Myth-Buster:
The Andrew Bolt Racial Vilification Case

29 April 2014

Andrew Bolt was successfully sued in a class action brought by Pat Eatock on behalf of light-skinned Aboriginal people in the Federal Court in 2011 over comments he made in articles which suggested that they weren't genuine Aboriginal people and pretended to be Aboriginal to access certain benefits and entitlements.

This factsheet addresses some of the myths about the case and broader myths around how Federal racial vilification laws operate. You can read the Court's summary of the case here: http://www.fedcourt.gov.au/publications/judgments/judgment-summaries#20111103.

Myth #1: Racial vilification laws are an affront to free speech

After the court made its decision in this case, Andrew Bolt said "this is a terrible day for free speech in this country." Tony Abbott responded to the decision by saying "we should never do anything that restricts the sacred principle of free speech."

Free speech, like many other human rights, is not absolute. It can be legitimately limited to protect against the serious harm that can flow from some speech such as sexual harassment, threats to kills, misleading and deceptive conduct and defamation. Tony Abbott himself successfully sued a book publisher for defamation over false and offensive remarks about him, receiving a significant compensation order in 1999 for damage to his reputation.

Racial vilification laws provide important protections for many Australians who experience the harm of racist hate speech. Australia is obliged under international law to stop the promotion and incitement of racial discrimination and hatred. Research also confirms that racial discrimination and vilification can cause serious mental health impacts and other social harm. Racism is still a significant problem in Australia and complaints to the Australian Human Rights Commission about racial hatred increased by 59% in the last financial year.

The court in Mr Bolt's case found that the articles were reasonably likely to offend, insult, humiliate and intimidate fair-skinned Aboriginal people.

Importantly, the laws contain safeguards to make sure they are appropriately balanced with free speech. As explained below, Andrew Bolt could not rely on these free speech safeguards because of the way he wrote the articles and the errors contained in them.

Myth #2: Racial vilification laws create a right not to be offended in Australia

There is no general right not to be offended in Australia. The price of free speech is that we accept that people should generally be able to say offensive things. But there are limits to the kinds of offensive things we can say.

Our laws make it a criminal offence to use profane or indecent language or behave in an offensive or insulting way in public. Our sexual harassment laws make it unlawful to engage in unwanted or unwarranted sexual behaviour that is offensive.

The racial vilification laws make it unlawful to do things that are reasonably likely to "insult, offend, humiliate or intimidate" *on the grounds of race*. The Courts have interpreted the laws sensibly and have said the laws only apply to behaviour that has "profound and serious effects, not to be likened to mere slights".

The laws don't apply to anything done in private and they don't apply to offensive or insulting behaviour for reasons other than race.

Myth #3: Racial vilification laws stifle legitimate discussion on racial issues

The court in Mr Bolt's case made it very clear that it's not unlawful to publish articles that deal with racial identity or challenge the genuineness of someone's racial identity.

There are important free speech exemptions to make sure matters of public interest and justifiable freedom of expression are not limited. These exemptions protect conduct like:

- performances and artistic works;
- statements and discussions for academic, scientific, artistic or public interest purposes;
- fair and accurate reporting of matters of public interest; and
- fair comments on matters of public interest if the comment is the person's genuine belief.

To rely on the free speech exemptions, the offensive racial conduct must be done reasonably and in good faith.

In another case under racial vilification laws, a Pauline Hanson book that argued that Aboriginal people were unfairly favoured by social security policies was found to fall within the free speech safeguards as it was genuine political debate done reasonably and in good faith.

Mr Bolt's articles didn't fall within the exemption because the court found that his articles contained multiple errors of material fact, distortions of the truth and inflammatory and provocative language. This meant that he could not rely on any of the free speech exemptions.

The following extract from the court's decision provides one example:

> Mr Bolt said of Wayne and Graham Atkinson that they were "Aboriginal because their Indian great-grandfather married a part-Aboriginal woman" (1A-33). In the second article Mr Bolt wrote of Graham Atkinson that "his right to call himself Aboriginal rests on little more than the fact that his Indian great-grandfather married a part-Aboriginal woman" (A2-28). The facts given by Mr Bolt and the comment made upon them are grossly incorrect. The Atkinsons' parents are both Aboriginal as are all four of their grandparents and all of their great grandparents other than one who is the Indian great grandfather that Mr Bolt referred to in the article.

Myth #4: Racial vilification laws allow thin-skinned people to sue if they are offended

Even if someone is personally offended or insulted by conduct, there won't be a breach of racial vilification laws unless the conduct meets an *objective* standard.

Courts have clearly stated that the conduct in question must be judged from the perspective of a hypothetical reasonable or ordinary person from the relevant racial group. Courts have said that extreme or atypical reactions are not relevant. In other words, the conduct won't be unlawful if it only racially offends a thin-skinned person, but not a reasonable member of the relevant racial group.

Courts have said that the test should not be that of a reasonable or ordinary member of the general Australian community as that test would run the risk of reinforcing existing prejudice. In any event, the court in Mr Bolt's case found that even judged by the standard of an ordinary and reasonable

Australian reader generally (as opposed to a representative of the relevant racial group) the articles would still be reasonably likely to offend, insult, humiliate or intimidate on the grounds of race.

Myth #5: Federal racial vilification laws are criminal laws

The racial vilification provisions in the *Racial Discrimination Act* don't make racial vilification a criminal offence.

They are civil law provisions that make it unlawful to say or do something that insults, offends, humiliates or intimidates someone or a group of people on the basis of their race.

So unlike criminal laws, if a court finds that someone has breached the Federal racial vilifications laws, they can't be imprisoned or fined. Instead, the court can issue a statement that the conduct is unlawful, and make a range of orders, like a direction that material be taken down from websites, or an order that the person pay compensation.

Pat Eatock, who sued Andrew Bolt under these laws, did not seek compensation. She only sought a declaration from the court that the writing and publishing of the articles was unlawful, an apology, an order preventing republication, and for the articles to be taken down from websites. Mr Bolt was not prosecuted, convicted, fined, jailed or even made to pay compensation.

Myth #5: The people named in the articles should have sued for defamation, not under racial vilification laws

The people named in the articles probably had a good case to sue Andrew Bolt and his publisher for defamation. But that is no reason to remove the protection of racial vilification laws.

Defamation cases are a notoriously costly and unpredictable. They deal with damage to a person's reputation.

Racial vilification laws deal with public damage to racial tolerance. Pat Eatock was entitled to sue Andrew Bolt under racial vilification laws because of the racially offensive and intimidating conduct he engaged in.

Racial vilification laws provide an accessible dispute resolution mechanism. The first step in any action is to complain to the Australian Human Rights Commission. The Commission receives on average more than a hundred racial vilification complaints each year. The majority are resolved through mediation. Only a handful go on to court.

Myth #6: The best way to deal with racial vilification issues is through public debate, not through the law

Education to build a culture of tolerance and non-discrimination is incredibly important in the fight against racism. The law is one useful tool that helps to achieve this.

The law sets appropriate standards of conduct. People are more likely to speak out in public against racism if the law supports their position. People are less likely to engage in racial vilification if the law makes it unlawful.

In this way, the law is an important tool that complements education and other strategies to combat racism.

It is also important to provide access to legal remedies for victims of racial vilification. Groups that experience racial vilification are often unable to participate in the public debate on an equal footing with others and racial vilification can have the perverse impact of causing affected people and groups to retreat from public participation. The Andrew Bolt case involved Australia's most widely read columnist unreasonably and in bad faith engaging in conduct reasonably likely to racially offend, insult, humiliate and intimidate light-skinned Aboriginal people. The law provided an important tool to address this in a way that public debate couldn't.

Further, as set out above, Federal racial vilification laws provide an accessible dispute resolution mechanism. The vast majority of complaints are resolved without going to court. There are only a handful of cases brought in court each year.