Executive Council of Australian Jewry Inc.

הועד הפועל של יהודי אוסטרליה

The Representative Organisation of Australian Jewry

Level 2, 80 William Street
Sydney NSW 2000

Address all correspondence to:
PO Box 1114, Edgecliff NSW 2027

Tel (+61 2) **8353 8500**
Fax (+61 2) **9361 5888**
Web: www.ecaj.org.au
E-mail info@ecaj.org.au

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20 December 2012

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Email: legcon.sen@aph.gov.au

Dear Sir/Madam

Re: Inquiry into Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 ("the Bill")

The Executive Council of Australian Jewry, the elected representative organisation of the Australian Jewish community, makes the following submission on behalf of the Australian Jewish community, in response to the call for submissions on the Bill.

We commend the Australian government for the work that has gone into developing the Bill and we support the five key principles, as outlined in the government's Fact Sheet, that have been applied in consolidating the five existing Commonwealth anti-discrimination Acts into a single comprehensive law.

Whilst we welcome the government's commitment to ensure that there will be no reduction in existing protections and that the highest current standards will be consistently applied and enforced across the full range of discriminatory practices, we urge the government to exercise caution to ensure that any broadening of the application of existing protections does not have unintended consequences, especially if these might ultimately lead to a weakening of public support even for the original protections.

We make the following comments in relation to particular items in the Bill which are of particular concern to the Jewish community.

1. Re-enactment of prohibition of racial vilification

We welcome the re-enactment of the provisions of sections 18C and 18D of the *Racial Discrimination Act 1975* (RDA) in clause 51 of the Bill, without amendment. We are aware that on 7 August 2012 the Federal Opposition leader, the Hon. Tony Abbott MP, announced that, if elected, a Coalition government would replace section 18C with "criminal sanctions akin to common law offences of incitement and 'causing fear'".

The announcement was made during a speech in which Mr Abbott referred to the case of *Eatock v Bolt* [2011] FCA 1103 and said that while insulting, humiliating or intimidating others on any grounds, racial or otherwise, is deplorable, a "hurt feelings" test is impossible to comply with while maintaining the fearless pursuit of truth. "*Expression or advocacy should never be unlawful merely because it is offensive*", Mr Abbott was reported as saying: http://www.smh.com.au/opinion/political-news/abbotts-vow-to-ditch-racist-speech-law-attacked-20120806-23q8a.html. Mr Abbott's characterisation of section 18C was subsequently echoed by senior journalist Paul Kelly in *The Australian* on 8 August 2012 (p12) when he described the test of whether or not there is a breach of s.18C as a *"subjective test"* based on *"hurt feelings"*.

Such a characterisation of section 18C is incorrect. The test of whether or not there is a breach of s.18C is an objective test, as conveyed by the words *"reasonably likely"* in that section: *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 at [15]; *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 at [12]; *Jones v Scully* [2002] FCA 1080 at [98]-[101]. In fact it is not even necessary for a complainant to adduce evidence that anyone has in fact been offended, insulted, humiliated or intimidated. Such evidence, if led, is admissible but not determinative. The Court must make an objective assessment of the position itself, so that community standards of behaviour rather than the subjective views of the complainant are the decisive consideration. Australian Courts have for many years made determinations in many other areas of the law that involve applying an objective standard of reasonableness, most commonly in negligence cases.

It is also a mischaracterisation of section 18C to suggest that it makes speech which merely "offends" or "insults" unlawful. The section makes it unlawful to publish material which offends or insults a person or group **"*because of the race, colour or national or ethnic origin of the person or of some or all of the people in the group*"**.[1] These words add a crucial limitation upon the application of section 18C which some critics of the section have attempted to excise from the discussion.

[1] Subsection 18C(1)(b)

To offend or insult a person or group merely by confronting them with ideas or opinions which they perhaps find incompatible with their own belief systems might hurt their sensibilities but does not in any way entail an assault upon their human dignity. In a free society, ideas of any kind - religious, political, ideological or philosophical - are capable of being debated and defended. Robust critiques of ideas of any kind, no matter how passionately adhered to, do not constitute a form of social exclusion of those who adhere to them.

In contrast, to offend or insult a person or group because of their "*race, colour or national or ethnic origin*" necessarily sends a message that such people, by virtue of who they are, and regardless of how they behave or what they believe, are not members of society in good standing. This cannot but vitiate the sense of belonging of members of the group and their sense of assurance and security as citizens. To offend or insult a person or group because of their "*race, colour or national or ethnic origin*" thus constitutes a very real and, we would submit, evil assault upon their human dignity. For this reason, we strongly support the retention of the words "offend" and "insult" in clause 51 of the Bill.

Critics of section 18C also do not take proper account of the defences that are available under section 18D of the RDA. Persons who are sued under section 18C are not required positively to establish the truth of material they have published, although they may do so if that is possible. All that is required in order to establish a complete defence is to satisfy the court that the material was published "*reasonably and in good faith*":

> *(a) in the performance, exhibition or distribution of an artistic work; or*
> *(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or*
> *(c) in making or publishing:*
> > *(i) a fair and accurate report of any event or matter of public interest; or*
> > *(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.*"

Taken together, sections 18C and 18D have been found by the courts to strike an appropriate balance between Australia's international obligation[2] to enact laws for the elimination of racial discrimination and the implied constitutional freedom of communication between people concerning political or government matters. In his judgment in *Jones v Scully* [2002] FCA 1080 (at paras 239-240) Justice Peter Hely said:

[2] As a State party to the *International Convention for the Elimination of All Forms of Racial Discrimination* 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: http://www.unhcr.org/refworld/docid/3ae6b3940.html [accessed 17 December 2012]

> *"the critical question is whether the RDA is reasonably appropriate and adapted to serving a legitimate end that is compatible with the maintenance of representative and responsible government, without unnecessarily or unreasonably impairing the freedom of communication about government and political matters protected by the Constitution. I agree ... that a "legitimate end" of the RDA includes the fulfilment of Australia's obligations under the* [International] *Convention* [for the Elimination of All Forms of Racial Discrimination]. *Stated more broadly, the legitimate end sought to be obtained by the RDA is the elimination of racial discrimination. It is not to be supposed that the elimination of racial discrimination is a purpose that is incompatible with the requirement of freedom of communication imposed by the Constitution. In addition, the constitutionally prescribed system of government does not require an unqualified freedom to publish offensive matter or perform offensive acts that are based on race. Indeed, in the same way that the protection of the reputations of those who take part in the government and political life from false and defamatory statements is conducive to the public good...so too is the protection of persons from offensive behaviour based on race.*
>
> *The next question is therefore whether the RDA is reasonably appropriate and adapted to achieve the elimination of racial discrimination having regard to the requirement of freedom of communication about government and political matters required by the Constitution. I agree...that, bearing in mind the exemptions available under s 18D, Part IIA of the RDA is reasonably appropriate and adapted to serve the legitimate end of eliminating racial discrimination. Section 18D, by its terms, does not render unlawful anything that is said or done "reasonably and in good faith" providing that it falls within the criteria set out in subs (a)-(c).* ***I consider that those exemptions provide an appropriate balance between the legitimate end of eliminating racial discrimination and the requirement of freedom of communication about government and political matters required by the Constitution****. I accordingly reject the respondent's argument that the RDA should be declared unconstitutional "for the sake of freedom to communicate political matters".* (Emphasis added).

Justice Hely's reasoning has been followed in all subsequent cases where the issue of the constitutionality of section 18C of the RDA has been raised. That reasoning remains persuasive.

We note that neither Mr Abbott nor Mr Kelly argued specifically that the decision in *Eatock v Bolt* was unjust. It should further be noted that in *Eatock v Bolt* the respondents made no specific submissions as to why, if the Court was to make a finding of a *prima facie* breach of section 18C, the respondents' conduct ought nevertheless be excused pursuant to section 18D. The outcome in *Eatock v Bolt* cannot therefore provide an adequate basis for criticising and seeking to amend the

current anti-vilification regime of the *RDA* when that case did not fully test the limits of the countervailing protections afforded to respondents by section 18D.

2. Extension of the concept of discrimination to conduct which only "offends"

Subclause 19(2)(b) of the Bill provides that unfavourable treatment of another person, as an element of unlawful discrimination, includes conduct that "offends, insults or intimidates" that other person. Although the Explanatory Notes include the word "humiliates" in connection with this subclause[3], the word does not appear in the Bill itself.

There are many ways in which one person might treat another unfavourably. In our view, courts are perfectly capable of determining for themselves whether unfavourable treatment has occurred in any given case based on the totality of the evidence and the circumstances. The Bill's attempt to list some of the types of conduct that might constitute unfavourable treatment is, in our view, overly prescriptive.

Further, the attempt to infuse the anti-vilification concepts of offensive, insulting and intimidating behaviour into anti-discrimination law is, we believe, fraught with the potential for confusion and unintended consequences. Significantly, unlike section 18C of the RDA, subclause 19(2)(b) of the Bill does not expressly provide for the application of an objective test, and thus leaves open the possibility that a subjective test would be applied.

We would be opposed to that outcome. A person may be offended or insulted capriciously and unreasonably, even allowing for the qualification in clause 19(1) that the conduct causing the offence or insult must be "*because the ... person has a particular protected attribute*". Without the express requirement of an objective test, as presently conveyed by the words "reasonably likely" in section 18C of the RDA, the new provision would, in our view, be too wide and open to abuse.

There are eighteen "protected attributes" listed in clause 17 of the Bill, seven of which apply only in the employment context. Some of these attributes are new to anti-discrimination law. We agree that "race" must continue to be a protected attribute for general anti-discrimination law purposes, as is currently the case under the RDA. However, we believe it is confusing and wrong for the Bill to have two sets of provisions - in clause 19(2)(b) and in clause 51 - that prohibit conduct that offends, insults or intimidates another person because of the other person's race, especially as:

(a) the wording, and the tests to be applied, are not identical;

[3] At para [107].

(b) the general defence of 'justifiable conduct' in clause 23 of the Bill would apply to conduct otherwise prohibited by subclause 19(2)(b) but not by clause 51; and
(c) the defences in clause 51(4) of the Bill would apply to conduct otherwise prohibited by clause 51 but not by subclause 19(2)(b).

In our view, the Bill should have one regime only that prohibits conduct that offends, insults, humiliates or intimidates others because of their race, namely the regime contained in clause 51.

Whilst there are good, evidence-based policy reasons to have legislation in place which prohibits conduct that offends, insults, humiliates or intimidates others because of other attributes, especially sexual orientation and gender identity, we believe that this should take the form of anti-vilification, not anti-discrimination, legislation and such legislation should include the same objective element as applies when the protected attribute is race. If, as we believe is the case, the Commonwealth lacks the constitutional power to enact anti-vilification legislation to protect attributes other than race, then it should be left to the States and Territories to do so, and the focus of government should be to achieve uniformity in such legislation across Australia.

3. General defence of justifiable conduct

Clause 23 of the Bill provides for a general defence of justifiable conduct. It provides that an act of discrimination is lawful if it is done for a legitimate aim and is proportionate to that aim. We have no difficulty with this provision. However, there should be no doubt that the general defence of justifiable conduct is not intended to provide an extra layer of defence against complaints of other types of conduct that would be unlawful under Parts 2-3 or 2-4 of the Bill. We therefore suggest that the Bill should make express provision that the defence applies only to conduct which would otherwise constitute unlawful discrimination, but not to other unlawful conduct.

As presently drafted, this limitation on the application of the defence is implied by the headings and subject matter of Part 2-2 and of Division 4 of that Part, and the fact that clause 23 is located within them. Because of the importance of this limitation, we submit that it should be provided for expressly in sub-clause 23(1), which should be amended to read;

The exception in this section applies:

(a) only to conduct which, but for this section, would constitute unlawful discrimination under Part 2-2 of this Act, but not to other unlawful conduct under Part 2-3 or Part 2-4; and

(b) in relation to all protected attributes.

4. Streamlining of complaints process

We welcome and support most of the provisions in the Bill that are aimed at simplifying and streamlining the complaints process, including the provisions for:

- a shifting burden of proof once an applicant has established a prime facie case, to recognise that the respondent is best placed to know the reason for an action and to have access to relevant evidence (clause 124);

- the enhanced power of the Australian Human Rights Commission to dismiss clearly unmeritorious complaints (clause 117);

- the requirement that matters dismissed in this way may proceed to court only by leave of the court (clause 121); and.

- interim injunctions (clause 126).

5. Costs

We strongly oppose the provision that parties should bear their own costs for litigation as a default position, with the court retaining a discretion to award costs in the interests of justice (clause 133). In our view, it is onerous enough that victims of discrimination or other unlawful conduct who seek redress must expend their own time, energy and resources, and engage lawyers and incur legal expenses, to do so. In our view, there is no justification for imposing on a successful complainant, or a successful respondent, the additional burden of legal costs as a default position.

The costs regime that ordinarily applies in litigation is that costs follow the event unless the court in its discretion considers there to be good reasons to order otherwise. The policy reasons that underpin this regime are well known. A party with a meritorious case should not be deterred from seeking justice by the prospect of having to bear expensive legal costs which cannot be recovered even if the action is successful. Similarly, a defendant against whom a case is brought which is found to lack merit should not suffer the penalty of being unable to recover legal costs that have been incurred in vindicating the defendant's position.

These policy reasons apply with equal force to actions seeking redress for alleged unlawful discrimination and other unlawful conduct. We therefore urge that clause 133 be deleted from the Bill, so that the costs regime that will apply will be that which ordinarily applies to actions in the Federal Court or the Federal Magistrates Court, as the case may be.

We wish the Senate Legal and Constitutional Affairs Committee well in its inquiry into the terms of the Bill and are prepared to supplement these submissions if necessary.

Yours sincerely

Peter Wertheim AM
Executive Director