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Submission to the

Parliamentary Joint Committee on Human Rights

Inquiry into the freedom of speech in Australia

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I thank the Committee for granting me an extension in this offering this submission.

This submission is largely based on the compatibility of section 18C with international human rights law. However, I add my concerns about the nature of the government's managing of the debate about this issue at the end of this submission.

Relevant international human rights laws

The relevant rights for the purposes of this submission are freedom of expression, freedom from hate speech, and freedom from racial discrimination. These rights are found in international human rights law, namely Articles 19, 20 and 26 of the International Covenant on Civil and Political Rights ("ICCPR"), to which Australia is a party.

Article 19 reads:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> > (a) For respect of the rights or reputations of others;
> >
> > (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Freedom of expression (article 19(2) is a very important right, but it is clear that it is not unlimited (article 19(3)).

It may be contrasted with article 19(1), the right to freedom of opinion, an absolute right with no limits. The holding of an opinion is a passive act. Once an opinion is expressed, the relevant right moves from the realm of 19(1) ("thinking") to 19(2) ("doing"). Hence, the Attorney General was correct when he infamously said in Parliament that there is a right to "be" a bigot. Bigoted thoughts are protected under article 19(1). However, the right to act like a bigot is much more circumscribed under Article 19(2) and other human rights provisions.

Article 20 is unusual as it constitutes a compulsory rather than a merely permissible limit to free speech. It reads:

> 1. Any propaganda for war shall be prohibited by law.
>
> 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 26 reads:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Australia is also bound in international law by the Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), which of course contains broad prohibitions on racial discrimination, including its own hate speech provision in Article 4:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, inter alia:

> a. shall declare an offence punishable by law 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, and also the provision of any assistance to racist activities, including the financing thereof;
>
> b. shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
>
> c. shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Section 18C

Section 18C currently renders unlawful any act, other than one done in private, which offends, insults, humiliates or intimidates another on the basis of race if the act is done because of the race of that other or that other's racial group (subject to s 18D).

The provision, which has been part of the RDA since 1995, has become controversial due to the findings in *Eatock v Bolt* [2011] FCA 1103, where the high profile columnist Andrew Bolt was found to be in breach of s 18C, in his publication of two columns in the Herald Sun about lighter skinned Aboriginal people.[1]

What is hate speech?

As noted above, the hate speech provisions of the ICCPR and CERD constitute compulsory limits on free speech. In contrast, States may impose permissible rather than compulsory limits on free speech under Article 19(3).

The term "hate speech" is a confusing one. Article 20 of the ICCPR and Article 4 of CERD combat speech which "incites", that is that which is intended to or which might foreseeably provoke a third party to hate or, at the very least, discriminate against the targeted group. Article 4 goes further in targeting the dissemination of all ideas based on racial superiority or hatred, and organisations which incite *and* promote racial discrimination.

Section 18C does not target incitement. Rather, it focuses on the impact of the impugned speech upon its target, that is its "victim".[2] This is not speech of the sort singled out by Article 20 as

[1] See Sarah Joseph, "Andrew Bolt, Free Speech and Racial Intolerance", Castan Centre blog (castancenter.com), 29 September 2011

[2] See, eg, *Eatock v Bolt* [2011] FCA 1103 at para 206.

necessitating compulsory prohibition, and may not fall within Article 4 either. However, it is speech which has been prohibited and even criminalised in some other countries,[3] and labelled as "hate speech".

Thus, the term "hate speech" has possibly come to encompass both speech which incites others (its meaning in international law) as well as speech which denigrates its target on a racial basis. Certainly, it has come to encompass both types of speech in the popular vernacular.

Furthermore, the situation has been muddied by a lack of international jurisprudence on the matter. The Human Rights Committee, which monitors and supervises the implementation of the ICCPR, has never found a violation of Article 20. Almost all violations of Article 4 of CERD have entailed a breach of the duty to investigate relevant complaints rather than substantive violations.[4] *The Jewish Community of Oslo v Norway*[5] is one case where a substantive violation of Article 4 was found: the relevant hate speech entailed neo-Nazi allegations and threats against Jews.[6]

I will use the international legal meaning of "hate speech", meaning it is confined to speech which incites or which proclaims racial superiority. In that sense, "hate speech" is quite narrow. The other type of speech, often targeted by "hate speech laws", is that which provokes certain feelings in its target or targets on a racial basis. In saying this, I am not trivialising that second type of speech. Certainly, "hurt feelings" can be of a minor kind. However, a barrage of racial invective can be so severe as to threaten a person's right to be free from racial discrimination and to participate in society on an equal basis.[7]

Hence, I do not believe the current provisions are justified in international law as limits on free speech rights by virtue of their characterisation as "hate speech" provisions. Certainly, it is likely that racist hate speech is caught within the net of s 18C, but s18C goes further in its prohibitions. While s18C goes beyond what is required under international hate speech prohibitions, it might be justified as protection of, in the words of Article 19(3), "the rights of others", namely the rights of others to be free from racial discrimination (protected in, eg Article 26 ICCPR and the CERD in general).

Offend and Insult

The prohibitions on speech which offends and insults, even on the basis of race, go too far. Feelings of offence and insult are not serious enough to justify restrictions on the human right to freedom of speech: there are no countervailing human rights to freedom from offence or freedom from insult. Feelings of offence and insult are not enough to equate with a right to be free from racial discrimination.

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[3] See, eg, Danish Criminal Code, s 266B

[4] See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases Materials and Commentary* (OUP, 3rd ed, 2013), paras 18.85-18.89.

[5] UN doc CERD/C/67/D/30/2003, 22 August 2005 (see also *Zentralrat Deutscher Sinti und Roma et al v Germany* UN Doc CERD/C/72/D/38/2006, 22 February 2008, where no violation was found).

[6] The CERD Committee cited the following at para 10.4: "In the course of the speech, Mr. Sjolie stated that his 'people and country are being plundered and destroyed by Jews, who suck our country empty of wealth and replace it with immoral and un-Norwegian thoughts'. He then refers not only to Rudolf Hess, in whose commemoration the speech was made, but also to Adolf Hitler and their principles; he states that his group will 'follow in their footsteps and fight for what (we) believe in'. The Committee considers these statements to contain ideas based on racial superiority or hatred; the deference to Hitler and his principles and 'footsteps' must in the Committee's view be taken as incitement at least to racial discrimination, if not to violence."

[7] In *Eatock v Bolt* [2011] FCA 1103, Bromberg J referred to the relevant rights as rights to be free from racial prejudice and intolerance (at paras 212-215).

It is true that the terms, "offence" and "insult" have been interpreted so that they mean more than "mere" offence and insult.[8] It is arguable that judicial interpretation has saved these provisions from actually breaching the right to free speech. However, in an ideal world, the law means what it says. The fact that "offence" and "insult" are interpreted so strictly as they do not represent their natural meaning is indicative of their problematic nature. Therefore, in an ideal world the prohibitions on the causing of offence or insult should be removed.

This remains the case, even taking into account the defence in s18D. One should not have to defend one's self merely for saying something insulting or offensive.

Humiliation and Intimidation

The prohibition on "humiliation" is also set to be repealed. "Humiliation" is more serious than offence and insult. Humiliation on the basis of one's race prejudices one's right to be free from racial discrimination, a genuine human right that may permissibly override freedom of speech.

In international human rights law, it is submitted that a government may, in this instance, have discretion to choose between the two countervailing rights. That is, its retention probably does not breach the human right to freedom of expression, but its removal may not breach the right to be free from racial discrimination. The government may have a "margin of appreciation" in choosing between the two competing rights in this instance.[9]

As with humiliation, acts of racial intimidation infringe another person's right to be free from race discrimination. Further, intimidation harms that other person's right to security of the person under Article 9 of the ICCPR.[10]

The prohibitions on humiliation and intimidation should be retained in s18C.

The impoverished debate over section 18C

I would not have voted in favour of a law which rendered "offensive" and "insulting" speech unlawful on the basis of race when this law was adopted in 1995. The inclusion of those words in the statute sends a certain message that such speech is not to be tolerated: there are legitimate debates over whether such a message should ever have been sent in a coercive law. Having said that, the law sat relatively uncontroversially on the statute books for 16 years, including the entire period of the Howard government, before controversy erupted over the Andrew Bolt case.

In a "perfect world", references to offence and insult would be removed from the statute, and perhaps incitement inserted, to accord more with the hate speech prohibition under international human rights law. Having said that, such a change would likely make little difference to the actual legal operation of the statute, given that judges already interpret those words as requiring a higher threshold than their common meaning might otherwise convey.

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[8] See *Creek v Cairns Post* [2001] FCA 1007 per Kiefel J at para 16 re "profound and serious effects, not to be likened to mere slights".

[9] The margin of appreciation is a doctrine adopted by the European Court of Human Rights whereby a benefit of the doubt is conferred upon States in adopting measures which limit human rights. The UN human rights bodies, particularly the UN Human Rights Committee under the ICCPR, have eschewed the idea of a margin of appreciation. However, it is still likely that "grey zones" exist where States retain discretion to adopt measures which fall at the point at which two rights clash.

[10] Article 9(1) reads, in part: "Everyone has the right to liberty and security of the person". The right has been interpreted to apply where people fear for their safety.

However, this debate has been run in a politically charged and frankly dishonest manner, such that the removal of those words could send a much more dangerous message than it would actually convey in law. The political context and impact of the debate cannot be ignored.

The rolling back of a law sends a message, as does the passage of one. It can send the message that it is acceptable to offend and insult another person on the basis of their race. That is a message that the government, and the backbenchers who have reopened the s18C debate, has done little to alleviate. For example, while the Attorney General was technically correct to say that there is a right to be a bigot, it would have been politically desirable if he had added that he personally abhorred bigotry and racism.

The arguments against s18C have all been about free speech, with few serious attempts to acknowledge important countervailing rights to be free from hate and racial discrimination. In these circumstances, it is not surprising that ethnic communities are apprehensive and even appalled at the idea of a rollback. After all, they are the people who will bear the brunt of any adverse message sent by the amendments, a message that seems to be officially underlined if a government focuses on the rights of bigots but not the victims of bigotry.

Furthermore, it is absurd that certain politicians and sections of the media have fixated on s 18C as the main danger to free speech in this country. Indeed, I do not believe that the campaign against s18C has been honestly pursued. For example, the fact that a complaint might be made under s18C has been routinely conflated with the actual scope of the provision's legal effect. The fact that a complaint is made does not mean that that complaint will succeed. Moreover:

> Fact: no one, not even Andrew Bolt, has been "convicted" under s 18C. It is not a criminal law provision.
>
> Fact: Andrew Bolt's impugned articles remain available online, with appending notices that explain they were found to breach s18C. Anyone can read them. Cached versions can be found without the notices.
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> Fact: most cases are resolved at the conciliation stage by the Australian Human Rights Commission.
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> Fact: The Australian Human Rights Commission cannot make binding findings of breach of s18C. Indeed, the results of conciliations are confidential.
>
> Fact: the Australian Human Rights Commission plays no role in whether an aggrieved person decides to pursue a remedy in court against another for breaching s18C
>
> Fact: the vast majority of cases, well over 90%, never go to court, but are somehow resolved, terminated or withdrawn at the conciliation stage.
>
> Fact: The infamous "Bill Leak case" was dropped. He likely would have had a defence under s.18D
>
> Fact: the "QUT claim", largely waged in the media without the revelation of the full facts, was lost. The claimant is now seeking leave to appeal, as is the right of litigants under any law.

And yet *this* is the law that has been singled out as the greatest threat to free speech in this country? Section 18C has been targeted while more profound and clear cut threats to freedom of speech have been ignored: anti protest laws, laws constraining whistle-blowers (eg regarding offshore detention), public order offences, national security laws, defamation laws, contempt laws, copyright laws and official secrets laws.

It is a shame that this inquiry did not take on the suggestion of its former Chair, Dean Smith, so that it examined restrictions on free speech in general rather than continue the disproportionate focus on this one provision.

If this Committee is seriously concerned about free speech for all, rather than that small subsection of the right involving freedom to offend and insult, it could suggest the passage of stronger general protections for free speech in federal law, and perhaps even a constitutional amendment.

Complaints Procedures of the Australian Human Rights Commission

The AHRC President has the power to terminate the consideration of a complaint under s46PH(1) of the *Australian Human Rights Commission Act* 1986 (Cth).

It has been argued by some in the media that the AHRC President should dismiss more s18C complaints at the outset than she does. However, the impression of overly lenient admissibility standards has been driven by media reports on particular cases which have not conveyed all of the relevant facts of certain case scenarios. Indeed, certain media outlets have been implacably hostile to the AHRC, particularly its President, and s18C, and have accordingly lost their credibility as reporters of matters related to s18C.

It should also be remembered that a greater rate of termination by the AHRC President could indirectly lead to a greater amount of litigation, as disgruntled complainants may still wish "to be heard". The termination of a complaint does not mean that a person cannot then choose to litigate (see s46PO).