



**Reconciliation**  
A U S T R A L I A

**30 April 2014**

**Submission to the Attorney-General**

*Proposed amendments to the Racial  
Discrimination Act 1975 (Freedom of  
Speech (Repeal of S.18C) Bill 2014)*

# 1. Introduction

Reconciliation Australia is the national organisation promoting reconciliation between the broader Australian community and Aboriginal and Torres Strait Islander peoples. Our vision is to build an Australia that is reconciled, just, and equitable for all. To do so, we are dedicated to building relationships, respect and trust between Aboriginal and Torres Strait Islander peoples and other Australians. We believe a reconciled Australia is one where:

- There are strong two-way relationships between Aboriginal and Torres Strait Islander and non-Indigenous Australians;
- Aboriginal and Torres Strait Islander history, culture and rights are a proud part of our everyday life;
- Our national wellbeing is enhanced by Aboriginal and Torres Strait Islander strength and prosperity;
- The collective rights of Aboriginal and Torres Strait Islander peoples are recognised and respected.

We believe that stronger relationships, built on shared knowledge and respect, are central to Aboriginal and Torres Strait Islander people controlling their life choices and fully participating in the economic and social opportunities enjoyed by the wider community. We aspire to enable all Australians to contribute to reconciliation and to breakdown stereotypes and discrimination.

As the national organisation promoting reconciliation, Reconciliation Australia condemns all forms of racism. Racism destroys the confidence, self-esteem and health of individuals, undermines efforts to create fair and inclusive communities, breaks down relationships and erodes trust. Racism perpetuates inequalities and can directly or indirectly exclude people from accessing services and opportunities.

The *Racial Discrimination Act 1975* (RDA) currently ensures all Australians are protected from discrimination on the grounds of race, colour, descent or ethnic origin. We believe that any changes to the RDA that weaken protections from racial vilification would pave the way to a less reconciled, just and equitable Australia. Our view is that in their present form the proposed amendments put forward by the Attorney-General would:

- significantly narrow the scope of potential unlawful conduct under the RDA and broaden the defence available to a person who is alleged to have done an unlawful act;
- erode, rather than strengthen, racial vilification laws; and
- place greater value on the right to free speech at the expense of protections against racial discrimination.

As the RDA currently provides strong and effective protections against racial discrimination, and the proposed amendments would significantly weaken the current protections, we strongly oppose the proposed changes to the RDA and recommend that the Act remains unchanged. If the Federal Government is committed to reviewing the RDA to strengthen racial vilification laws, we believe there are various ways the proposed amendments could be better designed to strengthen—or at least preserve—protections under the RDA.

In **Section 3** of this submission, we consider the proposed changes to sections 18C and 18D of the RDA within the context of the broader impact and prevalence of racism, particularly for Aboriginal and Torres Strait Islander peoples and discuss why racism remains a major barrier to reconciliation and to governments seeking to close the gap on health, education and employment outcomes for Aboriginal and Torres Strait Islander people. We believe any moves to reduce protections against racial vilification in Australian law have the potential to greatly undermine our national efforts towards reconciliation and to addressing gaps in socio-economic outcomes for Aboriginal and Torres Strait Islander peoples.

In **Section 4** we measure the success of the RDA over the past 20 years, including how the Act currently balances an individual's right to protection from racial discrimination, with another individual's right to freedom of expression. In this section, we also emphasise the importance of community consultation and support for change. We conclude that the RDA, in its current form, ensures effective protection against racial discrimination and effectively balances this right with freedom of speech. Further, we see little community support for change and encourage the government to genuinely reflect the views sought through this consultation process in its response. We believe a reconsideration of the proposed plans to amend the RDA would be seen by the vast majority of Australians as a positive act of leadership and send a positive message of unity, reconciliation and hope to the broader Australian community.

We oppose the proposed amendments and strongly recommend the Federal Government reconsiders implementing the draft *Freedom of Speech (Repeal of S. 18C) Bill 2014*. However, if the government would like to review the RDA to genuinely strengthen racial vilification laws, in **Section 5** we suggest ways the exposure draft bill could be amended to go some way towards this goal, while concurrently protecting free speech.

## 2. Summary of Recommendations

**Recommendation 1:** That sections 18C, 18B, 18D and 18E of the *Racial Discrimination Act 1975* are **not** repealed and the Act remains unchanged.

**Recommendation 2:** The Government should only consider changes to the *Racial Discrimination Act 1975* that genuinely strengthen legal protections against racial vilification. Additionally, any changes must be supported by the vast majority of the Australian community, and most importantly, by minority groups most affected by racism.

**Recommendation 3:** If the *Racial Discrimination Act 1975* is changed, we recommend that at the very minimum the proposed bill is amended to incorporate the following:

- a) Acts which **insult and humiliate** as well as intimidate and vilify are included in the draft bill;
- b) The definition of vilify is changed to be more consistent with its ordinary meaning and accepted community standards. For example: ‘vilify’ is “to depreciate or disparage with abusive or slanderous language; to defame, revile or despise”.
- c) The definition of intimidate **includes** psychological and mental harm and is not limited to physical harm only. For example the definition of ‘intimidate’ could borrow from criminal legislation and use the language of causing a reasonable apprehension of mental or physical harm, in the sense of injury to a person in respect of his/her person, property, business, employment, source of income or emotional or mental state.
- d) The scope of any free speech defence should be limited to communications that are made:
  - (i) for a genuine purpose;
  - (ii) in the public interest;
  - (iii) as a fair comment; and
  - (iv) as a genuinely held belief.The above concepts being well developed doctrines under defamation law.
- e) The standards against which racial discrimination is assessed should remain the standards of the particular group which has experienced discrimination.

### 3. Reconciliation and racism

Reconciliation Australia believes that racism harms individuals and directly damages the relationship between Aboriginal and Torres Strait Islander Australians and the wider community. It is a significant barrier to achieving our vision for a reconciled, just and equitable Australia.

#### The prevalence and impact of racism

Modern Australia prides itself on creating a fair, equal and welcoming society. Our First Peoples represent the world's oldest continuing cultures, and millions of Australians from diverse cultural backgrounds now call Australia home. The cultural diversity of Australia enriches us all. Despite this, there continues to be high levels of racism in Australian society and for many Australians from different backgrounds, racism is an ongoing reality in their lives.

Discussing racism can be uncomfortable and even resented, yet the fact remains that too many Australians and too many Aboriginal and Torres Strait Islander people continue to experience racism on a regular basis. The University of Western Sydney's Challenging Racism Project found that around 20 per cent of Australians have experienced race hate talk, in the form of verbal slurs or abuse; about 11 per cent have been excluded from the workplace or social activities based on their race; and about five per cent have been physically assaulted because of their race.<sup>1</sup> In 2013, the Scanlon Foundation found a marked increase in experiences of discrimination, with 19 per cent of respondents reporting they had been discriminated against. This was the highest level recorded since the survey began. Similarly, the Australian Human Rights Commission reported a 59 per cent increase in the number of complaints citing racial hatred in 2012-13 compared to the previous year.<sup>2</sup>

For Aboriginal and Torres Strait Islander Australians, racism and racial discrimination are common experiences. In 2008, over one-quarter (27 per cent) of Aboriginal and Torres Strait Islander people reported experiencing racial discrimination in the preceding 12 months.<sup>3</sup> Aboriginal and Torres Strait Islander peoples reported that they most commonly experience discrimination in the general public, by police, security, personnel or courts of law and at work or when applying for a job.<sup>4</sup> A more recent survey by the National Tertiary Education Union in 2011 found that 71.5 per cent of its Aboriginal and Torres Strait Islander members had experienced racial discrimination in the workplace.<sup>5</sup> Similarly, the Darwin Region Urban Indigenous Diabetes study, completed in 2004, found that 70 per cent of Aboriginal and Torres Strait Islander participants reported experiences of interpersonal racism, mainly from service providers and in employment and public settings.<sup>6</sup>

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<sup>1</sup> University of Western Sydney (2012) Challenging Racism: The Anti-Racism Research Project – National level findings.

<sup>2</sup> Australian Human Rights Commission (2013) Australian Human Rights Commission Annual Report 2012-2013. Sydney.

<sup>3</sup> Australian Bureau of Statistics (2010) The Health and Welfare of Aboriginal and Torres Strait Islander Peoples, Oct 2010 (ABS catalogue number 4704.0) Canberra: Australian Bureau of Statistics.

<sup>4</sup> *ibid.*

<sup>5</sup> National Tertiary Education Union (2011) I'm not a Racist, But... Retrieved 4 January from: <http://www.nteu.org.au/library/view/id/2069>

<sup>6</sup> Paradies, Y and Cunningham, J (2009) 'Experiences of racism among urban Indigenous Australians: findings from the DRUID study'. *Ethnic and Racial Studies*.32.3:570.

Not only is racism far too prevalent in Australian society but it has highly negative effects on those who experience it. Medical research clearly links experiences of racism with reduced health outcomes. These negative health outcomes are not only the result of racist intimidation causing fear of ‘physical harm to a person or group of persons’, but also racism encountered daily through speech, writing and attitudes.

The most frequently recorded impacts of racism include “feeling angry and frustrated” and “feelings of not belonging to the local community”.<sup>7</sup> Other effects include headaches, long-term effects on education and work, pervading fear of being attacked verbally or physically, paranoia, lack of trust, and post-traumatic stress.<sup>8</sup> Racial slurs, which to non-victims can be seen as light-hearted or insignificant, cause real harm especially when they are incessant and ongoing. The cumulative effect of words and attitudes that undermine an individual’s identity and self-worth directly affects their desire to engage with a society that rejects them. This in turn means that they are unlikely to function at capacity in everyday society.

There is evidence that the depth of racist experiences suffered by Aboriginal and Torres Strait Islander peoples may be greater than that experienced by other groups in society.<sup>9</sup> Experiences of racism for Aboriginal and Torres Strait Islander people are associated with anxiety, depression, suicide risk and overall poor mental health.<sup>10</sup> Fifty five per cent of Aboriginal people who participated in a Victorian study reported experiencing high or very high levels of psychological distress as a result of racism and that the levels of psychological distress increased as the volume of racism increased.<sup>11</sup> There are also emerging links between racism and diabetes, obesity, high blood pressure and drug and alcohol abuse for Aboriginal and Torres Strait Islander people.<sup>12</sup>

In addition to negative health impacts, racism has also been found to have a negative influence on the education, employment and incarceration rates of Aboriginal and Torres Strait Islander people. The Closing the Gap Clearinghouse cites racism as one of a number of multi-faceted causes of lower Aboriginal and Torres Strait Islander employment rates and suggests that reducing discrimination against Aboriginal and Torres Strait Islander people, including through cross-cultural training, is likely to be effective at closing the employment gap.<sup>13</sup> Discrimination also influences Aboriginal and Torres Strait Islander attendance and achievement at school and many researchers report that schools with an inclusive and safe environment, free from racism, are more likely to have higher attendance and retention

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<sup>7</sup> Priest, NC., Paradies, Y., Gunthorpe, W., Cairney, SJ., Sayers, SM (2011) ‘Racism As a Determinant of Social and Emotional Wellbeing for Aboriginal Australian Youth’, *The Medical Journal of Australia*. 194.10: 546-50.

<sup>8</sup> Mansouri, F., Jenkins, L., Morgan, L., Taouk, M (2009) *The Impact of Racism on the Health and Wellbeing of Young Australians*, The Institute for Citizenship and Globalisation, Faculty of Arts and Education, Deakin University.

<sup>9</sup> *ibid.*

<sup>10</sup> Priest, NC., Paradies, Y., Gunthorpe, W., Cairney, SJ., Sayers, SM (2011) ‘Racism As a Determinant of Social and Emotional Wellbeing for Aboriginal Australian Youth’, *The Medical Journal of Australia*. 194.10: 546-50.

<sup>11</sup> Ferdinand, A., Paradies, Y. & Kelaher, M (2012) *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: The Localities Embracing and Accepting Diversity (LEAD) Experiences of Racism Survey*, Melbourne: The Lowitja Institute.

<sup>12</sup> VicHealth (2008) ‘Ethnic and race-based discrimination as a determinant of mental health and wellbeing’, accessed 9 April 2014 from: <http://www.vichealth.vic.gov.au/en/Publications/Freedom-from-discrimination/Ethnic-and-race-based-discrimination-as-a-determinant-of-mental-health-and-wellbeing.aspx>

<sup>13</sup> Gray M, Hunter B & Lohar S (2011) *Increasing Indigenous employment rates. Issues Paper no.3. Produced for the Closing the Gap Clearinghouse*. Canberra: Australian Institute of Health and Welfare & Melbourne: Australian Institute of Family Studies

rates.<sup>14</sup> The 1991 Royal Commission into Aboriginal Deaths in Custody found that “Aboriginality played a significant and in most cases a dominant role” in Aboriginal peoples being in custody and dying in custody.<sup>15</sup> Twenty years on, the *Doing Time – Time for Doing: Indigenous youth in the criminal justice system* report found that young Aboriginal and Torres Strait Islander people are far more likely to come in contact with the criminal justice system and remain in custody. Further, the report found that a number of serious and complex factors contribute to the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system and that many submissions to the inquiry pointed to the role of racism and discrimination.<sup>16</sup>

Due to the complex and wide-ranging impacts of racism, racial discrimination remains a barrier to governments seeking to close the gap on health outcomes and to improve economic participation through employment and education for Aboriginal and Torres Strait Islander people. Strong and effective protections against racial discrimination are a critical foundation for policies and programs directed towards addressing the disadvantage experienced by Aboriginal and Torres Strait Islander people.

### **Racism as a barrier to reconciliation**

Reconciliation is about building relationships, respect and trust between Aboriginal and Torres Strait Islander people and other Australians to create a just and equitable Australia for everyone. Continuing occurrences of racism towards Aboriginal and Torres Strait Islander peoples today undermine efforts towards reconciliation. Racism breaks down relationships, erodes trust and is disrespectful. It does more than hurt people’s feelings. It denies Aboriginal and Torres Strait Islander peoples the right to fully participate in the social and economic life of the nation. Direct racism discourages Aboriginal and Torres Strait Islander people from accessing health, education and employment services, and on a systematic level racial discrimination denies Aboriginal and Torres Strait Islander people access to power, resources and opportunities, perpetuating inequalities between us.

For Aboriginal and Torres Strait Islander peoples, the experience of racism today has a strong historical context. Racial discrimination against Aboriginal and Torres Strait Islander peoples has been apparent and ongoing throughout Australian history. Beginning with the British declaration that Australia was *Terra Nullius* or “land that belongs to no one” and continuing through to racially discriminatory policies to assimilate Aboriginal and Torres Strait Islander peoples, our history has been built on and marked by mistrust and injustice. These past experiences for Aboriginal and Torres Strait Islander people continue to have multiple and significant effects and the historical legacy of discriminatory policies and practices has contributed to the devastating levels of Aboriginal and Torres Strait Islander disadvantaged experienced today.

Today racism continues to damage community cohesion and the relationship between the broader Australian community and Aboriginal and Torres Strait Islander Australians. Through

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<sup>14</sup> Helme S & Lamb S (2011) Closing the school completion gap for Indigenous students. Produced for the Closing the Gap Clearinghouse. Canberra: Australian Institute of Health and Welfare & Melbourne: Australian Institute of Family Studies.

<sup>15</sup> Royal Commission into Aboriginal Deaths in Custody National Report: Overview and Recommendations (1991) (Commissioner Elliott Johnson). Canberra: Australian Government Publishing Service.

<sup>16</sup> House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011) *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*.

the Australian Reconciliation Barometer, conducted every two years to measure progress towards reconciliation, we seek to understand the underlying values and perceptions that shape the relationship between Aboriginal and Torres Strait Islander people and other Australians. One of the most significant and consistent findings of the Barometer since it began is that trust between the general community and Aboriginal and Torres Strait Islander people is low and prejudice is high. These low levels of trust and high levels of prejudice are the measurable indicators of racism against Aboriginal and Torres Strait Islander people in Australia society today. Low levels of trust and high levels of prejudice directly impact the lives of Aboriginal and Torres Strait Islander people because they feel less confident to do everyday things such as access health services, attend school or apply for a job.

In our view, a lack of understanding and knowledge often translates into assumptions and stereotypes. Stereotypes can damage the relationships between us and are often the cause of racism. The results of the 2012 Barometer show that there is still a widespread lack of knowledge about Aboriginal and Torres Strait Islander history and culture among the general community and that this lack of understanding translates into stereotypes.<sup>17</sup> The 2012 Barometer found that non-Indigenous people are less likely than Indigenous respondents to view Aboriginal and Torres Strait Islander people as hard-working or disciplined. Further, the Barometer suggests that non-Indigenous people underestimate the impact of race-based discrimination on the levels of disadvantage faced by Aboriginal and Torres Strait Islander people today and that many peoples' views of Aboriginal and Torres Strait Islander Australians are influenced significantly by the media.<sup>18</sup>

Through the Reconciliation Action Plan program we have found that by creating respectful relationships, stereotypes, prejudice and low levels of trust can be overcome. Reconciliation Australia's RAP Impact Measurement report shows that in organisations committed to creating opportunities through Reconciliation Action Plans, employees are much more likely to have lower levels of prejudice and higher levels of trust for their Aboriginal and Torres Strait Islander colleagues.

Recently, the Expert Panel on Constitutional Recognition of Indigenous Australians recommended that prohibition of racial discrimination is inserted into the Australian Constitution.<sup>19</sup> While constitutional recognition is clearly outside the scope of this consultation, it is important to recognise that a reconciled nation that recognises its First Peoples is unlikely to be achieved unless racism is curbed and discouraged consistently throughout Australian laws and society.

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<sup>17</sup> Reconciliation Australia (2012) Australian Reconciliation Barometer. Available at <http://www.reconciliation.org.au/wp-content/uploads/2013/12/2012-Australian-Reconciliation-Barometer-Report-by-Auspoll.pdf>. Of those surveyed, 54 per cent felt their knowledge about the history of Australia's First Peoples was low, while almost two-thirds felt they had low levels of knowledge with regard to Aboriginal and Torres Strait Islander culture.

<sup>18</sup> Ibid. 83 per cent of Aboriginal and Torres Strait Islander respondents believe that race-based discrimination is a very important factor in creating disadvantage today, whereas only 34 per cent of non-Indigenous respondents believe it is a very important factor.

<sup>19</sup> Expert Panel on constitutional recognition of Indigenous Australians (2012). *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*. Canberra.

## 4. The current Racial Discrimination Act

Ongoing racism in Australia and its serious and widespread impacts, highlight the need for strong and effective legislation against racial discrimination. The purpose of legislation is to reflect community standards and values of what is acceptable and not acceptable in society to create trust, order, stability and justice for all Australian citizens. It is widely accepted by Australian society, and international human rights law, that everyone has the right to be protected from racial vilification. Strong protections against racial vilification also assist to reduce the prevalence and harm of racism, to protect vulnerable groups, to empower citizens to speak up against racism and to provide an avenue for justice to those discriminated against.

The *Racial Discrimination Act 1975* (RDA) ensures all Australians are protected from discrimination on the grounds of race, colour, descent or ethnic origin. We believe the RDA, as it currently stands, accurately reflects community standards and serves an important purpose to protect minority groups from vilification and harm.

Importantly, the RDA represents Australia's international commitment to global law under the International Convention on the Elimination of all Forms of Racial Discrimination (the Convention). As a signatory to the Convention, Australia has committed to not engaging in any act or practice of racial discrimination against individuals, groups of persons or institutions, and to ensure that public authorities and institutions do likewise.<sup>20</sup>

In the context of reconciliation it is important to note that Sections 18C and 18D of the Act were introduced as a result of the findings of the *Royal Commission into Aboriginal Deaths in Custody* as well as two other reports which found that racial vilification can cause emotional and psychological harm and reinforce other forms of discrimination and exclusion.<sup>21</sup> Most importantly, the reports found that seemingly low-level behaviour can soften the ground for more severe acts of harassment, intimidation or violence by impliedly condoning such acts.<sup>22</sup> In light of this Reconciliation Australia believes that the proposed amendments to the RDA would be a step back in our reconciliation journey and would pave the way to a less reconciled and just nation. By weakening the provisions against racial vilification the government is lowering community standards on what is acceptable behaviour and is potentially setting us on a path to increasing incidences of racial discrimination and harm.

Anti-racial discrimination legislation, and in particular the RDA, is a critical avenue for people who experience racial discrimination to seek justice before the law. Over the past 20 years, the RDA has proven to be effective and consistently interpreted by the courts. The current Act strikes the appropriate balance between the right to be free from racial vilification, and the right to freedom of expression.

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<sup>20</sup> International Convention on the Elimination of All Forms of Racial Discrimination. Available from: <http://www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf>

<sup>21</sup> Royal Commission into Aboriginal Deaths in Custody. Accessed 9 April 2014 from: <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/#national>. The other two reports are the National Inquiry into Racist Violence (Available from: <https://www.humanrights.gov.au/publications/racist-violence-1991>) and the Australian Law Commission's Multiculturalism and the Law Report. (Available from: <http://www.alrc.gov.au/report-57>)

<sup>22</sup> Australian Human Rights Commission. At a glance: Racial vilification under sections 18C and 18D of the Racial Discrimination Act. Accessed 9 April from: <https://www.humanrights.gov.au/glance-racial-vilification-under-sections-18c-and-18d-racial-discrimination-act-1975-cth>

There are almost 100 judgements and determinations in case law related to Section 18C of the Racial Discrimination Act. In these cases the courts have consistently interpreted section 18C and 18D as maintaining a balance between freedom of speech and freedom from racial vilification.<sup>23</sup> The courts have held that for conduct to be covered by section 18C, the conduct must involve “profound and serious” effects, not “mere slights”.

The RDA as it currently stands provides effective civil redress for racial discrimination. The vast majority of complaints are resolved by the Australian Human Rights Commission out of court at minimal cost to the taxpayer, compared to matters resolved in court.<sup>24</sup> Where legislation is consistently interpreted and shown to be effective, the reasons to change it are few. As such, there is no compelling argument to change the RDA and Reconciliation Australia argues for maintaining the Act in its current form.

## **Rights to free speech**

Like other Australians, Reconciliation Australia believes resolutely in the right to free speech. However, the right to free speech needs to be balanced carefully with the right to live free from racial discrimination. We believe the current legislation strikes a fair and effective balance between the two.

Section 18D of the RDA currently contains explicit exemptions for the protection of free speech. The exemptions contained in Section 18D for “anything said or done reasonably and in good faith” and anything that constitutes a “fair and accurate report of any event or matter of public interest” have been invoked multiple times over the past 20 years to protect speech that may be considered offensive to many Australians. A prime example is when Pauline Hanson was protected by the RDA when she published comments that Aboriginal people received preferential treatment from Governments. In the conciliation before the Human Rights and Equal Opportunity Commission, Commissioner Nader found Ms Hanson exempt from Section 18C, as her views were genuinely held and formed part of a genuine political debate.<sup>25</sup>

Reconciliation Australia believes that much of the attention drawn to the Andrew Bolt case as an example of the restrictions placed on free speech is misdirected. When Mr Bolt was found to be in breach of the RDA, he was not exempt by Section 18D as Ms Hanson was, because of “the manner in which the articles were written, including that they contained errors of fact, distortions of the truth and the inflammatory and provocative language”.<sup>26</sup> Therefore, free speech has been consistently protected under the RDA, as long as the individual is communicating in good faith and accurately to the best of their knowledge.

With the exemptions provided by Section 18D, the RDA ensures that free speech in the interest of public discussion and debate is always protected as long as it is done accurately and in good faith. Reconciliation Australia argues that the requirement for truth in the RDA is mirrored in other Australian legislation, balancing the right to freedom of speech with

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<sup>23</sup> Australian Human Rights Commission. At a glance: Racial vilification under sections 18C and 18D of the Racial Discrimination Act. Accessed 9 April from: <https://www.humanrights.gov.au/glance-racial-vilification-under-sections-18c-and-18d-racial-discrimination-act-1975-cth>

<sup>24</sup> Opinion piece by the Race Discrimination Commissioner, Dr Tim Soutphommasane. First published in *The Age* on 28 March 2014. Available: <https://www.humanrights.gov.au/news/stories/are-we-favour-bigotry-over-right-live-unaffected-it>

<sup>25</sup> Walsh v Hanson (200), unreported, HREOC.

<sup>26</sup> Eatock v Bolt (2011) FCA 1180.

protection of other individual's rights. Defamation laws balance the protection of individual reputation with freedom of expression. Additionally, Australian laws concerning advertising, obscenity, fraud, national security and public order all place restrictions on 'free speech'. In Australia, the concept of free speech has never been without barriers and, while it is highly regarded by both public and private citizens, there are certain values, such as the safety from inciting violence, or freedom from racial vilification, that are also considered to be fundamental in Australian society.

The current RDA places no more restrictions on free speech than other legislation regularly enforced in Australian society. Removing Section 18C and Section 18D from the RDA will harm individuals from minority groups in Australia more than it will assist free speech. The RDA in its current form has worked to protect all Australians from racial discrimination while allowing free speech for the past 20 years. Based on the interpretation of the law to date we believe there is no compelling reason to change the RDA.

**Recommendation 1:** That sections 18C, 18B, 18D and 18E of the Racial Discrimination Act 1975 are ***not*** repealed and the Act remains unchanged.

### **Consultation and community support for change**

Reconciliation Australia consistently advocates for effective engagement and community consultation as the basis for sound policy development. To consult respectfully, we believe it is important to listen to different points of views and to genuinely consider the views of the community in policy responses. Most importantly, genuine consultation requires an openness to change.

The overwhelming majority of the Australian public and community organisations representing minority groups support the existing racial vilification laws and are opposed to the proposed amendments to the RDA. In December 2013 we were one of 156 Aboriginal, ethnic, religious and community organisations to sign an open letter to the Attorney-General calling for Australia to retain strong and effective protections against racial vilification and opposing any repeal of the racial vilification provisions in the RDA.

Since then, numerous community groups and organisations have come out against the proposed changes, including the President of the Human Rights Commission, Professor Gillian Triggs, the Race Discrimination Commissioner Dr Tim Soutphommasane, the National Congress of Australia's First Peoples, the Human Rights Law Centre, the Federation of Ethnic Communities' Council of Australia (FECCA) and the NSW and ACT Governments, amongst many others.

On 14 April 2014, a Fairfax-Nielsen poll found that 88 per cent of respondents think it should be unlawful to "offend, insult or humiliate" someone because of their race or ethnicity. Another recent survey found that 90 per cent of respondents support laws that prohibit causing offence on the basis of race, culture or religion and that between 66 and 74 per cent

of respondents agree that it should be unlawful to offend, insult or humiliate on the basis of race.<sup>27</sup>

Reconciliation Australia believes that changes should only be made to the Racial Discrimination Act that are supported by the Australian community, and most importantly, by those most affected by racism.

**Recommendation 2:** The Government should only consider changes to the *Racial Discrimination Act 1975* that genuinely strengthen legal protections against racial vilification. Additionally, any changes must be supported by the vast majority of the Australian community, and most importantly, by minority groups most affected by racism.

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<sup>27</sup> Media release, Racism survey shows public supports existing Racial Discrimination Act, 26 March 2014. University of Western Sydney. Available: [http://www.uws.edu.au/newscentre/news\\_centre/feature\\_story/australias\\_largest\\_study\\_on\\_racism\\_shows\\_public\\_supports\\_existing\\_racial\\_discrimination\\_act](http://www.uws.edu.au/newscentre/news_centre/feature_story/australias_largest_study_on_racism_shows_public_supports_existing_racial_discrimination_act)

## 5. The proposed amendments to the RDA (*Freedom of Speech (Repeal of S.18C) Bill 2014*)

Reconciliation Australia believes there is no compelling reason to amend the *Racial Discrimination Act 1975* (RDA) and that the Act should remain unchanged. We strongly encourage the Federal Government to reconsider the proposed amendments.

We do, however, commend the Attorney-General's commitment to strengthen racial vilification laws in Australia while at the same time allowing for reasonable levels of freedom of speech.<sup>28</sup> As the amendments currently stand, we believe that they significantly weaken protections against racial vilification and extend freedom of speech provisions too far. As such, we believe the amendments do not fulfil the Attorney-General's stated objective of strengthening racial vilification laws. If the Federal Government is committed to genuinely strengthening racial vilification protections while at the same time protecting freedom of speech, we believe significant changes need to be made to the exposure draft *Freedom of Speech (Repeal of S.18C) Bill 2014*. In the following section we outline changes to the proposed amendments that we believe are necessary to fulfil the Attorney-General's objectives and would go some way to strengthening racial vilification laws.

### Strengthen racial vilification protections

The proposed amendments significantly weaken racial vilification protections. Under the proposed amendments "offend", 'insult' and 'humiliate' are removed and replaced with:

- (1) It is unlawful for a person to do an act, otherwise than in private, if:
  - (a) the act is reasonably likely:
    - (i) to vilify another person or a group of persons; or
    - (ii) to intimidate another person or a group of persons,
- (2) For the purposes of this section:
  - (a) vilify means to incite hatred against a person or a group of persons;
  - (b) intimidate means to cause fear of physical harm:
    - (i) to a person; or
    - (ii) to the property of a person; or
    - (iii) to the members of a group of persons.

These changes remove protections from racial discrimination that offends, insults and humiliates and introduce very narrowly defined protections against vilification and intimidation. In order to not weaken protections against racial discrimination we believe the definitions of 'vilify' and 'intimidate' should be substantially expanded and 'insult' and 'humiliate' should be inserted into the draft bill.

The definitions of 'vilify' and 'intimidate' in the proposed amendments ignore the frequent, severe and long lasting psychological and emotional damage of racism. Under the proposed amendments 'intimidate' is limited to mean "to cause fear of physical harm", and 'vilify' to mean "incite hatred". As outlined earlier in our submission many acts of racism in Australia are non-physically threatening or can seem insignificant and minor to outsiders. This,

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<sup>28</sup> Media release, Racial Discrimination Act, 25 March 2014. Available: <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/First%20Quarter/25March2014-RacialDiscriminationAct.aspx>

however, does not mean they are any less pervasive and harmful to the victim. There is a substantial body of evidence that shows that persistent occurrences of seemingly minor acts of racism can cause severe emotional and psychological damage. Limiting the definition of 'intimidate' to fear of physical harm disregards the psychological and mental health impacts of racism. Acts that insult and humiliate should also be inserted into the draft bill as these acts are more likely to be insidious and significantly harm individuals and communities in hidden and unseen ways.

In the case of the definition of 'intimidate', we believe it should include psychological and mental harm and its definition could be borrowed from criminal legislation and use the language of causing a reasonable apprehension of mental or physical harm, in the sense of injury to a person in respect of his/her person, property, business, employment, source of income or emotional or mental state.<sup>29</sup>

The definition of 'vilify' in the proposed amendments requires the presence of a third party (being the person—neither the perpetrator nor the victim—in whom hatred is incited), a significant weakening of the current standards. We believe that 'vilify' should be given a definition that is more consistent with its ordinary meaning and community standards. The Shorter Oxford English Dictionary (2002) definition of 'vilify' is "to depreciate or disparage with abusive or slanderous language; to defame, revile or despise". This definition could form the basis for a more insightful, accurate and meaningful definition.

These concepts outlined above are well-developed doctrines under defamation law. As such, we recommend that, at the very minimum the proposed bill is amended to incorporate the following:

- Acts which *insult and humiliate* as well as intimidate and vilify are included in the draft bill;
- The definition of vilify is changed to be more consistent with its ordinary meaning and accepted community standards. For example: 'vilify' is "to depreciate or disparage with abusive or slanderous language; to defame, revile or despise".
- The definition of intimidate *includes* psychological and mental harm and is not limited to physical harm only. For example the definition of 'intimidate' could borrow from criminal legislation and use the language of causing a reasonable apprehension of mental or physical harm, in the sense of injury to a person in respect of his/her person, property, business, employment, source of income or emotional or mental state.

### **Create reasonable provisions for freedom of speech**

Many Australian laws place limits on freedom of speech. These include laws concerning advertising, obscenity, fraud, national security, public order and defamation. The use of defamation laws by politicians from both sides of politics is well known and exemplifies the balance between free speech and the need for citizens to be protected from scurrilous and false verbal attacks. Defamation laws, in particular place restrictions on freedom of speech in recognition that harm to reputation can be very damaging to individuals.

In regard to the proposed amendments we are particularly concerned by the extremely broad exemptions for freedom of speech. Section 4 of the proposed amendments is so

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<sup>29</sup> Crimes Act 1900 (NSW) s545B

broad that it renders the preceding sections almost inapplicable to any public incidences of racial vilification and would make it nearly impossible to use the proposed bill as a protection against racial vilification.

Most significantly, the proposed changes mean there will no longer be a requirement that speech be done reasonably, accurately or in good faith, opening the door to malicious, inaccurate and fabricated attacks. We believe exemptions for freedom of speech should be based on provisions of reasonableness, accuracy and good faith. Introducing a provision for reasonableness on free speech would address the inconsistency in the current bill where a 'reasonableness' clause applies to the incident of racial vilification (section 3) but not to provisions for free speech (section 4).

As such we recommend that:

- The scope of any free speech defence should be limited to communications that are made:
  - (i) for a genuine purpose;
  - (ii) in the public interest;
  - (iii) as a fair comment; and
  - (iv) as a genuinely held belief.

The above concepts being well developed doctrines under defamation law.

### **A fair community standards test**

The proposed amendments explicitly change the community standards test to be “determined by the standards of an ordinary reasonable member of the Australian community, not from the standards of any particular group within the Australian community.”

We believe the community standards test should be assessed from the standards of a reasonable person from the relevant group of the person affected. As we have highlighted earlier in this submission, the findings of the Australian Reconciliation Barometer show that perceptions can vary significantly between groups and seemingly minor incidents to one group of people can have historic and significantly negative implications for other groups of people. In fact, the Barometer shows that in the case of Aboriginal and Torres Strait Islander people, the broader Australian community lacks knowledge and understanding of Aboriginal and Torres Strait Islander peoples, histories and cultures. It is therefore likely that an ordinary member of the Australian community would be unable to truly assess the gravity of the effect of racial vilification to Aboriginal and Torres Strait Islander people. We believe in the case of racial vilification it is important to measure its impact from the perspective of a reasonable member of the affected group.

As such, we recommend:

- The standards against which racial discrimination is assessed should remain the standards of the particular group which has experienced discrimination.

We believe a rejection of the proposed amendments or significant changes to the draft bill would be well-received by the Australian public.

**Recommendation 3:** If the *Racial Discrimination Act 1975* is changed, we recommend that at the very minimum the proposed bill is amended to incorporate the following:

- a) Acts which ***insult and humiliate*** as well as intimidate and vilify are included in the draft bill;
- b) The definition of vilify is changed to be more consistent with its ordinary

meaning and accepted community standards. For example: 'vilify' is "to depreciate or disparage with abusive or slanderous language; to defame, revile or despise".

- c) The definition of intimidate ***includes*** psychological and mental harm and is not limited to physical harm only. For example the definition of 'intimidate' could borrow from criminal legislation and use the language of causing a reasonable apprehension of mental or physical harm, in the sense of injury to a person in respect of his/her person, property, business, employment, source of income or emotional or mental state.
- d) The scope of any free speech defence should be limited to communications that are made:
  - (i) for a genuine purpose;
  - (ii) in the public interest;
  - (iii) as a fair comment; and
  - (iv) as a genuinely held belief. The above concepts being well developed doctrines under defamation law.
- e) The standards against which racial discrimination is assessed should remain the standards of the particular group which has experienced discrimination.