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Human Rights Policy Branch

Attorney-General's Department

3-5 National Circuit

BARTON ACT 2600

Via email: s18cconsultation@ag.gov.au

Dear Attorney General,

**PROPOSED CHANGES TO RACIAL VILIFICATION LAWS**

On 25 March 2014, you announced the details of proposed changes to Australia’s racial vilification laws and released the draft legislation Freedom of Speech (Repeal of s 18C) Bill 2014 publicly for consultation. Below is my submission on the proposed.

In general, I am in support of changes to section 18C of the Racial Discrimination Act (RDA) to be made in order to restore proper balance between freedom of expression and protection from racial vilification.

In my view, the only exception to freedom of speech should be when it calls for action that could result in violence, for example against people of certain social classes or racial or religious backgrounds and when it threatens national security and public safety.

Civil liberties and freedoms, in particular freedom of speech, play a very important role in modern society. They do so by adding to innovation, eliminating costly mistakes and giving modern societies their competitive edge. One characteristic of freedom of speech is that it may sometimes allow incorrect or offensive information to enter the public domain and this, of course, may hurt the feelings of some. But there should be no right to not be offended – especially enforced by criminal sanctions. Indeed, freedom to offend can go hand in glove with freedom of speech. Should astronomer Copernicus have refused to publish his heliocentric theory simply because he feared offending the Church and badly undermining the feelings of Catholics at the time? Progress might often depend on one person risking to offend by advancing an idea that proves to be right.

My submission is based on the following facts:

1. **Australia culture focuses on equality**

Historically speaking, Australia’s laws and culture focus more on equity and anti-discrimination and neglect protecting our civil liberties and freedoms. This lack of focus on civil liberties in Australia is further advanced by the fact that we are the only western democracy with no legislative Bill of Rights to protect our fundamental freedoms. Section 18C and the resulting judgement in the Bolt case provide a clear illustration of this point. Another illustration is the Australian Human Rights Commission’s past support of the former Labor Government plan to create statutory media regulation in response to the Finkelstein Inquiry or AHRC support for the abolition of the Australian Human Rights Commissioner position that is responsible for civil liberties and freedoms as defined under International Covenant on Civil and Political Rights (ICCPR).

1. **Educate to combat racist expression**

Informed engagement and education - not criminal sanctions - provide a more effective response to those who mistakenly advance incorrect historical or social facts or are simply saying offensive things about minority groups. Denying of Holocaust, criticising homosexuality from the pulpit, tweeting racist comments about a soccer player and criticising the Islamic ritualised slaughter of animals attracted convictions and penalties in different countries. But it is hardly believable that such convictions resulted in changes to the public opinion; if anything they build resentment of “political correctness” and support for the offenders.

Thus, additional resources should be provided for education, and in particular human rights education in our schools where attitudes of young Australians are being formed.

In addition, the issue of offending someone’s feelings because of reference to his social background, ethnicity or race should be left in the domain of the nation’s libel laws.

1. **Tolerance and political correctness**

The above goes to the crux of the matter. There is a movement amongst Western democracies towards globalisation of “political correctness”. Words are banned that are regarded offensive or not complying with certain moral or political standards. For example the word *“wife*” was first replaced by *“spouse”* and now is being replaced by the word *“partner”.* About 20 years ago some leaders in the ethnic communities in Australia started to argue that the word *“tolerance”* is offensive and should be ex-communicated from the public vocabulary. It was argued, that tolerance means to *“be put up with”* and that minorities should be respected for their contribution to Australia and not just being put up with.

From my point of view, tolerance is a notion worth preserving in our society. Tolerance is simply a beginning of a spectrum leading to respect or love. But common sense dictates that one cannot legislate for respect or love for all – both need to be earned. If only Nazis would have tolerated Jews and Poles during WWII, Poland would not have lost 6 million of its citizens. Similarly, no law can abolish bigotry. To deal with bigotry we need to build a better understanding and respect for the social differences that are part of our country. Bigotry will be defeated by free speech not new laws.

1. **Criminalisation does not work**

It is difficult to find evidence in support of the proposition that our freedom of speech needs to be curtailed because it grows racism in Australia or because of sensitivities associated with Australia as a multicultural society. For example compare Australia with the USA, which has both a very diverse population that includes a range of historically disadvantaged minority groups (Indian and African Americans) and a Constitutional Bill of Rights with a strong protection of a freedom of speech. One could reasonably argue, however, that the USA race relations and anti discrimination measures work better than those in Australia. This is despite the USA having a much greater freedom of expression, resulting in publication of books of ethnic jokes that I personally found to be offensive to my heritage.

1. **Limited past impact of 18C**

Further, there is no evidence that insertion of 18c in 1995 diminished racism or has made any noticeable impact of attitudes or behaviour towards diversity in Australia. Since post-WWII migration took place Australia continues to be a tolerant country with high intermarriage rates and relative social harmony.

The recent claim by the AHRC President that Australians are not concerned about freedom of speech because of a small number of complaints lodged with her Commission is simply not right. The fact is that the procedures involved and the sanctions resulting from infringements of the provisions of sex, disability and race anti-discrimination laws are vastly different to those applying to infringements under ICCPR. Anti discrimination laws provide for significant compensation and open access to the courts, while ICCPR infringements result in a report to Parliament.

1. **Subjective feelings versus objective judgements**

Finally the introduction *of “the standard of an ordinary member of the Australian community”* test is to be welcomed as it assumes the equality before the law principle and gives focus to objective rather than subjective interpretation of the circumstances. For example, when my Labor colleagues called me “*comrade”* in the past I have found it offensive and humiliating because of my past experience of Soviet comrades and dislike of communist system. But I understand that the word is not offensive to the broader Australian community.

In short I suggest the following:

1. I support the effort of the Australian Government to introduce changes into the Racial Discrimination Act to create better balance between freedom of expression and protection from racial vilification and violence. In particular the words *“offend”, “insult”* and *“humiliate”* should be removed from the RDA as there is no evidence that criminalisation of so-called hate speech elsewhere in the world has markedly contributed to social harmony and peace.
2. RDA should prohibit any call to violence against Australians on the basis of race and racial vilification where it creates serious effects.
3. More resources should be made for human rights education at our schools.

Yours sincerely



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Former Australian Human Rights Commissioner (2000-05)