

Submission to the Attorney-General's  
Department Consultation on Amendments  
to the *Racial Discrimination Act 1975*  
Freedom of speech (repeal of s.18C) Bill  
2014 exposure draft

**Pirate Party Australia**

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# Introduction

Pirate Party Australia would like to thank the Attorney-General's Department for the opportunity to comment on such important issues as racial discrimination and freedom of speech. Pirate Party Australia has considered the proposed bill and has formed the opinion that although some parts would encourage freedom of speech, the bill in its present form is inappropriate. The Pirate Party's concerns surround subsection (4) and the repeal of s 18E. The Pirate Party also recommends that rather than amend only the *Racial Discrimination Act*, the Government looks into enacting broader freedom of speech legislation.

## About Pirate Party Australia

Pirate Party Australia is a political party registered under the *Commonwealth Electoral Act 1918*. The Party was founded in late 2008, and contested its first Federal Election in 2013. The Party's main areas of concern are intellectual property rights reform, privacy rights, increased governmental transparency, and opposition to censorship.

Pirate Party Australia is a member of a worldwide movement that began in Sweden in 2006, and has since spread to more than 40 different countries. Pirate Parties have been elected to all levels government, including 45 state seats in Germany, three seats in the Icelandic Parliament, and two Members of the European Parliament.

## 1 Opening remarks

Pirate Party Australia is a strong advocate of freedom of speech and expression. However, the Pirate Party acknowledges that few rights exist in isolation. In certain circumstances exercising the right to freedom of speech and/or expression carries consequences which may restrict that exercise.

With regards to freedom of speech, Pirate Party Australia can identify two historically accepted situations where conflicts of rights exist. The first is with regard to the right to reputation<sup>1</sup> and the second concerns the right to feel safe.<sup>2</sup>

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<sup>1</sup>*International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 17, 19.

<sup>2</sup>*Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948) preamble.

Defamation laws provide a means of enforcing the right to reputation for those whose reputations are damaged by what someone else has said or published. It has long been accepted that this is an acceptable limitation on freedom of speech.

Similarly, assault offences (in criminal, civil, common and statutory law) establish that a person or the state can take action where threats of bodily harm are made.<sup>3</sup> Although there are some additional considerations, mere use of words can constitute an assault at least in NSW.<sup>4</sup> Freedom of speech does not trump this right: criminal and civil penalties may be applied to people who intimidate and threaten others.

Accordingly, Pirate Party Australia accepts there are, in some circumstances, situations where consequences must exist where what is said has an extreme negative effect on another. Despite this, the Pirate Party does not believe there is 'right not to be offended' and recognises that unpopular or controversial opinions can assist in encouraging debate.

However, the Pirate Party acknowledges that despite its name the Freedom of speech (repeal of s.18C) Bill 2014 does not introduce a general regime of freedom of speech into Australia. Freedom of speech in Australia is comparatively weak, and we are far from achieving the same level of protection as in the United States. This bill fails to provide genuine freedom of speech in its ordinary sense. Instead, it repeals what is effectively a very narrow limitation on freedom of speech, while not protecting or creating freedoms of speech on other issues.

This approach is inconsistent with the current government's attitudes towards freedom of speech, especially with regard to secondary boycotts on environmental grounds. As reported in *The Guardian* earlier this month:

The parliamentary secretary for agriculture, Richard Colbeck, said the backbench rural committee and 'quite a number in the ministry' want to use the review to remove an exemption for environmental groups from the consumer law ban on so-called 'secondary boycotts'.

'I do think there is an appetite in the government for changing these laws,' Colbeck said.<sup>5</sup>

There is an inconsistency between what speech ought to be protected, and what speech should be prohibited or limited. Pirate Party Australia urges the government to instead consider a broader review of freedom of speech with a view to enacting comprehensive legislation that protects

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<sup>3</sup>See, eg, *Criminal Code Act 1899* (Qld) sch 1, s 245.

<sup>4</sup>See, eg, *R v Tout* (1987) 11 NSWLR 251, 254-255.

<sup>5</sup>Lenore Taylor, 'Australian government may ban environmental boycotts', *The Guardian* (online), 3 April 2014, <http://www.theguardian.com/environment/2014/apr/02/coalition-review-of-consumer-laws-may-ban-environmental-boycotts>

freedom of speech in all areas, not just under the *Racial Discrimination Act*.

Pirate Party Australia notes that the *International Covenant on Civil and Political Rights* art 19 provides that 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.' This would appear to entitle the Commonwealth Parliament to enact legislation using its external affairs power.

## **2 The proposals**

Pirate Party Australia has chosen to make comments on each subsection, paragraph and subparagraph as appropriate. In its current form, Pirate Party Australia cannot support the proposed bill, as although parts of it are quite promising, the bill in its entirety has a number of failings.

### **2.1 Subsection (1)**

Pirate Party Australia believes the removal of the terms 'offend,' 'insult' and 'humiliate' is appropriate, and is supportive of the retention of 'intimidate' and the addition of 'vilify.' The Pirate Party believes that acts which do not fall under the *Racial Discrimination Act* would be sufficiently covered to a reasonable extent by existing defamation laws, especially 'humiliation,' which the Pirate Party notes have been largely harmonised across the states.

Paragraph (1)(b) is an appropriate simplification of the existing paragraph (1)(b).

### **2.2 Subsection (2)**

Pirate Party Australia is in favour of the revised subsection (2). The Pirate Party notes that the definitions of 'vilify' and 'intimidate' bear resemblance to assault in that they may create a fear of harm (immediate or constant). These definitions shift the unlawful activity away from subjective notions of offence or insult and towards a more objective basis of creating fears of actual harm and encouraging hatred based on race, colour or national or ethnic origin.

## **2.3 Subsection (3)**

Subsection (3) provides a satisfactorily objective test. Unlike 'offend,' 'insult' and 'humiliate,' the intentions to 'vilify' or 'intimidate' due to race, colour or national or ethnic origin would seem more objectively observable.

## **2.4 Subsection (4)**

Subsection (4) undermines the proposed section entirely, and as a result Pirate Party Australia cannot support the bill in its present form. The subsection provides far too much by way of exception, and is an unsuitable replacement for the current s 18D. Pirate Party Australia advocates for the replacement of the proposed subsection (4) with the current s 18D as it is worded. Pirate Party Australia does not object to the repeal of s 18D **on the condition** that its provisions are included verbatim, or as similar as is possible, in the new section.

Pirate Party Australia cannot see a justification for why vilification or intimidation would be acceptable in the 'public discussion of any political, social, cultural, religious, artistic, academic or scientific matter.' That is to say, the Party is experiencing difficulty in understanding the value of allowing the incitement of hatred or the causing of fear of physical harm in those contexts, particularly as the contexts are very broad. It would seem there are few activities that fall outside those categories, and this subsection would undermine the purpose of the proposed section.

## **2.5 Repeal of s 18E**

Pirate Party Australia sees no reason why the vicarious liability provisions in s 18E ought to be repealed. The Pirate Party requests explanation be provided on this issue.

## **3 Conclusion**

While this reform is in some ways promising, the Pirate Party cannot support it in its present form. With a revised subsection (4) and an explanation for why s 18E ought to be repealed, the Pirate Party may change its position.