Exposure Draft: Freedom of Speech (Repeal of s18C) Bill 2014

SUBMISSION TO THE COMMONWEALTH ATTORNEY-GENERAL

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EXECUTIVE SUMMARY

The Law Institute of Victoria (LIV)[1]opposes any change to Part IIA of the *Racial Discrimination Act* 1975 (Cth) (the RDA) and calls on the government to abandon the Exposure Draft Freedom of Speech (Repeal of s18C) Bill 2014 (the Exposure Draft).

The Exposure Draft has been released without any apparent policy analysis of the need for reform of Part IIA of the RDA. Public comments by the Attorney General suggestthat the only impetus for the reform is the outcome in *Eatock* v *Bolt* [2011] FCA 1103 (the Bolt case).[2]

For almost twenty years, s18C of the RDA has provided a low cost, predominantly non-litigious avenue for redress against racially offensive behavior in Australia. The case law demonstrates that s18C sets clear limits about what behaviour is acceptable in Australian society and provides remedies for people affected by public acts that are objectively likely to seriously offend, insult, humiliate or intimidate a person. Any reform of s 18Cshould be based on a thorough examination of relevant case law and a comparative review of similar laws in other jurisdictions, followed by adequate community consultation: that is, the usual process undertaken to assess any serious law reform proposal. Reform of a provision such as s18C, which seeks to balance competing public interests, should not be based on the outcome of one case (especially a case that was not appealed).

The current law strikes a balance between two competing rights: freedom from racial discrimination and freedom of expression. Section 18C does not cover mere personal hurt but prohibits conduct "injurious to the public's interest in a socially cohesive society".[3] Section 18C prohibits only conduct that has profound and serious effects.[4] Section 18D of the RDA further protects acts done or said reasonably and in good faith in a broad range of situations, including in the course of any statement, publication, discussion or debate for any genuine purpose in the public interest.

Contrary to elements of media commentary,[5] the Bolt case demonstrates the appropriate balance struck in the RDA between rights to freedom of expression and freedom from racial discrimination. In his judgment in the Bolt case, Justice Bromberg made it clear that the current provisions of the RDA mean it is lawful to publish articles that deal with racial identity or challenge the genuineness of someone's racial identity, even if the opinions expressed are those that reasonable people would consider to be abhorrent, so long as the facts upon which the comment is founded are true, the comment is an expression of a genuine belief and the subject is dealt with reasonably and in good faith (in accordance with s18D).[6] Bolt's articles were not exempted from being unlawful by s 18D of the RDA because the articles the subject of complaint were found to contain untruthful facts and distortions of fact and used inflammatory and provocative language among other matters.

[1] The Law Institute of Victoria (LIV) is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 16,000 members.

[2] George Brandis, 'Section 18C has no place in a society that values freedom of expression,' First that values freedom of expression,' *The Australian*, 30 September 2011, http://www.theaustralian.com.au/national-affairs/opinion/section-18c-has-no-place-in-a-society-that-values-freedom-of-expression/story-e6frgd0x-1226152196836.

[3] See *Eatock* v *Bolt* (2011) 283 ALR 505 (the Bolt case), at [263].

[4] *Creek v Cairns Post Pty Ltd (2001) 112 FCR 352 at* [16] (Kiefel J); *Bropho v Human Rights and Equal Opportunity Commission (2004) 135 FCR 105*at [70] (French J); *Jones v Scully (2002) 120 FCR 243*at [102] (Hely J); *Jones v Toben* [2002] FCA 1150 at [92] (Branson J); the Bolt case, above n2 at [268] (Bromberg J).

[5] See eg "Your right to speak freely", *Herald Sun,* 12 March 2014 available at http://www.heraldsun.com.au/news/opinion/your-right-to-speak-freely/story-fni0ffsx-1226851875830.

[6] The Bolt case, above n2, at [353] ff.

CURRENT LAW IS BALANCED AND APPROPRIATE

Current law strikes an appropriate balance between freedom of speech and freedom from racial discrimination

Freedom of expression is a fundamental human right.[7] Both international and Australian law recognise, however, that freedom of expression is not absolute and can be limited in certain circumstances, including as a reasonable, necessary and proportionate means for pursuit of a legitimate objective.[8]Examples of limits on freedom of expression in Australian law include consumer protection laws, defamation, copyright, contempt of court and parliament, censorship, blasphemy, child pornography, incitement to genocide or to discrimination, hostility or violence and sexual harassment laws.[9] Part IIA of the RDA is therefore only one of many limits on free speech under Australian law.

Freedom from racial discrimination is also a fundamental human right. One protection against racial discrimination is the international law prohibition of behavior that incites racial discrimination, hostility or violence.[10] Australia implemented this international law prohibition in domestic law through the introduction of Part IIA to the RDA.[11] Part IIA prohibits certain racially offensive behaviour under civil,[12] not criminal, law and creates an avenue for civil redress initially by complaint to the Australian Human Rights Commission.[13] (Then) French J noted in *Bropho*[14]that "the Convention which underpins Pt IIA of the *Racial Discrimination Act* allows States to strike a balance between the need to prohibit the evil of racial vilification and hatred and the need to protect freedom of speech and association within their reasonable limits".[15]

Part IIA was inserted by the *Racial Hatred Act* 1995 (Cth). An extract from the Second Reading Speech of the Racial Hatred Act highlights that:

> The bill places no new limits on genuine public debate. Australians must be free to speak their minds, to criticise actions and policies of others and to share a joke. The bill does not prohibit people from expressing ideas or having beliefs, no matter how unpopular the views may be to many other people. The law has no application to private conversations. Nothing which is said or done reasonably and in good faith in the course of any statement, publication, discussion or debate made or held for an academic, artistic or scientific purpose or any other purpose in the public interest will be prohibited by the law.[16]

Case law on Part IIA demonstrates that the courts have interpreted ss18C and 18D as a reasonable, necessary and proportionate limit on free speech for the purpose of promoting racial tolerance and protecting against the dissemination of racial prejudice.[17] Examples of the court's approach to balancing rights to free speech and freedom from racial discrimination in claims under s18C include:[18]

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[7]Article 19, *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR).
[8] ICCPR, Article 19(3).
[9] See Professor Gillian Triggs, "Freedom of Speech and Racial vilification: one man's freedom ends where another's starts", speech delivered to The Sydney Institute 26 November 2013, available at https://www.humanrights.gov.au/news/speeches/freedom-speech-and-racial-vilification-one-man-s-freedom-ends-where-another-s-starts (Professor Triggs speech).
[10]Article 20, ICCPR and Article 4, *International Convention on the Elimination of All Forms of Racial Discrimination*1966, opened for signature on 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).
[11]*Koowarta v Bjelke Petersen* (1982) 153 CLR 168, [211]-[221] (Stephen J), [222]-[235] (Mason J), [237]-[242] (Murphy J), [253]-[261](Brennan J).
[12]See *Racial Discrimination Act* 1975 (Cth), s26.
[13]*Australian Human Rights Commission Act* 1986 (Cth), s46P.
[14]*Bropho*, above n4.
[15]*Bropho*, above n4, at [62].
[16]Commonwealth, *Parliamentary Debates,* House of Representatives, 15 November 1994, 3336 – 3342 (MrLavarch), at 3337.
[17]*Jones v Toben*[2002] FCA 1150.
[18] See furtherProfessor Triggs speech, above n9.

- the words or conduct must be of a serious nature – s18C applies only to 'profound and serious effects not to be likened to mere slights';[19]

- whether conduct is reasonably likely to offend a group of people is to be objectively assessed on the reasonable victim test assessed by reference to community standards – so that relevant context is taken into account;[20] and

- s18D applies to protect conduct and words that would otherwise breach s18C, where the requirements of that provision are met (including that the act was done reasonably and in good faith).

The Bolt case demonstrates how Part IIA of the RDA seeks to balance free speech with prohibition of racial vilification. Andrew Bolt was found to have breached s18C because of the way he wrote the articles the subject of complaint and the factually erroneous basis on which he pursued discussion. He did not breach the RDA because he wrote about racial identity or questioned a person's racial identity. The Court found that the articles' untruthful facts and distortions of the truth, together with a derisive tone and provocative and inflammatory language among other matters defeated the defences available under s18D.

Racially vilifying speech is lawful under s18D in numerous circumstances, including when it is a "fair comment" or a fair and accurate report of an event or matter of public interest. When this requirement is met, the level of offence, insult, humiliation or intimidation caused by the speech is irrelevant and any complaint will be dismissed.

Racial vilification itself can also operate to stifle freedom of expression, because it can have a silencing effect on those who are vilified.[21] As Bromberg J notes in the Bolt case, where "racially based disparagement is communicated publicly it has the capacity to hurt more than the private interests of those targeted".[22] Bromberg J discusses the broader implications of racial vilification at [225]:

> The essence of racial vilification is that it encourages disrespect of others because of their association with the racial group to whom they belong. That kind of stigmatisation and its insidious potential to spread and grow from prejudice to discrimination, from prejudice to violence, or from prejudice to social exclusion, is at the fundamental core of racial vilification.

The broader implications of Andrew Bolt's articles are demonstrated by the role played by Tarwirri[23] in the Bolt case.Tarwirri was instrumental in instigating the action to test the concept of racial vilification and protect the right of Aboriginal and Torres Strait Islander people (especially young people) to determine their own identity, based on culture and the community in which they were brought up.[24] Bromberg J recognised the importance of s18C for younger people, who are more vulnerable in relation to challenges to their Aboriginal identity.[25] In these circumstances, racial vilification can operate to suppress freedom of expression of racial identity.

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[19] See above n3.
[20] *Bropho* [66] (French J); *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615at [15] (Drummond J); *Creek* at [12] (Kiefel J); *Scully* at [99] (Hely J); *McGlade v Lightfoot* (2002) 124 FCR 106 at[42]-[45] and [47] (Carr J).
[21] See Joint Statement: Racism is not Free Speech, 21 November 2013 at http://nationalcongress.com.au/joint-statement-racism-is-not-free-speech/.
[22] The Bolt case, above n3, at [264].
[23] Indigenous Law Students and Lawyers Association of Victoria
[24] See Tarwirri Media release, 28 September 2011.
[25] The Bolt case, above n3, at [296].

Current law provides a low cost, non-litigious avenue to seek redress for racially offensive behaviour

Approximately 95 per cent of complaints under s18C are dealt with by the Australian Human Rights Commission.[26]Most of the complaints resolved by the Commission result in remedies that include an apology, an agreement to remove material, systemic outcomes such as training and changes to policies and compensation – generally not exceeding $20,000.[27]

Remedies available under the RDA can be contrasted to those available in defamation, where arguably similar damage can be sustained.[28] In defamation cases, damage to reputation is presumed to be the natural or probable consequence of a defamatory publication. Damages can often total hundreds of thousands of dollars (including consolation for hurt, humiliation and distress, reparation for damage to reputation and vindication of reputation).[29]

EXPOSURE DRAFT SHOULD BE ABANDONED

Exposure Draft fails to protect against the dissemination of racial prejudice

The Exposure Draft does not seek to balance freedom of expression with freedom from racial discrimination, but rather would protect racial vilification and race hate speech uttered or written in the course of public discussion, whatever the cost.

The Exposure Draft would repeal Part IIA of the RDA (including s18E providing for vicarious liability for prohibited conduct by employees) and insert a new provision that would:

- prohibit words or conduct in public that are reasonably likely to incite racial hatred or cause fear of physical harm to a person, property or members of a group because of their race;
- create an objective test for determining the effect of conduct, based on an "ordinary reasonable member of the Australian community" and not the standards of the particular group who are vilified or intimidated; and
- exempt all words and acts done or communicated in the course of any public discussion from liability (the exemption provision).

Without a specific provision, vicarious liability could potentially be established according to common law.

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[26]See SBS online, "Interactive: Race discrimination cases from Brits to Bolt" 27 March 2014, at http://www.sbs.com.au/news/article/2014/03/27/interactive-race-discrimination-cases-brits-bolt(SBS article)and Professor Triggs speech, above n18. Last financial year, of the 192 complaints concerning racial hatred, only five (or 3 per cent) ended up in court – see speech by Dr Tim Soutphommasane, Race Discrimination, 3 March 2014Australian National University, available at http://www.humanrights.gov.au/news/speeches/two-freedoms-freedom-expression-and-freedom-racial-vilification.

[27]See the Australian Human Rights Commission's Racial Discrimination Act conciliated outcomes summaries at http://103.7.165.98/site-navigation; http://103.7.165.98/complaints/conciliation-register/racial-discrimination-act-1975-complaints-conciliated-period. For a recent Court award see *Clarke v Nationwide News Pty Ltd* (2012) 289 ALR 345: award of $12,000 for offence, insult and humiliation.

[28]See the discussion in the Bolt case, above n3, at [390].

[29]See eg, *Crampton v Nugawela* (1996) 41 NSWLR 176 (award of $600,000 upheld on appeal; matter involved racially insulting comments); *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 (awards of $200,000, $250,000 and $50,000 respectively for three defamatory imputations); *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183 (damages reassessed at $275,000).

The Exposure Draft is highly problematic for a number of reasons:

- The definitions of "vilify" and "intimidate" in subs (2) are overly narrow and inconsistent with their ordinary meaning, according to dictionary definitions.[30]

- The objective test in subs(3) significantly changes the assessment of whether words are reasonably likely to have the particular effect proscribed by statute (currently to offend, insult, humiliate or intimidate), by applying the standards of the general community, rather than by reference to the values, standards and circumstances of the group the subject of the act.[31] This means that historical disadvantage experienced by particular groups, and their experience of racism and its effects, cannot be taken into account. As Bromberg J points out in the Bolt case, "to import general community standards into the test of the reasonable likelihood of offence runs a risk of reinforcing the prevailing level of prejudice" and is antithetical to the promotional purposes of Part IIA (that is, to promote racial tolerance).[32]

- The breadth of the proposed exemption provision, which covers all "words, sounds, images or writing spoken, broadcast or published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter", would effectively permit dissemination of racial prejudice, or even incitement to racial hatred, however serious and harmful, so long as it is communicated on a public platform (including social media). The exemption provision therefore renders the proposed prohibition of racial vilification and intimidation in subs (1) all but meaningless.

- Current s18E, which establishes vicarious liability, is based on similar provisions across discrimination law, ensuring consistency across the jurisdiction.[33] Under s18E, an employer/principal can escape vicarious liability by, among other things, establishing they took reasonable steps to prevent the employee/agent from doing the act. This positive duty is appropriate and should be retained, because of the special role played by media organisations in generating and contributing to public discussion and debate and their potential to perpetuate racist attitudes.[34]If employers are not held vicariously liable for conduct by employees in the course of their employment, it would substantially undermine the effectiveness of Part IIA in an employment context as it would remove any need for an employer to encourage appropriate behaviour in the workplace. Further, it would greatly limit the opportunities for redress if action can only be taken against an individual perpetrator.

For these reasons, the LIV calls on the government to abandon the Exposure Draft in its entirety.

Racial discrimination presents a public health risk

If the government wants to pursue amendments to Part IIA of the RDA, a thorough policy analysis of the potential ramifications of change should be released publicly, with proper consultation undertaken with affected communities, to protect Australians from the significant harm that can be caused by racist behaviour.

Racial discrimination, including racial vilification and other offensive behavior based on racial prejudice, is widely recognised as a public health issue. VicHealth, for example, reports that exposure to ethnic and race-based discrimination is linked to anxiety and depression.[35]There is also reported emerging evidence of a link

[30]EgNew Oxford American Dictionary "vilify" (verb): "to speak or write about in an abusively disparaging manner : he has been vilified in the press"; Oxford English Dictionary "intimidate": "to render timid, inspire with fear; to overawe, cow; in modern use especially to force to or deter from some action by threats or violence"; Macquarie Dictionary "intimidate": "1. To make timid, or inspire with fear; overawe; cow.2. To force into or deter from some action by inducing fear" (as per the Bolt case, above n2).
[31]As per the Bolt case,above n3, [253]; *Creek* at [16] (Kiefel J); *Scully* at [108] (Hely J).
[32]The Bolt case, above n3, [253].
[33]See eg*Equal Opportunity Act* 1995 (Vic), s109.
[34]See egVan Dijk, Teun A. (1989) *Mediating Racism, The Role of the Media in the Reproduction of Racism, in Language, Power and Ideology*, edited by Ruth Wodak. Amsterdam and Philadelphia: J. Benjamin Publishing Company.
[35]See http://www.vichealth.vic.gov.au/Programs-and-Projects/Freedom-from-discrimination/Overview.aspx

between discrimination and poor physical health, such as diabetes, obesity and high blood pressure.[36] In Victoria, VicHealth undertakes programs and projects to reduce race-based discrimination and support cultural diversity based on research that shows that race is a social determinant of health.

Part IIA of the RDA plays a significant role in establishing community standards about the limits of free speech and what is acceptable behaviour, when the rights and health of others might be at stake. Any change to the RDA requires thorough analysis of potential public health implications, and the associated cost burdens.

CONCLUSION

Last financial year, the Australian Human Rights Commissionreported a 59 per cent increase in racial hatred complaints under s 18C, largely driven by cyber-racism on social media and video-sharing websites.[37]

The proliferation of social media in recent years – and the increased opportunities for freedom of expression provided by social media platforms – underscores the continuing need for the law to set clear boundaries to prevent harm caused by dissemination of racial prejudice.

If enacted, the Exposure Draft will effectively remove any avenue forvictims of racist speech and conduct to seek redress, even where significant harm has occured.

The government must make the case for law reform if it wishes to proceed with amendments to the RDA, including a thorough examination of relevant case law and adequate community consultation.

[36] Ibid.
[37] Australian Human Rights Commission media release, “Commissioner warns of escalation in online race hate”, 11 April 2014, available at http://www.humanrights.gov.au/news/stories/commissioner-warns-escalation-online-race-hate.