Australian Education Union

Submission to the

Human Rights Policy Branch on the Proposed Amendments to the *Racial Discrimination Act 1975*: Freedom of Speech (Repeal of s18C) Bill 2014

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The Australian Education Union represents approximately 190,000 members employed in public primary, secondary and special schools and the early childhood, TAFE and adult provision sectors as teachers, educational leaders and education assistants or support staff classifications across Australia.

We welcome the opportunity to respond to the exposure draft Bill on the proposed amendments to the *Racial Discrimination Act 1975* released by the Attorney-General, Senator the Hon George Brandis QC, on 25 March 2014.

Introduction

The AEU has a longstanding and strong commitment to anti-racism and cultural diversity and the role of education in building social cohesion, social inclusion and social justice.

Modern democratic Australia is a society built on the foundation of a rich living Indigenous culture and the participation of people from over one hundred diverse countries and cultures. While attractive to some, the notion that Australian society requires a single shared culture 'where diversity is seen as an aberration that passes in time through processes of assimilation',[1] is no longer shared by the majority of Australians who see the value of our diversity.

This is borne out by the public reaction to the Attorney-General's proposals to repeal Sections 18C, 18B, 18D and 18E of the *Racial Discrimination Act 1975*, provisions which make it unlawful to "offend, insult or humiliate" on the basis of "race, colour or national or ethnic origin." In their place the government wants a new provision which will preserve the existing protection against physically intimidating a person based on their race, and inserting a new clause against racial vilification, defined as "inciting hatred", with very wide-ranging exemptions to the proposed racial vilification measures for those participating in 'public discussion of political, social, cultural, artistic and scientific matters'.

From the outset it has been apparent that the catalyst for the proposed changes, as promised by the Coalition during the 2013 election campaign, was the case which has become known as 'the Bolt case'; the 2011 Federal Court finding that Andrew Bolt had breached section 18C of the Act, that his articles would have offended a reasonable member of the Aboriginal community, that he had not written them in good faith, and that there were factual errors.

Speaking in the Senate on March 24, the Attorney-General made this very clear:

> *It is certainly the intention of the government to remove from the Racial Discrimination Act those provisions that enabled the columnist Andrew Bolt to taken to the Federal Court merely because he expressed an opinion about a social or political matter.*
>
> *I will very soon be bringing forward an amendment to the RDA which will ensure that that can never happen in Australia again – that is, that never again in Australia will we have a situation in which a person may be taken to court for expressing a political*

[1] Professor Andrew Jakubowicz, *Cultural Diversity, Cosmopolitan Citizenship and Education: Issues, Options and Implications for Australia.* Discussion paper prepared for the AEU. July 2009 http://www.aeufederal.org.au/Publications/2009/AJakubowiczpaper.pdf

opinion. … People like Mr Bolt should be free to express any opinion on a social or a cultural or a political question that they wish to express…[2]

In the AEU's view these proposals, and the rationale for them, give rise to a number of issues of concern.

1. They remove existing legal rights of Australian citizens to complain about and seek remedy for acts which are found to be offensive, insulting or humiliating to them due to their race, colour, national or ethnic origin, and replace them with far more limited legal rights.

2. The current test or standard of proof is to be changed from that of a 'reasonable victim' to that of 'a reasonable member of the Australian community'.

3. The bill represents a rather peculiar way to advance the interests of any purported right to freedom of speech.

4. The bill sends a rather poor and disturbing message to the international and Australian community and to the sector the AEU represents.

Issue 1 – Removal of Current Rights & Substitution of More Limited Rights

It is clear that the current provision covers a broader range of acts than the proposal of the Exposure Draft. The AEU supports retention of the existing provisions and urges that no proposal as envisaged in the Exposure Draft be brought forward to the Parliament.

In the modern Australian community it is simply not acceptable that conduct in public which is offensive, insulting or humiliating is permitted to occur or continue. This has long applied to other forms of conduct which are considered inappropriate, such as publications which are offensive on gender or sexual grounds, or to commentary in electronic form which denies historical realities, such as prohibitions on Holocaust denial.

The current provision has been in operation since 1995 and, similarly to the above examples, language and other conduct which is racially offensive, insulting or humiliating has tended to decrease over this period. This is as it should be.

To restrict the right to seek redress only to those incidents which amount to racial vilification or physical intimidation, is to set simply too high a threshold. What is currently unacceptable conduct would become acceptable.

The proposed new defence created in new sub-section (4) for *"... 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"* is simply not qualified by any criteria of good faith or reasonableness or genuinely held belief. The proposed new defence would be available for

[2] Parliament of Australia, *Hansard*, 24 March 24, 2014, Page: 1797
http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F6a5b8de8-212b-46a9-b00f-61b865fe92a2%2F0026%22

any language communicated in the course of participating in public discussion of the relevant matters.

In the AEU's view, the exemption, or defence, currently provided in s18D for acts said or done reasonably in good faith in pursuit of genuine artistic or scientific purposes or which is fair and reasonable reporting on matters of genuine public interest based upon genuine belief held by the commentator, is a sufficient guarantee of the right to speak freely.

Issue 2 – Removal of the 'Reasonable Victim' test.

The proposal in the Exposure Draft at sub-section (3) that the standard for assessing whether the conduct of the relevant type has occurred, is proposed to be that of a reasonable member of the Australian community.

The proposal simply enshrines the domination of the racial majority within the Australian community and removes the need for any cultural sensitivity provision. The proposed new test would render as irrelevant the major purposes or objects of anti-racial discrimination legislation.

The AEU supports the retention of existing standard or test which is that of a reasonable person with the characteristics of the victim.

Issue 3 – Protection of Freedom of Speech

In response to Senator Nova Peris' question (Senate March 24) about the effect of the repeal of 18C on the experiences of ethnic groups in Australia, the Attorney-General defended his proposed changes as upholding the right of people to be bigots:

> *People do have a right to be bigots, you know. In a free country, people do have rights to say things that other people find offensive, insulting or bigoted.*[3]

His defence of bigotry and rather dismissive approach to the role of law is troubling. It is an oddly peculiar measure to seek to promote a purported right to freedom of speech through the removal of existing rights to protection against behaviour which is offensive, insulting or humiliating. It is as if, as expressed by Rachel Ball of the Human Rights Law Centre, free speech is "an automatic trump card, no matter what the harm done by racist hate-speech".[4]

Professor Andrew Lynch, Director at the Gilbert + Tobin Centre of Public Law at the University of New South Wales, summarises these concerns when he say:

> *… the government appears conflicted over the importance it places on free speech generally. Brandis has repeatedly justified his plans to remove the protections of the Racial Discrimination Act by insisting that "our freedom and our democracy fundamentally depend upon the right to free speech." … On section 18C, it is very*

[3] Parliament of Australia, *Hansard*, 24 March 24, 2014, Page: 1797
http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F6a5b8de8-212b-46a9-b00f-61b865fe92a2%2F0026%22

[4] Rachel Ball, *Who's afraid of anti-discrimination laws?*, ABC *The Drum*, 17 April 2014
http://www.abc.net.au/news/2014-04-11/ball-whos-afraid-of-anti-discrimination-laws/5381798

> *clear that the government is making a choice as to whose rights it gives priority. [Senator] Brandis presents his case as one of inviolable principle, yet we need only reflect on the circumstances of the notorious Bolt case to appreciate why free speech might justifiably be ceded to other interests. The reality is that some voices are louder than others in our democracy. Andrew Bolt communicates his views through a range of media platforms. The people about whom he made remarks and who brought their action under 18C have no equivalent capacity to respond. … Law is an instrument through which a community's values and rights may be given effect. [Senator Brandis] … came down firmly on the side of those who would give voice to racially motivated insult and offence, over those who are targeted by such comments.*[5]

The High Court has repeatedly held that Australian law recognises no universal or absolute right to freedom of speech and that there is only a constrained or limited implied right in the Constitution to a freedom to communicate on political matters.

While undoubtedly the Government has the right to proceed in the manner proposed in the Exposure Draft, it raises the issue of motivation. Had the Government genuinely wished to progress the creation of a statutory right to freedom of speech, it could have done so by the promotion of a genuine discussion of the issue in the Australian community and a widespread reference or enquiry undertaken perhaps through the Australian Law Reform Commission (ALRC).

Indeed the AEU notes that the proposed Terms of Reference to the ALRC on the issue of traditional rights, freedoms & privileges is couched in terms, in part, of interference with freedom of speech. Rhetorically, how does one interfere with something that does not exist?

It would appear the Exposure Draft represents a rather cynical attempt at manipulation of public opinion by the Government in the interests of a vocal minority of supporters.

Issue 4 – The Message of Racial Intolerance

The Prime Minister has said that "no-one wants to see bigotry or intolerance in our society" and that "the best antidote to bigotry is decency, proclaimed by people engaging in a free and fair debate"[6].

Rather than a rather vague appeal to 'decency', and what Race Discrimination Commissioner Dr Tim Soutphommasane calls an assumption 'that good speech can overcome bad speech'[7], we believe that a government which genuinely wanted to see an end to bigotry and intolerance in our society would be condemning it and ensuring that respect for diversity and

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[5] Professor Andrew Lynch, *Brandis, bigotry and balancing free speech*, The Age 26 March 2014 http://www.theage.com.au/comment/brandis-bigotry-and-balancing-free-speech-20140325-35gcj.html

[6] The Australian, *Concern over race-hate speech exemptions*, 25 March 2014 http://www.theaustralian.com.au/news/latest-news/govt-releases-draft-changes-to-racial-law/story-fn3dxiwe-1226864201342

[7] Dr Tim Soutphommasane, *Don't assume good speech can overcome bad speech - that is naive optimism*, Alice Tay Lecture in Law and Human Rights 2014, 3 March 2014 https://www.humanrights.gov.au/news/opinions/dont-assume-good-speech-can-overcome-bad-speech-naive-optimism

tolerance is reflected in all our political, social, economic and cultural institutions rather than encouraging it.

In the words of former Spanish Prime Minister Zapatero: "A decent society does not humiliate its members".

Australian workers should be able to undertake their employment in workplaces which are free from conduct which is racially offensive, insulting or humiliating. This is a matter of human dignity, professional courtesy or respect and of economic productivity.

School students replicate, model and experiment with behaviours found in the broader community. The AEU and the education workers it represents seek to promote the best standards for such behaviours. That is in the interests of the Australian community more broadly.

To remove barriers to racially offensive, insulting or humiliating behaviours will make the promotion of appropriate standards of behaviour in the Australian community, and within its education system, all the more difficult.