AASW
Australian Association of Social Workers

Submission to the Attorney-General of Australia in response to the Freedom of Speech (repeal of s. 18C) Bill 2014 – Exposure draft

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Introduction

Who we are

The Australian Association of Social Workers (AASW) is the professional body representing more than 7500 social workers throughout Australia.

We set the benchmark for professional education and practice in social work and have a strong voice on matters of social inclusion, social justice, human rights and issues that impact upon the quality of life of all Australians.

The social work profession

Social work is the profession committed to the pursuit of social justice, the enhancement of the quality of life, and the development of the full potential of each individual, group and community in society.

Principles of social justice, human rights, collective responsibility and respect for diversities are central to the profession of social work and are underpinned by theories of social work, social sciences, humanities and indigenous knowledge.

Social workers work with individuals, families, groups and communities. Social workers consider the relationship between biological, psychological, social, cultural and spiritual factors and how they impact on a client's health, wellbeing and development. Accordingly, social workers maintain a dual focus in both assisting with and improving human wellbeing and identifying and addressing any external issues (known as system or structural issues) that may impact on wellbeing such as inequality, injustice and discrimination.

Social workers are therefore uniquely placed to consider and respond to the Freedom of Speech (repeal of s. 18C) Bill 2014 as it relates not only to the individuals directly affected by racial discrimination, but the broader impacts on families, communities and society as a whole.

Our submission

The Australian Association of Social Workers makes this submission to the Attorney-General of Australia in response to the Freedom of Speech (repeal of s. 18C) Bill 2014 - Exposure Draft (the Bill).

The AASW welcomes the opportunity to comment on this important issue.

The AASW calls on the Federal government to make the findings of this consultation process available to the public. We believe this is critical to fostering an informed and meaningful public debate such that the best possible outcome for all Australians can be achieved.

The AASW calls on the Australian government to undertake further consultation with the Australian public and, in particular, with communities who are most likely to be impacted by this Bill. Available evidence on the experience of racism in Australia points to the central importance of consultation with Aboriginal and Torres Strait Islander and recent migrant communities.

Summary

The AASW welcomes this opportunity to comment on the Freedom of Speech (repeal of s. 18C) Bill 2014 – Exposure Draft (the Bill).

This submission challenges the basic premise of the proposed changes to the *Racial Discrimination Act 1975* (the Act) and suggests the Bill will be detrimental to the health and wellbeing of all Australians should it be passed. In summary, the AASW strongly rejects the Bill on the basis that:

a) There is significant evidence to demonstrate the worrying prevalence and impacts of racism in Australia. To pass this Bill would be to condone verbal and written racism and therefore increasing levels of physical, psychological and social harm that will have long-term consequences for the health and wellbeing of many Australians.

b) This Bill sends a message to the international and local community that Australia is a country that does not respect international human rights law and will tolerate racism.

c) The 'Bolt case' rationale is unsound. There is no evidence that Mr. Bolt's freedom of speech was restricted. The finding of the court in the Eatock v. Bolt case found that Mr Bolt's articles "contained multiple errors of fact" and "distortions of the truth". It was on that basis and that basis alone that Mr Bolt's case was rejected.

d) There is insufficient evidence to support the proposed amendments and we believe this is not conducive to meaningful law reform.

e) Prioritising the right to freedom of speech over the right to protection from racial vilification (in the commonly understood meaning of the word) is contra to Australia's obligations as a signatory to the International Covenant on Civil and Political Rights.

f) International human rights law expressly allows for restrictions to free speech in order to protect against the harm of racial vilification.

g) There has been no evidence presented by the Federal government to suggest that the Act is not achieving its purpose. Indeed, available evidence suggests the Act has achieved its purpose despite early reservations.

h) The repeal of sections 18C & D will serve to render the Act almost meaningless. Conduct that could be considered to be racially discriminatory will be so narrow and such conduct so difficult to prove that the changes if passed would largely allow unfettered racism in this country.

i) The Act has a role in setting community standards of conduct. The standards of conduct outlined in the Bill are so low as to send the message to the Australian public that racism is acceptable. This will cause significant distress to the many people affected by racism in this country every day.

j) The exemptions proposed to replace section 18D are so broad that it is likely that most public racial vilification will be protected, arguably even that which incites hatred or fear of physical harm will be allowed.

Discussion

1. Why maintenance of effective racial discrimination laws are imperative to the health and wellbeing of individuals and society

1.1 Racial discrimination is a significant problem in Australia

Racial discrimination is a significant problem in the Australian community. In the past year, verbal racial abuse affected 1 in 5 Australians.[1] In the same period, there has been a 59% increase in complaints of racial abuse to the Australian Human Rights Commission.[2] In addition to recent and well-publicised examples of racial abuse on the sports field and public transport, research by a number of reputable bodies including VicHealth and the Scanlon Foundation has documented widespread racial discrimination.[3]

A recent and significant national study of racism in Australia,[4] found that 41% of Australians have narrow views about who belongs in Australia and one-in-ten Australians have very problematic views, such as the view that some races are naturally inferior or superior. One-in-six Australians reported experiencing racial discrimination in the public domain, predominantly in the form of name calling and insults.

Specific populations of Australians are particularly at risk of racial abuse. 75% of Aboriginal and Torres Strait Islanders report regularly experiencing racism.[5] A recent national survey of immigrants who arrived in Australia between 2000 and 2010[6] found that 41% had experienced discrimination on the basis of skin colour, ethnic origin or religion in past 12 months.

1.2 Racial discrimination causes physical, psychological and social harm

Racial discrimination and vilification causes harm to the health and wellbeing of Australians. Of particular relevance to the Bill, is the fact that racial discrimination causes psychological and social harm *in addition to physical harm*. International studies show that public experiences of racism are related to poor physical and mental health, particularly depression, anxiety and substance misuse.[7] These findings have been replicated in Australia and are particularly significant for Indigenous populations.[8] Poor health and mental illness limit or undermine an individual's capacity to contribute to and participate in social life including for example, employment and education.

Social harm in this context results when members of the Australian community are excluded, resulting in social isolation as well as limitations on participation in public life. A major study of the impacts of racism in Victoria,[9] found that two thirds of victims coped with their experiences of racism by avoiding public settings in which racism might occur including public transport, shops, educational institutions and sporting events. Twenty-three percent responded that they did not feel safe to participate in activities that many Australians take for granted.[10] Social isolation in and of itself has been shown to result in higher rates of mental illness and poor health outcomes over the lifespan[11].

[1] Dunn et al 2012
[2] Ibid
[3] Human Rights Law Centre 2014, p. 4
[4] Dunn et al 2012
[5] Paradies, Y, Harris, R & Anderson, I 2008
[6] Markus, A 2013, p. 1
[7] Paradies, Y 2008
[8] Paradies, Y, Harris, R & Anderson, I 2008
[9] VicHealth 2012
[10] Ibid
[11] Friedli 2009

1.3 Harm from racial discrimination has far-reaching consequences

The AASW believes that these harms are not confined to the individuals who are the targets of racial discrimination and vilification. Australian society as a whole suffers when members of our community are unable to fully participate in public life. Clearly, the relationships between racial discrimination and social harms are complex and multi-layered, however in the most basic terms the inability to fully participate in education and employment, whether due to poor physical or mental health, impacts on the capacity to earn a living, sustain housing and rise above poverty. Avoidance of public settings has implications for children in such families, whereby children miss out on participation in social or cultural events and thus opportunities for learning, development and the formation of a sense of belonging and community. The poverty or disadvantage of families thus has intergenerational effects and creates a burden on health and welfare systems. We believe the integrity of racial discrimination laws are one important component in tackling and reducing these multiple and complex issues over generations.

Finally, the AASW believes that all Australians suffer when we undermine opportunities to learn about and from culturally and linguistically diverse communities. We believe diversity is enriching and adds immeasurable value to Australian community life. Measures that will enhance the participation of populations currently subject to racial discrimination should be protected and promoted.

2. Protecting against the harm of racial discrimination is a legitimate balancing of the right to free speech[12]

2.1 Australia is a party to the International Covenant on Civil and Political Rights (ICCPR).

The ICCPR enshrines three international human rights relevant to the Freedom of Speech Bill 2014; namely the freedom of opinion, freedom of expression and freedom from discrimination.

2.2 The ICCPR recognises that the need for freedom of expression to be limited to protect against the harm of racial vilification.

While the freedom to hold an opinion is absolute, that is, it cannot be restricted, the ICCPR recognises that the right to freedom of expression may be subject to restrictions where necessary to respect the rights and reputations of others. International human rights law specifically recognises the need to limit freedom of expression to protect against the harm of racial vilification. As a signatory to the ICCPR, Australia has an obligation to prohibit by law “any advocacy of racial hatred that constitutes an incitement to discrimination, hostility or violence”.

2.3 Freedom of speech should not compete with or over-ride the right to be protected from racial vilification

As international law makes clear, the right to freedom of speech and the right to be protected from racial vilification is not an ‘either/or’ proposition. As Australian Human Rights Commission President, Prof. Gillian Triggs states in relation to governments proposed changes to the Act, pitting one human right against another is a “fruitless exercise”. Rather, Prof. Triggs argues, Australian law must have the capacity to protect all human rights and freedoms[13].

[12] Human Rights Law Centre 2014

[13] Address to the National Press Club, retrieved 10 April 2014, http://www.abc.net.au/news/2014-04-09/national-press-club-gillian-triggs/5378938

3. The rationale for the proposed changes to the Act

3.1 The Bolt argument

The Federal government has made it clear that it believes the outcome of the Eatock v. Bolt case was wrong. The Federal government has also made it clear that it believes this outcome constituted an unacceptable restriction to Andrew Bolt's freedom of speech and has used this as the rationale for proposing the repeal of section 18 c of the Act.

3.2 The facts of the Bolt case

What is less well publicised is the fact that Mr Bolt's articles "contained multiple errors of material fact, distortions of the truth and inflammatory and provocative language".[14] The Court made it clear that it is not unlawful to publish articles that discuss or challenge someone's racial identity. Rather, the issue that the Court upheld was that Mr Bolt had "not acted reasonably or in good faith" on the basis that Mr Bolts articles were inaccurate and that he had not taken reasonable steps to be accurate. Indeed if he had, it is "far more likely that his articles would have been protected by the section 18D free speech exemptions".[15]

3.3 Bad cases make bad law

In any case, as Prof. Gillian Triggs[16] pointed out in her recent commentary on the veracity of the Bolt case as a rationale for changes to the Act, changes made on the basis of bad cases result in bad law. The public debate as facilitated by the Federal government to date has been extremely narrow and ideological in nature, which prevents an informed and reasoned debate on the efficacy of the Act as a response to genuine human rights issues.

More specifically, there has been no meaningful analysis of the Act as a mechanism for appropriately limiting freedom of expression to protect against racial vilification in accordance with Australia's obligations under the ICCPR. The AASW and any individual who wishes to express an opinion on the Bill have therefore had to rely on their own research and analysis of factual data in order to reach a justifiable position. The AASW believes the Bolt argument is a poor and unacceptable justification for the measures proposed and on this basis alone we believe the Bill should be rejected.

3.4 Understanding human rights and human rights law

As outlined in point 2.3 above, the contention implicit in the Federal governments stated rationale for the proposed changes, namely that the right to freedom of speech needs to be promoted or elevated above that of the right to protection against racial vilification reflects a fundamental misunderstanding of human rights and human rights law. The degree to which the proposed changes reflect adequate consideration of how the two rights might be concurrently upheld are cause alone to reject the changes proposed in the Bill.

[14] Human Rights Law Centre 2014, p. 6
[15] Ibid, p. 6
[16] Address to the National Press Club, retrieved 10 April 2014, http://www.abc.net.au/news/2014-04-09/national-press-club-gillian-triggs/5378938

4. The implications of the changes proposed in the Bill

4.1 Replacement of the words 'offend', 'insult' and 'humiliate' with 'vilify' and the retention of the word 'intimidate'

4.1.1 Removal of the words 'offend', 'insult' and 'humiliate'

a) Evidence to support the retention of the words 'offend', 'insult' and 'humiliate'

When the Act was introduced 20 years ago, there was some concern that the words 'offend' and 'insult' as outlined in section 18C were too broad in their scope and therefore set the bar too low for meaningfully identifying and penalising racial discrimination. Despite these reservations, an analysis of the cases that have gone to Court show that the laws have been applied sensibly and reasonably; that is, the concerns regarding the broadness of the terms do not appear to have undermined the capacity of the Courts to identify unlawful conduct. Indeed the Courts have stated that to be unlawful under section 18C, the conduct must have "profound and serious effects, not likened to mere slights"[17]. Therefore it is the AASW's view that there is no sound basis or rationale for the removal of these words.

b) The importance of the words 'offend', 'insult' and 'humiliate' in setting community standards

Further, it has been recognised that laws assist in establishing acceptable community standards and as such, are an important mechanism for fighting racism. If the Australian community understands that offending, insulting and humiliating an individual or group on the basis of race is unlawful, then they are more likely to speak out against racism.[18] Given evidence to suggest the prevalence and significance of racial discrimination outlined in part 1 of this submission, we believe retaining the existing wording of the Act serves an important community, as well as legal, purpose.

4.1.2 Addition of the word 'vilify'

a) The definition is too narrow

The definition of 'vilify' as proposed in the Bill is to "incite hatred against a person or group of persons". This is a narrow definition that is out of step with any common understanding or definition of the word. To vilify can be variously defined as the act of speaking or writing about in an abusively disparaging manner; to disparage or denigrate, to defame or traduce.[19] The AASW rejects the inclusion of vilify in its current form on the basis that it is too narrow and will not therefore provide adequate protection against racially discriminatory conduct.

b) The proposed definition of vilify will be too difficult to prove

State and Territory racial vilification legislation generally covers conduct that "incites hatred, serious contempt or severe ridicule" towards someone on the grounds of race.[20] These laws have been criticised on the basis that incitement of this kind is too difficult to prove. Given the definition of 'vilify' is even narrower, in that it does not extend to contempt or ridicule, it is reasonable to deduce that this form of vilification will be more difficult to prove. The AASW therefore rejects the proposed definition of 'vilify' on the basis that it will be prohibitive to identifying and penalising racially discriminatory behaviour.

[17] Human Rights Law Centre 2014
[18] Ibid. p. 7
[19] Oxford Dictionaries 2014; The Macquarie Dictionary 1998
[20] Human Rights Law Centre 2014

4.1.3 Narrow the meaning of 'intimidate'

It is proposed that the current word 'intimidate' be retained but be more narrowly defined to refer only to 'fear of physical harm' rather than its broader and more commonly understood meaning, 'to induce fear'. As with 'vilify', the proposed definition of intimidate is so narrow as to significantly and unacceptably reduce the range of racially discriminatory behaviours that could be considered under this legislation, and be so hard to prove as to be prohibitive to preventing racial vilification and hatred.

4.1.4 The overall impact of the proposed changes

The combined impact of the replacement of the words 'offend', 'insult' and 'humiliate' with 'vilify' and 'intimidate' would be to significantly reduce current protections offered by the Act; make it extremely difficult for anyone to successfully have a complaint of racial discrimination heard or upheld; and render the Act essentially redundant. The AASW strongly opposes and rejects these changes and calls for the Federal government to do the same.

4.2 The repeal of section 18D and the introduction of a "public discussion" exemption

Under the proposed changes there would be no requirement for public discussion to be conducted "reasonably or in good faith" as currently required by section 18D.

The exemption of all "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 manner" makes the exemption so broad as to render the legislation almost meaningless. It is highly likely most public racial vilification will be exempt, and critically, the exemption would most likely apply "even if [the conduct under consideration] incites racial hatred or causes racial humiliation or fear of physical harm on the ground of race".[21]

The AASW strongly rejects the repeal of section 18D and calls on the Federal government to do the same.

Conclusion

The Australian Association of Social Workers strongly rejects the Bill the basis that:

a) There is significant evidence to demonstrate the worrying prevalence and impacts of racism in Australia. To pass this Bill would be to condone verbal and written racism and therefore increasing levels of physical, psychological and social harm that will have long-term consequences for the health and wellbeing of many Australians.

b) This Bill sends a message to the international and local community that Australia is a country that does not respect international human rights law and will tolerate racism.

c) The 'Bolt case' rationale is unsound. There is no evidence that Mr. Bolt's freedom of speech was restricted. The finding of the court in the Eatock v. Bolt case found that Mr Bolt's articles "contained multiple errors of fact" and "distortions of the truth". It was on that basis and that basis alone that Mr Bolt's case was rejected.

[21] Human Rights Law Centre 2014

d) There is insufficient evidence to support the proposed amendments and we believe this is not conducive to meaningful law reform.

e) Prioritising the right to freedom of speech over the right to protection from racial vilification (in the commonly understood meaning of the word) is contra to Australia's obligations as a signatory to the International Covenant on Civil and Political Rights.

f) International human rights law expressly allows for restrictions to free speech in order to protect against the harm of racial vilification.

g) There has been no evidence presented by the Federal government to suggest that the Act is not achieving its purpose. Indeed, available evidence suggests the Act has achieved its purpose despite early reservations.

h) The repeal of sections 18C & D will serve to render the Act almost meaningless. Conduct that could be considered to be racially discriminatory will be so narrow and such conduct so difficult to prove that the changes if passed would largely allow unfettered racism in this country.

i) The Act has a role in setting community standards of conduct. The standards of conduct outlined in the Bill are so low as to send the message to the Australian public that racism is acceptable. This will cause significant distress to the many people affected by racism in this country every day.

j) The exemptions proposed to replace section 18D are so broad that it is likely that most public racial vilification will be protected, arguably even that which incites hatred or fear of physical harm will be allowed.

Recommendation

The AASW calls on the Federal government to reject the Freedom of Speech (repeal of s. 18C) Bill 2014 in its entirety.

Submitted for and on behalf of the Australian Association of Social Workers Ltd

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