



30 April 2014

Human Rights Policy Branch
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

By email: s18consultation@ag.gov.au

KINGSFORD
LEGAL CENTRE

Dear Madam/Sir,

Amendments to the *Racial Discrimination Act 1975*

Kingsford Legal Centre (KLC) welcomes the opportunity to provide a submission on the exposure draft of the *Freedom of Speech (Repeal of S.18C) Bill 2014 (exposure draft)*, which proposes to amend the *Racial Discrimination Act 1975 (Cth) (RDA)*. Our submission draws on the experiences of our clients and staff in dealing with people who have experienced racial abuse. All case studies have been de-identified to protect our clients' confidentiality.

This submission is supported by the following organisations:

- National Association of Community Legal Centres
- Darwin Community Legal Service
- Sydney Multicultural Community Services Inc
- South East Neighbourhood Centre
- Kooloora Community Centre.

We believe that the RDA has found an appropriate balance between the right to freedom of speech and right to freedom from racial vilification and should not be amended. If the Government wants to better protect freedom of speech we recommend including the right to freedom of speech in the Australian Constitution or a national human rights act.

Australia is a proud multicultural nation. Australians believe that racism is wrong. The changes proposed reduce protections against racism, privileging freedom of speech over freedom from racial vilification. We disagree with this priority and believe the changes are out of step with current community values. Our clients, who come from disadvantaged backgrounds, experience significant harm from racist speech and to weaken these provisions would disadvantage our clients further.

If the Government persists in amending the RDA, significant changes should be made to the exposure draft before it is introduced as a bill.

Kingsford Legal Centre

KLC is a community legal centre which has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas since 1981. KLC provides general advice on a wide range of legal issues, including discrimination and vilification on the basis of race.

KLC has a specialist discrimination law service (NSW wide), a specialist employment law service, and an Aboriginal Access Program. In addition to this work, KLC also undertakes

law reform and policy work in areas where the operation and effectiveness of the law could be improved.

In 2013 KLC provided 217 advices in relation to discrimination, which was over 12% of all advice provided (1804 advices). Of the advice provided in relation to discrimination, almost one third of the advice provided was in relation to race discrimination (64 advices).

No change is necessary

The exposure draft privileges freedom of speech over freedom from racial vilification despite a lack of credible evidence that section 18C has unreasonably constrained freedom of speech and evidence that racial discrimination and vilification is still present in our communities. The RDA does not need to be amended because it already reflects the appropriate balance between Australia's international human rights obligations to protect freedom of speech and freedom from racial hatred.

Article 19 of the *International Covenant on Civil and Political Rights (ICCPR)* requires Australia to protect freedom of speech however it also recognises that the right to freedom of speech is subject to limitations:

"2. 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.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others..."

Australia is obliged under the *Universal Declaration of Human Rights (UDHR)*, the ICCPR and the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* to ensure that no one is subjected to racial hatred.¹

We understand that the exposure draft was developed in response to a fear that section 18C privileged freedom from racial hatred over freedom from speech. However, courts have consistently interpreted the provisions from a broader public interest perspective:

"section [18C(1)] is at least primarily directed to serve public and not private purposes... That suggests that the section is concerned with consequences it regards as more serious than mere personal hurt, harm or fear. It seems to me that s 18C is concerned with mischief that extends to the public dimension. A mischief that is not merely injurious to the individual, but is injurious to the public interest and relevantly, the public's interest in a socially cohesive society... Conformably with what I regard as the intent of Part IIA, a consequence which threatens the protection of the public interest sought to be protected by Part IIA, is a necessary element of the conduct s 18C is directed against. For the reasons that I have sought to explain, conduct which invades or harms the dignity of an individual or group, involves a public mischief in the context of an Act which seeks to promote social cohesion."²

Section 18C of the RDA (and related provisions) only limit freedom of speech to the extent necessary to protect communities and individuals from the detrimental impact of racial vilification and therefore does not need to be amended.

¹ UDHR Article 7, ICCPR Article 26, ICERD Articles 1 and 4.

² *Eatock v Bolt* [2011] FCA 1103 at [263] and [267].

Despite the widespread coverage of the decision in the case of *Eatock v Bolt* [2011] FCA 110 which has prompted this review of the RDA, the use of section 18C is extremely limited, and there is no evidence that section 18C, as it currently stands, operates as any real limit of free speech.

While the National Human Rights Consultation (NHRC) identified that 57% of people surveyed considered that freedom of speech within defamation laws was a 'very important' human right³, there was no clear evidence that this right is not adequately protected and promoted.⁴

Conversely, the NHRC identified that freedom from discrimination was considered to be a 'very important' human right by more people (69%)⁵ and that people were concerned that protection from racial discrimination is inadequate:

*"Many submissions and community roundtable participants were worried by the Northern Territory Emergency Response legislation, which introduced measures to deal with welfare problems, child sexual abuse and family violence in Indigenous communities in the Northern Territory. The legislation was cited as evidence that 'there is inadequate protection of rights of Indigenous peoples'... A particular concern has been expressed about suspension of the operation of the Racial Discrimination Act 1975 (Cth) in relation to the Intervention legislation... Since there is no guarantee of equality under the Constitution, the Federal Parliament can override the Act (and other anti-discrimination legislation) at any time and adopt laws that discriminate on the basis of race."*⁶

In 2012-2013 the NSW Anti-Discrimination Board (ADB) received 196 complaints about race discrimination (18.6% of all complaints received) and 14 racial vilification complaints (1.3% of all complaints received).⁷

In 2011 the Lowitja Institute surveyed 755 Aboriginal and Torres Strait Islander people across four communities in Victoria about racism and found that:

- almost everyone who was surveyed had experienced racism in the previous 12 months;
- more than 70% of those surveyed had experienced eight or more incidents of racism in a year; and
- racism was most commonly experienced in shops (67%) and public spaces (59%).⁸

According to the 2008 National Aboriginal and Torres Strait Islander Social Survey (NATSIS) more than one-quarter (27%) of Aboriginal and Torres Strait Islander people aged 15 years and over had experienced discrimination in the past 12 months.⁹

In KLC's experience as a discrimination practice that undertakes significant work in the area of racial discrimination, section 18C is rarely used by people who have experienced vilification or discrimination. This is because section 18C already places significant limits on the type of speech that is actionable.

³ Colmar Brunton Social Research, 'National Human Rights Consultation – Community Research Phase' prepared for the Attorney-General's Department (September 2009) Figure 10 p 29.

⁴ Commonwealth of Australia *National Human Rights Consultation Report* (September 2009) p 97 – 128.

⁵ Colmar Brunton Social Research, above n 3.

⁶ Commonwealth of Australia, above n 4, p 109.

⁷ Anti-Discrimination Board of NSW *Annual Report 2012-2013* (October 2013) p 14.

⁸ Ferdinand, Angeline, Paradies and Kelaher, Margaret, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: The Localities Embracing and Accepting Diversity (LEAD) Experiences of Racism Survey* Lowitja Institute (January 2013) p 1 https://www.lowitja.org.au/sites/default/files/docs/LEAD%20Report-WEB_0.pdf viewed at 29 April 2014.

⁹ Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples: 'Social and Emotional Wellbeing: Discrimination'* (October 2010) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter450Oct+2010> viewed at 29 April 2014.

Peter

Peter is an elderly Aboriginal man. He was photographed without his consent while going for his daily walk down to the shops. This photo appeared in a magazine article that attributed high crime rates to Aboriginal people. We advised Louis that he could make a racial vilification complaint to the Australian Human Rights Commission, however he ultimately chose to pursue a defamation complaint because the burden of proving racial vilification was too high.

Section 18C as it currently stands finely balances fair and accurate reporting and fair comment with discrimination protections. The changes to section 18C that are currently proposed appear disproportionate and are not based on any evidence that there has been a significant restraint on free speech because of the impact of section 18C. This is significant as the RDA has been Australian law for over three decades.

There has also been a long history through the law of defamation in balancing the right to free speech and other rights such as the right to reputation. Criminal laws also limit freedom of speech by prohibiting the use of offensive language in or near a public place or school.¹⁰

This is always a balancing act of rights and responsibilities, one which is subject to community debate. While we welcome debate about Australia's protection of human rights, we believe that the current debate has not been balanced in articulating the impact of the RDA on free speech, and has ignored the ways in which free speech protections can be enhanced as well as retaining the current provisions of the RDA.

As the exposure draft proposes to wind back Australia's human rights protections we would recommend, at minimum, evidence based research on the extent to which the operation of section 18C has limited freedom of speech in Australia. We remain unaware of any significant limits to fair and accurate reporting in relation to race matters because of the RDA, and therefore the case for change does not appear to be made out.

Recommendation 1: The exposure draft should not be introduced into Parliament.

Amendments do not guarantee freedom of speech

We understand that one of the intentions of the exposure draft is to better protect freedom of speech, however amending the RDA will not guarantee the right to freedom of speech. The amendments will only serve to reduce protections against racial vilification. We believe that freedom of speech would be best protected if it were enshrined in the Australian Constitution or a national human rights bill, as is done in a number of other countries.

South Africa protects and limits freedom of speech in section 16 of their Bill of Rights, which is chapter 2 of their Constitution:

“(1) Everyone has the right to freedom of expression...

(2) The right in subsection (1) does not extend to...

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”

The *Canadian Charter of Rights and Freedoms* protects freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.¹¹

¹⁰ *Summary Offences Act 1988* (NSW) section 4A.

¹¹ Sections 1 and 2(b).

Recommendation 2: The Government investigate the possibility of including the right to freedom of expression in the Australian Constitution and/or in a national human rights act.

Amend the exposure draft

If the Government intends to proceed with amending the RDA, the following changes to the exposure draft should be made before a bill is introduced:

- remove reference to section 18B of the RDA in the exposure draft;
- amend section 18C(1)(b) of the exposure draft to include presumed race, colour or national or ethnic origin of the person or group of people;
- adopt subsections 18C(2) and (3) of the RDA;
- consider alternative definitions of 'vilify' in the exposure draft;
- expand the definition of 'intimidate' in the exposure draft to include psychological harm;
- remove subsection 18C(3) of the exposure draft;
- remove reference to section 18D of the RDA in the exposure draft and remove subsection 18C(4) of the exposure draft;
- remove reference to section 18E of the RDA in the exposure draft; and
- amend subsections 46P(2) and 46PO(1) of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) to allow groups, organisations or the AHRC to initiate discrimination and vilification complaints on behalf, or in the interest of, people aggrieved.

Making these amendments to the exposure draft before it is introduced will better ensure an appropriate balance between freedom of speech and freedom from racial vilification.

Retain section 18B

The exposure draft seeks to repeal section 18B without replacing it with a comparable provision. We submit that section 18B should not be repealed because it will make it too difficult for applicants to show that offensive acts were done on the basis of their race (and not other reasons). Repealing section 18B will weaken valuable protections against racial hatred and will also make Part IIA of the RDA inconsistent with similar sections within the RDA and other federal, state and territory anti-discrimination legislation. Repealing these sections will simply provide people who want to undertake vilification in essence with a 'defence'. This does not reflect community standards on the unacceptable nature of racial vilification and abuse and will undermine community harmony.

Section 18B of the RDA states that offensive behaviour based on racial hatred will be considered to be done if one of the reasons for the behaviour is done because of a person's race, colour or national or ethnic origin, regardless of whether or not it was the dominant or substantial reason for doing the act. However courts have deemed that race must be a real causative factor for the behaviour.¹²

Section 18B recognises that there are often multiple and complex reasons for vilifying acts. For example in *McMahon v Bowman* [2000] FMCA 3 the respondent made racially vilifying comments after a ball was hit into his yard. Arguably the comments were motivated by the race of the applicant and the respondent's inconvenience and/or frustration. However, without section 18B, the respondent may have been able to rely solely on being frustrated

¹² *Korczak v Commonwealth* [1999] HREOCA 29 at [8.4].

and inconvenienced, and the applicant may not have had a remedy for the racially abusive comments the applicant experienced.

Removing section 18B would also make the Part IIA of the RDA inconsistent with Part II of the RDA, which deems that an act of racial discrimination will be considered to be done if one of the reasons for the discrimination is done because of a person's race, colour or national or ethnic origin, regardless of whether or not it was the dominant or substantial reason for doing the act.¹³ Removing section 18B will also make it inconsistent with other provisions in federal and state and territory anti-discrimination legislation, which have a similar intention as section 18B.¹⁴

Recommendation 3: Section 18B of the RDA should not be repealed.

Presumed race, colour or national or ethnic origin

The RDA currently prohibits offensive behaviour, if the offending behaviour is done because of the person's race. A vilification complaint cannot be made if the offender incorrectly assumes the race or national or ethnic origin of the person. If the Government decides to amend the RDA, they should amend section 18C(1)(b) making it unlawful to vilify or intimidate a person or a group of people on the basis of their presumed or actual race, colour or national or ethnic origin. This would ensure that people subject to racial vilification, have a remedy available to them, regardless of whether the person vilifying correctly identified their race, national or ethnic origin. It would also reflect similar provisions in other anti-discrimination legislation.

The NSW Parliamentary Standing Committee on Law and Justice (**the Committee**) recently inquired into racial vilification laws in NSW (**NSW Inquiry**).¹⁵ The Committee referred to a *Sydney Morning Herald* story of a Korean tourist who was travelling on a Sydney bus who was subjected to racist abuse by a man who incorrectly identified her as being Japanese.¹⁶ This woman could not make a racial vilification complaint to the ADB or the AHRC because the offender did not correctly identify her as Korean.

The Committee received evidence that racial vilification has detrimental impacts on the individual being vilified regardless of whether the vilification was based on their presumed or actual race.¹⁷

Similar protections against vilification on the basis of presumed status are contained in the *Anti-Discrimination Act 1977 (NSW) (NSW ADA)*. It is unlawful to vilify a person on the grounds they are HIV/AIDS infected or thought to be, whether or not they actually are HIV/AIDS infected.¹⁸

Widening the provisions prohibiting racial vilification to make it unlawful to vilify on the basis of presumed or imputed race under the NSW ADA was widely supported by stakeholders in the NSW Inquiry and recommended by the Committee.¹⁹

¹³ Section 18.

¹⁴ *Disability Discrimination Act 1992* (Cth) section 10; *Anti-Discrimination Act 1977* (NSW) section 4A; *Sex Discrimination Act 1984* (Cth) section 8; *Anti-Discrimination Act 1992* (NT) subsection 20(3); *Equal Opportunity Act 1984* (SA) subsection 6(2); *Equal Opportunity Act 1984* (WA) section 5; *Discrimination Act 1991* (ACT) subsection 4A(2); *Anti-Discrimination Act 1991* (Qld) subsection 10(4); *Equal Opportunity Act 2010* (Vic) subsection 8(2)(b); *Racial and Religious Tolerance Act 2001* (Vic) subsection 9(2); and *Anti-Discrimination Act 1998* (Tas) subsection 14(3)(a).

¹⁵ NSW Legislative Council, Standing Committee on Law and Justice *Racial vilification law in New South Wales* (December 2013).

¹⁶ Ibid at 2.6 and R Olding, 'Racist rant: tourists abused on Sydney bus' *Sydney Morning Herald* 1 April 2013.

¹⁷ NSW Legislative Council, Standing Committee on Law and Justice, above n 8, 4.126.

¹⁸ *Anti-Discrimination Act 1977* (NSW) section 49ZXB.

¹⁹ NSW Legislative Council, Standing Committee on Law and Justice, above n 8, 4.135 and recommendation 4.

Recommendation 4: Subsection 18C(1)(b) of the exposure draft be amended to “the act is done because of the race, colour or national or ethnic origin of that person or group of persons or because of the presumed race, colour or national or ethnic origin of that person or group of persons”.

Retain definition of ‘private’ and ‘public place’

The exposure draft does not adopt the RDA’s definition of what is not a private act and the definition of a public place.²⁰ Repealing these definitions may narrow the current protections against racial vilification because courts would be free to redefine the definitions of private and public spaces. These definitions should be retained because they provide clarity about the scope of the provision.

Recommendation 5: The exposure draft should adopt the definitions currently contained in subsections 18C(2) and 18C(3) of the RDA.

Alternative definition of ‘vilify’

The exposure draft does not propose to make it unlawful to ‘offend, insult or humiliate’ a person or group of persons on the basis of their race. Instead it proposes to make it unlawful to vilify, which is limited to inciting hatred, and/or intimidate a person or a group of person (see below for a discussion about ‘intimidate’).

To limit ‘vilify’ to ‘inciting hatred’ sets the threshold for making a racial vilification complaint too high. It is also arguable that the proposed changes add little to the protections contained in the criminal law, and therefore, do not recognise the importance of protecting vulnerable groups from racial abuse and vilification.

Adam Goodes

On 24 May 2013, shortly after winning against Collingwood, AFL player Adam Goodes was called an ‘ape’ by a 13 year old girl.²¹ Goodes said the abuse left him feeling ‘gutted’.²²

On 29 May 2013 Eddy McGuire was discussing with Luke Darcy, on their breakfast radio show on Triple M, a promotion of the King Kong musical in which an ape’s hand was hung from the Eureka Skydeck, 300 metres above the ground. Darcy said: “One of the great promos ever was the hand coming out of the Eureka tower. What a great promo that is for King Kong.” McGuire interjected: “Get Adam Goodes down for it, you reckon?” McGuire went onto say: “You can see them doing that, can’t you? Goodesy. You know, the big, not the ape thing, the whole thing...”²³

Despite feeling ‘gutted’ by the racial abuse he experienced, Adam Goodes would not be able to make a racial vilification complaint under the provisions proposed by the exposure draft. This is because he would not have feared that a 13 year old girl would cause him physical harm and it is unlikely that the word ‘ape’ would satisfy the very high threshold of inciting others to hate Aboriginal people.

The failure to provide an effective remedy for someone in the position of Adam Goodes would appear to be out of step with community attitudes in relation to racial discrimination which at the time widely condemned the actions of the girl who abused him, and widely applauded Goodes’ reaction to the abuse. This was further exemplified by the widespread

²⁰ Subsections 18C(2) and (3).

²¹ Crawford, Adrian ‘Adam Goodes ‘gutted’ by racial slur but wants AFL fan educated’ *Sydney Morning Herald* 27 May 2013 <http://www.abc.net.au/news/2013-05-25/goodes-gutted-but-places-no-blame/4712772> viewed at 23 April.

²² Ibid.

²³ Paxinos, Stathi ‘McGuire apologises for Goodes King Kong gaffe’ *The Age* 29 May 2013 <http://www.theage.com.au/afl/afl-news/mcguire-apologises-for-goodes-king-kong-gaffe-20130529-2na8h.html> viewed at 23 April 2013.

condemnation of Eddie McGuire who also made derogatory allusions to apes when discussing the Goodes case. This community sentiment is also reflected in recent opinion polls which indicate that the community does not support the proposed amendments to the RDA.²⁴

It is important to consider that most people who experience this type of racial abuse are not in the position of Adam Goodes, and are not able to use the media to reply to the experience of the abuse. Despite Goodes' prominent social position and personal success, the experience of racial abuse affected him deeply. We need to recognise that these words are extremely powerful and have a deeply emotional impact, most often on people who are in a vulnerable position.

We believe that section 18C(1)(a) of the RDA does not need to be amended because courts already require that the conduct complained of have serious and profound effects on a person or groups of persons.²⁵ Justice Bromberg stated that:

"To "offend" can mean to hurt or irritate the feelings of another person. If the concern of the provision was to fully protect people against exposure to personal hurt, insult or fear, it might have been expected that the private domain would not have been excluded by the phrase "otherwise than in private" found in the opening words of s 18C(1)... In my view, "offend, insult, humiliate or intimidate" were not intended to extend to personal hurt unaccompanied by some public consequence of the kind Part IIA is directed to avoid."²⁶

However if the Government intends to change section 18C(1)(a) we submit that fears over the meaning of 'offend, insult, humiliate' could be allayed by inserting another subsection between subsection 18C(1)(a) and subsection 18C(1)(b), which reflects the current judicial test, that is, that the act must be reasonably likely, in all the circumstances, to have profound or serious effects on a person or group of people.

Recommendation 6: The exposure draft be amended to reflect:

- 1. section 18C(1) of the RDA, without amendment; or**
- 2. section 18C of the RDA, with the following amendment:**

“(1) It is unlawful for a person to do an act, otherwise than in private, if:

(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

(aa) the act is reasonably likely, in all the circumstances, to have profound or serious effects; and

(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group or because of the presumed race, colour or national or ethnic origin of that person or group of persons”.

²⁴ Kenny, Mark, 'Race hate: voters tell Brandis to back off' *Sydney Morning Herald* 13 April 2014 <http://www.smh.com.au/federal-politics/political-news/race-hate-voters-tell-brandis-to-back-off-20140413-zgubv.html> viewed at 23 April 2014: "The latest Fairfax-Nielsen poll specifically asked voters if they believe it should be lawful or unlawful to "offend, insult or humiliate" somebody based on their race. The answer was a statistically conclusive 88 per cent - or nine out of 10 - in favour of the status quo - that is, that it should remain unlawful to discriminate."

²⁵ *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 at [16] and *Eatock v Bolt* [2011] FCA 1103 at [263 – 267].

²⁶ *Eatock v Bolt* [2011] FCA 1103 at [263] and [267].

Expand the definition of 'intimidate'

The exposure draft maintains that it should be unlawful to intimidate a person or group of persons on the basis of their race, colour or national or ethnic origin, however it limits the definition of intimidate to fear of physical harm. We believe that the definition of intimidate in the exposure draft is too narrow and should include psychological harm. As the present exposure draft stands it is hard to see how the RDA would provide protections beyond those existing in the criminal law. This is unsatisfactory.

It is widely understood that racial vilification can cause serious psychological harm. In *Rugema v Gadsten Pty Ltd & Derkes* [1997] HREOCA 34, while there was no suggestion the applicant felt physically intimidated, Commissioner Webster was satisfied that the applicant:

"suffered a severe major depressive disorder with significant pain and suffering and loss of enjoyment of life as the result of racial abuse. He has suffered constant fatigue, has been suicidal, has problems sleeping with recurrent nightmares of racial abuse. He suffers sweating, heart palpitations, fear of going outside, he is now withdrawn socially, he is unable to concentrate, and as a result of the medication he is using he suffers impotence. Mr Rugema's confidence and general feelings of self worth have been diminished."

Stephan Kerkyasharian, President of the Anti-Discrimination Board of NSW, told the Committee of the NSW Inquiry that race-hate speech can cause psychological and social harm:

*"it is important to recognise that vilification has the potential to cause real harm. It is widely accepted that speech promoting prejudice and hatred can cause significant psychological and social harm to individuals from targeted groups. Indeed, the person who lodges a complaint is not the only person affected by the vilification, because hate speech does not just have one victim."*²⁷

According to the 2011 Lowitja survey about racism, 50% of all participants and 65% of participants exposed to 12 or more incidents of racism reported experiencing high or very high levels of psychological distress.²⁸

According to the 2008 NATSISS, Aboriginal and Torres Strait Islander people who had experienced discrimination were more likely than those who had not experienced discrimination to report high or very high levels of psychological distress (44% compared to 26%).²⁹

Jeremy Fernandez

*On 8 February 2013 ABC news host, Jeremy Fernandez, and his two year old daughter, were subjected to 15 minutes of racial abuse by another passenger on a Sydney bus, including being called a "black cunt" and told to "go back to my country".*³⁰

Although Jeremy Fernandez was subject to racial abuse on a public bus in front of his daughter, he would not be able to make a racial vilification complaint under the provisions proposed by the exposure draft because it is doubtful that the abuse would meet the very high threshold of 'inciting hatred' and that the abuse would have caused him to fear physical harm.

To limit 'intimidation' to fear of physical harm sets the bar for applicants too high and ignores the significant psychological harm racial vilification can and has caused to victims.

²⁷ NSW Legislative Council, Standing Committee on Law and Justice, above n 8, at [2.7].

²⁸ Lowitja, above n 8.

²⁹ ABS, above n 7.

³⁰ Lacey, Jen, 'ABC TV's Jeremy Fernandez racially abused on bus' *Sydney Morning Herald* 8 February 2013 <http://www.abc.net.au/local/stories/2013/02/08/3686232.htm> viewed on 23 April 2014.

Recommendation 6: Subsection 18C(2)(b) of the exposure draft be amended to “intimidation means to cause psychological harm or to cause fear of physical harm.”

Ordinary reasonable person test

Subsection 18C(3) of the exposure draft requires that the assessment of whether a person has vilified or intimidated another person be determined by the standard of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community. These subsections should be removed because the test lacks clarity and inappropriately ignores the valid opinions of the affected group of people.

It is not clear who an ‘ordinary reasonable member of the Australian community’ who is not a member of ‘any particular group’ is, and what their standards are. We submit that courts will also struggle to identify this hypothetical person and to determine what values they hold. This may result in lengthy, costly and inconsistent judicial decisions.

The test also assumes that the opinions of the affected group are not valid in determining whether or not they have been vilified or intimidated. However, in *Clarke v Nationwide News Pty Ltd trading as The Sunday Times* [2012] 307 Barker J states that:

*“an act done... that might not offend one group of Australians because it will be considered by them as a mere slight only, may well be considered reasonably likely, in the circumstances, to offend another, minority group.”*³¹

In *Wanjurri v Southern Cross Broadcasting (Aus) Ltd* [2001] HREOCA 2 Commissioner Innes AM states that:

“The test is objective. However, the objective test must take into account the race, colour, national or ethnic origin of the group of persons offended... It is well accepted in tort that the particular circumstances or characteristics of a person should be taken into account in respect of an objective standard. It is a clear inference from s. 18C that the comment must be offensive to the person or group of the particular race, colour or national or ethnic origin.”

In *Kelly-Country v Beers & Anor* [2004] FMCA 336 Brown FM states:

*“Mr Kelly-Country also describes himself as an “activist”... so may be regarded as being unduly susceptible or even an agent provocateur in respect of the material complained of... Accordingly, the response of the complainant to the act complained of must itself be reasonable and by implication proportionate... This is the so-called “reasonable victim” test... However, in applying the reasonable victim test... is to be informed by community standards, it is also necessary to consider the relative historical or socioeconomic situation of the group of persons to which a complainant belongs... He argues that it is well known that Aboriginal people have suffered and continue to suffer considerable social disadvantage in Australian society... in applying the reasonable victim test, the Court must have regard to the likely cultural sensitivity of the group to which Mr Kelly-Country belongs... for obvious reasons, a joke about a historically oppressed minority group, which is told by a member of a racially dominant majority, may objectively be more likely to lead to offence.”*³²

To determine whether vilification or intimidation has occurred according to standards outside the affected group and ignoring their views, undermines the intention of vilification provisions and serves to entrench the groups’ marginal status in our communities.

Recommendation 7: Subsection 18C(3) of the exposure draft be removed.

³¹ At [69].

³² At [87 – 92].

Exemptions

The exposure draft repeals section 18D and proposes to replace it with subsection 18C(4) which deems lawful anything communicated in the course of public discussion, regardless of whether what is communicated is done reasonably, in good faith, fairly or accurately. Subsection 18C(3) of the exposure draft removes any responsibility of the communicator to exercise their right to freedom of speech responsibly and exempts the most powerful avenue for racial vilification. This subsection should be removed and section 18D retained.

Articles 19(2) and (3) of the ICCPR states that the right to freedom of expression comes with the obligation to exercise that right responsibly, so as to not infringe on the rights of others, including the right of others to live free from racial vilification.³³ Freedom of expression should only be limited to the extent necessary to prevent racial vilification. However, to remove the obligation to exercise the right to freedom to expression reasonably, in good faith and to ensure that any published account is fair and accurate, privileges the right to freedom of expression over the right to live free from racial vilification.

Subsection 18C(3) of the exposure draft also exempts the most powerful avenue for racial vilification – the media. It is well known that the media have the power to shape public opinion. Without the need to act reasonably and in good faith, subsection 18C(3) allows journalists and broadcasters to spout racial hate speech, without fear of any repercussions. This is not acceptable and is not a mark of a country that promotes itself as a multicultural nation, which respects and celebrates diversity.

Section 18D of the RDA promotes a healthy balance between freedom of expression and the right to live free from racial vilification and should be retained.

Recommendation 8: Subsection 18C(4) of the exposure draft be removed and the exposure draft should not repeal s 18D of the RDA.

Retain section 18E

The exposure draft proposes to repeal section 18E of the RDA, which deems employers vicariously liable for the racially offensive acts of their employees or agents, unless they took all necessary steps to prevent the act. The exposure draft does not propose to replace section 18E with a comparable provision. Section 18E of the RDA should be retained because it encourages employers to take action to prevent racial vilification in the workplace and there are comparable provisions in other anti-discrimination legislation.

Racial vilification in the workplace can affect the productivity of employees and can have detrimental effects on businesses and organisations.

Louis

Louis works in a warehouse. His supervisor made racially offensive comments to him, in front of other staff, about the dark colour of his skin. He feels very hurt and humiliated by these comments. He feels as though his supervisor and his colleagues don't respect him. He complained to HR but the racial abuse continued. He eventually takes sick leave due to the stress and depression he is experiencing due to the racial abuse.

³³ "(2) 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. (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others..."

Section 18E of the RDA serves to encourage employers to take all reasonable steps to prevent racial vilification occurring. An employer will only be held vicariously liable for the offensive actions of their employees, if they did not take all reasonable steps to prevent racial vilification. To repeal section 18E removes employers' responsibilities to ensure a healthy workplace that is free from racial hate speech.

If section 18E of the RDA were repealed, it would be inconsistent with Part II of the RDA, which deems employers vicariously liable if their employees discriminate on the basis of a person's race.³⁴ Removing section 18E will also make it inconsistent with other provisions in federal and state and territory anti-discrimination legislation, which have a similar intention as section 18E.³⁵

Recommendation 9: The exposure draft should not refer to section 18E of the RDA.

Standing rules

Pursuing a vilification or discrimination complaint is a very personal type of litigation that can be emotionally draining and stressful. Without legal advice and representation, many complainants simply do not pursue their complaints. The challenge for unrepresented complainants is further compounded by the shift towards a more formal style of conciliation. In the past, conciliations may have been more informal, with neither party represented. However, in our experience, respondents are increasingly retaining legal representation at the conciliation phase, which significantly disadvantages unrepresented complainants.

In our experience, many clients find the current Commonwealth anti-discrimination process to be an ineffective means of resolving their complaints. In our experience, most discrimination and vilification cases settle. However, we believe that many settle on terms that do not reflect the seriousness of the discrimination or vilification or that result in inadequate compensation to the complainant. Our experience is that compensation offered in conciliation agreements is generally very low (often below \$10,000). The decision to litigate in a costs jurisdiction is made even more difficult when legal costs for the latter could easily be three or four times this amount.

When considering the effectiveness of the current federal system, the high percentage of conciliated outcomes cannot in itself be seen as a success. In our view, many matters settle because of the costs jurisdiction that complainants must enter if the matter does not resolve at the AHRC. As a result, many complainants settle on terms that do not reflect the merits of their case.

In addition to costs considerations, there are other barriers to accessing justice within the current discrimination and vilification framework – namely, barriers to physical access, and psychological costs and the time commitment involved in pursuing litigation (particularly for people with disabilities). It is also difficult for people living outside metropolitan areas to commence proceedings in the Federal Court or Federal Magistrates Court without a solicitor acting on their behalf.

These barriers contribute to the dearth of decided cases and expertise among the judiciary in this area of law, making it even more difficult for practitioners to provide advice on

³⁴ Section 18A.

³⁵ *Disability Discrimination Act 1992* (Cth) section 123; *Anti-Discrimination Act 1977* (NSW) section 53; *Sex Discrimination Act 1984* (Cth) section 106; *Anti-Discrimination Act 1992* (NT) section 105; *Equal Opportunity Act 1984* (SA) section 91; *Equal Opportunity Act 1984* (WA) section 161; *Discrimination Act 1991* (ACT) section 121A; *Anti-Discrimination Act 1991* (Qld) section 133; *Equal Opportunity Act 2010* (Vic) sections 9 and 10; *Racial and Religious Tolerance Act 2001* (Vic) sections 17 and 18; and *Anti-Discrimination Act 1998* (Tas) section 104.

prospects of success to complainants. This leads to more cases settling and fewer systemic outcomes.

In the current Commonwealth anti-discrimination system, alternative dispute resolution in the form of conciliation is employed at the first instance. The advantage of alternative dispute resolution is that it is a relatively informal process and minimises the expense to the parties. However, in our experience, the conciliation process can disadvantage the complainant. There is often a power imbalance between the complainant and the respondent, who is frequently a company or a government agency. This power imbalance is even more pronounced when the complainant is not represented, usually due to insufficient resourcing of advocacy and legal organisations.

If a complaint is not brought in relation to a specific issue or service it will continue to be discriminatory or vilifying. It would be of benefit to the community at large that systemic discriminatory or vilifying behaviour stopped. The lack of an effective mechanism to facilitate this impedes this objective.

Inconsistencies between sections 46P(2) and 46PO(1) of the AHRC Act make it very difficult for organisations to bring complaints alleging discrimination unless the organisation itself can prove it has standing, in its own right, to make the complaint.

We submit that these strict rules on standing should be amended to make it clear that organisations or groups representing, for example, Aboriginal peoples or people with a disability, can bring complaints on behalf of their members who have suffered discrimination or harassment or vilification, in their own right.

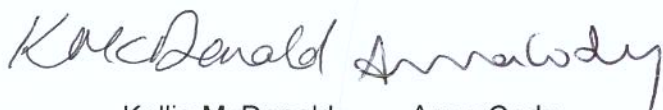
We also recommend that the various Discrimination Commissioners and the AHRC be given the power to investigate, of their own motion, conduct that appears to be unlawful under discrimination and anti-vilification law, and have the power to commence court proceedings without having to rely on an individual complaint. The Commissioners should be adequately resourced to perform this role.

Together, this will assist in addressing systemic discrimination and vilification and take some of the pressure off individuals who have been subject to discrimination or vilification in going through the court process.

Recommendation 10: The exposure draft amend subsections 46P(2) and 46PO(1) of the AHRC Act to allow groups, organisations or the AHRC to initiate discrimination and vilification complaints on behalf, or in the interest of, people aggrieved.

Please do not hesitate to call us on (02) 9385 9566 if you would like to discuss the content of our submission further.

Yours faithfully,
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