

Submission:**CLA** Civil Liberties Australia

Civil Liberties Australia is a not-for-profit association which reviews proposed legislation to help make it better, as well as monitoring the activities of parliaments, departments, agencies, forces and the corporate sector to ensure they match the high standards Australia has traditionally enjoyed, and continues to aspire to.

We work to help keep Australia the free and open society it has traditionally been, where you can be yourself without undue interference from 'authority' Our civil liberties are all about balancing rights and responsibilities, and ensuring a 'fair go' for all.

Comment on Exposure draft – Freedom of Speech (Repeal of S. 18C) Bill 2014

Comments in general:

1. There is a risk whenever Parliament amends laws in response to an individual case that the amendment becomes a rushed response that creates unforeseen problems in the future. There is also the risk of overreacting to once-off cases. The Bill would be stronger if more material were made available on a representative range of cases, other than just the Bolt case, that shows the need for the Bill.
2. There are Commonwealth laws other than 18C of the Racial Discrimination Act that prohibit conduct that causes offence. For example, sections 471.12 and 474.17 of the Criminal Code make it a crime to use a postal or carriage service to 'menace, harass or cause offence'; telecommunications laws have similar strictures. The Bill would be more thorough if it addressed, and perhaps collated into one legislative Bill, such provisions in addition to just 18C.
3. Providing the opportunity to put forward, in public, an alternative viewpoint is critical to any real, practical response to illegal speech. So far, the government has not proposed anything to address the powerlessness of the individual against the controllers of communications outlets. Section 18D – the exceptions clause – is largely focused on comments made formal outlets, such as in the media and in academic settings.

Specifics comments on the exposure draft:

4. Section 18C of the existing Act is flawed in the way it bundles together comments that 'offend, insult, humiliate or intimidate' and treats them as the same and each worthy of being made unlawful. Saying something that might cause 'offence' is very different from saying something that will 'humiliate' or 'intimidate'. 'Offence' can be caused unintentionally while it requires a malicious intent to 'intimidate' or 'humiliate'. It is that malicious intent that the law should regulate whilst leaving comments that cause offence unregulated.
5. The exposure draft retains the prohibition on speech that intimidates but removes the prohibition on speech that offends, insults or humiliates. It appears a decision has been made that conduct which 'intimidates' is worthy of prohibition but not conduct that 'humiliates'. For the reasons outlined at point 4, the two appear to have more in common than they do to differentiate themselves. The rationale behind this decision to differentiate between 'humiliate' and 'intimidate' should be released, along with any supporting case law or other legal or academic work.
6. The exemption would cover any comment made in the course of 'participating in a public discussion'. This exemption is so broad that it makes the remainder of the section ineffectual. The Bill would be more straightforward and achieve the same result if it were to simply repeal section 18C and not replace it. However, for the reasons outlined at point 4, this pathway is not supported. Instead, the exemption needs to be remedied.

Comments as to future actions needed:

7. A number of steps should be taken before the Bill is finalised. They are:
 - (a) A summary of cases that show the need for the amendment should be released
 - (b) The Government should examine all other Commonwealth laws that regulate offensive conduct and deal with them in a Bill as appropriate
 - (c) Supporting information should be released indicating what differentiates conduct that 'humiliates' from conduct that 'intimidates'
 - (d) The exemption should be remedied so as to leave the remainder of the section with some impact
 - (e) There should be a proper community consultation process once the further steps are undertaken (including the matters below)

Media and other public forums

We assume that the motivation for changing 18C arises, at least in part, from the Andrew Bolt case. A fundamental issue which emerges from that case, which is not addressed in the proposed change to legislation, is right of reply.

The best defence of free speech is more free speech. The first 'defence' desired by anyone insulted, humiliated, intimidated or who has been offended is the ability to respond by stating a different view, or views, in or to a similar forum, with a communication of equivalent style, time and/or length.

The government controls communications through media laws and licensing, and by laws relating to human rights and responsibilities (such as discrimination), as well as in other ways (Crimes Act, etc).

In addition to any changes to 18C, to provide a robust and complete response government should legislate so that a right of reply is quickly, simply and proportionately mandated. The government, as part of the steps above, should propose how it plans to address actual delivery of the right to responsive free speech in a way which provides equality of access to communication systems and outlets.

This important development in the delivery of a right to the opportunity of free speech should be the subject of widespread community consultation once the government has put forward its proposal(s).

ENDS

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