Dr Carolyn Tan

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Committee Secretary
Parliamentary Joint Committee on Human Rights
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Parliament House
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By email: 18Cinquiry@aph.gov.au

Dear Committee Secretary

INQUIRY INTO "FREEDOM OF SPEECH" IN AUSTRALIA

I am making this submission because I believe in the importance of protecting minorities from the harmful effects of speech or publications that denigrate people on the basis of race or ethnic origin. Harmful effects of intimidation, humiliation and insults on individuals are well known. Racial vilification can also inflame communities as we have seen in Kalgoorlie in reaction to vilification over social media. We need to build communities where all are respected. It is important to send a message that harmful speech that destroys such communal harmony is taken so seriously that it is not only frowned upon but unlawful. Any suggestion that laws of this sort should be repealed sends a message that such behaviour is no longer unacceptable. This will exacerbate the fear amongst ethnic minorities that has already been harmed by the rise of One Nation and Reclaim Australia and similar organisations.

As we all know, freedom of speech has never been absolute. There are laws against misleading and deceptive conduct, misrepresentation and also defamation. No concern seems to have been expressed in relation to the impact on such laws on freedom of speech and it is of particular concern that racial vilification has been singled out as restricting freedom of speech.

S18C and D of the RDA have not limited freedom of speech.

The history of case law over s18C of the RDA shows how hard it is for a breach to be established, especially due to the width of the s18D defences. This demonstrates that there has not been any significant inhibition on freedom of speech.

S18C only prohibit actions done because of the race, colour or national or ethnic origin of a person. Nothing prevents criticism of a person's behaviour or opinions, just not on the basis of their race that they are born with. There are no good reasons why anyone would want the right to criticise someone on the basis of that person's race or ethnic origin that they are born with etc.

The s18C standard is on objective one based on reasonableness. An act is not unlawful just because someone happened unreasonably or unexpectedly to be offended or humiliated.

There are extensive exemptions to s18C found in s18D which preserve the general principles of freedom of speech and public debate. Freedom of speech does not mean an

unlimited freedom to make inaccurate hurtful statements. Nor is such an unlimited freedom required for a climate of robust free debate of ideas and opinions which are still preserved by the s18D exemptions.

There may be reasonable arguments that s18C in the light of the s18D exemptions has not been sufficiently effective to protect minorities from racial hatred and denigration and these provisions could be criticised for not going far enough. For example, for courts have imposed a wide "margin of tolerance" in assessing whether an act was carried out reasonably and have applied an "outsider's" viewpoint, with all its attendant ethnocentricities. (See an analysis in Anna Chapman, "Australian Racial Hatred Law" (2004) 30 *Monash Law Review* 27.)

Australian Human Rights Commission complaints process

The AHRC has power to deal with frivolous and trivial complaints eg in s20(2) and s46PH of the AHRC Act. There is scope for natural justice for people alleged to have engaged in unlawful conduct eg in s27. Nothing further appears to be needed. However, as suggested above, if the AHRC has concerns about any lack of powers then no doubt the AHRC would be best placed to know what such limitations are.

The aim of the relevant legislation setting up the AHRC is not hearing proceedings but conciliation. The AHRC and complaints process has an educational role as well. Conciliation processes are important way of explaining to offenders of how damaging their behaviour is and to enable them to see other perspectives. The effectiveness of the complaints procedure should not be judged by successful and quick litigation as litigation should only be a last resort when conciliation fails.

Part of the educative role of the AHRC is also to make people aware of s18C and potential remedies against vilification. Letting people know of their rights and seeking out appropriate complaints for test cases is part of that function. This should not be adversely construed as "soliciting complaints" as if such behaviour was inappropriate and not part of the important functions of the AHRC.

Summary and Answer to the specific questions

The provisions of s18B to s18E of the Racial Discrimination Act have been in force for over 20 years without causing great problems or unduly restraining freedom of speech and debate. They have provided some small protection for racial minorities against the more obvious types of racial hatred and also have at least made an important statement of what is not acceptable within our multicultural Australia.

By contrast the proposed amendments would be a retrograde step and send a message that the vulnerable within our society can be freely and unreasonably humiliated and put down simply because of the race or colour they were born with.

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By reason of the foregoing, the answers to the specific questions are:

1. *Whether the operation of Part IIA of the Racial Discrimination Act 1975 (Cth)* ***('RDA')*** *imposes unreasonable restrictions upon freedom of speech?*

   No. There is no public benefit in allowing (or worse, encouraging) people to offend, insult, humiliate or intimidate others on the basis of race, colour, national or ethnic origin.

   in particular, whether, and if so how, ss. 18C and 18D should be reformed?

   No reform necessary, however, if it is decided by the government that the RDA should be amended, we recommend:
   - strengthening the prohibitions on racial vilification in 18C and narrowing the s18D exemptions which provide broad scope to excuse behaviour that would otherwise breach s18C, as can be seen in the many unsuccessful cases, such as those over publications that have caused much distress to Aboriginal communities, and/or
   - combining the s18D defences into s18C so s18C cannot be misconstrued in isolation from the extensive s18D defences.

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?*

   We are not aware of reforms necessary as the Act gives a reasonable scope for dealing with complaints, including frivolous ones. However, if the Commission identifies any practical changes to enable it to carry out its functions better, we would expect such AHRC recommendations to be well-informed.

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

   No to all questions. The RDA has an educative function and its role goes beyond responding to individual concerns.

4. *Whether the operation of the Commission (i) should be otherwise reformed in order better to protect freedom of speech (ii) and, if so, what those reforms should be?*

   No to (i) and not applicable to (ii).

Yours faithfully,

Dr Carolyn Tan