Australian Hellenic Council NSW Inc.

A coordinating body for the Australian Hellenic community

SUBMISSION ON THE EXPOSURE DRAFT

The Australian Hellenic Council

1. The Australian Hellenic Council NSW (AHC) is an incorporated association in NSW which represents a number of Greek community organisations. Its charter provides that it promote the positions of the Australian Hellenic community on issues that affect that community.

2. The AHC has been part of a loose alliance of other ethnic and community-based groups, including The Following consultation with community members and having taken part in various meetings with representatives from other community organisations the Australian Hellenic Council NSW wishes to make the following submission in relation to the Exposure Draft released by the Federal Government for amending section 18C and related sections of the *Racial Discrimination Act*.

AHC's support for the submission by the Australian Multicultural Council

3. The Australian Hellenic Council has reviewed the submission made by the Australian Multicultural Council (AMC) dated 16 April 2014, a copy of which is attached. We note that the terms of reference of the AMC include advising the government on multicultural affairs. We fully agree with the AMC's submission and adopt that submission in its entirety.

4. In so doing we also wish to make the following additional submissions in light of comments made in the current debate.

Is this really about freedom of speech?

5. Much has been said or written about the need to protect freedom of speech. The Exposure Draft even carries the title "Freedom of Speech (Repeal of section 18C) Bill 2014" as if the bill's name gives more weight or currency to the argument that repealing s.18C is really just about re-establishing the right to speak openly and bluntly in any social or public forum.

6. We find this argument disingenuous. As Professor Ron Sackville AO observed during Sackville:

"The difficulty with unqualified slogans like the 'public's right to know' or 'freedom of speech' is that they obscure the difficult choices that decision-makers and policymakers face … One of the characteristics of modern society, encouraged by the availability of instantaneous modes of communication, is a general yearning for simple solutions to complex problems. The popular media are by no means the only organs of information and opinion that exploit this desire. Our democratic institutions and elected representatives promote the belief that short-term solutions can be found to issues that require long-term planning and implementation. The use of the catchcries 'freedom of speech' and the 'right to know', as with all slogans, necessarily simplifies the nature of the issues requiring informed debate." [1]

7. Even the Attorney-General, when in previously in government, was prepared to stare down the absolutist libertarian ideal when it suited government policy making. In the Spring 2005 edition of the Liberal Party's journal, *the PartyRoom*, Senator Brandis under the heading "Rethinking rights in the age of terror" correctly observed that governments bear a heavy burden of persuasion whenever they propose laws which curtail traditional rights and liberties but that the traditional law enforcement paradigm was no longer equal to the national security challenge posed by global terrorism. George Brandis continued:

"The civil libertarians' approach reflects the attitude of the celebrated American legal scholar Ronald Dworkin, who popularised the expression "rights are trumps". His argument is that no amount of social utility or public benefit can justify an incursion on a citizen's rights. The problem with an absolutist position like that is that it forecloses further discussion - the attitude of so many civil libertarians is that they merely have to play the "rights" card and that is the end of the argument. The challenges presented by terrorism demand a more sophisticated response."[2]

8. According to Senator Brandis, an example of this is in sedition laws which, inter alia, seek to criminalise the use of language (whether spoken or written) that might encourage terrorism but which to some represent a violation of the right to freedom of speech. In Brandis' words:

"(F)reedom of speech has never been an absolute right - if it were the laws of defamation would not exist … (T)hose who share that sentiment do neither themselves, nor their

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[1] Ronald Sackville keynote address "Let truth and falsehood grapple: Milton as a dubious guide to some questions about free speech" to the Australia's Right To Know Freedom of Speech conference held on Tuesday 24 March 2009 accessed at http://www.australiasrighttoknow.com.au/files/ron-sackville.pdf

[2] G. Brandis, "Rethinking rights in the age of terror" *the PartyRoom* Spring 2005 p. 8ff

arguments, any favours by making grand, rhetorical, absolutist claims about civil liberties, rather than engaging in a careful reassessment of the sources, utility and rationale of the legal principles they seek to defend."

9. That is precisely what is now occurring in the debate over the proposed changes to the *Racial Discrimination Act*. The resort to "grand, rhetorical, absolutist claims" such as the right to be bigoted in the name of free speech does not make for a sophisticated or informed debate.

10. Similarly, the argument for repeal also falls down on the fallacy of the so-called marketplace of ideas which is a convenient-sounding metaphor for a robust and unhindered exchange of ideas between citizens who meet on an equal footing where all viewpoints are heard and that the best ideas will float to the top. The marketplace concept is fundamentally flawed because it assumes that everyone will have equal and unimpeded access to communicate and be heard. But it is not a level playing field and the marketplace of ideas can be distorted by those who control sections of the media.

11. The great paradox is that racial vilification can actually impinge free speech by having a silencing effect on the vilified. The marketplace of ideas is of no assistance to the silenced.

12. Finally, we agree that freedom of speech is fundamental to Australia's liberal democratic society but, as many have written, it is subject to well-recognised limits such as laws against defamation, misleading advertising, offensive conduct in public places, sedition laws and the transmission of offensive material through the post, consumer protection laws, copyright, contempt of court and parliament, censorship, blasphemy, pornography, incitement to genocide or to discrimination, hostility or violence. Laws against hate speech are no different.

The 'rationale' for repealing s.18C of the Racial Discrimination Act

13. Racial or hate speech destroys the spirit and human dignity simply because of who we are. Hate speech does not simply address offence; it seeks to deal with harm to one's human dignity. Section 18C has been misquoted in the debate. As its framers intended, the section has been interpreted to deal with profound and serious effects, not to be likened to mere slights. It is not about offence or insult *per se* to one's sensibilities.

14. The Attorney-General, echoing comments by the Institute of Public Affairs, claims that section 18C has had a "chilling effect" on freedom of speech in Australia and that it has in effect shut down legitimate public policy debate. That is simply untrue. Australia is not some kind of Orwellian backwater where freedom of speech is underfoot or so constrained as to be under threat.

15. This is free speech absolutism at its worst. One such advocate, Professor James Allan, has gone so far as to claim that in a well-functioning democracy it is incumbent on all citizens to grow a "thick skin", perhaps an unfortunate pun when considered in the context of the Federal Court decision (which is the acknowledged catalyst for the proposed changes in the laws) that found that the commentator Andrew Bolt had trashed the integrity and personal worth of so-called light-skinned or pale-faced Aborigines on spurious grounds with multiple errors of material fact and distortions of the truth. Bolt's comments, laced with mockery and inflammatory language, were found by the Court likely to humiliate and intimidate fair-skinned Aboriginal people and would reinforce or encourage racial stereotyping and would likely be destructive of racial tolerance.

16. And yet the Attorney General seemingly lacked this same thick skin when some years earlier he was driven to apoplexy by the publication of a book, *100 Greatest Tyrants*, which included Sir Robert Menzies for his attempt to ban the Communist Party in Australia. Senator George Brandis claimed at the time that the inclusion of Australia's longest-serving prime minister in the book was "disgraceful and inaccurate" and that the book should be removed from school libraries.[3]

17. Nor has this thick skin grown on the back of the conservative commentator Chris Kenny who at one and the same time openly has supported Andrew Bolt and the "right to offend" but was compelled to commence defamation proceedings of his own because of the subjective offence and affront felt by him following a skit on ABC television depicting Kenny as a dog molester. A black man's racial slur is worth less than a white man's defamation.

18. But Bolt's case cannot be viewed in isolation. The law as applied in Bolt was also invoked in the later decision of **Clarke v Nationwide News t/a Sunday Times.** In that case, four Aboriginal boys who died in a stolen car were specifically and maliciously targeted because of their race. Whilst issues such as juvenile crime and parental responsibility are legitimate subjects for commentary and discussion, the readers of that paper went on the attack with some crude and offensive comments, most of which however were deemed not to be in breach of the Act in that they were not serious enough. However, the Federal Court upheld several complaints in respect of racist vitriol that was reflected in comments such as that the deceased were "criminal trash" because of their Aboriginality whose bodies should be used as landfill in the bottom of disused mineshafts, or that their mothers should not be allowed to breed or that the families would not be able to behave at the funerals.

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[3] "Row over 'tyrant' Menzies library book" http://www.theage.com.au/news/National/Row-over-tyrant-Menzies-library-book/2006/10/24/1161455704923.html

19. This resort to racial stereotyping and outright abuse was both needless and gratuitous and was found to be offensive, insulting, humiliating and intimidating. Libertarians would argue that freedom of speech in the so-called marketplace of ideas would see the truth come to the fore after robust debate. But who speaks for the dead Aboriginal boys?

The failings of the Exposure Draft

20. The Exposure Draft purports to make it unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely to vilify or intimidate another person or a group of persons and the act is done because of the race, colour or national or ethnic origin of that person or that group of persons. However, "vilify" is narrowly defined to mean the incitement of hatred whilst "intimidate" is defined to mean causing fear of physical harm. According to Senator Brandis, the government took into account the racial vilification legislation of various States. And yet those state laws invariably proscribe conduct which not only incites racial hatred but also constitutes serious contempt for, or severe ridicule of, a person or group of persons on the ground of their race.

21. The courts have consistently held that the words "offend, insult, humiliate or intimidate" imply "profound and serious effects, not to be likened to mere slights" and relate to serious vilification. The dictionary words "offend, insult, humiliate or intimidate" should be given their ordinary English meanings

22. According to the Oxford English Dictionary, **Insult** means "to assail with offensively dishonouring or contemptuous speech or action; to treat with scornful abuse or offensive disrespect; to offer indignity to; to affront, outrage." **Humiliate** is defined as "to lower the pride or self-respect of; cause a painful loss of dignity to; mortify" (Macquarie Dictionary) or "to make low or humble in position, condition or feeling; to humble" (Oxford English Dictionary). **Intimidate** is defined "to make timid, or inspire with fear; overawe; cow"; "to force into or deter from some action by inducing fear" (Macquarie Dictionary) or "to render timid, inspire with fear; to overawe, cow; in modern use especially to force to or deter from some action by threats or violence" (Oxford English Dictionary).

23. The High Court has considered the related question of what it really means to engage in "offensive conduct" in the context of criminal legislation of using insulting words in or near a public place. In **Coleman v Power** Gleeson CJ held that "insulting words" extended to language which was "contrary to contemporary standards of public good order and goes beyond what, by those standards, is simply an exercise of freedom to express opinions on controversial issues". Callinan J held that the legislation aimed to strike down language that was "incompatible with civilised discourse and passage".

24. As noted above, under the NSW *Summary Offences Act*, "offensive language" is punishable and an objective test is applied to ascertain whether the words used were calculated to wound the feelings, or arouse anger, resentment, disgust or outrage in the mind of a reasonable man.

25. Why are laws directed at racial hate speech any different? Why is it acceptable in the name of free speech to vilify, insult, humiliate and denigrate someone on the grounds of race or ethnicity, ie, because of that person's very existence?

26. Of more concern is the apparent 'get out clause' in sub-section 4 of the proposed bill which provides that the entire section will not apply to "…words, sounds, images written, spoken, broadcast or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter". This exemption is so wide and broad that it will give the green light to abusive holocaust deniers, racists, bigots and other 'commentators' to engage in serious racial vilification of people simply because of the colour of their skin or their race. Senator Brandis seeks to justify this as a 'robust exchange' in the marketplace of ideas. That view is seriously naïve and philosophically flawed and it is hard to envisage any racially-vilifying conduct that will be caught by this legislation.

Racial Discrimination and the Greeks

27. The great English Romantic poet Percy Bysshe Shelley famously wrote that "we are all Greeks" in a moving acknowledgment to the enormous artistic, cultural, philosophical and other values which Western Civilisation inherited from the Hellenes.

28. That lofty sentiment resonates today even with Greece's well-recognised social and economic problems. But Greece is not immune from racial stereotyping and vilification. It has had to endure a political movement known as Golden Dawn that comes replete with thuggish supporters burning torches, stiff arm salutes, bashing helpless victims and a dangerous brand of demagogue rhetoric that has its clearly-defined origins in Nazi Germany. A prominent member of Golden Dawn proudly and unashamedly proclaimed in 2013 in relation to immigrants in Greece that "we are ready to open the ovens. We will turn them into soap … to wash cars and pavements. We will make lamps from their skin."

29. Now, under the current law, it is a breach of the Act to offend, insult, humiliate or intimidate someone in public on the grounds of race or ethnicity. However, the Exposure Draft – if enacted - would only make only it unlawful for a person to incite hatred or to cause fear of physical harm based on race or ethnic origin and even then such words would be exempted if uttered in the course of social or public discourse. If supporters of Golden Dawn surface in Australia and utter obscene, bigoted and offensive words on a website or at a public gathering, they would be afforded protection under the proposed

legislation on the basis that they would simply contend that it was in the course of participating in a public discussion about the effects of illegal immigration.

30. There can be no place in Australia for such zealotry.

31. The late Professor Manuel Aroney, a former Human Rights Commissioner, in the "Words that Wound" conference held in 1982 recounted a conversation he had with a friend who asked: "What's the problem? The heat's off the Greeks." In other words, there was no real racist propaganda against Greek-Australians but now was directed to other minority groups such as the Jews, the Indo-Chinese and the Aborigines. Why do we Greek-Australians care? Aroney's reply, no less valid today, was that we cannot afford to be complacent where racist propaganda is allowed to flourish.[4]

32. Nor should the Attorney-General's spirited defence of the right to be bigoted be allowed to replace balanced laws with a freedom to humiliate or vilify (in the true sense of that word) to the point where historians may one day look back and lament: we were all bigots.

33. The AHC stands with other ethnic community associations and particularly our brothers and sisters in the Aboriginal and Torres Strait Islander communities who have borne a disproportionate share of racial abuse and stereotyping in their struggle to assert their indigenous identity in the face of mainstream racial subordination. They should not have to be subjected to humiliating and deeply insulting remarks based on their race and cultural upbringing.

34. In that regard, the AHC agrees with the recent comments of Warren Mundine:

"All political traditions limit free speech; conservatives support censorship on moral and national security grounds, for example. The government's job is to balance individual freedoms with legitimate restrictions to protect people from harm. Balance is achieved through consistent, principled reasoning, not reacting to single events. I'm concerned this is not happening here and I question whether the government would take similar action over other groups … This debate is not really about individual freedoms; it's about perceptions of race and racism. The problem is not section 18C; it's ignorance of the sophistication of indigenous laws and cultures."[5]

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[4] Proceedings of the Conference on Freedom of Expression and Racist Propaganda held in Melbourne in November 1982 accessed at https://www.humanrights.gov.au/sites/default/files/Words_that_wound.pdf

[5] "Racial vilification legislation is not about freedom but about how we think about race" http://www.smh.com.au/comment/racial-vilification-legislation-is-not-about-freedom-but-about-how-we-think-about-race-20131217-2zj3k.html

Conclusion

35. No proper case for change in the law has been made. Racial bigotry is simply wrong and harmful to both the people it targets and to the cohesiveness of society as a whole. Racial hate speech assaults the victim's dignity, self-esteem and integrity simply because of that person's very existence. The proposed law will herald the rise of bigotry and the trivialisation of racial vilification.

36. The relevant question that those framing the laws need to ask is this: should our law be sending a message about civility and tolerance in an established and harmonious multicultural society or do we want the freedom to say what we think regardless of the harm it may cause to others particularly given the prevalence of causal or 'enlightened' racism and racial stereotyping that targets one's own sense of self-worth and dignity?

37. And whilst the Bolt decision is criticised by the Attorney General and others, it is important to recall Justice Bromberg's prophetic words in that case:

"At the heart of any attempt to secure freedom from racial prejudice and intolerance is the protection of equality and the inherent dignity of all human beings. These are the values that infuse international human rights … (for) the mischief of racial discrimination is … any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or other field of public life".

38. The Exposure Draft should be rejected and the existing laws retained.

Dated: 26 April 2014

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