Submission in response to the *Freedom of Speech (Repeal of s 18C) Bill 2014 Exposure Draft*

April, 2014

NATSILS

NATIONAL ABORIGINAL & TORRES STRAIT ISLANDER LEGAL SERVICES

Table of Contents

1. About the NATSILS

The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) is the peak national body for Aboriginal and Torres Strait Islander Legal Services (ATSILS) in Australia. NATSILS brings together over 40 years' experience in the provision of legal advice, assistance, representation, community legal education, advocacy, law reform activities and prisoner through-care to Aboriginal and Torres Strait Islander peoples in contact with the justice system. NATSILS are the experts on the delivery of effective and culturally competent legal assistance services to Aboriginal and Torres Strait Islander peoples. This role also gives us a unique insight into access to justice issues affecting Aboriginal and Torres Strait Islander peoples. The NATSILS represent the following ATSILS:

- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS Qld);
- Aboriginal Legal Rights Movement Inc. (ALRM);
- Aboriginal Legal Service (NSW/ACT) (ALS NSW/ACT);
- Aboriginal Legal Service of Western Australia (Inc.) (ALSWA);
- Central Australian Aboriginal Legal Aid Service (CAALAS);
- North Australian Aboriginal Justice Agency (NAAJA); and
- Victorian Aboriginal Legal Service Co-operative Limited (VALS).

2. Introduction

The NATSILS make this submission to the Australian Government to express our opposition to the proposed changes to the *Racial Discrimination Act 1975* (Cth) (RDA) as outlined in the recently released *Freedom of Speech (Repeal of s 18C) Bill 2014 Exposure Draft*. Given that racial discrimination and vilification is a matter of critical importance to the Australian public, we are pleased that the Australian Government has now embarked on a public consultation process in regards to the proposed changes through the release of the *Exposure Draft*.

Racial discrimination and vilification cause real and serious damage to our society and Australia needs strong protections against racial vilification. We condemn racism in all forms and are strongly against any changes to the RDA which weaken current protections against racial vilification. Through legislation, policies and attitudes, Aboriginal and Torres Strait Islander peoples have had, and continue to have, a traumatic and sustained experience of racism, and in general, there is underreporting of racism by our communities. Any reduction of the protections afforded by the RDA will only serve to exacerbate this even further.

We do not believe that there is any case for change in regards to the current provisions in the RDA. There is no evidence that the current provisions are too broad and the RDA already provides the right balance between the right to be freedom from racial vilification and the right to freedom of expression.

3. Why we need laws to protect against racial vilification in Australia

The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) handed down its findings in 1991. Recommendation 213 of the Royal Commission included:

> That governments which have not already done so legislate to proscribe racial vilification and to provide a conciliation mechanism for dealing with complaints of racial vilification. The penalties for racial vilification should not involve criminal sanctions. In addition to enabling individuals to lodge complaints, the legislation should empower organisations which can demonstrate a special interest in opposing racial vilification to complain on behalf of any individual or group represented by that organisation.

This recommendation was made as part of a suite of recommendations for what the Royal Commission called "Accommodating difference: relations between Aboriginal and non-Aboriginal people". Sections 18C and 18D of the RDA implement recommendation 213 and recognise that there needs to be protections against racist behaviour. In light of the continued over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system and in prison, and the growing incarceration rate of Aboriginal and Torres Strait Islander women in particular, the recommendations of the RCIADIC are just as important today as they were over 20 years ago.

Racism is a serious, continuing problem in Australia. Beyond the well-publicised recent examples of racial abuse on the sporting field and public transport, research by VicHealth, the Scanlon Foundation and others has documented widespread racial discrimination. Racism is an issue of particular importance to Aboriginal and Torres Strait Islander peoples, with 35.35 percent of all RDA related complaints received by the Australian Human Rights Commission in 2012-2013 being from Aboriginal and Torres Strait Islander peoples.[1]

Research confirms that racial discrimination and vilification can cause serious mental health impacts and other social harm. There are a number of pathways through which racism can impact upon health and wellbeing, including:

- Inequitable and reduced access to societal resources required for health (e.g. employment, education, housing, medical care);
- Inequitable exposure to risk factors associated with ill health;
- Stress and negative emotional/cognitive reactions which have negative impacts on mental health as well as affecting the immune, endocrine, cardiovascular and other physiological systems;
- Engagement in unhealthy activities (e.g. smoking, alcohol and drug use);
- Disengagement from healthy activities (e.g. sleep, exercise and taking medications); and

[1] See http://www.humanrights.gov.au/publications/annual-report-2012-2013 , 131.

- Physical injury via racially motivated assault.

The most consistent finding is the association between racism and mental health conditions such as psychological distress, depression and anxiety. Racism is also consistently associated with health risk behaviours such as smoking, alcohol and substance misuse. These associations commonly remain after adjustment for a range of confounders and occur within longitudinal as well as cross-sectional studies, suggesting that racism precedes ill health rather than vice versa.

Racism is harmful. It destroys the confidence, self-esteem and health of individuals, undermines efforts to create fair and inclusive communities, breaks down relationships and erodes trust. Racism perpetuates inequalities and can directly or indirectly exclude people from accessing services and opportunities. Racism remains a major barrier to achieving our vision for a just, equitable and reconciled Australia. Given the high rate at which Aboriginal and Torres Strait Islander peoples experience racism, it remains a barrier to governments seeking to close the gap on health outcomes, to improve economic participation through employment and education, and to addressing the high incarceration rates of Aboriginal and Torres Strait Islander peoples.

Our national laws are not only about legal protections and remedies, they also play an educative and standard setting role that sends a message of what is acceptable in our society. The law is never going to protect each and every victim of racial abuse, vilification and discrimination. However, what it can do is set norms for us all, which encourage us to speak out and speak up to stop racism.

4. Proposed changes

4.1 Current protections

The racial vilification protections are set in sections 18C and 18D of the RDA.

Currently, a person's conduct will breach section 18C where it is:

- done otherwise than in private;
- reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people; and
- done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Section 18D contains free speech exemptions that provide that section 18C does not make it unlawful to say or do something reasonably and in good faith:

- in the performance or distribution of an artistic work;
- in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest;
- in the making or publishing of a fair and accurate report of any event or matter of public interest;

- in the making or publishing of a 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 the comment.

In other words, section 18D allows some racially offensive, insulting, humiliating or intimidating conduct if it is done reasonably and in good faith in fair reporting, fair comment, artistic works or discussion in the public interest.

4.2 Proposed changes

In a recently published information paper,[2] the Human Rights Law Centre provides a useful summary of the proposed changes:

4.2.1 Remove "offend", "insult" and "humiliate"

The words "offend", "insult" and "humiliate" would be removed from the existing racial vilification protections.

4.2.2 Insert "vilify" and narrowly define "intimidate"

The new provision would make it unlawful to "vilify" or "intimidate" another person or a group of persons on the grounds of race.

The normal meaning of vilify is to disparage or denigrate. In the Government's proposed changes, it would be defined narrowly to mean "incite hatred against a person or a group of persons".

The current word intimidate would be kept but it would be given a much narrower meaning "to cause fear of physical harm" to a person, property or members of a group of persons.

Taken together, these changes would substantially wind back the scope of the existing protection given by section 18C.

State and Territory racial vilification laws which use the "incitement" test have been criticised for being too difficult to prove. They generally prohibit conduct that *incites hatred towards, serious contempt for, or severe ridicule of* someone in public on the ground of race. The proposed changes will be even harder to prove as they would not cover incitement of serious contempt or severe ridicule.

4.2.3 Insert a new community standards test

Section 18C has been interpreted sensibly by the courts to require an objective standard as to whether conduct is unlawful. This requires an assessment of the conduct from the perspective of a hypothetical reasonable or ordinary person from the relevant racial group.

The new provision would change this test to require an assessment from the standards of an ordinary reasonable member of the Australian community, not from the standards of any particular group within the Australian community. The concern here is that the impact of racial vilification is best assessed from the perspective of the groups who are the targets of that vilification as opposed to the broader community.

[2] See http://hrlc.org.au/wp-content/uploads/2014/03/InformationPaperRacialVilificationLawsApril2014_B.pdf

Depending on how it would be interpreted by the courts, the new test has the potential to narrow the scope of the protection offered by section 18C.

4.2.4 Insert a new, extremely broad "public discussion" exemption with no reasonable or good faith requirement

The proposed reforms would remove the existing free speech exemptions in section 18D. They would be replaced with a new exemption that would mean the new, narrowed racial vilification protections would not apply to:

> *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 matter.*

There is no requirement that to be exempt, the public discussion must be conducted reasonably or in good faith (as required by section 18D currently).

This new test is extraordinarily broad. Most public racial vilification is likely to be covered by the exemption – even if it incites racial hatred or causes racial humiliation or fear of physical harm on the grounds of race.

4.2.5 Remove sections 18B and 18E

The proposed changes would also remove section 18B which provides that if conduct is done for two or more reasons, and one of the reasons is because of race, the conduct is taken to be done on the grounds of race for the purposes of the racial vilification protections. Removing this provision has the potential to make it harder to prove racial vilification when there is more than one reason for the vilification.

The proposed changes would also remove section 18E which makes an employer or a principal responsible for racial vilification by their employee or agent, where the vilification is done in connection with their duties as an employee or agent and the employer failed to take reasonable steps to prevent it. It's difficult to predict the impact of removing this provision but it will narrow the scope of the racial vilification protections and reduce the legal obligation on employers to take steps to prevent racial vilification, for example by having proper policies and training.

5. Our views on the proposed changes

5.1 There is no case for change

The Federal racial vilification laws have been operating for almost 20 years. It is appropriate to review the laws to ensure they are working well and to see if they could be improved. The best available research suggests that the laws have been considered in less than 100 finalised court cases since 1995. An analysis of these cases shows that the laws have been applied sensibly by the courts and are operating reasonably effectively. There is no evidence that the current provisions are too broad.

The bar is already set very high in terms of bringing successful actions under section 18C. Current case law already establishes that conduct must have 'profound and serious effects,

not to be likened to mere slights'.[3] For example, cases such as *Kelly-Country v Beers* (2004) 207 ALR 421 in which a 'comedy' performance involving a 'blacked-up' performer was found not to breach the RDA as it fell under the current list of exemptions within section 18D despite containing content that was considered offensive by the Aboriginal complainant. Similarly, in a 2000 complaint under the RDA, *Walsh v Hanson*, politician Pauline Hanson's published comments that Aboriginal people received preferential treatment from Governments were found not to have contravened the RDA Section 18D as the views expressed were genuinely held and formed part of a genuine political debate.

Further, courts have also stated that conduct must be assessed against an *objective* standard, judged from the perspective of a hypothetical reasonable or ordinary person from the relevant racial group. Courts have said that extreme, atypical or intolerant reactions are not relevant. Even if someone is personally offended or insulted by conduct, there won't be a breach of racial vilification laws unless the conduct meets the *objective* standard.

From statements made to date, the only case being put forward by the Australian Government as an example of the law 'going too far' is the 2011 Federal Court decision in *Eatock v Bolt* in which the columnist, Andrew Bolt, and his publisher were found to have breached the racial vilification provisions of the RDA by writing and publishing articles that suggested that a number of fair-skinned Aboriginal people weren't genuinely Aboriginal and only claimed to be so to access certain benefits and entitlements. The key part of this case was that Andrew Bolt had not acted reasonably and in good faith. He was found to have made multiple errors of fact and distortions of the truth within these articles. Had he acted reasonably and in good faith, he would have been protected by the section 18D free speech exemptions. As such, we do not accept that the Court went too far in this case or that one case should sufficiently justify a radical winding back of the RDA.

Furthermore, there are high levels of support amongst the community for the maintenance of the current provisions. The Challenging Racism Research Project, headed by the University of Western Sydney, asked 2100 survey respondents whether it should be unlawful to humiliate, insult, offend or intimidate someone according to their race, and found that:

- 66% of participants agreed or strongly agreed it should be unlawful to 'offend'
- 72% of participants agreed or strongly agreed it should be unlawful to 'insult'
- 74% of participants agreed or strongly agreed it should be unlawful to 'humiliate'
- 79% of participants agreed or strongly agreed it should be unlawful to 'intimidate'

With such support amongst the public, there is no compelling case for change.

5.2 Balancing rights

As a current serving member of the United Nations Security Council, Australia has a strong obligation to respect and protect human rights. International human rights law protects three key human rights which are relevant to the RDA. The *International Covenant on Civil and Political Rights* (ICCPR), which Australia is a party to, enshrines the following rights:

- *Freedom of opinion* is the right to hold opinions.

[3] (*Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356-7 [16])

- *Freedom of expression* includes the freedom to impart and receive information and ideas of all kinds, whether orally, in writing, in print, through art or another medium. Freedom of speech is a concept that falls within the ambit of freedom of expression, as speech is one way of conveying opinion or expression.

- *Freedom from discrimination* is the right not to be subjected to unfavourable treatment because of your race, religion, sex or a range of other grounds.

The right to freedom of opinion is absolute. It cannot be subject to any exception or restriction. However, the right to freedom of expression is not absolute. Article 19(3) of the ICCPR recognises that the exercise of the right to freedom of expression may be subject to restrictions in certain circumstances, including where necessary to respect the rights and reputations of others. The right to freedom of expression must therefore be balanced against other rights.

International human rights law specifically recognises the need to limit freedom of expression to protect against the harm of racial vilification. Article 20 of the ICCPR specifically provides that states must prohibit by law any advocacy of racial hatred that constitutes incitement to discrimination, hostility or violence.

Australia is also a party to the *International Covenant on the Elimination of All Forms of Racial Discrimination* (ICERD), which requires Australia to take steps to eliminate the promotion and incitement of racial discrimination and hatred.

Many statements have been made by the Australian Government to the effect that the RDA places too great a restriction on the right to freedom of expression. However, the RDA already provides strong protections of this right, as evidenced by the associated case law.

Furthermore, freedom of expression is a fundamental human right but it is not an absolute right and must be balanced against other rights, such as the right to be free from racial discrimination and vilification. The existence and use of laws against defamation, sexual harassment, making threats to kill, confidentiality, contempt of court and misleading and deceptive conduct are all examples of our society's recognition and acceptance of the need to strike such a balance. The balance struck by the RDA in its current form is the right one and must be maintained.

5.3 Dramatic weakening of current protections

We condemn racism in all forms and are strongly against any changes to the RDA which weaken current protections against racial vilification. The proposed amendments significantly wind back current protections and raise the bar so high that it is almost impossible to imagine a situation in which they would be met and the protections could be utilised. Of greatest concern is the proposed extremely broad "public discussion" exemption. Most public racial vilification is likely to be covered by the exemption – even if it incites racial hatred or causes racial humiliation or fear of physical harm on the grounds of race. The proposed exemption is so broad, and the new protection is so narrow, that the combined changes would almost completely remove the existing Federal racial vilification protections. This is entirely unacceptable.

6. Conclusion

Racism causes real harm and widespread damage to Australian society. Our laws must provide strong protection against racial discrimination and vilification and send a clear message that such is unacceptable.

The proposed changes to the RDA outlined in the *Exposure Draft* would significantly wind back the current level of protections against racial vilification.

There is no case for change in relation to such an action, with the RDA operating well over its lifetime, being appropriately interpreted by the courts and having strong public support.

The RDA in its current form strikes the right balance between the right to freedom of expression and the right to be free from racial discrimination and vilification. To argue that the right to freedom of expression is an ultimate absolute right under attack from the RDA is misconceived. Our laws have long accepted restrictions on the right to freedom of expression in a number of areas.

We strongly condemn racism in all its forms and any action which would result in a weakening of current protections. As a result, we strongly oppose the changes outlined in the *Exposure Draft* in their entirety.