

**SUBMISSION TO THE HUMAN RIGHTS POLICY BRANCH
ATTORNEY-GENERAL'S DEPARTMENT**

in relation to proposed amendments to the

RACIAL DISCRIMINATION ACT (CTH) 1975

prepared by

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on behalf of

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BRIMBANK MELTON COMMUNITY LEGAL CENTRE
FLEMINGTON KENSINGTON COMMUNITY LEGAL CENTRE INC.
FOOTSCRAY COMMUNITY LEGAL CENTRE INC.
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Human Rights Policy Branch
Attorney-General's Department
3–5 National Circuit
BARTON ACT 2600

30 April 2014

By email s18consultation@ag.gov.au

Re: Proposed Amendments to Part IIA of the Racial Discrimination Act 1975

Thank you for the invitation to comment on the proposed amendments to the *Racial Discrimination Act 1975* (Cth).

We are writing on behalf of the Western Suburbs Legal Service, Brimbank Melton Community Legal Centre, Flemington Kensington Community Legal Centre, Footscray Community Legal Centre, and Wyndham Legal Service.

About Community Legal Centres

There are 51 community legal centres (CLCs) in Victoria that provide free legal services to the public. CLCs are committed to working towards a just and equitable legal system by providing high quality, free, independent legal advice and representation to clients who face economic and social disadvantage and who are marginalised from the justice system. CLCs also undertake important preventative work through legal education and law reform.

The five CLCs making this submission are all located in the Western suburbs of Melbourne, where the proportion of community members from non-English speaking backgrounds is high. We interact with clients and community members who have direct experiences of racism on a regular basis. We have also undertaken, both individually and collaboratively, extensive systemic work on the issue of racial discrimination including education, research, policy and law reform and strategic litigation.

On Sections 18C, 18B, 18D, and 18E

Since 1995 section 18C has provided for a method in which members of the community who have experienced racial discrimination can be given recourse. The vast majority of complaints made under 18C do not reach court. According to the Australian Human Rights Commission 54% of complaints made in 2012/13 were resolved at conciliation and less than 3% of racial hatred complaints reached court¹. The remedy generally comes in the form of an apology made following conciliation.

By providing a neutral forum in which grievances can be aired and a solution negotiated the section has played both a remedial and educational role. The process of finding a remedy and the usual remedy applied are indicative of how the section has assisted in promoting harmony and understanding within the Australian community so as to fulfil the purpose of the Racial Discrimination Act to eliminate racial discrimination.

Intimidating, offensive, humiliating, and insulting public comments made on the basis of a person's race, colour or national or ethnic origin reduce the capacity for people to engage in the public debate necessary for a functioning democracy and an open and tolerant society. An attack on a person done on this basis is an attack on the dignity of a person for it seeks to damage an immutable quality of that person. We believe expressions that are likely to insult, humiliate, offend or intimidate a reasonable member of an Australian community that are done unreasonably, in bad faith, and are unfair and

¹ <https://www.humanrights.gov.au/glance-racial-vilification-under-sections-18c-and-18d-racial-discrimination-act-1975-cth>

factually inaccurate, should be regarded as contrary to the standards of the Australian community as a whole and that it is appropriate for our legislation to reflect this.

All rights have limits, including the right to free speech. Sections 18B-18E as they stand provide for one extremely limited restriction to free speech. There are many other limits to freedom of expression found in Australian law such as defamation, copyright, obscenity, sedition, contempt of court, and incitement to violence. It is notable that a breach of these laws carries a far heavier penalty than does a breach of 18C, and yet there are no proposals to amend or repeal these laws. We question on what basis the Attorney-General believes that our racial discrimination law needs to be amended.

As community legal centres we support public policy that recognises and seeks to redress the power imbalances present in our community. This necessarily includes legislation that seeks to combat symbolic violence such as racial discrimination. Section 18C is a recognition of a fundamental part of the social pact in that it seeks to protect the right of every person in our society to live without fear of an attack on their dignity.

The restriction of free speech created by section 18C is limited, but prudential, as it recognises that allowing racial hatred to be expressed unchecked may silence and marginalise minority groups and allow for racist attitudes to grow. Far from driving racial hatred underground, the section ensures racism can be confronted without and/or before escalation to physical violence.

In order to remain a tolerant and understanding community our legislation should continue to provide a dispute resolution framework that can combat the power imbalances inherent in racism.

- *In our view sections 18B, 18C, 18D and 18E should be retained as they provide a measured response to the need for the Federal Government to reject racially discriminatory behaviour and provide recourse and agency to those individuals and groups whose dignity has been attacked without justification.*

On the Proposed New Laws

The Attorney-General has claimed that the proposed amendments will create “for the first time ever, a [Commonwealth] prohibition on racial vilification”². This is, with respect, a disingenuous claim. Vilify has been narrowly defined in the proposed changes as meaning “to incite hatred against a person or a group of persons”. The ordinary meaning of vilify is “to depreciate with abusive or slanderous language; to defame or traduce; to speak evil of”³.

The tortured definition of vilify included in the proposed new section ignores the effect racial vilification has on a targeted individual and instead places the entire focus on a third party. The proposed amendments in effect create a prohibition against the incitement of racial hatred rather than a prohibition against vilification. The definition proposed will be extraordinarily difficult to make out.

The Attorney-General has also stated that he wishes to attack the behaviour that is at the heart of racism by prohibiting conduct that incites racial hatred.⁴ Seeking to prevent the incitement of racial hatred, but not racial hatred itself, misunderstands what racism is and what it seeks to do.

Racist language is itself a form of violence that aims to assert and entrench the power imbalances that exist in society. Placing the focus on how a third party is affected by racism will only re-inscribe racist attitudes.

- *In the event that 18B, 18C, 18D, and 18E are repealed, we submit that the proposed definition of vilification mistakenly places the focus on how an act is likely to effect a neutral*

² Senate Hansard, 25 March 2014.

³ Oxford English Dictionary, Oxford University Press, Oxford, 2014.

⁴ Senate Hansard, 26 March 2014.

third party, rather than dealing with the likely effect of vilification on the person or group of persons who have been vilified. Vilify should be defined in the ordinary dictionary sense.

Intimidate has also been defined narrowly in the proposed change. It has been defined as “to cause fear of physical harm”. To intimidate is ordinarily defined as “to render timid, inspire with fear; to overawe, cow; to force to or deter from some action by threats or violence”⁵.

- *In the event that 18B, 18C, 18D, and 18E are repealed, we submit that the redefinition of the word intimidate in the proposed amendments needlessly privileges physical intimidation above all other forms of intimidation. Intimidation also includes behaviour that causes psychological and social harm. Intimidation should be defined in the ordinary dictionary sense to reflect this.*

The proposed subsection 3 states that whether or not an act done because of the race, colour or national or ethnic origin of a person is “reasonably likely” to vilify or intimidate another person is to be determined “by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community”. This section also misunderstands the nature of racial discrimination and has the effect of reinscribing racist attitudes into Australian law.

When a person is racially discriminated against, the intended audience is a person or persons’ of that race. Therefore, what is and is not racist in a particular case should be determined by asking what the likely reaction of an ordinary and reasonable member of the group in question would be. The proposed amendment instead states that the standards of an ordinary reasonable member of the Australian community will determine what is reasonably likely to vilify or intimidate. This new approach recognises and then dismisses all differences within the community. An ordinary reasonable member of the Australian community may have no understanding of how particular language use would be experienced by an ordinary reasonable member of a minority group for instance. The proposed new approach, which flattens and obscures the many different standards and experiences to be found within the Australian community, will significantly reduce the likelihood that behaviour considered reasonably likely to vilify or intimidate by a reasonable member of a particular group is in fact prohibited under Australian law.

- *In the event that 18B, 18C, 18D, and 18E are repealed, we submit that subsection 3 should be amended so that what is reasonably likely to vilify or intimidate is determined by making an objective assessment as to the likely reaction of an ordinary and reasonable member of the particular group in question.*

Subsection 4 creates an exception to the new prohibition. The exception is striking in its breadth. It is difficult to imagine any racially discriminatory acts done in public that would not be rendered exempt under this section.

- *In the event that 18B, 18C, 18D, and 18E are repealed, we submit that if the proposed amendments are to have any purpose at all, the exception in (4) should be narrowed to also include in some form the requirements presently found under section 18D. For instance, that any vilifying or intimidating act was done reasonably, in good faith, and was fair and accurate.*

We also note the complete repeal of 18B. We again question the basis on which this section has been removed. The section provides for clarity in interpretation. Without it, the new sections may condone an act that was only partly done because of the race of a person because this was not the dominant or primary reason for the act.

- *Section 18B should remain.*

⁵ Oxford English Dictionary, Oxford University Press, Oxford, 2014.

We also note in passing that the Racial Discrimination Act was enacted in order to give effect to Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination. As we interpret the new provisions they will no longer give effect to Australia's obligation to ensure there are effective protections and remedies made available for victims of racial discrimination.⁶

Summary of Concerns

Sections 18B-18E were introduced in response to the National Inquiry into Racist Violence, the Australian Law Reform Commission Report into Multiculturalism and the Law, and the Royal Commission into Aboriginal Deaths in Custody. The Act sought to close a gap that had been found in the legal protections available to victims of racist behaviour and aimed to promote and protect racial harmony in Australia.⁷⁸ By contrast the proposed amendments appear to have been made without any investigation having been made into the efficacy of the current law. We believe sections 18B-18E should remain part of the Act since there is no evidence to demonstrate the law has been harmful and/or not efficacious. It is bad public policy to amend a law without an evidentiary basis. There is no way to determine what the far-reaching effects of such a change will be without a detailed analysis of the present law.

The proposed changes to the Racial Discrimination Act will, if passed, cripple the existing protections and create a new prohibition so narrowly defined and with such broad exceptions that it cannot serve as a tool to fulfil the stated purpose of the Act, to eliminate racial discrimination. The changes proposed fail to recognise the impact of racism on the health of individuals and the community as a whole. Instead of asserting that racism has no place in Australian society, the changes will reinscribe racist attitudes into our law via the unique misjudgement that what is and what is not racist is to be determined by the standards of the Australian community as a whole and not determined "by the standards of any particular group within the Australian community".

We submit that if sections 18B-18E are to be repealed then the proposed new sections should be amended so that words are given their ordinary meaning. What is likely to vilify or intimidate should be determined by reference to the likely reaction of an ordinary and reasonable member of the group in question. The exception contained in the proposed new laws should also be narrowed to include the requirement that racially discriminatory acts are only justifiable if the act was reasonable, done in good faith, and was fair and accurate.

⁶ International Convention on the Elimination of All Forms of Racial Discrimination, Article 6.

⁷ House of Representatives Hansard, 15 November 1994.

⁸ Explanatory Memorandum to the Racial Hatred Bill 1994.