AMNESTY INTERNATIONAL

Submission to
Attorney-General's Department
Proposed Amendments to the Racial Discrimination Act 1975

24 April 2014
Submitted by

Amnesty International Australia

Contact: Julian Cleary
Title: Campaigner- Indigenous Peoples' Rights
Phone: (03) 9412 0717
Email: Julian.Cleary@amnesty.org.au

Executive summary

Freedom of expression has always been a core part of Amnesty International's work and is closely linked to the right to hold opinions and the right to freedom of thought, conscience and religion. Since 1961 Amnesty International has campaigned on behalf of thousands of prisoners of conscience – people who are imprisoned because of their political, religious or other conscientiously held beliefs, ethnic origin, sex, colour, language or sexual orientation. Amnesty International upholds the right of everyone to freedom of thought, conscience, opinion and expression, as set out in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and other international human rights treaties. The right to freedom of speech is essential to, and interrelated with, the realisation and exercise of all human rights. It is not, however, absolute and may be subject to certain restrictions to ensure that it does not infringe on the rights of others, such as the right to be free from discrimination and protected from racial hatred. Any restrictions on freedom of expression must be prescribed by law, be necessary and strictly proportionate to a legitimate aim.

Amnesty International is concerned that the draft *Freedom of Speech (Repeal of s. 18C) Bill 2014* (the draft Bill) fails to strike an appropriate balance between the right to free speech and the rights of others to freedom from racial discrimination and protection against racial hatred. The draft Bill would repeal provisions of the *Racial Discrimination Act 1975* (RDA) that provide essential recourse to culturally and linguistically diverse people and groups, including Aboriginal and Torres Strait Islanders, who continue to suffer racial abuse, vilification and the harmful long term psychological and health effects that result from it.

The current provisions are part of a framework for conciliation by the Human Rights Commission that focuses on resolving legitimate complaints in a non-adversarial manner. The current RDA provisions ensure a reasonable balance by exempting a broad range of expression that is made reasonably and in good faith. Such exemptions are provided for fair and accurate reporting of matters in the public interest and expression for genuine academic, artistic or scientific purposes.

The draft Bill defines racial vilification narrowly as "incitement to hatred." Racial intimidation is also restrictively defined as fear of physical harm. Amnesty International considers that the limited scope of the proposed protections and breadth of exceptions under the draft Bill combine to breach Australia's international obligations to protect individuals and groups from racial discrimination and hatred. Contrary to the Attorney-General's Media release of 25 March 2014 which accompanied the draft Bill, these laws will not strengthen the RDA's protections against racism; they will weaken them significantly.

Amnesty International **provides the following recommendations** to the Attorney-General's Department:

1. That the draft Bill not be introduced.

2. That any future amendments to the RDA be drafted to conform to Australia's international legal obligations.

3. That if, contrary to recommendation 1, the draft Bill is introduced:

    3.1. the definitions of vilification and intimidation be broadened to reflect their ordinary meaning; and

3.2. subsection 3 be repealed so that impact of an act on the victims group remains relevant when assessing what is reasonably likely to vilify or intimidate; and

3.3. subsection 4 be amended to include a requirement of reasonableness and good faith for any exempt public discussion; and

3.4. section 18E, relating to vicarious liability of employers, be retained as currently in force; and

3.5. section 18B, which clarifies the treatment of an act done for more than one reason, be retained as currently in force.

About Amnesty International

Amnesty International is a worldwide movement to promote and defend all human rights enshrined in the Universal Declaration of Human Rights (UDHR) and other international instruments, including the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Declaration on the Rights of Indigenous Peoples (the Declaration). Amnesty International undertakes research focused on preventing and ending abuses of these rights. Amnesty International is the world's largest independent human rights organisation, comprising more than 4.6 million supporters in more than 160 countries and over 335,000 supporters in Australia. Amnesty International is impartial and independent of any government, political persuasion or religious belief. It does not receive funding from governments or political parties.

Freedom of Expression

The UDHR and ICCPR recognise and protect the rights of all individuals to freedom of expression, which applies to information and ideas of all kinds, including those that others may find deeply offensive. Article 19 of the ICCPR recognises and protects the rights to freedom of opinion[1] and expression. Article 19(2) states that:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Under Article 19.3 the exercise of freedom of expression is said to carry with it "special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary...[f]or respect of the rights ...of others." While limitations on free speech must remain an exception, the ICCPR provides that there is a need to strike a balance between the right to free expression and other human rights, including the right to be free from discrimination, protected under Article 2.1 of the ICCPR and Article 2 of the Declaration. Such restrictions "may not put in jeopardy the right itself' and "must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated."[2]

Article 20 of the ICCPR places a positive obligation on Australia to prohibit by law any "advocacy of ...racial ... hatred that constitutes incitement to discrimination, hostility or violence." Limitations on such expression are recognised as not merely permissible, but obligatory to protect people

[1] Under Article 19(1) of the ICCPR the right to freedom of opinion is unqualified in nature: "[e]veryone shall have the right to hold opinions without interference." It "is a right to which the Covenant permits no exception or restriction": United Nations Human Rights Committee (UNHRC), General Comment No. 34: Freedoms of opinion and expression (Art. 19) (12 September 2011).

[2] UNHRC, General Comment No. 34, above n 1.

from racial hatred.[3] The United Nations Human Rights Committee interprets this obligation as "fully compatible with the right of freedom of expression."[4] Under Article 4(a) of the CERD, Australia has undertaken to "adopt measures to eradicate all incitement to, or acts of, racial hatred, including by making it an offence to disseminate ideas based on racial hatred and incitement to racial discrimination."[5]

These international instruments recognise the severity of the physical and psychological harm caused to victims, to community harmony and social cohesion when hate speech, vilification and expression that advocates racial hatred is unfettered. There is an enduring need for such protection in Australia where, according to Human Rights Commission President Gillian Triggs, complaints about racial hatred rose by 59 percent last year.[6]

Racial Discrimination Act 1975, Part IIA -Prohibition of offensive behaviour based on racial hatred

Section 18C of the RDA is directed toward implementing Australia's treaty obligations to eliminate all forms of racial discrimination under the CERD, including Article 4(a).[7] The draft Bill would repeal section 18C along with 18B, 18D and 18E.[8] These provisions were inserted into the RDA by the *Racial Hatred Act 1995* under new *Part IIA—Prohibition of offensive behaviour based on racial hatred* (Part IIA). In his 2nd reading speech about Part IIA then Attorney-General Lavarch said these laws were:

> intended to close a gap in the legal protection available to the victims of extreme racist behaviour. No Australian should live in fear because of his or her race, colour or national or ethnic origin.... Three major inquiries have found gaps in the protection provided by the Racial Discrimination Act. The National Inquiry into Racist Violence, the Australian Law Reform Commission Report into Multiculturalism and the Law, and the Royal Commission into Aboriginal Deaths in Custody all argued in favour of an extension of Australia's human rights regime to explicitly protect the victims of extreme racism.[9]

The inquiries mentioned above documented the very real harms caused by racist words and conduct. The three inquiries also identified a strong link between public racially vilifying conduct experienced by Aboriginal, Torres Strait Islander and other culturally diverse groups and racially-motivated violence. The insertion of Part IIA sought to respond to these significant and enduring concerns in a way that achieves a reasonable balance between free speech and the harm caused by racial hatred.

Section 18C makes certain offensive behaviour based on racial hatred unlawful but does not

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[3] UNHRC, General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20) (07/29/1983).

[4] UNHRC, General Comment No. 34, above n 1, CERD Committee, General Comment 35 (26 September 2013).

[5] When ratifying the CERD, Australia made a declaration that it was not then " in a position specifically to treat as offences all the matters covered by Article 4(a)... It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of Article 4(a)."

[6] SBS News 'Racial abuse could flourish: Triggs' (9 April 2014) http://www.sbs.com.au/news/article/2014/04/09/racial-abuse-could-flourish-triggs (accessed 10 April 2014).

[6] 'Compromise suggested on changes to Racial Discrimination Act' *The Guardian* (9 April 2014). http://www.theguardian.com/world/2014/apr/09/compromise-plan-racial-discrimination-act (accessed 14 April 2014).

[7] *Toben v Jones* [2003] FCAFC 137 [137]. For a comprehensive background on this topic see paragraphs [96]-[148] of Justice Kiefel's judgement in this case which dealt with the constitutional validity of the RDA in the context of holocaust denial.

[8] The draft Bill would leave in place only section 18F under Part IIA. Section 18F provides that this Part "is not intended to exclude or limit the concurrent operation of any law of a State or Territory."

[9] Hansard (No. 198, Tuesday, 15 November 1994), p. 3336 (Mr Lavarch, Racial Hatred Bill 1994).

make it a criminal offence.[10] It interacts with *Part IIB* of the *Australian Human Rights Commission Act 1986*, which allows people to make complaints about allegedly unlawful acts. The Human Rights Commission plays an essential role in receiving and investigating complaints; facilitating conciliation; and, in some circumstances where conciliation is unsuccessful, providing assistance to complainants to seek relief through the courts.[11] The strong conciliatory and support role played by the Commission has not been adequately recognised in debate around proposed changes.[12] Conciliation is free and often leads to resolution of racial hatred complaints through an apology, removal of racially vilifying content from websites, education and financial compensation.[13] This provides a way for tension between parties to be resolved before it escalates, including to the situation of racial violence. Conciliation provides complainants, many of whom have limited resources, with access to justice and contributes to social cohesion. By contrast, the law of defamation provides limited recourse for disadvantaged people and groups because of the prohibitive costs involved. State and Territory Legal Aid services, Community Legal Centres and the Aboriginal Legal Services do not generally take on defamation cases as they do not have the resources or capacity.

Section 18C-Offensive behaviour because of race, colour or national or ethnic origin

Section 18C currently makes it unlawful for a person to do a public act that is reasonably likely to offend, insult, humiliate or intimidate a person or group where the act is done because of their race, colour or national or ethnic origin. The Federal Court has consistently found violation of section 18C to require "profound and serious effects, not to be likened to mere slights."[14] In *Eatock v Bolt*, Justice Bromberg cited and agreed with the conclusions reached in earlier Federal Court judgements,[15] noting that:

> 18C is concerned with mischief that extends to the public dimension. A mischief that is not merely injurious to the individual, but is injurious to the public interest and relevantly, the public's interest in a socially cohesive society.[16]

At a recent press conference relating to the draft Bill, the Attorney-General does not appear to have taken note of the above judicial interpretation. The Attorney-General said the following:

> Those three words – offend, insult and humiliate – describe what has sometimes been called hurt feelings...
>
> You can't have a public discussion of an issue, particularly an issue about which people feel very strongly... without offending or insulting a person who has a strong contrary view. ..The word humiliate is also gone, because it's not possible to have a public discussion about a difficult issue about which different people feel strongly without running the risk that somebody who takes a strong contrary point of view

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[10] A note included under Section 18C of the RDA clarifies that "Section 46P of the Australian Human Rights Commission Act 1986 allows people to make complaints... about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence."

[11] *Australian Human Rights Commission Act 1986*, s 46PH(1)(h) and (i).

[12] 44% of all finalised complaints under the RDA received by the Commission in 2012-13 went to conciliation, and of these 61% were successfully conciliated: Australian Human Rights Commission 'Annual Report 2012-13', p 136.

[13] Racial Discrimintation Act 1975 - Complaints conciliated in the period January – June 2011 https://www.humanrights.gov.au/complaints/conciliation-register/racial-discrimination-act-1975-complaints-conciliated-period#racial (accessed 22 April 2014)

[14] *Creek v Cairns Post* (2001) 112 FCR 352, 356, Kiefiel J at [16], *Jones v Scully* (2002) 120 FCR 243, 269, [102], *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16, [70].

[15] *Eatock v Bolt* [2011] FCA 1103, [268].

[16] *Eatock v Bolt* [2011] FCA 1103, [263].

might feel that their view is being mocked.[17]

Section 18C, as interpreted by the courts, does not protect from hurt feelings. It proscribes profound and serious racial offence, insults, humiliation and intimidation while the following section exempts a wide range of areas of public discussion and debate. Under section 18D, good faith public discussion about contentious issues is lawful even where it profoundly and seriously offends or humiliates people with strong contrary views (see below). The narrow class of speech limited by Part IIA, as currently drafted, protects individuals and groups against racial vilification and inflammatory commentary that is neither fair nor accurate.[18] It does so in a way that promotes conciliation and imposes no criminal sanctions.

Amnesty International **recommends**:

- That the draft Bill not be introduced.

Subsection 1 of the draft Bill- Unlawful to Vilify or Intimidate

The draft Bill would repeal section 18C. Subsection 1 of the draft Bill would make it unlawful for a person to do an act that is reasonably likely to *vilify* or *intimidate* another person or group where the act is done because of their race, colour or national or ethnic origin.

Under subsection 2(a) of the draft Bill, vilify is defined narrowly as to "incite hatred against a person or group." The Attorney-General has said that this wording is based on similar provisions in state jurisdictions. However, State laws that use similar wording for intimidation include incitement of "serious contempt for or severe ridicule" alongside hatred.[19] The former are lower thresholds than hatred but incitement, generally, has proved difficult to demonstrate because it is necessary to show that a third party would be urged, spurred on, stirred up, animated or stimulated to feel hatred, serious contempt or severe ridicule by the conduct.[20] Amnesty International considers that defining vilification in this limited way inadequately takes account of the harm caused to the victim by racially vilifying conduct.

Under subsection 2(b) of the draft Bill, intimidate is defined as "to cause fear of physical harm" to a person; the property of a person or to the members of a group. There is no reference in the definition to psychological or other forms of harm. Amnesty International considers that the threshold for conduct amounting to vilification or intimidation under the draft Bill is too high to provide meaningful protection from racial vilification and intimidation.

Amnesty International **recommends that if, contrary to our primary recommendation, the Bill is introduced**:

- The definitions of vilification and intimidation should be broadened to reflect their ordinary meaning.

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17 Attorney-General Brandis, Press Conference, 'Racial Discrimination Act', Parliament House (25 March 2014).

18 Despite the term not specifically being used in the RDA Part IIA is widely understood to be directed towards racial vilification. For example, in B*ropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16, [now Chief] Justice French said that "In Pt IIA the Commonwealth Parliament appeared to have intended to strike a balance between the right to freely express or communicate certain matters and ideas and the right to live free from vilification", [33].

19 *Anti-Discrimination Act 1977 (NSW)* s 20C(1), *Anti-Discrimination Act 1991 (Qld)* s 124A(1), *Anti-Discrimination Act 1998 (Tas)* s 19, *Discrimination Act 1991(ACT) s 66(1), Racial and Religious Tolerance Act 2001 (Vic)*, s 7, *Racial Vilification Act 1996 (SA)* s 4. The *Criminal Code Act Compilation Act 1913 (WA)* does not use similar language and there is no equivalent Northern Territory provision.

20 Kazak v. John Fairfax Publications Ltd [2000] NSWADT 77.

Subsection 3 of the draft Bill- Determining whether an act is reasonably likely to vilify or intimidate

Under subsection 3 of the draft Bill, whether an act is reasonably likely to vilify or intimidate "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 provision would override the current situation at common law as set out by Justice Bromberg, according to which:

> Whether conduct is reasonably likely to offend, insult, humiliate or intimidate a group of people calls for an objective assessment of the likely reaction of those people. I have concluded that the assessment is to be made by reference to an ordinary and reasonable member of the group of people concerned and the values and circumstances of those people.[21]

In his press conference on the proposed legislation the Attorney-General said that:

> Subsection 3 restates the community standards test. That was always understood to be the law, the meaning of Section 18C before the Bolt case. But in that case, the judge took a very narrow view of how reasonableness was to be decided. He thought that the relevant group was a representative member of the so-called victim group rather than a reasonable member of the Australian community...We believe that the test of reasonableness in this area of the law, as in all others, ought to be community standards.

Amnesty International notes that prior to that case there appears already to have been "some consensus that the relevant standard is closer to the reasonable victim rather than reasonable person of the generic, ostensibly 'neutral' kind."[22] Amnesty International shares concerns that the words "not by the standards of any particular group" are likely to have the effect that 'the hypothetical reasonable person within the group that experiences the least racial intimidation and vilification will set this standard on behalf of those who are far more likely to have such experiences."[23] Political and historical factors may cause people from a particular group to feel legitimately intimidated or vilified by conduct in ways that would not be evident to "an ordinary reasonable member of the Australian community." Under subsection 3 of the draft Bill there would not be scope for such factors to be taken in to account.

Amnesty International **recommends that if, contrary to our primary recommendation, the Bill is introduced:**

- Subsection 3 be repealed so that the impact of an act on the victims group remains a relevant consideration when assessing what is "reasonably likely to vilify or intimidate."

Current Section 18D-Exemptions

Under the RDA, as currently drafted, anything said or done reasonably and in good faith in the performance, exhibition or distribution of an artistic work is exempted under 18D and therefore lawful. This is also the case for statements, publications, discussions or debate made or held for a genuine academic, artistic or scientific purpose or other genuine purposes in the public

[21] *Eatock v Bolt* [2011] FCA 1103, [15].
[22] Dan Meagher, 'So Far So Good: A Critical Evaluation of Racial Vilification Laws in Australia' *Federal Law Review* 32 (2004), 225.
[23] Sarah Joseph, 'Rights to bigotry and green lights to hate' *The Conversation* (28 March 2014).

interest. Making or publishing a fair and accurate report of any event or matter of public interest is exempt, so too is fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making it.

Amnesty International considers that the broad range of existing exemptions under section 18D should be retained as currently drafted. In their current form they ensure that both the right to freedom from racial discrimination and the right to freedom of expression are strongly protected.

Good faith and reasonableness

In *Bropho v Human Rights and Equal Opportunity Commission*, Justice French, now Chief Justice of the High Court of Australia, considered the requirement of good faith in detail. He concluded that whereas current section 18C "condemns racial vilification of the defined kind" section 18D "protects freedom of speech and expression." He goes on to say that "the good faith exercise of that freedom... will honestly and conscientiously endeavour to have regard to and minimise the harm it will, by definition, inflict. It will not use those freedoms as a 'cover' to offend, insult, humiliate or intimidate people by reason of their race."[24]

In the above case Chief Justice French said that reasonableness required a consideration of proportionality which takes in to account the purpose of Part IIA including the recognition of the two competing values of free speech and protection from racial vilification that are protected by those sections."[25]

Exemptions under subsection 4 of the draft legislation

Under subsection 4 of the draft Bill, the repealed 18D exemptions would be replaced by a provision whose effect will be that it is acceptable to incite racial hatred or intimidate a person or group on the grounds of their race if the expression is made in the course of "public discussion of any political, social, cultural, religious, artistic, academic or scientific matter." Amnesty International considers that the breadth of this exemption removes any meaningful protection from racial vilification and intimidation.

Similar state based anti-discrimination provisions uniformly require that public discussion be engaged in "reasonably and in good faith" and that reporting be fair.[26] Amnesty International is concerned that in the absence of a requirement of good faith, the broad public discussion exemption will readily serve as cover for people to incite hatred and physically intimidate people by reason of their race.

Amnesty International **recommends that if, contrary to our primary recommendation, the Bill is introduced:**

- Subsection 4 should be amended to include requirements of reasonableness and good faith for exempt public discussion.

Current Section 18E- Vicarious Liability

The draft Bill would repeal section 18E, under which an employer may be made liable for conduct by their employee (or agent) which happens in connection with their work and which would breach section 18C. An employer is currently liable unless they can show they took all reasonable steps to prevent the employee from so behaving. The draft Bill does not replace this

[24] *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16, [95].
[25] *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16, [79].
[26] *Anti-Discrimination Act 1977 (NSW)* s 20C(2), *Anti-Discrimination Act 1991 (Qld)* s 124A(2), *Anti-Discrimination Act 1998 (Tas)* s 55, *Discrimination Act 1991(ACT) s 66(2), Racial and Religious Tolerance Act 2001 (Vic)*, s 11.

with any similar liability provision. Amnesty International notes that there is no explanation in the media release accompanying the draft, or other available materials, as to why this provision should be repealed.

Case law on similar vicarious liability provisions in discrimination law, which has been referred to in the context of 18C,[27] highlights the importance of implementing effective workplace education programs identifying what sort of conduct is not acceptable; emphasising that the behaviour is not condoned and incorporating effective procedures to prevent it.[28] Amnesty International considers that repeal of this provision may jeopardise workplace education about unlawful vilification and take the onus off employers to be proactive, and take reasonable steps, to prevent it in the workplace. Amnesty International is concerned that employers, no longer facing possible liability for damages, may be less inclined to condemn racially vilifying conduct by staff, even where it happens in their presence. This may have damaging consequences for social cohesion in hospitality venues, on public transport and in the media.

Race Discrimination Commissioner Dr Tim Soutphommasane further notes that section 18E "has been an important weapon in the legal armoury of those who have sought to hold internet service providers and social media platform providers to account for racist material they allow to remain published."[29]

Amnesty International **recommends that if, contrary to our primary recommendation, the Bill is introduced**

- Section 18E should be retained as currently in force.

Current Section 18B- Reason for doing an Act

Under the draft Bill section 18B would also be repealed. Section 18B says that if an act is done for two or more reasons and one of the reasons is the race of the person, the act is taken to be done because of the person's race (whether or not it is the dominant reason or a substantial reason for doing the act).

Amnesty International considers that guidance as to how such an act should be interpreted by the courts is an important feature of the current legislation which should be retained. There is no explanation in the media release accompanying the draft as to why this provision should be repealed.

The effect of repealing section 18B is not entirely clear. Amnesty International is concerned, however, that courts may interpret the repeal as evidence of a legislative intention that complainants need to demonstrate that the dominant reason an act was done was due to their race, colour, national or ethnicity origin. This would make racial vilification or intimidation still more difficult to prove.

Amnesty International **recommends that if, contrary to our primary recommendation, the Bill is introduced**

- Section 18B should be retained as currently in force.

*27 Korczak v Commonwealth [*1999] HREOCA 29, [8.4].
28 Vance v State Rail Authority [2004] FMCA 240 [56].
29 Dr Tim Soutphommasane, 'In defence of racial tolerance' Speech to Australia Asia Education Engagement Symposium, Melbourne (1 April 2014) https://www.humanrights.gov.au/news/speeches/defence-racial-tolerance (accessed 22 April 2014).