TASMANIAN ABORIGINAL CENTRE INC.

ABN 48 212 321 102

HEAD OFFICE ☑
198 ELIZABETH STREET,
G.P.O. BOX 569,
HOBART, TAS. 7001
Phone: (03) 6234 0700
Fax: (03) 6234 0799
Email: hobart@tacinc.com.au

☐
182 CHARLES STREET,
P.O. BOX 531,
LAUNCESTON TAS. 7250
Phone: (03) 6332 3800
Fax: (03) 6332 3899
Email: launceston@tacinc.com.au

☐
53 ALEXANDER STREET,
P.O. BOX 536,
BURNIE TAS. 7320
Phone: (03) 6431 3289
Fax: (03) 6431 8363
Email: burnie@tacinc.com.au

30 April 2014

Commonwealth Attorney General
Senator the Hon George Brandis QC
By email: s18cconsultation@ag.gov.au

Dear Attorney-General

Re: Proposed Changes to Racial Discrimination Act 1975 (Cth)

We oppose the proposed amendments because of the detrimental effect the change will have on the lives and well-being of Aborigines throughout Australia. We say the amendments will turn back the clock on the gains made by the Closing the Gap campaign and in the name of reconciliation. The publicity surrounding the proposals and the 'right to be a bigot' speech have already resulted in an increase of observed racial discrimination and are, in our view, a travesty of the right to free speech. The changes breach international law and if enacted are likely to lead to increased costs in human lives and to the Australian health system.

Proposed Changes to Racial Discrimination Act (C'th)

We note that the amendments now proposed do not involve the entire reversal of the current effect of section 18C of the Act but we do not accept that any need has been demonstrated to remove the protections now afforded by that section. Indeed, it is our experience that most of the damage done to individuals by racial discrimination is caused by ongoing, sustained words, attitudes and actions that constitute insults, offence and humiliation rather than one-off acts of intimidation or vilification causing immediate physical harm. The work of our Legal Service, particularly with young people in schools, demonstrates that taunts and offensive words and conduct contribute to the poor schooling outcomes and absenteeism of many of the school children affected by bigotry and discrimination.

In our experience the protections of the current Act are of critical importance. Complaints of discrimination that we see as a community organisation are increasing in school yards throughout the state. The repeal of the basic protections extended by section 18C will impact negatively on our capacity to combat prejudices which lead to racial discrimination within school communities. In short, racial discrimination will be viewed as acceptable and systemic racism will increase. The role of apparently benign and race-neutral policies and practices and the adverse impact of such policies on the education of Aboriginal students have been described by an education expert.[1]

[1] Loretta de Plevitz 2007. Systemic racism: the hidden barrier to educational success for Indigenous school students. Australian Journal of Education, Vol. 51, No. 1, pages 54-71.

We consider the current provisions of the Act provide an appropriate balance between the individual human right of free speech and the right to be protected from racial discrimination. The proposed exemption for participation in "public discussion" is broader than the current exemption in section 18D of the Act without any apparent good reason for the change.

Contrary to some uninformed public commentary, section 18C requires more than a mere subjective feeling of offense. The courts have concluded that prohibited conduct must be more than "mere slights" and must have "profound and serious effects". Moreover the test of what is offensive, insulting or humiliating is objective rather than subjective: it is to be assessed from the perspective of a reasonable person in the situation of the person affected and extreme or atypical reactions will not be considered.[2] The exemptions from the prohibited conduct provisions have also been interpreted broadly, even extending to protect what many consider to be the racist rantings of Pauline Hanson.

The proposed changes contain the test that the conduct is to be assessed by the standards "of an ordinary reasonable member of the Australian community" and not of the groups who would be affected adversely by the conduct. This would put paid to any notion of Australia as a multi-cultural society and is strenuously opposed.

The removal of the protections against racist acts that offend, insult or humiliates in addition to racism that intimidates or vilifies is unjustified and is likely to expose Australia to international condemnation, particularly in the current environment where the owner of a National Basketball Association team in the USA looks set to be banned because of his expressions of bigotry.

Effect of Racial Discrimination on Physical and Psychological Health

There is a demonstrated link between mortality and the social factors of poverty, low education and negative social interactions like discrimination. Some studies go further and show that it is discrimination alone, all other social factors being equal, that leads to excess mortality. From an examination of 120 studies in the United States of America, eminent epidemiologists from the University of Michigan and published in the prestigious American Journal of Public Health in 2011 found there were more deaths attributable to racial discrimination that to acute myocardial infarction (heart attack).[3] The study appears not to have been replicated in Australia but there is no reason to believe Australia is doing any better.

The evidence from Australian research shows that the mortality rate for Aborigines and Torres Strait Islanders is about twice that of the total population.[4] A preliminary analysis of deaths over a ten year period for patients of the GP clinics at the Aboriginal Health Service in Tasmania revealed a twenty year gap in age at death between Aborigines and the Tasmanian population as a whole. The average age at death for the Aboriginal Health Service patients was 59.6 years whereas for Tasmania the

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[2] *Kelly-Country v Beers* (2004) 207 ALR 421, 441 [87].

[3] Sandro Galea, Melissa Tracy, Katherine Hoggatt, Charles DiMaggio and Adam Karpati. 2011. Estimated Deaths Attributable to Social Factors in the United States. *American Journal of Public Health* Vol. 101, No. 8, page 1456

[4] http://www.abs.gov.au/ausstats/abs@.nsf/mf/3302.0

figure was 80.9 in 2011.[5] The figure for Aborigines in Tasmania was similar to that assessed for other parts of Australia.[6]

Other Australian studies have shown the adverse impact of racism on the health of Aborigines. In a 2007 study published in the Australian and New Zealand Journal of Public Health, the authors found that, after controlling for all other variables, Aborigines who reported negative treatment were more likely to have poor health on all areas measured.[7] The study considered interpersonal self-reported racism of the type targeted by the current section 18C of the Racial Discrimination Act rather than the institutional racism more often studied.

Racial Discrimination Act and Australia's International Obligations

Australia accepted the need to protect freedom of expression and freedom from discrimination when it became a party to the International Covenant on Civil and Political Rights (ICCPR). Article 19 (3) of the ICCPR recognises that freedom of expression may need to be restricted to respect the rights and reputations of others. This is the effect of the current sections 18C and 18D.

The proposed changes to the RDA will breach Australia's obligations arising under internal law as a result of Australia's ratification of the United Nations Convention on the Elimination of Racial Discrimination.[8] Australia has already received criticism from the international community for the suspension of the RDA in the North Territory most specifically in Concluding Observations of the Committee on the Elimination of Racial Discrimination.[9] Also of particular interest is the criticism Australia has received from the Committee on the Elimination of Racial Discrimination in Concluding Observation 17 concerning the ongoing failure of the Commonwealth to criminalize activities involving the dissemination of racist ideas, incitement to racial hatred or discrimination. Contrary to such direction from the United Nations the Commonwealth instead proposes to water down existing racial discriminatory protections available to Aborigines.

If the proposed amendments proceed community members may well seek to have their individual complaints regarding the racial discrimination they are experiencing heard by the United Nations. We will also make representations to the Committee on the Elimination of Racial Discrimination about the ongoing failings of adequate racial discrimination protection.

The International Convention on the Elimination of all Forms of Racial Discrimination ('CERD') became part of Australian law through its enactment as a Schedule to the Racial Discrimination Act 1975. CERD imposes obligations about the way in which Australia must act towards its citizens and residents [10] and defines racial discrimination as:

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[5] Australian Bureau of Statistics 2012. *Deaths, Australia, 2011.*

[6] Australian Institute of Health and Welfare. 2012. Aboriginal & Torres Strait Islander Health Performance Framework 2012 Report, AHMAC. Canberra.

[7] Ann Larson, Marisa Gillies, Peter Howard and Juli Coffin 2007. It's enough to make you sick: the impact of racism on the health of Aboriginal Australians. Australian and New Zealand Journal of Public Health Vol 31 No. 4 pages 322 - 329

[8] International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966, signed by Australia on 13 October 1966 and ratified on 30 September 1975.

[9] CERD/C/AUS/CO/15-17 para 16.

[10] See section 3(1), s7, s47 Racial Discrimination Act (Cth) 1975.

Article 1.1:

"...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 any other field of public life."

'Impairment in the exercise of human rights and fundamental freedoms' is what will occur if section 18C is repealed.

Article 2 of CERD provides that:

1.States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

> *(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;*

Thus Article 2 requires the Commonwealth Government to actively strengthen legislation and protections to eliminate racial discrimination in all its forms. As a matter of common sense such protections must include rendering unlawful those acts likely to offend, insult, humiliate or intimidate a reasonable person of the groups targeted by the Act.

It is noteworthy that Article 4 of CERD does not restrict the prohibition on racially discriminatory ideas and incitement to actions where fear of physical harm to a person, property or group is concerned. The proposed Brandis amendment is a clear narrowing of the protections that Australia is required to extend to eliminate racial discrimination in all its forms pursuant to CERD.

It is in our view entirely appropriate that the conduct complained of in *Eatock v Bolt [2011] FCA 1103* remain unlawful. We agree with the Judge in that case that no law should exist to protect the publication of errors of fact, distortions of truth and inflammatory and provocative language aimed at persons of a particular racial group. On the other hand, the Brandis Bill with its notions of freedom of speech allow the powerful an open licence to offend, insult, humiliate and intimidate the most marginalised and vulnerable minority in this country on the basis of race.

In summary, our community does not support a narrowing of the protections afforded against racial discrimination under the Racial Discrimination Act as proposed by the Brandis Bill.

Yours sincerely,

Heather Sculthorpe
Chief Executive Officer