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

14 November 2016

Dear Committee

Inquiry on freedom of speech in Australia

I am a barrister based in Sydney. I wish to make five brief points about the first limb of the inquiry concerning s 18C of the *Racial Discrimination Act 1975* (Cth) ("**the Act**"):

1. The starting point for the Committee ought to be that freedom of expression should not be restricted without strong justification. Free speech may be said to be justified by individual autonomy, facilitation of truth, self-government, as a check on power, and promotion of good character and faculties.[1] These values are so important that freedom of expression sits at the apex of political rights fundamental to a free society.

2. That accepted, the prohibition of incitement of racial hatred has strong public policy justifications. The stirring of extreme racial enmity can undermine the equal status of citizens and place individuals at risk of social and physical mistreatment, but it can also lead to wider social frictions and dislocation. Similar jurisdictions, such as England and Canada, have anti-vilification laws which focus on the concept of inciting racial hatred: e.g. *Public Order Act 1986* (UK), s 17; *Canadian Criminal Code*, s 319.

3. On the other hand, s 18C inappropriately prohibits speech on the basis that it is likely to offend or insult. Other than time and place restrictions, the law has no business in restricting speech which people find offensive. That is not because people can "choose" whether or not to be offended, as some have suggested—common sense and experience tells us that people in many circumstances do not have control over the impact speech has upon them. Rather, it is because, generally, protecting people's feelings is not an appropriate objective for the law. Professor Jeremy Waldron explains why this is so in his 2012 book, *The Harm in Hate Speech*:

> "Laws restricting hate speech should aim to protect people's dignity against assault. I am referring to their status as anyone's equal in the community they inhabit, to their entitlement to basic justice, and to the fundamentals of their reputation. Dignity in that sense may need protection against attack, particularly against group-directed attacks ...

[1] This catalogue is from Vincent Blasi, 'Holmes and the Marketplace of Ideas' (2004) 1 *Supreme Court Review* 1.

> Protecting people's feelings against offence is not an appropriate objective for the law. ... [T]o protect people from offence or from being offended is to protect them from a certain sort of effect on their feelings. And that is different from protecting their dignity and the assurance of their decent treatment in society."

This view is supported by the former Chief Justice of New South Wales, James Spigelman, who cited Waldron's book in the Australian Human Rights Day Oration in 2012:

> "I agree with Professor Waldron. His detailed analysis supports the proposition that declaring conduct, relevantly speech, to be unlawful, because it causes offence, goes too far. The freedom to offend is an integral component of freedom of speech. There is no right not to be offended."

It may also be noted that the exemption provision in s 18D has been construed as a defence, so that the onus of establishing that it applies rests on the respondent.[2] That may not be a problem if s 18C did not capture speech which insults or offends. But given the current form of s 18C, the onus of satisfying s 18D should not rest on the respondent.

4. If the aim is to prohibit incitement of racial hatred, then ideally the test of whether speech is likely to insult, offend, humiliate or intimidate should be reformed to better achieve that objective. An alternative model is s 20C(1) of the *Anti-Discrimination Act 1989* (NSW), which provides that it is unlawful for a person to "incite hatred towards, serious contempt for, or severe ridicule of" a person or group on the ground of race. I suggest that the reference to intimidation in s 18C be retained and added to the formula in s 20C(1). That said, the mere excision of the references to insult and offence would be the next best alternative. Whatever wording is used, the word "vilify" is too ambiguous.

5. The standpoint for assessing adverse effects should be clarified to be referable to the "reasonable person in the community". At present, courts are required inquire whether or not it was reasonably likely that an ordinary, reasonable member of the person or group the subject of the speech would be offended, insulted, humiliated or intimidated.[3] Justice Sackville has recently examined the problems with this quasi-subjective test, including that it is hard to apply, and supports an objective test by reference to the ordinary, reasonable member of the community.[4] As he points out, judges are familiar with this standard as it is used in other areas of the law.

Yours faithfully

B. Michael

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[2] *Toben v Jones* [2003] FCAFC 137, [41], [78], [159].

[3] *Eatock v Bolt* (2011) 197 FCR 261, 320.

[4] Ronald Sackville, 'Anti-Semitism, hate speech and Pt IIA of the *Racial Discrimination Act*' (2016) 90 *ALJ* 631.