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Liberty Victoria Submission: Exposure draft - Proposed Changes to the Racial Discrimination Act

Liberty Victoria welcomes the opportunity to make a submission in relation to the exposure draft of the proposed changes to the Racial Discrimination Act.

Liberty Victoria has a long and proud history of campaigning for civil liberties and human rights for more than 70 years. Officially known as the Victorian Council for Civil Liberties Inc, its lineage extends back to the Australian Council for Civil Liberties ('ACCL'). The ACCL was formed in Melbourne in 1936 and was determined to offer 'a means of expression to those people in all parties who believe that social progress may be achieved only in an atmosphere of liberty.' Brian Fitzpatrick was the ACCL's General Secretary for twenty-six years and helped to form the Victorian Council for Civil Liberties before his death in 1965.

Throughout its history, Liberty Victoria has defended the right of individuals and organisations to free speech, freedom of the press and of assembly, and freedom from discrimination on the grounds of race, religion or political belief. It has operated in accord with the ACCL's original platform, working not only to defend existing civil liberties and oppose their limitation, but to campaign for the 'enlargement of these liberties.' We are now one of Australia's leading civil liberties organisations.

In a considered speech auspiced by the Australian Human Rights Commission, the former Chief Justice of New South Wales, Jim Spigelman, made two significant observations about the current debate in Australia with respect to freedom of speech and its relationship to s.18 of the Racial Discrimination Act (**"RDA"**). He observed that the debate should not be confined to a consideration of the rights and wrongs of the judgment of Justice Bromberg in *Eatock v Bolt* [2011] FCA 1103 (**"the Andrew Bolt case"**). Its terms must, necessarily, be deeper and wider than that. At the same time, however, serious consideration needs to be given to whether in Australia, the giving of offence or insult should be the subject of legal sanction. In Spigelman's view, there should be no right 'not to be offended'.

In this submission, Liberty Victoria addresses these two observations in turn, before reviewing the current proposal for the reform of the RDA as presented by the Commonwealth Attorney-General, Senator Brandis.

The Andrew Bolt Case

In extensive political and media commentary concerning the Andrew Bolt case, two matters have become tangled. The first is the content of Justice Bromberg's judgment in the case. The second is the desirability or undesirability of the racial prejudice provisions of the RDA that the judge

had to apply. It's important to untangle them.

Justice Bromberg was required to interpret and apply the provisions of the RDA as written. In this respect his judgment was exemplary. It's worth examining closely.

The judge found that the following imputations were contained in the articles that Bolt wrote:

- the applicants were not genuinely aboriginal;
- fair skin colour is sufficient to demonstrate that a person is not aboriginal;
- the applicants, who had fair skin, had chosen falsely to identify as aboriginal, and that they had used their falsely assumed aboriginal identity to advance their careers or political ambitions; and
- they had deprived other people who were genuinely aboriginal of opportunities to which they may otherwise have been entitled.

In the case of the applicants, his Honour found that every one of these imputations was incorrect. The question then became whether the imputations were reasonably likely to 'offend, insult, humiliate or intimidate' a person.

Having heard the evidence provided by the applicants, his Honour concluded that an ordinary and reasonable person in their position was likely to be injured in some or all of the ways specified. Further, the harms concerned had been inflicted by virtue of the applicants' race. For these reasons, the judge concluded that a case of racially discriminatory conduct had been made out.

Some commentators have criticised the judgment because, in their view, the test for injury should have been whether an ordinary member of the

public (as opposed to an ordinary and reasonable person in the applicants' position) would have been offended or intimidated in the same or similar circumstances. In Liberty's view, however, it would be unfair to use such a test.

An ordinary member of the public could in no way be expected to experience the harm caused by the denial of a person's racial identity in the way that the applicants, as members of the particular race and with their particular skin colour, had done. During the course of the case, evidence emerged about the traumatic and disenfranchising effects of the misinterpretation of the applicants' identities as aboriginal people with fair skin. They spoke of being excluded from both aboriginal and non-aboriginal circles - including while they were very young children - for being either "too white" or "not white enough". The impact of their racial identity upon each of the applicants was far-reaching and profound. To expect an ordinary member of the general public to comprehend the complexity of such issues is entirely unreasonable. Whatever "reasonable person" test is ultimately incorporated into the RDA as amended should reflect that fact.

The next question for his Honour to consider was whether Bolt could claim an exemption on the grounds that his articles constituted fair comment on a matter of public interest. To qualify for the exemption, he had to demonstrate that he had acted 'reasonably and in good faith'. Justice Bromberg determined that he had not.

There was significant time spent in the judgment on determining this question. His Honour's ultimate finding was that Bolt had not acted reasonably and in good faith, in large part because the articles in question contained multiple and serious errors of fact. They had distorted the truth. They were founded on inadequate and careless research. They had been written in a manner heedless of their racially prejudicial character. They had

been expressed in inflammatory, provocative and derisory language.

In these circumstances his Honour found that Bolt could not be regarded as having behaved either reasonably or in good faith. The exemption could not be claimed.

Several commentators have suggested that in drawing these conclusions, Justice Bromberg had placed too great an emphasis on the style of language used. The argument has been that it should be open to opinion writers to express their views forcefully and provocatively as the means of making their point. There is considerable validity in this.

Just because an article is written in inflammatory or derisory tone should not, in and of itself, be sufficient to demonstrate an absence of reasonableness or good faith. Journalists and their editors should be free to determine the manner in which their editorial opinions should be expressed. Judges should not be looking over their shoulders to determine whether the form of an argument, as opposed to its content, is in all the circumstances appropriate.

Quite apart from this, some commentators critical of the RDA have gone further and suggested that Justice Bromberg's decision itself delivered a substantial blow to freedom of speech. In the view of Liberty Victoria, this is not so.

The judge was at pains to point out that nothing in his extensive reasons placed any restriction on future discussion of matters of relevance to racial identification. This included discussion of an individual or group's identification as members of a particular race. The problem with Bolt's opinion pieces was not that; it was that Bolt had been mistaken with the facts, careless in his research and consequently had distorted the truth in a

manner heedless as to the damage he might do.

Reforming S.18C of the Racial Discrimination Act

The second, significant issue for this inquiry to consider is whether the RDA itself requires reform in the interests of maintaining freedom of speech. Two matters are particularly relevant here. The first is whether it should be unlawful, in the terms of the statute, to 'offend, insult, humiliate or intimidate' a person because of their race.

In Liberty's opinion, this formulation constitutes too great an incursion on free expression. It does so because in a free and democratic society we ought to be able to accommodate speech that 'offends and insults', even on racial and religious grounds. We may disagree with and be concerned by such speech but the solution is to combat it in the marketplace of ideas rather than to prohibit it.

However, the situation is different with respect to speech that humiliates and/or intimidates. Even more so with speech that vilifies or incites hatred. Here, the measure of the hurt, the gravity of the discrimination and potential social disruption are plainly sufficient reasons to justify a legal limitation.

Ever since the Andrew Bolt case, the RDA's limits on freedom of speech have been the subject of lively debate. The Attorney-General, George Brandis, has promised to wind back the limits as one of his first legislative acts. He has made this promise under the guise of championing freedom of speech and human rights.

This position, however, has met intense opposition from an array of organisations whose members have, from time to time, suffered racial vilification. They want the RDA's restrictions on racially prejudiced speech

retained.

The two sides have powerful backers. Those opposing any change include umbrella organisations representing people from - among others - Indigenous, Chinese, Vietnamese, Lebanese, Islamic and Jewish backgrounds. They have received influential support from the Race Discrimination Commissioner, Tim Soutphommasane.

Those advocating some sort of change form an unlikely coalition. They include conservative think tanks, including the Institute of Public Affairs; legal bodies such as the Law Council of Australia and civil liberties organisations like Liberty Victoria. Senator Brandis has courted further controversy by appointing the IPA's Tim Wilson as Freedom Commissioner. Clearly, not all bodies agitating for change agree on what the terms of the change should be.

Despite intense interest in the freedom of speech debate, in Liberty's view quite a bit of it has resembled tilting at windmills. This is because in many cases, each side has misinterpreted the intentions of the other.

The best place to begin an evaluation of the competing views is to examine the terms of the RDA itself. The relevant provision is s.18C.

This provides that it is unlawful for a person to do an act if it is reasonably likely to 'offend, insult, humiliate or intimidate' another person and the act is done because of the person's race. The provision appears in a part of the RDA headed 'racial vilification'.

It can be seen immediately, however, that the terms of the section relate only very loosely to the idea of racial vilification. Vilification carries with it a sense of extreme abuse and even hatred of its object. Vilification can

provoke hostile and even violent responses. The words of s.18C do not convey this meaning.

Unlike several states and the ACT, the Commonwealth does not have a law sanctioning racial hatred or vilification. There was an attempt to introduce such a law in 1995 but the Bill was defeated in the Senate.

So, as a first step in overcoming the present disagreement, the Government should consider outlawing hate speech. S.18C of the Racial Discrimination Act is inadequate in its current form, because it makes no direct reference to hate speech. It concerns less injurious forms of expression. Further, as a matter of principle, it seems reasonable to impose a limit on racially hateful utterances given their propensity to incite or provoke vengeful and violent responses.

Community organisations that have opposed any change to the legislation sometimes misconceive this proposal. As the joint group's statement says, 'we view with growing concern that the Federal Government has plans to remove or water down protections against racial vilification which presently extend to Australians of all backgrounds.' We should maintain such protections, but should remember the RDA in its present form does not contain them. If real protection against racial hatred is desired, then racial hatred, serious ridicule and serious contempt should be named and made subject to civil law sanction.

Should this be done, the intensity of the opposition to proposed changes to S.18C of the RDA may recede. Then one could look more dispassionately at the terms of the RDA's limits on freedom of speech and determine whether and to what extent they might give way to the desirability of protecting free public and political communication.

In that pursuit, however, some advocates of untrammeled free speech go too far. Advocates of unfettered free speech, such as those in the Institute of Public Affairs, argue that s.18C should be eliminated altogether. That would mean that prejudicial speech that insulted, offended, humiliated or intimidated members of a racial or ethnic group would be regarded as permissible, no matter the degree or ill-effect.

Here, the Soutphommasane side has a point. As it argues, to remove any sanction for speech of this character would send a signal that racism is acceptable. We should not do that. However, the question of what might best be discarded and what should be kept remains.

S.18C limits four different kinds of speech. The first is speech that intimidates a person on racial grounds. Intimidatory behaviour is threatening behaviour. It is behaviour that is calculated to place an individual or group in fear, whether physical or otherwise.

However much one might value freedom of expression, to allow racially threatening behaviour to pass without civil sanction does not seem desirable. People of different racial and ethnic backgrounds should be enabled to take their place in society without others inducing in them a real fear of being injured or silenced.

Secondly, there is speech that humiliates. Speech of this kind is an attack on a person’s self esteem and belief. And it is an attack on a ground that the person cannot change. To say, for example, that a person is black and therefore something less than human is to cut a person’s sense of self to the quick. The injury here is psychological but no less severe for that. Racial humiliation also requires civil penalty.

In Liberty's view, the experience of being humiliated or intimidated on the

basis of race is not freedom-neutral. The exercise by one person of the 'freedom' to intimidate or humiliate is likely to result in the silencing, repression and shrinking of the other person. In such cases, a person's exercise of their freedom of expression almost invariably impacts negatively on the freedom of expression and sense of self of that person's target, preventing him or her from enjoying full participation in society and community.

Next in the hierarchy, there is speech that insults. Insult is aggravated by its connection to race. However undesirable such invective may be, room needs to be made in the political realm for language that is impetuous or callous. Not to provide that space would substantially constrain the manner in which people habitually speak and relate. One might not like insult but it should be tolerated in the interests of free expression.

Finally the RDA restrains speech that offends. The problem is that it is difficult to predict when offence will be taken. The definition of offence is so wide and the circumstances in which it may be inflicted are so numerous that those wishing to put their views strongly on matters that bear on race enter upon uncertain legal territory. The unpredictability can produce a silencing effect that impinges too invasively upon open communication.

If the terms of s.18C are to be amended, therefore, consistent with the views of Justice Spigelman it should retain restrictions on speech that humiliates and intimidates but abandon limits on speech that insults or offends.

Freedom of Speech and its Limits: The Brandis Proposal

Late in 2013, the UN treaty committee responsible for monitoring national compliance with the UN Convention on the Elimination of Racial

Discrimination (**"CERD"** or **"the Convention"**) issued a new general comment. The comment dealt with freedom of speech and legitimate limits that may be placed upon it in the interests of protecting individuals from serious forms of racial discrimination. It makes a good starting point for looking with fresh eyes at the present fractious debate on the same subject in Australia.

Echoing the convention, the UN committee makes it clear that freedom of expression may be limited in only two circumstances. These are to respect the rights or reputations of others, or for the protection of national security or public order. A restriction on these grounds may not, however, endanger the right. Freedom of expression is primary and must not be overwhelmed by limits imposed upon it.

The committee argues that freedom of expression and one's entitlement to be free from damaging racial discrimination are complementary. This is because racial vilification is calculated to damage the right of those vilified to freely express their opinions and beliefs. The right and restriction are best seen, therefore, as mutually supportive rather than oppositional.

Because freedom of speech is primary, the committee observes that restrictions upon it must be the minimum necessary to ensure that racially hateful expression does not diminish either the equality of others before the law or their enjoyment of other fundamental rights. Restrictions on free speech, therefore, should attack only serious incursions on other's rights. Less serious instances of racial prejudice should be addressed by education and persuasion; not by law.

The kind of expression that the law should sanction is speech that rejects the core values of human dignity and equality and instead seeks to denigrate and degrade the standing of individuals and groups in the wider

community's estimation.

Senator George Brandis' proposal for the reform of s.18 of the Racial Discrimination Act should be assessed against these standards.

In seeking to penalise racial vilification and intimidation, the Senator's proposal meets a first test. It is concerned with serious attacks on people on racial grounds, and not with mere slights. The problem, however, is that it misses swathes of serious racially prejudicial speech in between these poles, rendering its prescriptions seriously inadequate.

The Brandis plan defines vilification and intimidation in terms far more limited than their generally accepted meaning. Racial vilification is defined as racial hatred alone. The Shorter Oxford Dictionary definition is 'to depreciate or disparage with abusive or slanderous language; to defame, revile or despise'.

Racial intimidation is defined in the proposal as speech that threatens physical harm (and nothing less) to a person or to their property. The Oxford defines it as to force or deter someone from an action by threats or to terrify, overawe or cow. Significantly, the Dictionary notes that intimidation is now commonly associated with action designed to interfere with others' free exercise of political and social rights.

No one should disagree that racial vilification and intimidation should be sanctioned. But to fully realise this objective, the two words should be made to mean what they mean. To confine them legislatively by removing their plan meaning for political ends has an Orwellian feel to it.

The UN committee sets down the kind of speech that should be restricted by law. It comprises incitement to hatred, contempt and discrimination

against members of a group on the grounds of their race, colour or ethnic origin. This embraces much more than just racial hatred and threats of physical harm. Such serious incursions upon the rights of racial and ethnic groups should also be included in Brandis' proposed list, not defined out of it.

The UN committee is also clear that racial insult, offence or slight does not qualify for legal restriction. It will qualify only if prejudicial speech amounts to hatred, serious contempt or serious discrimination. The Attorney-General is right, therefore, to advocate the exclusion of insult and offence from the prohibitions contained in S.18C of the Racial Discrimination Act. However, humiliation is a form of speech that constitutes serious contempt for others and for that reason should remain the subject of sanction. The statutory retention of a limit on intimidatory speech is appropriate but intimidation should be defined properly.

The UN committee is clear that limits to free speech must be necessary and proportionate. Consequently, the more important that the kind of speech is the less likely it is that a restriction will be regarded as legitimate.

By way of example, the committee observes that speech that relates to political or academic communication concerning matters of public interest should be given substantially free rein. Speech advocating the protection of human rights should not be subject to criminal or civil sanction. Expressions of opinion about contested historical facts should not be penalised.

Because of this, the existing RDA provides a defence to a charge of racially prejudicial speech if, nevertheless, it is fair comment on public and political affairs and is made in good faith and reasonably. This exemption applies only if the comments are ‘reasonable and made in good faith’. Courts are frequently required to determine whether a statement is made in good faith.

There is no problem there, although in the context of the RDA a formulation founded instead on making an exemption available where there is an 'absence of malice' might be preferable and more easily applied.

The requirement of 'reasonableness', however, does present difficulty. Reasonableness is not a requirement of the fair comment defence in defamation law and neither should it be here. The defamation defence requires that the comment must be fair, in the sense that it should be founded on proper material. It need not, however, be balanced or temperate. In Liberty's view, the same test should apply under the RDA. Judges should not be second guessing editorial and journalistic discretion in the expression of public and political opinion, however provocative.

Regrettably, the Brandis plan goes far beyond these limited reforms to the RDA provision and in doing so almost completely negates the plan's stated objective of proscribing serious vilification. It does this by extending the reach of the defence to almost every imaginable form of public communication.

Under the plan, racial vilification and intimidation will become permissible if expressed in public discussion about matters of a political, social, cultural, academic, artistic or scientific nature. The breadth of this defence is so great as to be ridiculous. And the sensible constraint of good faith is also wiped from the statute book. Liberty is extremely concerned that the expanded defence provides carte blanche for racial prejudice.

Conclusion

Freedom of expression is a primary value. But as the UN Committee's general comment constantly emphasizes, one should speak not only of the freedom of those who may vilify but also and equally the freedom of those

subject to racial attack. Vilification silences them.

The Brandis defence by preferring speakers' rights to victims' freedoms lessens the sum total of free speech rather than augmenting it.

The proposal should be rejected in favour of an amendment that moderates the present far-reaching limits on free speech, without removing all forms of protection against racial discrimination.

We thank you for this opportunity to make this submission. This is a public submission and is not confidential.

Yours sincerely

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