I wish to submit that many of the actual or perceived abuses of section 18C of the *Racial Discrimination Act 1975* (Cth) (RDA) as currently drafted, can be sufficiently addressed by allowing a procedure whereby costs awards, and a mechanism for security for costs, can be used deter frivolous complaints, both before the Commission and in the Courts.

I submit that making procedural changes in this manner is a superior policy response than making substantive amendments to section 18C of the RDA for the following reasons.

Section 18D of the RDA provides wide and adequate defences to protect freedom of expression in matters that are actually litigated. Section 18C of the RDA can be viewed as fixing a moral standard, as well as a norm of conduct. I submit that it is highly desirable to maintain this moral standard in the legislative text, as it conduces to a more tolerant society. The elimination (which I argue against) of this moral statement might be seen as encouragement to destructive fringe views and racism in Australian society quite apart from any litigation involving section 18C of the RDA.

A significant argument in favour of amending section 18C of the RDA, is that offensive and insulting speech is, in the style of Alexander Meiklejohn, more appropriately met by further speech in the democratic market of ideas. However, this argument fails adequately to address two matters. First, the victim of offensive and insulting speech may not be in a position to make a competitive response in the market of ideas dialectic. Often the victims (especially Aboriginal persons) will be from grossly disadvantaged segments of society, which hinders an effective free speech response. Secondly, a free speech response is already accommodated within section 18D of the RDA. Thus, I submit that ultimately the "further speech" argument is not adequate to overcome the desirability of having a moral statement in the text of the legislation as discussed above.

The other argument which, in my opinion and submission, is of sufficient concern to require a policy response, is that irrespective of whether the standards enshrined to the RDA are breached, the mere process of complaint has an undesirable chilling effect on free speech. Perhaps the litigation involving the complaint of Ms Cindy Prior is an obvious example, as the time and difficulty with which the respondents to that litigation were faced, would obviously have an undesirable chilling effect on free speech.

However, in my submission, this is best dealt with by a proportionate response which does not interfere with the moral statement in the text of section 18C of the RDA. The obvious response is to allow for an efficient process whereby cases that are not obviously strong ones (including taking into account the section 18D defences in the RDA), can be disposed of unless the rigor of security for costs is met. A modification to the present procedures would obviously need to make clear that the mere fact a person is a natural (as opposed to corporate) litigant within the jurisdiction advancing a case at first instances, is not a sufficient reason to deny security for costs. This would require that legislation overcame the traditional limitations in this respect identified in cases such as *Knight v. F P Special Assets Ltd* (1992) 174 CLR 178 at 190 and *Pearson v. Nayelder* [1977] 1 WLR 899 at 902G. The traditional position would need to be legislatively excluded, to broaden the scope for security for costs to peremptorily shut down frivolous cases.

This process would allow legitimate advocacy groups such as the B'Nai B'rith Anti-Defamation Commission, and similar to provide support for cases judged to be sufficiently meritorious as to justify funding, even if they were attended by sufficient doubt as to have a requirement that security be provided. Similarly, free speech groups would always be entitled to fund defences of such litigation. Either way, requiring a commitment of funding would allow market forces to select the cases worthy of running. The value of having a moral statement in the legislative text would then be preserved, along with an appropriate level of freedom of speech and expression.

As there is a more proportionate response (ie security for costs), amending (and thereby reducing) the import of the moral statement in section 18C of the RDA is disproportionate, and I would urge not be undertaken.

The above submission addresses paragraphs 1, 2, sub-paragraphs a., b. and e., by implication paragraph 3, and paragraph 4 of the terms of reference.

Respectfully submitted as above,

Henry Heuzenroeder