Australian Human Rights Commission

Human Rights Commissioner
Tim Wilson

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The Hon George Brandis QC
Attorney-General
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Dear Attorney-General,

As Australia's Human Rights Commissioner, it is with pleasure that I offer the following response to the exposure draft to the *Freedom of Speech (repeal of s.18C) Bill 2014*.

These comments are additional to those contained in the broader submission that has been made by the Australian Human Rights Commission. They are intended to complement that submission, and provide further elaboration on the key points of concern to me as Human Rights Commissioner.

After two decades of operation, it is entirely appropriate that the government review the operations of Part IIA of the *Racial Discrimination Act* ("*The Act")*. The proposal provides a good starting point for considering how *The Act* should be amended.

Within a human rights framework, it can be consistent to have free expression and also have limited restrictions on freedom of expression when its exercise impinges on others' human rights.

However, the deference should always be towards the most limited form of restriction on freedom of expression that is necessary.

In other words, efforts to outlaw expression that can impinge on others' human rights must ensure that any restriction constitutes an exception to freedom of expression, rather than treating freedom of expression as the exception to otherwise worthy objectives.

The spirit of this principle is included in Article 19(2) and (3) of the *International Covenant on Civil and Political Rights* 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.

The exercise of the rights provided for in paragraph 2 of this article carries 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:

(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals".

To this end, I support the intent and objectives of the *Freedom of Speech (repeal s.18C) Bill 2014* while making the following, additional observations to the submission from the Australian Human Rights Commission:

1. Objectives

The intention of Section 18 of *The Act* is to make acts that harm people on the basis of their race unlawful. Law plays an important part in establishing boundaries within society. The challenge for Parliament is to determine the threshold at which legal provisions should be created, given that not all conduct that is unacceptable should be made unlawful.

To the extent that an individual believes law should regulate speech, it remains an imperfect instrument. This is tacitly acknowledged under the current *Act* which does not cover expression in private.

Even if we outlawed all racism today, it is obvious that it would be ineffective. There are many other, and arguably more effective, methods that regulate our conduct outside of the law.

We have formal codes of conduct as conditions of our employment that require people to treat each other with respect. While these codes vary, they often include ensuring that employees do not engage in offensive or harmful conduct such as making sexist, racist or homophobic comments.

In the public domain, journalists have their own voluntary code of ethics through their union. Media outlets bind themselves with editorial codes of conduct that requires them not to make unjustified and disparaging remarks.

Codes are also common in civil society groups as a condition of membership, or in participating in sporting groups. The Australian Football League requires that "players must refrain from making any comment that vilifies or tends to vilify persons on the basis of their race, religion, colour, sex, sexual orientation or other related characteristics".

Formal codes are not the only mechanism to regulate expression. Social norms also apply. The marketplace also regulates expression, allowing people to boycott businesses that do the wrong thing.

On a day-to-day basis, social conventions and norms regulate our expressions more than laws do. Ensuring their success is also about driving cultural change which is achieved through public campaigns, such as the Australian Human Rights Commission's "Racism. It stops with me" campaign.

Not all of societies' ills can be solved through law.

2. Inconsistencies between the *Racial Discrimination Act* and human rights

As currently worded, *The Act* allows two core inconsistencies with the principles of human rights:

a. Freedom of expression

Freedom of expression is a fundamental and universal human right and has been consistently recognised in philosophy, law and international declarations and conventions. Free expression is closely allied with the universal human rights of free thought, association and religious worship and goes to the heart of an individual's ownership of their own life, their capacity to exercise their full faculties and talents, and pursue their own ambitions and enterprise.

Despite the centrality of the right to free expression, there is recognition that there are limits to the exercise of this right including when expression can do serious harm to others, or conflict with other human rights.

As currently drafted, *The Act* makes it unlawful to exercise an act, including expression, when it is reasonably likely to "offend, insult, humiliate or intimidate" a person on the basis of their "race, colour or national or ethnic origin".

In 1994 the Parliament established this threshold. This threshold is set at a lower level than most State laws. This threshold also restricts expression more broadly than required under international conventions that Australia is a party to. The intention was to clearly establish that in a free and pluralistic liberal democracy that racial abuse and violence is not acceptable. It is possible to reform *The Act* by setting the threshold at a higher, more serious level without undermining this objective.

Set against the background of the worthy aspiration of tackling racism, *The Act* imposes unjustifiable restrictions on free expression – notably on the grounds of "offend", "insult" and "humiliate".

A number of public comments have been made that these words have been interpreted by the courts as requiring profound and serious effects, not mere slights.

This raises the important issue about whether the law is being read down by the Courts to address the unnecessarily broad reach of the current *Act* and it undue restriction of free expression.

There now appears to be widespread acceptance that “offend” and “insult” are not a legitimate basis to restrict free expression, and I support these words being removed from the existing law.

There does not appear to be the same widespread acceptance for the removal of “humiliate” from the law, although I support the removal of this word from the law as well.

For example, discussions around homosexuality within some cultural groups can invoke all three of these responses, including humiliation, but is otherwise considered a legitimate subject matter for discussion in a free and open liberal democracy.

Mockery, which is often the basis of humour, can also be humiliating.

Similarly, these words do not reflect the language of Article 20(2) of the ICCPR which requires:

> *“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.*

The proposed change to replace “offend, insult, humiliate” with a defined “vilify” and “intimidate” more accurately reflects a human rights-compliant approach to keep expression free and open, while recognising that limited restrictions to protect against harm may be justified. Depending on the final definition, the proposed changes are likely to be more consistent with Article 20(2) than the existing law.

However, to the extent that restrictions on free expression are justified – such as intimidation and harassment – they do not just apply on the basis of racially-loaded language, but all language. This principle is recognised in other Federal and State laws.

The importance of keeping expression free and open on matters of race are particularly important considering the powers granted to the Commonwealth Parliament under the Australian Constitution.

Under Section 51 (xxvi) of the Australian Constitution the Commonwealth Parliament shall:

> *“have power to make laws for the peace, order, and good government of the Commonwealth with respect to … the people of any race, for whom it is deemed necessary to make special laws”.*

So long as the Parliament has the power to design race-specific laws the capacity to limit public discussion on the basis of comments that may “offend, insult, humiliate” can undermine important democratic participation.

If the Parliament can legislate on it, we must be free to talk about it.

b. Equality before the law

As currently interpreted, the assessment of whether an act is an offence under *The Act* is based on the attitudes of the group affected by the act. That creates serious risks of inequality before the law. The attitudes of a particular group toward an act can vary depending on whether a person is a part of that group.

Such subjective attitudes operate regularly within social conventions and norms. For example, according to social conventions and norms gay and lesbian people may be able to use the term "queer" to describe themselves or others that are same-sex attracted.

That term has traditionally been used as a form of abuse, but has been 'reclaimed' by some as form of identification to remove the stigma associated with it and to disempower its use as a form of abuse. However, it is socially understood that it would be unacceptable for those that are not same-sex attracted to use that term about those that are.

Social conventions develop over time in response to events and cultural attitudes. They are regulated informally by social norms. They may be unequal, but they do not create inequality before the law because they are not enforced by law. The same principle cannot apply in law.

It is utterly unjust that two persons, standing side-by-side, can be acting in precisely the same fashion, but one can be in violation of the law because they are not a part of the group that their actions refer, and the other individual is not because they are a part of that group.

Despite any good intentions, in its current form *The Act* has been interpreted to create unjust inequality before the law and must be corrected.

To that end, the spirit of sub-section 3 of the *Freedom of Speech (Repeal of s.18C) Bill 2014* is entirely justified. However it should consider the language adopted in other equivalent legislation, such as operates in section 28A of *The Sex Discrimination Act 1984*, to require a reasonable person to have "regard to all the circumstances".

3. Exemptions

Under the current wording of *The Act*, the need for exemptions exists because the threshold for whether an offence has occurred is too low. Exemptions are not protections of free expression, they are discretionary exemptions of the unnecessarily harsh application of law to limit free expression. Should the restrictions on expression sit at a sufficiently high bar, the need for exemptions is unnecessary.

A key aspect of the current *Act* is that acts expressed in good faith and are reasonable are afforded exemptions. Reasonableness is a deficient ground to justify restrictions on free expression. It remains questionable that requiring conduct be exercised in good faith is sufficient to limit expression.

Rightly or wrongly, much public debate is conducted with degrees of bad faith, particularly heated public arguments designed to convince people of differing points of view. That can include emphasising or delegitimising a point in favour or against an argument to suit the debater's needs.

Such a standard is particularly problematic around political debate around laws that specifically relate to racial matters, as outlined at the conclusion of Section 2 of this submission.

I commend the intention of seeking to review and reform *The Act* to preserve and protect free expression, while also ensuring that expression does not impinge on other's human rights.

I look forward to making further submissions to a revised draft Bill and I hope that the observations made in this individual submission, and the Commission's submission, will be considered.

I am happy for this submission to be made public.

Yours sincerely,

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