SECTION 18C AND THE SEARCH FOR SUBSTANTIVE EQUALITY

by Jeremy Grunfeld

INTRODUCTION

The *Racial Discrimination Act 1975* (Cth) (the 'Act') legislates to protect members of minority groups from the physical and psychological harms that can stem from acts of racial intolerance. It seeks to eventually eliminate racial and other forms of discrimination from Australian society.[1] Inquiries have continually indicated that an atmosphere where low-level, subtle or 'casual' racist behaviour is accepted creates a breeding ground 'for more serious acts of harassment, intimidation or violence'.[2] However, whilst seeking to deter racist behaviour, the Act must also operate to ensure that free speech is adequately protected as this is a fundamental human right under the *International Covenant on Civil and Political Rights* which Australia is a signatory to.[3] The existence of these two potentially conflicting aims means that the Act must be carefully framed so that it provides an appropriate mechanism to deter and remedy instances of racial hatred without going so far as to undermine or place undue limitations on free speech. In this article, I critique how well the Act currently balances these aims with specific reference to section 18C (the 'Vilification Prohibition').[4] By critically examining several Australian court decisions I argue that the Vilification Prohibition adequately protects free speech in its current form.

However, by deconstructing the 'reasonable person' test that is used by the court to determine allegations of racial vilification, I argue that a potential issue of unconscious bias can arise. While the judiciary is well positioned to consider allegations of racial vilification, the vast majority of decision makers do not come from minority backgrounds, and this may limit their ability to personally understand the effects of racial vilification.[5] Ultimately, I conclude that the *Racial Discrimination Act* and specifically the Vilification Prohibition are not problematic themselves. Rather, they are carefully calibrated to provide a framework capable of diminishing the existence of racial discrimination without undermining free speech. Nonetheless, the inherent bias of decision makers in interpreting the law means that substantive equality may not be accorded to complainants.

A SNAPSHOT OF THE CURRENT REFORM DEBATE

In its current form, the Vilification Prohibition makes it unlawful for any person in public to do something that a reasonable person would consider to be offensive, insulting, humiliating or intimidating to another person or group on the basis of their race. Section 18D (the 'Exemption Provision') says that the Vilification Prohibition does not apply if the act was done 'reasonably and in good faith' for a range of possible reasons. . The Racial Discrimination Amendment Bill 2016 (Cth) sought to narrow the scope of the Vilification Prohibition because it is said to currently capture various acts and conduct that ought not to be described as vilification and because it too heavily curtails 'Australian citizens' freedom of speech, expression and opinion'.[6] However, merely reading the relevant provisions in the *Racial Discrimination Act* provides little guidance. Rather, it is necessary to unpack the legislation with reference to its current interpretation by the judiciary.

UNPACKING THE CURRENT LAW AND THE PROPOSED AMENDMENT

Jurisprudence surrounding the Vilification Prohibition is well established. Section 18C has been regularly considered and interpreted by the courts. For instance, in *Prior v Queensland University of Technology*, the court recognised the importance of the law in establishing an appropriate balance between acting as a strong general deterrence, while allowing an adequate opportunity for free speech within Australia's liberal democracy. The Court explained that the Vilification Prohibition 'is only concerned with profound and serious effects, not mere slights'.[7] While nothing in the legislation establishes the requisite seriousness or triviality of an alleged breach, the court's interpretation limits the scope of its applicability insofar that the terms 'offend, insult, humiliate or intimidate' are defined as involving some form of public consequence.[8]

In *Prior* the court cites the interpretation of 'offend, insult, humiliate or intimidate' provided in *Eatock v Bolt*.[9] This case considered whether two newspaper articles authored by Andrew Bolt

entitled 'It's so hip to be black' and 'White fellas in the black' fell within the scope of the Vilification Prohibition. In the articles, it was alleged that Bolt conveyed that there are fair-skinned people with some Aboriginal descent who are not sufficiently Aboriginal to genuinely identify as Aboriginal persons. Bolt suggested that these individuals were motivated to identify as Aboriginal because career opportunities were made available to Aboriginal persons.[10] In *Eatock*, Bromberg J held that in order to satisfy the requirement set out in the Vilification Prohibition something more is necessary than merely causing an individual or group to suffer 'hurt or emotional damage'.[11] Rather, the alleged wrongful conduct must cut deeper insofar that it must cause damage to the dignity and public perception of an individual or group to constitute a civil wrong.[12] In this case, the Court held that Bolt had breached s 18C, and that the exemptions in s 18D did not apply because the publications were 'not done reasonably and in good faith'.[13]

In interpreting the Vilification Prohibition in this prima facie restrictive manner, the court has sought to achieve an interpretation consistent with s 15AA of the *Acts Interpretation Act 1901* (Cth),which requires legislation to be interpreted with a view to achieving the purpose of the Act.[14] A fundamental purpose of the *Racial Discrimination Act* is to ensure that Australia meets its international obligations through ratification of an international instrument that seeks to promote social cohesion:[15] the United Nations *Convention on the Elimination of Racial Discrimination*.[16] This purpose is reinforced by reference to the Second Reading Speech of the Racial Hatred Bill 1994 (Cth) which indicates that the Act operates to ensure that persons are treated fairly irrespective of race so that society can develop in a holistic sense.[17]

Reflecting on the purpose of the *Racial Discrimination Act*, reveals that s 18C has a public focus, requiring an objective rather than subjective assessment to determine whether the alleged wrongdoing is sufficiently serious.[18] While early cases suggested that the terms 'offend, insult, humiliate or intimidate' were to be interpreted in accordance with their ordinary dictionary definitions,[19] the jurisprudence has evolved so that a higher threshold that is more contextual and elastic is utilised, so that the Vilification Prohibition only deals with more serious public wrongs consistent with the Act's public focus.[20] This serves as a useful mechanism to ensure that free speech is not unnecessarily or unacceptably diminished.

Significantly, as the judiciary employs a purposive approach in interpreting the words 'offend, insult, humiliate or intimidate', it is not clear how amending section 18C would offer any practical benefit. Commentators have incorrectly suggested that the threshold for the seriousness of conduct caught within the scope of the Vilification Prohibition is exceedingly low, curtailing individuals' rights to free speech.[21] The basis for this belief is unfounded as commentators seem to misinterpret the judicial reading of the term 'offend, insult, humiliate or intimidate' by according them their ordinary (and relatively minor)[22] meaning, rather than a holistic meaning.[23] The wealth of judicial discussion surrounding these terms has led to a well-established definition that encompasses the legislature's underlying purpose and recognises that it is not a law concerned with subjective 'mere slights'.[24] Somewhat paradoxically, the changes proposed in the Racial Discrimination Amendment Bill 2016 (Cth) would have altered the key terms sparking uncertainty and requiring the judiciary reconsider their settled understanding. Interestingly, despite all the sound and fury, the likely outcome is that the court would find that the changes do not affect the scope of conduct caught by the Vilification Prohibition. The words are already interpreted contextually, providing a higher threshold than if the words were considered in their ordinary sense.

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The Racial Discrimination Amendment Bill 2016 (Cth) was not, however, only problematic from a technical/interpretative perspective but also from a purposive or symbolic perspective. As previously stated, research suggests that a legal framework that permits or facilitates subtle racism creates a breeding ground for more serious racially fuelled wrongs.[25] Law must be viewed as serving both a functional purpose as well as a symbolic one, by acting as a beacon to guide and educate members of society.[26] Any legislative attempt to increase the threshold of what constitutes racial vilification sends an alarming and worrying message from legislators to the general public via mainstream media outlets. The message being sent is that some instances of racism are not deplorable so long as they do not involve conduct or speech that is extreme.[27] Any law reform consideration where the subject matter is as sensitive as racism or vilification requires that careful attention is paid to the lived experiences of communities that are targets of this abuse.[28] I do not mean to say that legislative reform in this area should never occur, rather that the reform debate did not adequately recognise the sensitivity and importance of the Vilification Provision to those parties that are directly impacted by its existence. Law reform should not only ensure that laws are aligned with society's expectations. It should also educate the public about what is good and right so that society can develop in

a harmonious direction. In relation to the proposed amendments to the Vilification Prohibition, it is important to be mindful that decision makers and members of mainstream media reporting on the issue are frequently not members of minority groups that face discrimination and this often hampers their ability to adequately consider and respect minority views.[29] This issue is known as a 'dilemma of difference' and it means that the way society determines what conduct is offensive, insulting, humiliating or intimidating is by reinforcing, rather than breaking down the existing stereotypes that exist about minority groups.[30] This leads to a bias which has not only permeated into the reform debate but has also impacted the current law's ability to achieve just and equitable outcomes for complainants.

IS THE 'REASONABLE PERSON' TEST REASONABLE?

The objective focus of the Vilification Prohibition means that the requisite test instilled by reference to the wording 'reasonably likely' is a reasonable person test. The construction of this test in allegations of racial vilification is well settled by the existing case law. Section 18C(1)(a) requires the court to identify a hypothetical and ordinary representative of the group that the allegedly vilifying conduct was directed towards.[31] The court must then evaluate in all the relevant social, cultural and historical circumstances, whether it is likely that the representative would suffer the serious and profound effects of offence, insult, humiliation or intimidation as a result of the conduct.[32] The centrality of the reasonable person test is because the purpose of the Vilification Prohibition is to establish whether the conduct is generally viewed as offensive. Each individual, by nature, will differently categorise what is offensive to them on a spectrum. An individual at one end of the spectrum may find particular conduct to be deeply offensive whilst an individual at the other end may deem precisely identical conduct to be humorous or unobjectionable. Therefore, considering what the reasonable, ordinary or average person on a spectrum would deem to be offensive provides a resource efficient and fair mechanism to determine matters of vilification.

However, while the theoretical grounding of the reasonable person test appears sound, the operation of this test within the ambit of discrimination law is problematic, highlighting how issues of bias, subjectivity and the dilemma of difference play out in the judicial system. A key role of the judiciary while hearing a racial vilification case is to make an objective determination about whether allegedly vilifying conduct would be considered by an ordinary member of the relevant group, usually a minority, to be offensive, insulting, humiliating or intimidating.[33] While acknowledging that the judiciary is eminently qualified to resolve competing legal principles, Beth Gaze questions the courts' ability to fulfil this critical role in discrimination cases, because contextual differences limit the bench's ability to adequately grapple with and comprehend the purpose of anti-discrimination legislation.[34] This is an understandable and necessary critique. The context and socio-cultural makeup of the bench influences their mindset and ability to understand what may or may not be offensive to a hypothetical person from a vastly different background with vastly different life experiences. As Martha Minow asserts, difference is always comparative rather than intrinsic.[35] While the judges in the appellate courts in Australia might be an adequate reflection of a privileged, white, Anglo-Saxon, middle class male that is often viewed as the norm in Australian society, in cases concerning racial vilification, the law necessitates that decisions makers abandon their individual perspective and don one that they are completely unfamiliar with. While decision makers may make a concerted effort to make an objective determination, they remain inextricably linked with their own context and experiences, meaning that it is often challenging for them to make completely unbiased decisions.[36] Decision makers typically do not have lived experience of discrimination and as a result of their context, some of the existing case law indicates that allegedly vilifying conduct may be interpreted as a 'mere slight' lacking a 'sufficiently profound or serious effect' to what the court views as being a reasonable victim.[37]

Furthermore, a fundamental purpose of discrimination law is to break down existing stereotypes to thrust contemporary society towards greater tolerance and a more complete respect for diversity.[38] It is in place to act as a beacon that seeks to progress and encourage social change.[39] The reasonable person test fails to adequately embrace the purpose of the legislation as it necessitates that the judiciary rely on precisely the same stereotypes that the law seeks to breakdown. As Minow suggests, the law's assumption that the status quo or norm must be used as a benchmark is unhelpful in discrimination law.[40] This is because it masks the reality of often heinous allegedly wrongful conduct. It diminishes the reality of the applicant's individual perspective and the physical and emotional harm that may flow as a consequence of racial vilification.[41] In reality, perhaps there is no such thing as a reasonable person, and the court must question whether its current approach is too heavily reliant on the established social constructs of its decision makers.

CONCLUSION

The *Racial Discrimination Act* was introduced to play a vital role in the elimination of racial discrimination in Australia.[42] Through the contemporary interpretation of the Vilification Prohibition, the judiciary has acknowledged that vilification is only concerned with serious effects rather than mere slights. This acts as a mechanism to appropriately embrace the rights of complainants

without unnecessarily restricting society's right to free speech. The amendments proposed to section 18C would have sent an alarming message to the public, and would have failed to deter racist behaviour. Significantly, it also would have served no practical purpose as the existing provision is contextually rather than literally interpreted. The operation of the reasonable person test encapsulates the dilemma of difference identified by Martha Minow and the court must question whether it is too heavily reliant on the established social constructs of decision makers. Ultimately, it remains important to continually acknowledge that this is an area of law where both legislators and judges need to very carefully consider the lived reality of each complainant.

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1 See *Racial Discrimination Act 1975* (Cth) Long Title.

2 Human Rights and Equal Opportunity Commission, Parliament of Australia, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (1991) 37; see also Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992) 125 [7.30].

3 *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19.

4 *Racial Discrimination Act 1975* (Cth) s 18C.

5 See Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review* 325, 326-327.

6 Explanatory Memorandum, Racial Discrimination Amendment Bill 2016 (Cth) 1; see also Racial Discrimination Amendment Bill 2016 (Cth) sch 1 item 1.

7 *Prior v Queensland University of Technology & Ors* [2016] FCCA 2853, 2877 [57].

8 Ibid 2863 [30(P)].

9 Ibid 2867 [30(N)].

10 *Eatock v Bolt* (2011) 197 FCR 261, 264 [16].

11 Ibid 317 [267].

12 Ibid.

13 Ibid 349 [385].

14 *Acts Interpretation Act 1901* (Cth) s 15AA.

15 *Racial Discrimination Act 1975* (Cth) s 7; Australian Human Rights Commission, Submission to the Attorney-General's Department, Parliament of Australia, *Inquiry into Free Speech in Australia*, 28 April 2014, 17.

16 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

17 Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1994, 3336 (Michael Lavarch).

18 *Prior v Queensland University of Technology & Ors* [2016] FCCA 2853, 2864 [30(K)].

19 *Jones v Scully* (2002) 120 FCR 243, [103].

20 *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105, 122 [69].

21 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Freedom of Speech in Australia: Inquiry into the Operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and the Related Procedures under the Australian Human Rights Commission Act 1986 (Cth)* (2017) 5 [2.3].

22 See *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105, 122 [67].

23 Ronald Sackville, 'Anti-Semitism, Hate Speech and Pt IIA of the Racial Discrimination Act' (2016) 90(9) *Australian Law Journal* 631, 638.

24 Evidence to Parliamentary Joint Committee on Human Rights, Parliament of Australia, Canberra, 21 January 2017, 23 (Hugh de Krester, Executive Director Human Rights Law Centre).

25 See Human Rights and Equal Opportunity Commission, Parliament of Australia, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (1991) 37; see also Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992) 125 [7.30].

26 See John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) 223.

27 Evidence to Parliamentary Joint Committee on Human Rights, Parliament of Australia, Canberra, 3 February 2017, 12 (Ramdas Sankran, President Ethnic Communities Council); see also Amanda Porter, 'Words Can Never Hurt Me? Sticks, Stones and Section 18C' (2015) 40 *Alternative Law Journal* 86, 87.

28 Katharine Gelber and Luke McNamara, 'Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps between the Harms Occassioned and the Remedies Provided' (2016) 39(2) *University of New South Wales Law Journal* 488, 488-489.

29 See Martha Minow, 'Sources of Difference' in Martha Minow (ed) *Making all the Difference: Inclusion, Exclusion and American Law* (Cornell University Press, 1990) 49, 59.

30 Ibid.

31 *Eatock v Bolt* (2011) 197 FCR 261, 313 [250].

32 Ibid 315 [257].

33 See *Prior v Queensland University of Technology & Ors* [2016] FCCA 2853, 2864 [30].

34 Gaze, above n 5, 327.

35 Minow, above n 31, 70.

36 Gaze, above n 5, 328.

37 *Prior v Queensland University of Technology & Ors* [2016] FCCA 2853, 2876 [58]; see also *Clarke v Nationwide News Pty Ltd trading as The Sunday Times* (2012) 201 FCR 389, [51]-[52]; *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105, 124 [70].

38 Sackville, above n 25, 637; see also *Toben v Jones* (2013) 129 FCR 515, [136].

39 *State of Victoria v Schou* (2001) 3 VR 655, 659 [14].

40 Minow, above n 31, 70.

41 Ibid 70-71.

42 Robert French, 'The Racial Discrimination Act: A 40 Year Perspective' (Speech delivered at the Inaugural Kep Enderby Lecture, Sydney, 22 October 2015) 14.