4/7/2014

Senator George Brandis
Deputy Leader of the Government in the Senate
Attorney General
Minister for the Arts, Vice President of the Executive Council
Parliament House,
Canberra, ACT, 2600

Dear Senator Brandis

As you know from our previous correspondence we are deeply concerned about your plans to either amend or cut Section 18C of the Racial Discrimination Act. It is our belief that the debate around 18C influenced the WA Senate vote on the weekend and this resulted in a strong vote away from the major parties and created a Senate that will be more hostile to any attempt to change 18C. In this light we make the following submission for your consideration.

A SUBMISSION

FREEDOM OF SPEECH (REPEAL OF SECTION 18C) BILL 2014

Summary

We cite as the basis for our thoughts on this subject, a contribution by one of the founders of Liberty:

> Without Freedom of Thought, there can be no such Thing as Wisdom and no such thing as Public Liberty, without Freedom of Speech; which is the Right of every Man, **as far as by it, he does not hurt or control the Right of another.**
>
> Benjamin Franklin, New England Courant, 49, 9 July 1722.

We are strong supporters of the universal right of freedom of expression and believe it should be limited by few other considerations: national interest, including national security, and serious and profound harm to others. We believe the Bill sets the balance too far towards complete freedom of expression, based on Benjamin Franklin's test.

The Racial Discrimination Act 1975 (Cwth) in its present form serves a significant national interest goal, contributing to the unity and social

cohesion of our multicultural society. This goal is virtually abandoned by the exemptions included in the draft Bill.

The present law, including case law, limits the rights of those seeking to use unlimited freedom of expression to inflict serious and profound harm on a person or group on the grounds of race or ethnicity in most public speech, etc., by applying the test of reasonableness and good faith. This protection too is almost completely thrown out by the proposed exemptions included in the draft Bill which are not limited by truth, fair comment, good faith, public interest or any other reasonable restriction.

Racial mistrust and prejudice, as objectively established by the Reconciliation Barometer based on polling by Reconciliation Australia, are running at high levels in both Black and White communities. Now is not the time for the Commonwealth to be relaxing legal protection for some of the most vulnerable in our society from racial vilification, discrimination or hatred, hostility, serious contempt or severe ridicule

These acts are not just harmful to the person or group targeted, as would be the case in defamation: they have the potential to demean, reduce the standing, or the public perception of the worth of, or the perceived right of a whole racial or ethnic community to participate as equals in the social, economic and political activity of the community. In short, as the NSW Anti-Discrimination Act recognises (Section 20 C (2) (b)) there are links between defamation and what might be termed "group or racial defamation". If the one is protected by restricting freedom of expression to truth and fair comment, the other should be similarly restricted, but is not under the proposed Amendment Bill.

Purposes of the Racial Discrimination Act 1975 (RDA) and the Proposed Amendment

The preamble to the RDA states its purpose in the following terms:-

> to make the provisions contained in this Act for the prohibition of racial discrimination and certain other forms of discrimination and, in particular, to make provision for giving effect to the Convention (the "International Convention on the Elimination of all Forms of Racial Discrimination" – CERD).

As the draft Bill makes no change to the preamble, but substantially amends the Act's provisions, we assume the purpose of the amended Act, (if the proposed Bill were passed) would remain the same.

We contend that the draft Bill would, if passed, result in the Act falling well short of this stated purpose and well short of Australia's obligations under CERD which are set out in Article 4(a):

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof ...

Even a moment's reflection will demonstrate that what CERD classifies as a criminal offence is not even unlawful under Commonwealth law and the differences between CERD and Commonwealth law are increasing from a gap in the present law to a widening gulf under the Draft Bill.

A fair statement of the effects of the proposed amendments (and presumably therefore the intentions of those who support the Bill) would be:-

To make lawful

- acts that promote or incite in public debate on a comprehensive range of topics,
- racial hatred, vilification, intimidation, hostility and contempt
- that could inflict serious and profound harm on often vulnerable targets,
- in the interests of free speech unlimited by tests of truth, fair comment, good faith, genuine belief or any other reasonable restrictions.

We believe this provides grossly inadequate weight to the right of all Australians to live their lives free from the harm caused by racial discrimination, prejudice and hatred in the balance with the rights of freedom of expression.

Social Circumstances in Australia

The Reconciliation Barometer shows objectively the extent of the racial mistrust and prejudice that continues to exist in the Australian community, both Black and White. Now is not the time to be signalling that racist bigotry resulting in harm to the rights of others is not unlawful any more, which is very largely what this proposed law does.

Introducing a Criminal Offence into Commonwealth Law

At present violence or incitement to violence against the person or property of a group on the grounds, inter alia, of their race or ethnicity, is an offence under Sections 80.2 B and C and 80.3 of the Commonwealth Criminal Code Act 1995, with a limited defence of good faith. Some but not all States and Territories have laws creating criminal offences on the same grounds.

These offences fall short of what is required by CERD because they do not punish incitement to racial hatred or discrimination unless accompanied by violence or incitement to violence (which is not a necessary ingredient in the criminal offence defined by CERD). In line with the requirements of CERD, the Government in 1974, 1992 and 1994 tried to introduce an offence of incitement to racial hatred and discrimination into Commonwealth law but failed to do so. We strongly urge that the proposed Bill amending the Commonwealth law create a criminal offence for incitement to racial hatred and discrimination that falls short of violence or incitement to violence, as provided by CERD.

It is unfortunately the case that the need for such an offence has not reduced in the last twenty years.

Specific Comments on the Discussion Bill

- **New Sections (1) and (2).** Either the unlawful acts or the definition of them need to be broadened. Article 4 and 4(a) of the CERD state what is required by international treaty. Courts have interpreted the objects of the present law as regulating conduct which stimulates contempt or hostility. The NSW Anti-Discrimination Act 1977, (Section 20 C (1), under the heading "Racial vilification unlawful", identifies as unlawful a public act that "incites hatred towards, serious contempt for, or severe ridicule of..." . We believe either section 3 (1) (a) or 3 (1) 2 of the Amendment Bill should be broadened to include hostility, contempt and severe ridicule as well as harassing, discriminating, demeaning the worth of a person or group on the grounds of race or ethnicity, denying their right to participate equally in social economic and political affairs and debate, aggravated when also based on notions of racial superiority.

- **New Section (3).** The test is by reference to ordinary community standards rather than the present law which is of a reasonable person, having regard for all the circumstances of the offended group. The present section fails to give any weight to the history of oppression the injured group has undergone, making them vulnerable to attack by racial speech. We think it imperative that the test take into account "all the circumstances" of the targeted people.

- **New Section (4).** This section however makes the new Sections 1 (a) and 2 largely irrelevant; for it makes racist speech, as defined, lawful if it is said (or written, etc) in the course of a public discussion on a wide range of topics (social, political, religious, cultural, academic, artistic or scientific). When would racial vilification and intimidation be unlawful? Apparently it would catch hecklers at sporting events and the like or private discussions. That is just not good enough.

- **New Sections 2(c), (3) and (4)** taken together mean that there is no test of truth or fair comment, which of course sets the limits to freedom of expression in defamation law, or good faith and reasonableness, which sets the limits in the present Act. It is that last test that currently makes speech based on incorrect facts, distortions of the truth and provocative and inflammatory speech or acts, unlawful (but not criminal). That has been undoubtedly deliberately and we say recklessly, without regard for fairness (pun intended) omitted from this Act. We find this the most objectionable element in the proposed new law.

Conclusions

(a) Supported by Benjamin Franklin we believe that freedom of expression should be limited only in exceptional circumstances.

(b) Guided by international law, we recognise one of those areas where restrictions are warranted are racial vilification, discrimination and violence, and incitement to those acts, as discussed above. In the same way that defamation law limits acts to truth and fair comment, we believe the most reckless and obnoxious feature of the proposed amendments is that no similar appropriate limits are set by this Bill.

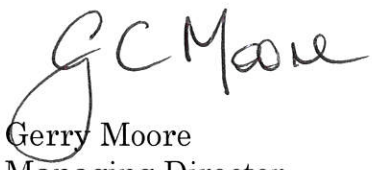
(c) Convinced by international law, we believe the most serious race hate acts (including not only incitement to racial violence but also, particularly when based on notions of racial superiority, the more extreme cases of racial hatred and discrimination should be offences under the Criminal Code Act 1995 (Cwth).

(d) Aware of the harm done by race hatred, we believe the definitions contained in the proposed Bill are inadequate, failing to capture even the plain English meaning of the words that are defined. Our suggestions in this regard are set out above.

We trust that you will take these hopefully constructive comments into account when reviewing the draft Bill.

Yours sincerely

L.G.C (Bill) Moyle
44 St George Ave
Vincentia, NSW, 2540
02-44-41-5187
moylegc@yahoo.com



Gerry Moore
Managing Director
Shoalhaven Community Development Ltd
Director, National Congress of Australia's First Peoples
02-44-22-4222
geraldc.moore@gmail.com

Peter Botsman
Voluntary Secretary, ISX
02-44-65-1665
peter@peterbotsman.com