SUBMISSION

MAY 2014

RACIAL DISCRIMINATION ACT

A submission to the Attorney-General's Department on amendments to the *Racial Discrimination Act 1975*

NEW SOUTH WALES BAR ASSOCIATION

The New South Wales Bar Association is pleased to provide this submission on the exposure draft of the Freedom of Speech (Repeal of s 18C) Bill 2014 *(Exposure Draft), which proposes certain amendments to the racial vilification provisions in ss 18B to 18E of the* Racial Discrimination Act 1975 *(Cth) (RDA).*

Summary

The Bar Association submits that the case for amendment of the existing racial vilification provisions in ss 18B-18E of the RDA has not been made out. It also appears that voters consider that the existing provisions should be left alone. The Fairfax-Nielsen poll, in the *Sydney Morning Herald* on 14 April 2014, reported that 88 per cent of those polled did not consider that it should be lawful 'to offend, insult or humiliate' (the language of existing s 18C) somebody based on their race.

The Bar Association considers that any amendment to, let alone repeal of the existing provisions should be preceded by a rigorous and comprehensive review of the alleged deficiencies in their operation, undertaken by an appropriate body such as the Australian Law Reform Commission, and drawing on the expertise and experience of a broad range of groups and individuals. The exposure draft has not been preceded by any such review, nor have any deficiencies in the operation of the existing provisions been identified.

Further, there is no evidence of which the Bar Association is aware that the existing provisions have had or are having anything in the nature of a 'chilling effect' on freedom of speech or freedom of expression in Australia.

In particular, the Bar Association submits that existing racial vilification laws, both those at Commonwealth level and at state level, have been developed with a keen awareness of their potential impact on the enjoyment of relevant human rights, both in terms of the promotion of, as well as interference in the enjoyment of, those rights. As Allsop J remarked in *Toben v Jones* (2003) 129 FCR 515 at [129], Part IIA of the RDA provides for the balancing of free speech with 'legal protection to victims of racist behavior', 'the strengthening of social cohesion and preventing the undermining of tolerance in the Australian community' and the 'removal of fear because of race, colour, national or ethnic origin'.

Similarly conscious of the potential human rights impacts of racial vilification laws, the courts have approached the task of construing the existing racial vilification laws with conservatism. While the language used in existing s 18C of the RDA is broad – particularly the words 'insult' and 'offend' – the courts have found contraventions of the section only in cases of 'profound and serious effects', and not in cases involving 'mere slights'.

While there may be an argument that the intended coverage of the provisions could be clarified in relation to the right of freedom of speech, or their operation improved generally, the exposure draft does not address such arguments. In relation to the exposure draft, the Bar

Association submits in particular that:

- the combined effect of subsections (1) and (2) of the new provision is to limit protection (i) against intimidation to where the relevant hate speech causes fear of threat of 'physical harm' to persons or property, and (ii) against vilification to incitement of hatred. The protection afforded by these new provisions is significantly narrower than that provided under article 19 of the International Covenant on Civil and Political Rights (ICCPR) which prohibits the 'advocacy' of racial hatred, and s 20C of the *Anti-Discrimination Act 1977* (NSW) which proscribes acts which incite 'serious contempt' and 'severe ridicule', as well as acts which incite racial hatred;
- subsection (3) of the new provision, which proposes that reasonableness be assessed from the standpoint of 'ordinary reasonable members of the Australian community, and not by the standards of any particular group within the Australian community', represents a significant departure from the existing test. Isolating a representative member of the Australian community seems particularly difficult and problematic; and suggesting that victims of racial hatred might not be ordinary reasonable members of the Australian community, a proposition inherent in the draft, is even more difficult and problematic; and
- the proposed new exception, contained in subsection (4), is an exceptionally broad and, the Bar Association submits, objectionable, exception. Its effect is to deprive the operation of the proscription in the new provision of any meaningful content. Also, significantly and unacceptably, the exception no longer imposes a 'good faith' requirement.

Structure of this submission

This submission addresses the following matters:

- first, identifies the appropriate conceptual human rights-based framework in which to analyse any amendments to the RDA;
- secondly, considers whether the case for amending the existing racial vilification provisions of the RDA has been made out; and
- thirdly, analyses the amendments to the RDA proposed by the exposure draft.

A rights-based approach to laws addressing racial vilification

Any debate about the content and operation of racial vilification laws should, necessarily, consider their impact on the enjoyment of human rights, both in terms of the promotion of, as well as interference in the enjoyment of human rights. This section considers the development of the RDA and New South Wales' racial vilification laws by reference to relevant human rights standards, including by reference to relevant international human rights instruments to which Australia is a party.

Enactment of the RDA, and 'freedom of expression'

The RDA was enacted in 1975. The preamble to the RDA refers to the International Convention on the Elimination of all Forms of Racial Discrimination (CERD)[1] and recites Parliament's desire to provide for 'the prohibition of racial discrimination and certain other forms of discrimination and, in particular, to make provision for giving effect to' CERD.[2]

Article 4 of CERD lists immediate and positive measure designed to eradicate all incitement to, or acts of, racial discrimination. Article 4 states relevantly:

> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
>
> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

It is plain from the terms of Article 4(a) that racial hatred is a form or manifestation of racial discrimination. As Allsop J noted in *Toben v Jones* (2003) 129 FCR 515 at [100]:

> Racial hatred was one form or manifestation of the perceived evil [of racial discrimination]. … It was the form of the perceived evil most likely to lead to brutality and violence, but it was not the only form of the perceived evil antithetical to the dignity and equality inherent in all human beings upon which the Charter of the United Nations was based. It was to all such forms and manifestations that the Convention was directed.

Australia deposited a reservation to article 4(a) on 30 September 1975. The reservation came about because of the inability of the Commonwealth Parliament at the time to enact a provision creating a criminal offence, contained in cl 28 of the Racial Discrimination Bill 1974,[3] in satisfaction of Australia's obligations under article 4(a).

In 1980, Australia ratified the International Covenant on Civil and Political Rights (ICCPR).[4] Article 19 of the ICCPR states:

1. Everyone shall have the right to hold opinions without interference.

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;

   (b) For the protection of national security or of public order (ordre public), or of public health or morals.[5]

Article 20(2) of the ICCPR states:

> Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Australia deposited reservations to articles 19 and 20 of the ICCPR as follows:

> Article 19
>
> Australia interprets paragraph 2 of Article 19 as being compatible with the regulation of radio and television broadcasting in the public interest with the object of providing the best possible broadcasting services to the Australian people.
>
> Article 20
>
> Australia interprets the rights provided for by Articles 19, 21 and 22 as consistent with Article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the Article in matters of practical concern in the interests of public order (ordre public), the right is reserved not to introduce any further legislative provision on these matters.

Against this background, it can be seen that laws addressing racial vilification create a tension between:

- the right to freedom from discrimination on the ground of race, as recognised in CERD and article 20(2) of the ICCPR, on the one hand; and
- the right to freedom of expression contained in article 19(2) of the ICCPR, on the other hand.

Balancing 'competing' rights

That two (or more) human rights may conflict is not a circumstance unique to the sphere of racial vilification. Nor is it a circumstance novel to Australia's anti-discrimination legislation.

Courts in jurisdictions with comparable and sophisticated domestic human rights legislation, including the United Kingdom, the United States, Canada and New Zealand, are frequently called upon to adjudicate matters said to involve 'competing' human rights.[6]

The following principles emerge from the case law in those jurisdictions:

- There is no hierarchy of rights. The aim must be to respect the importance of the conflicting rights, or sets of rights, engaged by the particular circumstances of the case.[7]

- The 'core' of a right is more protected than its periphery.[8]
- The full context, facts and societal values at stake must be considered.[9]
- The extent of the interference with each right must be considered.[10]

Those principles provide a useful conceptual basis within which to consider the tension that arises in the context of racial vilification laws between the right to freedom from discrimination on the ground of race and the right to freedom of speech or freedom of expression.

Legislative development of racial vilification laws in New South Wales

In the late 1980s and early 1990s, the state and territory legislatures enacted laws dealing with what was termed 'racial vilification'. In New South Wales, a new Division 3A inserted into Part 2 of the *Anti-Discrimination Act 1977* (NSW) (NSW Act).[11] Other states and territories enacted legislation in broadly similar terms.[12]

These laws, and the parliamentary debates which preceded their enactment, illustrate the manner in which the legislatures sought to balance the competing human rights identified above.

Section 20C of the NSW Act provides:

> 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.
>
> (2) Nothing in this section renders unlawful:
>
> (a) a fair report of a public act referred to in subsection (1), or
>
> (b) a communication or the distribution or dissemination of any matter comprising a publication referred to in Division 3 of Part 3 of the Defamation Act 1974 or which is otherwise subject to a defence of absolute privilege in proceedings for defamation, or
>
> (c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

In his second reading speech, the attorney general stated:

> … the issue of racial vilification or incitement to racial hatred has been the subject of debate in New South Wales and in the federal sphere for more than a decade. It has been the concern of successive governments. … Under present law the victims of racial vilification have no remedy under the Anti-Discrimination Act 1977 or under Commonwealth legislation. Existing laws which provide remedies for individual defamation and for prosecution of crimes such as offensive language are inadequate to reinforce the particular social unacceptability of this racist conduct. Legislation against racial vilification must involve a balancing of the right to free speech and the right to a dignified and peaceful existence free from racist harassment and vilification. The Government has drawn from the International Covenant on Civil and Political Rights in its approach to this issue.[13] [emphasis added]

The balancing of competing rights referred to by the attorney general was embodied in s 20C of the NSW Act. His second reading speech continued

> Proposed section 20C of the bill will make it unlawful for a person to engage in racial vilification, that is, 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. It is not the intention of the Government to cover matters of a trivial nature ...
>
> [The] exceptions [to s 20C] have been included in the bill to achieve a balance between the right to free speech and the right to an existence free from racial vilification and its attendant harms. The government is also mindful of the possibility of undue reliance by potential respondents on these exceptions and has therefore included the requirement that the act be done reasonably in good faith.[14]

The leader of the opposition stated that:

> In considering this legislation the Parliament is being asked to strike a balance; to curb freedom or expression on the one hand, with the right of an individual to build his or her life in an atmosphere of mutual tolerance, understanding and respect on the other hand … it will give sanctions against those who inflame racial hatred and it is a clear expression of the Parliament's and society's concerns about these occasional lapses in the public debate.[15]

This extrinsic material demonstrates a keen awareness on the part of the NSW Parliament of the effect of a provision such as s 18C of the RDA on freedom of speech, and of the need to balance such freedom with the object of the legislation to make unlawful public acts which incite the emotions and conditions referred to above.[16]

Accordingly, the task of construing s 20C of the NSW Act has been described by Allsop P, as he then was, (albeit in the context of NSW's homosexual vilification laws) as 'one to be approached with conservatism, recognizing the high value placed by the common law, and by the legislature, on freedom of expression'.[17]

Is there a case for change – the operation of the existing racial vilification provisions

Before considering the amendments proposed by the exposure draft, it arises to consider whether the case for amendment of the existing racial vilification provisions in ss 18B–18E of the RDA has been made out.

The genesis of Part IIA of the RDA

The RDA was amended by the *Racial Hatred Act 1995* (Cth) to insert Part IIA into the Act. Part IIA is titled 'Prohibition on offensive behavior based on racial hatred'.[18] Similarly to the NSW Act, and other state and territory legislation, the Racial Hatred Act aimed to strike a balance between the competing human rights described above.

During the second reading speech of the Racial Hatred Bill, the attorney-general stated:

> The bill is about protection of groups and individuals from threats or violence and incitement of racial hatred, which inevitably leads to violence. … 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 and having beliefs, no matter how unpopular the views may be to many other people.[19]

The preamble to the Racial Hatred Act states:

> An Act to prohibit certain conduct involving the hatred of other people on the ground of race, colour or national or ethnic origin, and for related purposes.

In *Toben v Jones* (2003) 129 FCR 515 at [128], Allsop J described the operation of Part IIA as follows:

> The civil provisions (now found, relevantly, in ss 18B, 18C and 18D of the RD Act) were new in their terms and structure. They were different from the various provisions of the State and Territory Acts and the provisions in the 1992 bill. The 1992 bill had used the words "hatred, serious contempt or severe ridicule" and recklessness or intent was required. Under the new provisions, no intent or recklessness was required; but s 18D had a body of justified conduct. The words of Part IIA, especially s 18C, did not require there to be an expression of racial hatred, or intended "vilification"; s 18C did not refer to incitement to violence. Rather, Part IIA of the RD Act had a less charged body of expression. It worked in the following way. Reading ss 18B, 18C and 18D together as a cohesive whole, acts were made unlawful which reasonably caused offence etc (see par 18C(1)(a)) to a person or persons in circumstances where one of the reasons (see s 18B as to more than one reason) for the act in question was the race etc (see par 18C(1)(b)) of the person or persons reasonably likely to be offended and where the act was not justifiable as a form of expression contemplated by s 18D.[20]

Subsection 18C(1) of the RDA makes unlawful an act done otherwise than in private that is reasonably likely, in the circumstances, to 'offend, insult, humiliate or intimidate' another person or a group of people because of the race or national or ethnic origin of the other person or of some or all of the people in the group.

While most attention in the current debate focuses understandably on s 18C of the RDA, it is also necessary to bear in mind ss 18B, 18D and 18E, provisions which are also proposed to be repealed by the exposure draft.

Section 18B provides that if an act is done for 2 or more reasons and 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 Part IIA of the RDA, the act is taken to be done because of the person's race, colour or national or ethnic origin.

Section 18D provides:

> 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.

Although s 18D is commonly referred to as containing the 'defences' to s 18C, the exceptions contained in s 18D strictly operate as exceptions to the prohibition in s 18C.[21]

Section 18E establishes vicarious liability for contraventions of s 18C.

Construction and application of the existing provisions

It can be noted at the outset that the words 'offend, insult, humiliate or intimidate' which appear in s 18C of the RDA can be contrasted with:

- the language of article 4(a) of CERD, which refers to 'racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts'; and
- the words used in s 20C of the NSW Act, which are 'incite hatred towards, serious contempt for, or severe ridicule'.[22]

In the absence of any statutory definition, the words 'offend, insult, humiliate or intimidate' are given their ordinary English meanings.[23]

The test for contravention of s 18C (and the role of the exceptions in s 18D)

In *Eatock v Bolt* [2011] FCA 1103 at [264], Bromberg J noted the importance of the requirement for a contravention of s 18C that the relevant act be a public one (something which is not proposed to be changed by the exposure draft):

> Proscribing offensive conduct in a public place not only preserves public order but protects against personal offence. The wounding of a person's feelings, the lowering of their pride, self-image and dignity can have an important public dimension in the context of an Act which seeks to promote tolerance and social cohesion. Proscribing conduct with such consequences will clearly serve a public purpose. Where racially based disparagement is communicated publicly it has the capacity to hurt more than the private interests of those targeted. That capacity includes injury to the standing or social acceptance of the person or group of people attacked. Social cohesion is dependent upon harmonious interactions between members of a society. As earlier explained, harmonious social interactions are fostered by respectful interpersonal relations in which citizens accord each other the assurance of dignity. Dignity serves as the key to participatory equality in the affairs of the community. Dignity and reputation are closely linked and, like reputation, dignity is a fundamental foundation upon which people interact, it fosters self-image and a sense of self-worth…

The test for whether the relevant act is 'reasonably likely in all the circumstances' to offend, insult, humiliate or intimidate another person is an objective one, to be determined objectively by reference to the likely reaction of the person or of the people within the group.[24]

This test presents considerable scope for the operation of the exceptions in s 18D of the RDA. For example, it has been said that s 18C creates a liability that arises with some ease.[25] Having regard to the relative ease with which the proscription in s 18C might be enlivened, the question arises as to whether the exceptions in s 18D operate to balance the interference with freedom of expression?

The chapeau of s 18D requires the relevant act to be done 'reasonably' and 'in good faith'.[26] These terms have been the subject of extensive consideration by the courts.

In *Bropho v Human Rights and Equal Opportunity Commission*, (2004) 135 FCR 105 at 131 [93], French J stated:

> In a statutory setting, the requirement to act in good faith … will require honest action and fidelity to whatever norm, or rule or obligation the statute prescribes as attracting the requirement of good faith observance. That fidelity may extend beyond compliance with the black letter of the law absent the good faith requirement. In ordinary parlance it may require adherence to the "spirit" of the law.

At [94]-[96], his Honour addressed the balance struck between the proscription in s 18C and the freedom in s 18D as follows:[27]

> 94. In my opinion, the balance struck in ss 18C and 18D between proscription and freedom requires more in the exercise of the protected freedom than honesty. Section 18D assumes that the conduct it covers would otherwise be unlawful under s 18C. The freedom it protects is broadly construed. But, given that its exercise is assumed to insult, offend, humiliate or intimidate a person or group of persons on the grounds of race, colour, or national or ethnic origin, there is no legislative policy which would support reading "good faith" more narrowly than its ordinary meaning.
>
> 95. How does this approach operate in the context of section 18D? It requires a recognition that the law condemns racial vilification of the defined kind but protects freedom of speech and expression in the areas defined in paragraphs (a), (b) and (c) of the section. The good faith exercise of that freedom will, so far as practicable, seek to be faithful to the norms implicit in its protection and to the negative obligations implied by section 18C. It will honestly and conscientiously endeavor to have regard to and minimize the harm it will, by definition, inflict. It will not use those freedoms as a "cover" to offend, insult, humiliate or intimidate people by reason of their race or colour or ethnic or national origin.

Accordingly, a person wishing to rely on the exceptions in s 18D must satisfy a court that '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'.[28]

Conversely, a person 'who exercises the freedom carelessly disregarding or wilfuly blind to its effect upon the people who will be hurt by it or in such a way as to enhance that hurt' may be unable to satisfy the court of his or her good faith.[29]

It has been argued that this requirement to demonstrate objective, as opposed to subjective, good faith operates at the risk of closing down public debate for persons who are not intellectually or socially equipped to meet the requisite duty.[30] However, the Bar Association is not aware of any case law or other evidence to suggest that this has occurred in practice.

We submit that the exposure draft, unlike the current section 18D, contains no requirement of reasonableness or good faith. Reasonable and robust debate should be protected. Humiliation and intimidation, which is almost never done in good faith should not.

Case law on the operation of s 18C of the RDA

It is useful to consider some of the cases which have considered the operation of s 18C.

In *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615, the applicant claimed that a decision of the trustees not to remove a sign "The ES 'Nigger' Brown Stand" designating a grandstand at the ground contravened s 18C. At first instance, Drummond J held that the trustees' decision not to remove the sign was not an act reasonably likely in the circumstances to offend, insult, humiliate or intimidate an indigenous Australian or indigenous Australians generally. His Honour had regard to the context in which the word 'Nigger' was used and to evidence of community perceptions of the sign. The Full Federal Court dismissed an appeal.

In *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, the *Cairns Post* published photographs of the applicant, an indigenous Australian, depicting her in a bush camp with an open fire and shed or lean-to in which young children could be seen. The photographs appeared together with ones depicting the white family from whom a young orphaned indigenous Australian girl had been removed and placed into the applicant's care. Kiefel J held that while the respondent's employees who chose the photographs might be guilty of 'thoughtlessness', the requirement that the act was done on the ground of race was not made out.

In *Jones v Scully* (2002) 120 FCR 243, Hely J found that the respondent had contravened s 18C of the RDA by distributing leaflets which had titles including 'The Jewish Khazar Kingdom', 'Russian Jews Control Pornography' and 'The Most Debated Question of Our Time - Was There Really a Holocaust?'

In *McGlade v Lightfoo*t (2002) 124 FCR 106, Carr J held that the respondent, a senator, contravened s 18C by making statements in an interview with a journalist, which were subsequently published in the *Australian Financial Review* and *West Australian* newspapers, that:

> Aboriginal people in their native state are the most primitive people on earth.
>
> If you want to pick out some aspects of Aboriginal culture which are valid in the 21st century, that aren't abhorrent, that don't have some of the terrible sexual and killing practices in them, I'd be happy to listen to those.

Carr J held at [60] that in the context of the respondent's other observations, 'a reasonably objective person would read the use of the word "primitive" not as being some benign observation by way of contrast with, say, western civilization, but as a pejorative remark carrying the least favourable meaning of that word i.e. undeveloped or crude'. In the circumstances, an indigenous Australian who continued to lead a traditional way of life and others who are related to those persons or who were descendants of indigenous Australia who formerly led a traditional way of life would be offended and insulted by the comment.[31] Significantly, the respondent chose not to put any evidence before the court which meant he had failed to discharge the onus of proof that any of the exceptions in s 18D applied.[32]

In *Jones v Toben* [2002] FCA 1150, the respondent published articles on the internet which contained statements to the effect that:

- there was serious doubt that the Holocaust occurred;
- it was unlikely that there were homicidal gas chambers at Auschwitz;
- Jewish people who were offended by and challenge Holocaust denial were of limited intelligence;
- some Jewish people, for improper purposes, including financial gain, exaggerated the number of Jews killed during World War II and the circumstances in which they were killed.

Branson J stated at [93]:

> The applicant gave evidence that the Australian Jewish community has the highest percentage of survivors of the Holocaust of any Jewish community in the world outside of Israel. Each of the first two of the imputations identified [above] above thus challenges and denigrates a central aspect of the shared perception of Australian Jewry of its own modern history and the circumstances in which many of its members came to make their lives in Australia rather than in Europe. To the extent that the material conveys these imputations it is, in my view, more probable than not that it would engender feelings of hurt and pain in the living by reason of its challenge to deep seated belief as to the circumstances surrounding the deaths, or the displacement, of their parents or grandparents. For the same reason, I am satisfied that it is more probable than not that the material would engender in Jewish Australians a sense of being treated contemptuously, disrespectfully and offensively.

Her Honour concluded that s 18C had been contravened by publication of the material described above on a website.

In *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, the applicant complained that a cartoon published in the *West Australian* newspaper contravened s 18C of the RDA. While the Commission considered that the publication contravened s 18C, it concluded that ss 18D(a) and (c) applied to exonerate the breach. An application for judicial review of the Commission's decision was dismissed by RD Nicholson J. The Full Federal Court dismissed an appeal from that decision. It is from this case, and particularly the reasoning of French J, that the present construction of ss 18B-18E is derived.

The case which has apparently prompted current debate about amendments to the racial vilification provisions in ss 18B-18E of the RDA is *Eatock v Bolt* [2011] FCA 1103. In that case, the applicant and others on whose behalf she brought the litigation, who were described as 'fair-skinned Aboriginal people', complained about two newspaper articles written by the respondent and published in the *Herald Sun* newspaper and on the newspaper's online site. Bromberg J held that fair-skinned Aboriginal people (or some of them) were reasonably likely, in the circumstances, to have been offended, insulted, humiliated or intimidated by imputations conveyed by the articles, and that s 18C of the RDA had been contravened.

Throughout his reasons for decision, consistently with earlier decision, Bromberg J recognised the conflicting human rights at play. At [215], Bromberg J stated:

> Racial discrimination is a product of the dissemination of racial prejudice. At the core of racial prejudice is the idea that some people are less worthy than others because of their race. The dissemination of racial prejudice usually involves attributing negative characteristics or traits to a specific group of people.
>
> …
>
> Ascribing negative traits to people by reason of their group membership disseminates the idea that members of the group are not worthy or less worthy and are thus deserving of disdain and unequal treatment.

After an extensive analysis of the human right to freedom from discrimination on the ground of race, his Honour concluded at [226]:

> … equality and dignity to provide the underlying rationale for protecting both individuals and society from the ills of the dissemination of racial prejudice. These are the underlying values which, in my view, s 18C is directed to protect. They are consonant with the commitment to equal dignity for all persons upon which CERD is based and which the RDA was enacted to give effect to.

Similarly, Bromberg J considered the human right to freedom of expression and the particular interference in that right by s 18C of the RDA. At [235], his Honour stated:

> Whilst the importance and fundamental nature of freedom of expression is recognised in each of the international, constitutional and common law spheres to which I have referred, the fact that the right is not unqualified is also unequivocally the case in each sphere.

A significant portion of the reasons for decision is devoted to the operation of the exemptions in s 18D. In that context, his Honour stated:

> 411. In Bropho at [69], French J recognized that freedom of speech is not limited to expression which is polite or inoffensive. However, the minimization of harm which French J spoke of involves a restraint upon unnecessarily inflammatory and provocative language and gratuitous insults. The language utilized should have a legitimate purpose in the communication of a point of view and not simply be directed to disparaging those to whom offence has been caused: Toben at [77] (Kiefel J).
>
> 412. I accept that the language utilised in the Newspaper Articles was inflammatory and provocative. The use of mockery and derision was extensive. The tone was often cynical. … It was language chosen by Mr Bolt in writing articles intended to confront those that he accused with "the consequences of their actions" and done with the expectation that they would be both "offended" and "upset" and in the hope that they would be "remorseful" (the words quoted are Mr Bolt's).

In the result, the court ordered a corrective notice be published adjacent to the respondent's regular column in the *Herald Sun*.[33] The court declined to order an apology be given (something which had been sought by the applicant).[34]

Conclusion

The Bar Association submits that on the basis of the case law to date, the case for repeal of ss 18B–18D has not been made out.

Part IIA of the RDA has been in force for nearly 20 years without any concern as to its operation. Indeed, only a handful of cases have been brought alleging a contravention of s 18C. While the language used in s 18C is broad – particularly the words 'insult' and 'offend' – the courts have found contraventions of the section only in cases of 'profound and serious effects', and not in cases involving 'mere slights'.[35]

The exposure draft

Amendments proposed by the exposure draft

The exposure draft proposes the repeal of existing ss 18B, 18C, 18D and 18E of the RDA.

A new section is proposed to be inserted which reads:

1. It is unlawful for a person to do an action, 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 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 Australia 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.

The following aspects of the proposed new provision can be considered:

- First, the conduct the subject of the new provision, specifically 'to vilify' or 'to intimidate'.
- Secondly, how the assessment of whether an act is 'reasonably likely' to have the requisite effect is proposed to be undertaken.
- Thirdly, the new exception provision, subsection (4), which applies to anything published or otherwise communicated in the course of participating in the 'public discussion'.
- Fourthly, the removal of the vicarious liability provision in existing s 18E of the RDA.

To vilify or intimidate

'Vilify' is defined in the proposed new provision as the incitement of racial hatred." This definition bears no relationship a to its more ordinary meaning of speech that degrades or denigrates'.[36] This is undoubtedly a narrower test than that in existing s 18C which captures 'conduct causing offence, insult, humiliation or intimidation'.

The combined effect of subsections (1) and (2) of the new provision is to limit protection (i) against intimidation to where the relevant hate speech causes fear of threat of 'physical harm' to persons or property, and (ii) against vilification to incitement of hatred (narrowly and peculiarly defined as noted above).

It follows that the protection afforded by the new provision is significantly narrower than:

- article 19 of the ICCPR which prohibits the 'advocacy' of racial hatred; and
- the NSW Act which proscribes acts which incite 'serious contempt' and 'severe ridicule', as well as acts which incite racial hatred.[37]

Additionally, the limitation to 'physical harm' only is narrower than the CERD prohibition in article 5(b), which recognises the 'right to security of person and protection by the states against violence or bodily harm'. In this context, 'bodily harm' includes not only physical harm but also psychological harm. The same approach is taken to that term in its well-known context in Australian domestic criminal law.[38]

Reasonably likely

The new provision also proposes that reasonableness be assessed from the standpoint of 'ordinary reasonable members of the Australian community, and not by the standards of any particular group within the Australian community'. This, too, creates an unnecessary and highly significant departure from the existing test which considers the effect of the relevant act on the particular person or a reasonable member of the particular group of persons to whom the act is directed.[39] It implies that victims of racial hatred might not be ordinary reasonable members of the Australian community, a proposition inherent in the draft, and one that imports the very discrimination which the rest of the RDA seeks to overcome.

Of course, any group of people, be it a group comprising the impugned or maligned group, or the Australian community generally, may include the sensitive and the insensitive, the passionate and the dispassionate, and the emotional and the impassive. Reactions which are extreme or atypical are to be disregarded. For this reason, the assessment is undertaken by reference to a 'representative member' of the group.[40] However, and significantly, isolating that representative member is made more difficult the larger the group gets.

Just who is such a representative member of the Australian community? A number of subsidiary questions arise, including:

- What kind of cultural background does this person have?
- Is this person someone who embraces cultural diversity or who is skeptical of it?
- Does this person have prejudicial thoughts about some or all ethnic minority groups?[41]

The Bar Association submits that requiring the relevant conduct to be judged against the ordinary reasonable member of the Australian community is not only highly problematic in terms of its practical operation, it also unacceptably detracts from the primary objective of

racial vilification laws, which is to recognise and protect the human right to freedom from discrimination on the ground of race. Proposed new subsection (3) removes from the assessment the factor which is most relevant to this human right – that is, the 'race, colour or national or ethnic origin' of the person or group of persons in relation to whom the act is done.

The new exception – 'public discussion'

The proposed new exception, contained in subsection (4) of the exposure draft, excludes from the operation of the new racial vilification provisions anything published or otherwise communicated in the course of participating in the 'public discussion' of any political, social, cultural, religious, artistic, academic or scientific matter. This is an exceptionally broad and, the Bar Association submits, objectionable, exception. Its effect is to deprive the operation of the proscription in the new provision of any meaningful content. Also, significantly and unacceptably, the exception no longer imposes a 'good faith' requirement. Reasonable and robust debate should be protected. Humiliation and intimidation, which is almost never done in good faith, should not.

The conduct considered in *Jones v Scully* (2002) 120 FCR 243 and *Jones v Toben* [2002] FCA 1150, both discussed above, would both likely fall within this new exception.

In *Jones v Toben* [2002] FCA 1150 at [88], Branson J upheld a complaint that the respondent had published material on a website that conveyed the following imputations:

- there is serious doubt that the Holocaust occurred;
- it is unlikely that there were homicidal gas chambers in Auschwitz;
- Jewish people who are offended by and challenge Holocaust denial are of limited intelligence; and
- some Jewish people, for improper purposes, including financial gain, have exaggerated the number of Jews killed during World War II and the circumstances in which they were killed.

The respondent argued unsuccessfully that the statements were made in good faith in the course of a publication held for a genuine academic purpose or a genuine purpose in the public interest. Both Branson J and the full court rejected that argument.[42] If *Jones v Toben* were decided under the amendments proposed by the exposure draft, the exception in subsection (4) would apply to the effect that the respondent would not be found to have contravened new subsection (1). This is because the new exception has no good faith requirement.

The Bar Association submits that it is difficult to see how any conduct would fall within the proscription in subsection (1) given the intolerable breadth of the exception in subsection (4).

Removal of the existing vicarious liability provision

The exposure draft also proposes to delete existing s 18E which imposes vicarious liability on employers and principals in relation to acts which contravene s 18C. It is difficult to predict the effect of the repeal of s 18E.

In the context of the NSW racial vilification laws, it has been held that both the speaker and the broadcaster of the speaker's words committed the requisite public act, even though the speaker had no capacity to communicate to the public in his own right.[43] If a similar interpretative approach was taken to the racial vilification laws in the RDA, then there would arguably be no effect, at least in respect of liability, by the removal of s 18E. In other words, both speakers and broadcasters, and authors and publishers could be found to have contravened new subsection (1), notwithstanding the absence of an equivalent to s 18E.

The race discrimination commissioner has observed that the removal of s 18E may make it more difficult for persons who are the subject of hate speech to get publishers, particularly internet service providers and social media platform providers, to remove the offending material.[44] This observation may have some force.

29 April 2014
Phillip Boulten SC
President

Endnotes

1. The Convention was done at New York on 7 March 1966. Australia signed the Convention on 13 October 1966. It came into force generally on 4 January 1969 (except article 14 which came into force on 4 December 1969). The convention entered into force for Australia on 30 October 1975.
2. *Eatock v Bolt* (2011) 149 FCR 261 at [197].
3. For an account of the matters which led to the deletion of cl 28 from the Bill

see *Toben v Jones* (2003) 129 FCR 515 at [114]-[116].

4. The ICCPR was done at New York on 7 March 1966. Australia signed the ICCPR on 13 November 1980. It came into force generally on 23 March 1976 (except article 41).
5. See also article 18 of the Universal Declaration of Human Rights.
6. See generally George C. Christie, *Philospher Kings? The adjudication of conflicting human rights and social values*, Oxford University Press Inc, 2011.
7. See eg, *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835.
8. See eg, *Bull v Hall and Preddy* [2013] UKSC 73, Reference re Same-Sex Marriage [2004] SCC 79 at [46]. The examples in those cases being that the commercial enterprises were at the periphery of the freedom of religion.
9. See eg, *R v Oakes* [1986] 1 SCR 103.
10. See eg, *Syndicat Northcrest v Amselem* [2004] SCC 47.
11. Those provisions were inserted by the *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW).
12. See *Discrimination Act 1991* (ACT), ss 66-67, *Anti-Discrimination Act 1991* (Qld) ss 124A, 131A, *Racial Vilification Act 1996* (SA), ss 3-6, *Wrongs Act 1936* (SA), s 37), *Racial and Religious Tolerance Act 2001* (Vic), ss 7-12, 24-25 and Criminal Code 1913 (WA), ss 77-80.
13. NSW House of Assembly Hansard, 4 May 1989, p 7488. See also the second reading speech by the Minister for Police and Emergency Services: NSW Legislative Council Hansard, 10 May 1989, p 7810.
14. NSW House of Assembly Hansard, 4 May 1989, p 7489. See also the second reading speech by the Minister for Police and Emergency Services: NSW Legislative Council Hansard, 10 May 1989, p 7811.
15. NSW House of Assembly Hansard, 4 May 1989, p 7489.
16. *Sunol v Collier (No 2)* [2012] NSWCA 44 per Allsop P at [58].
17. *Jones v Trad* [2013] NSWCA 389 at [27], citing *Sunol v Collier (No 2)* [2012] NSWCA 44 at [59]. See also *Brown v Classification Review Board* (1998) 82 FCR 225 at 235 and *Coco v The Queen* (1994) 179 CLR 427 at 437.
18. The constitutional validity of Part IIA was upheld in *Toben v Jones* (2003) 129 FCR 515.
19. House of Representatives Hansard, 15 November 1994, p 3336.
20. See also *Eatock v Bolt* (2011) 149 FCR 261 at [203].
21. *Jones v Trad* [2013] NSWCA 489 at [105]. See also *Sunol v Collier (No 2)* [2012] NSWCA 44 at [60].
22. Those words can also be contrasted with overseas legislation including the *Public Order Act 1987* (UK), which prohibits insulting words or behavior if there is objectively or subjectively an intention to stir up racial hatred. That Act is presently being amended to remove the reference to 'insulting'.
23. *Jones v Scully* [2002] FCA 1080 at [102].
24. *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at [66], *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 at [15], *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 at [12], *Jones v Scully* (2002) 120 FCR 243 at [99], *McGlade v Lightfoot* (2002) 124 FCR 106 at [42]-[45].
25. T Blackburn SC, 'Proposed repeal of section 18C of the *Racial Discrimination Act 1975* – Anti-discrimination and free-speech perspective', speech to the NSW Law Society, 19 March 2014, [8], available at http://www.banco.net.au/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=46&cntnt01returnid=15 .
26. In contrast to this 'objective good faith', defamation law has confined good faith to subjective honesty: Blackburn, op cit, [48].
27. See also Carr J at 143 [144].
28. *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at 133 [102].
29. *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at 133 [102].
30. Blackburn, op cit, [52].
31. *McGlade v Lightfoot* (2002) 124 FCR 106 at [61].
32. *McGlade v Lightfoot* (2002) 124 FCR 106 at [74].
33. *Eatock v Bolt (No 2)* [2011] FCA 1180.

34. *Eatock v Bolt (No 2)* [2011] FCA 1180 at [14].
35. *Eatock v Bolt* [2011] FCA 1103 at [268].
36. T Soutphommasane, In defence of racial tolerance, speech to the Australia Asia Education Engagement Symposium, Melbourne, 1 April 2014. *The Macquarie Dictionary* defines 'vilify' as 'speak ill of' or 'denigrate'.
37. *Anti-Discrimination Act 1977* (NSW), ss 20C(1) and 20D(1). See also *Discrimination Act 1991* (ACT), ss 66(1) and 67(1), *Anti Discrimination Act 1991* (Qld), ss 124A and 131A, *Racial Vilification Act 1996* (SA), s 4, Civil Liability Act 1936 (SA), s 73, *Anti Discrimination Act 1998* (Tas), s 19 and *Racial and Religious Intolerance Act 2001* (Vic), s 7(1).
38. *Li v R* [2005] NSWCCA 442 at [45], *McIntyre v R* [2009] NSWCCA 305 at [44].
39. *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 at [16], Jones v Scully (2002) 120 FCR 243 at [108].
40. *Eatock v Bolt* (2011) 197 261 at [251].
41. Southphommasane, op cit.
42. *Jones v Toben* [2002] FCA 1150 at [102] and Toben v Jones (2003) 129 FCR 515 at [43].
43. *Jones v Trad* [2013] NSWCA 389 at [44].
44. Soutphommasane, op cit.