Human Rights Law Centre

Points for opening statement

Senate Legal and Constitutional Affairs Committee inquiry into the Human Rights Legislation Amendment Bill 2017

24 March 2017

- No person in Australia should have to live in fear of being vilified because of their race, ethnicity or national origin. At its heart, this is what 18C aims to prevent, and in doing so, has an important role to play in strengthening social cohesion and inclusivity in Australia.
- S 18C renders unlawful conduct that is done in public and is based on race, ethnicity or national origin, and that has serious, profound and public effects.
- Whether conduct meets the test is assessed against an objective standard – the reasonable or ordinary member of the relevant racial or ethnic group. 18C does not prohibit comments in private, nor comments that only cause hurt feelings.
- S 18D, which must be rad with 18C, contains broad freedom of speech exceptions. People can say things, in public, about race for a range of reasons, like artistic expression, and those things can cause offence, humiliation and intimidation and even have serious and profound effects, so long as it is done in good faith and reasonably.
- Together, sections 18C and 18D strike the right balance between two fundamental rights - freedom of speech and freedom from racial discrimination and prejudice. As the Parliamentary Joint Committee on Human Rights noted, they are consistent with Australia's human rights obligations.
- The proposals in the Human Rights Legislation Amendment Bill in relation to 18C will water down the current level of protection afforded to racial and ethnic minorities in Australia:
    - First, replacing offend, insult and humiliate with 'harass', is likely to weaken the legal protection against racial vilification. How this new wording would be interpreted by the courts is hard to predict, but the broader social impact is very concerning.- it communicates to racial and ethnic minorities that freedom from racial prejudice is of lesser priority to the government than the ability of others to say racial offensive, insulting and humiliating things. It communicates to those who want to say racially offensive, insulting and humiliating things that the government thinks they should be allowed to. This is such a dangerous message to send and a particularly dangerous time to be sending such a message – reports of racism are on the rise.
    - Second, replacing the current objective test, in which the impact of conduct is assessed against a reasonable or ordinary member of the relevant racial or ethnic group, with 'the reasonable member of the Australia society' will also weaken the law. 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. It means for example, taking into account 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.

- Courts have warned that 'to import general community standards into the test … runs a risk of reinforcing the prevailing level of prejudice' in society.
- 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 inconsistent with the aims of the RDA and the racial vilification provisions.
- It is racial and ethnic minority groups that suffer the impacts of racism, not the Australian community as a whole. 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.

- The Australian Human Rights Commission plays a vital role in educating the public and helping vulnerable Australians address discrimination quickly and at minimum cost. Some of the proposals in the Bill appear sensible, but in the very brief time we've had to consider the Bill, there are two in changes particular that cause considerable concern in terms of access to justice, particularly because they will apply to all discrimination claims, including sex, age and disability discrimination claims:
  - First, cutting the time limit for making complaints from 12 to 6 months will impact most profoundly those who require assistance or support in understanding their legal rights and then exercising them, such as people with disabilities. This was not a recommendation of the PJCHR and there is no clear rationale for this change.
  - Second, requiring nearly all discrimination complainants whose matters don't resolve at the Commission to seek leave of the court before being allowed to start court proceedings will mean less incentive for respondents to genuinely and fairly engage in the conciliation process. Some cases won't resolve through conciliation because of the conduct of the respondent, not because a complaint is unmeritorious. The courts are already too daunting and out of reach for many vulnerable Australians, unscrupulous respondents may exploit this and not play fairly at conciliation, knowing that they won't be challenged in court.

- Sections 18C and 18D had been working effectively for two decades. The interpretation of the law settled. These changes proposed in the Bill are unnecessary and they send a dangerous message. The recent inquiry by the PJCHR did not say that the laws required change – in fact one suggestion was to leave the laws as they are.
- Strong leadership is what is needed and a commitment to partnering with Indigenous and multicultural communities, in fighting the racism that is uniquely directed towards them.
- More broadly, concern about freedom of speech not being properly protected in Australia could be addressed more appropriate and comprehensively by enacting a federal Human Rights Act; rather than taking the regressive step of weakening important racial vilification protections that promote greater equality in public debate.