Submission on the Exposure Draft of the Freedom of Speech (Repeal of S.18C) Bill 2014

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About ANTaR

ANTaR is the pre-eminent non-Indigenous national advocacy organisation dedicated specifically to supporting the realisation of Justice, Rights and Respect for Aboriginal and Torres Strait Islander people.

ANTaR's focus is on the education and engagement of non-Indigenous Australians so that the rights and cultures of Aboriginal and Torres Strait Islander people are respected and affirmed across all sections of society.

ANTaR seeks to persuade governments, through advocacy, to show genuine leadership and build cross-party commitment to Aboriginal and Torres Strait Islander policy.

ANTaR works to generate in Australia a moral and legal recognition of, and respect for, the distinctive status of Aboriginal and Torres Strait Islander Australians as First Peoples.

ANTaR is a non-government, not-for-profit, community-based organisation.

ANTaR campaigns nationally on key issues such as constitutional recognition, justice, health equality, community development, native title and other significant issues.

ANTaR has been working with Aboriginal and Torres Strait Islander organisations and leaders on rights and reconciliation issues since 1997. In the course of our work over these years we have seen significant harm to the health and wellbeing of Aboriginal and Torres Strait Islander people, families and communities caused by racism.

Introduction

Thank you for the opportunity to comment on the Exposure Draft of the Freedom of Speech (Repeal of S.18C) Bill 2014.

ANTaR notes that the administration of the human rights framework poses the often vexed challenge of finding the right balance between competing rights.

ANTaR acknowledges that this tension exists between the right to freedom of speech and right to live free from discrimination.

ANTaR notes that racial discrimination can and does have a harmful effect on many people who are subjected to it, including but not limited to Aboriginal and Torres Strait Islander people.

ANTaR believes these are important social issues that are bound with our values and which define us as a society. Any amendment therefore ought to be carefully considered and involve considerable community debate.

ANTaR notes that the balance struck by the existing law in Sections 18C and 18D of the Racial Discrimination Act (1975) was carefully reached after years of national inquiries and debates in Parliament and the general community.[1]

ANTaR acknowledges that in this exposure draft, the Attorney seeks to have appropriate protections against racism and to defend freedom of speech.

The exposure draft has the following key features:

1. It repeals sections 18C, along with 18B, 18D and 18E
2. It inserts a new section that will make it unlawful to do anything that is reasonably likely to vilify or intimidate on the grounds of race
3. It defines vilify as the inciting of hatred
4. It defines intimidation as to cause fear of physical harm
5. It defines the reasonable persons test by the standard of ordinary Australians
6. It provides exemptions to the operating of the section

ANTaR National's general position

ANTaR opposes the proposed amendments to the Racial Discrimination Act as detailed in the Exposure Draft of the Freedom of Speech (Repeal of S.18C) Bill 2014.

ANTaR believes that the proposed changes that permit offensive, insulting and humiliating behaviour based on race, alter the standard of appropriate and acceptable community behaviour, and have the potential to lead to a less tolerant and less cohesive society.

ANTaR believes that the Racial Discrimination Act (1975) provides a balanced protection

[1] https://nationalcongress.com.au/joint-media-statement-groups-meet-with-attorney-on-rda-changes/

against racism and the impact of racial vilification without unreasonably impacting upon an individual's right to freedom of speech.

ANTaR emphasises that Aboriginal and Torres Strait Islander people experience a high level of racism and race-hate speech in their daily lives compared to most other Australians. A survey of 12,500 Australians of all backgrounds found that around 20% had experienced some form of race hate speech.[2] Aboriginal and Torres Strait Islander Australians report far more frequent experiences of racism and racial discrimination than other Australians[3]. In a study of racism experienced by Aboriginal and Torres Strait Islander people in urban Adelaide, across a range of settings, "64% of people experienced racism often or very often in at least one setting and 29% experienced it sometimes. Only 7% reported never or hardly ever experiencing racism in any of the settings"[4]. This indicates that racism and the experience of race-hate speech is a serious problem affecting the lives and the physical and mental health of Aboriginal and Torres Strait Islander people. It is important to understand this context when considering any changes to the RDA and to recognise the damage race hate speech causes to those who are its intended recipients.

Specific comments on the Exposure Draft

1. ANTaR is concerned with the removal of current protections that make it unlawful to 'offend, insult and humiliate' on the basis of race. Aboriginal and Torres Strait Islander people continue to regularly experience racism in the form of offence, insults and humiliation, which impacts on their health and wellbeing, including mental health[5], school attendance[6] and employment opportunities[7,8].

2. ANTaR is concerned with the narrow definition of 'vilify', reflecting only the inciting of hatred. This definition is not in line with dictionary or ordinary use of the term that defines vilify as to 'speak or write about in an abusively disparaging manner'[9]. The proposed changes do not protect an individual from disparaging racist speech. The effects of the racial abuse on the individual would be irrelevant in the determination of a case unless a third party was incited.

3. ANTaR is concerned with the narrow definition of intimidation as causing fear of physical harm. It is widely accepted that intimidation can also give rise to fear of

[2] Racism exists in Australia – Are we doing enough to address it? Szoke, H., Speech to University of Technology, Queensland , 16 Feb 2012, http://www.humanrights.gov.au/news/speeches/racism-exists-australia-are-we-doing-enough-address-it

[3] Larson et al (2007). It's enough to make you sick: the impact of racism on the health of Aboriginal Austrlians, Australian and New Zealand Journal of Public Health., Volume 31, Issue 4, pages 322–329, August 200

[4] Gallagher et al (2009) In our own backyard: Urban health inequities and Aboriginal experiences of neighbourhood life, social capital and racism, Fliners University, Adelaide.

[5] Paradies Y (2013) *Racism, Racial Profiling and Health*, Conference Paper, Deakin University

[6] http://www.racismnoway.com.au/about-racism/understanding/schools.html accessed April 23

[7] Carter R (2007) *Racism and Psychological and Emotional Injury: Recognizing and Assessing Race-Based Traumatic Stress,* The Counseling Psychologist, Vol 35 No. 1

[8] Boyd M (2007) *Living in a Culture of Anglo Dominance,*VicHealth Letter Issue 30, Department of Health Victoria

[9] http://www.oxforddictionaries.com/definition/english/vilify?q=vilify accessed April 22

other types of harm, including but not limited to psychological, emotional, economic and social harm and that the impact of such fear is as great as that of the fear of physical harm.

4. ANTaR believes that the impact on the victim's group should remain a relevant consideration when assessing the reasonable person test. As noted in a media release by the National Congress of Australia's First Peoples

> "We know intimately the impact that racist abuse has on our peoples. It undermines our sense of personal security and safety, can disenfranchise us even further from the rest of society, and literally makes us sick." Congress Co-Chair Kirstie Parker.[10]

The intimate experience and knowledge of this impact is likely to be unknown to an ordinary reasonable member of the Australian Community who does not have any significant contact with Aboriginal and Torres Strait Islander people. To exclude this experience and knowledge in a determination would be an example of inaccessible and unfair justice.

5. ANTaR is considerably concerned with the broad category of exemptions, believing that the exemptions are excessive in their reach. ANTaR agrees with the President of the Human Rights Commission in relation to the exemptions where she states that:

> "broad exemption will positively permit racial vilification and intimidation in virtually all public discussion"[11]

6. ANTaR is further concerned that there is no requirement that to be exempt, the public discussion must be conducted reasonably or in good faith (as required by section 18D currently). Meagher (2004, p245) suggests that clarity around case law interpretations defining 'good faith' as being the absence of spite, ill-will or other improper motive has ensured the application of this ruling without controversy for 20 years.[12]

The Racial Discrimination Act in practice

ANTaR notes that the majority of discrimination complaints made to the Human Rights Commission are resolved through conciliation.[13] In the few cases that have progressed to court, the courts have interpreted the Act and its exemptions so that only serious cases of offence and insult have had legal ramifications.[14]

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[10] National Congress of Australia's First Peoples Media Release 25 March 2014
[11] https://www.humanrights.gov.au/news/stories/race-law-changes-seriously-undermine-protections accessed April 22
[12] Meagher D (2004) *So Far So Good? Critical Evaluation of Racial Vilification Laws in Australia,* Hein OnLine
[13] http://hrlc.org.au/wp-content/uploads/2014/03/InformationPaperRacialVilificationLawsApril2014_B.pdf accessed April 22
[14] http://www.austlii.edu.au/au/legis/cth/bill_em/rdlab1992404/memo_0.pdf accessed April 22

The laws and their interpretations generally strike an appropriate balance between the right to freedom of expression and the right to freedom from racial discrimination and vilification.

In the case of *Eatock v Bolt*, ANTaR notes that the "inclusion of untruthful facts, the use of inflammatory and provocative language and the failure to minimise the potential harm to those likely to be offended" denied to Bolt the exemptions in the act that would have otherwise permitted his opinion as 'fair comment' and of 'genuine purpose in the public interest'.[15]

On this basis ANTaR believes there is no compelling reason to amend the Racial Discrimination Act (1975) as proposed.

ANTaR considers that there could be value in providing clarity to the legislation to provide greater precision in interpretations, particularly, with respect to 'profound and serious effects'.[16,17]

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Recommendations

Recommendation 1: That the Australian Government does not proceed with introducing the exposure draft of the Freedom of Speech (Repeal of S. 18C) Bill 2014 into parliament for the reasons outlined above.

Should the government decide to proceed with introducing the exposure draft of the Freedom of Speech (Repeal of S. 18C) Bill 2014 into parliament, ANTaR makes the following recommendations:

Recommendation 2: Maintain the prohibition on acts that offend, insult and humiliate on the basis of race but clarify the intent to mean serious cases, in line with established court interpretations of this clause.

Recommendation 3: Revise the definitions of 'intimidate' and 'vilify' to reflect their ordinary meanings.

Recommendation 4: Re-insert 'reasonableness', 'good faith' and 'public interest' requirements to be applied in consideration of exemptions.

Recommendation 5: Ensure the reasonable person's test requires consideration of the impact on the relevant racial group affected by the conduct.

[15] http://www.fedcourt.gov.au/publications/judgments/judgment-summaries#20111103 accessed April 22,2014

[16] Meagher D (2004) *So Far So Good? Critical Evaluation of Racial Vilification Laws in Australia,* Hein OnLine

[17] https://www.humanrights.gov.au/news/stories/racial-discrimination-commission-responds-exposure-draft accessed April 29,2014