Parliamentary Joint Committee on Human Rights
Freedom of Speech in Australia

Submission of the Australian Christian Churches and Freedom for Faith, November 2016

This submission is made jointly by the Australian Christian Churches and Freedom for Faith.

The Australian Christian Churches are one of the very largest denominations in Australia. It has 1,063 churches in Australia with 3,300 credentialed Ministers and 315,000 adherents.

Freedom for Faith is an organisation that was formed to educate the Christian church and members of the wider public on issues relating to freedom of religion in Australia. The board of Freedom for Faith includes leaders from the Anglican, Baptist, and Presbyterian Churches as well as the Australian Christian Churches. The association's affiliate membership is made up of these and other faith-based organisations that share the aims and objectives of Freedom for Faith.

By way of summary, our two organisations are primarily concerned with freedom of speech as it relates to religious matters; but the restrictions on speech created by a prohibition on "offence" on racial grounds provides a model which may also be applied to the area of speech concerning issues of faith, morality or social policy. This is the case under the current law in Tasmania. Such restrictions on free speech were also proposed in an exposure draft of a Bill introduced by the federal government in 2012, but later withdrawn. These issues are discussed below. Because section 18C may provide a model for extending prohibitions on the articulation of opinions that others find offensive, we support those who argue that section 18C needs reform.

Christian teaching supports courteous and respectful speech

There is nothing in the teachings of the Christian religion which justifies us in defending racially offensive speech or insults based upon somebody's race or ethnicity. Paul wrote in his letter to the Colossians (4:6 New International Version):

> Let your conversation be always full of grace, seasoned with salt, so that you may know how to answer everyone.

Christian pastors seek to teach adherents of the faith to live godly lives. Inter alia, this involves treating other people with respect and concern for their wellbeing. The requirement to love our neighbour may in some situations place ethical constraints upon what we say and how we say it. The Christian faith also affirms the equality of all human beings as made in the image of God, regardless of their race (Acts 17:26, Galatians 3:28).

Whether the encouragement of appropriate standards of courteous and respectful speech is best left to moral codes or social pressure, or whether by contrast, speech which falls short of incitement to violence should be a matter for legal regulation, is an issue of great controversy. Nonetheless, opinions that offend are to be carefully distinguished from offensive ways in which those opinions are expressed. It is consistent with a long tradition of thought in liberal democracies that there should be no prohibition on the articulation of opinions that offend unless there are compelling reasons of public policy to do so.

Speech which is offensively expressed may at the very least be bad manners. It may demonstrate a lack of respect for others or a lack of sensitivity. It is not to be defended; but at the same time it is reasonable to argue that it should not be illegal either.

Section 18C and the International Covenant on Civil and Political Rights

We support legislation which gives effect to Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR). This requires signatory countries to ensure that:

> Any advocacy of national, religious or racial hatred that constitutes an incitement to discrimination, hostility or violence shall be prohibited by law.

However, we note that section 18C of the RDA currently goes far beyond the requirements of Article 20(2). Indeed it is so broad, that in our view, it contravenes Article 19 of the ICCPR concerning freedom of speech. Article 19 provides:

> 1. Everyone shall have the right to hold opinions without interference.
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> 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.
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> 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:
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> (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.

While the ICCPR provides that the right of freedom of speech 'may' be subject to limitations that are necessary for protection of the rights or reputation of others or to protect national security, public order, public health or morals, the United Nations' Siracusa Principles provide guidance as to what might constitute a lawful restriction on the right of freedom of speech. These Principles support a strict interpretation of these limitation clauses.[1]

In international human rights law, there is a right not to be defamed, but there is no right not to be offended. While it may be deplorable for anyone to deliberately cause offence on account of someone's race, it cannot be said that legislation as broad as that contained in the current section 18C is 'necessary' within the meaning of the ICCPR.

[1] United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

Our interpretation of the balance between freedom of speech and laws prohibiting vilification is supported by the decision of the Supreme Court of Canada in *Saskatchewan (Human Rights Commission) v Whatcott* [2013] 1 SCR 467 (27 Feb 2013) concerning the right to freedom of expression in the Canadian Charter of Rights and Freedoms. In this case, the Supreme Court upheld a conviction for religious vilification, but struck down as unconstitutional a part of the relevant provincial law which prohibited any statement that "ridicules, belittles or otherwise affronts the dignity of" persons. The Court ruled that this provision infringed the right to freedom of speech contained in the Canadian Charter. Rothstein J, giving the judgment of the Court, said (at [90]-[92]):

> Expression criticizing or creating humour at the expense of others can be derogatory to the extent of being repugnant. Representations belittling a minority group or attacking its dignity through jokes, ridicule or insults may be hurtful and offensive. However, … offensive ideas are not sufficient to ground a justification for infringing on freedom of expression. While such expression may inspire feelings of disdain or superiority, it does not expose the targeted group to hatred…While ridicule, taken to the extreme, can conceivably lead to exposure to hatred, in my view, "ridicule" in its ordinary sense would not typically have the potential to lead to the discrimination that the legislature seeks to address…
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> I find that the words "ridicules, belittles or otherwise affronts the dignity of" in s. 14(1)(b) are not rationally connected to the legislative purpose of addressing systemic discrimination of protected groups. The manner in which they infringe freedom of expression cannot be justified under s. 1 of the Charter and, consequently, they are constitutionally invalid.

Reference might also be made to the comments of Hayne J in the High Court of Australia in *Monis v The Queen* (2013) 249 CLR 92 – a decision which was handed down on the same day as the Saskatchewan case in the Supreme Court of Canada. At paras [221]-[222] he said this:

> On its own, regulating the giving of offence is not a legitimate object or end….The conclusion that eliminating the giving of offence, even serious offence, is not a legitimate object or end is supported by reference to the way in which the general law operates and has developed over time. The general law both operates and has developed recognising that human behaviour does not accommodate the regulation, let alone the prohibition,

> of conduct giving offence. Almost any human interaction carries with it the opportunity for and the risk of giving offence, sometimes serious offence, to another. Sometimes giving offence is deliberate. Often it is thoughtless. Sometimes it is wholly unintended. Any general attempt to preclude one person giving any offence to another would be doomed to fail and, by failing, bring the law into disrepute. Because giving and taking offence can happen in so many different ways and in so many different circumstances, it is not evident that any social advantage is gained by attempting to prevent the giving of offence by one person to another unless some other societal value, such as prevention of violence, is implicated.

Freedom of speech and freedom of religion

Our support for reform arises from a concern that provisions of this kind which prohibit causing offence have multiplied in recent years in Australian legislation, particularly at state level. Unless the trend is reversed, and a proper balance is found between different rights and freedoms, there will be an increasing number of grounds upon which people will be able to bring complaints about words, drawings or other forms of expression that have caused offence. This threatens the right to express opinions on matters of faith or to provide moral guidance which involves taking positions that others, who are not of that faith, may find offensive.

An example of the tendency towards promulgating laws that prohibit the giving of offence is the Exposure Draft of the *Human Rights and Anti-Discrimination Bill* 2012, introduced by the federal government of the day, but later withdrawn. It proposed to make it unlawful to treat, or propose to treat, another person unfavourably because the other person had a particular protected attribute, or a particular combination of two or more protected attributes (section 19). That section defined 'unfavourable treatment' of the other person as including conduct that offends, insults or intimidates the other person.

There were 18 protected attributes under the Bill. Hitherto, federal anti-discrimination laws had mainly applied to vertical relationships, prohibiting discriminatory conduct by persons possessing responsibility, authority or power in particular areas such as employment and the provision of services. However, the Exposure Draft indicated a shift towards a position where anyone can 'discriminate' against anyone else,[2] and giving offence or insulting someone could constitute discrimination.

This provision had the potential to stifle free speech on a considerable array of matters. Proponents of such laws may be well-meaning, but such proposals reflect totalitarian tendencies. The concern is that advocates for regulation may seek to use law to stifle dissent on moral and social issues, silencing through threat of prosecution or civil litigation, those who hold different opinions.

Another example is section 17 of the Anti-Discrimination Act 1988 in Tasmania. This provides that:

> A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in section 16(e), (a), (b), (c), (d), (ea), (eb) and (k), (f), (fa), (g), (h), (i) or (j) in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

This was the basis of the notorious complaint made against Archbishop Porteous, the Catholic Archishop of Tasmania, in 2015 for distributing a booklet that defended the Church's teachings on marriage. The Tasmanian Anti-Discrimination Commissioner accepted the complaint as worthy of progressing to the stage of a conciliation process, notwithstanding section 46 of the Constitution Act 1934 (Tas) which provides:

> Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.

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[2] The shift was not complete in this Exposure Draft because some of the categories of public life were limited by a reference to the 'provision of goods, services or facilities' and the 'provision of accommodation'. The Discrimination Law Experts Group argued for the removal of any such words of limitation: Submission 207 to the Senate Standing Committee on Legal and Constitutional Affairs, pp.22-23. For the report of the Committee, see Legal and Constitutional Affairs Legislation Committee, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (February 2013).

This shows, if further evidence were needed, that anti-discrimination commissions cannot necessarily be trusted to filter out even the most unmeritorous complaints at the outset. Eventually the complaint was withdrawn.

While currently, section 18C only applies to speech related to race and ethnicity, the boundary between ethnicity and religion is not necessarily clear. For example, the term "ethnic origin" has been interpreted to include certain religious groups such as Jews and Sikhs.[3] Furthermore, the Australian Human Rights Commission has advocated in the past for an extension of the reach of the law to cover 'vilification' on the basis of religion.[4]

Vilification complaints as sources of conflict

Experience shows that religious and racial vilification laws can stir up conflict if they are used as weapons in a war over opinions or beliefs.[5] Far from quieting conflict and preventing discord, they can increase disharmony in the community. Anti-discrimination commissions, tribunals and courts can become battlegrounds in which essentially ideological conflicts are fought out in an entirely inappropriate forum.

There are very good reasons why courts should refrain from expressing a view that one religious conviction is more valid than another, or more or less valid than an atheistic viewpoint. There are also good reasons why courts should stay out of issues of social controversy on which opinions legitimately differ. Having to rule upon whether it is unlawful to express opinions that cause another person to feel offended, insulted or humiliated requires courts to enter terrain where the wiser angels should fear to tread.

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[3] Tom Calma & Conrad Gershevitch, 'Freedom of religion and belief in a multicultural democracy: an inherent contradiction or an achievable human right?' Paper given at the Unity in Diversity Conference, Townsville, August 2009, available at
http://www.humanrights.gov.au/about/media/papers/freedom_religion20090803.html
(last accessed Nov. 22nd 2016).

[4] See e.g. HREOC, *Article 18: Freedom of religion and belief*, (1998). Its primary recommendation was for the enactment of legislation that would make discrimination and vilification on the grounds of religion and belief unlawful. See also HREOC, *Ismaξ– Listen: National consultations on eliminating prejudice against Arab and Muslim Australians* (2004), p.129.

[5] Patrick Parkinson, "The Freedom to be Different: Religious Vilification, Anti-Discrimination Laws and Religious Minorities in Australia" (2007) 81 *Australian Law Journal* 954-966.

The chilling effect of complaints procedures

There has been much focus in previous debates on section 18C upon the defence provided by section 18D. It is of course true that section 18D provides a defence on numerous grounds. It is also true that section 18C has been read down as to require some level of seriousness in terms of the offence caused. That is, the threshold which must be reached in order to claim victimisation is not set quite as low by the courts as the plain words of section 18C would appear to suggest.

Nonetheless, it is of no comfort that there is a solid defence to a claim, whether through section 18D, or through reading down section 18C, or even through the implied freedom of political communication, if one must go through an entire court case before such a defence can be upheld. The chilling effect of any law which restricts freedom of speech can often go far beyond that which the courts have determined the law should prohibit. In any consideration of the future of this law, this chilling effect needs to be taken into account.

Conclusion

For the reasons given, we support major amendments to section 18C to the effect that the law should go no further than the requirements of Article 20(2) of the ICCPR. There are many ways to promote civility and community harmony apart from through legislation, and the provision of remedies through litigation. Provisions which rely upon the subjective taking of offence can become weapons in a war about opinions which stir up conflict and cause community disharmony. They may have a deleterious effect upon freedom of speech. As Christians we support laws that are carefully targeted towards the betterment of society and which preserve a liberal zone of freedom for speech, conscience, association, and religion. We do not think that section 18C achieves this and emphasise, by making this submission, that any restriction on free speech inevitably impacts freedom of religion.

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