

Fact Sheet: Australia's Racial Vilification Laws



The right to freedom of expression is the cornerstone of our society

The right to freedom of opinion and freedom of expression is essential to Australian society. Freedom of opinion is the right to hold opinions. Freedom of expression includes the freedom to impart and receive information and ideas of all kinds, whether orally, in writing, in print, through art or another medium. These rights are enshrined in Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR), to which Australia is a party. The UN Human Rights Committee has described these rights as “the foundation stone for every free and democratic society”. Freedom of speech is a concept that falls within the ambit of these, as speech is one way of conveying opinion or expression.

Freedom of expression must be balanced with other rights

The right to freedom of opinion cannot be subject to any exception or restriction. However, the right to freedom of expression is not absolute. Article 19(3) of the ICCPR recognises that the exercise of the right to freedom of expression may be subject to restrictions in certain circumstances, including where necessary to respect the rights and reputations of others.

The right to freedom of expression must therefore be balanced against other rights, and in particular against Australia's obligation to outlaw incitement of racial hatred. Incitement can include urging, stirring up or stimulating, and extends to insults, ridicule or slander of individuals or groups. Article 20 of the ICCPR provides that states must prohibit by law any advocacy of racial hatred that constitutes incitement to discrimination, hostility or violence. Australia is also a party to the *International Covenant on the Elimination of All Forms of Racial Discrimination* (ICERD), which requires Australia to take steps to eliminate the promotion and incitement of racial discrimination and hatred. These concepts can also be referred to as racial vilification, which is behaviour that encourages others to hate, disrespect or abuse a person or group of people because of their race.

Racial vilification provisions in the *Racial Discrimination Act*

Part IIA of the *Racial Discrimination Act 1975* (Cth) implements Australia's obligations under ICERD and attempts to strike a balance between the rights to freedom of expression and freedom from racial discrimination and racial vilification.

Section 18C makes unlawful certain offensive acts that are done because of race, colour, or national or ethnic origin, and section 18D provides safeguards to ensure that matters of legitimate public interest are not prohibited.

Unlawful conduct under section 18C

A person's conduct will breach section 18C where it is:

- done otherwise than in private;
- reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people; and
- done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Exemptions under section 18D

Section 18D sets out exemptions to section 18C, by providing that conduct will not be unlawful where done reasonably and in good faith:

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (c) in making or publishing:
 - (i) a fair and accurate report of any event or matter of public interest; or
 - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

In this way, this section balances section 18C by upholding the exercise of the right to freedom of expression where comments or acts are in the legitimate public interest.

What is "unlawful conduct"

The courts have interpreted section 18C as directed to behaviour that has "profound and serious effects, not to be likened to mere slights". Acts which have been held to breach section 18C include:

- a website that was deliberately provocative and inflammatory and that doubted the holocaust and stated that some Jewish people, for improper purposes, including financial gain, have exaggerated the number of Jews killed during World War II, using references which were contrived to smear Jews; and
- a worker who racially abused another worker from Uganda including by calling him a "fucking black lazy bastard", and "fucking black cunt", to the point where the man became suicidal and had to be hospitalised.

Acts which have been found to fall within section 18D exemptions as artistic works include a cartoon, a comedy routine, and a play.

Breach of section 18C is not a criminal offence

An unlawful act under section 18C is not a criminal offence and is not punishable by imprisonment or a fine.

Individuals who want to take action under section 18C must first make a complaint to the Australian Human Rights Commission (AHRC). If the AHRC's mediation process is not successful, the individual can make an application in the Federal Court or Federal Circuit Court.

If the court finds that a person's conduct is unlawful under section 18C, it can make orders including:

- a declaration that the person has committed unlawful conduct and should not repeat this behaviour;
- an order for person to redress any loss or damage suffered;
- the employment or re-employment of the individual victim; and/or
- the payment of compensation.

Australian laws place other limits on freedom of expression

Section 18C is not the only area of Australian law that limits freedom of expression.

Defamation law limits freedom of expression in recognition of the fact that harm to reputation can be very damaging to individuals and business and should in some circumstances be prohibited.

The provisions in the *Criminal Code* (Cth) make it an offence for a person to use a postal or similar service in an offensive way.

It is also an offence under the criminal law to make threats to kill another person in certain circumstances.

The Australian Consumer Law also limits the exercise of freedom of expression, where such conduct is misleading or deceptive, or unconscionable.

Racial vilification and discrimination causes serious harm

It is clear that racial vilification and discrimination can result in serious harm. For example, a VicHealth report states that "the relationship between discrimination and poor mental health and certain risky health behaviours is well established".¹ A study on the mental health impacts of racial discrimination in Victorian culturally and linguistically diverse communities found that the likelihood of high psychological distress increased with the volume of racist experiences but did not depend on the type of racist incident. This suggests that all types of racism can impact on mental health.

¹ VicHealth, *More than tolerance: embracing diversity for health. Discrimination affecting migrant and refugee communities in Victoria, its health consequences, community attitudes and solutions – a summary report*, Victorian Health Promotion Foundation, Melbourne (2007), available at http://www.vichealth.vic.gov.au/~media/ResourceCentre/PublicationsandResources/Discrimination/VH_Racial%20Discrimination_CALD_web.ashx.