (as she then was) in *Creek v Cairns Post* [2001] FCA 1007 [12] and Hely J in *Jones v Scully* [2002] FCA 1080 [98]-[99], and applied by French J (as he then was) in the Full Federal Court case of *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16 [66].

(b) Reflect international standards for the protection of racial minorities against hate speech

Article 4 of CERD requires the Commonwealth to place legal limitations on any speech that has the capacity to promote ideas based on racial superiority or hatred, or that involves incitement to racial discrimination.

The existing language of s 18C has an important capacity to further this objective. By targeting expression that constitutes intimidation based on race, it directly targets behaviours that have the capacity to sustain norms of racial superiority or hierarchy – by excluding racial minorities from meaningful enjoyment of public spaces, and participation in public life. By targeting humiliation, it also addresses the relationship between the denial of human dignity to minorities and the maintenance of racialised hierarchies: human dignity involves respect from others, and a minimum level of psychological security and well-being.[8] Where a person is profoundly humiliated, they are also denied this basic form of respect and psychological security.

The existing prohibitions on serious offence and insult, based on race, also have the capacity to serve a similar function. They ensure respect for the human dignity of all citizens, and deter expression with the capacity to alienate or exclude minorities from meaningful participation in the public and political sphere. We also acknowledge, however, that in verbal terms the current provisions on offence and insult in s 18C are not as narrowly tailored as they could be to targeting expression that perpetuates racial superiority, hatred and discrimination.

It is on this basis that we recommend that the language of s 18C be amended so as more directly to address these harms.

(c) Reflect frameworks operating in the states and territories that protect against racial vilification

Australian states and territories currently adopt a range of civil and criminal provisions regulating racial hate speech. The changes we propose would make s 18C of the *Racial Discrimination Act* more closely align with these provisions, without any suggestion that in doing so s 18C would be intended to cover the field or displace the operation of these state/territory provisions.

Anti-discrimination legislation in New South Wales, Queensland, South Australia, Victoria and the Australian Capital Territory, for example, currently prohibits public acts that 'incite hatred towards, serious contempt for, or severe ridicule of' a person or group based on race.[9] We further note that Western Australia uses the language of promoting 'animosity towards, or harassment of, a racial group, or a person as a member of a racial group' in a criminal context.[10]

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8 Compare Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006).

9 *Anti-Discrimination Act 1977* (NSW) s 20C; *Anti-Discrimination Act 1991* (Qld) s 124A; *Racial Vilification Act 1996* (SA) s 4; *Racial and Religious Tolerance Act 2001* (Vic) s 7; *Discrimination Act 1991 (*ACT) s 67A. Note the addition of inciting 'revulsion' in the Victorian and ACT Acts.

10 *Criminal Code Act Compilation 1913* (WA) s 77.

We have proposed, as one of our alternative recommendations above, picking up the language of inciting or promoting *racial hatred*. The concept of incitement here has a narrower, and more established legal meaning, but may be less understandable to a lay audience, and as such we have recommended use of the word 'promote'.

The language of 'serious contempt' and 'severe ridicule' also captures similar ideas to the idea of demeaning and degrading language. However, we believe that the concepts of 'demean and degrade' are somewhat more closely linked to underlying ideas in international law about human dignity and substantive equality, and thus slightly preferable in this context.

(d) Reflect the necessary balance between the protection against racial hate speech, and the constitutional protection of implied political communication

The Full Federal Court has upheld Part IIA of the *Racial Discrimination Act* as a constitutional exercise of the Commonwealth's external affairs power.[11] That case did not explicitly consider its validity against the implied freedom of political communication derived from ss 7 and 24 of the Constitution.[12] One year earlier, however, a single judge of the Federal Court did find that the exemptions in s 18D provided 'an appropriate balance between the legitimate end of eliminating racial discrimination and the requirement of freedom of communication about government and political matters required by the Constitution'.[13]

The High Court has previously considered two provisions regulating offensive speech. Both cases have been narrowly decided, and neither provides a direct answer to the constitutional validity of ss 18C and 18D. In the 2004 decision of *Coleman v Power*,[14] a majority of the Court held that a criminal provision prohibiting the use of 'threatening, abusive, or insulting words to any person' in or near a public place[15] was constitutionally valid. However, for three judges this finding was premised on a statutory construction of the provision that limited it to words intended to, or likely to provoke a violent response.[16]

In the 2013 decision of *Monis v The Queen*,[17] the Court was evenly divided (3:3) as to the validity of a provision that made it a criminal offence to use the postal service in a way that 'reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.'[18] All of the judges agreed that the standard of offensiveness required to breach the provision was high. French CJ, Hayne and Heydon JJ would have struck the provision down, as they did not accept that ensuring *civility* of the post was a legitimate objective in a democratic society. In coming to this decision, both French CJ and Hayne J held the Australian system of government rested on a commitment to "robust" debate.'[19] In contrast, Crennan, Kiefel and Bell JJ

11 *Toben v Jones* (2003) 129 FCR 515 [21], [50], [144].
12 Ibid [147]-[148].
13 *Jones v Scully* [2002] FCA 1080 (Hely J).
14 (2004) 220 CLR 1.
15 *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 7(1)(d).
16 *Coleman v Power* (2004) 220 CLR 1, 54 (Gummow and Hayne JJ), 67 (Kirby J).
17 (2013) 249 CLR 92.
18 *Criminal Code* (Cth) s 471.12.
19 See, eg, *Monis v The Queen* (2013) 249 CLR 92 [67] (French CJ); [85] and [220] (Hayne J).

held that the provision's purpose was slightly different: to protect against unsolicited, seriously offensive material intruding into an individual's personal domain.[20] Their Honours accepted this purpose as consistent with the constitutionally prescribed system of democratic government, and they found the provision was proportionate to its pursuit. With the Court evenly divided, a procedural rule decided the case in favour of the validity of the provision,[21] and the case has extremely limited precedential value.

What can be taken from these two cases is that the High Court is likely to strike down legislation that protects against offensive behaviour without some additional social threat. That additional threat, in *Coleman*, was the threat of violence in a public place. In *Monis*, for French CJ, Hayne and Heydon JJ, there was no threat apparent from the legislation. For Crennan, Kiefel and Bell JJ, that additional threat was the unsolicited intrusion of offensive material into the private domain.

Sections 18C and 18D of the *Racial Discrimination Act* protect against seriously offensive, insulting, humiliating and intimidating speech in a public place, that is 'done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.' Their purpose is clearly not *merely* to protect the civility of public discourse, but, rather to protect against threats caused by racial hate speech to social cohesion, and social commitments to diversity. This purpose, we believe, is likely to be seen by the High Court as consistent with the constitutionally prescribed system of democratic government.

We also believe that, if understood by reference to their judicial interpretation (which would be promoted by adopting one of the recommendations above), the provisions are proportionate in pursuit of this objective, in that they have been crafted and interpreted in a way that achieves an appropriate balance between the competing interests at play. In this respect, we would draw attention to three important aspects of the provisions:

(i) The civil nature of the provision, as contrasted with the criminal nature of the provisions challenged in both *Coleman* and *Monis*.

(ii) The judicial interpretation of the standard of behaviour required before s 18C will be triggered (see discussion of this standard in (a), above).

(iii) The exemptions provided in s 18D, which allow for reasonable, informed public debate. Section 18D exempts expression made reasonably and in good faith: for academic, artistic and scientific purposes and any other genuine purpose in the public interest; and for fair and accurate reporting of events or matters of public interest or fair comment on events or matters of public interest if the comment is an expression of a genuine belief held by the person making the comment. These exemptions may be unavailable for speech that is factually untrue or distorts the truth and is provocative and inflammatory in a

[20] Ibid [320] and [348].
[21] *Judiciary Act 1903* (Cth) s 23(2)(a).

gratuitous way,[22] but, we believe, that the wording of s 18D is justified and consistent with the purpose of Part IIA to protect against racial hate speech.

Procedural reform

The second element of our submission focusses on procedural reforms. The purpose of procedural reform is to clarify the President's power under the *Australian Human Rights Commission Act*. The Act gives the President discretion to dismiss a complaint under s 46PH(1)(a) when satisfied it does not amount to unlawful discrimination. Used effectively, this provision can significantly reduce the time spent on unsubstantiated claims. Importantly, this would reduce the negative impacts experienced by those who are subjects of such allegations. Procedural reform could occur with or without substantive reform to Part IIA of the *Racial Discrimination Act*, but some combination of the two would certainly be complimentary.

This clarification could be achieved in different ways, including:

(a) Amending s 46PH(1)(a) to clarify that the President must consider the application of the exemptions in s 18D to the conduct complained of, when determining whether a complaint amounts to unlawful discrimination;

(b) Creating a new process allowing persons against whom a complaint is made to apply to have the President consider the exercise of his or her discretion to terminate the complaint under s 46PH within a set time limit (say, three months). This would create an 'expedited' procedure, albeit limited to whether the discretion in s 46PH ought to be exercised. If such a change were to be adopted, we stress that it must be accompanied by appropriate resourcing so as not to create an unreasonable burden on the Commission. If the Committee is seriously considering recommending a change to the Commission's procedure for handling complaints under Part IIA of the *Racial Discrimination Act*, we recommend that the Committee obtain the Commission's advice as to the resource implications and likely practical utility of any such change.

Procedural changes such as those suggested above can provide practical solutions to the inconveniences experienced by respondents who are the subject of unsubstantiated claims. These processes, aimed at reducing the turnaround time of claims, acknowledge the stress and anxiety experienced by the parties involved in Commission claims. Individuals who might feel the 'chilling' effect of s 18C described earlier may feel less restricted by the provision knowing that there is an expedited process available should they find themselves the subject of a claim.

[22] See, eg, *Eatock v Bolt* [2011] FCA 1103 [380]-[386], [390], [392], [398]-[407], [411]-[414], [425] (Bromberg J).

Yours sincerely

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