The Law Society
OF WESTERN AUSTRALIA
The voice of the legal profession in Western Australia

16 April 2014

Martyn Hagan
Secretary General
Law Council of Australia
DX 5719
CANBERRA ACT 2600

By email: sarah.moulds@lawcouncil.asn.au

Dear Mr Hagan

**AMENDMENTS TO THE RACIAL DISCRIMINATION ACT 1975 - CONSULTATION**

Thank you for the memorandum dated 27 March 2014 and your request for feedback from Constituent Bodies in response to the proposed draft legislation regarding the *Racial Discrimination Act 1975* (Cth) (the RDA).

The Law Society of Western Australia provides the following comments:

1. On 25 March 2014 the Attorney-General released exposure draft legislation which sets out the Government's proposed reforms to sections 18B-18E of the RDA.

2. The draft legislation implements a pre-election commitment by the Government to repeal section 18C of the RDA in its current form. This reform is pursued on the basis that, as currently drafted, the provisions present an unacceptable threat to freedom of speech and basic civil liberties.

3. There has been significant commentary criticising the proposed changes, querying whether they are necessary, and raising concern that they will result in insufficient protection against the harm caused by racial abuse.

4. By letter dated 18 December 2013, The Law Society of Western Australia responded to informal consultation conducted by the Law Council of Australia on this issue. A copy is attached.

5. The Society remains concerned that the draft legislation raises a significant issue in balancing the right of freedom of speech with the right not to be the subject of conduct which is offensive, insulting, humiliating or intimidatory because it is directed towards the race, colour or national or ethnic origin of a person.

6. The preamble to the RDA, and the statutory language contained within, references the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD). Australia ratified, and became a State Party to, the ICERD on 30 September 1975.

Level 4, 160 St Georges Terrace Perth WA 6000, DX 173 Perth
Telephone: (08) 9324 8600 Facsimile: (08) 9324 8699
Email: info@lawsocietywa.asn.au Website: www.lawsocietywa.asn.au
Please address all correspondence to The Law Society of Western Australia PO Box Z5345, St Georges Terrace Perth WA 6831

7. Article 2(1)(c) of the ICERD directs that each State Party 'shall take effective measures to review governmental, national and local policies, and amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists'.

8. Sections 18B-18E of the RDA were introduced as a result of the Racial Hatred Bill 1994 (Cth) (the Bill). The Bill was formed in response to a number of reports on racial violence including the *National Inquiry into Racist Violence*, the *Royal Commission into Aboriginal Deaths in Custody* and the Law Reform Commission's Report *Multiculturalism and the Law*.

9. The Bill was considered an integral element of the Commonwealth's overall scheme of human rights legislation based on the conciliation of complaints, together with an Australian-wide education programme designed to reinforce tolerance and harmony whilst ensuring that people knew their rights and remedies.[1]

10. Following the passing of the Bill, Part IIA – Prohibition of offensive behaviour based on racial hatred was introduced into the RDA and contains sections 18B-18E.

11. French J in *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 pointed out that under these provisions "*free speech has been balanced against the rights of Australians to live free of fear and racial harassment*". He noted, at [70], that the then Attorney General, Michael Lavarch, in his Second Reading Speech (Parl Deb H of R 15/11/94 at 3341) said –

> *'The requirement that the behaviour complained about should 'offend, insult, humiliate or intimidate' is the same as that used to establish sexual harassment in the* Sex Discrimination Act. *The commission is familiar with the scope of such language and has applied it in a way that deals with serious incidents only.'*

12. As French J, at [70], said –

> In the light of the statutory policies so outlined the conduct caught by s 18C will be conduct which has, in the words of Kiefel J in the *Cairns Post* case at [16]:
> *'Profound and serious effects not to be likened to mere slights.'*

13. It is worth noting that the RDA provides only a civil prohibition on racial vilification. No force is given to criminal sanctions.

14. Section 18C of the RDA makes it illegal for someone to do a public act which is 'reasonably likely, in all the circumstances,' to 'offend, insult, humiliate or intimidate' someone on the basis of their race as determined by the standards

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[1] Explanatory Memorandum, Racial Hatred Bill 1994 (Cth) 8.

of a reasonable member of the particular racial or ethnic group (the reasonableness test).

15. As noted above, the courts have emphasised that the legislation states that an act is only unlawful if it is proven reasonably likely, in all the circumstances, to cause harm involving 'profound and serious effects'. That is, 'mere slights' are not enough to be a breach of the law.[2]

16. Section 18D of the RDA ensures that artistic works, scientific debate, and fair comment on and fair reporting of a matter of public interest are exempt from being in breach of section 18C – provided it is done reasonably and in good faith.

17. Therefore, one is free to give expression to racist ideas, including those that offend, if they fall within section 18D's broad definitions of reasonable free speech.

18. The permissible limitation found in sections 18C and 18D reflects the legislature's attempt at balancing an implied constitutional right of freedom of speech whilst pursuing a racially tolerant and socially cohesive multicultural society.

19. The proposed reforms remove the terms 'offend', 'insult', and 'humiliate', found in section 18C(1)(a) of the RDA. 'Intimidate' remains and 'vilify' is added.

20. The draft legislation limits the definition of 'intimidate' to 'fear of physical harm'. This narrow definition does not include the psychological and emotional damage that can be caused by racial abuse.

21. The definition of 'vilify' is given a narrow meaning; to incite hatred against a person or a group of persons. This is much harder to prove than an action which is reasonably likely to incite racial hatred. It will not be sufficient if the action merely incites ridicule and denigration. It ignores the serious harm that racial attacks can cause for people where there is no actual incitement of others to hatred, or at least when that cannot be proven. For example, in *Clark v Nationwide News Pty Ltd trading as The Sunday Times* [2012] FCA 307 the description of three Aboriginal boys aged 15, 11 and 10, who died in a motor vehicle accident involving a car allegedly stolen by an older cousin, as "scum" whom the commentator would use as "landfill" may not incite hatred, but it is, as Barker J concluded, at [309], "so deeply offensive, insulting and humiliating that it is breathtaking".

22. The draft legislation also seeks to change the reasonableness test by requiring this to be by the standards of an 'ordinary reasonable member of the Australian community', not by the standards of any particular group within the Australian community. The proposed sub-section 3, is thus apparently intended to eliminate the 'reasonable victim' test for determining whether the

[2] *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 (Kiefel J).

victim has been vilified which has been applied by the Courts in interpreting the current provision.

23. Therefore, the test is no longer the effect on the group, the subject of the attack or even the intended audience but on the attitudes of the ordinary Australian who may never have suffered any discrimination and may not understand the hurtful impact of the actions on a minority group.

24. The draft legislation also introduces a very broad exemption for any act that is done 'in the course of participating in public discussion of any political, social, cultural, religious, artistic, academic or scientific matter'. This radically widens the current exemption which protects fair reporting, fair comment and other matters done 'reasonably' and 'in good faith'.

25. The draft legislation contains no requirement for accuracy, reasonableness, good faith or public interest in the topic. This may lead to people publishing and reporting vilifying (and defamatory) materials against individuals and entire cultural groups. This is a freedom to make dishonest and totally unreasonable assertions. It licences the publication of material deliberately designed to hurt, offend and humiliate individuals and cultural groups. This is not a form of conduct which a just and reasonable society should be condoning.

26. The vicarious liability provision in section 18E of the RDA is also removed in the draft legislation. Currently, an employer can be held vicariously liable for the actions of an employee or agent if during the course of their employment they carry out an act that would be unlawful under section 18C of the RDA. Removal of the vicarious liability provision provides a licence to media organisations to publish any manner of vilification with impunity.

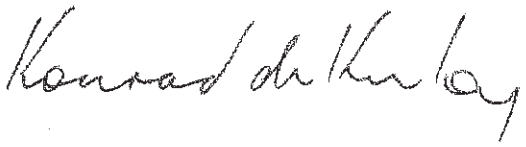
27. The provisions of sections 18B-18E of the RDA have been in force for almost 20 years without causing great problems or unduly restraining freedom of speech and debate. They have also provided some small recourse for racial minorities against the more obvious types of racial hatred whilst making an important statement regarding what is not acceptable within our multicultural Australia.

28. The proposed draft legislation risks a retrograde step for the Australian community and may send a message that vulnerable peoples within our society can be freely and unreasonably humiliated and put down simply because of their race, ethnicity or the colour of their skin. It removes an important remedy against damaging the reputation of a group defined by an immutable characteristic of race, ethnicity or colour.

29. It should not be overlooked that complaints are initially made to the Australian Human Rights Commission. The Commission plays an important role under the RDA in identifying and conciliating complaints and educating the public about what constitutes discrimination. The processes conducted by the Commission are important steps under the legislation which often results in the resolution of disputes, the dissipation of tensions and education and

reconciliation of the participants. As a result, many complaints never proceed to applications in the Federal Court. It is a process which provides a venue for those who may have been vilified to seek a remedy where they may not have the resources to contemplate engaging in litigation against a well-resourced respondent.

Yours sincerely



Konrad de Kerloy
**President**

The Law Society of Western Australia
The voice of the legal profession in Western Australia

18 December 2013

Mr Martyn Hagan
Secretary General
Law Council of Australia
DX 5719
CANBERRA ACT 2600

By email: sarah.moulds@lawcouncil.asn.au

Dear Mr Hagan, Martyn

**PROPOSED CHANGES TO THE COMMONWEALTH RACIAL VILIFICATION LAWS**

I refer to your Memorandum dated 3 December 2013 and Briefing Note in relation to the proposed changes to the Commonwealth racial vilification laws.

The Commonwealth Attorney-General's announcement that his first law reform initiative will be to repeal section 18C of the *Racial Discrimination Act 1975*, which deals with racial vilification, is said to be a response to the decision in *Eatock v Bolt* [2011] FCA 1103; (2011) 197 FCR 261.

This proposal clearly raises a significant issue in balancing the right of freedom of speech with the right not to be the subject of conduct which is offensive, insulting, humiliating or intimidatory because it is directed towards the race, colour or national or ethnic origin of a person.

Aside from the case of *Eatock v Bolton*, there are other circumstances where the provisions in s 18C (qualified by the exemptions in s 18D) have played an important role in upholding the international standards set in the International Covenant on Civil and Political Rights and International Convention on the Elimination of All Forms of Racial Discrimination: see *Clark v Nationwide News* [2012] FCA 307; *Toben v Jones* [2003] FCAFC 137; (2003) 129 FCR 515.

There has been a good deal of confusion in the public debate on this topic in coming to grips with the fact that section 18C poses an objective test, but that the objective test, if it is to meet the objectives of the provision, must have regard to the perspective of a 'reasonable victim': see *Creek v Cairns Post* [2001] FCA 1007; (2001) 112 FCR 352.

The position of the Law Society of Western Australia in relation to the specific issues raised by the Law Council is as follows:

(a) It opposes repeal of, or any changes to, sections 18C and 18D of the RDA on the grounds that the existing provisions can be shown to be necessary, effective and drafted and/or interpreted in a way that strikes the appropriate

balance between freedom of expression and protection from racial hatred and vilification;

(b) It supports a more extensive review of Commonwealth racial vilification and racial hatred laws to ensure that these laws comply with the full range of Australia's international human rights obligations;

(c) It does not support specific proposals for reform of sections 18C and 18D, such as reform proposals that would:

(i) change or narrow the scope of section 18C, for example by removing or replacing the terms 'insults' and 'offends' for subparagraph 18C(1)(a);

(ii) raise or change the threshold for determining whether racial vilification has occurred, for example by requiring the conduct to be 'serious' or by requiring an objective test where the conduct must be viewed from the perspective of a reasonable member of the community as opposed to a reasonable member of the racial group;

(iii) broaden the range of conduct that is exempt from racial vilification provisions; or

(iv) expand the coverage of existing criminal offence provisions as an alternative to civil vilification provisions.

Yours sincerely

Craig Slater
**President**