

“Grotesque”

Senator Brandis, Racial Vilification & Part IIA of the Racial Discrimination Act

Bill Moyle, Gerry Moore, Peter Botsman

Senator Brandis has written that the reasonable likelihood of “offending or insulting” people on the grounds of race or ethnicity “grotesquely” restricts freedom of expression.¹ His agenda seems to be to weaken the Racial Discrimination Act.

As three citizens living on the South Coast of NSW we wish to respectfully take issue with Senator Brandis and warn against any watering down of the already timid protections against racial discrimination in Australia. The Labor Party’s attempts to criminalise racial vilification failed in 1974, 1992 and 1994. Labour’s failures were not mere politicking their legislative efforts were designed to honour Australia’s obligations under the International Covenant on All Forms of Racial Discrimination (CERD). Any weakening of the present law by any government would be intolerable. If anything, the sanctions against speech that is based on or incites racial contempt or hostility should be strengthened by making it a criminal offence.²

Under the existing Part II A of the Racial Discrimination Act 1975, speech based on race or ethnicity would not be unlawful if it were made reasonably and in good faith. Courts have made it clear that under this test speech insulting or offending an individual or a group on the grounds of race and ethnicity would be unlawful if it combined erroneous facts, distortions of the truth and provocative and inflammatory language; and if the effects of that speech were likely to be serious and profound.³

Courts have interpreted the objects of Part IIA of the Racial Discrimination Act variously as eliminating racial discrimination and promoting understanding; and as regulating conduct which stimulates contempt or hostility by lowering regard for and demeaning the worthiness of a person or group based on their race or ethnicity. We strongly argue that the present Act is contributing to these goals but that they are not yet in sight of achievement.

The Reconciliation Barometer shows that about six out of seven people in both black and white communities believe there is mutual mistrust between the two communities and about three out of four believe this is based on racial prejudice.⁴ Clearly, racial prejudice remains influential in Australian society and laws regulating racist speech should not be weakened. To those who argue that racial tolerance should be left to education alone, the law is itself instructive.

¹ Senator George Brandis 2014, “The recovery of liberty”, *The Australian*, 20 March 2014

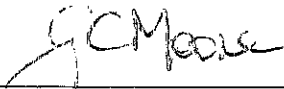
² See Article 4 of the International Convention on All Forms of Racial Discrimination (CERD) attached

³ *Eatock v Bolt*, (2011) FCA 1103, Reasons for Judgment, paras. 8, 209-212

⁴ Reconciliation Australia, “Key Findings for 2012”, *Australian Reconciliation Barometer 2012 an Overview*, p.1.

Racist speech is an offence under international law as incitement to racial discrimination or hostility. ⁵ Along with incitement to racial violence and defamation, speech that constitutes or incites racial hostility or vilification based on objective tests must, in any civil society, be outside the law. It is a clear threat to the social cohesion of Australia's multicultural society and should be an appropriate limitation to freedom of expression, as international law recognises. We believe it is *racist speech* that is "grotesque": it interferes with the inherent right of every individual to live their lives free from racial prejudice; in damaging the equality and inherent dignity of some citizens, it damages all.

We hope that Senator Brandis and the Liberal and National Party of Australia will come to realise that their thinking about Section 18c of the Racial Discrimination Act can only damage the Australian nation's standing in the world. It is important that we move on to deal with the more important challenges that we face as a nation and as a member of the international community. We hope that this debate will help younger Australians to appreciate that tolerance of evil is itself oppressive.


LGC (Bill) Moyle AM	Gerry Moore	Peter Botsman
44 St George Avenue Vincentia NSW 2540	CEO, Habitat Personnel and Director, National Congress of Australia's First Peoples	Voluntary National Secretary ISX
02 4441 5187	02 4422 4222	02-4465-1655
moylelgc@yahoo.com	gmoore@habitatpersonnel.org.au	peter@peterbotsman.com

For media comment on this matter please contact Bill Moyle on the phone number above.

⁵ Article 4, , International Covenant on Elimination of all Forms of Racial Discrimination (CERD); and articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR) (Refer Attachment).

Extract from Part II A Racial Discrimination Act 1975 (Commonwealth of Australia).

Section 18C Offensive behaviour because of race, colour or national or ethnic origin

(1) It is unlawful for a person to do an act, otherwise than in private, if:

(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

(b) the act is 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.

Note: Subsection (1) makes certain acts unlawful. Section 46P of the *Human Rights and Equal Opportunity Commission Act 1986* allows people to make complaints to the Human Rights and Equal Opportunity Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

(a) causes words, sounds, images or writing to be communicated to the public; or

(b) is done in a public place; or

(c) is done in the sight or hearing of people who are in a public place.

Part IIA Prohibition of offensive behaviour based on racial hatred
Section 18D

14 Racial Discrimination Act 1975

(3) In this section:

public place includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

18D Exemptions

Section 18C does not render unlawful anything said or 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.

International Convention for the Elimination of all Forms of Racial Discrimination (CERD)

Adopted by the United Nations.

Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

- (a) Shall 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;
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
- (c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- (d) Other civil rights, in particular:
 - (i) The right to freedom of movement and residence within the border of the State;
 - (ii) The right to leave any country, including one's own, and to return to one's country;
 - (iii) The right to nationality;

- (iv) The right to marriage and choice of spouse;
- (v) The right to own property alone as well as in association with others;
- (vi) The right to inherit;
- (vii) The right to freedom of thought, conscience and religion;
- (viii) The right to freedom of opinion and expression;
- (ix) The right to freedom of peaceful assembly and association;
- (e) Economic, social and cultural rights, in particular:
 - (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
 - (ii) The right to form and join trade unions;
 - (iii) The right to housing;
 - (iv) The right to public health, medical care, social security and social services;
 - (v) The right to education and training;
 - (vi) The right to equal participation in cultural activities;
 - (f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

International Covenant on Civil and Political Rights (ICCPR)

Adopted by the United Nations, effective from 1976

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. 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.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law