SUBMISSION

To the Human Rights Policy Branch

Attorney-General's Department

3-5 National Circuit

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Proposed Amendments to the Racial Discrimination Act 1975

From the Australian Human Resources Institute

30 April 2014

On behalf of its 20,000 members, the Australian Human Resources Institute is pleased to respond to the invitation from the Attorney-General's Department to contribute to the consultation on 'Amendments to the Racial Discrimination Act 1975'.

AHRI has a longstanding interest in issues relating to equity, inclusion and discrimination in Australia's workplaces. Accordingly, we took the opportunity when this consultation was announced to consider the issues that might arise from the proposed repeal of the Act with respect to the workforce and workplaces.

It is worth saying at the outset that some AHRI members have expressed concern about the proposed amendments. That said, we have not had a chance within the time frame to conduct a survey of members. However, we invited a workplace relations lawyer with a human rights background to draft a short paper on the issue and have posted it as a blog on the AHRI website.

This modest submission touches on the issues we regard as pertinent to our members in particular and HR practitioners in general and draws on the aforementioned paper in doing so.

The paper by Angus Macinnis of StevensVuaran Lawyers is here:
http://blog.ahri.com.au/employment-law/changes-to-the-racial-discrimination-act-will-they-have-an-effect-on-workplaces/

We recognise that the issues in relation to workplaces, in so far as they exist, are not the same as those that apply in the wider Australian community, and we will largely refrain from commenting on those wider community issues for the purposes of this submission.

We will come at the issue from three perspectives:

- Public vs private actions
- Free speech and the workplace
- Workplace inclusion and diversity principles

Public vs private actions

The consultation draft indicates in item (1) that for an act to be unlawful, it must take place in a context which is "otherwise than in private".

Macinnis notes that it is enough that members of the public do not have access to an employer's premises for the premises to be regarded as "private". That is, the conduct in question does not have to be expressly confidential to be regarded as "private" for the purposes of section 18C of the Act.

Macinnis touches on two instances of case law from 2011 arising from a Full Bench decision of Fair Work Australia and the Federal Magistrates Court respectively, in support of that view. One case dealt with a swastika drawn on a freezer door and the other related to a workplace conversation in which one employee made reference to the skin colour of the other. Both were deemed to be 'private' and so section 18C did not apply.

Some cases are less clear cut in this respect. For example, Macinnis cites a 2001 Federal Magistrates Court decision which held that racial abuse of an employee infringed section 18C because the abuse occurred in a place where it could be heard by a member of the public.

A 2013 racial abuse incident by a spectator at a football match directed at the Sydney Swans Aboriginal player Adam Goodes has not been tested in court but may be deemed unlawful for the same reason as the 2001 case. That is, while the football stadium is Goodes' workplace from one perspective, it is also a public space from another perspective and would probably not be deemed to be private within the meaning of the Act.

That the 'offender' in the Goodes' incident was not a fellow employee but a member of the public (and a minor) also distinguishes that incident. The 2001 case involved an incident between two employees, one of whom was in earshot of a member of the public when the offending statement was uttered.

Free speech and the workplace

The western tradition boasts an admirable history in the post-Enlightenment period of enunciating and defending certain principles espousing free speech. Two central planks in the playing out of that history are John Stuart Mill's 1859 work *On Liberty* and the celebrated 1770 utterance usually attributed to the French *philosophe* Voltaire: "I do not agree with what you have to say, but I'll defend to the death your right to say it".

While those principles are default positions in many present day western democracies, it is widely accepted that when entering into employment relationships, citizens waive their right to certain liberties with respect to free speech. For example, employees commonly undertake not to speak ill of their employer either out of implied self-interest or because express terms in their employment contract prohibit them from doing so. Employees also agree not to speak freely to third parties about matters that are deemed confidential for commercial reasons or because the matters relate to issues such as performance or termination, and are what Macinnis calls 'friction points'.

In any proposal to amend legislation, such as those proposed with respect to the Racial Discrimination Act, AHRI takes the view that there are good reasons why some of the restraints on free speech in workplaces have evolved and we would wish to see them retained.

Workplace inclusion principles

We note that item (3) of the consultation draft indicates that for an act to be unlawful the test will be whether it is likely to have the unlawful effect in accordance with the standards to be determined by a "reasonable member of the Australian community, not by the standards of any particular group within the Australian community".

We would not wish that reversal of standards to be applied in workplaces.

Contemporary Australian workplaces have increasingly moved towards the adoption of policies that encourage inclusion and diversity, and that includes the inclusion of a wide mix of employees from different racial, ethnic and cultural groups.

The rationale for the development of policies and practices in this area is founded on business imperatives centring on productivity, innovation and workplace harmony. Human resource management principles attempt to ensure that the people in an enterprise reflect the customer base of the business for the purposes of maximising competitiveness in marketing strategy, customer service, and innovative product development.

Behind that rationale is a recognition and an acceptance of the fact that Australian society is not a mono-culture, but consists of a great variety of racial, ethnic and cultural groups, many of which are minority groups. Inevitably, the standards of a "reasonable member of the Australian community" will end up being the standards of the majority group which in many cases will not be sensitive to language that may deeply offend people in a certain minority group for reasons that are rooted in origins that relate to a history of exclusion, discrimination or persecution, or are simply peculiar to the racial, ethnic or cultural background of the group.

For some years AHRI has taken a national leadership role in building the good will required within workplaces to establish cultures centred on inclusion and diversity. We are keen to ensure that momentum is not lost.

While not suggesting that the amendments being proposed to the Racial Discrimination Act in their current form would have the effect of undermining the considerable achievements in this area of business, we are signalling that we would not like to see comparable amendments made with respect to employment law or work, health and safety regulation that weaken the present legislative impediments relating to a loss of workplace harmony, including harassment or bullying. We believe that racial, ethnic and cultural harmony within workplaces is vital, and their loss would have a deleterious effect on productivity and competitiveness.

Further contact

If the Department wishes to contact AHRI further about this submission , please do so in the first instance through the National Manager, Government and Media Relations, Paul Begley, on 03 9918 9232 or 0402 897 884 or email paul.begley@ahri.com.au

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