Australian Hellenic Council NSW Inc.

A coordinating body for the Australian Hellenic community

SUBMISSION TO PARLIAMENTARY INQUIRY INTO FREEDOM OF SPEECH - PART IIA OF THE RACIAL DISCRIMINATION ACT 1975 AND THE AUSTRALIAN HUMAN RIGHTS COMMISSION

The Australian Hellenic Council

1. The Australian Hellenic Council NSW Inc. (AHC) is a peak representative group in NSW representing a number of Greek community organisations. Its charter requires that it promote the positions of the Australian Hellenic community on issues that may affect that community.

2. In 2014 the AHC made a detailed submission in relation to the Exposure Draft released by the Federal Government for amending section 18C of the *Racial Discrimination Act* (RDA). Parts of that submission are reprised in this document as they continue to have currency in the current debate.

Background to the current inquiry

3. This Parliamentary Committee inquiry is to be informed by the recommendations of the Australian Law Reform Commission (ALRC) in its Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws [ALRC Report 129 – December 2015], in particular Chapter 4 – "Freedom of Speech".

4. As the ALRC reported, it is widely recognised that freedom of speech is not absolute. Although the ALRC has not established whether section 18C of the RDA has, in practice, cause unjustifiable interferences with freedom of speech it nevertheless recommended that Part IIA of the Act might benefit from a more thorough review in the context of whether the proscription against insulting and offending conduct constitutes an unreasonable interference with freedom of speech.

5. In announcing this inquiry, the Attorney-General has also asked stated that the Committee will examine whether the existing processes of the Australian Human Rights Commission (AHRC) are sufficient to ensure that trivial or vexatious complaints to the Commission, and complaints which have no reasonable prospects of success, are identified and dismissed at an early stage.

6. It is also important to recall the objects and underlying rationale of the RDA. As the Governor-General, Sir Peter Cosgrove, correctly observes:

"There is no justification for excluding, limiting, singling out, vilifying people on the basis of their looks, their language, their culture or their beliefs, or discredited theories or stereotypical notions of race. And whilst this Act was no doubt intended to protect a minority from prejudice or discrimination on the part of the majority, it also serves to underpin our values as a society by protecting the majority from the damage that might be caused by any extreme views of a radical minority, wildly at odds with the rest of the community." [1]

7. The AHC wishes to makes submissions as to both aspects of the Committee's inquiry.

Racial Discrimination and the Greeks

8. Why the Greeks? The late Professor Manuel Aroney OBE, 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 although now it 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.[2]

9. The AHC represents various generations of Greek migrants to this country, dating back to the gold rushes and accelerating during the inter war period and after 1945. Contrary to the recent statement by Senator Hanson of One Nation,[3] whose party's views on immigration are a hangover from the nationalistic excesses of the White Australia policy, there was nothing dignified or endearing in being called a "wog" or a "dago", simply because of the birthplace of one's parents or grandparents, or to be told that you are not one of us. All people deserve respect and dignity and inclusion, irrespective of their racial or ethnic background or the colour of their skin. That is a precious freedom and right that needs to be defended against racial abuse and stereotyping.

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[1] Sir Peter Cosgrove, "Address by the Governor-General" *Perspectives on the Racial Discrimination Act* (AHRC August 2015), p. 13

[2] 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

[3] Senator Hanson in a speech to The Senate, 24 November 2016 (Hansard, p. 12) declared:
"People say, 'Why are we standing up here and speaking out against the words "to offend, insult, humiliate or intimidate"?' Today times have changed greatly. People have come to our country. I remember most, years ago when they came, there were the Greeks, the Italians and different ones. They were called wogs. They keep telling me, 'My god, we actually had everything thrown at us. We were abused, but we said no. We got on with it.' Because when the Aussies had a go at them in that Aussie way they became part of the community - they assimilated. I remember all the guys at the fish markets - the Greeks and the Italians. We all had jokes together and it was taken in a good sense of humour. I think we have lost that in Australia. I think people have become so precious that you cannot say or do anything anymore."

10. Whilst most of the insults that many Australians of Greek background had to endure would not constitute offending behaviour under the RDA today, the same cannot be said of some odious verbal or written bigoted assaults upon persons whose 'misfortune' is that their race, colour or national origin does conform to a white Christian stereotype or, as Professor Geoffrey Levey has put it (borrowing from the sociologist Gerard Bouchard), a perceived "duality paradigm" in which the prevalent culture is regarded as foundational and therefore to be preferred, followed by the rest.[4]

11. It is no surprise, therefore, that most of the prominent reported RDA cases involve serious and contemptible racial slurs hurled at indigenous people or vile anti-Semitic and holocaust-denying vitriol directed against Australian Jews.

12. And as Australians of Greek origin, we are mindful of the rise of ultra-right political organisations such as Golden Dawn, replete with thuggish supporters burning torches, stiff arm salutes, bashing helpless victims, all mixed with 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."

13. There can be no place in Australia for such zealotry if supporters of Golden Dawn were to surface in Australia and utter obscene, bigoted and offensive words grounded in neo-Nazi concepts of the superior race and ethnicity.

Part IIA of the Racial Discrimination Act

14. Section 18C of the RDA makes behaviour (which can include speech acts) based on race unlawful where it is "reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate" a person or group and it is done otherwise than in private.

15. The definition of racial vilification in section 18C of the RDA is framed by the 'objective standard' of conduct that is "reasonably likely, in all the circumstances, to offend".

16. As one commentator describes it, section 18C is designed to "provide important protection against public vilification on the basis of race to individual and groups, and provide some capacity to legally acknowledge the importance of speech acts in creating a climate of racial hostility and fear".[5]

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[4] G. B. Levey, "Why the campaign to reform the Racial Discrimination Act failed" Perspectives on the Racial Discrimination Act (AHRC August 2015), p. 102

[5] B Gaze, "The RDA after 40 years: advancing quality, or sliding into obsolescence?" *Perspectives on the Racial Discrimination* Act (AHRC August 2015), p. 66 Ms Gaze also provides interesting commentary on the incidence of reported decisions and the relatively low number of successful actions which reinforces the

17. Section 18D – which is less often referred to in the current debate – acts as a powerful shield in that it does not render unlawful anything said or done reasonably and in good faith in artistic discourse, public discussion or the publication of matters which are fair comment.

18. In essence, Part IIA of the RDA "broadcasts our society's disapproval of the indignity of discrimination".[6]

Offend, insult, humiliate or intimidate

19. 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. It is not about offence or insult per se to one's sensibilities.

20. Her Honour Keiffel J (as she then was) in Creek v Cairns Post Pty Ltd [2001] FCA 1007 at [16] observed: "To 'offend, insult, humiliate or intimidate' are profound and serious effects, not to be likened to mere slights." This is not a low harm threshold.

21. There is a very useful summary of the law and how it has been judicially interpreted in the recent decision of the Federal Circuit Court in Prior v Queensland University of Technology & Ors [2016] FCCA 2853 at [30ff] (QUT), confirming the consistent and proper judicial interpretation of the legislation.

22. Critics of s.18C almost invariably and (daresay) predictably choose to focus on the words "offend" and "insult" in s.18C as if they are to be interpreted in a vacuum without reference to the overall racially-discriminating context and circumstances of the impugned conduct. As we have seen such an approach is clearly inconsistent with the settled caselaw. As the legal commentator Richard Ackland has put it, the words are applied collectively, as an "omnibus concept"[7]. Indeed, the words "insult" and "offend" are applied as a concatenation of words that include "humiliate" and "intimidate" and clearly carry a meaning more than offering indignity to or treating someone insolently.[8]

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concept that overtly racial insult or harassment of a serious nature has occurred with race being the basis of that offending behaviour.

[6] T. Soutphommasane, "A brave Act" *Perspectives on the Racial Discrimination Act* (AHRC August 2015), p. 8

[7] R. Ackland, "The tirade about 18C is a massive piece of fakery, a culture war conceit" The Guardian, 14 November 2016

[8] This interpretive principle was discussed by Kirby J in Coleman v Power [2004] HCA 39 at [223] in considering the meaning of the word "insulting" under the Vagrants, Gaming and Other Offences Act 1931 (Qld) but is of equal application here.

23. The decision of the Federal Court in Eatock v Bolt [2011] FCA 1103; (2011) 197 FCR 261 (Bolt) is widely regarded as the catalyst for the push for change to the law. In Bolt the Federal Court upheld a complaint against the conservative columnist Andrew Bolt and the Herald & Weekly Times arising from the publication of articles, laced with mockery and inflammatory language but also littered with factual errors and gross distortions of the truth, which conveyed grossly offensive messages about lighter-skinned indigenous people, implying they were not genuinely Aboriginal but using that as a pretext to access benefits that would otherwise not be available to them. Bolt's comments 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.

24. But Bolt is not the marker of s.18C jurisprudence. There are examples of more egregious conduct in other cases. For example, in Clarke v Nationwide News Pty Ltd t/a Sunday Times (2012) 201 FCR 389 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 the Sunday Times 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.

25. This resort to racial stereotyping and outright abuse was both needless and gratuitous and was found to be offensive, insulting, humiliating and intimidating. As we will see below, 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 these dead Aboriginal boys?

Freedom of speech

26. The claim is propounded by some that s.18C is a restraint of freedom of speech and has a "chilling effect" on public discourse and has in effect shut down legitimate public policy debate on matters pertaining to race. Some commentators gone so far as to claim that 18C is "now used to gag any debate about race and ethnicity" and was used to "silence a prominent and well-respected columnist".[9]

[9] S. Breheny, "Section 18C is being used as a weapon, not a shield; it must be repealed" The Australian 5 February 20176

27. The Institute of Public Affairs has gone further and made the outrageous and demonstrably false claim that it is almost impossible in the context of the proposed referendum for indigenous recognition for Australians to have a full and frank debate about whether notions of race and ethnicity should be enshrined in the Constitution "if even having such a debate is potentially unlawful".[10]

28. That is simply alarmist rhetoric from a very conservative, right-wing lobby group that is desperate to claim a victory in the culture wars. Australia is not some kind of Orwellian backwater where freedom of speech is underfoot and robust discussion in the community is somehow constrained.

29. Professor George Williams in a submission to the ALRC has suggested that laws alleged to impinge on freedom of speech in Australia tend to fall within six categories:

(a) anti-vilification laws;
(b) defamation;
(c) misleading or deceptive representations (In breach of the Australian Consumer Law);
(d) counter terrorism and security laws;
(e) criminal laws relating to treason, blasphemy, perjury and the like; and
(f) summary and public order offences. [11]

30. It is fair to say that governments of all complexions tend to respond to the exigencies of perceived threats or challenges to their authority by introducing in some cases more draconian laws. In recent times, whistle-blowers in refugee camps on Nauru and Manus Island have been targeted to ensure that Australia's offshore detention regime continues to operate under a veil of secrecy.

31. At the same time, no one seriously questions that consumer protection laws, such as those first promulgated in the Trade Practices Act and now found in the Australian Consumer Law, which offer legal remedies to consumers against statements or conduct by traders which are misleading or deceptive, act to impose unreasonable restraints on freedom of speech. Similarly, laws designed to make it an offence to advocate the doing of a terrorist act or counselling, promoting or urging terrorism, are considered to strike a reasonable balance between a society's right to free speech and its concomitant right to protection from acts of terrorism.

32. Unfortunately, opponents of section 18C either ignore or overlook the many other statutory restrictions on freedom of speech. In some cases, they actually take advantage of them. The conservative commentator, Chris Kenny, commenced defamation proceedings when he felt slighted and insulted by an ABC television skit and claimed that he was offended by its alleged portrayal of him as a "low, contemptible and disgusting

[10] S. Breheny & M. Begg, "Section 18C of the Racial Discrimination Act", letter dated 9 February 2016 to Coalition Senators and MPS
[11] G. Williams, "The Legal Assault on Australian Democracy" (12 May 2015)

person". Instead, these critics focus on the RDA as though it has profound consequences for free thinking and free speech in Australia.

33. Section 18C *per se* does not constitute a legal assault on Australian democracy. One may rhetorically ask how the decision in Bolt has stymied or otherwise silenced Andrew Bolt who to this day maintains that he was "prosecuted" under the RDA (a demonstrable falsehood as breach of s.18C is a civil matter) in his quest for libertarian martyrdom.

34. Similarly, the defence of free speech argument stumbles 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 are supposed to meet on an equal footing where all viewpoints are heard and where 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.

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

36. One may therefore ask why are laws directed at racial hate speech any different? Why is it acceptable in the purported 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? In truth, there should be no difference.

37. It is also important to recall that the High Court in Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 has recognised the principle of proportionality to be applied in determining whether an impugned law infringes the implied freedom of political communication. That test involves consideration of the extent of the burden affected by the impugned provision on the freedom. There are three stages to this test: is it suitable in the sense of a rational connection to the purpose of the law; is it necessary in the sense that there is no obvious or compelling alternative; and, finally, is there a balance achieved between the restriction on the freedom upon which the restriction is imposed?

38. It is our submission that the RDA achieves a proper balance between hate speech and speech which can be tolerated. As Justice Bromberg put in in Bolt :

"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".

Whether the handling of complaints made to the Australian Human Rights Commission under the Australian Human Rights Commission Act 1986 (AHRC Act) should be reformed

39. This part of the inquiry stems directly from the celebrated QUT case. There has been considerable disinformation and distortion of the facts and circumstances of this case and the perceived inadequacies of the 'conciliation' process mandated by the AHRC Act.

40. In QUT, much has been made of the seemingly untoward delay in bringing the matter to a conclusion. However, it would appear that the complainant's lawyers in that case in dealing with the Queensland University of Technology made a conscious decision to delay the matter as there was a belief (mistaken as events showed) that the matter could be resolved as between the compliant and the University without the involvement of the students. [12]

41. It would be wrong in principle to condemn a conciliation procedure or a commitment to alternative dispute resolution because of one arguably notorious outcome, particularly when one has regard to the actual powers vested in the AHRC.

42. Section 46PH of the AHRC Act provides that the President of the Commission may terminate a complaint where the President relevantly is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance or that there is no reasonable prospect of the matter being settled by conciliation.

43. The courts have traditionally held that proceedings need to be manifestly hopeless or bound to fail for them to have no reasonable prospects of success. It may be desirable, therefore, to add what is currently in Section 31A(3) of the Federal Court of Australia Act, and reproduced in Rule 13.10(3) of the Federal Circuit Court Rules, to the effect that a complaint need not be hopeless or bound to fail for it to be held as having no reasonable prospects of success.

44. Consideration may also need to be given to inserting the word "frivolous" in section 46PH (1)(c) of the AHRC Act as an additional factor to be taken into account if the President is to be satisfied that the complainant has no reasonable prospects of successfully prosecuting the claim and the claim constitutes an abuse of the process of the Tribunal. However, it must be borne in mind that the Commission is not a judicial body or a tribunal and cannot make judicial determinations; its statutory role is to investigate and conciliate complaints.

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[12] QUT Statement on 18C https://www.qut.edu.au/about/governance-and-policy/statement-on-18c-court-case

45. As recognised by the Federal Court in Eliezer v University of Sydney [2015] FCA 1045 at [37] the assessment required as to whether a proceeding has no reasonable prospects of success necessitates the making of value judgments in the absence of a full and complete factual matrix and argument, with the result that the provision vests a discretion in the Court.

46. As a result, there should be no rush to judgment that in light of the QUT the conciliation procedures of the AHRC require a major overhaul. Conciliation and mediation are recognised alternative dispute resolution techniques and it is more appropriate to fine tune the Commission's powers to facilitate resolution of complaints in a timely and expeditious manner.

Conclusion

47. Finally, it is perhaps instructive to reflect on the following insightful comments made by Senator Pat Dodson in the Australian Senate on 24 November 2016 during a debate on a Private Members' bill to abolish s.18C altogether:

"(W)e do not debate the definition of 'whiteness' or the culture of whiteness - and nor should we. But there is something that we need to pull ourselves up on, and that is the age-old reality of what it is like to walk in the shoes of someone else who is different, who is diverse and who has the richness of their own culture - when we talk about them, when we write about them and when we print things in relation to them ….
Freedom is a very treasured thing, and it starts with defending, as has been said in an ideological sense, the rights of people. But with rights come responsibilities, and in a complex, multicultural society let's stress also the responsibility to note that other Australians do not see things entirely the way that we might from a Eurocentric position, or from an Anglo-Celtic background or from a sense of tradition and culture and politics."

48. For the reasons outlined in this submission, the AHC respectfully submits that neither Part IIA of the RDA nor the procedures adopted by the AHRC constitutes an assault on freedom of speech in this country.

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