Redfern Legal Centre

Submission

Parliamentary Inquiry into Freedom of Speech

Parliamentary Joint Committee on Human Rights

Redfern Legal Centre

Author: Linda Tucker[1]

[1] This submission draws on previous work of Redfern Legal Centre, provided in our submission on the proposed amendments to the *Racial Discrimination Act 1975* (Cth) in April 2014, available on the RLC website, at http://rlc.org.au/sites/default/files/attachments/RLC%20Submission%20Racial%20Vilification%20RDA.pdf We are also grateful for the assistance of Ting Lim, a solicitor and volunteer on RLC's discrimination advice night.

Introduction – Redfern Legal Centre

Redfern Legal Centre (RLC) is an independent, non-profit, community-based legal and human rights organisation with a prominent profile in the Redfern area.

RLC has a particular focus on human rights and social justice. Our specialist areas of work are domestic violence, tenancy, credit and debt, employment, discrimination and complaints about police and other government agencies. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

RLC's experience

In 2016, 12% of RLC's clients identified themselves as being Aboriginal or Torres Strait Islander and approximately 42% were of culturally and linguistically diverse (CaLD) backgrounds.

We have provided submissions to previous inquiries on the issue of discrimination and vilification and continue to work with clients who demonstrate to us the multiple and intersecting impact of historic and continuing prejudice and marginalisation. Racial profiling and stereotyping continues to influence how they are provided with services, education, employment, access to premises and policing as well as to how they are treated by neighbours and others in the community. This submission draws on those earlier submissions in addressing the terms of this Inquiry.

RLC's experience includes advising and assisting individuals with complaints about racial vilification and race discrimination under state and federal anti-discrimination laws.

Parliamentary inquiry into freedom of speech

RLC thanks the Parliamentary Joint Committee on Human Rights for the opportunity to comment on its freedom of speech inquiry, announced by the Attorney-General on 8 November 2016.

The parliamentary inquiry into freedom of speech in Australia relates to two issues:

1. Whether the operation of Part IIA of the *Racial Discrimination Act 1975* (Cth) imposes unreasonable restrictions upon freedom of speech, and in particular whether, and if so how, ss. 18C and 18D should be reformed; and

2. Whether the complaints-handling procedures of the Australian Human Rights Commission should be reformed.

RLC addresses the two issues in this submission.

Part IIA of the *Racial Discrimination Act 1975* (Cth)

The operating provisions and its introduction into the *Racial Discrimination Act 1975* (Cth) (**RDA**)

The *Racial Hatred Act 1995* (Cth) was adopted by the Federal Parliament in 1995 following an extensive debate. The Act lead to the insertion of Part IIA of the RDA which comprises ss 18B to 18E of the RDA.

Section 18C provides that it is unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people, and the act is done because of the race, colour or national or ethnic origin of the other person or some or all of the people in the group.

Section 18D of the RDA provides for a number of exemptions to s 18C. Section 18D says s 18C does not render unlawful anything said or done reasonably and in good faith in the following circumstances:

(a) 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.

Balancing free speech with the right to live free from discrimination

RLC recognises the importance of freedom of speech in a democratic society and acknowledges freedom of speech as a fundamental human right. The protection of this freedom, however, must be balanced against other fundamental human rights and freedom, such as the right to live free from discrimination and harassment for reasons of a person's unique attribute, such as race.

The principle of free speech is enshrined in our democracy and was carefully considered and balanced with the provisions the *Racial Hatred Bill 1994* sought to introduce into the RDA. With respect to free speech, the Explanatory Memorandum of the *Racial Hatred Bill 1994* noted:

> The Bill is based on the principle that no person in Australia need live in fear because of his or her race, colour, or national or ethnic origin.
>
> The High Court has recently established an implied guarantee of free speech inherent in the democratic process enshrined in our Constitution. But the High Court has also made it clear that there are limits to this guarantee. There is no unrestricted right to say or publish anything regardless of the harm that can be caused.

The Explanatory Memorandum goes on to say:

> The Bill is not intended to limit public debate about issues that are in the public interest. It is not intended to prohibit people from having and expressing ideas. The Bill does not apply to statements made during a private conversation or within the confines of a private home.
>
> The Bill maintains a balance between the right of free speech and the protection of individuals and groups from harassment and fear because of their race, colour or national or ethnic origin. The Bill is intended to prevent people from seriously undermining tolerance within society by inciting racial hatred or threatening violence against individuals or groups because of their race, colour or national or ethnic origin.

It is important to read s 18C of the RDA in conjunction with its exemptions provision, s 18D. The exemption, set out above, requires the court to consider whether, if conduct were to amount to a breach of s 18C of the RDA, there are circumstances that would render such conduct exempt and therefore not unlawful.

The application of s 18D has been considered by the Federal Court of Australia. This has allowed an appropriate 'check and balance' approach to Part IIA of the RDA.

In *Eatock v Bolt* [2011] FCA 1103, the Federal Court of Australia gave extensive consideration to the application of s 18D of the RDA to the articles which were the subject of a complaint under s

18C. The Court ultimately found that the articles contravened s 18C after concluding that the comments made in the articles were not based in truth (at [378]-[380]), and "*the language utilized in the Newspaper Articles was inflammatory and provocative…the use of mockery and derision was extensive*". (at [412], emphasis supplied)

As this judgment and the words of s18D themselves make clear, fair, accurate reporting and discussion of matters that might otherwise contravene s 18C of the RDA will not be unlawful, by reason of s 18D.

In *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, the Full Court found that the term 'reasonably and in good faith', contained in s 18D, requires an objective assessment of the alleged conduct, balanced with considerations of proportionality, including a person's state of mind which is a subjective assessment.

RLC is of the view that Part IIA of the RDA, in its present form, achieves a positive balance between the protection of our right to freedom of speech and the protection of our right to be free from discrimination, harassment and vilification on the basis of race.

Further, it is clear from judgments dealing with applications under s 18C, that the courts require the conduct to have had 'profound and serious effects'.[2]

Recommendation

RLC recommends that Part IIA of the RDA remains unchanged as it strikes the appropriate balance between free speech and to live free from discrimination.

The complaint process

General comments

As RLC understands, if a person makes a complaint to the AHRC, alleging conduct that falls within s 18C of the RDA, and the complaint is accepted, the AHRC has authority to attempt to investigate and conciliate the complaint between parties.[3]

If the complaint under s 18C cannot be resolved, the complaint is finalised at the AHRC and the complainant will be provided with the option of pursuing the matter to the Federal Court of Australia or the Federal Circuit Court of Australia.[4] It is important to note that Part IIA of the RDA does not impose criminal sanctions on a respondent should a complaint be made to the

[2] *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 at [16]
[3] Section 46PF of the *Australian Human Rights Commission Act 1986* (Cth)
[4] Section 46PO of the *Australian Human Rights Commission Act 1986* (Cth)

AHRC. Making a complaint to the AHRC enlivens an alternative dispute resolution process which is primarily dictated by the parties. The AHRC does not have the power to compel parties to come to a resolution nor does it have the power to issue orders, criminal sanctions or take matters to court on behalf of a complainant.[5]

Regardless of the nature of the events which lead a person to make a complaint, the very act of writing and lodging a complaint with a federal or state government agency is a serious one. By lodging a complaint, the complainant initiates a legal proceeding, albeit initially considered informal in the broader context of the Australian legal system. Initiating legal proceedings, no matter how informal and 'relaxed', can be challenging and even distressing for all involved - complainant or respondent - to varying degrees.

RLC represents a number of vulnerable and traumatised clients from disadvantaged backgrounds. The disadvantage faced by a majority of our clients is multifaceted. For example, a client may present to RLC who may be homeless or living in public housing with their only income source from Centrelink. Often our clients come from low socio-economic backgrounds and their position of vulnerability is heightened by attributes such as their racial background (Aboriginal or Torres Strait Islander or CaLD backgrounds), disability and/or gender. Such complexity gives rise to a vulnerability and disadvantage that legislation such as the RDA, and the AHRC complaints process, seek to protect.

The AHRC's power to initiate investigations

The nature of the AHRC complaint process is that it is primarily driven by the complainant. While the AHRC can provide a safe and structured forum for parties to resolve a complaint, whether a complaint is pursued or resolved, ultimately lies with the complainant. When a complaint process is predominantly driven by a complainant, it requires the complainant to at times repeatedly recount the alleged events either in writing or verbally over the phone or face to face. This experience of recounting the events acts to re-traumatise clients and can often leave them feeling like the process has let clients down.

Given this stressful experience, RLC recommends that the AHRC be provided with the power to initiate 'own motion' investigations into circumstances where systemic discrimination has been identified. These own motion investigations would be similar to the powers exercised by the Fair Work Ombudsman in matters such as the 7-Eleven case regarding the underpayment of wages.[6]

---

[5] Sections 46PJ and 46PK of the *Australian Human Rights Commission Act 1986* (Cth) allow the Australian Human Rights Commission to compel parties to attend a compulsory conference. RLC understands that these powers are rarely exercised.

[6] https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/april-2016/20160409-7-eleven-presser

The AHRC receives over 2000 complaints a year and is in a unique position to be able to identify systemic themes in the complaints they receive. It is also in a position as a third party to be able to compel parties – actually or notionally – to participate in a process to address, ongoing systemic racism. The AHRC's report, *Freedom from Discrimination,* reported that Aboriginal and Torres Strait Islanders suffered from institutional racism particularly in areas such as employment, education and health. [7] A power to initiate own motion inquiries would significantly reduce the burden on individuals to bring forward complaints and pursue it through an alternative dispute resolution process. This would also be distinct from a complaints process in which an individual respondent may face proceedings leading to a finding against them.

Recommendation

The RLC recommends the AHRC be provided with powers to initiate own motion inquiries when it identifies circumstances that give rise to systemic discrimination.

Lacking in substance, misconceived, trivial and vexatious complaints

Under s 46PH(1)(c) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) , the President can decide to terminate a complaint if satisfied that the complaint is misconceived, trivial, vexatious or lacking in substance. The *Anti-Discrimination Act 1977* (NSW) provides the President of the NSW Anti-Discrimination Board with the power to finalise a complaint on the same basis.[8]

A significant difference between the jurisdictions is the requirement for a complainant under the NSW Act to seek the leave of the NSW Civil and Administrative Tribunal before a matter proceeds to hearing where it has been terminated on this basis.[9]

While there is no such provision under the AHRC Act, the President of the Commission will provide a substantial report with the termination so it will be clear when there has been a finding under s 46PH regarding the basis of the termination. The court is therefore clearly apprised as to the Commission's view of the application. The RLC considers this should be a sufficient safeguard to address concerns regarding the prejudice to respondents in matters which may be misconceived, trivial, vexatious or lacking in substance.

It is widely appreciated that the vast bulk of discrimination complaints settle by way of conciliation or shortly thereafter and that, where matters do proceed to court, they are

[7] *Freedom from Discrimination: Report on the 40th anniversary of the Racial Discrimination Act*, National Consultation Report 2015 p 5
https://www.humanrights.gov.au/sites/default/files/document/publication/RDA40_report_2015_AHRC.pdf
[8] Section 92 of the *Anti-Discrimination Act 1977* (NSW)
[9] Section 96(1) of the *Anti-Discrimination Act 1977* (NSW)

uncontroversial, with existing procedures able to ensure that the issues are dealt with rigorously and with fairness to the parties.

If any reform is considered necessary, then there may be grounds to consider the introduction of a requirement to seek the leave of the court when the complaint has been terminated by the Commission pursuant to s 46PH(1)(c) of the Act.

We note, however, that proceeding to a costs jurisdiction is a significant deterrent to litigation. The requirement that the complainant exercise his or her option to file proceedings in the Federal Court of Australia or the Federal Circuit Court of Australia can be expensive and daunting for RLC's regular client demographic.

Conclusion

The current RDA provides an accessible and cost-effective avenue for individuals to resolve concerns about racial discrimination and racial vilification, being the investigation and conciliation service offered by the Australian Human Rights Commission. It also codifies the point at which civilized and reasonable, if robust debate, trips over into mere expression of prejudice in the public domain. In that regard it provides some certainty.

Recent coverage of a small number of cases has distorted the many years of constructive work of the Commission and the court, working within the current RDA regime, in addressing the damage done by hate speech to both individuals and the fabric of the society, to mutual respect within that society and in particular to people within minority groups in our community.