Q A I L S
Queensland Association of Independent Legal Services Inc

30 April 2014

Human Rights Policy Branch
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

By email: s18cconsultation@ag.gov.au

Dear Sir/Madam,

Freedom of speech (repeal of s.18C) Bill 2014 – Exposure draft

Queensland Association of Independent Legal Services Inc (**QAILS**) represents 33 community legal centres in Queensland. Our member community legal centres are independently operating not-for-profit, community-based organisations that provide free legal services to the public, focusing on the disadvantaged and people with special needs.

QAILS welcomes this opportunity to comment on proposed amendments to the *Racial Discrimination Act 1975* (**RDA**), contained in the exposure draft of the *Freedom of speech (repeal of s.18C) Bill 2014* (**Bill**).

QAILS supports the existing protections contained in the RDA, to the extent that they act as a normative standard to prevent offensive behaviour because of race, colour or national or ethnic origin. Racial hatred causes serious harm to individuals and diminishes us all as a community. It increases the likelihood of racial discrimination and racist violence.

Complaints

In 2012-13, Queensland's community legal centres provided information in the 'discrimination' area 209 times; provided 344 pieces of legal advice, and provided ongoing casework and assistance 125 times. These are across all attributes, including race, in both Commonwealth and state jurisdictions.

A Queensland community legal centre received complaints from two unrelated people who were receiving government services. One of the government workers regularly and publicly said that Aboriginal people were 'like monkeys'. These comments were causing a build-up of tension between Aboriginal and non-Aboriginal people in the community. The community legal centre advised that this was potentially racial vilification and advised about complaints processes.

This comment became the subject of cultural discussion within the affected community and, without the affected people having legal recourse, had the potential to ignite racial violence.

The Anti-Discrimination Commission of Queensland (**ADCQ**) accepted only 62 complaints on the basis of race in 2012-13, which represents 10% of total complaints. In the same period, less than 10% of inquiries and less than 23% of complaints received by the Australian Human Rights Commission

(**AHRC**) related to the RDA, totalling only 500 complaints received for the year, and only 181 were in the area of 'racial hatred'. In a country the size of Australia, the number of complaints is quite small; however, the existing protections provide an important opportunity for people to seek redress for inappropriate, offensive attacks on the base of their race or ethnic origin.

The offence caused

The AHRC successfully resolves the vast majority of complaints under the RDA, with very few progressing to the courts. The existing laws do not illegalise conduct that hurts feelings; the jurisprudence in this area has constrained the operation of the existing section to conduct which has 'profound and serious effects, not to be likened to mere slights.'

Tensions with freedom of speech

QAILS supports the right to freedom of speech, which is fundamental to our democracy but not absolute. Australian laws place limits on our speech and expression in areas like defamation, false advertising, sexual harassment and threats to kill. In our view, the RDA plays a critical role in combatting racial hatred and protecting individuals and groups against discrimination and hate speech based on race, colour, descent or national or ethnic origin. This is an appropriate limitation on the right to freedom of speech, upholding international standards expressed in the *International Covenant on Civil and Political Rights* and *International Convention on the Elimination of All Forms of Racial Discrimination*.

Vilification definition

The amended section defines vilification as, 'to incite hatred against a person or group of persons.' QAILS recommends considering a broader definition, similar to that in the Queensland legislation, 'to incite hatred towards, serious contempt of or severe ridicule of a person or group or persons.'

Queensland's Prisoners Legal Service had an Aboriginal client who was very distressed because an officer had called him a 'black maggot'. He was afraid of pursuing a complaint because he was worried about retribution, although no threat had been made yet. He was relieved to hear that because racial vilification was unlawful, he could make a complaint and if anything happened he would be protected by the provisions of the Act that address victimisation for making a complaint. He made a complaint and requested an apology, which he received.

Cases such as these, and published cases including *Singh v Shafston Training One Pty Ltd and Anor* [2013] QCAT 008, can involve severe ridicule causing distress, and QAILS believes they should be considered unlawful.

Intimidation definition

Proposed amendments require intimidation 'to cause fear of physical harm.' This definition allows individuals to emotionally intimidate and suppress others as long as there is no threat of physical harm. QAILS submits that this definition incorrectly excludes behaviour that causes emotional or psychological damage.

We also note that acts that satisfy this definition may also be criminal conduct (assault).

Standards of a reasonable person

The amended section proposes that whether an act is reasonably likely to be unlawful, will be judged by the standards of an 'ordinary reasonable member of the Australian public, not by the standards of any particular group'.

Current legislation correctly focuses on the harm caused by the act, not the conduct of the act itself. The law should work to protect groups that are subject to racial hate speech and other offensive speech, and therefore the standard should be those of the group affected. QCAT has noted that when the offended person is in a place of vulnerability, due to a particular relationship with the defendant, an otherwise less offensive or hateful act will amount to vilification (*Singh v Shafston Training One Pty Ltd and Anor* [2013] QCAT 008). We suggest that the standard of 'a reasonable ordinary person in the situation' is more appropriate.

Reasons for the action

Under existing section 18B, where an act is done for two or more reasons, one of which is racial discrimination, the act is unlawful. As this provision has been removed in the proposed amendments, there is some uncertainty about acts done for more than one reason. QAILS encourages the Bill to clarify whether a similar approach to the one used in existing section 18B is to be applied, or if there is a new test, such as looking to the dominant purpose of the act. QAILS supports the retention of the existing test.

Vicarious liability

Currently section 18E of the RDA causes employers to be vicariously liable for their employees or agents unlawful actions unless they take all reasonable steps to prevent the action. 66% of discriminatory complaints received by ADCQ in 2012-13 were work related, showing the importance of ensuring that workplaces are supported to oppose racism. Removal of this provision could remove some of the incentive for employers to prevent discrimination in the work place. QAILS supports retaining section 18E or a similar provision.

Exemptions

The RDA currently allows speech, which might otherwise be unlawful under section 18C, where it is said or done **reasonably** and in **good faith.** The Bill contains no such qualification, and would allow racial vilification and race hate speech inciting violence even where it is unreasonable and in bad faith.

Section 124A of the *Anti-Discrimination Act 1991* (Qld) is our state equivalent on racial vilification. Section 124A(2)(c) exempts acts done reasonably and in good faith. The Supreme Court of Queensland has noted that this exemption strikes an appropriate balance between the effects of section 124A and the implied right to freedom of free speech in the *Constitution* (*Owen v Menzies* [2013] 2 Qd R 327).

The proposed exemptions allow a wide interpretation of public discussion, potentially allowing racial abuse as long as it relates to any 'any political, social, cultural, religious, artistic, academic or scientific matter.' It will also exempt acts that meet the legal definition of the crime of assault. In our view, any exemptions (such as those in proposed section (4)) must ensure that only those acts done reasonably and in good faith may be exempted from the prohibition on this form of offensive behaviour.

There should never be an exemption for behaviour that causes fear of imminent personal harm.

Our suggestions for reform

As set out above, the existing provisions in the RDA provide an important protection, and we generally support the existing section 18C.

We recommend that the section be amended to codify the common law position, that only those acts that have 'profound and serious effects' are unlawful under section 18C. This is generally consistent with the threshold under Queensland law, which QAILS supports.

If some amendments are to be made, we recommend that exemptions can only apply to acts done reasonably and in good faith. We support broadening the Bill's definition of vilification to include inciting serious contempt or severe ridicule and broadening the definition of intimidate to include emotional or psychological intimidation. The 'reasonable person' test should give some consideration to the circumstances of the act and the particular vulnerability of the target of the act. Any amendments should clarify whether other parties, including employers, should be held vicariously liable, due to the number of discriminatory complaints in the work place, and the potential damage caused.

If you have any queries, please contact me on 07 3392 0092 or at director@qails.org.au.

Yours sincerely,

James Farrell
QAILS Director