Submission to the Attorney-General, Senator the Honourable George Brandis QC

Freedom of speech (repeal of s.18C) Bill 2014 – Exposure draft

April 2014

CAWLS
Women's Legal Service

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1 Executive Summary

The **Central Australian Women's Legal Service (CAWLS)** is a not for profit organisation funded by the Commonwealth Attorney-General's Department and the Northern Territory Government. CAWLS provides free legal advice and assistance to all Central Australian women in the areas of domestic and family violence, family Law and children, family Law and property, discrimination, victims of crime, child protection and housing. Our purpose and commitment is to be an accessible, proactive and responsive legal service for all Central Australian women with priority given to those in greatest need. A large portion of CAWLS's client base is comprised of women from Indigenous and other culturally and linguistically diverse (CALD) backgrounds, and may be directly affected by changes made to the Act.

This submission is in response to the amendments to the *Racial Discrimination Act 1975* ('the Act) by Attorney-General's Department as contained in the *Freedom of speech (repeal of s.18C) Bill 2014 – Exposure draft* ('the Bill').

This submission is endorsed by the Multicultural Community Services of Central Australia, which provides services, representation and leadership for the CALD community in Central Australia.

CAWLS is concerned by the proposed amendments to the Act and the specific operation of the amended section that will replace the current s.18C.

Our concerns broadly relate to the following aspects of the Bill under consideration:

- **Section 1** – The restriction of circumstances and behaviours which are deemed unlawful by the Act;
- **Section 2(b)** – The restricted interpretation of the word 'intimidate' to mean a fear of physical harm;
- **Section (3)** – The standard for determination of whether an act is reasonably likely to have racially vilified a person or group of people; and
- **Section (4)** – The vast nature of the exception to the applicability of the intended section.

CAWLS also wishes to express what we see as overarching issues with the premise and utility of the Bill.

Recommendation

- That section 18B, 18C, 18D and 18E remain operational provisions of the Act.
- That the Government reconsider the amendments to section 18C of the Act to maintain strong and effective legal provisions against racial vilification in this country.

- That the Government uphold laws against racial vilification in conformity with those currently in operation in Australian states and territories.
- That the protection of freedom of speech be upheld by the Government but not to the disadvantage of other fundamental human rights, including the right to equality and to live freely from racial discrimination and vilification.

2 Section 1

CAWLS is concerned by the restricted applicability of section 1 to prohibit racially offensive behaviour. The Bill means the Act now only deems unlawful behaviour that serves to 'vilify' or 'intimidate' a person or group of persons. This replacement of the current test for racial vilification shifts the focus from the harm that can result from race-based speech to conduct that intimidates or incites hatred – providing far more limited protections to the individual and a greater emphasis on regulating public order.

By restricting the forms of behaviour that falls under the Act, it is unlawful to commit an act that 'incites hatred', but it is no longer unlawful to commit acts of racism that insult, offend or humiliate. This is despite the fact that these forms of racism can incredibly damaging to individuals and communities, and often more insidious and harder to confront.

Recommendation

- That section 18C as it currently stands remains an operational provision of the Act.
- That behaviour intended to insult, offend or humiliate on the basis of race remains unlawful.

3 Section 2(b)

The proposed Bill amends the Act by providing an incredibly restricted definition of what it means to 'intimidate' for the purposes of the section.

The Oxford dictionary definition of intimidate is to:

> Frighten or overawe (someone), especially in order to make them do what one wants.

The Bill restricts intimidation to mean a fear of physical harm alone.

Intimidation is a subjective experience, which is rarely limited to a fear of physical harm. A person or group of people may experience intimidation through conduct or communication directed at them on the basis of their race, may in ways unrelated to a threat of physical violence. Conduct that oppresses someone from expressing their cultural identify because of fear of verbal abuse, ridicule, isolation or the impact on employment or other opportunities is still clearly racism, that has the potential to create serious harm. The restriction of 'intimidation' to fear of physical harm disregards the seriousness of other kinds of non-violent behaviour that are instrumental in perpetuating cultural oppression.

Recommendation

- That the definition of 'intimidate' remain broad and not be restrictively interpreted to mean a fear of physical harm alone.

4 Section 3

Section 3 of the Bill determines that the standard for whether an act is reasonably likely to have the effect specified in sub-section (1)(a) 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 section shifts the perspective for assessing racial vilification from that of a reasonable person to whom racist conduct is directed to the view of 'an ordinary member of the Australian community'. This is in opposition to existing State and Territory specific 'incitement to hate' legislation.

This 'objective test' serves to undermine the perspective of those who are subject to vilification on the basis of their race by denying them the opportunity to make an assessment as to their own vilification – they will be spoken for instead by 'an ordinary reasonable member of the Australian community'.

The fact that 'ordinary reasonable member of the Australian community' remains undefined in fact embeds the notion that people of an 'other' religion, ethnicity or race are somehow not 'ordinary', 'reasonable' or indeed valuable and intrinsic members of the Australian community. The wording implies that to be from a background that is presumably non-Anglo-Saxon is to be outside of the Australian community. This section in itself perpetuates the notion that to be from racial, ethnic or religious minority is to be different, inferior, and thereby justifiably excluded from processes of decision making, including decisions about one's very own experiences. The section takes away from the experience of the individual, and instead asks someone who cannot have endured that experience to determine its potency.

Recommendation

- That the determination of an assessment as to whether a person has experienced racial vilification rest remains a test of 'reasonable likeliness' as per the current section 18C of the Act.

5 Section 4

Section 4 of the Bill provides an exemption to the section so broad as to effectively nullify the prohibition against racial vilification or intimidation. The defence to the section applies to conduct or communication that occurs within the course of public discussion. This means that offensive, insulting, humiliating and contemptuous behaviour and communication on the basis of race is permitted in a far-reaching range of scenarios.

This exemption would allow for the media to broadcast or publish potentially offensive and harmful material on the basis of race, with no consequence. Public behaviour is informed and influenced by the behaviour of public figures including those who speak out in the media. People in positions of power, and the media, must be held to account and use their positions responsibly. There is a risk that the 'public discussion' exemption will be exploited by people motivated to express racially

offensive opinions, or perpetuate harmful racial stereotypes, under the guise of 'freedom of speech'. Regardless of the intent, it is possible that unmetered comments on sensitive matters such as race could contribute to acts of racial vilification by the public. Public figures and media personalities must consider the flow on effects of public comments they make, and the provision as it currently stands solidifies this responsibility.

The broad framing of the defence outlined in section 4 is tantamount in effect to repealing section 18C altogether.

6 Overarching concerns

Racism remains a widespread issue in Australian society, taking many forms – overt, discreet, institutional. It impacts upon individuals, families and communities, and has direct links with social, physical and mental wellbeing.

The purpose of the Act is to protect individuals and groups from discrimination based on their race, colour, descent or national or ethnic origin, and to ensure that all individuals have the same opportunities and are treated equally regardless of their background. Section 18C as it currently stands is a vital tenet of the Act and to restrict its operation so greatly is to inhibit the Act from achieving its purpose.

While freedom of speech is a fundamental human right, it should not be favoured to the elimination of other rights that exist to protect people from harm and to encourage a harmonious and respectful society. Freedom of speech and freedom from vilification cannot be conflated – they must be balanced. Section 18C, as it currently stands, provides for fair comment on public interest matters where done reasonably in good faith. The fact that freedom of speech is a right that must inevitably be balanced and constrained to exist in accordance with other rights is already recognised by Australian law. Freedom of speech is regulated by varying legal measures to restrict a range of anti-social behaviours including sexual harassment, defamation, fraud, domestic and personal violence. Tempering freedom of speech to the point of providing individuals and communities with appropriate protection from racial vilification is just as important to uphold principles of equality, tolerance and inclusion.

The courts are responsible for interpreting the Act and case law has demonstrated that only serious cases will be contemplated. To imply that section 18c as it currently stands is a restriction on freedom of speech is to disregard how the law has effectively been operating since its enactment.

Final Recommendations

- That the section 18c remain as it currently stands.
- That any changes to the Act be subject to rigorous and meaningful public consultation and enquiry.