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

24 November 2016

Dear Committee Secretary

Please accept our submission to the Inquiry into Freedom of Speech in Australia. We are academics with many years of expertise in researching the operation of hate speech laws, both in Australia and internationally. Recently, we concluded a large study into the operation of hate speech laws in Australia and their impact on public discourse. Our submission therefore relies on very high levels of expertise in this subject area.

We wish to comment on the first three terms of reference of this Inquiry.

Term of Reference 1: Whether the operation of Part IIA of the *Racial Discrimination Act 1975* (Cth) imposes unreasonable restrictions upon freedom of speech, and whether and if so how, ss 18C and 18D should be reformed.

Background

Part IIA of the *Racial Discrimination Act 975* (Cth) was introduced in 1995, in response to virulent expressions of racial hatred by right-wing organisations, ongoing requests for such legislation from relevant community organisations, the findings of the Royal Commission in to Aboriginal Deaths in Custody in 1991, and the 1991 report of the National Inquiry into Racist Violence conducted by the Human Rights and Equal Opportunity Commission. All of these organisations and reports documented high levels of racial vilification in the community, which was recognised as harmful to targeted ethnic minority and Indigenous communities.[1]

At the time, the federal parliament discussed the free speech concerns raised by this legislation, and formed the conclusion that existing laws were inadequate to sanction and deter public expressions of racism, and that it was appropriate that the parliament legislate to instantiate Australia's commitment to multiculturalism, equality and non-discrimination.[2] The free speech concerns were ameliorated in part by the decision not to include a criminal offence of serious vilification, and in part by the inclusion of section 18D, which provided wide-ranging exemptions for the unlawful conduct captured by section 18C.[3]

[1] Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (2002), pp. 38, 121, 222-256; Human Rights and Equal Opportunities Commission, *Racist Violence: Report of the National Inquiry into Racist Violence* (1991).
[2] Luke McNamara, *Regulating Racism*, pp. 18-20; Australian Law Reform Commission, *Multiculturalism and the Law* (1992).
[3] Luke McNamara, *Regulating Racism*, pp. 43, 53.

Operation of the laws

We have recently concluded a large study into the effects of racial vilification laws on public discourse in Australia.[4]

First, that study found that between 2000 and 2010, a total of 766 complaints was lodged under section 18C, with an average of 77 per year. This is overall a modest number of complaints. Nationally, under all anti-vilification legislation in operation in each jurisdiction, between 165 and 362 complaints are lodged per year, with an average of 242 per year.

Second, that study found that early judgments in adjudicated complaints in tribunals and courts were used by target communities as tools of advocacy in educating community members about how not to engage in vilification.

Third, the study found that only 1.8% of complaints nationally were adjudicated in a tribunal or court, a tiny percentage of complaints overall. We acknowledge that a small number of complaints has resulted in very widespread media coverage, and debate over the operation of Part IIA. It is our view, based on the evidence, that these are exceptional cases that do not represent the bulk of operation of Part IIA or other anti-vilification laws in Australia. The complaints that were adjudicated are not representative of the procedures that are most often applied under section 18C and section 18D. They are especially not representative of the genuine educational benefit of Part IIA in those complaints that are able to be successfully conciliated.

Fourth, the study found that there is evidence that the incidence of hate speech in the community remains at concerning levels, and indeed in some cases has increased since the time of the reports that led to the introduction of Part IIA in 1995. This is the case in relation to all the grounds covered by anti-vilification nationally, including Indigenous people, the LGBTIQ community, ethnic minorities, and religious minorities (although we note that Part IIA only covers the ground of race).

Fifth, the study found that the nature of vilifying comments in mediated outlets such as letters to the editor had changed over time. Particularly, there was a sustained shift over time in the language used to express sexuality-based prejudice, and a discernible but less sustained shift in language used to express prejudice towards Indigenous peoples. There had been no sustained shift in the language used to express prejudice towards recent migrants. Overall, there was a modest but significant reduction in the proportion of letters expressing prejudice over time (from 33.86% in 1992-1997, to 29.08% in 1998-2003, and 28.54% in 2004-2009). However, there had been no change in the language used in street-level vilification over time, or in the targets of that vilification as including Indigenous Australians, LGBTIQ community members, and ethnic minorities. One shift that has occurred is in which ethnic minority is targeted, with longer-term migrant communities (such as Vietnamese, Italians and Greeks) reporting that racist attention had shifted away from them and towards Muslims and recent migrants from Africa and the Middle East.

Sixth, the study found that target communities felt extremely strongly that the law sent an important, symbolic message to the community at large. This was achieved through the

[4] Katharine Gelber and Luke McNamara, 'The Effects of Civil Hate Speech Laws: Lessons from Australia', *Law and Society Review* 49(3) (2015): 631-664.

conscious and successful use of prior judgments as tools of advocacy, and also outside the formal utilization of the laws. We conducted interviews with 101 members of Aboriginal and Torres Strait Islander, Afghani, Australian-born Arabic-speaking Muslim, Australian-born Arabic-speaking Christian, Chinese, Indian, Jewish, Lebanese-born Christian, Lebanese-born Muslim, Sudanese, Turkish Alevi, Turkish Muslim, and Vietnamese community members. The overwhelming view of our interviewees was that the laws were useful as a statement in support of vulnerable communities, that knowing they were there set a standard for what's 'not acceptable'.[5]

Seventh, the study found that there was no evidence the laws were having a 'chilling effect' on speech. Although this is one of the most common claims of detractors of hate speech laws, there was evidence to the contrary that the Australian public is willing to express robust views on a broad range of policy issues.

Based on the evidence, therefore, it is our conclusion that Part IIA has not operated in such a way as to impose unreasonable restrictions on freedom of speech during its two decades of operation. The balance of evidence shows that there is therefore no need to reform Part IIA.

Constitutionality[6]

A related question about the operation of Part IIA is whether it would survive a constitutional challenge to its validity. There are two ways in which such a challenge could be made: a) whether Part IIA is within power of the Commonwealth to implement, given the textual distance between its terms and the terms of the relevant international treaty obligations,[7] and b) whether the terms of section 18C impermissibly restrict the implied constitutional freedom of political communication.

The High Court of Australia has not yet heard a case on Part IIA, so we do not know the outcome of a constitutional challenge should one be launched.

We note, however, that the Federal Court has expressed the view that Part IIA survives constitutional challenge on both these grounds. Namely, the Federal Court held that Part IIA is a valid exercise of the external affairs power, and that 'it is clearly consistent with the provisions of the Convention, and the ICCPR, that a State Party should legislate to "nip in the bud" the doing of offensive, insulting, humiliating or intimidating public acts which are done because of race, colour or national or ethnic origin before such acts can grow into incitement or promotion of racial hatred or discrimination'.[8]

We concur with the opinion of Justice Carr on these matters.

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[5] Katharine Gelber and Luke McNamara, 'Evidencing the harms of hate speech', *Social Identities* 22(3) (2016 324-341.

[6] We also respond here to the issue raised in the Australian Law Reform Commission's *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* Dec 2015), at [4.9] and [4.176] – whether s 18C is broader than is required under international law to prohibit the advocacy of racial hatred, broader than similar laws in other jurisdictions, and may be susceptible to constitutional challenge, and its conclusion at [4.196] that the Federal Court has found it is not.

[7] The relevant treaty obligations are Article 4 of the International Convention on the Elimination of all Forms of Racial Discrimination, and Article 20 of the International Covenant on Civil and Political Rights.

[8] *Toben v Jones* [2003] 129 FCR 515 at [13]-[21].

The use of the terms 'insult' and 'offend' in Part IIA[9]

Much has been made in media debate of the proposition that the use of the terms 'offend' and 'insult' in Part IIA are too low a bar, and that this undermines both the propriety of the provision *per se*, and the fair application of the provision to respondents. Our response to this issue overlaps with our response to Term 2, below.

For the moment, we note, as did the Federal Court in *Eatock v Bolt*, that 'the section is concerned with consequences it regards as more serious than mere personal hurt, harm of fear … [it] is concerned with mischief that extends to the public dimension. A mischief that is not merely injurious to the individual, but is injurious to the public interest and relevantly, the public's interest in a socially cohesive society.'[10] Justice Bromberg went on to say that,

> 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 … in my view, "offence, insult, humiliate or intimidate" were not intended to extend to personal hurt unaccompanied by some public consequence of the kind Pt IIA is directed to avoid … It is for those reasons that I would respectfully agree with the conclusion reached by other judges of this Court, that the conduct caught by s 18C(1)(a) will be conduct which has "profound and serious effects, not to be likened to mere slights".[11]

We respectfully agree with Justice Bromberg, and the Federal Court's line of cases, which conclude that Part IIA is directed to conduct that has 'profound and serious effects'.

We add further that the profound and serious effects to which the Court has alluded are real, and that our interviews with target community members have affirmed that they do in fact experience the very real and concrete harms of vilification that are alleged in the literature.[12]

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[9] We also respond here to the issue raised in the Australian Law Reform Commission's *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* Dec 2015), at [4.9] and [4.176] – whether s 18C lacks sufficient precision and clarity, and unjustifiably interferes with freedom of speech by extending to speech that is reasonably likely to 'offend'.

[10] *Eatock v Bolt* [2011] 197 FCR 261 at [263].

[11] *Eatock v Bolt* [2011] 197 FCR 261 at [263]-[268]. This is also recognised at [4.189] of the Australian Law Reform Commission's *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Dec 2015).

[12] Gelber and McNamara, *Evidencing the Harms of Hate Speech*.

Term of Reference 2: Whether the handling of complaints made to the Australian Human Rights Commission ("the Commission") under the Australian Human Rights Commission Act 1986 (Cth) should be reformed, in particular, in relation to:

a. the appropriate treatment of:
   i. trivial or vexatious complaints; and
   ii. complaints which have no reasonable prospect of ultimate success;
b. ensuring that persons who are the subject of such complaints are afforded natural justice;
c. ensuring that such complaints are dealt with in an open and transparent manner;
d. ensuring that such complaints are dealt with without unreasonable delay;
e. ensuring that such complaints are dealt with fairly and without unreasonable cost being incurred either by the Commission or by persons who are the subject of such complaints;
f. the relationship between the Commission's complaint handling processes and applications to the Court arising from the same facts.

Much has been made in recent public debate of the apparent failure of the AHRC to terminate earlier three complaints which were subsequently summarily dismissed by the Federal Court.[13]

However, it is clear that the AHRC already has the statutory authority to terminate complaints on a variety of grounds, including on the basis of an assessment that the behavior alleged does not amount to unlawful behavior.[14] In the case of a complaint under Part IIA of the *Racial Discrimination Act 1975* (Cth) this assessment should take account of both s 18C and the exemptions contained in s 18D. No additional statutory powers are required to allow the AHRC to refuse to take forward to conciliation complaints that the Commission finds to be trivial or vexatious, or which have no reasonable chance of success.

We submit that there is no evidence that the provisions of Part IIA, or of the Act under which the Commission operates, are defective, or otherwise in need of amendment.

We are not privy to the statistics on what proportion of s 18C complaints are declined/terminated on the basis that the alleged behavior does not fall within the legislative definition of unlawful racial vilification under Part IIA of the *Racial Discrimination Act 1975* (Cth). We further note that one or two recent complaints that have attracted media scrutiny do not provide a sound basis for concluding that there is a systemic problem. If the Inquiry is concerned to understand how the AHRC exercises its complaint-handling discretions, relevant quantitative and qualitative data should be sought from the Commission.

Term of Reference 3: Whether the practice of soliciting complaints to the Commission (whether by officers of the Commission or by third parties) has had an adverse impact upon freedom of speech or constituted an abuse of the powers and functions of the Commission, and whether any such practice should be prohibited or limited.

[13] *Prior v Queensland University of Technology & Ors (No. 2)* [2016] FCCA 2853 (4 November 2016).
[14] *Australian Human Rights Commission Act 1986* (Cth), s 46PH(1)(a).

It was one of the findings of the large scale study we conducted, referred to above, that many of the communities who are targeted by racial vilification did not know about the existence of Part IIA and other anti-vilification laws.

It is entirely within the statutory duties of the Commissioners at the AHRC to undertake education within the community as to the existence of the laws that are designed to protect them from harm, and of the opportunities that exist to lodge complaints. This is an especially so in a context where community knowledge about the existence of racial vilification laws, and how they work, remains low.

Conclusion

The evidence we have gathered and analysed over more than 20 years researching anti-vilification laws leads us to the conclusion that there is no case for statutory reform of Part IIA of the *Racial Discrimination Act 1975* (Cth) or the *Australian Human Rights Commission Act 1986* (Cth). Noting that the specific details of how the AHRC has carried out its functions in relation to individual complaints are confidential, there is also insufficient data on which to recommend changes to the internal practices of the Commission in conciliating complaints. The role of the Commissioners in promoting the objectives and existence of anti-discrimination law must be protected. The statutory independence of the AHRC must be respected and maintained.

In conclusion, we submit that changes to section 18C at this time:

- are legally unnecessary since a line of cases in the Federal Court has established clearly that for conduct to be rendered unlawful, it must occasion 'profound and serious effects, not to be likened to mere slights',
- would undermine the important educative and symbolic effects of section 18C, at a time when there are high levels of reported vilification in target communities, and
- would diminish the ability of target communities to use prior judgments as a tool of advocacy and education in the broader community, thereby undermining a central rationale for the existence of Part IIA.

We would be happy to give further advice to this Inquiry. Please feel free to contact us if you have any further questions.

Yours sincerely

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