RACIAL VILIFICATION AND SOCIAL MEDIA

by Daniel Herborn

Under section 18C of the *Racial Discrimination Act 1975* (Cth) ('the Act'), it is unlawful to publicly do any act which is reasonably likely to offend, insult, humiliate or intimidate another person or group if the act is done because of the race, colour, nationality or ethnic origin of the other person or group. This is potentially a powerful protection against any form of hate speech or racial vilification. However, there have not been many successful prosecutions under this section, with one study finding that in the first three years of the Federal Court hearing discrimination claims, there were only three successful claims of racial vilification.[1] Other commentators have criticised the Act as setting up an 'arduous task' for complainants in comparison to other jurisdictions such as the United States and the United Kingdom.[2] Some recent developments have provided an opportunity to see how this legislation might apply to online content, particularly the user-generated content which is increasingly popular and is generally not subject to much control or modification.

CLARKE V NATIONWIDE NEWS: CAN USER COMMENTS ON A WEBSITE BREACH ANTI-DISCRIMINATION LEGISLATION?

The 2012 Federal Court case *Clarke v Nationwide News*[3] ('*Clarke*') was notable for applying this legislation to user-generated content, specifically the user comments underneath an online newspaper article. In 2008, the *Sunday Times* newspaper (circulated throughout Western Australia) published a number of articles about Natalie Clarke, an Aboriginal woman whose three sons and a nephew were tragically killed in a motor vehicle accident. Users were able to add their own comments underneath the content provided by the newspaper, a common feature of many online newspaper articles. Journalists who were employed by Nationwide News (the publisher of *Sunday Times*) reviewed the comments and published them underneath the story if they were approved.

Some users wrote comments underneath these articles which were offensive to Ms Clarke and vilified her and her family members in racial terms. These comments included statements that the deceased were 'criminal trash' (comment 66), and 'I would use these scum as land fill' (sic) (comment 29). Comments 29, 66, 76 and 108 were found to be in breach of the law.

Natalie Clarke took legal action against the publisher, arguing that 16 different comments that appeared on the site had breached the racial vilification section of the Racial Discrimination Act.

POSSIBLE DEFENCES AND EXEMPTIONS

The publisher attempted to rely upon the exemption found at section 18D. This section provides:

> Section 18C does not render unlawful anything said or done reasonably and in good faith …
>
> (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest

This introduces what has been described as a 'broadly drawn defence'.[4] It meant the judge needed to adjudicate on whether the comments were reasonable and made in good faith and made in the course of a discussion or debate that was for any genuine purpose in the public interest.[5] In this respect, the judgment in *Clarke* followed *Bolt*[6] and *Bropho*[7] in holding that 'good faith' in this context has both a subjective and objective element.[8]

The judge found, however, that these exemptions did not apply to all the impugned comments. While some comments, however intemperately expressed, could be seen as expressing an opinion as part of a larger debate, not all the comments fell under this exemption.

Another submission the publisher made was that the comments did not breach the Act because there was not a link between the Aboriginality of the children and the derogatory comments. Section 18C only makes it an offence to make comments that humiliate or intimidate a person *because of* their race. However, the judge found that in relation to some of the published comments,

the reasonable reader would infer that the race of the victims of the crash was a factor in the person making their comments.[9] The fact that the children were easily identifiable as Aboriginal also raised race as a motivation for the comments.

Each of the impugned comments was examined in relation to the test at 18C. The following comment was not held to breach the Act:

> I suggest to the Sunday Times reporters that they look at the criminal history of these boys. They were certainly not little goodie, goodie two shoes. Talk to the local police. They knew all about them.[10]

While the judge found it may offend the victim's mother, that was not the relevant test. Instead the impugned comment needed to be considered in light of the 'reasonable victim', which in this case would be an Aboriginal person in the wider community who did not have a personal connection to the accident. On balance, he considered that this particular comment would not offend the hypothetical 'reasonable victim'.[11] The judgement makes clear that the language of the Act does not prohibit direct or unsympathetic comments, but is restricted to prohibiting language that is reasonably likely, in the particular circumstances in which it is communicated, to offend, insult or humiliate the hypothetical reasonable victim because of their race.

DID ANY OF THE ONLINE COMMENTS BREACH THE RACIAL DISCRIMINATION ACT?

In total, four of the comments made online were found to have breached the Act.[12]

The publisher was ordered to pay a sum of $15,624 to Ms Clarke for the insult and humiliation caused by the comments which breached the legislation. The publisher was also ordered to pay her legal costs for the matter. Ms Clarke had been represented by the Aboriginal Legal Service of Western Australia.

This case shows that it is no defence for a publisher to simply rely on the fact that the offensive material was generated by a user and not the publisher. If the publisher has an opportunity to review user-generated content and refrain from publishing it, they can be held liable if that content breaches racial anti-discrimination legislation.

SOCIAL MEDIA

Almost all of the content on social media sites such as Twitter and Facebook is user-generated. Anybody who has an account can upload content to the site and have it published almost instantaneously. This makes these sites an invaluable tool for people to communicate with others and distribute information. But it also means there is the possibility for people to post offensive material without anyone checking whether the content is objectionable or breaking any laws.

OFFENSIVE MEMES ON FACEBOOK

This issue came to a head recently when someone posted a series of offensive memes about Aboriginal people in a Facebook group.

Memes are some of the most popular user-generated content on the internet. Mostly, they are harmless and humorous. In this context, a meme is basically a stock picture, normally of a comic stereotype, which acts as a template. Anyone can contribute their own version of the meme by adding text, normally in the form of two lines of humorous commentary. Some memes have millions of hits online and have become cultural phenomena. The creators of memes are able to stay anonymous.

The series of memes in question were clearly offensive, depicting Aboriginal Australians as alcoholics, child molesters and welfare abusers. The memes explicitly and exclusively had a racial element, with each meme being made on the background of an elderly Aboriginal man's face transposed on the Aboriginal flag. They were also clearly offensive and were clearly not part of any broader debate being conducted in good faith. While some of the comments users wrote on the news story in *Clarke* were considered by the judge to have been made as part of a larger debate about youth delinquency in Western Australia, there was no such context here.

Many people complained about the group to Facebook and Australia's media regulator the Australian Media and Communications Authority.[13] Over 15,000 people signed a petition in 24 hours calling for the page to be removed. Many of those offended by the page made the point that the content on the page potentially violated Australia's racial discrimination laws.

Initially, Facebook did not remove the page but simply added the words 'Controversial Humour' to the title of the page.[14] The page attracted international news coverage and widespread condemnation.[15] Another page on the website, titled 'Shut down Aboriginal Memes' had over 7,900 'likes' in late November, while an online petition at change.org, a website dedicated to launching online petitions, had attracted over 18,000 online signatories.

However, much of the content simply reappeared soon after on a new, slightly different page.[16] At one stage in September 2012, the page was back on Facebook, in a slightly different form, but was still as offensive as ever. At the time of writing, however, the page had once again disappeared.

The page had launched in June 2012.[17] After Facebook's initial reluctance to remove the page or to respond to media enquiries about the page's content,[18] the page disappeared, having apparently been removed by Facebook.[19] It is not clear however if the social media company removed it due to user backlash or whether the creator of the page simply took it down.

ENFORCEMENT PROBLEMS—WHEN SITES ARE HOSTED OVERSEAS AND THE LACK OF AN APPROPRIATE AUSTRALIAN REGULATORY BODY

Stephen Conroy, the Federal Communications Minister, suggested that the matter was complicated by the fact Facebook content is hosted in the United States.[20]

Other commentators however did not appear to view the location of the hosting site as an issue and saw the page as potentially in breach of the Act. Joel Ziegler, a senior associate at Holding Redlich, weighed into the debate stating that the page, in its various versions, 'appears to be in breach of section 18C of the Act'.[21] Ziegler opined that Facebook, the moderator of the page and potentially some of the Facebook users who posted their own content on the page may have all contravened the Act. He also stated that:

> I don't think the defendants in such a case could rely on the defence under section 18D of the *Racial Discrimination Act,* that the publication of the content on the 'Aboriginal Memes' page was done reasonably and in good faith, in the course of a genuine purpose in the public interest.[22]

Race Discrimination Commissioner Helen Szoke also expressed the opinion that the page was potentially in breach of the Act.[23]

The Australian Communications and Media Authority ('ACMA') sent mixed messages on whether its jurisdiction covered content posted on Facebook, apparently initially telling people who complained about the page that it could not look into the matter, then later launching an investigation.[24]

CONCLUSION

The latest developments in anti-discrimination law in the online content sphere offer distinctly mixed results. The decision in *Clarke v Nationwide News* shows that publishers cannot simply hide behind a defence that their users generated the content and they merely moderated and published it. Instead, the case confirmed websites can be found guilty of publishing material that breaches Australia's anti-discrimination legislation.

When the material is hosted outside Australian jurisdiction, however, there is seemingly little Australian authorities can do to prevent even the most blatantly offensive and unlawful information being published. With user-generated content continuing to rise in popularity, this problem is unlikely to go away anytime soon.

The eventual disappearance of the offensive Aboriginal memes page, while a good result in one sense, is also largely unsatisfactory in that it suggests there is a lack of clear enforcement options for material which breaches Australia's racial anti-discrimination laws but is posted on social media sites which are hosted overseas. The backlash against Facebook shows it may be in a website's commercial interests to prevent or remove racially offensive user-generated content being shared on a site. This, however, is hardly a satisfactory outcome, amounting to a rule that racist material will only be removed when enough people complain about it.

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1 Jonathon Huynor, 'Skin Deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25(535) *Sydney Law Review* 536.

2 Dominique Allan, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31(579) *Sydney Law Review* 580.

3 *Clarke v Nationwide News Pty Ltd trading as The Sunday Times (No 2)* [2012] FCA 990 (4 April 2012).

4 Anna Chapman, 'Australian Racial Hatred Law: Some Comments on Reasonableness and Adjudicative Method in Complaints Brought by Indigenous People' (2004) 30 *Monash University Law Review* 27–48.

5 *Racial Discrimination Act 1975* s 18D.

6 *Eatock v Bolt* [2011] FCA 1103; (2011) 197 FCR 261.

7 *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16; (2004) 135 FCR 105.

8 *Clarke v Nationwide News*, above n 3, 133.

9 Ibid 208.

10 Ibid 212.

11 Ibid 217-218.

12 Ibid 352.

13 Emma Sykes, 'Racist Facebook page deactivated after outcry', *ABC Brisbane* (online), 9 August 2012 <http://www.abc.net.au/local/stories/2012/08/08/3563446.htm>.

14 Andrew Crook and Matthew Knott, 'Facebook page vilifying Aborigines 'breaks Australian law'' *Crikey,* August 8 2012 <http://www.crikey.com.au/2012/08/08/facebook-page-vilifying-aborigines-breaks-australian-law/>.

15 See for example, 'Facebook removes 'racist' page in Australia', *BBC News* (online), 9 August 2012 <http://www.bbc.co.uk/news/world-asia-19191595>; Rod McGuirk, ''Aboriginal memes' Facebook page deemed racist in Australia; Social Network Pressured to Take it Down', *The Huffington Post* (online), 8 August 2012 <http://www.huffingtonpost.com/2012/08/09/aboriginal-memes-facebook n_1758825.htm>.

16 Alison Caldwell, 'Material from offensive Aboriginal memes page still on Facebook', *ABC News AM,* August 10 2012 <http://www.abc.net.au/am/content/2012/s3564731.htm>.

17 Sykes, above n 13.

18 Rick Morton, 'Facebook gives OK to racial abuse page', *The Australian* (online), 8 August 2012 <http://www.theaustralian.com.au/australian-it/facebook-gives-ok-to-racial-abuse-page/story-e6frgakx-1226445151367>.

19 BBC News, above n 15.

20 ''Facebook should ban racist page about Aborigines', Stephen Conroy says', *news.com.au*, 9 August 2012 <http://www.news.com.au/technology/facebook-should-ban-racist-page-stephen-conroy-says/story-e6frfro0-1226446334179>.

21 Quoted in Crook and Knott, above n 14.

22 Ibid.

23 Asher Moses and Adrian Lowe, 'Contents removed from racist Facebook page', *The Sydney Morning Herald* (online), 8 August 2012 <http://www.smh.com.au/technology/technology-news/contents-removed-from-racist-facebook--page-20120808-23tr1.html>.

24 Michelle Starr, 'Facebook's racist blunder' *CNET Australia* <http://www.cnet.com.au/facebooks-racist-blunder-339341049.htm>; Andy Park, 'Facebook racial hate page taken down', *SBS News Australia* (online) <http://www.sbs.com.au/news/article/1679266/Facebook-racial-hate-page-taken-down>.

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