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EXPOSURE DRAFT RACIAL DISCRIMINATION ACT 1975 (FREEDOM OF SPEECH REPEAL OF S.18C) BILL 2014

NSW COUNCIL FOR CIVIL LIBERTIES SUBMISSION

The New South Council for Civil Liberties (NSWCCL) welcomes the opportunity to comment on the exposure draft Racial Discrimination Act 1975 (*Freedom of Speech Repeal of S.18C) Bill 2014*). This is a matter of great importance and we wish to join the many other groups and individuals who have done so and strongly register our view of the proposal.

1. IN SUMMARY

1.1. NSWCCL strongly and comprehensively opposes the amendments to the Racial Discrimination Act 1975 (*Freedom of Speech Repeal of S.18C) Bill 2014* issued as an exposure draft by the Commonwealth Attorney-General on the 25th March 2014.

1.2. The amendments will dramatically narrow the definition of unlawful racist speech/conduct and the list of exemptions, where these behaviours will be lawful, is so expansive as to include almost every context in which public racist abuse could occur. The overall effect will be an unwarranted and dangerous weakening of longstanding and necessary statutory protections against racist abuse in Australia.

1.3. Equally disturbing, the overall context in which the amendments have been introduced by the Government comes with undesirable symbolical implications. The unfortunate public linking of the draft amendments with the Attorney-General's affirmation of everyone's right to be a bigot [1] will have sent a clear message to many that racist abuse is once again 'acceptable' in Australia. There is considerable anger in the community about the proposed changes and the overall process.

This has created a political and community context in which reasoned discussion of the extremely complex, sensitive and vitally important issue of the proper and desirable balance between freedom of expression and freedom from racist abuse and vilification will be hard to achieve.

1.4. There is no urgency for amendments to the Racial Discrimination Act 1975 (the Act) beyond the political commitment made by the Government in the pre-election context.

[1] Australian Parliament Hansard 24/3/2014 p1797

That was not made in response to any discernable wide-spread public pressure. The Act is not broken.

NSWCCL joins the widespread call for this proposal to be withdrawn.

2. RATIONALE

2.1. The current provisions in S18 of the Act have worked well for the 20 years since their introduction.[2] The exposure draft is not accompanied by any substantiating or detailed explanation as to the need for this radical reduction in the scope and effectiveness of the current law.

NSWCCL appreciates that these proposals are an exposure draft and therefore the Government is inviting community feedback and is open to changing its position. Nonetheless, it is disappointing that such a significant proposal for major statutory change on a matter of such great importance to our community is not supported by a detailed and substantive justification.

2.2. Any proposed future amendment of the existing Section 18 provisions in the Racial Discrimination Act 1975 should be supported by a comprehensive and balanced justification for change and must engage the community in meaningful discussion and a public consultation process over a more reasonable time frame.

3. FREEDOM OF SPEECH AND FREEDOM FROM RACIST VILIFICATION

3.1. The **very** brief media release accompanying the exposure draft bill asserts that the amendments will:

'strengthen the Act's protections against racism, while at the same time removing provisions which unreasonably limit freedom of speech.' [3]

Neither of these assertions is accurate.

3.2. NSWCCL considers the first of these assertions to be objectively and demonstrably untrue. It is possible to argue that the amendments will make the Act more appropriate (if you want weaker protections) – but there are no reasonable grounds to support an argument that they will strengthen protections against racism. The claim is significantly misleading. The proposed amendments will radically weaken 'the Act's protections against racism'.

3.3. With regard to the second assertion, NSWCCL is of the view that there is no supporting evidence that the operation of the Act over 20 years has resulted in any unreasonable limitation on freedom of speech. While we share a concern that 'to offend or insult' a person or group on racist grounds may be interpreted so as to set an inappropriately low threshold for unlawful behaviour, the overall provisions of the Act

[2] See complaint statistics and case summary re Section 18 C and 18D in 'At a Glance: Racial vilification under sections 18C and 18D of the Racial Discrimination Act 1975' Australian Human Rights Commission . Also

[3] Attorney-General and Minister for the Arts, Media Release Racial Discrimination Act, 25 March 2014 (AG Media release 25March 2014)

have ensured that there have been no cases where a person has been found to have acted unlawfully on the basis of trivial offensive comments.

3.4. It is also worth noting, that in assessing the potential impact of Sections 18(C) and 18(D) - which must always be considered in conjunction - on freedom of speech, that the remedies available are only civil ones. Furthermore, before any civil remedy can be claimed in a court, conciliation by the Australian Human Rights Commission must be attempted. The Act clearly incorporates a strong educational aim, as also appears in some of the remedies that the court can award.

Some public discussion gives the misleading impression that contravention of the provisions in S18(C) will lead to a heavy fine or gaol and is thus a draconian threat to free speech.

3.5. The Government has given great prominence to the Andrew Bolt case in its public indications of its intention to repeal S18 of the Act. While this case has generated a deal of controversy and conflicting analyses, a single case over 20 years does not constitute a sound basis for repeal of these provisions- especially as it is clear that Mr Bolt would not have been found to have behaved unlawfully if he had been able to avail himself of the robust defences available in S18D of the Act. [4]

3.6. NSWCCL regards freedom of speech and expression as a fundamental civil liberty without which democracy cannot function nor other freedoms be protected. A core part of our civil liberties advocacy over 50 years has been in defence of freedom of speech and expression against repressive laws and policies in a host of contexts. We share the Attorney-General's commitment to a society where 'freedom of speech is able to flourish'[5]. We also share the long accepted view that freedom of expression can be restricted in limited contexts where this is necessary to prevent harm to individuals or society. As the Human Rights Commissioner Tim Wilson has very recently reminded us in the context of these proposed amendments:

'Within a human rights framework, it can be consistent to have free expression and also have limited restrictions on freedom of expression when its exercise impinges on others' human rights.

However, the deference should always be towards the most limited form of restriction on freedom of expression that is necessary.

In other words, efforts to outlaw expression that can impinge on others' human rights must ensure that any restriction constitutes an exception to freedom of expression, rather than treating freedom of expression as the exception to otherwise worthy objectives'[6].

NSWCCL is very comfortable with this articulation of the underlying principle governing the relationship between freedom of expression and other human rights. It is

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[4] Notably: 'S 18(D) (1) *Section 18C does not render unlawful anything said or done reasonably and in good faith…. (c) in making or publishing: (i) a fair and accurate report of any event or matter of public interest.'*

[5] AG Media release 25March 2014)

[6] Letter to Attorney-General 28th April 2014 providing additional comments to those of the AHRC on the Freedom of Speech (repeal of s 18C)Bill 2014

our longstanding hope that these fundamental principles will one day be given effective protection in Australia through a legislated Charter of Human Rights.

3.7. Our disagreement with the Attorney-General in the current context is not about the importance of freedom of expression. It is about the critical importance of effective protections against the very real dangers of racism, including racial vilification, in the current Australian context.

3.8. In December 2013 the Attorney-General announced a major review of fundamental freedoms to be undertaken by the Australian Law Reform Commission. The stated purpose is 'to identify provisions that unreasonably encroach upon traditional rights, freedoms and privileges.' Senator Brandis said it 'will be one of the most comprehensive and important [reviews] ever undertaken by the ALRC.' [7] While the review is to give particular focus to specified areas[8], it provides an obvious context for a comprehensive and considered review of the many existing tensions and inconsistencies relating to freedoms and rights and their protection or limitation in current Australian law.

NSWCCL considers this could be an extremely important review and awaits the final terms of reference and time frame with interest. It is the obvious appropriate context for any further consideration of the need for any amendment to Australia's racial vilification laws.

NSWCCL recommends that the need for any future amendments to the RDA be considered in this broader context.

DETAILED COMMENTS

4. HARM THRESHOLD FOR UNLAWFUL CONDUCT

4.1. The amendments will dramatically narrow the definition of unlawful racist abuse and related behaviour. The existing definition of unlawful racist speech ('*(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people*;') is to be replaced with acts of vilification and intimidation which are defined very narrowly for the purposes of the Act:

> "(1) It is unlawful for a person to do an act, otherwise than in private, if:
> (a) the act is reasonably likely:
> (i) to vilify another person or a group of persons; or
> (ii) to intimidate another person or a group of persons,
>
> (2) For the purposes of this section:
> (a) vilify means to incite hatred against a person or a group of persons;
> (b) intimidate means to cause fear of physical harm:
> (i) to a person; or
> (ii) to the property of a person; or
> (iii) to the members of a group of persons.

[7] 'New Australian law reform inquiry to focus on freedoms' Attorney-General Media release 11/12/13.

[8] The particular focus areas specified are commercial and corporate regulation; environmental regulation; and workplace relations. AG Media release 11/12/13.

Both 'vilify' and 'intimidate' have been specially defined far more narrowly than is understood in common parlance or in standard dictionary definitions.

4.2. 'Vilify' in normal parlance incorporates a broader meaning than 'incite hatred' - including disparaging or degrading speech or conduct as well as the specified incitement of hatred.[9] These are meanings which incorporate conduct which can have serious harmful effects on persons and groups and should not be excluded from the Act.

4.3. The proposal also requires 'incitement' for racial vilification to be unlawful. This requires evidence of incitement to hatred in a third party and is a worrying amendment. Currently the Act operates by reference to the effect of the conduct on the abused person or group. NSWCCL considers this to be appropriate. [10]

If 'vilification' is to be specified as unlawful behavior, the effect on the person or group being vilified should be sufficient grounds for proof of such conduct.

4.4. 'Intimidate' has been restricted to causing 'fear of physical harm'. This is an extraordinary restriction of the common understanding of racial intimidation which clearly incorporates causing real and serious emotional and psychological harm. This has been the case under the current Act for 20 years. This proposed narrow definition would exclude many- and possibly most- manifestations of racist intimidation.

4.5. The proposal repeals the S18(C) 'offend', 'insult' and 'humiliate' unlawful behaviours – presumably on the grounds that they set an inappropriately low threshold. However, as the Australian Human Rights Commission regularly attests, the courts have consistently interpreted this Part of the Act to deal with' profound and serious effects, not to be likened to mere slights'. [11]

There is no pressing need to repeal these provisions. But if they were to be repealed the Act would need to specify alternative unlawful behaviours to capture racial abuse which is should be unlawful.

This could be achieved by the inclusion of broadly (and normally) defined acts of racist vilification and intimidation.

5. COMMUNITY STANDARDS TEST

5.1. The proposal includes a significant variation in the community standards test in that it specifies that the reasonable test as to the effect of the racist conduct is '*to be determined by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community.'*

This is a major shift from the current Act which has no such exclusion.

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[9] See Oxford dictionaries online

[10] For a discussion of the issue of incitement in the context of racial vilification see: Nicholas Cowdery AM QC 'Review Of Law Of Vilification: Criminal Aspects' paper given To Roundtable on *Hate Crime and Vilification Law: Developments and Directions* Law School, University of Sydney 28 August 2009. Also Michael Chesterman Freedom of Speech in Australian Law. A delicate plant.. Ashgate, Dartmouth, Sydney 2000 Ch 5

[11] Most recently in: Australian Human Rights Commission Submission to the Attorney-General's Department . Amendments to Part 11A, Racial Discrimination Act, 28 April 2014.p 3

In its briefing on the RDA in 2002 the (then) Human Rights and Equal Opportunity Commission explained S18 1(a) as follows:

> *'The victim's perspective is the measure of whether an act is likely to offend, insult, humiliate or intimidate. For example, if derogatory comments are made against Indigenous people, the central question to ask is whether those comments are likely to offend or intimidate an Indigenous person or group, not whether they have this effect upon a non-Indigenous person.*
>
> *At the same time, the victim's response to the words or image must be reasonable……*
>
> *……This is called the 'reasonable victim' test. The 'reasonable victim' test allows the standards of the dominant class to be challenged by ensuring cultural sensitivity when deciding the types of comments that are considered offensive.'*[12]

NSWCCL supports this approach as appropriate and necessary for the protection of equality and rights in the Australian context of great ethnic and racial diversity.

The proposed exclusion of the **reasonable** perspective of the person or group vilified or intimidated as to the effect of that conduct upon them is unacceptable and should not be included in the Act.

5.2. A related problem with the draft bill is the deletion of the words 'in all the circumstances' which currently makes explicit the broad context for assessment of an act being 'reasonably likely' to have been unlawful. This inclusive parameter should be retained in the Act.

6. EXEMPTIONS

6.1. The current Act has very broad exclusions set out in S18 (D). Some have argued that these were so broad as to render the Act relatively weak. Nonetheless, the Attorney-General's draft proposal greatly expands these exemptions - both by omission of overarching criteria for exemption and by more than doubling the specific exempt contexts.

6.2. The current requirements that an action, to be exempt, must be 'said or done **reasonably** and in **good faith'** and be for '**genuine'** specified purposes or 'any other **genuine** purpose in the **public interest'.** These have been omitted from the draft bill. As have the requirement that a report of, or comment on any event or matter of public interest must be '**fair and accurate'.** Exempt comment must also be the '**expression of a genuine belief** held by the person making the comment.' (my emphases). These requirements have been omitted in the current bill.

6.3. Within these parameters, academic, artistic and scientific and public interest purposes are exempt in the current Act. The proposed exemptions are significantly expanded. The list of proposed behaviours and contexts (without any community standards qualifications) which are exempt if discussed in a public context are:

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[12] Australian Human Rights and Equal Opportunity Commission : Race Vilification Law in Australia, October 2002 https://www.humanrights.gov.au/publications/racial-vilification-law-australia

> *'(4) ….words, sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter.'*

The breadth of these exemptions has rightly caused a public furore. NSWCCL shares the broadly expressed view that these exemptions encompass something close to all possible, and certainly most likely, contexts for racial abuse.

It is difficult to imagine these exemptions were presented – even in an exposure draft – as a serious proposition.

The existing exemptions should not be expanded or amended.

7. NSWCCL POSITION AND RECOMMENDATIONS

7.1. The New South Wales Council for Civil Liberties (NSWCCL) strongly and comprehensively opposes the amendments to the Racial Discrimination Act 1975 (*Freedom of Speech (Repeal of S.18C) Bill 2014*) issued as an exposure draft by the Commonwealth Attorney General on the 25th March 2014.

7.2. The (*Freedom of Speech (Repeal of S.18C) Bill 2014*) proposal should be withdrawn from consideration by the Australian Government

7.3. Any proposed future amendment of the Section 18 provisions in the Racial Discrimination Act 1975 should be supported by a comprehensive and balanced justification and must engage the community in meaningful discussion as part of a public and considered review process.

7.4. The need for any amendment to the RDA should be considered in the broader context of the current 'Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges'

7.5. If the Government determines to continue with amendment of Section 18 of the Racial Discrimination Act 1975, notwithstanding widespread opposition, this should only encompass a minor clarification of unlawful behaviours which does not weaken existing, necessary protections against racial vilification in Australia. Specifically:

a. There should be no repeal of existing definitions of unlawful behaviour in Section 18C(1) (a) except for the repeal of *'to offend' and possibly to 'insult'*
b. The repeal of either or both of these unlawful behaviours must only proceed if the Act is simultaneously strengthened by their replacement with specified unlawful behaviours with a higher threshold of effect. This could be achieved by:
    i. the inclusion of 'to vilify' with the expanded 'normal' definition and excluding the requirement for it to involve incitement of a third party.
    ii. The maintenance of 'to intimidate' without any narrowing definition of its 'normal' meaning to include emotional and psychological as well as physical harm
c. The existing exemptions (Section 18 D) should be retained –especially the provisions relating to actions being done 'reasonably and in good faith' and reports

and comments being 'fair and accurate'. There should be no further expansion of exempt purposes.

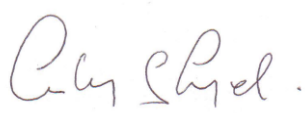
d. No other parts of Section 18 should be repealed or amended.

7.6. All submissions (except for those requesting confidentiality) in response to this proposal should be made public immediately to inform future discussions of this important issue

The NSWCCL hopes this submission is of assistance to the Department and the Government in their consideration of this matter. We are available for further discussion on any aspects of this submission.

This submission was written by Dr Lesley Lynch on behalf of the NSWCCL with input from the NSWCCL Committee.

Yours sincerely



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The NSWCCL was founded in 1963 and is one of Australia's leading human rights and civil liberties organisations. Its aim is to secure the equal rights of everyone (as long as they don't infringe the rights and freedoms of others) and oppose any abuse or excessive power by the State against its people. To this end NSWCCL attempts to influence public debate and government policy on a range of human rights issues. It seeks to secure amendments to laws, or changes in policy, where civil liberties and human rights are not fully respected. It listens to individual complaints and, through volunteer efforts, attempts to help members of the public with civil liberties problems. NSWCCL prepares submissions to government, conducts court cases defending infringements of civil liberties, engages regularly in public debates, produces publications, and conducts many other activities.