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Exposure Draft of the Freedom of Speech (Repeal of S. 18C) Bill 2014 (Cth)

Submission to the Attorney-General Hon George Brandis

APRIL 2014 | MAURICEBLACKBURN.COM.AU

Submission

on the Exposure Draft of the *Freedom of Speech (Repeal of S. 18C) Bill 2014 (Cth)*

to the Attorney-General Hon George Brandis QC

Our submission:

Maurice Blackburn Lawyers contends that the current provisions of Part IIA of the *Racial Discrimination Act 1975 (Cth)* ("**the Act**"), especially s18C, represent a nuanced, measured approach to prohibiting the public expression of racial hatred.

These provisions successfully balance the need for free and fair expression in a democratic society and the rights of individuals not to be abused or vilified on the basis of their race, colour, national or ethnic identity.

The reforms proposed by the Federal Government in the *Freedom of Speech (Repeal of S.18C) Bill 2014 (Cth)* will render Part IIA essentially powerless, removing a means of civil redress for people exposed to public displays of bigotry and hatred.

Maurice Blackburn calls on the Federal Government to abandon the *Freedom of Speech (Repeal of S.18C) Bill 2014 (Cth)* and to preserve Part IIA of the Act as it currently stands.

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About Maurice Blackburn

Who we are:

Since the day we opened our doors nearly a hundred years ago, we've been in the business of helping everyday Australians. We have proudly built our business on the belief that we can make a genuine difference in the lives of those who need our help. The firm has 27 offices nationally and over 800 staff that serve the needs of culturally diverse communities. At Maurice Blackburn we fight with tenacity and treat our clients with sincerity and respect. These values have run deeply throughout our organisation for almost a century.

A brief history:

Our firm was founded in 1919 by Maurice Blackburn, a man whose sense of social justice was truly ahead of its time. This belief in social justice and defending civil liberties has lead us to fight cases that make a genuine difference in peoples' lives. These include, the defence of Dr Mohamed Haneef and successful cases like the fight for the 40-hour working week, equality for Aboriginal workers and equal pay for women.

Introduction

Maurice Blackburn Lawyers has championed the rights of minorities and the principles of diversity and inclusion since its inception.

We understand the power of legal redress as a means to compensate victims for physical, psychological or emotional trauma suffered at the hands of bigots, bullies and bosses.

In addition to fighting for clients from a diverse array of cultural backgrounds, Maurice Blackburn has been recognised for its commitment to equity and diversity in the workplace. The firm's Cultural Diversity Tool Kit, aims to cultivate attitudes, behaviour and practices that are sensitive to the needs of people from diverse cultural backgrounds. The toolkit notes, "people from more than 200 different nationalities work and study in Australia, speak over 260 languages and identify with more than 100 religious faiths."[1]

The Federal Government proposes to introduce the *Freedom of Speech (Repeal of S. 18C) Bill 2014 (Cth)* and has invited submissions from all stakeholders.

In light of our commitment to these values, diverse client base and workforce, the fundamental changes to the operation of Part IIA of the *Racial Discrimination Act 1975* proposed by the Federal Government are of profound concern to our firm and have prompted this contribution.[2]

In speaking to the proposed reforms, this submission will examine the lack of impetus for reform, addressing the efficacy of the laws as they stand and the lack of public support for change.

The focus will then turn to the substantive content of the Exposure Bill, following the format of the draft proposals.

In addressing each section proposed for repeal, this submission will examine the operation of the provision, answer critiques levelled at these, the content that will be omitted and the implications of removal, thereby demonstrating the utility of the provisions as they currently stand.

The format will then change, examining the new provision to be inserted in s18C's place under the broad headings of vilification and intimidation separately, dealing with interrelated sub-sections under the relevant heading.

Finally, the submission will address the replacement of the 'reasonable victim' test through

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[1] Maurice Blackburn, Cultural Diversity Toolkit, 2014, 2.

[2] The focus of this submission is not on the compatibility of the proposed reforms with international human rights law. For a strong overview of these issues, please consult the Melbourne University Castan Centre for Human Rights Law's contribution to the debate. Monash University Castan Centre for Human Rights Law, 'Submission on the Repeal of Section 18C of the Racial Discrimination Act,' April 30, 2014: http://www.law.monash.edu.au/castancentre/policywork/section-18c-submission.pdf

sub-section (3) and the expansion of exemptions from the operation of this provision under sub-section (4) separately, before concluding.

In making this submission, Maurice Blackburn will argue the case for retaining Part IIA as it stands, demonstrating that these proposed changes are unnecessary, render s18C and its associated provisions ineffectual and remove a means of legal redress for individuals and groups subjected to racial hatred.

Impetus for reform?

The need for reform is unclear and the case for change is unconvincing.

The proposed laws follow the heated public debate prompted by the outcome in Eatock v Bolt [2011] FCA 1103. There, the Federal Court found journalist Andrew Bolt had contravened s18C of the *Racial Discrimination Act* in penning four newspaper articles which singled out certain Australians with Aboriginal heritage, who Bolt alleged were falsely or self-interestedly claiming Aboriginality.

Section 18C, the provision in issue, makes it unlawful to publically insult, humiliate, offend or intimidate an individual or a group on the basis of their race, colour, national or ethnic origin.

Following this decision, there were demands that this section be repealed, ostensibly to protect freedom of speech and expression.

As a consequence, in the lead-up to the 2013 Federal Election the repeal of s18C became Liberal Party policy and on forming Government, the Attorney-General sought to act on this commitment.

However, in response to the concerns of minority groups, anti-racism campaigners and some Liberal Party parliamentarians, the Federal Government backed down from full repeal, opting to propose a revised provision in place of s18C while still seeking to remove ss 18B, 18D and 18E.

These proposals have found expression in the Exposure Draft of the *Freedom of Speech (Repeal of S. 18C) Bill 2014 (Cth).*

The arguments of advocates for reform are often made on a philosophical basis - that freedom of speech is the paramount human right from which all others flow - rather than a pragmatic assessment of the operation of the current provisions.

Critics that have addressed the operation of this part of the *Racial Discrimination Act* often contradict each other in doing so.

For example, the claims of the Federal Government and others that the laws repress freedom of speech seem to argue that Part IIA is too effective in its current form. Yet others contend that these laws have achieved nothing in the wake of increased reports of racial hatred.

The University of Queensland's Garrick Professor of Law James Allan's comments are representative of this view. He asserts that, 'the idea that 18C is doing anything is palpably

ridiculous.'[3] As the Executive Director of the Executive Council of Australian Jewry David Wertheim has observed however, 'if the murder rate goes up do we scrap murder laws?'[4]

Critics of the current laws seem to ignore the statistical evidence of the function of s18C and its associated provisions. The Australian Human Rights Commission reports that of the 192 racial hatred complaints made in 2012-2013, this constituted:

> *…a 59 per cent increase in complaints under section 18C. Fifty-three per cent of racial vilification complaints in 2012-13 were resolved at conciliation. Four per cent of complaints made under section 18C were terminated or declined for being trivial, misconceived or lacking in substance. And less than three per cent of racial hatred complaints proceeded to court.*

It is clear that these laws are working, but it can hardly be said that they represent an onerous restriction on freedom of expression given how few complaints result in formal proceedings.

Beyond philosophical concerns and spurious claims concerning the efficacy of s18C, of greatest importance is the reaction to the proposed laws from indigenous Australians and ethnic communities, people who bear the brunt of public hate speech..

The Community Relations Commission of NSW, which represents 190 ethnic communities throughout the state, has made clear that:

> *…the changes proposed by the government, if passed, will send a dangerous signal that hate speech is sanctioned by the law as a form of freedom of speech, that bigotry has a place in our society.*
>
> *While we accept fully that this is not the intention of the proposed change that will be the effect. And those so inclined will seize upon it, with unambiguously negative consequences for Australian society. The changes will give succour to those who harbour bigoted views and reassure them that they may bring those views into the public domain, aware that their targets will have no alternative but to suffer in silence or dignify their tormentors with a response.*[5]

In a joint statement released by representatives of Indigenous, Greek, Jewish, Chinese, Arab, Armenian and Korean communities, these groups condemned the changes in the strongest terms noting that the proposal:

> *…would send a signal that people may spout racist abuse in public, no matter how unreasonably and dishonestly. It would be astonishing if an Australian government*

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[3] Stefanie Balogh and Patricia Kavelas, '18C Not Stopping Racism, Says Law Expert James Allan,' *The Australian,* March 28, 2014:

http://www.theaustralian.com.au/business/legal-affairs/c-not-stopping-racism-says-law-expert-james-allan/story-e6frg97x-1226866974817#

[4] Ibid.

[5] Community Relations Commissions, 'Community Relations Commission of NSW Urges Government to Back Down on 18C':

http://www.crc.nsw.gov.au/__data/assets/pdf_file/0004/22819/20140331_CRC_urges_government_to_back_down_on_18C.pdf

> *in the 21st century was prepared to embrace such a morally repugnant position. It would be utterly indefensible.*[6]

The broader Australian public have also made their views on the matter emphatically clear. The *Sydney Morning Herald* reported in a recent Nielson poll that:

> *…nine out of 10 Australians believe it should continue to be unlawful to "offend, insult or humiliate" based on race or ethnicity.*
>
> *Tellingly for the government, which has pursued the removal of legal sanctions against offending, insulting or humiliating, within the Racial Discrimination Act, six out of 10 disagree with Attorney-General George Brandis' statement that "people do have a right to be bigots".*[7]

In view of the contradictory arguments put forward for reform, which preference finer philosophical points over the law's practical effect and the widespread rejection of the proposals by Australia's first peoples, ethnic communities and the wider Australian public, it is difficult to see the need for change.

[6] National Congress of Australia's First Peoples, 'Joint Statement: Leaders Reject Proposed RDA Changes, ' March 18, 2014: http://nationalcongress.com.au/joint-statment-race-hate-laws/

[7] Mark Kenny, 'Tony Abbott Slumps in Polls Despite Best Week Yet,' *Sydney Morning* Herald, April 13, 2014: http://www.smh.com.au/federal-politics/political-news/tony-abbott-slumps-in-polls-despite-best-week-yet-20140413-zqu9c.html

The Exposure Draft

The Exposure Draft provides that:

The Racial Discrimination Act 1975 is amended as follows:

1. Section 18C is repealed.

2. Sections 18B, 18D and 18E are also repealed.

3. The following section is inserted:

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

(a) the act is reasonably likely:

(i) to vilify another person or a group of persons; or

(ii) to intimidate another person or a group of persons,

and

(b) the act is done because of the race, colour or national or ethnic origin of that person or that group of persons.

(2) For the purposes of this section:

(a) vilify means to incite hatred against a person or a group of persons;

(b) intimidate means to cause fear of physical harm:

(i) to a person; or

(ii) to the property of a person; or

(iii) to the members of a group of persons.

(3) Whether an act is reasonably likely to have the effect specified in sub-section (1)(a) is to be determined by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community.

(4) This section does not apply to words, sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter."

Repeal of s18C – Offensive behaviour because of race, colour or national or ethnic origin

The current form of s18C provides that:

(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*
>
> *(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.*

Note: Subsection (1) makes certain acts unlawful. Section 46P of the Australian Human Rights Commission Act 1986 allows people to make complaints to the Australian Human Rights Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

> *(a) causes words, sounds, images or writing to be communicated to the public; or*
>
> *(b) is done in a public place; or*
>
> *(c) is done in the sight or hearing of people who are in a public place.*

(3) In this section:

***"public place"** includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.*

How does the provision operate?

Section 18C makes unlawful an act, performed by a person not in private, if the act is reasonably likely, in all the circumstances to offend, insult, humiliate or intimidate an individual or group on the basis of their race, colour, national or ethnic origin. Whether an act would do so is determined by an objective 'reasonable victim' test. The onus of demonstrating a contravention of s18C, on the balance of probabilities, rests with the complainant.

In order to fall under this provision, the act must cause words, sounds, images or writing to be communicated to the public or be done in a public place or be done in the sight or hearing of people who are in a public place.

'Public place' is defined as a place which the public has access to by right, by implied or express invitation and whether or not a charge for admission is required. It includes the workplace.[8]

[8] *Korczak v Commonwealth* [1999] HREOCA 29 at 8.3.

Contravention of the provision is not a criminal offence but may entitle a claimant to a civil remedy via court proceedings, if conciliation cannot be reached with a respondent, following a complaint to the Australian Human Rights Commission.

The removal of 'offend, insult, humiliate'

The key change to be effected by repeal of s18C, is the removal of the words 'offend, insult, humiliate' from s18C.

Advocates for change claim these terms are too broad and imply a subjective test into the provision – both critiques should be addressed before examining the implications of repeal.

Is s18C too broad?

Many of the advocates for repeal of s18C, contend that the words *'offend, insult, humiliate'* found at s18C(1)(a) encompass behaviour which is relatively innocuous or insufficiently harmful.

Comments made by the Attorney-General reflect this view:

> *Those three words - offend, insult and humiliate - describe what has sometimes been called hurt feelings...It is not, in the Government's view, the role of the State to ban conduct merely because it might hurt the feelings of others.*[9]

On their face these words may appear somewhat open-ended, however the courts have interpreted 'offend, insult, humiliate and intimidate' (the words are read collectively, not individually) as requiring a serious effect.

Kiefel J, in *Creek v Cairns Post Pty Ltd [2001] FCA 1007* found that:

> *To "offend, insult, humiliate or intimidate" are **profound and serious effects**, not to be likened to mere slights.*[10]

This finding was expanded on by Branson J in *Jones v Toben [2002] FCA 1150*:

> *…I understand her Honour to have found in the context provided by s 18C of the RDA a legislative intent to render unlawful only acts **which fall squarely within the terms of the section** and not to reach to "mere slights" in the sense of acts which, for example, are reasonably likely to cause technical, but not real, offence or insult (see also Jones v Scully per Hely J at [102]). It would be wrong, in my view, to place a gloss on the words used in s 18C of the RDA.*[11]

In *Bropho v Human Rights & Equal Opportunity Commission {2004] FCAFC 16 (6 February 2004),* French J also cited *Creek* with approval and quoted the following comments from the then Attorney-General Hon Michael Lavarch in the Second Reading Speech of the *Racial Hatred Bill:*

> *The requirement that the behaviour complained about should 'offend, insult, humiliate or intimidate' is the same as that used to establish sexual harassment in*

[9] Emma Griffiths, 'Racial Discrimination Act Amendment: Federal Government Leaves Open Possibility of Altering Proposed Changes,' *ABC Online,* March 25, 2014: http://www.abc.net.au/news/2014-03-25/racial-discrimination-act-changes-george-brandis/5343464

[10] *Creek v Cairns Post Pty Ltd [2001] FCA 1007* at 16.

[11] *Jones v Toben [2002] FCA 1150*

> *the* Sex Discrimination Act*. The commission is familiar with the scope of such language and has applied it in a way that deals with* ***serious incidents only****.'*[12]

A body of precedent has developed which construes the terms in the current legislation in such a fashion as to capture serious breaches rather than simply a person or group's 'hurt feelings'.

A subjective test?

Also unpersuasive are claims that the provision as it stands imposes a subjective test as to whether an individual feels insulted, offended or humiliated.[13] This argument holds that the provision turns too much on the personal views of a victim, who may be easily offended or who should have 'thicker skin'.

It is readily evident from the case law however that the test is an objective one.

As Drummond J observed in *Hagan v the Trustees of the Toowoomba Sports Ground Trust [2000] FCA 1615*:

> *It is apparent from the wording of s 18C(1)(a) that whether an act contravenes the section is not governed by the impact the act is subjectively perceived to have by a complainant. An objective test must be applied in determining whether the act complained of has the necessary offensive, insulting, humiliating or intimidatory quality for it to be within the sub-section. The question so far as s 18C(1)(a) is concerned is not: how did the act affect the particular complainant? But rather would the act, in all the circumstances in which it was done, be likely to offend, insult, humiliate or intimidate a person or a group of people of a particular racial, national or ethnic group?*[14]

In applying an objective test, the courts do so by reference to the perspective of the hypothetical person or group *who might possibly be offended by an act of the type complained of.*[15] This is sometimes referred to as the 'reasonable victim' test. The rationale for this has been well-expressed by Barkery J:

> *The adoption of such a perspective is important because, if the Court were not to do so there would be a real risk that the standards of some other, different person or group would be adopted without any sensitivity to cultural differences between groups in the community. This point is well made in human rights literature…the adoption of a "reasonable victim" standard can be understood as a means of eliminating a systemic barrier as complainants will no longer be subject to the views of the dominant group concerning the types of comments that in fact are offensive to other groups or sub-groups in the community.*[16]

In view of the above, Tim Soutphommasane (the current Commonwealth Race Discrimination Commissioner) observed:

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[12] Parl Deb H of R 15/11/94 at 3341 in *Bropho v Human Rights & Equal Opportunity Commission [2004] FCAFC 16.*

[13] For example see, Bernard Keane, 'Racial Vilification: Why Defenders of Section 18C Fail,' *Crikey,* March 20, 2014: http://www.crikey.com.au/2014/03/20/racial-vilification-why-defenders-of-section-18c-fail/

[14] *Hagan v the Trustees of the Toowoomba Sports Ground Trust [2000] FCA 1615* at 15.

[15] *Clarke v Nationwide News Pty Ltd trading as The Sunday Times [2012] FCA 307* at 50.

[16] Ibid., at 51.

> *The law has been well settled. The critics of Section 18C are simply wrong to assert that it mandates a subjective test and makes the mere causing of offence unlawful.*[17]

It is difficult to conclude then that some subjective test has been imported into the current provision.

Implications for removal

The proposed reforms to s18C will repeal the section as it currently reads and replace it with a much narrower, less effective provision. While the content of its replacement is dealt with in greater depth at pages 22-28, at this juncture it is worth noting the immediate features of the current provision that will be lost.

The legal effect of the removal of the words 'offend, insult, humiliate' from s18C is to severely limit the scope of the new provision. Many very serious acts of racial hatred and vilification (in its complete, dictionary meaning) will fall outside the new provisions, removing a means of redress for members of our community exposed to egregious bigotry. This is counter to the avowed object of the Federal Government in seeking to 'strengthen the Act's protections against racism.'[18]

The following examples of conduct are drawn from the case law. They would likely be exempt from the new provision as a consequence of removing these three words

Campbell v Kirstenfeldt **[2008] FMCA 1356**

- Ms Campbell, an Aboriginal Australian woman brought a complaint against her neighbor for verbally abusing her and her son, using slurs including "*n…..s"; "c..ns"; "black mole"; "black b……ds";* "*lying black mole c..t"* and "*go back to the scrub where you belong"*.

- The acts complained of were based on their race and/or colour and were objectively reasonably likely to cause insult, humiliation and/or offence.

- The female applicant secured a declaration from the Federal Court that the respondent had engaged in unlawful conduct and $7500 in damages for hurt and humiliation.

Jones v Toben **[2002] FCA 1150**

- Mr Jones on behalf of himself and members of the Committee of Management of the Executive Council of Australian Jewry brought a complaint against Dr Toben for material published on his website.

- The Federal Court found against Dr Toben and ordered him to remove from his website material which included, any material that implied the following messages:
    - that there is serious doubt the Holocaust ever occurred;
    - that there is serious doubt that there were ever gas chambers at Auschwitz;

[17] Australian Human Rights Commission, 'Body of Case Law Provides Clarity on 18C: Commissioner,' March 14, 2014: http://www.humanrights.gov.au/news/stories/body-case-law-provides-clarity-18c-commissioner

[18] Attorney-General for Australia, Minister for the Arts, Senator the Hon George Brandis QC, 'Racial Discrimination Act,' Media Release, March 25, 2014: http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/First%20Quarter/25March2014-RacialDiscriminationAct.aspx

- those Jewish people who take offence and/or challenge Holocaust denial are of limited intelligence; and
- that some Jewish people, for improper purposes including for financial motivation, exaggerated the number of Jewish people killed during the Holocaust.

***Kanapathy v In De Braekt (No 4)* [2013] FCCA 1368**

- Mr Kanapathy, while working as a security officer at the Perth Central Law Courts brought a complaint against Ms In De Braekt, a legal practitioner, for verbally abusing him, after she had refused a search request.
- Ms In De Braekt said, inter alia:
  - "*are you from Singapore you don't belong here you don't know anything why don't you go back to Singapore you idiot you prick";*
  - *"who give the short prick like you idiot to be in charge";*
  - *"you got short man syndrome"*
  - *"you prick";*
  - *"you idiot"*.
- The Federal Court ordered Ms In De Braekt to pay Mr Kanapathy $12,500 in damages, of which $10,500 constituted general damages and $2,000 in specific damages (medical expenses as a consequence of Ms In De Braekt's conduct).

Beyond this, the replacement of the 'reasonable victim' test with that of an 'ordinary reasonable member of the Australian community' is also addressed in greater depth at p 26.[19]
.

Finally, the removal of sub-section (2) may have unintended consequences. Sub-section (2) prescribes exactly when *an act is taken not to be done in private*. Though an expansive definition, it served to place clear statutory limits on the scope of these acts. By removing these, should an interpretative objection be raised during proceedings, judges will be able to parse the new wording without legislative constraint. Surely, this is contrary to the Federal Government's other attempts to remove judicial discretion in the application of this provision.

Recommendation

For the reasons provided above, Maurice Blackburn believes s18C should be retained in its current form.

Repeal of s18B – Reason for doing an act

The current form of s18B provides that:

> *If:*
>
> *(a) an act is done for 2 or more reasons; and*
>
> *(b) one of the reasons is the race, colour or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act);*

then, for the purposes of this Part, the act is taken to be done because of the person's race, colour or national or ethnic origin.

How does the provision operate?

s18B is an interpretive provision.

This section broadens the operation of s18C(1)(b) to capture acts performed for a number of reasons where one reason is the race, colour, national or ethnic origin of a person (whether or not this was the dominant or a substantial reason for doing so).

Implications for removal

This provision is clearly designed to negate any claim that an act for the purposes of s18C(1)(b) was not performed solely 'because of' the race, colour, national or ethnic origin of a person and therefore did not fall under its auspices.

The removal of this section may provide an interpretive loophole for those who otherwise would satisfy the requirements of the new provision, if they can demonstrate an act to vilify or intimidate was performed for another purpose than just "because" of *the race, colour or national or ethnic origin of a person.*

For example, a person who writes an online blog complaining about a colleague's work performance in which they level racial slurs at them and encourage other co-workers to do the same, may seek to argue to a court that the act was done principally on the basis of commenting on the victim's work and only secondarily because of their race. As the act could not be shown to be done solely 'because of' the person's race, colour or national or ethnic origin', the victim of this abuse would not be able to bring an action under the new provision.

Recommendation

For the reasons provided above, Maurice Blackburn believes s18B should be retained in its current form.

Repeal of s18D

The current form of s18D provides that:

Section 18C does not render unlawful anything said or done reasonably and in good faith:

> *(a) in the performance, exhibition or distribution of an artistic work; or*
>
> *(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or*
>
> *(c) in making or publishing:*
>
> > *(i) a fair and accurate report of any event or matter of public interest; or*
> >
> > *(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.*

How does the provision operate?

Once the complainant has demonstrated that the respondent has contravened s18C, the onus of proof then rests on the respondent to demonstrate on the balance of probabilities that their action falls within one of the exemptions provided in s18D, which are to be broadly construed.[20]

As Tim Soutphommasane has noted:

> *Section 18D is one of the few provisions in Australian law that explicitly protects the interest of free speech. It protects anything that is done reasonably and in good faith in the course of artistic expression, scientific inquiry, or fair comment and reporting of a matter of public interest. No such conduct will be held as contravening Section 18C.*[21]

These exemptions apply both to those who do the act and to those who publish or exhibit the otherwise unlawful work.

Whether an act is done 'reasonably' and in 'good faith' is to be determined by objective and subjective tests respectively.

Whether an act is done 'reasonably' and in 'good faith' was considered by French J in Bropho and these formulations have been subsequently applied.[22] These words form a 'composite expression' and imply a number of tests.

The former involves the weighing of a number of factors including '*time, place, audience, and whether or not gratuitously insulting or offensive matters, irrelevant to the question of public interest under discussion, have been included*.'[23]

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[20] *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 at 73.

[21] See above, note 15.

[22] *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 at 173.

[23] *Eatock v Bolt* [2011] FCA 1103 at 341.

The test of good faith provides that a person:

> *…will act in good faith if he or she is subjectively honest, and objectively viewed, has taken a conscientious approach to advancing the exercising of that freedom in a way that is designed to minimise the offence or insult, humiliation or intimidation suffered by people affected by it*.[24]

Read together, they operate in accord with the rest of the provision to place reasonable limits on free expression.

Are the current exemptions too narrow?

The repeal of this provision and the content of the sub-section which replaces it (the proposed s18C(4)), implies that these exemptions are considered by the Federal Government to be too limited. Yet the provision as it currently reads, exempts a huge swathe of acts – many of which, on their face, are racist.

Turning to the first exemption, the courts have interpreted 'artistic work' widely with French J stating:

> *…it must be accepted that artistic works cover an infinite variety of expressions of human creativity.*[25]

For example, in *Kelly-Country v Beers & Anor* [2004] FMCA 336, a comedian under the stage name 'King Billy Cokebottle' performed a monologue which denigrated Aboriginal Australians. Though 'impolite and offensive' this act, fell within the 'artistic works' exemption.[26]

Similarly, the exemption at s18D(b) covers most public debate, so long as it is for a genuine purpose and 'in' the public interest. Political debate is certainly included.[27]

Finally, the exemptions for making or publishing fair and accurate reports of public interest and fair comment on a matter of public interest where the comment is a genuinely held belief simply reflect the standards long-applied in defamation law. Kiefel J in *Creek v Cairns Post Pty Ltd* identified this, observing that:

> *The section has borrowed words found in defamation law. I do not think the notion of whether something is in the public interest is to be regarded as in any way different and here it is made out. For a comment to be "*fair*" in defamation law it would need to be based upon true facts and I take that to be the meaning subscribed to in the section.*[28]

In view of the above, it is difficult to see the need to broaden what are already wide exemptions.

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[24] Ibid., at 343.

[25] *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 at 106.

[26] For what constitutes 'in the public interest' see discussion in Eatock v Bolt [2011] FCA 1103 at 430-446.

[27] *Walsh v Hanson* - Unreported, HREOC, Commissioner Nader, 2 March 2000

[28] *Creek v Cairns Post Pty Ltd [*2001] FCA 1007 at 32.

Implications for removal

The current exemptions protect freedom of speech and expression (as it is recognised in Australia) while ensuring that s18C remains a viable, effective means of calling to account racists who attack others in public. As explored in greater depth on pp27-28, the sub-section which is to take the place of these exemptions, goes too far in preferencing the rights of bigots over victims.

Recommendation

For the reasons provided above, Maurice Blackburn believes s18D should be retained in its current form.

Repeal of s18E – Vicarious liability

The current form of s18E provides that:

> *(1) Subject to subsection (2), if:*
>
> *(a) an employee or agent of a person does an act in connection with his or her duties as an employee or agent; and*
>
> *(b) the act would be unlawful under this Part if it were done by the person;*
>
> *this Act applies in relation to the person as if the person had also done the act.*
>
> *(2) Subsection (1) does not apply to an act done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing the act.*

Applying the definition of 'person' contained in the *Acts Interpretation Act 1901 (Cth) at s2C:*

> *(1) In any Act, expressions used to denote persons generally (such as "person", "party", "someone", "anyone", "no-one", "one", "another" and "whoever"), include a body politic or corporate as well as an individual.*
>
> *(2) Express references in an Act to companies, corporations or bodies corporate do not imply that expressions in that Act, of the kind mentioned in subsection (1), do not include companies, corporations or bodies corporate.*

How does the provision operate?

Section18E ensures that employers will be held vicariously liable for a contravention of s18C by an employee, unless the employer can demonstrate that they have taken all reasonable steps to prevent the employee from doing the unlawful act.

The Inquiry Commissioner in *Korczak v Commonwealth (1999)* noted that:

> *While the RDA requires the Department to be vigilant for conduct which may be discriminatory and while it clearly requires proactive and preventative steps to be taken, the RDA does not require perfection, only "reasonableness".*[29]

Examples of reasonable steps include:

- developing in consultation with staff or their union a written policy which prohibits discrimination and harassment;
- regularly distributing and promoting the policy at all levels of the organisation;
- providing the policy and other relevant information on discrimination and harassment to new staff as a standard part of induction;
- periodically reviewing the policy to ensure it is operating effectively and contains up to date information;
- training all line managers on their role in ensuring that the workplace is free from discrimination and harassment; and

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

- conducting awareness raising sessions for all staff on discrimination and harassment issues.[30]

Why remove s18E?

No rationale for removing s18E has been provided by the Attorney-General.

The decision to omit this section in the Exposure Draft is a matter of great concern to our firm. Any reform which makes it easier for an employer to avoid their responsibilities and which exposes workers to harm is one we object to strongly.

In view of this silence, we are forced to turn to views expressed publically by other commentators to understand, and respond to, the arguments for change.
Mark Cohen is perhaps the most coherent in claiming that:

> *…. the vicarious liabililty provisions under section 18E, which makes an employer liable for the actions of his or her employee, strike me as a very heavy burden. Vicarious liability came about with negligence committed in and about the ordinary course of a company's business activities, such as where a truck driver runs over and kills a pedestrian while making deliveries. How, therefore, is the making of racially offensive or insulting comments part of the usual working day? I have real difficulty in seeing why it should intrude, unless the employer is consciously promoting the employee's conduct. Nor can I think of an insurance policy that an employer could obtain to cover such a risk. That provision, in my view, should be limited solely to the circumstances where it can be shown that the employer was complicit.*[31]

Essentially, Mr Cohen argues that employers should not be held liable for this sort of conduct by employees. Furthermore, the words 'very heavy burden' imply that he believes the remedies awarded against employers have been too great.

A brief review of relevant legislation and case law reveals these objections to be unfounded.

Should employers be held vicariously liable for such conduct?

That employers should be held vicariously responsible for the actions of employees is a fundamental principle of the common law and the employment relationship.

Moreover, vicarious liability is a cornerstone of Federal discrimination legislation. s18E was explicitly designed to reflect the analogous provisions of s106 of the *Sex Discrimination Act 1984 (Cth)*, s123 of the *Disability Discrimination Act 1992 (Cth)* and s18A of the *Racial Discrimination Act 1975 (Cth).*[32]

A 'very heavy burden'?

Claims that s18E is too harsh on employers are hardly new but can be readily dismissed. As academics Luke Macnamara and Tamsin Solomon observed in 1996:

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[30] Australian Human Rights Commission, 'Employer Responsibilities: A Guide to Vicarious Liability': https://www.humanrights.gov.au/employer-responsibilities-guide-vicarious-liability.

[31] Mark Cohen, 'Why Australia's Race Discrimination Laws Need Changing,' *The Guardian*, March 27, 2014: http://www.theguardian.com/commentisfree/2014/mar/27/racial-discrimination-act-bolt-laws

[32] *Racial Hatred Bill*, Explanatory Memorandum, 12.

> *The introduction in s18E of culpability for one's employee's or agent's racist actions, where those actions were done in connection with the person's employment or agency, was considered by some commentators to be an outrageous imposition upon employers, but seems to be rather a reasonable requirement for employers to establish their own systems; to prevent racial vilification in the workplace…If the institutionalisation of racism is to be combated, it is logical that such systems should equally be established to protect not only people's money but their dignity and right to be free from racist abuse.*[33]

What has occurred in practice is that workplaces have introduced clear policies, procedures and appropriate training addressing their responsibilities to ensure a safe workplace, free from racial abuse. Taking such action has been enough to discharge employers of vicarious liability under s18C(2).

In the few instances where remedies have been awarded against employers under this provision, the penalties cannot be construed as disproportionate.

Without claiming to be definitive, it appears that one of the most significant sum of damages awarded against an employer held vicariously liable under s18E, has been $50,000 in *Wanjurri v Southern Cross Broadcasting (Aus) Ltd [2001].*[34] This was distributed evenly amongst the five applicants at $10,000 each.

The greatest financial impost in these cases can likely be attributed to costs being awarded against a party however given that the vast majority of complaints settle, the financial burden of contravention is not great.

Implications for removal

Geraldine Collins, National President of the Australian Lawyers Alliance, has suggested that:

> *The scrapping of vicarious liability appears to be another attempt to protect "big business" at the cost of the ordinary person. It is contrary to legal principles established over hundreds of years.*
>
> *An employer is responsible for the actions of its employees. However, this amendment protects an employer from the consequences of the actions of its employees. It effectively means an employer could direct an employee to act in a discriminatory manner and then hide behind the employee in avoiding liability for its own actions.*[35]

The repeal of s18E removes a powerful incentive for employers to introduce comprehensive policy, procedures, processes and training for dealing with racial hatred in the workplace. Though this may provide a small, short-term boost to the balance sheets of some companies, the potential deleterious impacts to productivity and cohesiveness in diverse workplaces could prove substantial.

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[33] Luke McNamara and Tamsin Solomon, 'The Commonwealth *Racial Hatred Act* 1995: Achievement or Disappointment?' *Adelaide Law Review* 9 (1996): 270-271.

[34] *Wanjurri v Southern Cross Broadcasting (Aus) Ltd* [2001] HREOCA 2at 11

[35] Australian Lawyers Alliance, 'Proposed Changes to RDA Will Disallow People From Utilising Law,' March 26, 2014: http://www.lawyersalliance.com.au/news/proposed-changes-to-rda-will-disallow-people-from-utilising-law

Moreover, in an age where internet communication has become the norm, where public comment proliferates across many digital platforms (and has become accordingly difficult to moderate) this provision is increasingly vital. As Tim Soutphommasane has noted:

> *Section 18E has been an important weapon in the legal armoury of those who have sought to hold internet service providers and social media platform providers to account for racist material they allow to remain published. As yet, it is uncertain what the deletion of section 18E would mean. But if it were potentially to make it more difficult for victims of racism to get internet service providers and social media platform providers to take down racist material, that would surely count as a retrograde development.*[36]

If employers are to remain accountable for preventing racist workplace behaviour, Section 18E of the RDA must remain in place.

Recommendation

For the reasons provided above, Maurice Blackburn believes s18E should be retained in its current form.

[36] J-Wire Staff, 'Race Discrimination Commissioner Defends Racial Tolerance,' *J-Wire,* April 2, 2014: http://www.jwire.com.au/news/race-discrimination-commissionner-defends-racial-tolerance/41681

Insertion of vilification

The draft Exposure Bill inserts the following provision:

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

> *(a) the act is reasonably likely:*
>
> > *(i) to vilify another person or a group of persons;*
>
> *and*
>
> *(b) the act is done because of the race, colour or national or ethnic origin of that person or that group of persons.*

The Attorney-General has claimed that:

> *The protection against racism is strengthened by including, for the first time in Commonwealth law, a specific prohibition against racial vilification (defined as inciting hatred of a person or group because of their race, colour, or national or ethnic origin). It is, by the way, one of the misconceptions in this debate that the current Racial Discrimination Act already prohibits racial vilification. It doesn't.*[37]

Though formally correct – the Attorney-General is being disingenuous in asserting that this inclusion (and the consequent omission of insult, offend or humiliate) has 'strengthened' this protection.

Rather, the introduction of 'vilification' under this provision and the high bar cumulatively established by sub-section (2)(a) serves to render this provision of little use to those subjected to racial abuse or hatred.

Sub-section (2)(a)

(2) For the purposes of this section:

> *(a) vilify means to incite hatred against a person or a group of persons;*

The requirements of sub-section (2) are problematic for a number of reasons.

A narrow definition

The definition of 'vilify' provided in the Exposure Bill is much narrower than that provided by comparable State and Territory legislation, though it clearly borrows the language of 'to incite hatred'.

For example, the *Anti-Discrimination Act 1977 (NSW)* provides that:

20C Racial vilification unlawful

> *(1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group*

[37] Attorney-General for Australia, Minister for the Arts, Senator the Hon George Brandis QC, 'Opinion Piece – Why the Law Has to Change,' Media Release, April 3, 2014:

The *Racial and Religious Tolerance Act 2001 (VIC)* is broader still:

7 Racial vilification unlawful

> *(1) A person must not, on the ground of the race of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.*

By comparison the Exposure Bill's definition covers a much smaller tranche of conduct, only addressing the impact of an individual's behaviour on a third party or public audience.[38]

Incitement of a third party

The introduction of a third party into the legislative equation further raises the bar for applicants who seek to demonstrate that vilification has occurred.

As Tim Soutphommasane and others have identified:

> *Even in cases of overt racist abuse, it would be necessary to demonstrate that the conduct could incite a third person to feel racial hatred. Such an incitement test has proven extremely difficult to satisfy in existing state racial vilification laws.*
>
> *Take the scenario of a spectator racially abusing a person at a football match. Under what is proposed, the only thing that will matter is whether third parties were incited. The effects of the abuse in degrading the target would be irrelevant, no matter how serious or severe the vilification.*[39]

This definition of vilification will ensure that only particularly egregious acts of racial hatred, directed towards engendering this sentiment in another party, will fall under the new provision.

Recommendation

For the reasons provided above, Maurice Blackburn believes these sections should not be introduced.

[38] Australian Human Rights Commission, 'In Defence of Racial Tolerance,' April 1, 2014: http://www.humanrights.gov.au/news/speeches/defence-racial-tolerance

[39] Tim Soutphommasane, 'Are we to Favour Bigotry Over the Right to Live Unaffected by it?' *The Age,* March 28, 2014: http://www.theage.com.au/comment/are-we-to-favour-bigotry-over-the-right-to-live-unaffected-by-it-20140328-zqo0t.html#ixzz2xOjWFV9B

Changes to intimidation

The draft Exposure Bill also inserts the following provision:

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

> *(a) the act is reasonably likely:*
>
> > *(ii) to intimidate another person or a group of persons,*
>
> *and*
>
> *(b) the act is done because of the race, colour or national or ethnic origin of that person or that group of persons.*

Though this change retains the term 'intimidate' from the original wording, its meaning has been defined at s(2)(b) in such a way as to make this considerably more difficult to demonstrate.

Sub-section (2)(b)

(2) For the purposes of this section:

> *(b) intimidate means to cause fear of physical harm:*
>
> > *(i) to a person; or*
> >
> > *(ii) to the property of a person; or*
> >
> > *(iii) to the members of a group of persons.*

As with the words 'offend, insult, humiliate', in interpreting the meaning of 'intimidation' the courts have relied on the ordinary dictionary definition of this term. For example Barker J in *Clarke v Nationwide News Pty Ltd trading as The Sunday Times [2012] FCA 307,* relied on the *Shorter Oxford Dictionary* phrasing which states:

> *intimidate – to render timid, inspire with fear; to overawe, cow, now esp to force to or deter from some action by threats or violence*[40]

The new definition of 'intimidate' provided in the Exposure Bill however, is clearly much narrower than that applied in the past, to the detriment of potential applicants.

A group or an individual looking to bring an action under this provision would be forced to demonstrate that the act of the respondent caused them to fear physical harm to themselves or their property – non-physical harm, is entirely excluded.

As a consequence, this provision for example, won't capture the circumstances where an individual is intimidated from participating in public debate for fear of being the subject of racial taunts and slurs.

[40] *Clarke v Nationwide News Pty Ltd trading as The Sunday Times [2012] FCA 307* at 66.

Recommendation

For the reasons provided above, Maurice Blackburn believes these sections should not be introduced.

'An ordinary reasonable member of the Australian community'

> *(3) Whether an act is reasonably likely to have the effect specified in sub-section (1)(a) is to be determined by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community.*

The introduction of sub-section (3) appears to be an explicit rebuttal to the finding against Mr Bolt in *Eatock.*

Counsel for the respondent unsuccessfully sought to argue that s18C(1)(a):

> *…imported an objective assessment of community standards and that the same standard applied irrespective of whether group offence or personal offence was alleged. Acceptance of that contention would see a reasonable person test substitute the reasonable representative test…* [41]

The new subsection (3) clearly seeks to import a 'reasonable person test' into the operation of 18C in place of the 'reasonable victim' test.

Without retreading ground previously dealt with, as Bromberg J observed in *Eatock*:

> *…to import general community standards into the test of the reasonable likelihood of offence runs a risk of reinforcing the prevailing level of prejudice.* [42]

Waleed Aly, has also identified significant implications as to whether an individual fears physical harm:

> *This is particularly problematic with the proposed offence of racial "intimidation". To "intimidate" is "to cause fear of physical harm" according to the draft Act. Now our ordinary reasonable white person is being asked to tell, say, black people whether or not they are "reasonably likely" to be fearful of physical harm. Black people – reasonable ones – might actually be fearful, but ultimately a hypothetical white person will decide that for them.*[43]

Finally, the last few words of this sub-section:

> *…not by the standards of any particular group within the Australian community..,*

are simply unnecessary in light of the words that precede it. It is clearly an attempt to further circumscribe the test to be used by judges, however the wording preceding this phrase is emphatic and further clarification is unnecessary.

Recommendation

For the reason provided above, Maurice Blackburn believes these sections should not be introduced.

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[41] *Eatock v Bolt* [2011] FCA 1103 at 253.

[42] Ibid.

[43] Waleed Aly, 'George Brandis' Racial Discrimination Act Changes Create the Whitest Piece of Proposed Legislation I've Encountered,' *The Sydney Morning Herald,* March 27, 2014: http://www.smh.com.au/comment/george-brandis-racial-discrimination-act-changes-create-the-whitest-piece-of-proposed-legislation-ive-encountered-20140327-zqnea.html#ixzz2yp3m75JC

'Public discussion of any political, social, cultural, religious, artistic, academic or scientific matter'

(4) This section does not apply to words, sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter."

The mooted introduction of sub-section (4) has proven the most controversial inclusion in the Exposure Draft.

Of principal concern is the scope of this exemption. It is much wider than the exemption it replaces - s18D. It is difficult to conceive of a communicative act which would fall outside this new sub-section, completely undermining the effect of rendering vilification and intimidation unlawful.

This is achieved through two features of the new provision. Firstly, the expansion of the categories of 'matters' which are exempted in the course of participating in public discussion and secondly, the removal of key terms which stipulate reasonable standards and motives of public discourse for an exemption to apply.

This first feature can be addressed briefly. The Federal Government has simply broadened the matters covered by the exemption still further to encompass any political, social, cultural, religious, artistic, academic or scientific matter. On its face, this wording captures nearly every conceivable topic a human being could possibly communicate on.

In addressing the second feature, it is necessary to unpack a number of key omissions which cumulatively undermine the effect of s18C.

The removal of 'reasonably and in good faith'

What constitutes conduct or utterances performed 'reasonably and in good faith' is addressed at pp 15-16. These words are the cornerstone of s18D placing rational standards on public discourse, ensuring that those who are making statements that would otherwise contravene s18C, will not do so if they discharge this light burden.

Presumably this decision is to remedy the perceived wrong of the judgement in *Eatock* where Bolt could not avail himself of a s18D exemption as Bromberg J had concluded that:

> *… Mr Bolt's conduct involved a lack of good faith. What Mr Bolt did and what he failed to do, did not evince a conscientious approach to advancing freedom of expression in a way designed to honour the values asserted by the RDA. Insufficient care and diligence was taken to minimise the offence, insult, humiliation and intimidation suffered by the people likely to be affected by the conduct and insufficient care and diligence was applied to guard against the offensive conduct reinforcing, encouraging or emboldening racial prejudice. The lack of care and diligence is demonstrated by the inclusion in the Newspaper Articles of the untruthful facts and the distortion of the truth which I have identified, together with the derisive tone, the provocative and inflammatory language and the inclusion of gratuitous asides*[44].

The removal of these words gives the green light to those who wish to make unreasonable, grossly unfounded statements of racial hatred.

[44] *Eatock v Bolt* [2011] FCA 1103 at 425

The removal of 'genuine purpose'

s18D(b) stipulated that the communication covered by this sub-section must be 'made or hold' for a 'genuine purpose' whether academic, artistic, scientific or in the public interest.

Again, though this was not a high bar, this wording excluded contributions that contravened s18C which were not for a genuine purpose. The exemption is thereby further broadened.

Removal of 'fair and accurate report' or 'fair comment'

So far as the making or publishing of reportage is concerned, a requirement that, to be exempt from s18C, reporting of prohibited utterances or conduct should be fair and accurate and in furtherance of the coverage of an event or matter of public interest (as applies under s18D(c)(i)) would no longer apply.

Also significantly, the new exemption would remove any requirement that comment that is otherwise prohibited, should be made fairly, on a matter of public interest and in the expression of a genuinely held belief, in order to attract the operation of the exemption (see s18D(c)(ii)).

What is the effect of this?
Essentially, this new exemption provision would apply in blanket fashion to nearly every conceivable expression of racial hatred. The carve-outs are so broad as to render the new provisions concerning vilification and intimidation entirely toothless.

For example, a commentator writing in a mainstream newspaper who calls on readers to commit violent atrocities against Muslim Australians claiming that they are trying to introduce sharia law 'by stealth', will confidently be able to rely on s18C(4) of the Exposure Draft to exempt themselves from any sanction.

Its operation would deprive the courts of the opportunity to finely balance the competing demands of freedom of expression and the maintenance of respect for racial and cultural diversity, by reference to the particular circumstances and context in which the alleged contravention occurred.

This change robs the law of nuance, practicality and effect.

Recommendation

For the reason provided above, Maurice Blackburn believes this sub-section should not be introduced.

Conclusion

Maurice Blackburn Lawyers is unconvinced by the arguments made for reform.

As a firm committed to the values of diversity and inclusion in our work on behalf of our clients and in our own workplace, we want Australia's laws to reflect these same principles.

We are deeply concerned that the proposed changes will effectively eliminate a form of legal redress for the victims of racial hatred.

Accordingly, we call on the Federal Government to abandon the *Freedom of Speech (Repeal of S.18C) Bill 2014 (Cth)* and to preserve Part IIA of the Act as it currently stands