Human Rights Law Centre

Submission to Senate Standing Committee on Legal and Constitutional Affairs: Why the objective test in section 18C of the *Racial Discrimination Act 1975* (RDA) should be a reasonable member of the relevant racial, ethnic or national group

24 March 2017

Summary
The current objective standard of a reasonable member of the relevant racial group is being applied sensibly by the courts and should be retained as part of section 18C of the RDA. To change the test to 'a reasonable member of the Australian community', as proposed in the Human Rights Legislation Amendment Bill 2017, would weaken legal protections against racial vilification and risk reinforcing prejudice, particularly against unpopular racial minorities.

Reasonable member of the relevant racial group
Section 18C has been interpreted by the courts to require an *objective* standard – that is, whether conduct is reasonably likely to offend, insult, humiliate or intimidate, judged from the perspective of a hypothetical *reasonable or ordinary person from the relevant racial, ethnic or national group*.

Courts have said that extreme, atypical or intolerant reactions of members of the group are not to be taken into account.[1] This means that conduct is not unlawful under the current law if it racially offends, insults, humiliates or intimidates an overly sensitive person in the group.

Further, to be unlawful, the conduct must have serious and profound effects.[2]

Standard based on a reasonable member of the relevant group is vital and must be retained
Assessing conduct against the objective standard of a reasonable person from the relevant group ensures that the specific experiences, values and circumstances of different minority groups, who are most at risk of racial vilification, are considered in assessing the impact.

Courts have warned that 'to import general community standards into the test … runs a risk of reinforcing the prevailing level of prejudice.'[3]

To change the current objective test to 'a reasonable member of the Australian community' carries these risks, particularly where the conduct affects an unpopular racial minority. Making this change would be antithetical to the aim of protecting against racial prejudice. It would weaken legal protections against racial vilification.

The current objective test allows courts to take into account, for example, the context of the Holocaust and Jewish peoples' experiences of violent anti-Semitism, when considering whether anti-Semitic conduct is reasonably likely to have serious and profound effects.

It is racial and ethnic minority groups that suffer the impacts of racism, not the Australian community as a whole. Racism and racial vilification cause significant psychological distress and have a chilling effect on freedom of expression and public participation by minority groups.[4]

We cannot, and should not, expect a reasonable member of the Australian community, who has never had the distressing and degrading experience of being called a 'coon', a 'black cunt', a 'terrorist' or being told that 'Hitler should have finished you', to understand the impact of such statements and the fear and sense of exclusion they create.

There is no need for reform. However, if there is to be reform, it should be limited to clarifying the current objective test - that of a reasonable or ordinary member of the relevant racial, ethnic or national group.

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[1] See *Eatock v Bolt* (2011) 197 FCR 261 [251].
[2] Creek v Cairns Post (2001) 112 FCR 352, 356 [16].
[3] Ibid [253].
[4] See eg VicHealth et al, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities. Experiences of Racism: A Summary* (2012).