Shadow Attorney-General
Shadow Minister for the Arts

The Hon Senator Brandis QC
Attorney-General

c/o Human Rights Policy Branch
Attorney-General's department
3-5 National Circuit
Barton, ACT 2600

By email: s18cconsultation@ag.gov.au

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Dear Attorney-General,

Since the Government's release of the exposure draft of the proposed *Freedom of Speech (Repeal of s 18C) Bill 2014* in late March, I have consulted broadly with Australians across the country, including community leaders and individuals. Many of my own constituents in multicultural South-East Melbourne have expressed their concerns to me about this legislation.

I make this submission not just to outline my own firm position, and that of the Federal Opposition, that the current provisions of the *Racial Discrimination Act 1975* (Cth) ('the Act') should be retained. I also want to voice the concerns of the many Australians who have urged me in recent months to staunchly oppose the Government's proposed attack on our hate speech laws.

Background

The race hate provisions of the Act have served the diverse community of modern Australia well for almost twenty years. They set a standard for public decency and civility which an overwhelming proportion of Australians from all backgrounds and walks of life support. They ought not be the subject of partisan contest – indeed the current provisions, introduced by a Labor government in the mid-1990s, were kept in place undisturbed during more than a decade of subsequent Liberal government.

The words of the Attorney-General the Hon Michael Lavarch as he introduced the present provisions of the Act into the Parliament in 1994 are as true today as they were then:

> 'The bill is intended to close a gap in the legal protection available to the victims of extreme racist behaviour. No Australian should live in fear because of his or her race, colour or national or ethnic origin. The legislation will provide a safety net for racial harmony in Australia, as both a warning to those who might attack the principle of tolerance and an assurance to their potential victims.'

It is worth remembering how these provisions came to be part of Australian law. They were not enacted on a whim, but were preceded by:

- The National Inquiry into Racist Violence in Australia headed by eminent lawyers Irene Moss AO and Ron Castan AM QC;
- the Royal Commission into Black Deaths in Custody;
- the Australian Law Reform Commission's Report on Multiculturalism and the Law; and
- lengthy parliamentary inquiries and debate.

The section implements important obligations our nation has agreed to fulfil under the *International Convention on the Elimination of Racial Discrimination,* a key human rights treaty to which some 177 states are party.

No case for change

The present proposal, by contrast, has been preceded by no such rigorous research or consultation. No case for change has been articulated by the Government.

Though the *Racial Discrimination Act* has helped, the blight of racist speech remains with us. Around one in five Australians have told the Australian Human Rights Commission that they have experienced racial hate speech, such as verbal abuse, racial slurs or name-calling. More than one in twenty Australians say that they have been physically attacked because of their race. These are dreadful statistics, which should be of concern to all of us.

The impetus for the current proposal is not any serious consideration of how we might best address the problem of racism in our society. Rather, the Government is obsessed with a single Federal Court decision made over two years ago – a decision which the unsuccessful respondents chose not to appeal.

The Government has wilfully ignored the way in which the current provisions actually operate in hundreds of cases each year. Section 18C provides a civil remedy for those affected by hate speech. Complaints are handled in the first instance by the Australian Human Rights Commission, not a court, and are dealt with by a process of conciliation. Almost all complaints are dealt with to the satisfaction of the parties in that conciliation process. Only a very small number of cases end up in a courtroom.

This is right. It is appropriate. The current provisions help our community deal with racism through a constructive dialogue between those who have engaged in hate speech and those who suffer its consequences. Typical outcomes include apologies and retractions.

The current provisions also include ample protection for free speech. Section 18D expressly defends reasonable and good faith contributions in public debate, academic inquiry and the arts. This, too, is right and appropriate.

The Government has provided no coherent explanation for why these provisions must change. I have repeatedly asked you what it is that cannot be said now, which you think ought to be? Exactly what type of hate speech do you believe demands inclusion in our public discourse?
Claiming that 'people have a right to be bigots', as you did on 24 March, is not making a case for repeal. Nor is claiming that 'hearing views that you find offensive, outrageous or insulting is *not* a form of harm', as you did in an interview published on 17 April.

The effect of the proposed amendments

Notwithstanding these extreme claims, when you announced the release of your exposure draft, you said that this proposal would 'strengthen the Act's protections against racism, while at the same time removing provisions which unreasonably limit freedom of speech'. You claimed that your law would contain a new prohibition against racial vilification, 'sending a clear message that it is unacceptable in the Australian community'.

The Government should be clear about what these provisions entail: the complete evisceration of our federal hate speech laws. The noisy minority behind the changes are certainly under no illusions as to their effect. Chris Berg of the Institute of Public Affairs said the proposed amendments are 'a magnificent example of how to repeal legislation without admitting you're repealing legislation'.

Prohibition of 'vilification' and 'intimidation'

Your claim that this proposed law would see racial vilification proscribed in Commonwealth statute for the first time is an obfuscation. While the proposed laws apparently borrow from existing state anti-vilification statutes – they are a retreat even from these limited protections.

The definition of 'vilification' in every state and territory with such a law already goes well beyond that proposed in this exposure draft. The *Racial and Religious Tolerance Act 2001* in my home state of Victoria, for example, prohibits not only 'conduct that incites hatred', but also conduct that incites 'serious contempt for, or revulsion or severe ridicule of' a person.

The insistence by the Government that they oppose 'vilification' is disingenuous pedantry. However narrowly you want to define the term in your legislation, the Oxford English Dictionary holds 'vilify' to mean '[t]o depreciate with abusive or slanderous language; to defame or traduce; to speak evil of'. Clearly it is this type of conduct, when pursued on the basis of race, which the present provisions prohibit. It is hard to imagine any conduct which would 'incite hatred against a person' because of their race which would not also be 'reasonably likely' to 'offend, insult, humiliate or intimidate' a person on the basis of their race. Section 18C is the Commonwealth's racial vilification provision. It already prohibits what you consider 'racial vilification', alongside other categories of hate speech which your law would permit.

Similar violence is done to the meaning of 'intimidation'. Justice Bromberg noted in the Bolt case that '[t]he word "intimidate" is apt to describe the silencing consequences of the dignity denying impact of racial prejudice as well as the use of threats of violence'. The exposure draft the Government has produced, however, expressly restricts the term to little more than what is already covered by the general law of assault. Perversely, it reduces the social scourge of racism to a matter of physicality.

The new 'free speech exemption'

Similarly disingenuous is the Government's claim that the proposed provisions strike some sort of fair balance between free speech and protecting against racial hate.

The exposure draft reveals no attempt at balance. The proposed section 4 almost entirely defeats the operation of the proposed prohibitions on 'vilification' and 'intimidation'.

Crucially, the new provision removes the current stipulations in s 18D that exempt speech be 'reasonable' and 'in good faith', the hurdles on which Andrew Bolt failed. In your zeal to condone Bolt's articles, which were not protected under s 18D due to his errors of fact, distortions of the truth and inflammatory and provocative language, the Government will protect all manner of hate speech.

The Government is apparently not bold enough to admit the full breadth of conduct which this new exemption will allow. You have expressly denied, for instance, that Holocaust denial of the kind at issue in *Toben v Jones* (2003) 129 FCR 515 will be permitted under your law. The plain meaning of the exposure draft, however, is that such speech would be protected as participation in discussion of political, social or academic matters. It is of no consequence, under your proposal, that the contribution of Holocaust deniers to such 'discussions' is a mere gloss on a dangerous racism.

It is hard to see why there is even any need for a free speech exemption to such a narrowly-drawn prohibition. Exactly what sort of incitement to race hate or physical intimidation ought to be protected in the name of free speech?

Nonetheless, the new exemption is unjustifiably broader than the present provision. The Government has not explained why people should be free to vilify or intimidate another person on the basis of their race, merely because they do so in the course of an unreasonable and bad faith contribution in public debate.

Other issues

Though the Government's draft makes sweeping cuts to the operation of the Act with its removal of 'insult, offend and humiliate', its redefinition of 'vilification' and 'intimidation' and its new overbroad 'free speech' exemption, it also presents subtler attacks on the current law.

The proposed Bill would repeal s 18B, which provides that an act is taken to be done on the basis of race even if race was not the only reason for the act. The basis for this provision is obvious: racism is a social phenomenon, and the expression of race hate is often intertwined in the complexity of social interaction. For this reason a provision of this type is standard practice in discrimination legislation. Identical or similar provisions are found in almost all federal, state and territory anti-discrimination statutes.

The proposed Bill would also repeal s 18E, which provides for vicarious liability for acts in breach of s 18C by agents or employers. Most obviously, this would preclude applicants from holding media companies to account for material they publish, or from taking action against organisations with toxic workplace cultures. Again, vicarious liability is a standard feature of discrimination legislation in Australia.

As the Government has not deigned to provide any explanatory materials, I am at a loss as to the intent behind these features of the exposure draft. Certainly, you have not explained to the community why we should depart from established jurisprudence about vicarious liability, or what the thinking behind the repeal of s 18B is.

The community's response

Though the Government has been unwilling to have an open and informed debate about its exposure draft, the community has already made its view clear. There is overwhelming opposition to your proposal.

In the past month I have listened to community views at information sessions about the proposed changes in my own electorate of Isaacs, across Melbourne, and in Sydney and Brisbane. Other such sessions have been held around the country.

The many hundreds of people I have spoken with at these events come from all backgrounds and all walks of life. They have expressed their opposition to the Government's proposal with a near-unanimity I have seldom seen in Australian politics. Opposition to this proposed Bill has united Jews and Arabs. European men and women in their 80s have spoken of the hurt and shame of being called 'wogs' when they arrived in Australia, as Asian, Middle-Eastern, and African migrants of succeeding generations nodded in understanding. Representatives of Australia's Indigenous peoples have reminded us all that their experience of racism in this country extends back centuries.

I want to wholeheartedly endorse the deep concerns that have been expressed to me. In telling their stories, people of all sorts of backgrounds have put the lie to the idea that the Act is concerned with mere 'hurt feelings', or that hate speech does not cause serious harm to individuals and to society. As an Aboriginal leader put it to me: 'racist speech literally makes us sick'.

You will receive, I am sure, many erudite and technical submissions from lawyers and academics. Without doubt, they will point out how ill-considered and sloppily drafted this law is. I hope you will remember, however, that our laws are not just technical documents. They say something about the sort of society that we aspire to. Though most Australian voters will never read the Racial Discrimination Act, all will have understood the message the government is sending.

One man who spoke up at an information session in Melbourne's north made the point that 'we are not Ancient Greeks debating the finer points of philosophy'. Rather, we are dealing with a delicate social issue which has a powerful impact on the lived experience of millions of Australians. Walking away from laws which protect against racism would say a lot about the priorities of this Government, and the priorities of our community. A woman at another forum asked simply: 'what kind of country do we want to live in?'

Submissions process

Law reform should be undertaken in an open and consultative fashion, especially where the proposed legislative change in question is of as significant public interest as this.

I give my permission for this submission to be made public, though I note that there has been no clear announcement as to how the Government intends to deal with submissions. No discussion paper was provided to guide submissions. There is no indication that a report will be prepared based on the submissions received. The Government has not announced any opportunity for oral submissions or formal community consultations.

I urge the Government to publish this and all other submissions save for those requesting anonymity, as is standard process. An issues paper based on the content of submissions to

date should be prepared and published as a proper basis for further debate. The Government should convene open, public consultations on its proposed reforms. It should not be left to community groups and Opposition MPs to hold public information sessions, as has been the case.

If the Government truly is committed to a free marketplace of ideas, we should expect nothing less than best practice as we debate important changes to the law.

Conclusion

I hope that you will seriously consider the views expressed to you in this (albeit very limited) submissions process. In the face of such broad community opposition, I call on the Government to abandon this misconceived proposal.

Yours faithfully,

Mark Dreyfus QC MP