



**Media Section of the
Media, Entertainment & Arts Alliance
(MEAA Media)
submission to the Parliamentary Joint
Committee on Human Rights inquiry into
two matters regarding freedom of
speech in Australia**

December 19 2016

The Media, Entertainment & Arts Alliance (MEAA)

MEAA is the largest and most established union and industry advocate for Australia's creative professionals. Its Media section (MEAA Media) membership includes journalists, artists and photographers.

Members of MEAA Media are bound by MEAA's *Journalist Code of Ethics*.

meaa.org

Introduction

The Media section of the Media, Entertainment & Arts Alliance (hereafter MEAA Media), the union and industry advocate for Australia's journalists, welcomes this opportunity to make a submission to the Parliamentary Joint Committee on Human Rights inquiry into two matters regarding freedom of speech in Australia:

- *“whether the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) (including sections 18C and 18D) impose unreasonable restrictions on freedom of speech; and*
- *whether the complaints-handling procedures of the Australian Human Rights Commission should be reformed.”*

MEAA is concerned at the rise of hate speech in Australia. When Part IIA was introduced into the *Racial Discrimination Act* in 1995 it was long before the widespread use of digital technology. Now there are a multitude of platforms available for the widespread dissemination of opinions and messages of all kinds. Social media platforms enable those engaging in hate speech to spread their message, call others together who share their views and to use these platforms to target and discriminate against individuals and groups on the basis of race.

MEAA Media believes hate speech is antithetical to ethical journalism, and in particular to *MEAA's Journalist Code of Ethics*.

However, MEAA Media believes that the use of the words “insult” and “offend” have led to confusion over the intent of Part IIA.

As part of this submission, MEAA Media recommends that Part IIA should seek to address widespread concerns at the rise of hate speech concomitant with the need for changes to the Act. We believe that replacing “insult” and “offend” with “vilify” will add a practical solution to concerns with section 18C while also ensuring the Act continues to make illegal all racially discriminatory hate speech.

Unreasonable restrictions on freedom of speech

MEAA Media believes freedom of speech, perhaps better described as freedom of expression, is increasingly under threat.

As the leading industry advocate for Australia's journalists, we believe that press freedom in Australia is under assault from various attacks, not least by laws voted on by the Australian Parliament.

MEAA Media believes that refining the legal tests used in s18C and reviewing the adequacy of the exception protections in s18D are worth considering but we are concerned there are many more significant threats to free speech that also deserve urgent attention, such as:

- the persecution and prosecution of whistleblowers in the public and private sectors (albeit MEAA Media notes that while there have been assurances given in this area, MEAA Media is yet to see the detail);
- the threat of up to 10 years jail for journalists and whistleblowers contained in s35P of the *Asio Act*;
- the star chamber powers of anti-corruption bodies that bypass journalist shield laws (journalist privilege); that allow the bodies to operate in secret free from public scrutiny; that deny the right to silence; and that can compel and coerce the production of journalists' notes and recordings;

- the use of Journalist Information Warrants to secretly access journalists' and media organisations' telecommunications data in an effort to discover journalists' confidential sources as well as the creation of Public Interest Advocates who operate in secret and who have no experience in or of the media;
- the use of defamation, contempt of court and suppression orders to intimidate or muzzle legitimate reporting of matters in the public interest usually when matters are before the court concerning powerful interests;
- the views of senior members of the Australian Public Service that government information should be suppressed, that freedom of information has become "pernicious" and that the processes of government decision making should be kept hidden; and
- the refusal of government ministers, departments and their agents to provide access to information or refusing to answer questions based on spurious "operational" grounds.

MEAA Media members are left to ponder the apparent limitations of the Parliament's free speech "agenda".

We believe this Committee's "inquiry into two matters regarding freedom of speech in Australia" should not operate in isolation of the other threats to freedom of speech in Australia. We urge the Committee to consider holding an inquiry into the raft of issues that have arisen in recent years that threaten and undermine freedom of speech.

The 1995 amendments to the *Racial Discrimination Act*

Amid the highly-charged atmosphere of the current debate, it is worth recalling why s18C and s18D were introduced. The explanatory memorandum¹ to the 1994 Bill that ultimately amended the Act stated:

The High Court has recently established an implied guarantee of free speech inherent in the democratic process enshrined in our Constitution. But the High Court has also made it clear that there are limits to this guarantee. There is no unrestricted right to say or publish anything regardless of the harm that can be caused. A whole range of laws protect people's rights by prohibiting some forms of publication or comment, such as child pornography and censorship laws, criminal laws about counselling others to commit a crime, and Trade Practices prohibitions on misleading and false advertising or representations.

While it is highly valued, the right to free speech must therefore be balanced against other rights and interests.

The Bill is not intended to limit public debate about issues that are in the public interest. It is not intended to prohibit people from having and expressing ideas. The Bill does not apply to statements made during a private conversation or within the confines of a private home.

*The Bill maintains a balance between the right to free speech and the protection of individuals and groups from **harassment and fear because of their race, colour or national or ethnic origin.***

*The Bill is intended to prevent people from **seriously undermining tolerance within society by inciting racial hatred or threatening violence against individuals or groups because of their race, colour or national or ethnic origin.***²

The explanatory memorandum went on to examine the two sections in detail:

Proposed section 18C

Proposed section 18C provides a civil remedy in relation to acts done otherwise than in private which may be offensive to people and which are done because of the race, colour or national or ethnic origin of those people.

*Proposed section 18C provides that it is unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people and the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group. **This civil prohibition is analogous to that applying to sexual harassment under the Sex Discrimination Act 1984 in which unwelcome acts are done in circumstances in which a reasonable person would be offended, intimidated or humiliated.**³*

The same definitions of “an act done otherwise than in private” and “public place” apply to this prohibition as apply to the criminal offence provisions.

Proposed section 18D

*Proposed section 18D provides a number of very important exemptions to the civil prohibition created by proposed section 18C. The exemptions are needed **to ensure that debate can occur freely and without restriction in respect of matters of legitimate public interest.***

*However, the operation of proposed section 18D is governed by the requirement that to be exempt, anything said or done must be said or done reasonably and in good faith. **It is not the intention of that provision to prohibit a person from stating in public what may be considered generally to be an extreme view, so long as the person making the statement does so reasonably and in good faith and genuinely believes in what he or she is saying.***

First, there is the exemption which deals with an act that is done reasonably and in good faith in relation to artistic works. This exemption would cover both serious drama and comedy acts. Whilst some of these performances may cause offence to some people, they are presented as entertainment and are not within the scope of the prohibition.

There are also exemptions which will cover statements, publications and the like made for academic, artistic or scientific purposes or for any other worthwhile purpose in the public interest.

There is an exemption relating to the making or publishing of a fair report of an event or matter of public interest. The media is entitled to report events as they happen. The publication must be fair. The provision would not affect the accurate reporting of public debate on matters of acknowledged sensitivity, for example, policy on native title or migration.

Finally there is an exemption for the making or publishing of a fair comment on a matter of public interest. This is qualified by the requirement that the comment be an expression of a genuine belief held by the person making the comment. This is also subject to the overall qualification in section 18D that to be exempt, anything said or done must be said or done reasonably and in good faith.

It is for the complainant, in relation to the civil prohibitions, to establish that the respondent's act was reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or group, and that the act was done because of the race, colour, or national or ethnic origin of the complainant or group of people of which the complainant is a member.

However, if so established, the onus then rests on the respondent to show, on the balance of probabilities, that his or her action falls within one of the exemptions in section 18D.⁴

Subsequent calls for change to the Act

MEAA Media notes the current inquiry is not the first time an attempt has been made to consider amendments to Part IIA of the *Racial Discrimination Act 1975*.

Four years ago leading media organisations joined together to call for change then, much along the line of the commentary that appears in relation to the Act now. The media organisations' response to the proposed amendments in 2012 looked at both the use of the words "insult" and "offend" in section 18C; also the issue of racial vilification; and the application of exemptions as set out in s18D.

The attempts to consolidate and clarify the Act were forestalled by the 2013 federal election. However, it is important to note that media organisations believed a solution through modest amendments could satisfy their concerns about the Act.

MEAA Media also notes that earlier in 2016, the Australian Law Reform Commission (see below) also addressed issues surrounding the Act and recommended a review of the legislation.

It is on the basis that there have been calls in the past to re-examine the Act in order to remove confusion and any unintended consequences that MEAA Media makes this submission.

The case for review: the Australian Law Reform Commission report

In its March 2016 report, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Report 129)*⁵, the ALRC acknowledged that Australian racial vilification laws have long been the subject of academic and other criticism.

It noted earlier findings that s18C lacked "sufficient precision and clarity in key respects" and that, as a consequence, an "incoherent body of case law has developed, where too much is left open to the decision maker in each individual case".

The ALRC noted that there were arguments that s18C lacked sufficient precision and clarity, unjustifiably interfered with freedom of speech by extending speech to "that is reasonably likely to 'offend'" that the ALRC said appeared broader than required to prohibit the advocacy of racial hatred.

The ALRC further noted that there were arguments that "people should also be protected from vilification on other grounds, including sex, sexual orientation and gender identity" and that existing anti-vilification laws do not effectively prohibit "hate speech".

As a result, the ALRC recommended a review of s18C in relation to "freedom of speech".

The ALRC felt a review of Part IIA of the Act might best be done in conjunction with a more general review of vilification laws that could consider not only existing encroachments on freedom of speech, but also whether existing Commonwealth laws effectively discourage the urging of violence towards targeted groups distinguished by race, religion, nationality, national or ethnic origin or political opinion.

The role of ethical journalism in the current debate

Under MEAA's rules, all members of MEAA Media are bound by MEAA's *Journalist Code of Ethics*.⁶ It is a requirement of the *Fair Work (Registered Organisations) Act 2009* that MEAA's rules are registered with the Fair Work Commission.

Only MEAA Media members can be investigated by MEAA's National Ethics Panel for alleged breaches of the Code.

The Code was first developed in 1944. The code was reviewed and updated in 1984 and subject to a major review between 1994 and 1999 leading to the current MEAA *Journalist Code of Ethics* being instituted in February 1999⁷.

Aside from this requirement on individual journalists who are MEAA Media members, the Code is acknowledged by many media outlets across Australia as part of their codes of practice/conduct for editorial employees.

Clause 2 of the MEAA *Journalist Code of Ethics* states:

*"2. Do not place unnecessary emphasis on personal characteristics, including race, ethnicity, nationality, gender, age, sexual orientation, family relationships, religious belief, or physical or intellectual disability."*⁸

MEAA Media believes that its members, observing the MEAA *Journalist Code of Ethics*, would be less likely to trigger a complaint under s18C but should they do so, it would be anticipated that the exemptions of s18D would operate.

Moreover, MEAA Media does not believe that journalism that operates within the MEAA *Journalist Code of Ethics* is in any way impeded or undermined by doing so. It is not automatic that vigorous journalism that does not place "unnecessary emphasis on... race, ethnicity, nationality, gender, age, sexual orientation, family relationships, religious belief or physical or intellectual ability" is in any way the victim of an attack on freedom of speech.

Good journalism is ethical journalism and the skills of journalists should be in their ability to present a news story, an opinion, an argument, an image or a headline without breaching clause 2 of the MEAA *Journalist Code of Ethics*.

MEAA Media's view: s18C of the Racial Discrimination Act 1975

MEAA Media believes it is evident that the interpretation of "insult" and "offend" in s18C has become confusing.

Despite the passage of 20 years, there has been a growing concern, albeit from a limited number of decided cases, that the intent of the law is not producing adequate outcomes in part because the

interpretation and understanding is so confused and that, consequently, the operation of s18C has become bogged down in “incoherent case law”⁹ and poor oversight of the mechanics of the Act.

Importantly, the purpose of the original legislation to provide “*a civil remedy in relation to acts done otherwise than in private which may be offensive to people and which are done because of the race, colour or national or ethnic origin of those people*” has become lost amid a highly-charged political debate that has lost sight of other threats to freedom of speech.

We believe that a balance needs to be struck between making hate speech unlawful while protecting and preserving freedom of speech.

Based on the explanatory memorandum to the 1995 amendments to the Act it could be concluded that the amendments were seeking to prevent hate speech, i.e. vilification on the basis of race. It is less clear why the words “insult” and “offend” were introduced.

MEAA Media believes that it is unlikely a journalist would seek to “vilify” on the basis of race whereas a complainant could be “offended” or “insulted” by legitimate public interest journalism.

Every day vigorous journalism provokes. At times, it can offend or insult. That is the nature of public debate.

But because vigorous journalism is provocative, or because it can offend or insult at one time, that does not mean it intends to vilify. If such journalism does intend to vilify on the particular basis of race then it deserves to be condemned, particularly as it is outside what is considered ethical journalism.

MEAA Media believes that it makes sense for consideration be given to remove the words “insult” and “offend” in s18C and, instead, replace them with “vilify”, which would help to target the specific intent that s18C wishes to identify and make unlawful.

Such an amendment would clarify the behaviour that s18C seeks to identify and penalise and would go some considerable way to targeting the hate speech that the 1995 amendments sought to eradicate: “*The Bill is intended to prevent people from **seriously undermining tolerance within society by inciting racial hatred or threatening violence against individuals or groups because of their race, colour or national or ethnic origin***”.¹⁰

S18D

With regard to s18D, MEAA Media also supports consideration being given to the manner in which “good faith” is examined and determined by the courts and the Commission.

It is possible that this may also apply to the requirement in section 18D that potentially offending conduct was done “reasonably” in addition to the good faith requirements.

In other respects, we believe that there is no change required to s18D.

Complaints handling

While the Terms of Reference specify the handling of complaints by the Australian Human Rights Commission, MEAA Media wishes to make the following observations.

Complaints by the public about the media should be addressed swiftly and comprehensively. We note that in recent years, following its internal reorganisation and reform, the Australian Press Council's¹¹ complaint handling processes have improved dramatically, allowing for a fast resolution to complaints.

But we believe media outlets should take appropriate measures to speedily and thoroughly deal with complaints from the public and to do so publicly. Too often the public turns to a third party without first raising a complaint with the specific media outlet that has published or broadcast the item in question. Media outlets must be willing to be held accountable for their failings by the consumers who put their trust, and their time and money, into supporting the media outlet.

Only after a complaint has been dealt with, and only if there is no satisfaction, should a member of the public feel so aggrieved that they wish to take their complaint to a third party such as a media self-regulatory body like the Australian Press Council or Free TV Australia, or MEAA if there is an ethics complaint about a MEAA Media member; or to the Australian Human Rights Commission in relation to an alleged breach of the *Racial Discrimination Act*.

A prompt resolution of such a complaint is vital. Ideally, the AHRC should be appropriately resourced to ensure that in principle determinations are made about a case's merits within the shortest possible time of its receipt.

For a complaint to linger for any length of time when it is abundantly clear that it will fail only raises false hope and confusion for all parties to the complaint, and bogs down the AHRC in needless details.

In respect of complaints that the Commission has disallowed through the Commission finding that s18D will likely apply, only if the complainant wishes to challenge and appeal against the application of s18D should the complaint be dealt with by the Commission.

Summary

In response to the four specific questions posed in the inquiry's full Terms of Reference¹², MEAA Media states:

1. S18C could be amended by removing the words "insult" and "offend" and replacing them with "vilify"; and S18D does not need to be amended;
2. The complaint processes of the AHRC could be improved to allow complaints that are subject to the exemptions set out in s18D to be rejected as soon as possible;
3. We make no comment on the solicitation question; and
4. A more efficient approach to complaints handling, in concert with other bodies that investigate complaints, is required so that complaints are dealt with promptly, openly and transparently, with minimum cost to the parties involved.

MEAA Media believes that freedom of speech in Australia is under threat on several fronts, not least by a battery of recent laws that:

- persecute and prosecute whistleblowers who seek to expose fraud, corruption, dishonesty, illegality and threats to public health and safety;
- criminalise legitimate public interest journalism;
- use defamation laws to intimidate and harass journalists and media organisations;
- use suppression orders that allow important judicial matters to go unreported;
- allow the refusal of government to operate openly and transparently and that block attempts at scrutiny by the media and/or the community;

- seek to hide government decision-making by narrowing the application of freedom of information laws, and
- use legislation to secretly go after whistleblowers and go after journalists.

In the face of these threats to press freedom and freedom of expression, the terms of reference of this inquiry with their focus on only freedom of speech concerns with the application of s18C of the *Racial Discrimination Act 1975* appear to be too narrow.

However, MEAA Media believes that this inquiry does represent an opportunity to follow-up the recommendation of the Australian Law Reform Commission for a comprehensive review of Part IIA of the Act.

¹ http://www.austlii.edu.au/au/legis/cth/bill_em/rhb1994119/memo_0.html

² MEAA emphasis

³ MEAA emphasis

⁴ MEAA emphasis

⁵ <https://www.alrc.gov.au/publications/freedoms-alrc129>

⁶ <https://www.meaa.org/meaa-media/code-of-ethics/>

⁷ <https://www.meaa.org/faqs-meaa-journalist-code-of-ethics/>

⁸ <https://www.meaa.org/meaa-media/code-of-ethics/>

⁹ <https://www.alrc.gov.au/publications/freedoms-alrc129>

¹⁰ http://www.austlii.edu.au/au/legis/cth/bill_em/rhb1994119/memo_0.html MEAA emphasis

¹¹ MEAA is a constituent member of the Council.

¹² http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia/Terms_of_Reference