



# Refugee Council of Australia

ATTORNEY-GENERAL'S DEPARTMENT

## **SUBMISSION ON CHANGES TO THE RACIAL DISCRIMINATION ACT**

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, asylum seekers and the organisations and individuals who work with them, representing over 170 organisations and 700 individual members. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members, community leaders, asylum seekers and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback to the Attorney-General's Department on changes to the *Racial Discrimination Act 1975 (RDA)*. Racism and discrimination are issues that have a significant impact on refugee communities in Australia and this submission highlights the impacts of the proposed amendments. RCOA strongly opposes these proposed amendments to the *RDA* as we believe they weaken protections against racism, racial vilification and discrimination towards refugee communities.

RCOA submits that sections 18B, 18C, 18D and 18E protect from the harm of racial vilification and discrimination, as exemplified by almost 20 years of case law. RCOA believes that the proposed amendments would provide a licence to the community to engage in racist behaviour and may lead to further acts of racially motivated violence. RCOA also argues that there is a lack of a clear rationale for these changes, which have only been brought about after extensive media attention regarding one case. Indeed, research shows that these laws have been considered in less than 100 finalised court cases since 1995 and RCOA argues that the courts have applied these laws reasonably and appropriately.

Many refugee communities know all too well the fine line between racial vilification and racial persecution. People of refugee background consulted in the preparation of this submission emphasised the importance of protecting against racist hate speech, which can easily lead to racially motivated violence, physiological harm and other serious issues. Many refugee communities have fled persecution on the basis of their race, being one of the five grounds on which people are entitled to seek protection as refugees under the Refugee Convention. Refugee communities are among the minority groups who would be most affected by these changes to the law and as such it is important to consider their needs when assessing the proposed amendments.

### **1. Current success of complaints mechanisms**

1.1. RCOA submits that the current process of making a complaint under the *RDA* to the Australian Human Rights Committee is reasonably effective. As a conciliation tool, the law provides a civil and educative process to bring aggrieved parties together through mediation. Over the past five years, the Commission has received an average of 130 racial vilification complaints each year. According to the Human Rights Law Centre, 'a very small percentage of complaints (4% in 2012-13) are terminated because they are

trivial, misconceived or lack substance. The majority are resolved through mediation. Few complaints go on to court (less than 3% in 2012-13).<sup>1</sup> This shows the significant role the laws play not through the courts but through mediation and conciliation processes. RCOA emphasises the need to ensure adequate access to these complaint mechanisms, especially for refugee communities.

- 1.2. RCOA acknowledges the support available for members of racial minorities, including the use of translators and the extensive list of translated information packs. However, more can be done to increase community awareness regarding the process for making a complaint to the Australian Human Rights Commission. Most people consulted for this submission were not aware of the process for making a complaint and how such an issue is resolved.
- 1.3. Appendix 1 contains examples of racial vilification complaints to the Australian Human Rights Commission. These examples show the success of the laws and systems in place to deal with racial vilification in the community. RCOA argues that the current laws are effective and the proposed amendments would weaken these mechanisms and lessen the access to conciliation for our members.

## 2. Impacts of racism on refugee communities

- 2.1. Racism is a serious and widespread issue in the Australian community. Recent studies by the Scanlon Foundation found that 41% of newly arrived communities from non-English speaking backgrounds were discriminated against because of their skin colour, ethnic origin or religious beliefs last year.<sup>2</sup> In addition, the 2013 national report found that 19% of all Australians have encountered discrimination on the basis of race, up 7% since 2012 and the highest level recorded by the reports.<sup>3</sup>
- 2.2. Racism and racial vilification have a significant impact on people from refugee backgrounds and their communities. Racial hatred and vilification can cause emotional and psychological harm, as well as reinforce other forms of discrimination and exclusion. Furthermore, by tolerating offensive, humiliating and intimidating language we may open the door to more severe acts of harassment, intimidation or violence.
- 2.3. ***Racism and community participation:*** Racist behaviour has significant impacts on a person's engagement in the community. People from refugee backgrounds consulted by RCOA have shared many experiences of racism at work, in public places, on public transport and in social activities such as sporting clubs. These experiences of racism, especially words that 'offend', 'insult' and 'humiliate', cause people to disengage with community life. Many people have expressed how they no longer go out in public because of experiences of racially motivated verbal and physical abuse. This had led to isolation, exclusion and mental health issues. People from refugee backgrounds have also reported experiences of verbal abuse when participating in sport, which has led many to leave the sporting clubs.
- 2.4. ***Racism and health:*** Racism also has a significant impact on a person's physical and mental health. Many people have talked of experiences of depression, anxiety and physical complaints due to racial abuse and vilification. There has been significant academic research into the impacts of racism on mental health, which has found an

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<sup>1</sup> Human Rights Law Centre, "Racial Vilification Laws: New Resources to Help the Public Give Feedback on Changes," accessed April 25, 2014, <http://hrlc.org.au/racial-vilification-laws-new-resources-to-help-the-public-give-feedback-on-changes>

<sup>2</sup> Andrew Markus, *Mapping Social Cohesion: Recent Arrivals Report* (Scanlon Foundation, 2013).

<sup>3</sup> Andrew Markus, *Mapping Social Cohesion: National Report* (Scanlon Foundation, 2013).

'association between self-reported racism and ill health for oppressed racial groups.'<sup>4</sup> Likewise, a VicHealth report into racism and mental health found that experiences of racism are associated with poor mental health.<sup>5</sup> In 1991, the National Inquiry into Racist Violence was released with recommendations regarding the implementation of what came to be 18C. The final report in 1991 found that, 'Physical violence is not the only, or even in some cases the most important, form of racist violence. The physical effects of violence often cause less damage to the individual victim than the psychological effects.' RCOA is concerned that if racist behaviour is permitted, there will be an increase of mental health issues arising out of racial abuse. It is also worth noting that many people from refugee and asylum seeker backgrounds have come to Australia with significant torture and trauma experience and continued racial abuse only adds to these mental health issues.

- 2.5. **Racism in the workplace:** Racism is also a significant issue for refugee communities in the workplace. Racism can impact on a person's work, productivity and rapport between employees. Racist comments can also be detrimental to those seeking work, as harmful negative stereotypes are often portrayed about refugee communities, which impacts on people's perceptions when hiring employees. A number of people have shared that they fear going into work because of the racist abuse they encounter. This is exemplified in the Human Rights and Equal Opportunity Commission case of *Rugema v Gadsten Pty Ltd & Derkes*, in which the Commission found that a workplace breached section 18C of the *RDA* because of one employee's racist language and signs against another employee, a former refugee from Uganda. These abuses included comments such as 'black bastard' and 'lazy black bastard'. This racial abuse had such a severe impact that the man was unable to concentrate, had become suicidal and had to be hospitalised, suffering a severe major depressive disorder. This example highlights the important protections 18C provides against racism in the workplace and RCOA is concerned that the proposed amendments would not protect against such an incident. RCOA is also concerned about the proposal to repeal section 18E of the *RDA*, which makes an employer liable for actions of their employees, as this would remove additional protections against racial abuse in the workplace.
- 2.6. **Racism in education:** Refugee communities' experience of education is also significantly affected by racism. Some have discussed being verbally abused by classmates and teachers, as well as being treated unfairly because of their race. Teachers have verbally attacked students because of the colour of their skin or because of their cultural background. These abuses can also hinder people from attending education, significantly affecting a person's engagement in education and later employment. Many people have also expressed issues with the assumptions people make that equate limited English experience with low education or intelligence.
- 2.7. **Racism and settlement:** Racism also impacts on the settlement of newly arrived communities. For those who are new to Australia, finding housing, employment and participating in public life is vital to ensure successful settlement into life in Australia. As discussed above, racism affects a person's participation in community life, education and employment, thus hindering vital aspects of the settlement process. Racism also alters people's perceptions of the Australian community, where people fear that the majority of Australians are racist, thus impacting on social cohesion. Many people have expressed concern that, because of the negative stereotypes and racist comments

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<sup>4</sup> Y. Paradies, "A Systematic Review of Empirical Research on Self-Reported Racism and Health," *International Journal of Epidemiology* 35, no. 4 (July 12, 2006): 888.

<sup>5</sup> Victorian Health Promotion Foundation, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: Experiences of Racism Survey: A Summary*. (Carlton South, Vic.: Victorian Health Promotion Foundation, 2012), 2, [http://visions-download.unimelb.edu.au/Mental%20health%20impacts\\_racial%20discrim\\_Indigenous-4.pdf](http://visions-download.unimelb.edu.au/Mental%20health%20impacts_racial%20discrim_Indigenous-4.pdf)

directed to them, they would not be 'accepted' into the Australian community. Such experiences have ongoing negative consequences for communities' positive settlement and results in reduced social inclusion and lower health and wellbeing indicators for individuals and communities, especially young people.<sup>6</sup> In our consultation processes with refugee communities, many noted that the negative and inflammatory rhetoric perpetuated by some politicians and public figures has had an enormous impact on people settling in Australia, as well as those refugees living around the world. RCOA is concerned that if protections against racial abuse are weakened, this will have a negative impact on people's settlement in Australia.

2.8. ***Racism and structural inequality:*** Racism occurs not only through express verbal attacks but also through systemic and inherent structures of inequality. While these laws cannot address what is a historical and social problem in society, they can at least set a very minimum standard of decency that should be bestowed to all members of the public. As some of those consulted by RCOA have argued, addressing the racial issues of privilege, history and society needs to involve more than simply changing the law but at the very least 'it would be nice not to get racially abused on the bus.' Another refugee community member commented that the *RDA* has not addressed these issues of systemic racism but it at least forces people to reconsider the language they use when making bigoted comments: 'The only thing [the Act] changed is that it will censor what people say to you.' However, by watering down these protections it will not only provide for an increase of racist behaviour but will also create a culture that licences bigotry and allows systemic racism to go unchecked. As one person commented, by removing these protections from the Act, the government is 'whispering' to bigoted people that they are allowed to humiliate people on the basis of race. Community members have also discussed the structural problems inherent in the complaints system, in which members of the community who have been racially abused by the political and social systems have to then make a complaint to that system. Issues of power balances and privilege are also not addressed through this system – a young African man may not have as much support in making a complaint as a white person whose first language is English.

2.9. ***Racism and further violence:*** Racist behaviour and speech can lead to further violence and intimidation. Racist comments and actions can be seen to condone more severe physical attacks directed at members of ethnic or cultural groups. Many people consulted regarding these changes emphasised the fear that by watering down protections against racial abuse, it 'opens the door' to further acts of racism and violence. This has been seen in many parts of Australia, where racist comments have eventually led to violence and riots against minority groups. More than one in 20 Australians have been physically attacked because of their race. Racial incitement to hatred and violence is a particular concern to members of refugee communities, as many fear the repeat of the Cronulla Riots and other similar events. RCOA is concerned that by weakening the current provisions, racially motivated violence will become more prevalent.

### **3. Racism and the current political debate on refugee and asylum seeker issues**

3.1. RCOA has often highlighted the harmful nature of public discourse on asylum seeker issues as perpetuated by some politicians, public figures and those in the media. It cannot be ignored that those seeking asylum in Australia are from specific ethnic backgrounds. As such, there is a fine line, especially in the public's perception, between comments directed against asylum seekers and comments against certain ethnic minorities. Recent research has found that 25% of the Australian public expressed

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<sup>6</sup> See <http://www.vichealth.vic.gov.au/Publications/Freedom-from-discrimination/Racism-and-young-people-research.aspx>

negative feelings towards immigrants from the Middle East, and 16% towards those from Ethiopia.<sup>7</sup> We believe the current inhumane asylum seeker policies, while not explicitly implemented because of race, are linked with higher levels of racism within the Australian community.

- 3.2. As discussed in RCOA's annual submissions to the Australian Government on the Refugee and Humanitarian Program<sup>8</sup>, a number of former refugees highlighted the racist and derogatory comments directed towards asylum seekers as a major concern. This negative portrayal by some politicians and public figures has given rise to increased racial abuse directed towards refugee and asylum seeker communities. The lack of leadership from successive governments has provided a licence for members of the community to engage in racist and bigoted behaviour. In turn, these comments fuel misconceptions about asylum seekers and refugees, which negatively contribute to the public debate on Australia's immigration policies – creating a push for harsher and more inhumane policies.
- 3.3. These racist and misleading comments not only impact those who arrive by boat but also those resettled through Australia's offshore refugee program. A startling assertion made by a community representative in Western Australia (but also echoed in other states) during RCOA's consultations on the 2011-12 Refugee and Humanitarian Program<sup>9</sup> was that refugees coming through Australia's offshore resettlement program should be warned about the negative public attitudes towards refugees before they arrive in Australia.
- 3.4. Allowing racist vilification and stereotypes to propagate fuels public hostility towards Australia's humanitarian program and creates a more hostile environment for refugees settling in Australia. Research by the Scanlon Foundation shows that negative perceptions towards asylum seekers arriving by boat has increased significantly: 33% of Australians now support 'turning back the boats' option, an increase of 10 percentage points since 2011.<sup>10</sup> Similarly, 60% of Australian want to 'increase the severity of the treatment of asylum seekers.'<sup>11</sup> RCOA argues that this hostility towards asylum seekers arriving by boat is fuelled in part by negative and racist comments perpetuated by some politicians and leaders in the community.

#### **4. Removal of 18c – offend, insult, humiliate**

- 4.1. The Attorney-General seeks to repeal section 18C, removing the words 'offend, insult, humiliate' from the *RDA*. RCOA believes this would significantly limit the protections against racial abuse in the community. RCOA acknowledges statements that the Attorney-General has made arguing that 'offend, insult and humiliate describe what has sometimes been called hurt feelings.'<sup>12</sup> However, RCOA argues that the Attorney-General's comments trivialise and belittle the significant harm that members of refugee communities can face when confronted with such racist behaviour.

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<sup>7</sup> Markus, *Mapping Social Cohesion: National Report*.

<sup>8</sup> RCOA's submissions on the Refugee and Humanitarian Program can be viewed at <http://refugeecouncil.org.au/r/isub.php>

<sup>9</sup> See <http://www.refugeecouncil.org.au/r/isub/2011-12-IntakeSub-Sec6.pdf>

<sup>10</sup> Markus, *Mapping Social Cohesion: National Report*.

<sup>11</sup> Philip Dorling, "Australians Want Boat Arrivals Treated More Harshly: Poll," *The Sydney Morning Herald*, January 8, 2014, <http://www.smh.com.au/federal-politics/political-news/australians-want-boat-arrivals-treated-more-harshly-poll-20140108-30g97.html>.

<sup>12</sup> Attorney-General George Brandis, Press Conference, Parliament House, 25 March 2014, <http://www.attorneygeneral.gov.au/transcripts/Pages/2014/First%20Quarter/25March2014-PressConference-ParliamentHouse.aspx>

- 4.2. As discussed above, words that offend, insult and humiliate have serious impacts on refugee communities and their engagement in the public sphere. These words, when expressed in a serious and malicious way, can cause people to withdraw from public life, face discrimination and abuse at work and in school and can cause significant mental harm. The Attorney-General's comments also ignore the power dynamics at play when such words are directed towards minority groups. What may be considered merely 'hurt feelings' to the Attorney-General may in fact cause significant harm to members of refugee communities. This is especially significant for those who have fled racial persecution and may have existing physical and mental trauma from their past exposure to racial prejudice and violence.
- 4.3. RCOA submits that, while these terms are not defined in the current legislation, case law shows that the conduct must have 'profound and serious effects, not to be likened to mere slights'.<sup>13</sup> As such, the law requires that the harm complained of must be significant, contrary to the Attorney-General's suggestion. This ensures that complaints brought to the court have significant merit. RCOA argues that racist behaviour does have profound and serious effects and thus often meets this threshold. RCOA also acknowledges that when complaints do not meet this requirement they are dismissed, as appropriate.
- 4.4. Justice Bromberg appropriately stated that the reading of words 'offend, insult, humiliate' should be understood to refer to conduct that is 'injurious to the public interest and relevantly, the public's interest in a socially cohesive society'.<sup>14</sup> Thus it is important to consider the harm such racist conduct causes to social cohesion in the community when considering the merits of the case. As discussed, racist behaviour has a significant impact on social cohesion in the community.
- 4.5. RCOA submits that the words 'offend, insult, humiliate' should be interpreted in line with the objectives of the legislation,<sup>15</sup> which includes appropriate consideration to relevant international human rights laws, outlined below. As a principle of statutory interpretation, legislation should be interpreted to comply with Australia's international obligations where possible.<sup>16</sup> This means that the courts must appropriately balance the right to free speech and the freedom from racial vilification and discrimination. By requiring complaints to be 'profound and serious', RCOA believes the courts have appropriately balanced these competing rights.
- 4.6. RCOA argues that the current case law sets a higher bar than merely 'hurt feelings' and has been significantly developed since its introduction. As such, RCOA believes there is no need for these changes to the *RDA* and the provisions should remain in place. However, we agree with comments made by the Human Rights Law Centre that, for clarity, additions may be included to refer to *serious offences*, in order to codify existing interpretations of the law.<sup>17</sup>

## **5. The narrow definitions of 'intimidate' and 'vilify'**

- 5.1. One term that will remain from section 18C is the prohibition of acts that 'intimidate' on the basis of race. The prohibition against behaviour that intimidates on the basis of race is vital to protecting minorities and ensuring safety in the community. However, RCOA is

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<sup>13</sup> *Creek v Cairns Post Pty Ltd* [2001] FCA 1007, para [16].

<sup>14</sup> *Eatock v Bolt* [2011] FCA 1103, para 263.

<sup>15</sup> Section 15AA *Acts Interpretation Act 1901* (Cth); *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16, para [69].

<sup>16</sup> *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 287, para 27.

<sup>17</sup> Human Rights Law Centre, "Racial Vilification Laws."

concerned about the Attorney-General's proposal to define 'intimidate' so narrowly to only mean 'fear of physical harm'. Intimidation can take many more forms than simply fear of physical harm. As discussed above, racism can create a range of fears, for example, fear of going outside, fear of bullying or harassment and fear of being denied opportunities. These fears can lead to serious psychological issues.

- 5.2. Psychological harm has been a significant issue in many racial vilification cases. Previous case law regarding section 18C shows that racial abuse and discrimination can cause significant psychological issues.<sup>18</sup> RCOA is concerned that such acts or comments that cause fear of psychological or social harm will not be protected against under these changes. RCOA strongly opposes this narrow definition of 'intimidate' and argues the term should be given its ordinary meaning, in line with existing case law,<sup>19</sup> which recognises that intimidation is not limited to causing fear of physical harm but includes conduct causing emotional or psychological harm.
- 5.3. RCOA acknowledges the comments of the Attorney-General that the word 'vilify' is not found in the current legislation. RCOA submits that, due to the inclusion of other words in the Act, the legislation effectively prohibits acts that vilify. However, an additional prohibition of vilification is welcomed, as it will add clarity to the Act.
- 5.4. Nevertheless, RCOA argues that the proposed definition of 'vilify' in the exposure draft is too narrow, as it only protects against acts that 'incite hatred'. This is in stark contrast to the commonly understood definition of 'vilify' to mean 'inciting hatred, serious contempt or severe ridicule', as found within a number of State legislations.<sup>20</sup>
- 5.5. RCOA submits that the RDA should reflect the current State and Territory legislations in its definition of 'vilify'. As discussed, incitement to hatred, serious contempt and severe ridicule is a particular concern to member of refugee communities. This will also ensure compliance with Australia's human rights obligations, as outlined below.

## **6. Addition of subsection (3) – community standards test**

- 6.1. Current case law has established that to assess the conduct in question, the test of harm must be from the perspective of an ordinary, reasonable member of the *affected group*. At least nine cases, since the introduction of section 18C, clearly establish this requirement.<sup>21</sup> This provision ensures that cultural, historical and social context is considered when assessing the level of harm.
- 6.2. The current exposure draft seeks to change previous case law to an assessment 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 is a significant departure from the settled case law.
- 6.3. RCOA submits that it is vital to take into account the social and historical context of racist conduct when considering its harm. Certain racist language that 'ordinary' members of

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<sup>18</sup> See *Rugema v Gadsten Pty Ltd & Derkes* [1997] HREOCA 34; *Gama v Qantas Airways Ltd (No.2)* [2006] FMCA 1767, para [125].

<sup>19</sup> See *Jones v Scully* (2002) 120 FCR 243

<sup>20</sup> See *Discrimination Act 1991* (ACT), s 66; *Anti-Discrimination Act 1977* (NSW), s 20C; *Anti-Discrimination Act 1991* (Qld), s 124A; *Racial Vilification Act 1996* (SA), s 4; *Anti-Discrimination Act 1997* (Tas), s 19; *Racial and Religious Tolerance Act 2001* (Vic), s7.

<sup>21</sup> See *Bryant v Queensland Newspaper Pty Ltd* [1997] HREOCA 23; *Shron v Telstra Corporation Ltd* [1998] HREOCA 24; *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615; *Wanjurri v Southern Cross Broadcasting (Aus) Ltd* [2001] HREOCA 2; *Creek v Cairns Post Pty Ltd* [2001] FCA 1007; *Jones v Scully* [2002] FCA 1080; *Kelly-Country v Beers & Anor* [2004] FMCA 336; *Campbell v Kirstenfeldt* [2008] FMCA 1356; *Eatock v Bolt* [2011] FCA 1103.

the community may be unaware of may significantly impact people from refugee backgrounds. For example, the use of the term ‘cockroach’ towards members of the Tutsi community of Rwanda has the specific historical context of the Rwandan genocide that an ordinary Australian would be naïve to.

- 6.4. The position of privilege between an ‘ordinary’ Australian and minority groups need to also be taken into context when considering these issues. Those who have come from a history of privilege may be far better equipped to deal with racist behaviour than others. This is especially important when considering the needs of refugee communities, who have often faced significant racial abuse and violence and may have mental health issues associated with torture and trauma. As such, comments that may be minimal to some Australians can have a significant impact on some refugee communities.
- 6.5. RCOA argues that this proposal would essentially continue to imbed systemic and structural racism by requiring a hypothetical ‘ordinary’ member of the community to dictate what is harmful. It seeks to suggest that the ‘ordinary’ member of the Australian community knows more about racism than a member of the harmed group. In the words of one analysis, ‘the standards of the privileged majority, not the affected minority, will determine whether something is racist.’<sup>22</sup> As the Scanlon Foundation surveys show, 81% of Australian’s have not experienced racial discrimination. This means that it is likely that an ‘ordinary’ member of the community would have no experience of racism from which to make such a judgement of harm.
- 6.6. Members consulted for this submission indicated their frustration with the general community dictating to them what is and isn’t racist, as they believe that they themselves are in the best position to assess issues of racism, rather than the average Australian. As Waleed Aly argues:

*If the “ordinary reasonable Australian” has no race, then whether or not we admit it, that person is white by default and brings white standards and experiences to assessing the effects of racist behaviour. Anything else would be too particular...This matters because – if I may speak freely – plenty of white people (even ordinary reasonable ones) are good at telling coloured people what they should and shouldn’t find racist, without even the slightest awareness that they might not be in prime position to make that call.<sup>23</sup>*

- 6.7. RCOA submits that it is vital for the perspectives of the affected group to be considered when making a judgement regarding that harm certain acts may have. Minority groups, such as those from refugee backgrounds, are the ones best placed to assess what is harmful to them. As such, RCOA rejects the proposed amendments and argues that the current standard of test from the perspective of an ordinary, reasonable member of the affected group should remain.

## **7. International human rights law**

- 7.1. Australia has ratified both the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*<sup>24</sup> and the *International Covenant on Civil and Political*

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<sup>22</sup> Cosima Marriner, “Racism on the Rise in Australia: Migrants Report Cultural Shift,” *The Sydney Morning Herald*, April 6, 2014, <http://www.smh.com.au/national/racism-on-the-rise-in-australia-migrants-report-cultural-shift-20140405-365a5.html>

<sup>23</sup> Waleed Aly, “Brandis’ Race Hate Laws Are Whiter than White,” *The Age*, March 27, 2014, <http://www.theage.com.au/comment/brandis-race-hate-laws-are-whiter-than-white-20140327-35lv7.html>

<sup>24</sup> UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

*Rights (ICCPR).*<sup>25</sup> Both treaties contain obligations for Australia to prohibit hate speech, racial vilification and racial discrimination.

- 7.2. RCOA reminds the Attorney-General that Australia has voluntarily undertaken to uphold these obligations under international law. If Australia sees itself as a leader in the international community it should seek to set an example by ensuring compliance with these treaties. By removing these protections in the *RDA*, Australia is ignoring its international duties and renegeing on its commitments it made to the Australian and international community.
- 7.3. The *RDA* seeks to give effect to Australia's ratification of *ICERD* through ensuring domestic legislation complies with the international treaty. Australia voluntarily ratified *ICERD* on 30 September 1975, and agreed to be bound to it under international law. *ICERD* creates obligations for Australia to eliminate racial discrimination, racial hate speech and to promote racial tolerance and harmony. As such, it is important to consider Australia's obligations under *ICERD* when considering changes to laws which impact on racial vilification and discrimination.
- 7.4. Article 4(a) of *ICERD* creates an obligation for Australia to 'declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.'<sup>26</sup> RCOA understand that Australia has made a reservation to article 4(a) of *ICERD*, stating 'Australia is not at present in a position specifically to treat as offences all the matters covered by article 4 (a) of the Convention...It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4(a).'
- 7.5. RCOA submits that Australia is now in the position to adequately prohibit such acts, as intended by the reservation statement. As such, RCOA calls on Australia to remove this reservation to article 4(a). In addition, RCOA believes that Australia's reservation 'is incompatible with the object and purpose of the treaty,' as outlined in the *Vienna Convention on the Law of Treaties*.<sup>27</sup> The purpose of *ICERD* is to eliminate all forms of racial discrimination and hate speech. A reservation to article 4(a) seems contrary to the purpose of the Convention, as prohibiting hate speech and vilification is an essential part of the Convention. RCOA submits that the proposed changes may fall short of requirements under *ICERD*. Such exemptions seem contrary to the requirements that Australia prohibit *all* forms of racial discrimination. RCOA calls for the Attorney-General to consider these requirements under *ICERD* when amending the *RDA*.
- 7.6. Australia has ratified the *ICCPR*, which states in article 20(2) that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'<sup>28</sup> This requires Australia to implement domestic legislation prohibiting such acts. RCOA believes the proposed amendments may be contrary to the *ICCPR* and may place Australia in violation of its international obligations. This is especially significant when considering the broad exemptions in subsection 4, which provide exceptions to an extremely wide range of public acts.

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<sup>25</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

<sup>26</sup> *ICERD*, art 4(a).

<sup>27</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331

<sup>28</sup> *ICCPR*, art 20(2).

7.7. RCOA recognises that Australia has also made a reservation to article 20 of the *ICCPR*. RCOA calls on the Australian government to remove this reservation, as we believe that the Australian government is in a good position to fulfil the requirements of article 20. In the Human Rights Committee's concluding observations to Australia's Fifth Report under the *ICCPR*, the Human Rights Committee expressed its 'regret' at the lack of hate speech prohibitions that would fulfil article 20 of the Covenant, and urged the Australian Government to pass such a law.<sup>29</sup> RCOA calls on the Attorney-General to consider requirements of article 20 of the *ICCPR* when amending the *RDA* and ensure that such changes are consistent with Australia's obligations under international law.

## **8. Free speech and human rights**

8.1. RCOA acknowledges the significant political debate surrounding these amendments regarding issues of free speech. It is important to note that free speech is a vital human right upheld under international human rights law. Many people from refugee and asylum seeker communities have fled to Australia because of persecution resulting from the exercise of free speech. Those consulted by RCOA have constantly stated that they value to protections of free speech in Australia see them as a cornerstone of democracy.

8.2. However, the right to freedom of speech is not absolute and needs to be balanced against other important rights, such as the right to freedom from racial vilification and discrimination. As one person from a refugee background notes: 'Free speech is very important. Some of us have never had free speech...but you cannot use your free speech to vilify and demonise others.'

8.3. The right to free speech is expressed in article 19(2) of the International Covenant on Civil and Political Rights, which states that 'everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.'<sup>30</sup> However, the following paragraph, article 19(3) outlines that freedom of speech carries special 'duties and responsibilities' and may be limited in order to 'respect of the rights or reputations of others'.<sup>31</sup> These rights include freedom of racial discrimination and vilification, as outlined in *ICERD* and the *ICCPR* above. International human rights law makes it clear that speech may be reasonably limited to prohibit racial hatred or discrimination.

8.4. It is in light of this balance between free speech and racial vilification, RCOA strongly argues against these proposed amendments, as they do not respect the rights of others as required in the *ICCPR*. RCOA argues that the right to free speech is already well protected under the current provisions of the *RDA* and that, in light of the case law, these competing rights have been balanced appropriately by the courts.

8.5. It is worth noting that free speech can also be impacted by acts of racism. It is important to recognise the often silencing effect racism can have on a person's ability to feel free to express their opinions in public. Refugee communities have stated how they may often be silenced or marginalised when speaking about a certain issue, due to racism within the broader community. Thus, racism can make a person less free to speak. If the Australian Government is concerned about issues of free speech, they should ensure all members of the community are free from discrimination and vilification in order to equally participate in public discussions.

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<sup>29</sup> Human Rights Committee, Consideration of Reports Submitted by States Parties Under article 40 of the Covenant, Concluding Observations of the Human Rights Committee, 7 May 2009, para [26].

<sup>30</sup> *Ibid*, art 19(2).

<sup>31</sup> *Ibid*, art 19(a).

## **9. Removal of 18D and addition of subsection (4) – public discussion exemptions**

- 9.1. The repeal of 18D from the *RDA* will remove current provisions in the legislation that seek to appropriately balance the right to free speech and the right to freedom from discrimination and racial vilification. RCOA argues that the current provisions effectively balance these competing rights as they ensure that ‘fair’ and ‘accurate’ acts of free speech done in ‘good faith’ and ‘in the public interest’ are permitted. The current proposal seeks to replace 18D with a new exemption for ‘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, academic or scientific matter.’
- 9.2. RCOA strongly argues that these exemptions are extremely broad and seem to cover almost all public acts of racial vilification. It seems unlikely that the courts would find a display of public expression that does not fit into one of the exempted categories listed. RCOA believes these broad exemptions would permit racist comments made in almost any public forum, and thus make the protections against racial vilification practically useless. RCOA argues that the proposed amendments be rejected in favour of the existing legislation.
- 9.3. The amendments also remove requirements that these acts need to be done in ‘good faith’, be ‘accurate’, ‘fair’, and in the ‘public interest’, thus permitting inaccurate and malicious statements. RCOA argues that the good faith requirements are essential to ensure Australia meets its obligations under international human rights law. The current laws effectively balance these competing rights by ensuring that free speech that is done in good faith is permitted.
- 9.4. As Justice French notes regarding the relationship between *ICERD* and the *RDA*:
- ‘The Convention article which underpins Pt IIA of the Racial Discrimination Act allows States to strike a balance between the need to prohibit the evil of racial vilification and hatred and the need to protect freedom of speech and association within their reasonable limits. Part IIA reflects a like balance in the prohibitions imposed by s 18C and the exemptions it allows by s 18D.60’<sup>32</sup>*
- 9.5. The proposed amendments too strongly favour the right to free speech, to the detriment of the right to freedom of discrimination, and thus are likely be in breach of human rights laws outlined above. RCOA argues that the existing requirement that acts of speech need to be done in ‘good faith’, be ‘accurate’, ‘fair’, and in the ‘public interest’, be retained in the legislation.

## **10. The need for leadership in addressing racism**

- 10.1. As discussed, racism is widespread in the Australian community, and causes significant harm to both the targeted groups as well as the wider community. RCOA laments the Attorney-General’s comments that ‘people do have a right to be bigots’ and fears that such leadership will give licence to further racism and discrimination in the community. Such comments effectively serve to condone and even encourage racist behaviour regardless of whether the proposed amendments to the *RDA* are passed into law

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<sup>32</sup> *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16, para [58]-[62].

- 10.2. RCOA calls on Australian politicians and public figures to show leadership in condemning all forms of racism and using their public profile to highlight issues of racism in the community. This can include public education initiatives such as the Human Rights Commission's 'Racism. It Stops With Me' campaign. Public education is essential to building a culture of understanding and acceptance in the community but cannot be fully effective unless it is coupled with positive political leadership.
- 10.3. RCOA also calls for the government to show leadership in correcting misconceptions about asylum seekers and refugees which leads to discrimination and vilification against people seeking protection from persecution. We believe the current policies regarding asylum seekers are directly connected to negative attitudes in the community, including racism. It is only through addressing such attitudes that we can begin to have a civilised and informed discussion about these issues.
- 10.4. While legislation alone cannot eliminate racism, it provides a standard for the community about what is and isn't acceptable. By removing these protections, RCOA believes there will be more incidents of racism directed towards people from refugee and migrant backgrounds. Many refugee communities have expressed concerns about recent comments and the proposed changes creating an 'open door' for more severe racial abuse.
- 10.5. As Tim Soutphommasane argues:
- 'The danger of removing legislation that has been in place for almost two decades, of dismantling an important part of the Racial Discrimination Act that has largely enjoyed community support, is that it can licence racial hatred. It may encourage people to think there is no harm in dealing out racial vilification. It may condone hate speech that diminishes the freedom of others. It may unleash a darker, even violent, side of our humanity, which revels in the humiliation of the vulnerable. It may, in short, encourage freedom without responsibility.'*<sup>33</sup>
- 10.6. These laws describe the type of community we seek to be. RCOA believes the Australian community strives to be a multicultural society that is tolerant and accepting of difference.<sup>34</sup> While changes in the law cannot address issues of racism alone, they play an important role in creating a cohesive and tolerant society.

### **Recommendation**

*RCOA calls on the Attorney-General to reject the proposed changes to the Racial Discrimination Act 1975 as outlined in the Exposure Draft.*

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<sup>33</sup> Tim Soutphommasane, "Two Freedoms: Freedom of expression and freedom from racial vilification," March 3, 2014, <https://www.humanrights.gov.au/news/speeches/two-freedoms-freedom-expression-and-freedom-racial-vilification#fn24>

<sup>34</sup> Markus, *Mapping Social Cohesion: National Report*, 37.

## **APPENDIX 1: EXAMPLES OF RACIAL VILIFICATION COMPLAINTS AND CASES<sup>35</sup>**

### ***Complaint about racial vilification on the internet***

The complainant, of Asian background, complained about a website which he said advocated violence against Asians. The comments on the website included: 'Asian People Flood our city with their Asian shops with their language all over them, having their own dedicated "china town" and their own suburb ...' '... we understand everyone has different levels of hate for Asians and so we have ... Yellers. Their job is to Yell at the Asians with passion i.e. "YOU GOOK F\*\*K OFF TO CHINA" and do whatever they can to show Asians they are not welcome in Australia. ... Fighters ... are there to express their anger physically by laying the Gooks out.' On receipt of the complaint, the Commission contacted the Internet Service Provider, which subsequently disabled the website as it breached the ISP's Acceptable Use Policy.

### ***Complaint about racial vilification in the print media***

The complainant, of Aboriginal descent, claimed the respondent newspaper and cartoonist published a cartoon that vilified Aboriginal people. The newspaper and cartoonist said the cartoon was published in the course of a debate, was drawn and published for genuine artistic purposes and contained genuine and fair comments on an event of public interest. During the conciliation process, the complaint resolved with an agreement that the respondents would visit the complainant's community to listen to community members' stories and teach the children how to draw cartoons.

### ***Complaint about racial vilification in the workplace***

The complainant, an Aboriginal person, worked for the respondent government department as a maintenance worker, and claimed that his supervisors called him over by whistling instead of using his name, assigned him 'bad' jobs (including lining the toilet pits after use), called him a 'black c\*\*t, used offensive language when speaking to him and described Aboriginal people as lazy and useless. The complainant also claimed that when he made an internal complaint, the respondent told him this was part of the work culture and that some of that 'stuff' was 'OK'. The complainant said he resigned due to this treatment. The respondents denied the allegations. The complaint was resolved through a conciliation process and the respondents agreed to pay the complainant \$45 000 and provide him with a statement of regret.

### ***Court case involving consideration of Section 18C***

The case of *Toben v Jones* (2003) 129 FCR 515 was the first to apply the Racial Discrimination Act's racial vilification provisions to the internet. It involved a complaint about the Adelaide Institute website, established by the respondent, which was argued as being anti-Semitic and vilified Jews. The Adelaide Institute presented as a scholarly centre for Holocaust research. In this case, the Federal Court of Australia found that certain documents on the website did vilify Jews for a number of reasons, including imputing that Jewish people who are offended by and challenge Holocaust denial are of limited intelligence; and that some Jewish people have exaggerated the number of Jews killed during World War II and the circumstances in which they were killed and have done so for improper purposes such as financial gain.

### ***Court case involving consideration of Section 18D***

The *Kelly-Country v Beers & Anor* [2004] FMCA 336 (21 May 2004) case involved a complaint about a comedian's performances, where the comedian, under the name 'King Billy Cokebottle', purports to be an Aboriginal person, performing a comedy monologue. The comedian was not Aboriginal. The performances were on video and audio tape, and available for public purchase. It was alleged that Aboriginal people were portrayed as rude, stupid, unable to speak English

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<sup>35</sup> Australian Human Rights Commission, "At a glance: Racial vilification under sections 18C and 18D of the Racial Discrimination Act 1975 (Cth)," Text, December 11, 2013, <https://www.humanrights.gov.au/glance-racial-vilification-under-sections-18c-and-18d-racial-discrimination-act-1975-cth>

properly, dirty, always drunk or drinking and swearing, among other things. It was also alleged that matters involving aspects of sacred tribal activities were referred to in performances, which could only be discussed by and in the presence of initiated male Aboriginal people. The Federal Magistrates Court of Australia noted the acts and tapes were 'impolite and offensive' to many groups within Australia, but just because they were offensive or insulting did not mean they were unlawful under the Racial Discrimination Act. The Court noted the performances and tapes were comedic in intention, and were not to be taken literally or seriously and had no overt political context. The Court found the performances fell within the term 'artistic work', as found the exemption in section 18D.