

SUPPLEMENT

CHAPTER 9: VILIFICATION

Significant legislative developments

New Commonwealth criminal offence

Since 2010, it has been an offence under the Commonwealth *Criminal Code* to intentionally urge the use of force or violence against a group of people,¹ or a member of a group,² when ‘the target group is distinguished by race, religion, nationality, national or ethnic origin or political opinion’.³ In order for such action to be unlawful, the offender must intend that violence or force will occur and the use of force or violence must ‘threaten the peace, order and good government of the Commonwealth’.⁴

Important cases

Validity of State vilification laws

The States and Territories, like the Commonwealth, are not permitted to legislate in a way that impermissibly interferes with constitutionally protected free speech about political or governmental matters.⁵ The constitutional validity of State vilification laws has been challenged on free speech grounds in three States. On each occasion the State Court of Appeal has dismissed the challenge. In *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc*⁶ the Victorian Court of Appeal held that that State’s religious vilification laws did not infringe the implied freedom of political communication afforded by the Commonwealth Constitution. The NSW Court of Appeal rejected a challenge to the constitutional validity of that State’s homosexuality vilification laws in *Sunol v Collier (No 2)*.⁷ In *Owen v Menzies*⁸ the Queensland Court of Appeal upheld the validity of that State’s legislation which makes it unlawful to vilify people on the grounds of race, religion, sexuality or gender identity.

Elements of Commonwealth racial vilification legislation – the impact of the act upon the victims

In *Eatock v Bolt*,⁹ Bromberg J found that journalist Andrew Bolt had contravened s 18C of the *Racial Discrimination Act 1975* (Cth) in two articles written for the *Herald Sun* newspaper published by the Herald and Weekly Times Pty Ltd (HWT) in 2009. The articles, which can

¹ *Criminal Code* (Cth), s 80.2A(1).

² *Criminal Code* (Cth), s 80.2B(1).

³ *Criminal Code* (Cth), ss 80.2A(1)(c), 80.2B(1)(d).

⁴ *Criminal Code* (Cth), ss 80.2A(1)(d), 80.2B(1)(e).

⁵ *Coleman v Power* (2004) 220 CLR 1

⁶ (2006) 15 VR 207.

⁷ [2012] NSWCA 44.

⁸ [2012] QCA 170.

⁹ (2011) 197 FCR 261.

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be read in full as annexures to the published reasons for judgment, were titled ‘It’s so hip to be black’ and ‘White fellas in the black’. Questions associated with the impact of the articles—including the imputations they conveyed and the identity of the victim group from whose perspective the impact was measured—were important issues in the case. Bolt and HWT were found liable for the contravention and HWT was ordered to publish corrective notices in the *Herald Sun*. Neither Bolt nor HWT appealed against the findings and orders made by Bromberg J.

Elements of Commonwealth racial vilification legislation – causation

The element of causation¹⁰ in s 18C of the *Racial Discrimination Act 1975* (Cth) is sometimes difficult when dealing with the liability of a person who publishes material written by another person who is not their employee or agent.¹¹ Different results have been reached in two recent cases involving ‘stranger’ comments published on a website that is controlled by another person or organisation.

In *Silberberg v The Builders Collective of Australia*¹² an organisation which published comments on its website written by an unknown third party (and which contravened s 18C) was not held liable for its act of publication because its failure¹³ to remove the offending comments was not attributable to the race of the plaintiff. In *Clarke v Nationwide News Pty Ltd trading as the Sunday Times*¹⁴ the proprietor of a newspaper in Perth was held liable for anonymous posts on its website which contravened s 18C of the *Racial Discrimination Act* because it moderated the website and was aware of the contents of those posts.

Exceptions to liability – general principles

The exceptions to liability in State racial vilification legislation are very similar to those in s 18D of the *Racial Discrimination Act 1975* (Cth). After reviewing the relevant case law from all Australian jurisdictions, an Appeal Panel of the NSW Administrative Decisions Tribunal said in *Burns v Laws*¹⁵ that it had experienced ‘considerable difficulty in identifying consistency in the statements of principle’ and observed that ‘[m]any of the opinions as to how an exception ... should be interpreted and applied are highly divergent’.¹⁶ The Appeal Panel went on to suggest that ‘the following statements have broad, though not universal, support:

- (i) The onus lies on the respondent to satisfy the tribunal of fact that the conduct was done ‘reasonably and in good faith’ (in NSW, s 104 of the ADA is relied upon).

¹⁰ See discussion at [9.3.23]-[9.3.29] in the text.

¹¹ Section 18E of the *Racial Discrimination Act* makes both an employer and a principal liable for any unlawful acts (under Part IIA) by an employee or an agent unless the employer or principal took all reasonable steps to prevent the unlawful act. See discussion at [9.3.36].

¹² (2007) 164 FCR 475.

¹³ Section 3(3) of the *Racial Discrimination Act* deems failing to do an act to be the doing of an act for the purposes of the Act.

¹⁴ [2012] FCA 307

¹⁵ [2008] NSWADTAP 32

¹⁶ [2008] NSWADTAP 32 [27]

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- (ii) The inquiry as to whether the conduct was ‘done reasonably and in good faith’ is not confined to evidence relating to the ‘doing’ of the act (the method), but extends to the contents (the message).
- (iii) In forming a view as to whether the conduct was done reasonably and in good faith, relevant material includes the content of the offensive material (in this case the broadcast), any evidence given by the respondent as to the circumstances, reasons and motives for the publication, any inferences that may reasonably be drawn from the material itself in respect of these matters, the context of the publication including any pattern of conduct by the publisher of the statements.
- (iv) While the expression ‘done reasonably and in good faith’ may be regarded, broadly speaking, as a composite one, it contains two elements or requirements, to be addressed separately.
- (v) Whether the conduct was done reasonably is to be assessed in an objective manner.
- (vi) Good faith is not established if the respondent acted in bad faith, out of malice or for an improper purpose.
- (vii) Ultimate judgments as to such matters as ‘reasonableness’ and ‘good faith’ are ones of fact.¹⁷

Exceptions to liability – burden of proof

In both *Eatock v Bolt*¹⁸ and *Clarke v Nationwide News Pty Ltd trading as the Sunday Times*¹⁹ Federal Court judges proceeded on the basis that the respondent bears the burden of proof when relying upon exceptions in s 18D even though French J had earlier expressed the view in *Bropho v Human Rights and Equal Opportunity Commission*²⁰ that this issue is not settled.

Draft Commonwealth legislation***Racial vilification***

Racial vilification is dealt with in cl 51 of the *Human Rights and Anti-Discrimination Bill 2012* (Cth) (‘the Commonwealth Bill’). Clause 51 contains no changes of substance to the existing vilification provisions in ss 18B-18D of the *Racial Discrimination Act 1975* (Cth).

Unfavourable treatment because of a particular protected attributed – includes offensive or insulting behaviour

The central provision in the Commonwealth Bill is cl 22 (1) which makes it unlawful to ‘discriminate’ against another person if the discrimination is connected with any ‘area of public life’. Clause 22(2) contains a non-exhaustive list of nine ‘areas of public life’ covered by this prohibition. These ‘areas’ range from ‘work and work-related areas’ to ‘membership and activities of clubs or member-based associations’.

The term ‘discriminates’ is defined in cl 19(1) to mean treating a person ‘unfavourably because the other person has a particular protected attribute’. Cl 19(2)(b) provides that ‘unfavourable treatment includes ... conduct that offends, insults or intimidates the other

¹⁷ [2008] NSWADTAP 32 [29]

¹⁸ (2011) 197 FCR 261 [339]

¹⁹ [2012] FCA 307 [116]

²⁰ (2004) 135 FCR 105

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person'. It seems highly likely that this 'avoidance of doubt' provision will not be included in any draft of the Bill introduced into Parliament because of the controversy it has generated.

There are 18 'protected attributes' listed in cl 17 of the Bill. Cl 22(3) provides, however, that discrimination on seven of these grounds—family responsibilities, industrial history, medical history, nationality or citizenship, political opinion, religion, and social origin—is unlawful only when the discrimination is connected with work and work-related areas.

Procedure

The procedure for making a complaint of racial vilification under the Commonwealth Bill is broadly similar to the current procedure for making a complaint that a person has contravened Commonwealth anti-discrimination legislation.

There is no right to commence proceedings in a court unless various procedural steps have been followed. An aggrieved person, or someone else acting on their behalf, must first lodge a complaint with the Australian Human Rights Commission²¹ which may investigate and/or attempt to conciliate the matter.²² Although there is no time limit for lodging a complaint, the Commission may close a complaint if it concerns conduct that occurred more than 12 months before the complaint was lodged.²³

If a complaint has not been resolved by the Commission, the complainant may commence proceedings in the Federal Court or the Federal Magistrates Court within 60 days of the complaint being closed by the Commission.²⁴

Remedies

The remedies available to a complainant in proceedings under the Commonwealth Bill before the Federal Court or the Federal Magistrates Court are the same as those now provided for in s 46PO(4) of the *Australian Human Rights Commission Act 1986* (Cth) in relation to existing Commonwealth anti-discrimination legislation. The Commonwealth Bill contains a presumption that a court should order that each party should pay their own costs. That presumption may be set aside 'when the court concerned considers there are circumstances that justify it in doing so'.

²¹ *Human Rights and Anti-Discrimination Bill 2012* (Cth) cl 89.

²² *Human Rights and Anti-Discrimination Bill 2012* (Cth) cl 105.

²³ *Human Rights and Anti-Discrimination Bill 2012* (Cth) cl 117(2)(b).

²⁴ *Human Rights and Anti-Discrimination Bill 2012* (Cth) cl 120-123.