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4 December 2016

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA, ACT 2600

Dear Mr Goodenough,

**Inquiry into s 18C of the *Racial Discrimination Act* 1975 (Cth)**

Please accept the following as my submission to the Committee's inquiry into the operation of Part IIA of the *Racial Discrimination Act* 1975 (Cth) and the handling of complaints in relation to it by the Australian Human Rights Commission.

## A balancing of difficult issues

The reform of s 18C of the *Racial Discrimination Act* raises not only legal issues, but also cultural and social ones. In the best of all possible worlds, the abuse of people on the ground of their race, or indeed any other grounds, would be so socially unacceptable that no law on the subject would be necessary. However, because we do have such a law in relation to offensive racial communications, there is a considerable risk that if it is repealed or altered, this will have the effect of sending out a cultural message that such abuse is now acceptable and given legal sanction. The difficulty facing the Committee and the Parliament is essentially that even if s 18C warrants reform, the message sent out by undertaking the reform might itself result in damage that outweighs the benefits of the reform. This is a political assessment that the Committee and Parliament must make, which is beyond my expertise. It is, however, a problem of which I am acutely conscious.

## The constitutional issues

As my expertise falls within the area of constitutional law, this is the area on which I will concentrate in this submission. Sections 18C and 18D of the *Racial Discrimination Act* provide as follows:

> **18C Offensive behaviour because of race, colour or national or ethnic origin**
> (1) It is unlawful for a person to do an act, otherwise than in private, if:
> (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
> (b) the act 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.

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*Note: Subsection (1) makes certain acts unlawful. Section 46P of the Australian Human Rights Commission Act 1986 allows people to make complaints to the Australian Human Rights Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.*

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

(a) causes words, sounds, images or writing to be communicated to the public; or

(b) is done in a public place; or

(c) is done in the sight or hearing of people who are in a public place.

(3) In this section:

***"public place "*** includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

**18D Exemptions**

Section 18C does not render unlawful anything said or done reasonably and in good faith:

(a) in the performance, exhibition or distribution of an artistic work; or

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in making or publishing:

(i) a fair and accurate report of any event or matter of public interest; or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

While it is unlawful to act in the way described in s 18C, without an exemption under s 18D, it is not a criminal offence and cannot be prosecuted as such in a court. Instead, a person can complain about the unlawful act to the Australian Human Rights Commission, which can then seek to conciliate the complaint. If conciliation fails and the complaint is terminated, any person affected in relation to the complaint can apply to the Federal Court or the Federal Circuit Court, alleging that an unlawful act occurred and if the Court is satisfied that the unlawful act was done by a respondent, the Court may make orders including orders declaring that the respondent has committed an unlawful act, directing that it not be repeated or continued and requiring that the respondent perform any reasonable act to redress any loss or pay the respondent damages.

The Committee should be aware that there are also many provisions in State laws that make offensive behaviour a criminal offence. For example, in New South Wales, s 4A of the *Summary Offences Act* 1988 (NSW) makes it an offence for a person to 'use offensive language in or near, or within hearing from, a public place or a school'. It is also an offence to use 'insulting or offensive language' in various places, such as the Royal Botanical Gardens or a national park: *Royal and Botanic Gardens and Domain Trust Regulation* 2013 (NSW), Reg 65; *National Parks and Wildlife Regulation* 2009 (NSW), Reg 13. In addition, it is an offence to 'behave in an offensive manner' or 'use any offensive language' on a train or public passenger vehicle: *Passenger Transport Regulation* 2007 (NSW). These provisions could cover acts such as racist rants on trains and buses or other offensive racist acts in public places. The differences between these provisions and s 18C include that they are not constrained to acts related to race and they are criminal offences which may be prosecuted in courts and the subject of a penalty.

Some States also have racial vilification laws that may be applied as criminal offences, although they are rarely used and criminal prosecutions have generally not proved successful. For example, New South Wales has two provisions in its *Anti-Discrimination Act* 1977 (NSW), one of which makes racial vilification unlawful and the other of which makes it a criminal offence. Section 20C makes it unlawful for a person, by a public act, 'to incite hatred towards, serious contempt for, or severe ridicule of, a person or group' on the ground of race, subject to listed exemptions. Section 20D makes it an offence for a person, by a public act, to 'incite hatred towards, serious contempt for, or severe ridicule of, a person or group' on the ground of race by means which include threatening physical harm towards the person or group or their property or inciting others to do so. The test is an objective one – i.e. has the act incited hatred, etc. The Attorney-General's consent is required before an offence can be prosecuted.

Committee Members are no doubt aware of the fact that the High Court has recognised an implied freedom of political communication that is derived from the Commonwealth Constitution. Communication about matters concerning race, particularly where they point to social or cultural problems, will often fall within the category of political communication. Bill Leak's cartoon linking political concerns about juvenile detention in the Northern Territory with social concerns about child neglect in Aboriginal communities is one such political statement. Similarly, statements about whether or not it is appropriate for computer labs at a University to be confined for the use of students from one racial background would also appear to fall within political communication.

The High Court, in cases such as *Coleman v Power* (2004) 220 CLR 1 and *Monis v The Queen* (2013) 249 CLR 92, has accepted that laws that make it unlawful to make 'insulting' or 'offensive' communications will burden that implied freedom of political communication and that their validity will depend upon the application of a proportionality test.

In particular, for the purposes of applying the implied freedom, the High Court has read down the scope of words such as 'insult' and 'offensive' so as to mean only very serious acts. In *Coleman v Power*, the appellant was convicted of using 'insulting words' to a police officer. That conviction was set aside by a majority of the High Court. Justices Gummow and Hayne noted that 'insult and invective have been employed in political communication at least since the time of Demosthenes'. Their Honours questioned the meaning of 'insulting' as follows:

> In the context provided by the section as a whole, is "insulting" to be read as encompassing any and every disrespectful or harmful word of gesture? Is it a criminal offence (of *behaving* in an insulting manner) for someone in a public place to deliberately turn his or her back on a public figure or even an acquaintance? To do so may be an insult, but is it to behave in an insulting manner? Is the uttering of an unmannerly jibe at another to be a criminal offence (of using insulting *words*) if, for example, one calls the other "ugly" or "stupid", or uses some other term of disapprobation? Again, to do so may be to offer insult, but is it to use insulting words to a person? Are the niceties of the civil law of defamation to be introduced to the determination of whether words used in a public place are insulting words? There is no obvious basis upon which any of the defences to the tort of defamation might be adopted and applied. If that is so, why should the criminal offence be given a reach which, because none of the civil law defences would be available, would be much larger than the tort? [(2004) 220 CLR 1, 74 [181]]

Their Honours concluded at [183] (with Kirby J agreeing at [226]) that the 'insulting words' that were prohibited by the section were 'those which are directed to hurting an identified person and

are words which, in the circumstances in which they are used, are provocative, in the sense that either they are intended to provoke unlawful physical retaliation, or they are reasonably likely to provoke unlawful physical retaliation from either the person to whom they are directed or some other who hears the words uttered'. On this basis, they were able to find that the law was valid, as it was for the legitimate purpose of keeping public places free from violence [198]. They went on to note that if the provision was instead construed as prohibiting the use of words to a person that are calculated to hurt the personal feelings of that person, then this would narrowly constrain public discourse and would breach the implied freedom of political communication [199].

Justice McHugh found that the provision was invalid because he did not think that it could be read down in such a manner as to avoid breach of the implied freedom. He said at [102]:

> Regulating political statements for the purpose of preventing breaches of the peace by those provoked by the statements is an end that is compatible with the system of representative government established by the Constitution. However in the case of insulting words, great care has to be taken in designing the means of achieving that end if infringement of the constitutional freedom is to be avoided. In so far as insulting words are used in the course of political discussion, an unqualified prohibition on their use cannot be justified as compatible with the constitutional freedom. An unqualified prohibition goes beyond anything that could be regarded as reasonably appropriate and adapted for preventing breaches of the peace in a manner compatible with the prescribed system.

Justice McHugh also accepted that a law regulating political statements for the purpose of preventing participants in political debate from being intimidated, would be valid. However, he noted at [105] that 'insults are a legitimate part of the political discussion protected by the Constitution'. Hence, an unqualified prohibition on their use cannot be justified as compatible with the implied freedom.

Similar issues arose in the *Monis* case. The case concerned the validity of s 470.12 of the *Criminal Code* which provides that it is an offence to use a postal or similar service in a way that reasonable persons would regard as being, in all the circumstances, 'menacing, harassing or offensive'. While all the judges accepted that the word 'offensive' had to be interpreted as confined to a high level of offensiveness (i.e. conduct calculated or likely to arouse significant anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable person in all the circumstances), the Court split concerning whether this was sufficient to support its constitutional validity. Justices Crennan, Kiefel and Bell upheld the validity of the law on the basis that it was proportional to a legitimate end of preventing the misuse of the post to deliver seriously offensive material into a person's home or workplace.

Chief Justice French and Justices Hayne and Heydon held that the section was invalid in its application to seriously 'offensive' communications because it breached the implied freedom of political communication. Their Honours held that the provision did not serve a legitimate end. Chief Justice French at [73] and Justice Hayne at [97] held that preventing people from receiving offensive communications did not amount to a legitimate end and was inconsistent with the maintenance of the system of representative government. Justice Hayne noted the importance of political communications even when they provide great offence. He added at [87] that: 'Great care must be taken in this matter lest condemnation of the particular views said to have been advanced by the appellants, or the manner of their expression, distort the debate by obscuring the centrality and importance of the freedom of political communication, including political communications that

are intended to and do cause very great offence'. He noted that if the provision was valid, it would make it a crime to send in the post offensive political communications even if they were true or would satisfy a defence to a claim for defamation.

While the context of s 18C is different, the above cases do give us some indication of the High Court's approach to free speech issues where political communications is involved. First, the level of offence or insult involved must be very serious. Mere slights or hurt feelings would not be enough. Secondly, the prohibition of offensive or insulting behaviour must not be broad and unqualified. There must be exemptions and the law must be narrowly tailored. Thirdly, there needs to be a legitimate reason for the law that goes beyond protecting people from insult or offence. Finally, a proportionality test (now set out in *McCloy v New South Wales*) must then be applied to test the validity of the law.

Section 18C is not unqualified. There is a list of exemptions in s 18D. The Committee might wish to consider whether those exemptions are sufficient. For example, while political communication might well fall within anything said or done, reasonably and in good faith, for 'any other genuine purpose in the public interest', it would be worth considering whether an exemption should be added for communications made in the course of the debate or discussion of political and government matters, as this might bolster the constitutional validity of s 18C.

Consideration might also be given by the Committee to the difficulty in applying those exemptions. This is because they are all subject to the qualification that the acts included in the exemption must be done 'reasonably and in good faith'. In assessing this qualification, the courts have taken into account the failure of the person doing the act to minimise or avoid the giving of offence or insult (see, eg: *Eatock v Bolt* (2011) 197 FCR 261, [411] and [425]; and *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, [102]). Hence, political communications that are offensive in nature might not fall within the exemption in s 18D as currently interpreted.

The Committee might also wish to consider whether the operative terms of s 18C, being 'to offend, insult, humiliate or intimidate another person or a group of people' accurately reflect the interpretation that the High Court would be likely to apply to the provision. The above cases suggest that the High Court would be likely to interpret 'offend' as referring to the giving of serious offence and 'insult' as referring to a gross insult.

The Federal Court has also interpreted the words of s 18C in a manner that attributes to them a serious level of offence or insult. Justice Kiefel, when a member of the Federal Court, stated in *Creek v Cairns Post Ltd* (2001) 112 FCR 352 at [16] that s 18C is directed at the infliction of 'profound and serious effects, not to be likened to mere slights'. Justice French, also when a member of the Federal Court, in *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at [67]-[68] noted that the terms 'offend, insult, humiliate or intimidate' are open textured and may be 'used in ordinary parlance to describe a level of response to a person's conduct which is relatively minor'. He considered that the lower registers of the meaning of these terms were 'a long way removed' from the mischief at which the Act was directed. His Honour also concluded at [69] that as 'a general principle freedom of expression is not limited to speech or expression which is polite or inoffensive' and he agreed at [70] that the conduct caught by s 18C was such as to have 'profound effects not to be likened to mere slights'.

Justice Sackville (in 'Anti-Semitism, hate speech and Pt IIA of the Racial Discrimination Act' (2016) 90(9) ALJ 631, 646) has stated:

> Laws curtailing hate speech are justifiable not because they protect people from being offended or insulted by prejudiced and ill-informed views, but because they help to protect vulnerable groups from more serious harm such as intimidation, discrimination, social exclusion and, ultimately violence. These principles suggest that Pt IIA should be amended by eliminating references to conduct that is merely likely to offend or insult members of a particular group. This could be achieved, for example, if the legislation was confined to hate speech or conduct that is likely to intimidate, degrade or incite hatred or contempt for members of the group.

It is in the public interest that the words of s 18C accurately reflect the meaning that it is held to have by the courts. It is consistent with the principle of the rule of law that laws state clearly what they mean and can be understood by the public without the need for further specialist knowledge. Such a change would be educative to those who seek to bring complaints to the Australian Human Rights Commission, reducing the prospect of them being misled as to the scope of the provision. From a legal and constitutional point of view, this would improve the clarity, and bolster the validity, of the provision.

**Addressing the procedures of the Australian Human Rights Commission**

At present, if a complaint is lodged with the Commission under s 46P of the Act, alleging unlawful discrimination, then under s 46PD the complaint *must* be referred to the President and under s 46PF the President *must* inquire into the complaint and attempt to conciliate it. The President can decide not to inquire into the complaint if either (a) the aggrieved person does not wish the President to do so; or (b) the President is satisfied that the complaint has been settled or resolved. The President *may* terminate the complaint under s 46PH if the President is satisfied that the alleged unlawful discrimination is not unlawful discrimination or the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance. The President may also terminate a complaint if he or she is satisfied that there is no reasonable prospect of the matter being settled by conciliation.

Recent controversies suggest that a better process needs to be implemented in the Australian Human Rights Commission for sifting complaints and only proceeding with those that *prima facie* appear to breach s 18C and not to fall within an exemption in s 18D. The Commission has the power, but not the obligation, to terminate complaints if satisfied that the acts complained of do not fall within 'unlawful discrimination'. It is not clear why the Commission should proceed to conciliate complaints of acts which the President is satisfied are not unlawful. Hence, it may be better to oblige the President to terminate the complaint once he or she reaches that state of satisfaction. Further, it might be of assistance to require the President, upon first receiving a complaint, to make an assessment as to whether the alleged act would, *prima facie,* appear to be unlawful, before proceeding to engage in the conciliation process.

If it pursues this path, it would be wise for the Committee to consult with the Commission to ensure that any such provision could be implemented in an efficient and effective manner.

## Conclusion

Minor amendments to ss 18C and 18D of the *Racial Discrimination Act* and to the complaints handling process under the *Australian Human Rights Commission Act* could alleviate concerns that the provisions are operating inappropriately and disproportionately burdening freedom of speech in Australia. Before introducing any such changes, however, consideration should be given to what message will be sent out to Australians about acceptable public behaviour. If it is proposed to proceed with changes, consideration should be given to educating the population further about other existing legal provisions that operate to protect people from abuse, fear and intimidation in public places.

If the Committee needs any further clarification, please do not hesitate to contact me.

Yours sincerely,

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