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March 30, 2014

Submission on s 18C reforms

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Submission on Proposed amendments to Part IIA of the Racial Discrimination Act 1975 (Cth)

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Associate Professor Neil Foster

30 March 2014

Senator the Hon George Brandis QC
Attorney- General for Australia
Minister for the Arts
PO Box 6100
Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Brandis;

Proposed amendments to Part IIA of the *Racial Discrimination Act* 1975 (Cth)

I am writing to offer a comment as part of the community consultation that you have invited on proposed amendments to the provisions of the *Racial Discrimination Act* 1975 (Cth) (“RDA”) dealing with racially based hate speech, in particular current sections 18C-18E.

I am an Associate Professor in Law at the Newcastle Law School, University of Newcastle, and have an interest in the area of freedom of speech, both as a lawyer and a member of the Australian community generally, but also as it relates to the area of “Law and Religion”, which I teach. However, as you would expect, the views expressed here are my own and are not offered as representing the views of the University or my colleagues in the Law School.

The need for the amendment is supported

Let me start by saying that I generally support the need for amendments to the current form of s 18C, and especially to the words “offend, insult, humiliate or intimidate”. It seems to me that these words set the bar far too low when the important right of “freedom of speech”, recognised both by the common law and international human rights instruments, is taken into account.

I have written a paper on this issue in connection with the area of freedom of religious speech, which is attached to the email by which I am making this submission.¹ While there are different considerations governing religious and racial “hate speech” laws, and while there is no Commonwealth provision on religious speech as such, there are similar considerations that arise in both areas.

¹ The paper, “Religious Anti-Vilification Laws: Gatekeeping Freedom of Religion and Freedom of Speech in Australia” (presented to the *Australasian Law Teachers Association Annual Conference 2013: Law Teachers as Gatekeepers*, Australian National University College of Law, Canberra, ACT, Oct. 2013) may also be downloaded at http://works.bepress.com/neil_foster/71/.

In particular, I would like to adopt the points that I make in the paper as part of this submission, and stress two of them: first, that some regulation of severe “hate speech” is justified; second, that the best commentary and judicial decisions at high levels in recent years support the view that prohibiting mere “offence” is inappropriate.

On the first issue, I think that the book I refer to in my paper, Jeremy Waldron’s monograph *The Harm in Hate Speech* (Cambridge, Mass; Harvard UP, 2012) makes a very good case for a limited prohibition of seriously hateful speech both in the religious and racial area. As he notes, there is important harm done to groups in society when a message of exclusion and hatred is sent, and nothing is done about that by the government. For that reason I support the draft amendments which include a prohibition on vilification and intimidation.

On the other hand, Waldron notes that it would be inappropriate to prohibit behavior that causes mere “offence”. His views are supported by the three superior court decisions I discuss in the paper. One, the decision of the Supreme Court of Canada in *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 (27 Feb 2013), upheld a conviction for religious vilification but actually struck down as unconstitutional a part of the relevant provincial law which prohibited any statement that “ridicules, belittles or otherwise affronts the dignity of” persons. At para [92] of the decision the Court ruled that this provision was a serious infringement of the right to freedom of speech contained in the Canadian *Charter of Rights and Freedoms*.

The two other decisions I mention are those of the High Court of Australia. In both the result of the litigation was that a constraint on certain types of speech was accepted, but in each case the High Court made it clear that constraints of this sort had to be very carefully delimited so as not to breach the implied freedom of political communication under the Commonwealth *Constitution*. In *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 (27 February 2013) (the “*Adelaide Preachers’ Case*”) the Court by majority upheld the regulation of street preaching in Adelaide, but only so long as it was based on legitimate traffic and public order considerations, not if it was aimed at the content of the relevant speech.²

In *Monis v The Queen* [2013] HCA 4 (27 February 2013) the 6 member Court were evenly divided on whether a Commonwealth prohibition on the sending of “offensive” material through the post was valid, again in light of the implied freedom of political communication. But the general tenor of the comments of all members of the Court was that it would only be valid if directed at matters that went beyond mere “offence” to something more serious. (The difference between the 3-member joint judgment and the separate decisions of other members of the court was that the joint judgment held that the relevant legislation could be interpreted as only dealing with more serious impact, while

² See paras [68], [140] and [219], quoted in the paper, on the need for restrictions on free speech not to be based on the content of what is said.

the other members of the court held that the legislation as worded could not be interpreted that way and hence was invalid.)

In particular, Hayne J made some important comments about the standard of mere “offence” in legislation. His Honour’s comments at para [222] are of particular interest in the current context:

[222] The conclusion that eliminating the giving of offence, even serious offence, is not a legitimate object or end is supported by reference to the way in which the general law operates and has developed over time. The general law both operates and has developed recognising that human behaviour does not accommodate the regulation, let alone the prohibition, of conduct giving offence. Almost any human interaction carries with it the opportunity for and the risk of giving offence, sometimes serious offence, to another. Sometimes giving offence is deliberate. Often it is thoughtless. Sometimes it is wholly unintended. Any general attempt to preclude one person giving any offence to another would be doomed to fail and, by failing, bring the law into disrepute. Because giving and taking offence can happen in so many different ways and in so many different circumstances, it is not evident that any social advantage is gained by attempting to prevent the giving of offence by one person to another unless some other societal value, such as prevention of violence, is implicated.

In other words, it is possible that the current form of s 18C, which prohibits conduct that causes “offence”, is not simply unwise but actually constitutionally invalid.

Comment on the proposed amendments

To turn to the proposed amendments: I have set out below for convenience of discussion the text of the “exposure draft” of the amendment as contained in your press release of 25 March 2014.³ I will not be commenting on minor drafting issues (such as the lack of a section number for the new section), which I am sure will be corrected before the final form is presented to Parliament.

Freedom of speech (Repeal of S. 18C) Bill 2014

The *Racial Discrimination Act 1975* is amended as follows:

1. Section 18C is repealed.
2. Sections 18B, 18D and 18E are also repealed.
3. The following section is inserted:
 1. “ It is unlawful for a person to do an act, otherwise than in private, if:
 - a. the act is reasonably likely:
 - i. to vilify another person or a group of persons; or
 - ii. to intimidate another person or a group of persons,
 - and
 - b. the act is done because of the race, colour or national or ethnic origin of that person or that group of persons.

³ At

<http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/First%20Quarter/25March2014-RacialDiscriminationAct.aspx> .

2. For the purposes of this section:
 - a. vilify means to incite hatred against a person or a group of persons;
 - b. intimidate means to cause fear of physical harm:
 1. to a person; or
 2. to the property of a person; or
 3. to the members of a group of persons.
3. 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.
4. 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.”

The new provision- vilification and intimidation

The repeal of the current s 18C is clearly the main provision. Current s 18D provides a defence, which is now being incorporated into the new provision.

The substantive obligation under the new provision is not to do a public act (including speech) on racial grounds that vilifies or intimidates. The core of vilification is the incitement of hatred. These seem, for reasons noted above and in my paper, sensible and worthwhile provisions.

Standard to be used- subsection (3)

New subsection (3) requires the tendency to vilify or intimidate to be determined by the standard of the “ordinary reasonable member of the Australian community”. It seems that the current standard is based on the perceptions of the racial group being targeted: see eg *Clarke v Nationwide News Pty Ltd trading as The Sunday Times* [2012] FCA 307 (27 March 2012) at [50]. There are good reasons in the interests of minority groups in society to maintain the current standard. But I can see arguments based on the need to have a clear shared standard of behaviour across the whole community (who are the ones bound by the provision) for the amendment. In particular, there is a need for certainty for those who wish to speak or communicate in public to know whether their speech is prohibited or not. On balance, I support the change here as favouring appropriate freedom of speech.

Defence- subsection (4)

However, I do not support currently proposed new subsection (4), which provides a defence that is really far too broad. On the face of the provision, the defence would effectively “eat up” the prohibition in subsection (1), as it is hard to see any public comment that would fall outside the scope of “public discussion of any political, social, cultural, religious, artistic, academic or scientific matter”.

Currently s 18D requires that speech which does not breach s 18C must be comment made “reasonably and in good faith” for a more limited set of purposes. If coming to the matter *de novo* I would have been inclined to accept that current s 18D provides a good balance of freedom of speech with the other values at stake here. But I have to say that some of the judicial decisions on “good faith” in

considering this and related provisions over recent years indicate that it is not a sufficiently clear standard to allow robust debate on important issues. I do not think that what Andrew Bolt said in the materials for which he was sued in *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) was all justified or wise, but I think that the finding of lack of good faith in that decision was wrong. In my view the comments were made as part of an honest attempt to have a serious debate on important issues.⁴

In previous comment on that decision I have suggested that the complainants in that decision may well have been able to sue in the ordinary law of defamation. I would like to suggest that the Government give serious consideration to providing that claims based on the new vilification/intimidation provision here be subject to a range of defences consciously drawn from the law of defamation. The defences to defamation developed by the common law, and refined by statute over many years, have the important purpose of balancing the right to freedom of speech, with the other important right not to have one's reputation destroyed. True, in this situation the right of the defendant here is slightly different. It is a right to make free public comment on important issues. It is justifiably being circumscribed by the need to avoid the harm of vilification and intimidation. But the defamation defences can also protect the interests of free speech here. In essence, while the interests of the *complainant* in defamation and RDA hate speech cases are different, the interests of the *defendant* in being able to speak freely on important issues, and knowing beforehand what speech is permitted or not, are the same.

This is an area that may need further consideration. But let me give one or two examples. The lack of a clear defence of "truth" is a defect of the current s 18D. The reference to a "fair and accurate report" in s 18D(c)(i) comes close but it seems to me that it would be simpler to incorporate the law of "justification" from the area of defamation. (And the preliminary hurdle of "reasonably and in good faith" creates a large area of uncertainty.) A comment, for example, that persons of Ruritanian origin committed 90% of the child sex offences in Australia, would be likely to engender hatred and vilification of Ruritanians in the Australian community. Yet if it could be supported by clear evidence it would be important that it be brought to public attention. Even if it could not be ultimately shown to be true, an honest opinion based on plausible sources should be protected as part of a community debate.

The new defence provision might simply be drafted to incorporate the defences under the current law of defamation in a relevant jurisdiction, deeming the comments made under subsection (1) to be defamatory comments published about the person or group of persons. Alternatively, a more detailed provision could be drafted which spells out the relevant defences clearly. Some of the defamation defences might not be suitable- the defence of "triviality", for

⁴ I am also concerned about the way that the "good faith" defence was rejected at first instance in the religious vilification decision over-turned in *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284 (14 December 2006).

example, under s 33 of the *Defamation Act* 2005 (NSW), would not be relevant given the seriousness of the behaviour being addressed.

It is worth noting that incorporation of the defamation defences would go some way to making the law as a whole more coherent. In his judgment in *Monis v The Queen* [2013] HCA 4 Hayne J noted this in relation to the prohibition of “offensive” material coming through the post:

[213] To hold that a person publishing defamatory matter could be guilty of an offence under s 471.12 but have a defence to an action for defamation is not and cannot be right. The resulting **incoherence** in the law demonstrates either that the object or end pursued by s 471.12 is not legitimate, or that the section is not reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government and the freedom of communication that is its indispensable incident...A statement can still be offensive even if it is true. (emphasis added)

Other substantive changes- repeal of ss 18B, 18E

Apart from the repeal of s 18C, two substantive changes are then being made. The repeal of s 18B will remove the principle of interpretation by which, if a prohibited ground is one reason for an action, it may be treated as “the” reason, even if not the main or substantial reason. While I appreciate that provisions of this sort are found elsewhere in discrimination legislation (including immediately prior to this part of the RDA, in s 18 dealing with “standard” race discrimination claims), I agree on reflection that it is sensible to remove s 18B from Part IIA. The important underlying freedom of speech is undermined dramatically by requiring that any possible taint of racial hatred to a comment, even if made for many other legitimate reasons, may be actionable.

The other substantive change is the removal of s 18E, which sets up a statutory form of “vicarious liability” for the actions of “employees or agents” (just as s 18A sets this up for “standard” race discrimination claims.) In my view s 18E ought to remain. The new provision will be addressing serious issues of vilification and intimidation; these things may often happen in the workplace; and “exempting” employers completely is a bad move. In the workplace safety area we require employers to take responsibility for wrongs that one employee commits against another, mainly because this will focus the employer’s mind on not simply issuing platitudes about safety, but actually enforcing safety prohibitions. This new “stronger” form of unlawful behaviour, vilification or intimidation, is not dissimilar to safety. I would encourage the Government to maintain the current s 18E. It is already more generous to employers than the common law of vicarious liability is, by providing in s 18E(2) that it is a defence to show that “all reasonable steps” were taken to prevent the unlawful speech. It should stay.

Thank you for the opportunity to comment on this important legislative reform.

Yours sincerely,

(Associate Professor Neil Foster)