From the desk of Simon Breheny, Director, Legal Rights Project

sbreheny@ipa.org.au

Institute of Public Affairs Legal Rights Project

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Submission from the Institute of Public Affairs to the public consultation on amendments to the *Racial Discrimination Act 1975*

The Institute of Public Affairs was founded in 1943. Since that time the IPA has fought to maintain the principles of freedom and liberal democracy. Freedom of speech is an essential feature of a liberal democracy which is why the IPA has so strongly fought for freedom of speech in Australia.

The background to the process of public consultation the federal government is undertaking on the *Racial Discrimination Act 1975* is well-known. The extensive research and analysis conducted by the IPA on freedom of speech over a number of years is available on the IPA's website at www.ipa.org.au. Attention is drawn specifically to the book published by the IPA in 2012 and authored by IPA Policy Director, Chris Berg, *In Defence of Freedom of Speech: From Ancient Greece to Andrew Bolt*. This submission deliberately does not seek to traverse the years of IPA research and analysis on the issues raised in the current process of public consultation. Instead this submission is focussed on a number of key issues.

Freedom of speech and freedom of thought under threat in Australia

It is essential to put any discussion about the *Racial Discrimination Act*, and in particular section 18C of the Act, into context.

Sadly, freedom of speech and what follows from this freedom, namely freedom of thought, has been under sustained attack in Australia for a number of years. The attempt of the Gillard government to regulate the media was an attack, literally unprecedented in recent Australian history, on freedom of the press. Without freedom of the press there can be no freedom of speech.

The attempt, also by the Gillard government, to introduce the so-called *Human Rights and Anti-Discrimination Bill* in 2012 was likewise an unprecedented attack on the political freedom of Australians. The Bill proposed to make it unlawful to "offend" or "insult" someone on the basis of their "political opinion". Such a measure would have had an absolutely chilling effect on political discussion and freedom of speech in this country. The Bill would have all but eliminated freedom of religion in Australia, because it proposed that a public expression of

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religious belief would have been unlawful if someone was offended by such actions. The Bill would have made it unlawful to debate religion and religious practices if a person found such a debate "offensive". Furthermore the Bill proposed that individuals accused of unlawful behaviour were to be declared guilty unless they could prove their innocence, that individuals accused under the legislation would not have an automatic right to legal representation, and that the accused would be required to pay all the costs of their defence even if they were found to be innocent.

In the wake of a massive public outcry against the Bill, led by the IPA, the then government withdrew the Bill. As Janet Albrechtsen wrote in *The Australian* newspaper on 6 February 2013:

> When tested against rational arguments, Roxon's agenda failed. [Nicola Roxon was the Labor government's Attorney-General who introduced the Bill.] Take a bow, too, the staff, headed by John Roskam, at the Institute of Public Affairs and the IPA's paying members who ran FreedomWatch - a campaign that garnered rational, passionate, liberty-based arguments against Roxon's Bill.[1]

That such dangerous and draconian legislation could even have been contemplated in a free and democratic country such as Australia is alarming. Let's not forget that the *Human Rights and Anti-Discrimination Bill* would have handed to government massive power over the lives of individuals and society. No less alarming is that the Bill was enthusiastically supported by the Australian Human Rights Commission. (It is of passing interest that another enthusiastic supporter of the *Human Rights and Anti-Discrimination Bill* and indeed the organisation that wrote the Bill was the Attorney-General's Department – the very organisation that the Abbott government has charged with conducting the public consultation on amendments on the *Racial Discrimination Act 1975* and the organisation to which this submission is addressed.)

Opponents of freedom of speech

Once upon a time the political left supported freedom of speech. That is no longer the case, particularly in Australia. Now the task of defending freedom of speech in Australia falls upon the IPA.

A recent statement by Neil Ormerod, Professor of Theology at the Australian Catholic University, provides a useful summation of the views of those opposed to freedom of speech:

> Free speech for racist bigots, free speech for climate denialists. Where will it end? Free speech for the tobacco industry to deny smoking causes cancer? There is a value in free speech to promote reasoned discussion and deliberation. And then there is obdurate and at times wilful ignorance. Smoking does cause cancer, there are no superior races and human-induced climate change is as certain as it is scientifically possible to demonstrate.[2]

Of course the question left unanswered by Professor Ormerod and the political left is - who gets to decide whether free speech is "valuable"? The government? A judge? The Australian

Human Rights Commission? And who gets to decide that the "obdurate" and those suffering from "wilful ignorance" are not allowed to speak?

Aside from the political left, a number of ethnic community leaders in this country also oppose freedom of speech. A number of ethnic community organisations specifically oppose the removal of section 18C of the *Racial Discrimination Act 1975*. Part of the argument for their position is that a prohibition against insulting or offending someone on the basis of their race is necessary to ensure that Australia is a tolerant multicultural society. However this argument ignores a number of key things. During the period of the successful settlement of millions of new arrivals to Australia in the 1950s and 1960s, section 18C did not exist. Individuals and their families coming to Australia from other countries for a better life sought to come to this country because of the freedoms that were available in Australia. And one of those freedoms is freedom of speech. The freedoms that made Australia the country and society that it is, are not a product of section 18C of the *Racial Discrimination Act*. Australia's freedoms are the legacy of a centuries-old tradition of liberty which Australia was fortunate enough to inherit. It would be unfortunate if those who have come to Australia to gain the benefits of this country's freedoms were successful in removing the very freedoms they have benefited from.

The idea that the government restrict freedom of speech for its citizens in the name of tolerance is not one that is held in the United States. The United States is a country that accepts ten times the number of new arrivals that Australia does. Yet without the equivalent of Australia's section 18C the United States is the country in which millions of people from ethnic minorities seek to live and bring up their families.

As noted by Professor of Law at the University of Queensland, James Allan:

> In the US there are no hate speech laws of any kind… Australians are no more prone to being sucked in by offensive or hateful speech than North Americans or those with multiple degrees. And if you don't believe that, then you can't really be in favour of democracy, it seems to me.[3]

The difference between Australia and the United States is demonstrated by two cases, one very recent and one from the 1970s.

In the first case, Donald Sterling, the owner of the Los Angeles Clippers basketball team, made a number of grossly offensive racially-motivated comments. For example he told his partner to stop "associating with black people."[4] On 29 April 2014, the National Basketball Association Commissioner banned Sterling from the NBA for life, fined him US$2.5 million, and asked the NBA Board of Governors to vote on whether to force Sterling to sell the franchise. President Barack Obama said on this issue, "when ignorant folks want to advertise their ignorance, you don't really have to do anything, you just let them talk. And that's what happened here."[5] It was civil society and popular opinion which deemed Sterling's action unacceptable. It was not the government.

The other case is a famous and controversial one. In 1977 the National Socialist Party of America attempted to organise a street march through the suburb of Skokie in Chicago, a locality which was the home of many survivors of the Holocaust. The American Civil Liberties

Union defended the right of the Party to proceed with its march. Aryeh Neier, the National Director of the ACLU during the Skokie case, has said the following about freedom of speech:

> I think it is so important because freedom of speech seems to me the key to all other rights. If one can speak out about any abuse one has suffered, one always has the possibility of gaining certain relief or certain redress from any other kind of abuse. And I think people all over the world prize the ability to express themselves freely because they know that that is the way that they can protect themselves against other kinds of abuses of their rights.[6]

David Hamlin, the Executive Director of the ACLU Illinois Chapter during the Skokie case said this about those who said the ACLU should not be defending the ability of fascists to engage in such activity:

> "No free speech" is, of course, the hallmark of fascism. Advocating the revocation of free speech for Fascists is fascism itself, and roughly the same as advocating "no voting in a democracy." A surprising collection of leftists and others would eventually adopt the position represented by that slogan, most of them with a zeal sufficient to enable them to ignore the inherent contradiction of the position they had taken.[7]

Canada is an example of where laws like section 18C have been repealed. Section 13 of Canada's *Human Rights Act* had been used in a similar way to section 18C, most famously against commentator Mark Steyn. In June 2013 the conservative Harper government repealed section 13. The Canadian parliament recognised that these laws are incompatible with freedom of speech. As Steyn himself said recently:

> I heard a lot of that kind of talk during my battles with the Canadian "human rights" commissions a few years ago: of course, we all believe in free speech, but it's a question of how you "strike the balance", where you "draw the line"… which all sounds terribly reasonable and Canadian, and apparently Australian, too. But in reality the point of free speech is for the stuff that's over the line, and strikingly unbalanced. If free speech is only for polite persons of mild temperament within government-policed parameters, it isn't free at all. So screw that.[8]

Why freedom of speech matters

There are three main arguments for freedom of speech. The first is a democratic one. Free expression is an institution that supports democratic deliberation. This observation forms the basis of the High Court of Australia's implied freedom of political communication. In the words of Chief Justice Mason:

> Only by exercising that freedom can the citizen criticise government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives… Absent such a freedom of communication, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives.[9]

The second is the "marketplace of ideas". This is most commonly associated with John Stuart Mill. In his famous book *On Liberty*, Mill argued for a discursive ideal of freedom of speech. Free speech allows individuals and society at large to interchange, test and confirm ideas. To censor speech is therefore to stifle this process. For Mill, free speech is really freedom of discussion. As he wrote:

> the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it.[10]

The third argument for freedom of speech is founded in moral autonomy. This places the argument for freedom of expression in freedom of conscience. This is the argument for freedom of expression defended in Chris Berg's *In Defence of Freedom of Speech: from Ancient Greece to Andrew Bolt*:

> Freedom of speech is a matter of individual agency, or personhood. It is an element of individual autonomy. The right to hold views that may be contrary to those of the majority, or of those in positions of power, is seen as quintessentially democratic. As we are all equal, we equally hold that right. This is a non-instrumental argument. Freedom of speech is a good in and of itself – it has intrinsic value.[11]

John Stuart Mill's famous argument was not limited to a defence of speech that assisted the pursuit of truth. Rather, Mill valued the expression of extreme and untruthful opinions for the benefits it gave true opinions. As he argued, unless truth is "vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds."[12]

Section 18C of the *Racial Discrimination Act* is explicitly intended as a significant weapon in the battle against prejudice by restraining contrary voices. In the second reading speech for the *Racial Hatred Bill 1995*, Attorney-General Michael Lavarch argued that section 18C "sends a clear warning to those who might attack the principle of tolerance." Mill counsels us that a tolerance which is only brought into being by legal force is a weak and fragile tolerance:

> the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience.[13]

Australia opposed the introduction of the provision against the incitement of racial hatred in the *International Covenant on Civil and Political Rights*, Article 20 (2), which was adopted in 1966. Making the case against this provision, which was proposed by a group of nations led by the Soviet Union, the Australian representatives argued that "people could not be legislated into morality".[14] This remains true today. A legislative prohibition on expressions of prejudice will not limit prejudice. Worse, a recurring phenomenon in the history of censorship and legal speech constraints is the counter-productive influence of such policies.

There are justifiable limitations on expression. Speech should be prohibited when it crosses the boundary from expression into action. An example of this is John Stuart Mill's famous corn

dealer – where an opinion that corn-dealers starve the poor would be lawful speech if shared in normal conversation but unlawful if shared to an armed mob outside the home of a corn-dealer.

The repeal of section 18C

To the extent that section 18C covers conduct that "offends", "insults" and humiliates" it is a restriction on the fundamental human right to freedom of speech. And to the extent that it covers conduct that "intimidates" it duplicates a range of more appropriate Commonwealth and state laws against intimidation.

Section 18C also creates a legal test based on emotional states. No such test should exist anywhere in the law. Permitting "hurt feelings" to be the basis of legal claims imposes legal obligations which are impossible to comply with. It asks judges to assess liability based on sentiment.

Section 18C also restricts conduct that intimidates. Intimidatory conduct has met a threshold where speech ought to be restricted. Every Australian state and territory has laws against intimidation. For example, it is against the law to:

- urge violence against groups based on race, religion, nationality or ethnic or political opinion under section 80.2A of the Commonwealth *Criminal Code Act 1995*;
- intimidate or annoy by violence under section 545B of the New South Wales *Crimes Act 1900*;
- use obscene, indecent, threatening language and behaviour in public under section 17 of the Victorian *Summary Offences Act 1966*;
- threaten violence under section 75 of the Queensland *Criminal Code 1899*;
- intimidate another person under section 338E of the Western Australian *Criminal Code Act Compilation Act 1913*;
- make unlawful threats under section 19 of the South Australian *Criminal Law Consolidation Act 1935*;
- cause an apprehension of fear under section 192 of the Tasmanian *Criminal Code 1924*;
- threaten violence under section 35A of the Australian Capital Territory *Crimes Act 1900*;
- make threats under section 200 of the Northern Territory *Criminal Code Act*.

Section 18C should be repealed in full, and these laws should be relied upon as appropriate protections against intimidation. Retaining intimidation in the context of section 18C merely duplicates these other laws and adds to the complexity of Australia's legal system.

Eatock v Bolt

On 28 September 2011, News Corp Australia journalist Andrew Bolt was found to have breached section 18C of the *Racial Discrimination Act*.[15] The Federal Court case of *Eatock v*

Bolt had considered two articles which Bolt had written on a matter of public policy, and which were published in the *Herald Sun* in 2009.

The judge in the case, Justice Bromberg, also found that Bolt didn't fall within any of the exemptions provided for in section 18D. Bolt had argued that the "fair comment" exemption should apply in his case as he was discussing an important issue in the public interest. The exemption did not apply because the judge held that Bolt's conduct was not done "reasonably and in good faith". Justice Bromberg held that Bolt had used "gratuitous asides" and a "mocking" and "sarcastic" tone in his articles, and that this was sufficient to deny the exemption.

The *Bolt case* is an example of the dangers of section 18C. It was used in that case as a political tool to censor a political enemy. The case demonstrates how serious a restriction on freedom of speech section 18C is, and exactly why the provision must be repealed in its entirety.

The *Bolt case* and the problems it highlighted with the law brought forth a number of supporters for change. For example, three of Australia's leading newspapers agreed that section 18C restricts freedom of speech:

> This newspaper has long argued that the *Racial Discrimination Act* should be amended to rebalance it more towards free speech. Specifically, we believe Section 18C should be abolished.[16]
> *The Age*, 21 December 2013

> Gagging people from fairly and legitimately held opinions is censorship. It is a basic denial of freedom of speech… The underlying problem with the ill-considered effects of Section 18C is that if someone says they have been offended or humiliated, who is to challenge them? That is not what freedom of speech and the right to fairly voice your opinions is about.[17]
> *Herald Sun*, 12 March 2014

> Australia has no reason to be complacent about freedom of speech. Hundreds of prohibitions govern the things we are not allowed to know. And we rank 28th out of 180 on the World Press Freedom Index. The further erosion of freedom of speech is too high a price to pay for legislation erroneously intended to stifle the rougher edges of our robust debate. Trying to legislate for good manners or to prevent hurt invariably backfires. The government is right to abolish Section 18C of the RDA.[18]
> *The Australian*, 29 March 2014

Comments on the Exposure Draft

The Exposure Draft as proposed by the Attorney-General is a substantial improvement on the current law. Repealing section 18C and replacing it with the provision as proposed would be a significant step forward on freedom of expression. As the IPA said on the day the Exposure Draft was released, "While a full repeal of 18C would have been preferable, the government's

proposal goes 95% of the way towards ensuring what happened to Andrew Bolt won't happen again."[19]

One of the most significant strengths of the Exposure Draft is that it removes the words "offend", "insult" and "humiliate". These are the words that create the restriction on freedom of speech at the rotten core of section 18C. Removing these words is a big step in the right direction.

Disappointingly however, the Exposure Draft also proposes to add the word "vilify". This term is vague and ambiguous. Replacing the words "offend", "insult" and "humiliate" with the word "vilify" barely increases the threshold of this provision at all. There is a significant risk that conduct that is currently unlawful under section 18C will still be unlawful under the Exposure Draft due to the very broad range of conduct that can fall within the meaning of the word "vilify".

Under the Exposure Draft, "vilify" is defined to mean "inciting hatred". The same term is used in various racial vilification laws at the state level. For example, inciting hatred is against the law in New South Wales under section 20C of the *Anti-Discrimination Act 1977*. The cases considering the meaning of hatred in the context of that legislation have set a very low threshold for unlawful conduct.

Kazak v John Fairfax Publications is particularly insightful.[20] The case considered whether the publication of an article critical of Palestinian engagement with Israel breached section 20C. In particular, the words "Palestinians cannot be trusted in the peace process" were alleged to be sufficient to breach the Act. On the meaning of "hatred", the tribunal agreed with a Canadian Human Rights Tribunal decision in which it was stated, "With "hatred" the focus is a set of emotions and feelings which involve extreme ill will towards another person or group of persons."[21] This definition is extraordinarily broad. It allows judges to make arbitrary decisions about the limits of public debate. Speech that conveys "ill will" should never be enough to take another person to court.

The government should not proceed with the vilification clause in the Exposure Draft. It is vague and ambiguous and it risks being as significant a restriction on freedom of speech as the current section 18C.

Laws against intimidation are appropriate. Threats of physical violence and incitement to violence should be unlawful. Both state and Commonwealth laws exist to protect individuals against such conduct. The vast majority of these laws apply generally, and the reason for the intimidation is not relevant. Only racial vilification laws require such a racial test to be met.

The government should not proceed with the intimidation clause in the Exposure Draft. Generally applicable laws against intimidation should be relied upon to appropriately deal with intimidatory conduct.

The exemption provision as it is currently drafted is crucial to the strength of this Exposure Draft. It is broad, and is designed to protect discussion of "political, social, cultural, religious, artistic, academic or scientific" matters. It is a significant expansion of the current exemption under section 18D, and is appropriate. Most importantly, the exemption provision does not

include a requirement that conduct be done "reasonably" or "in good faith". This condition on the application of the exemptions has proved too difficult to meet in many cases, and it has undermined the original rationale behind the existence of the exemption – the protection of free speech.

Conclusion

Freedom of speech is fundamental to a free society. The Exposure Draft proposed by the Attorney-General is a welcome step towards restoring freedom of speech in Australia. However, the IPA's view remains that section 18C of the *Racial Discrimination Act* should be repealed in its entirety. Tolerant, liberal, open societies like the United States successfully welcome people from every corner of the planet without laws like section 18C. Canada recently repealed legislation equivalent to section 18C.

Although the IPA has some reservations with the Exposure Draft, the IPA believes it should proceed unchanged. If any changes are made to the proposal, particularly any that would weaken the exemption provision, the IPA believes the Exposure Draft should not proceed. A weakened exemption provision would offer no guarantee that a case like *Eatock v Bolt* would not be decided in exactly the same way it was in 2011 under the current section 18C. Any reform to section 18C which left open the prospect of more cases like *Eatock v Bolt* would represent a complete failure of the reform project. It would be preferable to revisit this issue in a future parliament rather than effectively endorse the current restrictions on freedom of speech with a new law which resembles section 18C.

Simon Breheny
Director, Legal Rights Project

[1] Janet Albrechtsen, 'People power defeated Roxon's radical agenda', *The Australian* (6 February 2013).
[2] Neil Ormerod, 'Senator Brandis, your free speech will be costly', *Sydney Morning Herald* (20 April 2014).
[3] James Allan, 'These elitist hate-speech laws erode democracy', *Sydney Morning Herald* (3 March 2014).
[4] Sean Gregory, 'NBA bans Donald Sterling 'for life' after racist rant', *Time* (29 April 2014).
[5] Dan Berman, 'President Obama: Alleged Donald Sterling remarks 'incredibly offensive', *Politico* (27 April 2014).
[6] Timothy Garton Ash, interview with Aryeh Neier, 'Aryeh Neier on free speech', (6 February 2012) *Free Speech Debate* at http://freespeechdebate.com/en/media/aryeh-neier/.
[7] David Hamlin, *The Nazi/Skokie Conflict: A Civil Liberties Battle* (Beacon Press, 1980), page 72.
[8] Mark Steyn, 'The slow death of free speech', *Spectator Australia* (19 April 2014), page viii.
[9] Cited in Dan Meagher, 'What Is 'Political' Communication? The Rationale of the Implied Freedom of Political Communication', *Melbourne University Law Review* 28, no. 2 (2004).
[10] John Stuart Mill, *On Liberty* (London, J. W. Parker and Son, 1859).
[11] Chris Berg, *In Defence of Freedom of Speech: From Ancient Greece to Andrew Bolt*, Monographs on Western Civilisation (Institute of Public Affairs; Mannkal Economic Education Foundation, 2012), 156.
[12] John Stuart Mill, *On Liberty* (London, J. W. Parker and Son, 1859).
[13] John Stuart Mill, *On Liberty* (London, J. W. Parker and Son, 1859).
[14] Jacob Mchangama, 'The Sordid Origin of Hate-Speech Laws', *Policy Review*, no. 170 (2011).

[15] *Eatock v Bolt* [2011] FCA 1103.
[16] 'Freedom of speech needs liberating', *The Age* (21 December 2013).
[17] 'Your right to speak freely', *Herald Sun* (12 March 2014).
[18] 'Smothering free exchange of ideas a dangerous path', *The Australian* (29 March 2014).
[19] Simon Breheny, 'Abbott government's changes to Racial Discrimination Act a win for freedom of speech – Institute of Public Affairs', *FreedomWatch* (25 March 2014).
[20] *Kazak v John Fairfax Publications Limited* [2000] NSWADT 77.
[21] *Kazak v John Fairfax Publications Limited* [2000] NSWADT 77, paragraph [42].