

Redfern Legal Centre



**Submission on proposed
Amendments to the
Racial Discrimination Act 1975 (Cth)
Repeal of Sections 18B, 18C, 18D and 18E**

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Introduction – Redfern Legal Centre

Redfern Legal Centre (RLC) is an independent, non-profit, community-based legal and human rights organisation with a prominent profile in the Redfern area.

RLC has a particular focus on human rights and social justice. Our specialist areas of work are domestic violence, tenancy, credit and debt, employment, discrimination and complaints about police and other governmental agencies. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

RLC's Experience

In the year of 2012-2013, 5.7% of RLC's clients identified as being Aboriginal or Torres Strait Islander and 28.6% were of culturally and linguistically diverse (CaLD) backgrounds.

Our clients bring to us their life experience of discrimination and vilification. Their disadvantage is frequently the outcome of historic and continuing prejudice and marginalisation. Racial profiling and stereotyping continues to influence how they are provided with services, education, employment, access to premises and policing as well as to how they are treated by neighbours and others in the community.

RLC's experience includes advising and assisting individuals with complaints about racial vilification and race discrimination under state and federal anti-discrimination laws.

Proposed Amendments to the *Racial Discrimination Act*

RLC understands that the amendments proposed to the current *Racial Discrimination Act* in the *Freedom of Speech (Repeal of S 18C) Bill 2014* “Bill” involve the removal of the current ss 18B, 18C, 18D and 18E and the insertion of a new section which would make it unlawful for a person do an act in public which is reasonably likely to vilify or intimidate another person or group of persons, on the basis of the person or persons “race, colour or national or ethnic origin”. “Vilify” is defined as “inciting hatred” against a person or group of persons and “intimidate” is defined as causing “fear of physical harm”. It is not clear whether the fear would need to be of physical harm by the person doing the act of vilification or could be of it being done by others.

It is noted that the section includes a broad exception, stating that it does not apply to “words, sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic or academic or scientific matter”. RLC understands that these amendments are proposed for the purpose of promoting freedom of speech.

The Bill also seeks to repeal ss 18B and 18E. Section 18B has provided that where an action is done for more than one purpose and one of those reasons is the race, colour or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act) then, the act is taken to be done because of the person's race, colour or national or ethnic origin. Section 18E has provided that a person can be vicariously liable for the unlawful acts of their employee or agent acting within their duties. Section 18D has provided for exemptions where the unlawful act is done reasonably and in good faith.

RLC’s Views on the Proposed Amendments

RLC recognizes the importance of freedom of speech in a democratic society and acknowledges freedom of speech as a fundamental human right. The protection of this freedom, however, must be balanced against other fundamental human rights and freedoms, such as the right to be protected from discrimination and harassment on the basis of individual characteristics such as

race. RLC believes that the right to freedom of speech should not form the basis for a public license to discriminate, vilify or defame individuals on the basis of their race, colour, origin or ethnicity.

Case study I

An Aboriginal woman attended RLC in a distressed state. She instructed us that on the previous day she had been travelling on a bus with her daughter and a friend, when she was subjected to a tirade of racist abuse from another passenger. Words said included “*And you, you black c—. I bet it smells. Your face looks like your c—. All you black c—’s let your children have sex with your husbands.*” In this instance the person also said they had a knife and would use it. Our client called the police, but by the time the police attended the perpetrator had left the bus. Our client was disappointed that neither the bus driver or fellow passengers had offered her support or challenged the perpetrator.

RLC believes that the current ss 18B, 18C, 18D and 18E of the *Racial Discrimination Act* achieve a positive balance between the protection of our right to freedom of speech, and the protection of other right to be free from discrimination, harassment and vilification on the basis of characteristics such as race. The current s 18D is particularly important to achieving this balance, by providing an exception from the effect of s 18C for “*anything said or done reasonably and in good faith...in the performance, exhibition or distribution of an artistic work...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...in making or publishing...a fair and accurate report of any event or matter of public interest, or....a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment*”. It is noted that the Federal Court of Australia in its decision in *Eatock v Bolt* [2011] FCA 1103 gave extensive consideration to the application of s 18D of the *Racial Discrimination Act* to the articles which was the subject of the complaint under s 18C and ultimately found that the articles contravened s 18C after concluding that the comments made in that article were not based in truth (at [378]-[380]) and “*the language utilized in the Newspaper Articles was inflammatory and provocative...the use of mockery and derision was extensive*” (at [412]). As this judgment and the words of s 18D themselves make clear, fair, accurate reporting and discussion of matters that might otherwise contravene s 18C of the *Racial Discrimination Act* will not be unlawful, by reason of s 18D.

RLC believes that, in its current form, the proposed *Freedom of Speech (Repeal of S 18C) Bill* does not successfully achieve this balance. The proposed exception clause is sufficiently broad to allow the public airing not only of racially discriminatory views and attitudes irrespective of whether those views are made in good faith or otherwise, are accurate or inaccurate, true or untrue. With such a broad exception clause, the proposed amendment provides little in the way of meaningful protection for a person's right to freedom from discrimination, harassment and vilification on the grounds of race.

RLC recognizes that the proposed amendments to the *Racial Discrimination Act* do not affect other legal avenues which individuals may have available to them to address public, racist speech which is damaging and untrue, such as an action in defamation. The point of providing remedies under the *Racial Discrimination Act* in relation to racial vilification is because those other remedies have been ineffective in addressing the real damage done by hate speech to the fabric of the society, to mutual respect within that society and in particular to people within minority groups within the community. In addition, it has been the experience of RLC that these remedies are extremely difficult for individuals to access and to navigate, particularly individuals who are on a low income or who face other socio-economic barriers in accessing our legal system. The current *Racial Discrimination Act* provides an accessible and cost-effective avenue for individuals to resolve concerns about racial discrimination and racial vilification, being the investigation and conciliation service offered by the Australian Human Rights Commission. It also codifies the point at which civilized and reasonable, if robust debate, trips over into mere expression of prejudice in the public domain. In that regard it provides some certainty.

Finally, RLC is concerned by the manner in which the proposed amendment limits the matters which may be characterised as "racial vilification" to acts done with the likelihood of inciting hatred or cause a fear of physical violence. It has been the experience of RLC that racism, unfortunately, takes many forms and that racist remarks made in public are of themselves enough to create a hostile environment within the community. Being publicly subjected to comments that hurt, humiliate and offend effectively impinges on how a person engages with others in the community and perceives themselves as included within the society. This has long term consequences for the cohesiveness of the society..

Case Study 2

Our client was an international student of African appearance, although a citizen of north America. She lived in city high-rise apartment. From the day she moved in, the staff on the service desk in the foyer of her building made comments to the effect that a black person could not afford to live in the building, a black person was not wanted in the building, a black person must be in an overcrowded apartment, and that black girls look like men. They also referred to her as a nigger. She reported the comments were loud enough to be heard by other users of the foyer.

RLC notes that in order for an act to be considered as one reasonably likely to vilify a person or group of persons it has to be reasonably likely to incite hatred. *McInnes FM in Stokes & Ors v Royal Flying Doctor Service & Anor (no 2) [2003] FMCA 177* said:

It is interesting to note that there are very few cases relating to the interpretation of the word "incite" arising out of human rights legislation. I was referred however to the decision of the Human Rights and Equal Opportunity Commission in the matter of Shaikh v Campbell & Navona Pty Ltd [1998] HREOCA 13 (24 April 1998). In that case in referring to section 17 of the RDA the Commission stated at page 8 the following:

" ... In order to make out a case under this section the complainant has to show incitement, assistance or promotion of someone carrying out unlawful acts. Incitement denotes encouragement in an active way. ..."

The word "hatred" is not itself defined within the *Racial Discrimination Act*. The definition of hatred given at <http://www.collinsdictionary.com/dictionary/english/hatred> is as a noun "a feeling of intense dislike; enmity".

The Bill arises from dissatisfaction from the decision of the Court in *Eatock v Bolt [2011] FCA 1103*. It must be presumed that the intention therefore is to establish that the conduct found to have taken place in that instance would be excluded from the coverage of the proposed prohibition in the Bill and not be considered to be included within incitement to racial hatred. The conduct in that matter was declared by the Court as:

(a) the articles were reasonably likely to offend, insult, humiliate or intimidate some Aboriginal persons of mixed descent who have a fairer, rather than darker, skin and who by a combination of descent, self-identification and communal recognition are and are recognised as Aboriginal persons, because the articles conveyed imputations to those Aboriginal persons that:

(i) there are fair-skinned people in Australia with essentially European ancestry but with some Aboriginal descent, of which the individuals identified in the articles are examples, who are not genuinely Aboriginal persons but who, motivated by career opportunities available to Aboriginal people or by political activism, have chosen to falsely identify as Aboriginal; and

(ii) fair skin colour indicates a person who is not sufficiently Aboriginal to be genuinely identifying as an Aboriginal person.

Commonsense and everyday experience in the community tells us that it is re-enforcement and continuation of adverse perceptions that underlie unlawful discrimination, racial hatred and in turn racial violence.

Beyond the direct experience of RLC, the litigation following the April 2005 Cronulla riots provides an example of the manner in which such remarks can have unexpected and violent consequences. It is for this reason that protection against racist hate speech in all its forms – balanced by appropriate protections for freedom of speech – should in the view of RLC be maintained in the *Racial Discrimination Act*.

Recommendation

Section 18C together with the section 18D be retained.

The Bill still requires that the act, which incites hatred or causes a fear of violence, be done because of the race, colour or national or ethnic origin of that person or that group of persons. It would be unfortunate if the interpretation of the repeal of s18B led to a situation where the that act had to be done solely because of the race, colour or national or ethnic origin of that person or that group of persons and not as currently provides, where it could be done for one or more purposes.

Recommendation:

Section 18B be retained.

The Bill also removes vicarious liability from employers or principals who require or allow their employees or agents to make such acts within the course of their duties.

Case Study 3

A woman and her companion attending a shopping Centre are subjected to racial abuse, in front of members of the public, from a security guard. Increasingly mainstream services including government agencies, health services, banking and major grocery suppliers are situated within private marketplaces policed by security guards. Access to these marketplaces are essential. In this case as others, it is difficult to determine who is responsible for the conduct of security guards within the various subcontracting of the shopping centre management. Each party tries to say it is not their responsibility for how the guard conducts himself. Clearly this is not acceptable.

Recommendation:

Section 18E be retained.

Summary

It is the view of RLC that the existing ss 18B, 18C, 18D and 18E of the *Racial Discrimination Act* provide are effective in protecting individuals against racial vilification, in a manner that does not burden freedom of speech. It is therefore the view of RLC that the *Racial Discrimination Act* should be maintained in its existing form.