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## Your contact with AHRC [SEC=OFFICIAL:Sensitive]

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Info Service <InfoService@humanrights.gov.au>

Thu, Nov 19, 2020 at 12:54 PM

To: 

Dear Roger

I refer to your correspondence about Affirm Press, Diversity Arts Australia (Diversity Arts), Sweatshop Literacy Movement Inc (Sweatshop) and the Australian Council for the Arts (Arts Council).

You raised concerns about the cover of a book called 'After Australia' edited by Michael Mohammed Ahmad, which you say includes an image of a family of white people with their faces scribbled out. You say you found this 'defacement' highly offensive against your colour, being a White Australian/European person.

I understand the book was published by Affirm Press, in partnership with Diversity Arts and in association with Sweatshop. You advise that the Arts Council provided financial support for the publishing of the book, which I understand that they disagreed that they did.

I would like to take this opportunity to provide you with some information about the Commission's complaint process and the *Racial Discrimination Act 1975* (Cth) (RDA).

### The Commission's complaint function

The Commission has the power to investigate and conciliate complaints about:

- discrimination because of a person's race, sex, gender identity, sexual orientation, intersex status, pregnancy, marital or relationship status, age or disability as well as sexual harassment in specific areas of public life, such as, employment, education and the provision of goods and services;
- racial hatred that takes place in public;
- discrimination in employment because of a person's criminal record, trade union activity, religion, political opinion or social origin; or
- breaches of human rights by the Commonwealth of Australia.

The Commission can also assist those involved in a complaint to resolve the matter through a process called 'conciliation'. Conciliation can be undertaken through an exchange of information, a joint telephone discussion or an in-person meeting facilitated by a Commission conciliator.

Conciliation is not like a public hearing before a court or tribunal. The Commission does not make a decision about whether discrimination or racial hatred has occurred. Rather, conciliation provides an opportunity to discuss the relevant issues and explore different ways the complaint may be resolved.

The President can terminate a complaint on a number of grounds, including where satisfied that the complaint cannot be resolved through conciliation or is lacking in substance. If a complaint is terminated, a person can make an application to the Federal Court of Australia or the Federal Circuit Court of Australia for the court to hear and determine the allegations. In certain circumstances, the complainant can only make an application to the court if the court has granted leave for them to do so.

## *Racial discrimination*

Section 9(1) of the *Racial Discrimination Act 1975* (RDA) provides that it is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

## *Racial hatred*

The racial hatred provisions in section 18C of the RDA say that it is against the law to do an act in public which:

- is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate that person or group; and
- is done because of the race, colour, or national or ethnic origin of that person or group of people.

The RDA aims to strike a balance between the right to live free from racial hatred and the right to communicate freely ('freedom of speech'). Therefore, section 18D of the RDA says an act will not be against the law if it is 'done reasonably and in good faith':

- in an artistic work or performance;
- in a statement, publication, discussion or debate made for genuine academic or scientific purposes;
- in making or publishing a fair and accurate report on a matter of public interest; or
- in making a fair comment if the comment is an expression of the person's genuine belief.

It is important to note that the RDA does not make racial hatred a criminal offence.

## **Initial consideration of your correspondence**

### *Racial discrimination*

In your correspondence you refer to discrimination on the basis of your colour. However, you do not appear to have pointed to any nullification or impairment of the recognition, enjoyment or exercise of any human right as required under section 9 of the RDA.

If you wish to pursue the matter, it would be helpful if you could provide some more information in relation to this point.

### *Racial hatred - Objective test*

The Federal Court of Australia has said that the test of whether an act is 'reasonably likely to offend, insult, humiliate, or intimidate' another person is an objective one. This means that what is considered is whether a reasonable person in the position of the person making the complaint would feel offended, insulted, humiliated or intimidated by the conduct.

The court has also said that for an action to be racial hatred it must have 'profound and serious effects' and 'not to be likened to mere slights'.

Given the way in which section 18C has been interpreted by the courts, it is not clear how the book cover you refer to would meet the objective test of being 'reasonably likely to offend, insult, humiliate or intimidate' in all the circumstances.

If you wish to pursue the matter, it would be helpful if you could provide some more information in relation to this point.

### *Racial hatred - Because of race*

In considering cases of racial hatred, the Federal Court of Australia has also found that there must be a causal connection between the reason for doing the act and the race of the 'target' person or group.

In terms of the issue you have raised, it is not clear how the publishing of the book with the chosen cover could be said to have been done because of your colour or on the basis of white people more broadly.

If you wish to pursue the matter, it would be helpful if you could provide some more information in relation to this point.

### **Possible next steps**

If after reading this email, you want to pursue this matter with the Commission, please confirm this by return email within 14 days.

If you wish to proceed, please confirm whether you wish to make a claim of racial hatred, instead of racial discrimination.

Please also provide the additional information noted above, that is:

- Information which supports that there has been a nullification or impairment of a human right under section 9 of the RDA;
- Information which supports that the action you are complaining about can be said to be 'reasonably likely to offend, insult, humiliate or intimidate' in all the circumstances; and
- Information which supports that the act you are complaining about was done because of your race or national or ethnic origin.

Should you have any further queries or wish to provide clarification, please advise by return email.

Regards,

**Rebecca**  
Supervisor  
National Information Service

### **Australian Human Rights Commission**

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**Note:** Our National Information Service phone line and our complaints functions remain open. If

you have concerns about discrimination or other breaches of human rights, we are ready to assist you. Contact us on 1300 656 419 Monday to Friday between the hours of 10am and 1.30pm AEDT or email us at any time on [infoservice@humanrights.gov.au](mailto:infoservice@humanrights.gov.au).

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