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Castan Centre for Human Rights Law

Submission on the repeal of section 18C of the Racial Discrimination Act

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Dated 30 April 2014

This submission is largely based on the compatibility of the proposed amendments with international human rights law. However, we add our concerns about the nature of the government's managing of the debate about this issue at the end of this submission.

Relevant international human rights laws

The relevant rights for the purposes of this submission are freedom of expression, freedom from hate speech, and freedom from racial discrimination. These rights are found in international human rights law, namely Articles 19, 20 and 26 of the International Covenant on Civil and Political Rights ("ICCPR").

Article 19 reads:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. 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.
>
> 3. 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.

Freedom of expression (article 19(2) is a very important right, but it is clear that it is not unlimited (article 19(3)). It may be contrasted with article 19(1), the right to freedom of opinion, an absolute right with no limits. The holding of an opinion is a passive act. Once an opinion is expressed, the relevant right moves from the realm of 19(1) ("thinking") to 19(2) ("doing"). Hence, the Attorney General was correct when he said in Parliament that there is a right to "be" a bigot. Bigoted thoughts are protected under article 19(1). However, the right to *act* like a bigot is much more circumscribed under Article 19(2) and other human rights provisions.

Article 20 is unusual as it constitutes a compulsory rather than a merely permissible limit to free speech. It reads:

> 1. Any propaganda for war shall be prohibited by law.
>
> 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 26 reads:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Australia is also bound in international law by the Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), which of course contains broad prohibitions on racial discrimination, including its own hate speech provision in Article 4:

> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, inter alia:
>
> > a. shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
> >
> > b. shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
> >
> > c. shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

The Proposed Bill

The proposed *Freedom of Speech (Repeal of s18C) Bill* 2014 repeals s18C, along with s18D, which currently provides a "free speech defence" to s18C offences. Sections 18B and 18E are also repealed.

Section 18C currently renders unlawful any act, other than one done in private, which offends, insults, humiliates or intimidates another on the basis of race if the act is done because of the race of that other or that other's racial group (subject to s 18D). The

proposed amendment would remove the prohibitions on offensive, insulting or humiliating acts.

The provision, which has been part of the RDA since 1995, has become controversial due to the findings in *Eatock v Bolt* [2011] FCA 1103, where the high profile columnist Andrew Bolt was found to be in breach of s 18C, in his publication of two columns in the *Herald Sun* about lighter skinned Aboriginal people.[1]

What is hate speech?

As noted above, the hate speech provisions of the ICCPR and CERD constitute compulsory limits on free speech. In contrast, States may impose permissible rather than compulsory limits on free speech under Article 19(3).

The term "hate speech" is a confusing one. Article 20 of the ICCPR and Article 4 of CERD combat speech which "incites", that is that which is intended to or which might foreseeably provoke a third party to hate or, at the very least, discriminate against the targeted group.

However, the current federal "hate speech" provisions do not target incitement. Rather, they focus on the impact of the impugned speech upon its target, that is its "victim".[2] This is not speech of the sort singled out by Articles 4 and 20 as necessitating compulsory prohibition. However, it is speech which has been prohibited and even criminalised in some other countries,[3] and labelled as "hate speech".

Thus, the term "hate speech" has possibly come to encompass both speech which incites others (its meaning in international law) as well as speech which denigrates its target on a racial basis. Certainly, it has come to encompass both types of speech in the popular vernacular.

Furthermore, the situation has been muddied by a lack of international jurisprudence on the matter. The Human Rights Committee, which monitors and supervises the implementation of the ICCPR, has never found a violation of Article 20. Almost all violations of Article 4 of CERD have entailed a breach of the duty to investigate relevant complaints rather than substantive violations.[4] *The Jewish Community of Oslo v Norway*[5] is one case where a

[1] See Sarah Joseph, "Andrew Bolt, Free Speech and Racial Intolerance", *Castan Centre blog*, 29 September 2011

[2] See, eg, *Eatock v Bolt* [2011] FCA 1103 at para 206

[3] See, eg, Danish Criminal Code, s 266B

[4] See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases Materials and Commentary* (OUP, 3rd ed, 2013), paras 18.85-18.89.

[5] UN doc CERD/C/67/D/30/2003, 22 August 2005 (see also *Zentralrat Deutscher Sinti und Roma et al v Germany* UN Doc CERD/C/72/D/38/2006, 22 February 2008, where no violation was found).

substantive violation of Article 4 was found: the relevant hate speech entailed neo-Nazi allegations and threats against Jews.[6]

I will use the international legal meaning of "hate speech", meaning it is confined only to speech which incites. The other type of speech is that which provoke certain feelings in its target or targets on a racial basis. In saying this, I am not trivialising that second type of speech. Certainly, "hurt feelings" can be of a minor kind. However, a barrage of racial invective can be so severe as to threaten a person's right to be free from racial discrimination and to participate in society on an equal basis.[7]

Hence, I do not believe the current provisions are justified in international law as limits on free speech rights by virtue of their characterisation as "hate speech" provisions. Certainly, it is likely that racist hate speech is caught within the net of s 18C, but s18C goes further in its prohibitions.

While s18C goes beyond what is required under international hate speech prohibitions, it might be justified as protection of, in the words of Article 19(3), "the rights of others", namely the rights of others to be free from racial discrimination (protected in, eg Article 26 ICCPR and the CERD in general).

The proposed amendments significantly roll back the current prohibitions, thus enhancing the scope of freedom of speech in Australia. However, they may breach human rights international law if they remove too much protection from the right to be free from racial discrimination.

Offence and Insult

The prohibitions on speech which offends and insults, even on the basis of race, go too far. Feelings of offence and insult are not serious enough to justify restrictions on the human right to freedom of speech: there are no countervailing human rights to freedom from offence or freedom from insult. Feelings of offence and insult are not enough to equate with a right to be free from racial discrimination.

[6] The CERD Committee cited the following at para 10.4: "In the course of the speech, Mr. Sjolie stated that his 'people and country are being plundered and destroyed by Jews, who suck our country empty of wealth and replace it with immoral and un-Norwegian thoughts'. He then refers not only to Rudolf Hess, in whose commemoration the speech was made, but also to Adolf Hitler and their principles; he states that his group will 'follow in their footsteps and fight for what (we) believe in'. The Committee considers these statements to contain ideas based on racial superiority or hatred; the deference to Hitler and his principles and 'footsteps' must in the Committee's view be taken as incitement at least to racial discrimination, if not to violence."

[7] In *Eatock v Bolt* [2011] FCA 1103, Bromberg J referred to the relevant rights as rights to be free from racial prejudice and intolerance (at paras 212-215).

It is true that the terms, "offence" and "insult" have been interpreted so that they mean more than "mere" offence and insult.[8] It is arguable that judicial interpretation has saved these provisions from actually breaching the right to free speech. However, in an ideal world, the law means what it says. The fact that "offence" and "insult" are interpreted so strictly as to no longer represent their natural meaning is indicative of their problematic nature. Therefore, the prohibitions on the causing of offence or insult should be removed.

Humiliation

The prohibition on "humiliation" is also set to be repealed. "Humiliation" is more serious than offence and insult. Humiliation on the basis of one's race prejudices one's right to be free from racial discrimination, a genuine human right that may permissibly override freedom of speech.

In international human rights law, it is submitted that a government may, in this instance, have discretion to choose between the two countervailing rights. That is, its retention probably does not breach the human right to freedom of expression, but its removal may not breach the right to be free from racial discrimination. The government may have a "margin of appreciation" in choosing between the two competing rights in this instance.[9] Here, the exposure draft favours freedom of speech, specifically the right to humiliate another on the basis of race over the right not to be so humiliated.

We recommend against removal of the prohibition on "humiliation".

Intimidation

Intimidation, the most serious of the current prohibitions, stays under the current proposals. As with humiliation, acts of racial intimidation infringe another person's right to be free from race discrimination. Further, intimidation harms that other person's right to security of the person under Article 9 of the ICCPR.[10]

However, the exposure draft defines intimidation very narrowly. Intimidation will mean the causing of "fear of physical harm" to one's person, one's property, or to members of a group. Inappropriately, "psychological harm" is excluded. Yet fear of psychological harm to one's person seems more intimidating than fear of physical harm to one's property.

[8] See *Creek v Cairns Post* [2001] FCA 1007 per Kiefel J at para 16 re "profound and serious effects, not to be likened to mere slights".

[9] The margin of appreciation is a doctrine adopted by the European Court of Human Rights whereby a benefit of the doubt is conferred upon States in adopting measures which limit human rights. The UN human rights bodies, particularly the UN Human Rights Committee under the ICCPR, have eschewed the idea of a margin of appreciation. However, it is still likely that "grey zones" exist where States retain discretion to adopt measures which fall at the point at which two rights clash.

[10] Article 9(1) reads, in part: "Everyone has the right to liberty and security of the person". The right has been interpreted to apply where people fear for their safety.

We recommend against the adoption of such a narrow definition of "intimidation". Psychological intimidation on the basis of race interferes seriously on a person's right to be free from racial discrimination. For example, it may deter a person from seeking to access a particular good or service, due to fear of a torrent of withering racism.

Vilification

A new prohibition is added in the exposure draft, a ban on racial vilification, that is an act which incites hatred again a person or a group of persons. This is a true hate speech provision because, as noted above, hate speech traditionally concerns the "incitement" of third parties by racist speech, rather than the effect of such speech on the targeted people themselves.

Vilification is probably already banned under the current provisions. Speech which vilifies must surely simultaneously offend, insult, humiliate or intimidate. Nevertheless, the new proposed additional prohibition is welcome. It encapsulates even worse behaviour than that which intimidates. We recommend the inclusion of an explicit prohibition on "vilification" in any amendments.

Defining "private" and "public"

Speech targeted by s 18C is not actionable if it occurs "in private". That concept is then defined in ss18C(2) and 18C(3), which clarify the extent of the public realm for the purposes of the statute. The definitions are removed in the proposed law, without explanation. The removal of the definitions seems unwise, as, at the least, it will open the door to complex arguments over the dividing line between "private" and "not private". It is not desirable to make the matter *less* clear, possibly generating complex time-consuming courtroom argument.

We recommend the reinsertion of the definitions in ss 18C(2) and s18C(3).

Clause 3

By whose standards is it to be decided if an act intimidates or vilifies, according to the proposed draft? Certainly, s18C applies objective standards – it is not enough simply for the complainant to be offended (or insulted or humiliated or intimidated).[11] But, what is the measure of objectivity – the community in general or the reasonable member of the targeted group?

In the *Bolt* case, Bromberg J decided at para 253 that the relevant standards were those of the target group, in that case lighter skinned Aboriginal people, rather than the community

[11] See, eg, *Hagan Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 at para 15.

in general. As pointed out in the submission by Robert Corr, this aspect of the decision did not depart from previous jurisprudence on the matter.[12]

Clause 3 reverses that decision: the standards are proposed to be those of the "reasonable member of the Australian community, not … the standards of any particular group within the Australian community".

Clause 3 may be justifiable with regard to vilification, which concerns the reactions of third parties rather than members of the targeted group. However, even in this case, the incitement of hostilities could arise between minority groups in circumstances where the general community is unaware of the nuances behind such hostilities.

Clause 3 is inappropriate with regard to intimidation. The general community may well be unaware of the intimidatory power of certain words or acts. For example, the word "cockroach" commonly had genocidal connotations in Rwanda: would that connotation be understood by Australia's general community?

The standards of "the general community" correspond with those of the majority group in Australian society. The people of any race can be intimidated or vilified, but majority groups are historically less likely to have such experiences. Therefore, Clause 3 seems to dictate that the hypothetical reasonable person within the group that experiences the least racial intimidation and vilification will set this standard on behalf of those who are far more likely to have such experiences.[13]

We recommend against the adoption of clause 3. However, it is likely that international human rights law is neutral on the matter. That is, neither the adoption nor the non-adoption of clause 3 is likely to breach international human rights law.

Clause 4

Clause 4 provides a defence to any allegation of vilification or intimidation, and reads as follows:

> This section does 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.

Clause 4 replaces s 18D. Section 18D provided an exemption for similar acts, but only when done "reasonably and in good faith". Clause 4 contains no requirements of reasonableness or good faith. Therefore, it seems to provide a defence for anything written or broadcast in the mainstream media, and probably any blog or public tweet. Preachers would be able to

[12] See submission on s18C amendment from Robert Corr, pp 14-15.

[13] See also Waleed Aly, "George Brandis's Racial Discrimination Act changes create the whitest piece of proposed legislation I've encountered", *Sydney Morning Herald*, 27 March 2014.

pronounce intimidation and hate from the pulpit, as could academics and teachers in the classroom.[14]

Indeed, racist personal disputes that erupt beyond the private domain (such as "neighbourhood disputes"[15]), or random extreme verbal attacks, may remain all that is caught within the net. Yet one can hardly doubt the potential power of intimidation or hate which might pour forth in the public sphere, fully protected under clause 4.

Clause 4 opens the way for breaches of Article 4 of CERD and Article 20 of the ICCPR, as well as breaches of the right to be free from racial discrimination. We strongly recommend against its adoption in its present form. Requirements of good faith, genuineness and reasonableness should be restored.

Other proposed changes

We have had the benefit of reading the submission of Mr Robert Corr, submitted on 9 April. We endorse his submissions on the following matters:

1. We recommend against the removal of "all the circumstances", currently in s 18C but removed from the replacement provision. These words ensure that the relevant tribunal will consider a matter taking into account appropriate context and nuance.

2. We recommend against the repeal of s 18B. Section 18B provides that the offence in s 18C will arise if an act is done for two or more reasons, and one of the reasons is due to the race of the person against whom an act (including a speech act) is aimed. There has been no explanation for the removal of s18B. It would be almost impossible for complainants to prove that a targeted person's race was the *only* reason for the commission of the relevant act.

3. We recommend against the repeal of s 18E, which currently provides for vicarious liability, for the reasons given by Robert Corr (at his pages 23-25).

4. We also agree with Mr Corr's submissions on the title of the bill, and the numbering of amendments at his page 25.

The impoverished debate over section 18C

I would not have voted in favour of a law which rendered "offensive" and "insulting" speech unlawful on the basis of race when this law was adopted in 1995. The inclusion of those

[14] In contrast, an artistic performance (as opposed to the discussion of such a performance) may be excluded from clause 4 protection, which does not replicate s18D(b). See submission by Robert Corr on this omission at pp 20-21.

[15] Here, however, I am assuming that such disputes remain caught within the legislation, which is less clear if the definition sections in ss18C(2) and 18C(3) are removed.

words in the statute sends a certain message that such speech is not to be tolerated: there are legitimate debates over whether such a message should ever have been sent in a coercive law. Having said that, the law sat relatively uncontroversially on the statute books for 16 years, including the entire period of the Howard government, before controversy erupted over the Andrew Bolt case.

The rolling back of the law sends a message too. It can send the message that it is acceptable to offend and insult (and, against our advice, humiliate) another person on the basis of their race. That is a message that the government should try to alleviate. However, the government has done little to assuage the impression that it supports racist speech. While the Attorney General was technically correct to say that there is a right to be a bigot, it would have been politically desirable if he had added that he personally abhorred bigotry and racism. The government's arguments have all been about free speech, without serious attempts to acknowledge important rights to be free from hate and racial discrimination. In these circumstances, it is not surprising that ethnic communities are apprehensive and even appalled at the idea of a rollback. After all, they are the people who will bear the brunt of any adverse message sent by the amendments, a message that seems to be officially underlined if a government focuses on the rights of bigots but not the victims of bigotry.

As noted, it is the Andrew Bolt case which sparked this debate. The Attorney General, as well as the new Human Rights Commissioner Tim Wilson, has suggested that it has a "chilling" precedent value regarding the expression of opinions about race. However, this case has been wantonly misrepresented. Bolt's views on race have not been silenced. He continues to frequently write about race, especially his disdain for any differential treatment for Indigenous people.[16] So too do other commentators, such as Gary Johns in *The Australian*, who regularly writes scathingly about Indigenous culture.[17]

The impugned columns by Andrew Bolt were plagued by inaccuracies about named people. It seems fair to speculate that they could have given rise to successful defamation proceedings, regardless of s18C. In any case, it is simply untrue to say that the case prohibits discussion of racially sensitive matters in a way that hurts the feelings of Indigenous people. It is more correct to say that the case indicates that such columns will breach s.18C if the points made therein are "proven" by multiple factual inaccuracies which could well have been defamatory.

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[16] See, eg Andrew Bolt, "I am you are we are Australian", *Herald Sun*, 29 January 2014, attempting to redefine "Indigenous Australian".
Bolt's disdain for such laws or proposals did not, however, extend to the Northern Territory Intervention which, in its earliest iteration, explicitly overrode the RDA (see "It's racist to help black children", 13 August 2007
http://blogs.news.com.au/heraldsun/andrewbolt/index.php/heraldsun/comments/its_racist_to_help_black_children/)

[17] See, eg, Gary Johns, "History yes, culture no', *The Australian*, 8 October 2010; "Equality at risk as consequences of recognition are unclear", *The Australian*, 25 March 2014

Conclusion

We recommend

1. The prohibitions of “offend” and “insult” be removed, or explicitly defined so as to only apply to those which cause a form of profound harm. Removal is the easier option.
2. The prohibition on “humiliation” remains
3. The prohibition on “intimidation” remains, without the proposed narrowing definition.
4. The proposed prohibition on “vilification” be added.
5. The qualifier of “all the circumstances” be retained
6. The clarifying definition regarding the public and private realms in s18C(2) and 18C(3) be retained
7. Clause 3 not be enacted
8. Clause 4 not be enacted, and instead s18D be retained.
9. Sections 18B and 18E be retained

Finally, and perhaps most importantly, we also recommend that the government demonstrate greater sensitivity to the concerns of ethnic communities. While it may believe that speech which offends and insults others on the basis of race should be lawful, it should make it clear that it is not a supporter of such speech.