DR HELEN PRINGLE: SUBMISSION

Human Rights Legislation Amendment Bill 2017 Inquiry
Senate Legal and Constitutional Affairs Legislation Committee

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Please note: The perspective expressed in this submission is not that of UNSW.

The recommendation of this submission is limited to the proposal to replace the words 'offend, insult, humiliate' in the Racial Discrimination Act 1975 (Cth) [RDA] with the term 'harass', viz:

1 Part IIA (heading)

Repeal the heading, substitute:

Part IIA—Prohibition of harassing or intimidating acts done because of race, colour or national or ethnic origin

2 Section 18C (heading)

Repeal the heading, substitute:

18C Harassing or intimidating acts done because of race, colour or national or ethnic origin

3 Paragraph 18C(1)(a)

Omit "offend, insult, humiliate", substitute "harass".

(http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s1063_first-senate/toc_pdf/1704920.pdf)

My submission argues that this proposed change is ill-advised, and moreover that it exacerbates the problem it seeks to remedy in regard to the language and objects of the RDA.

In response to the inquiry by the Parliamentary Joint Committee on Human Rights (PJCHR] into Freedom of speech in Australia, it was my written submission and evidence that Part IIA of the RDA does not stand in need of major reform, although it is important that there be more informed and wider awareness of the character and significance of the anti-discrimination context of the Act as a framework for the operation of Part IIA. My submission to the PJCHR Inquiry also proposed that major changes are not called for in the workings of the Australian Human Rights Commission Act 1986 or in the procedures of the Australian Human Rights Commission. As stipulated in the request of the present Committee (http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/HumanRightsBill2017), this submission does not duplicate my argument to the PJCHR Inquiry.

This proposed change to the RDA is justified in the Explanatory Memorandum to the Bill (http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s1063_ems_b4e1870b-6673-4a96-999b-99b1d3799a07/upload_pdf/17049em.pdf) on two main grounds. First, that the reform better meets Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination [CERD]. And secondly, that '[t]he formulation "harass or intimidate" more accurately describes the core vice of racial vilification than the existing formulation, without subjecting frank and open discussion and debate, however challenging to legal sanctions and therefore prejudicing freedom of speech.'

The Explanatory Memo disingenuous in its suggestion that the proposed change would remedy the non-alignment of the RDA with CERD (which is scheduled to the RDA). The feature of the RDA that is on all fours with CERD is its failure to *criminalise* certain forms of action and of associations. The proposed changes to the RDA do not respond at all to the core of the misalignment with CERD (although, oddly, this is noted in the Explanatory Memorandum at p. 14). However, I believe that it is appropriate that *civil* remedies only be specified in the RDA and in other anti-discrimination acts, and that discrimination not be made the target of criminal sanctions.

Secondly, and more importantly however, the proposed use of 'harass' and 'harassment' to capture 'the core vice of racial vilification' is misguided on two separate counts.

1. Section 18C does not address 'vilification', and the problem is not how to better address 'vilificaiton'. Rather, 18C addresses 'Offensive behaviour because of race, colour or national or ethnic origin'. Of course, the term 'offensive behaviour' may catch vilification by words, but its reach is much wider. Section 18C does not deal only with 'words', and it is quite misleading to pitch the countervailing consideration to it as that of 'freedom of speech'. Section 18C deals with discriminatory *acts*, whether by words or by other means. The emphasis in the Section is on what the act that is complained of does, that is, whether the act discriminates (ie through being offensive, insulting, humiliating or intimidating to a person or persons on the basis of certain characteristics of those persons). The emphasis of the section is not on offensive or insulting or humiliating speech but on discrimination. The distinctiveness of the RDA is in providing a remedy 'at large', whereas other anti-discrimination acts provide remedies in regard to specific areas (eg employment or education).

The proposed change misunderstands what Section 18C is designed to accomplish, and in doing so further misconstrues the risks posed by the section to freedom, and casts the alternative formulation in terms that solely target *speech*. The proposed changes, that is, magnify the problem that they are attempting to resolve.

2. The Explanatory Memorandum, as well as parliamentary speeches and comments by ministers in support of the proposal, argues that 'harass' is a more appropriate term in the context of the RDA than 'offend, insult, humiliate' because its meaning is clearer and/or more widely understood. For example, the Prime Minister has explained,

> The terms 'harass' and 'intimidate' are clear English terms. It is perfectly plain what they mean. They are to be found in many statutes. The reality is that the language 'offend, insult or humiliate' has been criticised by one expert after another. Indeed, the High Court itself has been obliged to define it as involving 'serious effects, not to be likened to mere slights'. That is Justice Susan Kiefel, our Chief Justice [while sitting on the Federal Court].[1]

The Explanatory Memorandum makes the point that 'Section 18C must be amended to address the disconnect between the ordinary meaning of the words "offend, insult, humiliate" and the way they have been judicially interpreted' (p. 2). However, the Explanatory Memorandum itself (at p. 20) notes the difficulty in defining the meaning of 'harass', and also notes the disconnect between ordinary meanings of 'harass' and a range of judicial interpretations. The proposed addition of 18C(2B) does little to clarify the authority or the relation of these conflicting meanings (its explicit stipulation that 'a single isolated act' can count as harassment is to be welcomed, however).

It is simply wrong to say that 'offend' is difficult to define where 'harass' is not. The substitution of 'harass' for 'offend, insult, humiliate' does not resolve the problem of the clear and simple meaning of terminology.

Finally, in this context, the meaning of 'harassment' in cognate anti-discrimination law – to which the prime Minister has referred in endorsing the use of 'harass' – indicates that the proposed change simply imports back into the RDA the very problem the proposal is seeking to resolve. The Sex Discrimination Act (SDA) gives the meaning of sexual harassment in the following terms (§28):

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[1] CPD (House of Representatives) 21 March 2017, Question without Notice.

(1) For the purposes of this Division, a person sexually harasses another person (the *person harassed*) if:

(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or

(b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility ***that the person harassed would be offended, humiliated or intimidated*** [emphasis added].

In other words, the meaning of 'harass' is understood in anti-discrimination law with regard to the very terms that the proposed changes would replace by 'harass'. The proposed use of 'harass' simply ushers the terms back into the manner in which the RDA as an anti-discrimination act is to be interpreted. This is not a satisfactory outcome if clarity in meaning is to be striven for. Given the well-accepted interpretation of the terms in 18C as it stands, my recommendation is that the section be left as it is.