



29 April 2014

Human Rights Policy Branch
Attorney-General's Department
3-5 National Circuit BARTON ACT 2600

By email: s18consultation@ag.gov.au

Dear Sir/Madam,

Freedom of Speech (Repeal of s.18C) Bill 2014

1. Women's Legal Services NSW (WLS NSW) thanks the Attorney-General's Department for the opportunity to comment on the Exposure Draft Freedom of Speech (Repeal of s.18C) Bill 2014.

Introduction

2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.
3. WLS NSW has a specialist Aboriginal Women's Legal Program (IWLP). This program delivers a culturally appropriate legal service to Aboriginal women in NSW. We provide an Aboriginal legal advice line, participate in law reform and policy work, and provide community legal education programs and conferences that are topical and relevant for Aboriginal and Torres Strait Islander women.
4. An Aboriginal Women's Consultation Network guides the IWLP. It meets every quarter over 2 days to ensure we deliver a culturally appropriate service. The members include regional community representatives and the IWLP staff. This network liaises with the WLS NSW Board.

Summary of Recommendations

5. WLS NSW is strongly opposed to the *Freedom of Speech (Repeal of s.18C) Bill*



2014. We do not support any amendments that would weaken the existing protections against racial discrimination and vilification within the *Racial Discrimination Act 1975 (Cth)*. We are particularly concerned about how the proposed changes will impact on all marginal groups and particularly Aboriginal and Torres Strait Islander women.

6. WLS NSW submits that the existing provisions in section 18C and the exemptions provided under section 18D provide an appropriate balance between freedom of expression and freedom from racial vilification. These provisions have been interpreted reasonably and sensibly by the courts. Therefore, we see little justification for the repeal of sections 18C, 18B, 18D or 18E.
7. In the alternative, if section 18C is amended, in order to allay concerns about the broad application of the provision and to reflect current judicial interpretation, we suggest that the words 'offend' and 'insult' be amended to 'seriously offend' and 'seriously insult.'
8. While we are in support of legislative amendments that would increase protections against discrimination and racial vilification, we do not believe that the proposed legislation does this nor does it adequately meet the standards required under Australia's human rights obligations for the protection against racial vilification as outlined below.
9. Despite the appearance of introducing increased protections against racial vilification, we submit that the proposed exemption, as provided under section 4 of the Bill, is so broad as to render the provisions almost useless. If this legislation is passed, we fear it will legitimise racial vilification in the public domain rather than provide any actual protection.
10. In summary WLS NSW recommends:
 - 10.1 Section 18C of the *Racial Discrimination Act 1975* be retained;
 - 10.2 In the alternative, amend the current legislation to provide that section 18C only applies where the act is 'reasonably likely, in all the circumstances, to seriously offend, insult, humiliate or intimidate another person or group of people';
 - 10.3 Section 18D of the *Racial Discrimination Act 1975* be retained;
 - 10.4 In the alternative, if amendments are made to the exemptions there needs to be a balancing test which includes reasonableness, good faith and public interest;
 - 10.5 'Intimidate' be given its ordinary meaning in the *Racial Discrimination Act 1975*;
 - 10.6 Section 18B of the *Racial Discrimination Act 1975* be retained;
 - 10.7 Section 18E of the *Racial Discrimination Act 1975* be retained;
 - 10.8 There be specific protections against racial vilification in the *Racial Discrimination Act 1975*;
 - 10.9 If the term 'vilify' is to be introduced it should have its ordinary meaning; and

- 10.10 The comparator for determining whether an act is 'reasonably likely' to vilify or intimidate another person or group should continue to be a reasonable member of the particular group. This should be included in the legislation.

Australia's human rights obligations

11. Review of the *Racial Discrimination Act 1975* (Cth) must be grounded in a human rights framework.

Freedom from racial vilification

12. Australia is a party to the *International Convention on Civil and Political Rights* (ICCPR).¹ The ICCPR provides specific protection against incitement of racial hatred. Article 20 states, 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'²
13. Australia is also a party to the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD).³ Article 4 of the CERD prohibits racial hatred and incitement to racial discrimination.
14. Australia has a reservation in place in relation to Article 4 of the CERD. The Committee on the Elimination of Racial Discrimination in their Concluding Observations has criticised this reservation.⁴
15. Further one of the recommendations made during Australia's Universal Periodic Review before the Human Rights Council in 2011 was for Australia to take steps to prevent hate speech and incitement to racial violence.⁵ Australia's response was, 'The Australian Government will continue to administer a strong framework for the prevention of hate speech and incitement to violence.'⁶

Freedom of expression

16. Article 19 of the ICCPR provides protection for freedom of expression. However, this right is not absolute and comes with responsibilities, including 'respect of the rights or reputations of others.'⁷

Need for protection against race discrimination and racial hatred

17. In our experience racial discrimination and racial vilification are serious and on going problems in Australia. Many of our clients report experiencing racial discrimination

¹ *International Convention on Civil and Political Rights*, ratified by Australia on 13 August 1980 ('ICCPR').

² Article 20 ICCPR.

³ *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD), ratified by Australia on 30 September 1975.

⁴ Concluding Observations of Committee on the Elimination of Racial Discrimination, Australia, 77 Session, CERD/C/AUS/CO/15-17, 27 August 2010, para 17.

⁵ Human Rights Council, seventeenth session, *Report of the Working Group on the Universal Periodic Review, Australia*, 24 March 2011, at 86.98.

⁶ Australia's Formal Response to the Universal Periodic Review Recommendations, recommendation 98 at <http://www.ag.gov.au/RightsAndProtections/HumanRights/UniversalPeriodicReview/Documents/AustraliasformalresponsetotheUPRrecommendations.pdf>

⁷ Article 19 ICCPR.

across all aspects of public life including applications for housing, purchasing goods and services, in education and the workplace. Many of our clients also report being the victim of public acts of racial hatred including being regularly subject to offensive and/or derogatory language and/or conduct.

18. WLS NSW is particularly concerned about discrimination experienced by Aboriginal and Torres Strait Islander persons. There have been numerous reports that have highlighted similar concerns. For example, *Racist Violence: Report of the National Inquiry into Racist Violence* found that 'racist violence is an endemic problem for Aboriginal and Torres Strait Islander people in all Australian states and territories.'⁸ It was also found that, 'the fact that Aboriginal and Torres Strait Islander people are faced with racism in almost every aspect of their daily lives, is the underlying reason for the high levels of racist violence against Aborigines and Torres Strait Islanders reported to this Inquiry.'⁹
19. In The National Report of the Royal Commission into Aboriginal Deaths in Custody, it was noted that verbal abuse constituting racial vilification was a persistent feature of the systemic discrimination suffered by Aboriginal people in the criminal justice system, particularly at the point of contact with police.¹⁰
20. The Royal Commission into Aboriginal Deaths in Custody recommended 'that governments which have not already done so legislate to proscribe racial vilification.'¹¹
21. The stories told by our clients echo the findings of these reports and enquiries.
22. We note that 192 of the 500 complaints lodged with the Australian Human Rights Commission under the *Racial Discrimination Act 1975* cited racial hatred as the grounds for complaint.¹²
23. We submit that the number of complaints demonstrates that there is still very clearly a need for protection from acts of racial hatred and further submit that it is very likely under reported.
24. Discrimination and vilification affects the whole community and not just individuals of a particular group. As outlined in the second reading speech for the Racial Hatred Bill 1994, legislation that provides strong protections against discrimination and protects against racial vilification can have a powerful educative role and demonstrates community recognition that racism is unacceptable. This remains just as important today.¹³

⁸ *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, Canberra, Australian Government Publishing Services, 1991 at 213

⁹ *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, Canberra, Australian Government Publishing Services, 1991 at 213

¹⁰ Royal Commission into Aboriginal Deaths in Custody, *National Report, 1991*, Vol 4

¹¹ Royal Commission into Aboriginal Deaths in Custody, *National Report, 1991*, Vol 4, recommendation 213.

¹² Australian Human Rights Commission 2012/13 Annual Report at 132

¹³ Racial Hatred Bill 1994, House of Representatives, Second Reading, 15 November 1994 at 3337.

Offensive behaviour because of race, colour or national or ethnic origin and exemptions

Current protection

25. Section 18C of the *Racial Discrimination Act* 1975 currently provides protection against conduct that is likely to offend, insult, humiliate or intimidate another person where the act is done because of the race, colour or national or ethnic origin of the person or people in the group.
26. Section 18D of the *Racial Discrimination Act* 1975 provides a list of exemptions which are limited by tests of reasonableness, good faith, fair and accurate reporting and public interest.

Adequacy of current protection

27. WLS NSW believes that section 18C provides essential protection and should be retained without the need for any amendment.
28. We submit that our international human rights obligations require Australia to take steps to prevent discrimination on the basis of race and to prevent acts of racial vilification. Intimidation, offence, insults and efforts to humiliate are tools that are often used to facilitate discrimination and racial hatred. By limiting their use, section 18C provides an important protection and conveys a clear message that our community does not accept or condone racial discrimination.
29. We submit that the courts have applied section 18C in a reasonable and appropriate manner. Case law demonstrates that that 'mere slights' do not meet the relevant threshold and only serious offence or insult has been accepted as being a breach of the provisions.¹⁴ We therefore do not believe that section 18C allows for an unacceptable curtailment of an individual's right to freedom of expression, when read in conjunction with s18D.
30. We submit that the existing exemptions under section 18D, which incorporate notions of good faith, fair and accurate reports, genuine purpose and public interest, provide the appropriate balance between freedom of expression and freedom from racial vilification.

Alternative proposal

31. WLS NSW believes that there is no need for any amendment to section 18C. In the alternative, if section 18C is amended, in order to allay concerns about the broad application of the provision and to reflect current judicial interpretation, we suggest that the words 'offend' and 'insult' be amended to 'seriously offend' and 'seriously insult.'
32. If despite our recommendation that section 18D be retained in its entirety amendments are made to this section, there needs to be a balancing test which includes reasonableness, good faith and public interest.

¹⁴ *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352; *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105.

Proposed Legislation

33. The proposed legislation seeks to repeal section 18C in its entirety.
34. We submit that removal of section 18C would significantly reduce the current protections against racial hatred. We do not support any legislative amendment which diminishes such protection.
35. The Bill removes the existing exemptions under section 18D and provides a much broader defence to include protection for any words, sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in public discussion of any political, social, cultural, religious, artistic, academic or scientific matter.¹⁵
36. We submit that the breadth of the exemptions available would mean that any benefit derived from the introduction of a specific protection against racial vilification is likely rendered useless. In effect, the Bill would allow and condone racial vilification in the public realm, rather than providing protection.
37. Further, the exemptions far exceed the protections afforded to freedom of expression in international law as discussed above.

Intimidation

Current protection

38. Section 18C currently provides protection against acts of intimidation that are committed because of someone's race, colour or national or ethnic origin of the person or people in the group. Intimidation is not defined in the *Racial Discrimination Act 1975*.

Adequacy of current protection

39. Section 18C already provides appropriate protection against intimidation. This protection is necessary and should not be reduced.

Proposed legislation

40. We submit the Bill seeks to significantly decrease the protections against intimidation by narrowing its definition. Proposed section (2)(b) provides that to 'intimidate' means 'to cause fear of physical harm.'¹⁶ The existing legislation provides no qualification that to intimidate is to cause fear of physical fear only.

41. WLS NSW submits that intimidation should not be confined to fear of physical harm and it has been well established that other threats, such as psychological harm, can be equally as destructive.

42. On March 2014 the Hon George Brandis stated:

¹⁵ S.4 *Freedom of Speech (Repeal of s.18C) Bill 2014*.

¹⁶ S. 2(b) *Freedom of Speech (Repeal of s.18C) Bill 2014*.

‘ to intimidate a person is to cause them to be fearful. That is an entirely different concept. People are right to go about their daily lives free of fear, including fear born of intimidation because of their race or colour or national or ethnic origin. Intimidation is not an action of legitimate public discussion, no matter how robust that discussion is. So intimidation, in our view, should stay.’¹⁷

43. WLS NSW believes that threats that are reasonably likely to cause fear on the basis of race should be considered unacceptable.

Recommendations:

S. 18C of the *Racial Discrimination Act 1975* be retained;

In the alternative, amend the current legislation to provide that section 18C only applies where the act is ‘reasonably likely, in all the circumstances, to seriously offend, insult, humiliate or intimidate another person or group of people’;

S. 18D of the *Racial Discrimination Act 1975* be retained;

In the alternative, if the exemptions are amended, they should include reasonableness, good faith and public interest; and

‘Intimidate’ be given its ordinary meaning in the *Racial Discrimination Act 1975*.

Reason for the act

Current protection

44. Section 18B of the *Racial Discrimination Act 1975* currently provides that if an act is done for two or more reasons, and one of those reason is the race, colour or national or ethnic origin of a person, then the act is considered to have been done ‘because of’ the persons race, colour or national or ethnic origin.

Adequacy of current protection

45. WLS NSW submits that the protection afforded under section 18B is essential and in line with similar provisions under federal and state anti-discrimination legislation.

Proposed legislation

46. The Bill seeks to repeal section 18B.

¹⁷ Hon George Brandis press conference 25 March 2014.

47. While the Bill is silent on the issue, WLS NSW is concerned that the deliberate repeal of section 18B would suggest that the protection may not apply if it was done for more than one reason.

48. We believe this is unnecessary and likely a difficult threshold to meet. The repeal of section 18B would be an unacceptable curtailment of the protection and one we oppose.

Recommendation:

Section 18B of the *Racial Discrimination Act 1975* be retained.

Vicarious liability

Current protection

49. Section 18E places an obligation on employers to take reasonable steps to ensure that employees are not subject to acts done because of the race, colour or national or ethnic origin of the person or people in the group that are likely to offend, insult, humiliate or intimidate another person.

Adequacy of current protection

50. WLS NSW submits that the protections afforded under section 18E are essential and in line with similar vicarious liability provisions under federal and state anti-discrimination legislation.

Proposed Legislation

51. The Bill seeks to repeal section 18E in its entirety.

52. Employment is an area where members of minority racial groups may be particularly vulnerable and it is often an area in which our clients report experiencing racism. Requiring employers to implement policies and procedure to ensure employees are protected can go a long way to create a positive work culture free from racism.

Recommendation:

Section 18E of the *Racial Discrimination Act 1975* be retained.

Protection against racial vilification

Current protection

53. The current provisions of the *Racial Discrimination Act 1975* do not provide specific protection against racial vilification and as such could be improved.

Adequacy of current protection

54. As outlined above, Australia's international human rights obligations require Australia to ensure that there is adequate legal protection against racial vilification and the incitement of hatred. WLS NSW believes that there should be clear and strong protections against racial vilification and we support amendments which would strengthen the provisions that currently exist.

Proposed legislation

55. However, contrary to the arguments made by the Hon George Brandis QC,¹⁸ WLS NSW does not believe that the proposed legislation increases protections against racial vilification. We submit that the Bill provides very little protection at all and fails to meet the standards required under international law for the reasons outlined below.

56. We have already raised our concerns above about the broadening of the exemptions. This section will focus on the narrow definition of 'vilify' and the appropriate comparator.

Narrow definition of vilify

57. Under the proposed legislation, vilify means 'to incite hatred against a person or group of persons.'¹⁹

58. We submit that this is an extremely narrow definition. The definition is significantly narrower than equivalent provisions in state and territory anti-discrimination legislation and an unnecessarily high threshold to meet.²⁰

59. The ordinary meaning of 'vilify' is to disparage or denigrate. We believe that a more appropriate definition would be one that adopts the ordinary meaning of the words.

Test for 'reasonably likely' – the appropriate comparator

60. Section 18C currently provides that it is unlawful to do an act, otherwise than in private if it is 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person.'²¹ The courts have identified that the test for when an act is 'reasonably likely' to have a particular effect is an objective test, looking at a hypothetical representative member of that class of persons whose reactions are being assessed.²²

¹⁸ Hon George Brandis press conference 25 March 2014.

¹⁹ S2(a) Freedom of Speech (Repeal of s.18C) Bill 2014.

²⁰ Section 20C(1) *Anti-Discrimination Act 1977* (NSW).

²¹ S.18C (1)(a) *Racial Discrimination Act 1975*.

²² *Eatock v Bolt* [2011] FCA 1103; *Creek v Cains Post Pty Ltd* (2001) 112 FCR 352

61. Section 3 of the Bill seeks to change the comparator to an ordinary reasonable member of the Australian community.²³

62. We are concerned that the amendments draw focus away from the impact that racial vilification may have on a racial group and submit that section 3 of the Bill significantly decreases the current protections in the *Racial Discrimination Act 1975*.

63. We submit that it should be clear that the appropriate comparator for determining whether an act is 'reasonably likely' to vilify or intimidate another person or group is a reasonable member of the particular group.

Recommendations:

There should be specific protections against racial vilification in the *Racial Discrimination*

If the term 'vilify' is to be introduced it should have its ordinary meaning; and

The comparator for determining whether an act is 'reasonably likely' to vilify or intimidate another person or group should continue to be a reasonable member of the particular group. This should be included in the legislation.

64. If you would like to discuss any aspect of this submission, please contact Gabrielle Craig, Senior Solicitor or Shannon Williams, Senior Community Access Officer on 02 8745 6900.

Yours faithfully,
Women's Legal Services NSW

Janet Loughman
Principal Solicitor

²³ S. 3 *Freedom of Speech (Repeal of S.18C)* Bill 2014.