Community Legal Centres NSW

30 April 2014

The Hon Senator George Brandis QC
Attorney-General
c/o Human Rights Policy Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Via email: s18cconsultation@ag.gov.au

Dear Attorney-General,

I write to make a submission to the proposed amendments to the *Racial Discrimination Act 1975* on behalf of Community Legal Centres NSW which is the peak representative body for 38 Community Legal Centres (CLCs) in NSW.
CLCNSW believes that the changes to the *Racial Discrimination Act 1975* outlined in the Exposure Draft send a clear message to the Australian community that the Federal Government is weakening its stance against racism.

CLCs are independent community organisations providing equitable and accessible legal services. NSW CLCs work for the public interest, particularly for disadvantaged and marginalised people and communities. CLCs not only provide legal advice and assistance, but also encourage and enable people to develop skills to be their own advocates. We promote human rights, social justice and a better environment by advocating for access to justice and equitable laws and legal systems. CLCs work towards achieving systemic change through community legal education, and through law and policy reform. The 38 CLCs throughout NSW employ qualified staff including solicitors, social workers and community legal educators. We also have volunteer solicitors, barristers, law students and others working with us to extend our legal services. The members of CLCNSW are both generalist and specialist centres.

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In December last year, CLCNSW joined with over 150 leading community organisations from around Australia to write to you, urging you not to change the Racial Discrimination Act that has long played an important role in combating racial hatred and protecting individuals and groups against discrimination and hate speech. The organisations represented a wide range of Aboriginal, ethnic, religious, community and legal groups and include leading organisations such as Amnesty International Australia, the Australian Council of Social Services, Oxfam Australia, the Lowitja Institute, the Refugee Council of Australia and the Human Rights Law Centre.

Our key recommendation is that the *Racial Discrimination Act* 1975 (Cth) should not be amended.

CLCNSW believes that the changes to the *Racial Discrimination Act 1975* outlined in the Exposure Draft send a clear message to the Australian community that the Federal Government is weakening its stance against racism.

The message that the government is weakening its stance on racism is particularly concerning when the Australian Human Rights Commission's recent report of a significant increase in complaints received under the Racial Discrimination Act, particularly relating to material on the internet. In 2012-13, the Commission received 192 complaints of racial hatred, of which 79 (about 41%) were internet hate – all lodged under Section 18C.[1]
The government's message about weakening its stance on racism is concerning when the first results of an as yet unpublished academic study, of over 2100 Australian internet users reveal that the internet is a place where racism is rampant.[2] Further, according to the Challenging Racism Project, an academic study of over 2100 Australian internet users, approximately 20 per cent of Australians have experienced forms of race hate.[3]
Many of our centres provide discrimination law advice. This places us in a strong position to be able to understand the impacts of discrimination and particularly how it can affect the health and well-being of our clients. We consider that any weakening of the stance against racism can therefore have broad adverse consequences for the community.

Perhaps the clearest message about watering down the government's opposition to racism can be found in proposed subsection (3) of the exposure draft. This subsection stipulates that the reasonableness of the act '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 community'. This sends a clear message that people who are part of a particular group within the Australian community are not ordinary or reasonable. Given that this stipulation is found within the *Racial Discrimination Act*, it is reasonable to understand this subsection as stating that people who are part of a particular race, colour or national or ethnic origin group within the Australian community are not ordinary or reasonable. CLCNSW considers this to be a racist statement that sends precisely the wrong message to the community about the government's view on the appropriateness of racism in our society.

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[1] https://www.humanrights.gov.au/sites/default/files/document/publication/ahrc_annual_report_2012-13.pdf
[2] http://theconversation.com/what-do-australian-internet-users-think-about-racial-vilification-24280
[3] http://www.uws.edu.au/ssap/ssap/research/challenging_racism. See also http://theconversation.com/what-do-australian-internet-users-think-about-racial-vilification-24280

Even if you do not accept that argument that subsection (3) of the exposure draft suggests that people, who are part of a particular race, colour or national or ethnic origin group within the Australian community, are not ordinary or reasonable, there are other problems with this subsection. When introducing his reforms, the Attorney observed that the successful civil prosecution of Andrew Bolt under section 18C was the catalyst. The Federal Attorney General made clear that the amendments to the *Racial Discrimination Act 1975* are in response to the successful civil prosecution of Andrew Bolt under section 18C. This subsection is clearly in response to Justice Bromberg holding that the reasonable likeliness of Bolt's articles to offend, insult, humiliate or intimidate, had to be analysed from the perspective of fair-skinned Aboriginal people. This subsection seeks to ensure that the reasonable likeliness of vilification and intimidation are not to be determined by the standards of a particular group within the Australian community, that is allegedly being vilified or intimidated, but rather an ordinary reasonable member of the Australian community. The problem is that most Australians, who are of Anglo-Saxon background, have not been abused on the basis of their race, and therefore are not in a position to judge what behaviour is reasonably likely to vilify or intimidate on the basis of race. There are many particular groups in Australia who are particularly vulnerable to vilification and intimidation, and do not have the means to defend themselves from such actions. The proposed subsection will only provide even less protection to these groups.

Australia has ratified the United Nations Declaration on the Rights of Indigenous People ("UNDRIP"), and in doing so, has undertaken a duty to fulfil it's international obligations.

The exposure draft offends the following instruments, as;

Article 8(2)(e) of the UNDRIP provides:

> States shall provide effective mechanisms for prevention of, and redress for:
> ….
> (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

And, Article 15(2) of the UNDRIP provides:

> States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

To legislate and advocate[4] in a manner that can be seen as offending Australia's international obligations reduces Australia's international standing.

Definition of Intimidation

CLCNSW is concerned with the definition of intimidation found in subsection (2)(a) of the exposure draft. One of our largest client groups comprises victims of domestic violence

[4] "People do have the right to be bigots" Federal Attorney-General Brandis, 24 March, 2014.

and/or sexual assault including childhood sexual assault. As a result of many years experience in this area, our member CLCs have developed specialist knowledge and understanding about the lived experience of intimidation. Subsequently, we are well placed to comment on the definition of intimidation and to provide insight and feedback to the Federal Government.

From this experience, CLCNSW is able to recognise that the definition of intimidation found in subsection (2)(a) of the exposure draft is too narrow. Intimidation is not just about physical harm. We regularly support victims of domestic violence and/or sexual assault including childhood sexual assault who have experienced intimidation that involves psychological and social harm.

One of our member Community Legal Centres is Kingsford Legal Centre, which provides specialist free discrimination legal advice across NSW. This places us in a strong position to be able to understand the link between discrimination in the form of intimidation and health. A 2007 VicHealth report states that "the relationship between discrimination and poor mental health and certain risky health behaviours is well established". [5] A study on the mental health impacts of racial discrimination in Victorian culturally and linguistically diverse communities found that the likelihood of high psychological distress increased with the volume of racist experiences but did not depend on the type of racist incident. This suggests that all types of racism can impact on mental health.

Community standards test

CLCNSW is concerned about the new emphasis on the standards of an 'ordinary reasonable member of the Australian community' as distinct from the standards of 'any particular group within the Australian community'.

While this may be viewed as simply reiterating the existing objective test as to assessing the effect of an act, it should be clear that such assessment relates to the effect *on a particular group/ the target group.*

We agree that standards concerning what is a reasonable act should be those understood and held by any reasonable member of the Australian community. We consider, however, that in the application of those standards to an act which targets a particular group, the perspective of those who have been so targeted should be a relevant consideration in determining its effect.

Exemptions

CLCNSW agrees with the observation of the President of the Australian Human Rights Commission regarding subsection [4] of the Exposure Draft: "This provision is so broad it is difficult to see any circumstances in public that these protections would apply."[6] Importantly, the requirements for "reasonableness" and "good faith" in the exemptions

[5] See, for example, VicHealth, *More than tolerance: embracing diversity for health. Discrimination affecting migrant and refugee communities in Victoria, its health consequences, community attitudes and solutions – a summary report*, Victorian Health Promotion Foundation, Melbourne (2007), available at http://www.vichealth.vic.gov.au/~/media/ResourceCentre/PublicationsandResources/Discrimination/VH_Racial%20Discriminiation_CALD_web.ashx.

[6] https://www.humanrights.gov.au/news/media-releases/changes-racial-discrimination-act

would be removed. We recommend that the requirement for a defendant to prove good faith, and accurate and fair comment, should be retained in the free speech defence.

Our Recommendations

Our key recommendation is that the *Racial Discrimination Act* 1975 (Cth) should not be amended.

CLCNSW agrees with the positions of Kingsford Legal Centre and Human Rights Law Centre that the government should have looked at codifying those judicial decisions that have interpreted section 18C so as to ensure that it only captured serious instances of offence and insult as well as intimidation and humiliation.[7]

If the government insists on proceeding with changes similar to those outlined in the exposure draft, CLCNSW recommends the following changes:

- The definition of the offence of 'Intimidation' should be amended to include psychological and social harm;
- The definition of the new offence of 'Vilification' should be amended to mean 'denigration of that person';
- The impact on the victim's group should remain a relevant consideration when assessing the test of "reasonably likely";
- The requirement for a defendant to prove good faith, and accurate and fair comment, should be retained in the free speech defence; and
- Retain sections 18B and 18E.
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If you would like to discuss this further please contact either Zachary Armytage or Kerry Nettle from CLCNSW on (02) 9212 7333.

Yours sincerely,

Alastair McEwin
Director
Community Legal Centres NSW

[7] http://hrlc.org.au/proposed-exemptions-licence-the-promotion-of-racial-discrimination-and-hatred/