

2 May 2014



Human Rights Policy Branch  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

By email: [s18cconsultation@ag.gov.au](mailto:s18cconsultation@ag.gov.au)

Dear Sir/ Madam

**Exposure Draft – *Freedom of Speech (Repeal of S. 18C) Bill 2014***

Attached is a copy of the Law Council's submission in respect of the above consultation.

The Law Council is grateful for the opportunity to contribute to this consultation. Please contact Ms Sarah Moulds on 08 7225 8011 or [sarah.moulds@lawcouncil.asn.au](mailto:sarah.moulds@lawcouncil.asn.au) for any questions.

Yours sincerely

A handwritten signature in black ink, appearing to read "Martyn Hagan".

**MARTYN HAGAN  
SECRETARY-GENERAL**

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# Exposure Draft Reforms to Racial Discrimination Act 1975 (Cth)

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## **Attorney-General's Department**

**2 May 2014**

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## Acknowledgement

The Law Council of Australia wishes to acknowledge the assistance of the following Constituent Bodies and Committees in the preparation of this submission:

Law Society of Western Australia

Law Society of South Australia

Law Society of the Northern Territory

Law Institute of Victoria

Law Society of New South Wales

Victorian Bar

The Law Council's National Human Rights Committee

The Law Council's Indigenous Legal Issues Committee

In addition to these Bodies and Committees, feedback in response to past consultations on proposed reforms to the *Racial Discrimination Act 1975* (Cth) has been provided by the New South Wales Bar Association and the Queensland Law Society.

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## Introduction

1. The Law Council of Australia welcomes the opportunity to comment on proposed amendments to the *Racial Discrimination Act 1975* (Cth) (the RDA). These amendments, outlined in Exposure Draft legislation, repeal sections 18B, 18C, 18D and 18E of the RDA and insert new provisions making it unlawful to publicly vilify or intimidate a person or group of persons because of their race, colour or national or ethnic origin. A new community standards test and new exemption provision are also proposed.
2. The release of these proposed amendments for public comment is an important part of the vigorous debate about freedom of speech in Australia, demarcated by the Government's pre-election commitment to repeal sections 18C and 18D of the RDA on the grounds that these provisions unduly burdened this fundamental freedom. This intention was subsequently repeated by Attorney-General, Senator the Hon. George Brandis QC, after the election and flagged as a key legislative priority. Whilst the Law Council understands the importance of this public debate, it notes that this debate could have benefited from a formal discussion paper on this issue and a longer consultation process, noting the relatively short timeframe for responses to the Exposure Draft.
3. The harms of speech that vilifies are perhaps best summarised by the Canadian Supreme Court in the case of *R v Keegstra*,<sup>1</sup> wherein the court explained (at 703):

*Essentially, there are two sorts of injury caused by hate propaganda. First, there is harm done to members of the target group. It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence ... Words and writings that wilfully promote hatred can constitute a serious attack on persons belonging to a racial or religious group, and in this regard . . . these persons are humiliated and degraded.*

*... A second harmful effect of hate propaganda which is of pressing and substantial concern is its influence upon society at large. The Cohen Committee noted that individuals can be persuaded to believe almost anything if information or ideas are communicated using the right technique and in the proper circumstances. . . . The threat to the self-respect of target group members is thus matched by the possibility that prejudice will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups...<sup>2</sup>*

4. Globally, it is fair to say that few issues have provoked as much debate, scholarly writing and rights-based litigation efforts as those legislative efforts aimed at

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<sup>1</sup> [1990] 3 SCR 697.

<sup>2</sup> *R v Keegstra* [1990] 3 SCR 697 ('*Keegstra*') concerned the interpretation and application of ss 318 and 319 of the *Criminal Code*, RSC 1985, c C-46. These provisions make it an indictable offence to communicate statements that wilfully promote hatred against any identifiable group. In *Keegstra*, the Canadian Supreme Court held that although these provisions do infringe the right to free expression, the infringement is nonetheless justified because of the threat to equality posed to target groups, and to society at large, from speech that seeks to undermine equal participation (at 747). Much has been written on the *Keegstra* decision. See generally: Tamsin Solomon, 'Antisemitism as Free Speech: Judicial Responses to Hate Propaganda in Zundel and Keegstra', (1995) 13(1) *Australian-Canadian Studies* 1; Kathleen Mahoney, '*R v Keegstra*: A Rationale for Regulating Pornography?' (1992) 37 *McGill Law Journal* 242; Richard Moon, 'Drawing Lines in a Culture of Prejudice: *R v Keegstra* and the Restriction of Hate Propaganda' (1992) *University of British Columbia Law Review* 99; Bruce Elman, 'Combatting Racist Speech: The Canadian Experience' (1994) 32(4) *Alberta Law Review* 621; Bruce MacDougall, *Queer Judgments: Homosexuality Expression and the Courts in Canada* (Toronto: University of Toronto Press, 2000) 147.

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addressing the inequalities caused by words ‘that wound’, disenfranchise and alienate. The experiences of other nations in this regard stand as testament to the jurisprudential complexity of this issue.

5. The Law Council has long recognised, and sought to communicate, the concerns of those groups particularly affected by any conduct which undermines their right to participate equally. Hate speech, at its core, threatens this most basic of democratic principles.
6. The Law Council is acutely aware that proposed amendments to the RDA raises issues that are multidimensional and complex and, as such, demand a reasoned and clearly articulated analysis of what often appear to be polarised positions about the value of free speech and the effect of unrestricted speech on social equality.
7. There is a significant and developing jurisprudence on this issue both within Australia and internationally overseas that must inform the current debate in Australia. However, given the short time provided for submissions, the Law Council is not yet in a position to provide an adequate analysis on that jurisprudence. The Law Council is in the process of undertaking the additional work necessary to prepare a further submission and hopes to be able to provide such submission in due course.
8. In the interim, the Law Council has consulted widely with its constituent state bodies and has worked actively with various Law Council committees to ensure that their concerns are given expression. The Law Council notes, in particular, submissions received from:
  - Law Society of Western Australia (LSWA);
  - Law Society of South Australia (LSSA);
  - Law Society of the Northern Territory (LSNT);
  - Law Institute of Victoria (LIV);
  - Law Society of New South Wales (LSNSW);
  - The Victorian Bar;
  - The Law Council’s National Human Rights Committee; and
  - The Law Council’s Indigenous Legal Issues Committee.
9. In addition, the Law Council notes feedback in response to past consultations on proposed reforms to the RDA provided by the New South Wales Bar Association and the Queensland Law Society.
10. The Report that follows summarises the concerns, issues raised and, ultimately, conclusions drawn by these groups in relation to proposed amendments to the RDA.
11. The Law Council is aware that since the release of the exposure draft legislation, there has been significant public discussion and that a great many submissions have been received by the Attorney-General’s Department. The Law Council is confident it can provide a further detailed submission before any draft legislation is released for public consideration. Until then, it offers the following overview of submissions received to date by the Law Council. It is hoped that this will give expression to the concerns raised by some of those most affected by legislation that seeks, ultimately, to break down those barriers that most often stifle equal participation.

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## Executive Summary

12. A number of commentators have questioned the scope of the anti-vilification provisions currently embodied in the RDA. Some have queried their validity in light of internationally recognised and protected right to free expression. Others have queried whether they adequately protect against the vice they are designed to prevent. Some have suggested that while racism should be condemned, alternative legal and non-legal mechanisms should be advanced to achieve this aim.
13. There has also been commentary criticising the proposed changes to the RDA, querying whether they are necessary in light of way the existing provisions have been interpreted, and raising concerns that the proposed changes will fail to protect against the harms caused by racial abuse. Organisations representing Indigenous Australians and ethnic and religious communities, for example, have opposed the proposed changes on the grounds that they will remove provisions that have previously protected members of their communities from physical or psychological harm. Still others assert that these changes risk sending a dangerous message that some forms of racial abuse are acceptable in Australia.
14. The Law Council considers that freedom from racial discrimination and freedom of opinion and expression can and should be robustly protected and promoted in a way that reinforces the indivisibility and complementary nature of the right to equality and the right to free speech. It considers that laws designed to protect against the identifiable harm caused by racial vilification must have due regard to the central position that the right to free speech holds in our community. However it also recognises that the exercise of this right can justifiably be limited where necessary to ensure the enjoyment of other fundamental rights, such as the right to equality.
15. Submissions received by the Law Council from many of its Constituent Bodies and Expert Committees consider the content and legislative history of the existing provisions in Part IIA of the RDA and the way these provisions have been interpreted and applied by the courts and the Australian Human Rights Commission (AHRC). Feedback received from the Law Council's Constituent Bodies and Expert Committees supports the continuation of the existing provisions of Part IIA of the RDA on the grounds that they are necessary to address the harms caused by racial vilification and provide a low-cost, non-litigious avenue to seek redress for those experiencing this harm. It is emphasised in these submissions that current provisions in the RDA contain features designed to protect against unnecessary or disproportionate interference with the right to free speech and have been interpreted by the courts in Australia in a way that balances free speech interests and the need to protect against the dissemination of racial prejudice, resulting in social inequality.
16. The Law Council recognises that from a civil and political rights perspective, there is a case for amendment of the current provisions. The Law Council acknowledges the points made in this regard by the AHRC in their submission. However, it is clear from the submissions received that the following concerns arise in relation to the proposed amendments to the RDA:
  - The amendments risk diluting the existing protections available to those seeking redress from racial vilification;
  - The amendments contain terms that are defined in ways that do not align with analogous State and Territory provisions or Australia's obligations under international law;

- The amendments may detract from the object and purpose of the RDA (for example, by making changes to the existing ‘reasonable victim’ test); and
- The amendments replace the existing exemption with an exemption provision that, because of its scope, risks undermining the utility of the proposed provisions designed to prohibit public conduct that vilifies or intimidates on the basis of race colour or national or ethnic origin.

17. Having regard to each of the views expressed thus far, the Law Council is of the view that the Exposure Draft provisions should not be pursued.
18. The Law Council has a long standing commitment to ensuring Australia’s laws adhere to the full range of Australia’s human rights obligations including those relating to racial equality and has for many years promoted, at every opportunity, the advancement of multiculturalism and of indigenous interests in Australia. The delicate balance established by the current terms of the RDA must be disturbed only after careful consideration of those interests and mindful of the possible fragility of national reconciliation.
19. Accordingly, the Law Council opposes the current proposals and strongly counsels a careful and broad ranging investigation of improvements to the Australian laws regarding hate speech as applied in respect of racial, religious, gender based or any other characteristic.

## The Existing Provisions

20. The RDA was introduced in 1975 to make racial discrimination unlawful in Australia, ‘and to provide an effective means of combating racial prejudice’ in Australia in accordance with the obligations set out in the *International Covenant on the Elimination of All Forms of Racial Discrimination* (ICERD).<sup>3</sup>
21. Part IIA of the RDA, which was introduced in 1995 following the passage of the *Racial Hatred Bill 1994* (Cth), originally included offences relating to racist violence and a civil provision that made incitement to racist hatred and hostility unlawful.<sup>4</sup>
22. The Bill was introduced to implement Article 4 of the ICERD and in response to recommendations of three inquiries: the Human Rights and Equal Opportunity Commission (HREOC)’s *National Inquiry into Racist Violence* 1991, the *Royal Commission into Aboriginal Deaths in Custody* 1991 (the Royal Commission), and the Australian Law Reform Commission’s *Multiculturalism and the Law Report* 1992 No. 57 (the ALRC’s Report).
23. Like the RDA, Part IIA is supported by the External Affairs Power under section 51(xxix) of the *Australian Constitution*.<sup>5</sup>

<sup>3</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 1975, 285 (Keppel Earl Enderby QC, Attorney-General and Minister for Customs and Excise). *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) (‘ICERD’).

<sup>4</sup> Initially these reforms were pursued via the *Racial Discrimination Amendment Bill 1992* (Cth). This Bill lay in the Parliament in 1992-1993 to allow public discussion and scrutiny. A federal election was announced early in 1993, resulting in the lapse of the Bill. On 10 November 1994, a revised version of the Bill, the *Racial Hatred Bill 1994* (Cth), was introduced in the House of Representatives. The Bill included proposed criminal offences for incitement to racial violence and a civil penalty regime. On 2 February 1995 the Senate referred the Bill to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report.

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24. Part IIA of the RDA is titled 'Prohibition of offensive behaviour based on racial hatred'. It contains five provisions – sections 18B to F. Sections 18C and 18D are critical, with the other provisions clarifying their scope and application.

25. Section 18C is entitled 'Offensive behaviour because of race, colour or national or ethnic origin'. It provides:

*(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 Australian Human Rights Commission Act 1986 allows people to make complaints to the Australian Human Rights 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.*

*(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.*

26. Section 18C makes such an action unlawful but not necessarily criminal.<sup>6</sup> Under the civil penalty regime a victim can seek conciliation with his/her perpetrator. Complaints of racial hatred are made to the AHRC in the first instance under section 46P of the *Australian Human Rights Commission Act 1986* (Cth).<sup>7</sup> The Commission will then attempt to resolve the matter between the parties unless the case should be terminated on grounds that it is misconceived, trivial or lacking substance.

27. Conciliation allows agreement between the parties and enables the victim to be involved in his/her resolution process. Most of the complaints under section 18C that are resolved by the Commission result in a combination of the following remedies:

- an apology;
- an agreement to remove material;

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<sup>5</sup> *Koowarta v Bjelke Petersen* (1982) 153 CLR 168.

<sup>6</sup> See the Note to section 18C of the *Racial Discrimination Act 1975* (Cth) (RDA).

<sup>7</sup> For more on the complaints process, see: <https://www.humanrights.gov.au/complaints-information>.

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- systemic outcomes such as changes to policies and procedures, training for staff and training for individual respondents; and
  - payment of compensation.<sup>8</sup>

28. If the complaint is not resolved through conciliation, the complainant can apply for a determination by the Federal Court of Australia or the Federal Circuit Court of Australia.<sup>9</sup> Either court may order a range of remedies including an apology, the removal of material, or payment of compensation. An unlawful act is an offence where it falls within the express provisions of Part IV of the RDA. For instance, if the act involves the dismissal, or threatening to dismiss, another person from the other person's employment.<sup>10</sup>

29. Section 18D provides:

*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.*

## The Exposure Draft Proposal

### The Proposed Reforms

30. On 8 November 2013, the Attorney-General announced that the Government would be making changes to the vilification provisions within the RDA.<sup>11</sup> Many organisations, including the Law Council, encouraged the Government to release Exposure Draft

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<sup>8</sup> See: *Australian Human Rights Commission Act 1986* (Cth), s 29(2)(c): where the Commission has found a breach of human rights, the Commission may make a recommendation for compensation or another action to remedy or reduce the loss or damage suffered by the person who was the victim of the act. See also: Australian Human Rights Commission, *RACIAL DISCRIMINATION ACT 1975 - Complaints conciliated in the period January – June 2011* (accessed on 22 April 2014), available at: <http://103.7.165.98/complaints/conciliation-register/racial-discrimination-act-1975-complaints-conciliated-period>. For a recent court award see: *Clarke v Nationwide News Pty Ltd* (2012) 289 ALR 345, where an award of \$12,000 was made for offend, insult and humiliate.

<sup>9</sup> Pursuant to s 46PO, *Australian Human Rights Commission Act 1986* (Cth).

<sup>10</sup> Pursuant to sub-s 27(2), *Australian Human Rights Commission Act 1986* (Cth).

<sup>11</sup> Chris Merritt, 'Attorney-General George Brandis's first task: repeal "Bolt laws" in name of free speech' *The Australian*, (online), 8 November 2013, available at: <http://www.theaustralian.com.au/business/legal-affairs/attorney-general-george-brandis-first-task-repeal-bolt-laws-in-name-of-free-speech/story-e6frg97x-1226755431421#>.

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legislation for public comment or to otherwise conduct a broad public consultation in relation to the proposed reforms.

31. On 25 March 2014 the Attorney-General released the Exposure Draft legislation for public comment by 30 April 2014.<sup>12</sup> The Exposure Draft provides:

*Freedom of speech (Repeal of S. 18C) Bill 2014*

*The Racial Discrimination Act 1975 is amended as follows:*

*Section 18C is repealed.*

*Sections 18B, 18D and 18E are also repealed.*

*The following section is inserted:*

*“ (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,*

*and*

*(b) the act is done because of the race, colour or national or ethnic origin of that person or that group of persons.*

*(2) For the purposes of this section:*

*(i) vilify means to incite hatred against a person or a group of persons;*

*(ii) intimidate means to cause fear of physical harm:*

*1. to a person; or*

*2. to the property of a person; or*

*3. to the members of a group of persons.*

*(3) Whether an act is reasonably likely to have the effect specified in sub-section (1)(a) is to be determined by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community.*

*(4) This section does not apply to 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.”*

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<sup>12</sup> Attorney-General, The Hon Senator George Brandis QC, ‘Racial Discrimination Act’ (Media Release, 25 March 2014), available at:

<http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/First%20Quarter/25March2014-RacialDiscriminationAct.aspx> (‘Attorney-General Media Release’).

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## Rationale for the Exposure Draft Provisions

32. In this section of the submission the Law Council examines the reasons advanced in favour of the need for reform of the existing provisions. It includes a summary of the Federal Court's decision in *Eatock v Bolt*.<sup>13</sup>

### The Internationally Protected Right to Freedom of Expression

33. Foremost among arguments in favour of repeal or reform of existing racial vilification laws is the view that there is a conflict between these laws and the right to freedom speech and opinion – a right that is undeniably central to Australia's commitment to the democratic process and one protected under international law, for example by Article 19 of the *Universal Declaration of Human Rights*,<sup>14</sup> which provides:

*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*

34. The right to freedom of opinion and expression (also protected by the *International Covenant on Civil and Political Rights* (ICCPR))<sup>15</sup> includes the freedom to seek, receive and impart information and ideas, and is also vital in ensuring that other rights are observed, such as the right to a fair trial (as contained in Article 14 of the ICCPR).

35. This fundamental freedom is particularly important in allowing dissenting views to be imparted and considered. The free expression of a range of views enables an individual to exercise his or her human freedom and allows society to grow, develop and change for the benefit of its people.

36. In *Lange v Australian Broadcasting Corporation*<sup>16</sup> the High Court held that implicit in the system of representative democracy for which sections 7 and 24 of the *Australian Constitution* provide, is an implied freedom of political communication. Such a freedom was held to be essential to meaningful representative democracy. As one commentator has noted: '[r]obust discussion [is] a sign of healthy democracy'.<sup>17</sup>

37. Some who oppose racial vilification laws generally emphasise how such restrictions produce a 'slippery slope' that unduly infringes the right to speak freely and without fear of censorship. As one commentator notes:

*...there are many things that one person might say that might be hurtful to another, or a group of others. A person might say things about people with red hair, people with freckles, tall people, short people, people who are of above average weight, those of below average weight, those who are intelligent, those who are not intelligent, those who like particular music bands, those who like particular movies, those who support particular political parties, members of a particular profession, those of a particular sexuality, those with larger ears, those with larger noses etc. Statements made on any or all of those things could also*

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<sup>13</sup> [2011] FCA 1103.

<sup>14</sup> GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948).

<sup>15</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>16</sup> (1997) 189 CLR 520.

<sup>17</sup> Anthony Gray, 'Racial Vilification and Freedom of Speech in Australia and Elsewhere,' *Common Law World Review* 41(2) (2012) 167, 171.

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*be extremely hurtful and, in some cases, cause emotional harm. Yet, no one suggests that these comments can or should be banned in a democracy.*

*...The price we pay for democracy is that some people will exercise this right in an irresponsible way, but the solution for this is not (should not be) to ban someone saying it.<sup>18</sup>*

38. Proponents of this view also tend to argue that racial vilification laws do not change the views of the vilifiers or necessarily protect society from the spread of racism. A piece of evidence given to support this argument is that there were laws in Germany in the 1920s and 1930s forbidding racial vilification, as the Canadian Supreme Court noted in in the *R v Keegstra* decision.<sup>19</sup>

#### Freedom of Speech as a Protection against Racism

39. The Attorney-General has described the rationale behind the changes proposed in the Exposure Draft, as to ‘... strengthen the [RDA’s] protections against racism, while at the same time removing provisions which unreasonably limit freedom of speech’.<sup>20</sup>
40. The Attorney-General has also identified the reform as ‘a key part of the Government’s freedom agenda’.<sup>21</sup> In his Media Release accompanying the Exposure Draft, the Attorney-General stated that:

*I have always said that freedom of speech and the need to protect people from racial vilification are not inconsistent objectives. Laws which are designed to prohibit racial vilification should not be used as a vehicle to attack legitimate freedoms of speech.<sup>22</sup>*

41. The Attorney-General believes that the proposed reforms indicate the type of society that Australians want to live in, ‘where freedom of speech is able to flourish and racial vilification and intimidation are not tolerated’.<sup>23</sup> He has recently stated in *The Australian Jewish News* that it is possible to ‘have appropriate protections against racism, and defend freedom of speech’ – it is not necessary to make a choice between two alternatives.<sup>24</sup> The Attorney-General explained that his thinking on this matter had derived from:

*...the Voltairean position that, if one is sincere in one’s belief in freedom of speech, the true test is whether one will defend to the death the right of people to say things which one finds deeply offensive. The freedom of speech argument is one of the most politically difficult of all, because if one is to be a true defender of free speech, one has to defend one’s enemies. To do so is not to condone, let alone approve of, what they say. It is to acknowledge that the right to hold and express opinions is one of the most fundamental rights which a person can have; that for the state to arrogate to itself the right to censor those opinions is one of the most dangerous things the state can do.*

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<sup>18</sup> Ibid 188.

<sup>19</sup> [1990] 3 SCR 697, [162].

<sup>20</sup> Attorney-General, Media Release.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Attorney-General for Australia, Minister for the Arts, Senator the Hon George Brandis QC, ‘Opinion piece – Why the law has to change’, *The Australian Jewish News*, (online) 3 April 2014, available at: <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/SecondQuarter/3April2014-Opinionpiece-Whythelawhastochange.aspx>.

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*The government's proposed amendments to the Racial Discrimination Act are an attempt, made in good faith and after much deliberation, to resolve the Voltairean paradox. The protection against racism is strengthened by including, for the first time in Commonwealth law, a specific prohibition against racial vilification (defined as inciting hatred of a person or group because of their race, colour, or national or ethnic origin).<sup>25</sup>*

42. Similar themes were explored by the Attorney-General as part of the Coalition Senators' minority report following the Inquiry into the Exposure Draft of the *Human Rights and Anti-Discrimination Bill 2013* (Cth). The report focused on the proposed definition of discrimination, but also included a reference to section 18C:

*In a society in which respect for freedom of speech and expression is a fundamental value – and, in the view of coalition senators, Australia must always be such a society – the Parliament must be vigilant to ensure that those freedoms are not impinged upon by new laws – however well-meaning their purpose. If freedom of speech means anything, then that freedom cannot depend upon the popularity of those views. Indeed, it is the unpopular, unfashionable or eccentric view which is in most need of protection. We are in complete agreement with the wise observation of John Stuart Mill.*

*To categorize conduct (including speech) as 'unlawful' because it might cause offence or insult to another person would impose a massive limitation of freedom of expression. Literally any controversial opinion would potentially be caught...Not only would the proposal threaten Australia's proud tradition of free and robust political discussion, it would also, in the view of coalition senators, be a violation of Australia's obligations under Universal Declaration and the Charter...<sup>26</sup>*

43. The Exposure Draft provisions have also been welcomed by former Prime Minister John Howard, and identified as according with the classical liberal tradition.<sup>27</sup> Similarly, the Human Rights Commissioner, Tim Wilson, supports the changes in the Exposure Draft on the basis that it corrects the legal limits of free speech, promotes pluralism, opposes 'reprehensible racism', and highlights the importance of personal responsibility.<sup>28</sup> Commissioner Wilson particularly welcomes the community standard test, as it 'resolves the issue of equality before the law'.<sup>29</sup> Further, Commissioner Wilson advocates that 'offend' and 'insult' should be removed from section 18C, but

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<sup>25</sup> Ibid.

<sup>26</sup> Dissenting Report by Coalition Senators, [1.8]-[1.9], available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13/antidiscrimination2012/report/d01](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/antidiscrimination2012/report/d01).

<sup>27</sup> Troy Bramston, 'Howard backs race act changes', *The Australian*, (online), 3 April 2014, available at: <http://www.theaustralian.com.au/national-affairs/john-howard-backs-race-act-changes/story-fn59niix-1226872820593#>.

<sup>28</sup> Tim Wilson, 'Free speech is best medicine for the bigotry disease', *The Australian*, (Australia), 26 March 2014, 12.

<sup>29</sup> Ibid. It should be noted, however, that under the ICERD, States are required to take special measures to ensure that formal equality, for example equality before the law, does not in fact perpetuate substantive inequality of individuals or groups on the basis of their race, colour, descent, or national or ethnic origin. Article 1(4) of the ICERD provides that 'special measures' must be taken to secure the 'adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination', until that point where substantive equality has been realised; and art 2(2): 'special and concrete measures' must be taken 'to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms'.

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acknowledges that it is less straightforward to determine when someone is humiliated.<sup>30</sup>

#### Support for Some Changes to the Existing Provisions

44. A range of other commentators, including those with considerable human rights expertise and experience who might not support for the full range of provisions proposed in the Exposure Draft, have suggested that some changes to section 18C of the RDA should nonetheless be welcomed.
45. For example, Tom Blackburn SC has suggested that sections 18C and 18D need to be amended, but not repealed.<sup>31</sup> In particular, Mr Blackburn suggests that that the 'good faith' test currently contained in section 18D, that provides an exception to section 18C if the standard 'objectively reasonable' is met, should be replaced with the exception to defamation that confines 'good faith within the boundaries of subjective honesty'.<sup>32</sup> Blackburn argues that the requirement of reasonableness goes too far, as it 'neuters any defence of fair comment'.<sup>33</sup>
46. Others within particular ethnic communities have acknowledged that some improvements could be made to the existing laws. For example, *The Australian* has cited an Australian Jewish community leader Mark Leibler as stating that a compromise could be reached on the Exposure Draft, suggesting that the 'offence' provision at section 18C of the RDA could be removed to account for free speech.<sup>34</sup> However, Mr Leibler also acknowledges that the proposed exemptions to racial hatred are so broad that they would have to go through an 'amazing legal challenge in the High Court' in order to be successful.<sup>35</sup>
47. The President of the AHRC, Professor Gillian Triggs, has also noted that there is room for compromise in reforming the RDA, so long as it balances the right to free speech with the right not to be subjected to racial abuse in public.<sup>36</sup> However, Professor Triggs does not believe that this balance is achieved by the Exposure Draft provisions, stating that '[t]he proposed amendments will allow racial vilification in virtually all public discussions'.<sup>37</sup>

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<sup>30</sup> Ibid. Wesley Aird, writing in *The Australian*, has also supported the proposed amendments on the basis that they 'align [the RDA] more closely with the expectations of mainstream Australian society' – see: Wesley Aird, 'Vile intra-racial abuse also hurts Aborigines', *The Australian*, (Australia), 29 March 2014, 16.

<sup>31</sup> Tom Blackburn, 'All comment is fair as long as it's based on fact', *The Australian*, (Australia), 21 March 2014, 27.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Patricia Karvelas, 'Jewish leader eyes middle path on race act reform'. *The Australian*, (Australia), 15 April 2014.

<sup>35</sup> Ibid.

<sup>36</sup> Gillian Triggs, 'Race law changes seriously undermine protections', *The Australian*, (Australia), 28 March 2014, 12. In contrast, the Race Discrimination Commissioner, Tim Soutphommasane, supports an objective test, based on community standards: Gabrielle Chan, 'Race discrimination commissioner says he would support some clarity to 18C', *The Guardian Australia*, (online), 1 April 2014, available at: <http://www.theguardian.com/world/2014/mar/31/race-discrimination-commissioner-says-he-would-support-some-changes-to-18c>.

<sup>37</sup> Ibid. Australian Human Rights Commission, submission to Attorney-General's Department, *Amendments to Part IIA, Racial Discrimination Act 1975*, 28 April 2014, available at: <https://www.humanrights.gov.au/submissions/amendments-part-ii-a-racial-discrimination-act-1975> ('AHRC Exposure Draft Submission').

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## The Bolt Decision

48. The Attorney-General has identified the decision in *Eatock v Bolt*<sup>38</sup> as the point at which the 'over-reach' of section 18C was best identified. While this view has not been supported by the Law Council's Constituent Bodies and Committees, there has been considerable public discussion about that decision. The Law Council does not believe the decision requires detailed consideration in this submission, although its assessment of the decision is contained in Attachment B and the decision is also discussed below in relation to the interpretation of 'offend, insult, humiliate or intimidate'.

## Support for the continuation of the current statutory protections against racial vilification

49. When evaluating proposals for legislative reform, the Law Council considers whether the proposed reform is necessary to achieve a particular legitimate end or to improve or clarify the operation of the law. It also considers the extent to which the proposed reform complies with Rule of Law Principles and other relevant standards, including Australia's obligations under international law.

50. It is clear from the feedback received from its Constituent Bodies and Committees that these bodies believe that the Exposure Draft provisions have not been shown to be necessary having regard to the legislative history, content and application of the existing provisions. The submissions received by the Law Council support the continuation of the existing provisions of Part IIA of the RDA on the grounds that they:

- are necessary to address the harm caused by racial vilification, including non-physical harm;
- provide a low-cost, non-litigious avenue to seek redress for those experiencing the harm caused by racial vilification;
- contain features designed protect against undue interference with the right to free speech;
- have been interpreted by the courts in a way that appropriately balances free speech and protection against the dissemination of racial prejudice; and
- are needed to implement a range of Australia's international obligations.

## Addresses the harm caused to individuals and society as a result of racial vilification

### *Harm caused to individuals*

51. When evaluating whether the need for reform of the current provisions has been demonstrated, it is important to consider the nature of the harm that the current provisions were introduced to address, and the effectiveness of the current provisions at addressing this harm.

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<sup>38</sup> [2011] FCA 1103.

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52. Hate speech based on race, or racial vilification, can harm individuals in a variety of ways, including:

- psychologically, emotionally and physically – individuals can experience ‘sadness, humiliation, outrage, fear, nervous tension and loss of self-esteem’ and these ‘may become manifest as severe physical illnesses’;<sup>39</sup> and
- financially – some people experiencing racial vilification could lose customers, employment opportunities or low self esteem may hinder applicants applying for positions.

53. The Race Discrimination Commissioner, Dr Tim Soutphommasane, has stated that in addition to the stress caused by racial abuse, racist speech can also cause more ‘insidious harm’, affecting a person’s sense of identity, worth and dignity.<sup>40</sup> The effect of racial hatred on a victim’s dignity and self-worth has also been noted by the LSNSW’s Indigenous Issues Committee.

54. Professor Gillian Triggs notes that most complaints of racial abuse that are received by the AHRC do not lead to physical violence and in fact have psychological and social impacts on the victims.<sup>41</sup> This is also noted by the LSSA, the LIV, the LSWA and the LSNSW’s Indigenous Issues Committee.

#### *Harm caused to society*

55. As noted by the LSNSW’s Indigenous Issues Committee, the effects of hate speech are not limited to personal harm against individuals, but the broader effects which prevent those affected from enjoying their human rights and participating in a society free from discrimination, where equality is the norm.

56. This was recognised in the 1991 *Racist Violence: Report of the National Inquiry into Racist Violence* (Racist Violence Report) which reported that ‘[i]ncitement to racial hostility is a significant element in creating a climate conducive to racist harassment, intimidation and violence’.<sup>42</sup> It found that racial vilification can cause people from targeted groups to feel fearful for their safety in public places,<sup>43</sup> and that fear of racist harassment and violence impacted upon people’s fundamental choices about their

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<sup>39</sup> Michael Chesterman, *Freedom of Speech in Australian Law: a Delicate Plant* (Ashgate, Aldershot, 2000), 193; see also Mari Matsuda, ‘Public Response to Racist Speech: Considering the Victim’s Story’ (1989) 87 *Michigan Law Review* 2320; Richard Delgado, ‘Words That Wound: A Tort Action For Racial Insults, Epithets, and Name-Calling’ (1982) 17 *Harvard Civil Rights-Civil Liberties Law Review* 133; T. Massaro, ‘Equality and Freedom of Expression: The Hate Speech Dilemma’ (1991) 32 *William and Mary Law Review* 211; Anne Flahvin, ‘Can Legislation Prohibiting Hate Speech Be Justified in Light of Free Speech Principles?’ (1995) 18 *University of New South Wales Law Journal* 327; Stefanou Haag, ‘Antiracism: From Legislation to Education’ (1994) 1 *Australian Journal of Human Rights* 185; and Robert Post, ‘Racist Speech, Democracy and the First Amendment’ (1991) 32 *William and Mary Law Review* 267, 271–7. Frederick Schauer says that the costs of free speech are borne disproportionately by racial minorities: ‘Uncoupling Free Speech’ (1992) 92 *Columbia Law Review* 1321, 1322.

<sup>40</sup> Dr Tim Soutphommasane, Race Discrimination Commissioner, ‘Two Freedoms: Freedom of expression and freedom from racial vilification’ (Speech delivered at the Alice Tay Lecture in Law and Human Rights 2014, Herbert and Valmae Freilich Foundation, Australian National University, 3 March 2014), available at: <https://www.humanrights.gov.au/news/speeches/two-freedoms-freedom-expression-and-freedom-racial-vilification> (‘Dr Tim Soutphommasane, Alice Tay Lecture’).

<sup>41</sup> Professor Gillian Triggs, President, Australian Human Rights Commission, ‘The freedom wars and the future of human rights in Australia’ (Speech Delivered at the National Press Club, Canberra, 9 April 2014), available at: <https://www.humanrights.gov.au/news/speeches/freedom-wars-and-future-human-rights-australia> (‘Professor Triggs, National Press Club’).

<sup>42</sup> Human Rights and Equal Opportunity Commission, *Report of National Inquiry into Racist Violence in Australia* (1991), 269, available at: <http://www.humanrights.gov.au/publications/racist-violence-1991>.

<sup>43</sup> *Ibid* 151.

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work, social and cultural life.<sup>44</sup> It can also have a ‘silencing effect’ on disadvantaged groups.

57. The harm caused to affected communities occurs because racial vilification means that the ‘whole race is included in the slur being cast’ even where the comment may only be aimed at a specific individual.<sup>45</sup> For example, the Executive Council of Australian Jewry has written:

*Expressions of hatred and vilification of members of identified communities which are identified by race and which are based on negative stereotypes of the characteristics shared by members of those communities, amount to more than offence, more than —only words and more than hurt feelings. It is conduct which has the effect of generating not just ill-feeling against members of a particular group but also a sense that vilification is socially acceptable, and of impliedly justifying acts of violence or discrimination against them.*

*Racial vilification is particularly harmful because it contributes to a climate of hatred and violence towards marginalised or disempowered sectors of the community. Vilification of entire groups of people is harmful to members of those groups because it undermines, and can ultimately destroy, the sense of safety and security with which they go about their daily lives.*<sup>46</sup>

58. Racial vilification itself can also operate to stifle freedom of expression, because it can have a silencing effect on those who are vilified.<sup>47</sup> As Bromberg J notes in *Eatock v Bolt*,<sup>48</sup> where ‘racially based disparagement is communicated publicly it has the capacity to hurt more than the private interests of those targeted’.<sup>49</sup> Justice Bromberg observes:

*The essence of racial vilification is that it encourages disrespect of others because of their association with the racial group to whom they belong. That kind of stigmatisation and its insidious potential to spread and grow from prejudice to discrimination, from prejudice to violence, or from prejudice to social exclusion, is at the fundamental core of racial vilification.*<sup>50</sup>

59. The effectiveness of the current provisions, at addressing both the individual and societal harm caused by racial vilification, has been considered by a number of academics.<sup>51</sup> It has also been the subject of commentary by a number of members of communities who appear to be most commonly affected by racial vilification in Australia. For example, the LSNSW’s Indigenous Issues Committee has also noted that:

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<sup>44</sup> Ibid 261.

<sup>45</sup> Michael Chesterman, *Freedom of Speech in Australian Law: a Delicate Plant* (Ashgate, Aldershot, 2000), 193.

<sup>46</sup> Executive Council of Australian Jewry, submission 41 to Australian Human Rights Commission Consultation, *Racism. It stops with me*, 2012, available at: <http://itstopswithme.humanrights.gov.au/it-stops-with-me/consultations>.

<sup>47</sup> National Congress, ‘Racism is not Free Speech’ (Joint Statement, 21 November 2013), available at: <http://nationalcongress.com.au/joint-statement-racism-is-not-free-speech/>.

<sup>48</sup> [2011] FCA 1103.

<sup>49</sup> Ibid [264].

<sup>50</sup> Ibid [225].

<sup>51</sup> For example see Katharine Gelber & Luke McNamara, ‘Freedom of speech and racial vilification in Australia: “The Bolt case” in public discourse’ (2013) 48 (4) *Australian Journal of Political Science* 470; Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (The Federation Press, 2002).

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*There is extraordinary unity among Indigenous and Ethnic communities in opposing any change to the existing provision. The Committees' view is that this is because those that have experienced racial vilification have no wish to have their children experience it as well. There is also a common understanding that the foundation stone of a cohesive society is tolerance, inclusion and equality, not hate or the facilitation or promotion of bigotry.*

60. The AHRC has also reported on the increasing number of complaints it has received under Part IIA over recent years. In the 2012-3 financial year, the Commission received 2,177 complaints, 23% (500) of which were complaints under the RDA (this does not include instances where a complainant made multiple complaints under different anti-discrimination legislation).<sup>52</sup> Thirty-five percent of these complaints were made by Aboriginal Australians.<sup>53</sup> There was an increase of complaints made under the RDA, attributable to an increase in the number of complaints received regarding material on the internet.<sup>54</sup> Of the complaints made under the RDA, 44% were conciliated; 28% were terminated on the basis that there was no reasonable prospect of conciliation; 12% were discontinued; 9% were withdrawn; and 7% were terminated for other reasons.<sup>55</sup> Of those complaints that were conciliated, 61% were successfully resolved.<sup>56</sup>
61. This research and commentary suggests that the current provisions form an important component of a broader legislative and non-legislative approach to combating racism and promoting tolerance in Australia.

### **Provides a low cost, non-litigious remedy to racial vilification**

62. When considering whether reform or repeal of the current provisions is necessary, it is noted that the current provisions provide a low-cost, non-litigious avenue to seek redress for those experiencing the harm caused by racially offensive behaviour.
63. These provisions aim to address a gap in legal protection that cannot be readily addressed through common law remedies.<sup>57</sup> For example, the AHRC's 1991 *Report of National Inquiry into Racist Violence* in Australia noted that while civil law remedies could theoretically be pursued by a private citizen subject to racial vilification, such as defamation, assault and battery, trespass and nuisance, this would be 'fraught with both legal and practical difficulties'. A number of commentators have also suggested that defamation law is an inadequate means of protecting individuals against racially-based harm.<sup>58</sup>
64. As the LIV has submitted, not only do the existing provisions of Part IIA fill a gap in protection, they have also been used to resolve complaints *before* they reach expensive court proceedings.
65. The AHRC has noted that civil actions have been successful only in the most egregious or extreme cases, at the high end of the spectrum. The SBS suggests that

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<sup>52</sup> Australian Human Rights Commission, *Annual Report 2012-3*, 8 October 2013, 124, available at: [https://www.humanrights.gov.au/sites/default/files/document/publication/ahrc\\_annual\\_report\\_2012-13.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/ahrc_annual_report_2012-13.pdf).

<sup>53</sup> Ibid 131.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid 134.

<sup>56</sup> Ibid.

<sup>57</sup> Commonwealth of Australia, Parliamentary Debates, House of Representatives, Tuesday 15 November 1994, 3336, (The Hon Michael Lavarch MP, Attorney-General).

<sup>58</sup> D Rolph, 'Racial Discrimination Laws as a Means of Protecting Collective Reputation and Identity' in M Rimmer (ed), *A Research Handbook on Indigenous Intellectual Property* (forthcoming).

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less than five per cent of complaints made under the RDA make it to court, where the majority of them fail.<sup>59</sup>

66. Most of the complaints resolved by the AHRC result in remedies that include an apology, an agreement to remove material, systemic outcomes such as training and changes to policies and compensation – generally not exceeding \$20,000.<sup>60</sup> Remedies available under the RDA can be contrasted to those available in defamation, where arguably similar damage can be sustained.<sup>61</sup> In defamation cases, damage to reputation is presumed to be the natural or probable consequence of a defamatory publication. Damages can often total hundreds of thousands of dollars (including consolation for hurt, humiliation and distress, reparation for damage to reputation and vindication of reputation).<sup>62</sup>
67. Submissions received by the Law Council argue persuasively that the removal of the existing provisions and the introduction of the Exposure Draft provisions – which contain terms and concepts that are different from analogous State and Territory laws and which depart from the established Commonwealth jurisprudence on the RDA – may have an impact on the extent to which any new provisions will continue to provide accessible, low cost, non-litigious remedies for those experiencing common forms of racial abuse.

### **Contains features designed to protect against undue interference with the right to free speech**

68. Many of the arguments outlined in favour of the Exposure Draft provisions or other reforms to sections 18C and 18D of the RDA, stem from the view that the existing provisions tip the balance too far in favour of protection from racial abuse and fail to guard against undue interference with the right to free speech.
69. Freedom of expression is a fundamental human right.<sup>63</sup> Both international and Australian law recognise, however, that freedom of expression is not absolute and can be limited in certain circumstances, including as a reasonable, necessary and proportionate means for pursuit of a legitimate objective.<sup>64</sup> Examples of limits on freedom of expression in Australian law include consumer protection laws, defamation, copyright, contempt of court and parliament, censorship, blasphemy, child pornography, incitement to genocide or to discrimination, hostility or violence and

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<sup>59</sup> Professor Gillian Triggs, President, Australian Human Rights Commission, 'Freedom of Speech and Racial vilification: one man's freedom ends where another's starts', (Speech Delivered at The Sydney Institute, 26 November 2013), available at <https://www.humanrights.gov.au/news/speeches/freedom-speech-and-racial-vilification-one-man-s-freedom-ends-where-another-s-starts> ('Professor Triggs, The Sydney Institute'); and SBS online, 'Interactive: Race discrimination cases from Brits to Bolt' 27 March 2014, available at: <http://www.sbs.com.au/news/article/2014/03/27/interactive-race-discrimination-cases-brits-bolt>. Last financial year, of the 192 complaints concerning racial hatred, only five (or 3 per cent) ended up in court – see: Dr Tim Southommasane, Alice Tay Lecture.

<sup>60</sup> See: Australian Human Rights Commission, *RACIAL DISCRIMINATION ACT 1975 - Complaints conciliated in the period January – June 2011* (accessed on 22 April 2014), available at:

<http://103.7.165.98/complaints/conciliation-register/racial-discrimination-act-1975-complaints-conciliated-period>. For a recent court award see: *Clarke v Nationwide News Pty Ltd* (2012) 289 ALR 345, where an award

of \$12,000 was made for offend, insult and humiliate.

<sup>61</sup> [2011] FCA 1103, [390].

<sup>62</sup> See, for example: *Crompton v Nugawela* (1996) 41 NSWLR 176 (award of \$600,000 upheld on appeal, matter involved racially insulting comments); *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 (awards of \$200,000, \$250,000 and \$50,000 respectively for three defamatory imputations); *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183 (damages reassessed at \$275,000).

<sup>63</sup> ICCPR, art 19.

<sup>64</sup> *Ibid* art 19(3).

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sexual harassment laws.<sup>65</sup> Part IIA of the RDA is therefore only one of many limits already imposed on free speech under Australian law.

70. Freedom from racial discrimination is also a fundamental human right, as is the right to equality.

71. These two rights – freedom of expression and the protection from racial vilification, tied as it is to broad equality principles – can be seen as complementary and mutually reinforcing, rather than in competition with each other. For example, the protection from racial vilification has been described as an integral component of the internationally protected freedom of expression and opinion.<sup>66</sup> Existing section 18D of the RDA contains a provision designed to balance the prohibition on racial vilification contained in section 18C with the recognition of the fundamental importance of freedom of speech. It provides that section 18C does not render unlawful anything said or done reasonably and in good faith: it ensures that artistic works, scientific debate and fair comment on a matter of public interest are exempt for section 18C, even if this involves a public act that offends, insults, humiliates or intimidates a person or group on the grounds of race, provided that what is said or done is reasonable and in good faith.

72. This provision was introduced in the RDA in recognition that the protections contained in section 18C do curtail free speech. An extract from the Second Reading Speech of the *Racial Hatred Act 1995* (Cth) highlights that:

*The bill places no new limits on genuine public debate. Australians must be free to speak their minds, to criticise actions and policies of others and to share a joke. The bill does not prohibit people from expressing ideas or having beliefs, no matter how unpopular the views may be to many other people. The law has no application to private conversations. Nothing which is said or done reasonably and in good faith in the course of any statement, publication, discussion or debate made or held for an academic, artistic or scientific purpose or any other purpose in the public interest will be prohibited by the law.*<sup>67</sup>

73. The courts have generally interpreted this provision to have broad application, in recognition of the legislative intention that it guards against any unjustified intrusion on the right to free speech that may arise from section 18C.

74. The Victorian Bar has described section 18D as a ‘carefully targeted and balanced exemption’. In that regard, Professor Triggs further explains that section 18D has operated to dismiss the following cases:

- *...a politics student who said that the Queensland police were corrupt. The case against him was dismissed on the grounds that his words were protected by the right to freedom of political communication.*
- *A book by Pauline Hanson and David Etteridge claiming that Aboriginal people received privileged treatment from government was found to have been published reasonably and in good faith, for a genuine purpose in the public interest*

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<sup>65</sup> Professor Triggs, The Sydney Institute.

<sup>66</sup> Owen Fiss, *The Irony of Free Speech* (Harvard University, 1996) 4.

<sup>67</sup> Commonwealth, *Parliamentary Debates*, Senate, 28 November 1994, 3276 (Senator John Faulkner, Minister for the Environment, Sport and Territories).

- *In Kelly-Country, a standup comedian played a character called “King Billy Cokebottle” who was a grotesque caricature of an aboriginal. The court found that, in the context of a comedy performance where the aim was to give offence or make jokes at the expense of someone, the offence or hurt was not out of proportion and was reasonable.*
- *A cartoon published in the West Australian in 1997 and entitled ‘Alas poor Yagan’ satirized the return to Australia from a graveyard in Liverpool of the head of an Aboriginal leader. It was found not to have breached Section 18C because it was published in good faith as an artistic work, and for a genuine purpose in the public interest.<sup>68</sup>*

75. In *Eatock v Bolt*<sup>69</sup> the Federal Court took a relatively expansive view of section 18D. Justice Bromberg comprehensively analysed the meaning of the phrase ‘reasonably and in good faith’, relying on French J’s analysis from *Bropho v Human Rights and Equal Opportunity Commission (Bropho)*.<sup>70</sup> Justice Bromberg summarised the relevant, though not exhaustive, principles of ‘reasonableness’ as:

- a thing done ‘reasonably’ must have a rational relationship to that activity and is not disproportionate to what is necessary to carry it out;
- ‘reasonably’ imports an objective judgment;
- it allows the possibility that there may be more than one way of doing things ‘reasonably’;
- the judgment should be informed by the normative elements of sections 18C and 18D and recognise the balance to be struck between freedom of expression and protection from racial vilification; and
- the importance of context in determining ‘reasonableness’, including the time, place, audience, and whether or not gratuitously insulting or offensive matters, irrelevant to the question of public interest under discussion, have been included.<sup>71</sup>

76. Justice Bromberg also followed the *Bropho*<sup>72</sup> understanding of ‘in good faith’, noting its both subjective and objective nature in relation to racial vilification. On the subjective side, this involves subjective honesty and a legitimate purpose, while on the objective side, it requires an attempt to honour the values asserted by the RDA. This means that a person who wishes to rely on the protection on section 18D for his act, must be honest in his or her approach and at the same time must do so in way that seeks to uphold the values enshrined in the Act by seeking to minimise offence.<sup>73</sup>

<sup>68</sup> Professor Triggs, National Press Club.

<sup>69</sup> [2011] FCA 1103.

<sup>70</sup> [2004] FCAFC 16, [70]. The majority of the court held that the test of whether an act was done ‘reasonably and in good faith’ contains both objective (‘reasonableness’) and subjective elements (‘good faith’). In determining whether an act was done ‘reasonably’, the courts objectively assess the respondent’s actions, having regard to whether the act was ‘proportionate’ to the achievement of a legitimate purpose. In determining whether an act was done in ‘good faith’, the majority of the Full Court suggested that a respondent will be required to show that they turned their mind to the harm that may be caused by their actions.

<sup>71</sup> *Eatock v Bolt* [2011] FCA 1103 (‘*Bolt*’), [341].

<sup>72</sup> [2004] FCAFC 16.

<sup>73</sup> *Bolt* [2011] FCA 1103, [343].

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77. The nature of the artistic work and the context of the impugned act within it may also be relevant to an assessment of its reasonableness. In *Bryl v Nowra*,<sup>74</sup> Commissioner Johnston stated that in drawing a line between what is reasonable, and what is not, when publishing and performing a play, a judge ‘should exercise a margin of tolerance and not find the threshold of what is unreasonable conduct too readily crossed.’<sup>75</sup> Moral and ethical considerations, expressive of community standards, are relevant in determining what is reasonable.<sup>76</sup>
78. Submissions received by the Law Council argue that in light of this jurisprudence, the existing section 18D provides a meaningful safeguard against any unnecessary or disproportionate interference with the right to free speech that may arise from the application of section 18C.

## Balanced interpretation by the courts

79. The public debate surrounding the existing provisions has included commentary on the way in which the courts have applied the provisions in cases such as *Eatock v Bolt*,<sup>77</sup> and, in particular, on the meaning attributed to the terms ‘offend, insult, humiliate or intimidate’.
80. Despite some strong public criticism of the courts’ approach, the case law on Part IIA demonstrates that the courts have interpreted sections 18C and 18D as a reasonable, necessary and proportionate limit on free speech for the purpose of promoting racial tolerance and protecting against the dissemination of racial prejudice.<sup>78</sup> Examples of the courts’ approach to balancing rights to free speech and freedom from racial discrimination in claims under section 18C include:<sup>79</sup>
- the words or conduct must be of a serious nature – section 18C applies only to ‘profound and serious effects not to be likened to mere slights’;<sup>80</sup>
  - whether conduct is reasonably likely to offend a group of people is to be objectively assessed on the reasonable victim test assessed by reference to community standards – so that relevant context is taken into account,<sup>81</sup> and
  - section 18D applies to protect conduct and words that would otherwise breach section 18C, where the requirements of that provision are met (including that the act was done reasonably and in good faith).

### Interpretation of offend, insult, humiliate and intimidate

81. The terms ‘offend’, ‘insult’ and ‘humiliate’ have attracted criticism on the grounds that these terms risk unduly burdening the right to free speech.

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<sup>74</sup> *Bryl v Nowra* [1999] HREOCA 11, extract at (1999) EOC 93-022.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> [2011] FCA 1103.

<sup>78</sup> *Jones v Toben* [2002] FCA 1150 (*‘Toben’*).

<sup>79</sup> Professor Triggs, The Sydney Institute.

<sup>80</sup> *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 (*‘Creek’*), [16] (Kiefel J); *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 (*‘Bropho’*), [70] (French J); *Jones v Scully* (2002) 120 FCR 243 (*‘Scully’*), [102] (Hely J); *Toben* [2002] FCA 1150, [92] (Branson J); *Bolt* [2011] FCA 1103, [268] (Bromberg J).

<sup>81</sup> *Bropho* (2004) 135 FCR 105, [66] (French J); *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 (*‘Hagan’*), [15] (Drummond J); *Creek* (2001) 112 FCR 352, [12] (Kiefel J); *Scully* (2002) 120 FCR 243, [99] (Hely J); *McGlade v Lightfoot* (2002) 124 FCR 106 (*‘McGlade’*), [42]-[45] and [47] (Carr J).

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82. The terms 'offend, insult, humiliate or intimidate' in section 18C are not defined in the RDA. The Second Reading Speech to the *Racial Hatred Bill 1995* (Cth) introducing Part IIA suggests that the terms may have been included to promote consistency between the RDA and other Commonwealth anti-discrimination regimes:

*The requirement that the behaviour complained about should 'offend, insult, humiliate or intimidate' is the same as that used to establish sexual harassment in the Sex Discrimination Act. The commission is familiar with the scope of such language and has applied it in a way that deals with serious incidents only.*<sup>82</sup>

83. The courts have interpreted the terms 'offend, insult, humiliate or intimidate' with reference to their ordinary dictionary meanings.<sup>83</sup> For example:

- Offend – 'To irritate in mind or feelings; cause resentful displeasure in. 2. To affect (the sense, taste, etc) disagreeably.'<sup>84</sup>
- Insult – 'To assail with offensively dishonouring or contemptuous speech or action; to treat with scornful abuse or offensive disrespect; to offer indignity to; to affront, outrage.'<sup>85</sup>
- Humiliate – 'To lower the pride or self respect of; cause a painful loss of dignity to; mortify.'<sup>86</sup>
- Intimidate – '1. To make timid, or inspire with fear; overawe; cow. 2. To force into or deter from some action by inducing fear.'<sup>87</sup>

84. However, as the LSWA has emphasised, the courts have also made clear that such conduct must extend to the public dimension and must have 'profound and serious effects not to be likened to mere slights'.<sup>88</sup>

85. The following case study examples provide some insight into how these terms have been interpreted.

### *Jones v Toben*

86. The case of *Jones v Toben*<sup>89</sup> concerned material posted on the internet by Dr Fredrick Toben that cast doubt on the Holocaust, suggesting that the gas chambers used to exterminate Jewish people at Auschwitz were unlikely, and further, that some Jewish people, for improper purposes such as financial gain, had exaggerated the number of Jews killed during World War II.

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<sup>82</sup> Commonwealth of Australia, Parliamentary Debates, House of Representatives, Tuesday 15 November 1994, 3336, (The Hon Michael Lavarch MP, Attorney-General).

<sup>83</sup> Per Bromberg J in *Bolt* [2011] FCA 1103, [262] citing: *Scully* (2002) 120 FCR 243, [103] (Hely J); *McGlade* (2002) 124 FCR 106, [52] (Carr J); *Toben* [2002] FCA 1150, [90] (Branson J); and *Bropho* (2004) 135 FCR 105, [67] (French J).

<sup>84</sup> Arthur Delbridge (ed) *Macquarie Dictionary: Australia's National Dictionary* (Macquarie Library, 2001), cited by Bromberg J in *Bolt* [2011] FCA 1103, [262].

<sup>85</sup> J. A. Simpson, E. S. C. Weiner (eds) *Oxford English Dictionary* (Oxford University Press, 1989), cited by Bromberg J in *Bolt* [2011] FCA 1103, [262].

<sup>86</sup> Arthur Delbridge (ed) *Macquarie Dictionary: Australia's National Dictionary* (Macquarie Library, 2001), cited by Bromberg J in *Bolt* [2011] FCA 1103, [262].

<sup>87</sup> *Ibid.*

<sup>88</sup> Per Bromberg J in *Bolt* [2011] FCA 1103, [268] citing: *Creek* (2001) 112 FCR 352, [16] (Kiefel J); *Bropho* (2004) 135 FCR 105, [70] (French J); and *Scully* (2002) 120 FCR 243, [102] (Hely J); or, as Branson J put it in *Toben* [2002] FCA 1150, [92]: 'real, offence'.

<sup>89</sup> *Toben* [2002] FCA 1150.

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87. The complainant, President of the Executive Council of Australian Jewry, Mr Jeremy Jones, took the matter to the (then) HREOC that found the material to be in breach of section 18C of the RDA.
88. Mr Jones subsequently applied to the Federal Court of Australia to enforce HREOC's decision. Justice Branson enforced HREOC's decision, stating that she was 'satisfied that it is more probable than not that the material would engender in Jewish Australians a sense of being treated contemptuously, disrespectfully and offensively.'<sup>90</sup> Dr Toben was ordered to remove the offensive material from the internet.
89. Justice Branson stated that because the RDA did not define the phrase 'offend, insult, humiliate or intimidate', or any of its individual terms, they were to be given their ordinary, dictionary meanings.<sup>91</sup> Justice Branson recognised that each word bore a slightly different meaning, noting that it appeared that 'the first two words involve closely related concepts and the same may, perhaps to a lesser extent, be said of the final two words.'<sup>92</sup>
90. Justice Branson cited the judgment of Kiefel J in *Creek v Cairns Post Pty Ltd*<sup>93</sup> who noted that the effect of the terms was to be 'profound and serious', rather than being likened to 'mere slights'.<sup>94</sup> Justice Branson considered that this was not to detract from the ordinary meaning of the words, but rather, to place them within the legislative content of the introduction of the terms into the RDA, that is, only acts that 'fall squarely within' section 18C are to be unlawful.<sup>95</sup>

#### *Bropho v Human Rights and Equal Opportunity Commission*

91. The case of *Bropho*<sup>96</sup> concerned a cartoon published in the Western Australian newspaper in September 1997 that was the basis of a complaint made to HREOC, pursuant to section 18C. The plaintiff alleged that the cartoon implied an unseemly desire on the part of some Nyoongar people to take advantage of public funding to travel to England and that an Aboriginal leader had frivolously used the dreamtime serpent in the context of this visit. The cartoon also depicted the head of Yagan, a Western Australian Aboriginal leader who was killed in 1833 by two settlers, and whose head was returned to England.
92. The complaint was dismissed by HREOC for the reason that it was an artistic work, and fell within the exemption at section 18D. A challenge to this decision by way of judicial review was dismissed by a judge in the Federal Court of Australia.<sup>97</sup>
93. Mr Bropho appealed to the Full Court of the Federal Court, raising the question of the appropriate balance between the prohibition of racial vilification, and the protection of freedom of expression in the RDA; as well as the statutory requirement at section 18D of reasonableness and good faith in the exercise of that freedom. The appeal was dismissed by French J and Carr J, with Lee J dissenting. In his extensive discussion of the terms 'offend, insult, humiliate or intimidate' at section 18C, French J stated that these words are 'open textured', and although they can be used to describe conduct

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<sup>90</sup> Ibid [93].

<sup>91</sup> Ibid [90].

<sup>92</sup> Ibid [91].

<sup>93</sup> (2001) 112 FCR 352, [16].

<sup>94</sup> *Toben* [2002] FCA 1150, [92].

<sup>95</sup> Ibid.

<sup>96</sup> (2004) 135 FCR 105.

<sup>97</sup> See: *Bropho* [2002] FCA 1510.

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which is relatively minor (with reference to their dictionary meaning), they ‘must be judged according to their ordinary meaning, in their context, acknowledging their somewhat elastic content and having regard to the objectives of the legislation which are to be derived from its terms and from extraneous material including the Second Reading Speech and the Explanatory Memorandum’.<sup>98</sup>

94. French J stated that ‘[t]he lower registers of the...definitions and in particular those of ‘offend’ and ‘insult’ seem a long way removed from the mischief to which Article 4 of [the ICERD] is directed’.<sup>99</sup>
95. Justice French observed that the intention of the *Racial Hatred Bill 1995* (Cth) was “...to close a gap in the legal protection available to the victims of extreme racist behaviour”.<sup>100</sup>
96. Justice French referred to the interpretation made by Kiefel J of the statutory policies, who stated in *Creek v Cairns Post Pty Ltd*<sup>101</sup> that the conduct caught by section 18C would have ‘[p]rofound and serious effects not to be likened to mere slights’.<sup>102</sup>
97. Justice French noted that in *Toben v Jones*<sup>103</sup> Carr J agreed with this statement by Kiefel J, as well as her approach that regard must be paid to all the circumstances in order to determine whether racial hatred had occurred.<sup>104</sup>

#### *Eatock v Bolt*

98. In *Eatock v Bolt*,<sup>105</sup> Bromberg J held that the messages that were conveyed by the articles were reasonably likely to offend, insult, humiliate or intimidate the people who were the subject of those articles.
99. Justice Bromberg determined that the imputations conveyed by the articles were:<sup>106</sup>

*There are fair-skinned people in Australia with essentially European ancestry but with some Aboriginal descent, of which the individuals identified in the articles are examples, who are not genuinely Aboriginal persons but who motivated by career opportunities available to Aboriginal people or by political activism, have chosen to falsely identify as Aboriginal; and*

*Fair skin colour indicates a person a person who is not sufficiently Aboriginal to be genuinely identifying as an Aboriginal person.*

100. In making these findings, Bromberg J stated that the ordinary (dictionary) meaning of the words ‘offend, insult, humiliate or intimidate’ used in previous cases was ‘potentially quite broad’ when read in the context of section 18C, that is more concerned with public mischief that is injurious to the public interest and social cohesiveness of society.<sup>107</sup>

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<sup>98</sup> (2004) 135 FCR 105, [67]-[69].

<sup>99</sup> *Ibid* [68].

<sup>100</sup> *Ibid*, quoting: Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1994, 3336 (Michael Hugh Lavarch, Attorney-General).

<sup>101</sup> [2001] FCA 1007, [16].

<sup>102</sup> (2004) 135 FCR 105, [70].

<sup>103</sup> [2002] FCA 1150, [31].

<sup>104</sup> (2004) 135 FCR 105, [70].

<sup>105</sup> [2011] FCA 1103.

<sup>106</sup> *Ibid* [16] and [284].

<sup>107</sup> *Ibid* [263].

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101. Justice Bromberg found that ‘offend’ was wider than ‘insult’, ‘humiliate’ or ‘intimidate’, but should be interpreted conformably with the words chosen as its partners.<sup>108</sup>
102. The term ‘insult’ was found to be closely connected to a loss of or lowering of dignity.<sup>109</sup> This is the same for the term ‘humiliate’, which also carries with it a meaning of:
- ...more than destruction of self-perception or self-esteem of a person. It affects others in the community by lowering their regard for, and demeaning the worthiness of, the person, or persons, subjected to that conduct. It stimulates contempt or hostility between groups of people within the community and it is the intent of the Act that such socially corrosive conduct be controlled.*<sup>110</sup>
103. Justice Bromberg also observed that, ‘intimidate’ means silencing consequences of the dignity denying impact of racial prejudice as well as the use of threats of violence,<sup>111</sup> but noted that in *Bropho*,<sup>112</sup> this term was also interchangeable with the definition of ‘humiliate’ extracted directly above – ‘more than destruction of self-perception or self-esteem of a person’.<sup>113</sup>
104. Justice Bromberg stated that the effect of the terms, taken together, is to apply to personal hurt *in conjunction with* ‘some public consequence’ that needn’t be significant, but threatens the protection of the public interest that Part IIA of the RDA is required to protect.<sup>114</sup> Justice Bromberg summarised such acts as ‘conduct which invades or harms the dignity of an individual or group, involves a public mischief in the context of an Act which seeks to promote social cohesion’.<sup>115</sup>

## **Implements a range of Australia’s international obligations**

### International Covenant on Civil and Political Rights

105. As noted above, Australia’s international obligations to protect and promote freedom of expression have been cited as a basis for reviewing and reforming the existing Part IIA of the RDA.
106. Submissions to the Law Council highlight that international law recognises the need to limit speech freedoms when necessary to ensure the fulfilment of other protected human rights – like, for example, social equality.
107. This is encapsulated in Articles 19 and 20 of the ICCPR. Article 19 provides:
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.*

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<sup>108</sup> Ibid [265].

<sup>109</sup> Ibid.

<sup>110</sup> Ibid [266], citing Lee J in *Bropho* (2004) 135 FCR 105 at [138].

<sup>111</sup> Ibid [265].

<sup>112</sup> (2004) 135 FCR 105, [138] per Lee J.

<sup>113</sup> [2011] FCA 1103, [266].

<sup>114</sup> Ibid [267].

<sup>115</sup> Ibid.

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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 provides:

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. .*

### International Covenant on the Elimination of All Forms of Racial Discrimination

108. In addition to the rights contained in the ICCPR, it is also necessary to consider the extent to which the current provisions give effect to Australia's obligations under the ICERD and the impact that the removal or reform of these provisions may have for Australia's compliance with this Convention.

109. As noted above, Part IIA of the RDA was introduced to implement Article 4 of the ICERD.<sup>116</sup> This Article must in considered in light of Articles 2 and 5 of the ICERD, as set out below.

110. Article 2 of ICERD sets out both negative and positive obligations on States in relation to racial discrimination. It provides that the State must penalise the following four categories of conduct: (1) dissemination of ideas based upon racial superiority or hatred; (2) incitement to racial hatred; (3) acts of violence against any race or group of persons of another colour or ethnic origin; and (4) incitement to such acts.<sup>117</sup>

111. Article 4 of the ICERD elaborates on those obligations, specifying that the State must fulfil its obligations under Article 2 in three discreet ways:

- (a) create an offense that is punishable by law. It provides that 'ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts...and also the provision of any assistance to racist activities', should constitute an offence;
- (b) declare illegal and prohibit certain organisations, organised and propaganda activities that promote and incite racial discrimination, making participation in such organisations or activities an offence that is punishable by law; and
- (c) prevent public authorities or public institutions from promoting or inciting racial discrimination.

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<sup>116</sup> There is no requirement that State Parties implement a treaty as a literal translation into domestic law, but rather, a State Party to a treaty is required to interpret the treaty in 'good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose: *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 31(1).

<sup>117</sup> Committee on the Elimination of Racial Discrimination ('CERD'), General Recommendation 15, *Measures to eradicate incitement to or acts of discrimination* (Forty-second session, 1993), U.N. Doc. A/48/18 at 114 (1994), at [3]. See: <http://www1.umn.edu/humanrts/gencomm/genrxv.htm>.

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112. The Committee on the Elimination of Racial Discrimination (CERD), in interpreting Article 4 of ICERD has stated that offences for racial discrimination must apply to:<sup>118</sup>

- (a) *All dissemination of ideas based on racial or ethnic superiority or hatred, by whatever means;*
- (b) *Incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent, or national or ethnic origin;*
- (c) *Threats or incitement to violence against persons or groups on the grounds in (b) above;*
- (d) *Expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination on the grounds in (b) above, when it clearly amounts to incitement to hatred or discrimination;*
- (e) *Participation in organizations and activities which promote and incite racial discrimination.*

113. Article 5(a) of the ICERD sets out the right of equality before the law in the context on the prohibition on racial hatred and discrimination, as set out at Article 4, and identifies a non-exhaustive list of rights that the State must ensure are available and enjoyable by everyone, regardless of their race, colour or national or ethnic origin.

114. Article 5(b) of the ICERD identifies '[t]he right to security of person and protection by the State against violence or bodily harm...'. Criminal case law in various jurisdictions provides that 'bodily harm' encompasses psychological, as well as physical, harm.<sup>119</sup>

115. At the time of ratification of the ICERD, Australia made reservations to Article 4(a) on the basis that Australia was not in a position at that time to treat all of the offences identified in Article 4(a) as offences under Australian law. Australia noted existing criminal law may cover some of the acts identified in Article 4(a), and that 'at the first suitable moment' legislation would be sought from Parliament implementing the terms of Article 4(a).

116. Australia has implemented some of its ICERD obligations in domestic law through the introduction of Part IIA to the RDA.<sup>120</sup> As noted by French J in *Bropho*,<sup>121</sup> 'the Convention which underpins [Part IIA of the RDA] 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'.<sup>122</sup>

117. In addition to enacting section 18C of the RDA, Australia has also sought to enact a range of legislative measures to give effect to these obligations. For example:

- In 2010 the Commonwealth *Criminal Code Act 1995* (Cth) (Criminal Code) was amended with the introduction of sections 80.2A (urging violence against

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<sup>118</sup> CERD, General Recommendation 35, *Combating racist hate speech* (26 September 2013), U.N. Doc. CERD/C/GC/35, at [13]. See:

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhssyNNtg151ma08CMA6o7Bglz8iG4SuOjovEP%2bcqr8joDoVEbW%2bQ1MoWdOTNEV99v6FZp9aSSA1nZya6gtpTo2JUBMI0%2boOmjAwk%2b2xJW%2bC8e>.

<sup>119</sup> See, for example: *Li v R* [2005] NSWCCA 442 at [45] in New South Wales; *R v Ireland*, *R v Burstow* [1998] 1 Cr App R 177 in Britain; and *R v McCraw* (1991) 66 C.C.C. (3d) 517 in Canada.

<sup>120</sup> *Koowarta v Bjelke Petersen* (1982) 153 CLR 168, [211]-[221] (Stephen J), [222]-[235] (Mason J), [237]-[242] (Murphy J), [253]-[261] (Brennan J).

<sup>121</sup> *Bropho* (2004) 135 FCR 105.

<sup>122</sup> *Ibid* [62].

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a group distinguished by their distinguished by race, religion, nationality, national or ethnic origin or political opinion) and 80.2B (urging violence against members of a group, that group being distinguished by race, religion, nationality, national or ethnic origin or political opinion).<sup>123</sup>

- The Criminal Code also makes it an offence to use a postal or similar service,<sup>124</sup> or a carriage service<sup>125</sup> to menace, harass or cause offence. Although there is no reference to racial superiority or hatred in these provisions, it is arguable that these offences apply to the dissemination of ideas based on racial superiority or hatred.
- At the State and Territory level, there are general assault provisions that may cover acts of violence against any race or group of persons of another colour or ethnic origin,<sup>126</sup> as well as specific offence provisions relating to incitement of racial hatred or vilification.<sup>127</sup>
- Section 9(1) of the 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.
- Section 17 provides that it is unlawful for a person (a) to incite the doing of an act that is unlawful by reason of a provision of this Part (i.e. Part II of the RDA which includes section 9); or (b) to assist or promote whether by financial assistance or otherwise the doing of such an act.

118. The Exposure Draft provisions replace section 18C with a provision which does not include the terms 'offend', 'insult' and 'humiliate', but instead prohibits acts that is reasonably likely to 'vilify' (defined as inciting hatred) or 'intimidate' (defined as giving rise to fear of physical harm).

119. Submissions received by the Law Council express concern that that these new definitions will not provide the protection required by Articles 4(a) and 5(a) of the ICERD.

120. It is further submitted that the term 'vilify' appears to be narrower than the term 'bodily harm' as provided in Article 5(b) of the ICERD. The LSNSW's Human Rights Committee has expressed the view that the proposed replacement of the words 'offend, insult, humiliate' by the word 'vilify' in the Exposure Draft provisions is not adequate to meet the requirements of the ICCPR and the ICERD. This is so because 'vilify' is defined by the Exposure Draft provisions to mean only the incitement of racial hatred. Article 4(a) of the ICERD requires State parties to make 'all dissemination of ideas based on racial superiority or hatred' an offence. If the definition of 'vilify' is

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<sup>123</sup> Sections 80.2A and 80.2B were inserted into the Criminal Code with the *National Security Amendment Act 2010* (Cth). The *National Security Amendment Bill 2010* (Cth) was referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report and the Senate Standing Committee for the Scrutiny of Bills also considered the Bill. See:

[http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/bd/bd1011a/11bd021](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1011a/11bd021).

<sup>124</sup> *Criminal Code 1995* (Cth) s 471.12.

<sup>125</sup> *Ibid* s 474.17. Section 473.14 stipulates how to determine whether material is offensive as it relates to Telecommunications Services.

<sup>126</sup> See for example *Criminal Code 1899* (Qld) s 335 (common assault) and s 337 (serious assault).

<sup>127</sup> See for example *Anti-Discrimination Act 1991* (Qld) s 131A which provides for an offence of serious racial, religious, sexuality or gender identity vilification.

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confined to inciting hatred, an additional element may need to be proven – the inciting of a third party – which may impose a higher threshold than that required under the ICERD. The Committee also takes issue with the definition attributed to the term ‘intimidates’ as ‘to cause fear of physical harm’.

121. However, it is also noted that the relevant provisions of ICERD do not necessarily demand the inclusion of terms such as ‘insult’ and ‘offend’ in legislation aimed at prohibiting racial vilification. The ICERD leaves it to State parties to give appropriate domestic legislative effect to obligations rather than mandating specific legislative provisions.

122. The proposed exemption clause in the Exposure Draft has also given rise to concerns about Australia’s compliance with its obligations under ICERD.

123. It is clear from the General Recommendations of CERD, and the articles of the ICERD itself, that protection from racial vilification should be pursued in a manner that does not unduly burden the right to free speech. For example, Article 5 of the ICERD provides that States must prohibit and eliminate racial discrimination to guarantee the right of equality before the law, through the enjoyment of certain rights, including the right to freedom of opinion and expression and the right to equal participation in cultural activities. This suggests there must be a balance to enjoy such rights without freedom of expression amounting to racial discrimination. The Committee has commented that:<sup>128</sup>

*...the expression of ideas and opinions made in the context of academic debates, political engagement or similar activity, and without incitement to hatred, contempt, violence or discrimination, should be regarded as legitimate exercises of the right to freedom of expression, even when such ideas are controversial.*

124. However, CERD further provides that freedom of expression should be limited by law where it is ‘necessary for protection of the rights or reputations of others and for the protection of national security or of public order, or of public health or morals’.<sup>129</sup> Importantly, CERD has stressed that freedom of expression should not ‘aim at the destruction of the rights and freedoms of others, including the right to equality and non-discrimination’.<sup>130</sup>

125. The CERD has further outlined the circumstances that a decision-maker should consider when determining whether dissemination or incitement of racial discrimination has occurred:<sup>131</sup>

- (a) the content and form of speech;
- (b) the economic, social and political climate;
- (c) the position or status of the speaker in society and the audience to which the speech is directed;
- (d) the reach of the speech; and
- (e) the objectives of the speech.

126. These factors are useful when evaluating exemptions to laws prohibiting racial vilification.

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<sup>128</sup> CERD, General Recommendation 35, at [25].

<sup>129</sup> Ibid at [26].

<sup>130</sup> Ibid.

<sup>131</sup> Ibid at [15].

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127. The Exposure Draft exemption does not contain a requirement of reasonableness or good faith and does not take into account the factors CERD has outlined as important when determining whether an exemption should apply to conduct which otherwise may amount to a breach of Article 4 of the ICERD.

#### Other Relevant International Human Rights Obligations

128. Australia is also a signatory to the *Universal Declaration on the Rights of Indigenous People*<sup>132</sup> which imposes the following obligations on State Parties:

*States shall provide effective mechanisms for prevention of, and redress for:....(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.*<sup>133</sup>

...

*States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.*<sup>134</sup>

129. Concerns have been raised that the Exposure Draft provisions may result in Australia not fulfilling these obligations.

130. In line with its past advocacy on Commonwealth anti-discrimination law,<sup>135</sup> the Law Council supports a comprehensive review of the RDA to determine whether it is effective at meeting its legislative objects to eliminate discrimination and implement Australia's obligations under the ICERD.

## Further Submissions Made to the Law Council on the Exposure Draft Provisions

131. As noted above, the Law Council's National Human Rights Committee and Indigenous Legal Issues Committee, the LIV, the LSNSW Human Rights and Indigenous Issues Committees, the LSWA and the LSSA opposed the proposed reforms on the basis that the need for reform of the existing provisions had not been established. The LSNT passed a resolution to this effect in 2013. Many of these bodies also expressed the view that the Law Council should not propose amendments to the Exposure Draft legislation but instead provide detailed comments on the Exposure Draft provisions.

132. The LSSA also strongly opposed the Exposure Draft provisions but also expressed the view that, although it was not convinced of the need for such an amendment, a case could be made for amending the words of section 18C to align with its judicial interpretation. For example, section 18C could be amended to apply to acts which are 'reasonably likely ... (i) to cause profound or serious offence, insult or humiliation or (ii) intimidate another person or group of people'. The LSSA explained that such an amendment would ensure that the words of the section make clear to all members of

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<sup>132</sup> G.A. Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, UN Doc A/RES/61/295 (13 September 2007).

<sup>133</sup> Art.8(2)(e).

<sup>134</sup> Art.15(2).

<sup>135</sup> A summary of the Law Council's past advocacy in relation to Commonwealth anti-discrimination law can be found at: <http://www.lawcouncil.asn.au/lawcouncil/index.php/current-issues/anti-discrimination>.

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the public that only racist conduct causing profound or serious offence, insult or humiliation is unlawful.

133. The Victorian Bar limited its comments to the proposed exemption, expressing concern at the Exposure Draft provision and suggesting that consideration be given to a provision that more closely reflects existing section 18D.

## Coverage of Exposure Draft Proposal

134. Subsection 18C of the RDA currently provides that an act will be unlawful if it occurs 'otherwise than in private'. This phrase is described in sub-section 18C(2) as an act that '(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.' 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.'
135. The relevant Exposure Draft provision refers to 'acts done *otherwise than in private*' (emphasis added), but does not provide any further detail as to the meaning of this term. As a result it is unclear whether the Exposure Draft provisions are intended to have the same coverage in terms of 'acts done otherwise than in private', as the existing section 18C.
136. It is also noted that the coverage of racial vilification laws was recently considered by the NSW Standing Committee on Law and Justice as part of its 2013 inquiry into racial vilification laws in NSW. These laws are found in Division 3A of the *Anti-Discrimination Act 1977 (NSW)*.<sup>136</sup>
137. The Terms of Reference for this inquiry were to inquire into: the effectiveness of section 20D of the *Anti-Discrimination Act 1977 (NSW)* which creates the offence of serious racial vilification; whether section 20D establishes a realistic test for the offence of racial vilification in line with community expectations; and any improvements that could be made to section 20D, having regard to the continued importance of

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<sup>136</sup> Section 20D of the *Anti-Discrimination Act 1977 (NSW)* provides:  
(1) A person shall not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group by means which include:  
(a) threatening physical harm towards, or towards any property of, the person or group of persons, or  
(b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.  
Maximum penalty:  
In the case of an individual-50 penalty units or imprisonment for 6 months, or both.  
In the case of a corporation-100 penalty units.  
(2) A person shall not be prosecuted for an offence under this section unless the Attorney General has consented to the prosecution.

Section 20C provides:

- (1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.  
(2) Nothing in this section renders unlawful:  
(a) a fair report of a public act referred to in subsection (1), or  
(b) a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege (whether under the *Defamation Act 2005* or otherwise) in proceedings for defamation, or  
(c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

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freedom of speech. At that time, section 20D had not yet led to any successful prosecutions.

138. Both the LSNSW and the NSW Bar Association supported the ongoing need for the offence provisions, but made recommendations as to how they could be improved.<sup>137</sup>
139. In December 2013, the NSW Parliamentary Standing Committee issued a lengthy report.<sup>138</sup> Among its fifteen recommendations, the Committee recommended that the NSW Government consider amending section 20B of the *Anti-Discrimination Act 1977* (NSW) to ensure that it covers communications that occur in quasi-public places, such as the lobby of a strata or company title apartment block.<sup>139</sup> The NSW Committee also pointed to section 12 of the *Racial and Religious Tolerance Act 2001* (Vic), which provides that if the respondent can establish that their conduct was intended 'to be heard or seen only by themselves', they will not be caught by the prohibitions in the Act.
140. The distinction between public and private acts is also relevant to considerations relating to the scope of the exemption proposed in the Exposure Draft provisions.
141. The Exposure Draft provisions repeal and do not replace existing section 18B of the RDA. This section currently provides:
- If:*
- (a) an act is done for 2 or more reasons; and*
- (b) one of the reasons is the race, colour or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act);*
- then, for the purposes of this Part, the act is taken to be done because of the person's race, colour or national or ethnic origin.*
142. The LSSA has observed that no reason for repealing this section has been outlined, and has warned that its removal could lead to an outcome whereby only conduct engaged in solely because of race would come within the ambit of the Exposure Draft provisions. These provisions should explicitly include conduct in which race is a motivating factor.
143. The LSNSW's Human Rights Committee also expressed this view and noted that provisions similar to section 18B exist in the *Sex Discrimination Act 1984* (Cth) and the *Disability Discrimination Act 1992* (Cth) and the relevant Anti-Discrimination Acts of the States and Territories.

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<sup>137</sup> See: Law Society of New South Wales, *Inquiry into Racial Vilification Law in NSW*, 6 March 2013, available at: [http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/eed871aa8ad3d34bca257b2c007ac8f6/\\$FILE/0012%20Law%20Society%20of%20New%20South%20Wales.pdf](http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/eed871aa8ad3d34bca257b2c007ac8f6/$FILE/0012%20Law%20Society%20of%20New%20South%20Wales.pdf); and The New South Wales Bar Association, *Inquiry into Racial Vilification Law in NSW*, 12 March 2013, available at: [http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/90dea18c6e27d1a0ca257b35007bb5c2/\\$FILE/0031%20NSW%20Bar%20Association.pdf](http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/90dea18c6e27d1a0ca257b35007bb5c2/$FILE/0031%20NSW%20Bar%20Association.pdf).

<sup>138</sup> Standing Committee on Law and Justice, Parliament of New South Wales, *Racial vilification law in New South Wales*, 3 December 2013, available at: [http://www.parliament.nsw.gov.au/Prod/Parliament/committee.nsf/0/e08d4387100a3c56ca257c35007fcc4d/\\$FILE/Racial%20vilification%20law%20in%20New%20South%20Wales%20-%20Final%20report.pdf](http://www.parliament.nsw.gov.au/Prod/Parliament/committee.nsf/0/e08d4387100a3c56ca257c35007fcc4d/$FILE/Racial%20vilification%20law%20in%20New%20South%20Wales%20-%20Final%20report.pdf).

<sup>139</sup> *Ibid*, Recommendation 1.

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144. The Law Council also notes the AHRC's submission on the Exposure Draft that raises legitimate questions about whether the current wording of section 18C – that includes the terms 'offend' and 'insult' – extends beyond the scope of permissible limitations of Article 19 of the ICCPR.<sup>140</sup> Such questions must be considered in light of Australia's obligations under the ICERD and in light of the relevant case law interpreting the scope of the terms in section 18C – that demands 'serious or profound effects beyond mere slights'.<sup>141</sup> These are the type of inquiries that would benefit from further detailed analysis by the Law Council and others.

## Meaning of 'vilify' and 'intimidate'

145. The Exposure Draft provisions make it unlawful for a person to vilify another person or a group of persons. The term 'vilify' is defined as 'to incite hatred against a person or group of persons'. This definition can be contrasted to the dictionary meaning of 'vilify': 'to speak or write about in an abusively disparaging manner'.<sup>142</sup>

146. The Exposure Draft provisions also make it unlawful to intimidate another person or a group of persons. The term 'intimidate' is defined as 'to cause fear of physical harm'. This definition can be contrasted with the dictionary meaning of 'intimidate' which includes 'to make timid, or inspire with fear; overawe; cow' or 'to force into or deter from some action by inducing fear'.<sup>143</sup>

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<sup>140</sup> AHRC Exposure Draft Submission. See specifically [17], and [22]-[24]:

17. *The right to freedom of expression is of fundamental importance. While not an absolute right, it can only be permissibly limited in certain circumstances.*

...

22. *Certain 'very specific limitations' of freedom of expression will be legitimate if 'they are necessary in order for the State to fulfil an obligation to prohibit certain expressions on the grounds that they cause serious injury to the human rights of others'. [10] It is accepted that such limitations include matters that meet the required threshold in:*

- o Article 20(2) of the ICCPR which establishes that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'; and*
- o Article 4(a) of the ICERD which establishes the requirement 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 ...'.*

23. *Article 20(2) of the ICCPR sets a high threshold for hate speech that States are required to prohibit by law. This provision relates to advocacy of hatred that also constitutes incitement to discrimination, hostility or violence. Accordingly:*

*advocacy of national, racial or religious hatred is not a breach of article 20, paragraph 2, of the Covenant on its own. Such advocacy becomes an offence only when it also constitutes incitement to discrimination, hostility or violence; in other words, when the speaker seeks to provoke reactions (perlocutionary acts) on the part of the audience, and there is a very close link between the expression and the resulting risk of discrimination, hostility or violence. In this regard, context is central to the determination of whether or not a given expression constitutes incitement. [11]*

24. *The UN Human Rights Committee, the monitoring committee set up under the ICCPR, has also clarified that 'a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3'. [12] In other words, while States are required to impose the prohibitions described in article 20, these prohibitions must also satisfy the requirements set down in article 19(3).*

<sup>141</sup> *Creek* (2001) 112 FCR 352, [16] (Kiefel J); *Bropho* (2004) 135 FCR 105, [70] (French J); *Scully* (2002) 120 FCR 243, [102] (Hely J); *Toben* [2002] FCA 1150, [92] (Branson J); *Bolt* [2011] FCA 1103, [268] (Bromberg J).

<sup>142</sup> Oxford Dictionaries, *Vilify* (accessed 22 April 2014), available at:

<http://www.oxforddictionaries.com/definition/english/vilify?q=vilify>. See also: Dr Tim Soutphommasane, 'In defence of racial tolerance', (Speech Delivered to the Australia Asia Education Engagement Symposium, Melbourne, 1 April 2014), available at: <https://www.humanrights.gov.au/news/speeches/defence-racial-tolerance> ('Dr Tim Soutphommasane, Australia Asia Education Engagement Symposium').

<sup>143</sup> Arthur Delbridge (ed) *Macquarie Dictionary: Australia's National Dictionary* (Macquarie Library, 2001), cited by Bromberg J in *Bolt* [2011] FCA 1103, [262].

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147. When taken together, the Exposure Draft provisions impose a significantly narrower test than that in existing section 18C, which captures ‘conduct causing offence, insult, humiliation or intimidation’.
148. In particular, the new definitions limit the protection to ‘incitement of hatred’ and to cases where the hate speech causes fear of threat of ‘physical harm’ to persons or property.
149. As a result, the protection afforded by the new provision is narrower than:
- The ordinary or dictionary meaning of the terms ‘vilify’ and ‘intimidate’;
  - The racial vilification provisions in most States and Territories, which include conduct that incites ‘serious contempt’ and ‘severe ridicule’, as well as acts which incite racial hatred;<sup>144</sup>
  - Relevant international law obligations, including:
    - Article 20(2) of the ICCPR which prohibits the ‘advocacy’ of racial hatred ‘that constitutes incitement to discrimination, hostility or violence’. As discussed above, the meaning of ‘vilify’ in its current form in the Exposure Draft is arguably inadequate; and
    - Article 5 of the ICERD that sets out the right of equality before the law in the context on the prohibition on racial hatred and discrimination, as set out at Article 4, and identifies a non-exhaustive list of rights that the State must ensure are available and enjoyable by everyone, regardless of their race, colour or national or ethnic origin. This includes ‘[t]he right to security of person and protection by the State against violence or bodily harm...’ at Article 5(b), which, as discussed above, arguably encompasses psychological, as well as physical, harm.
150. Concerns have been raised that the Exposure Draft provisions exclude a wide range of harm experienced as a result of racial hatred. This is of concern given that the AHRC has observed that ‘most complaints of racial abuse, many of them involving material published on the internet, do not lead to physical violence’ and warned that ‘[i]f psychological and social impacts are excluded from the prohibition, very few cases will be caught’.<sup>145</sup> As the Race Discrimination Commissioner explains, financial and social destruction can be every bit as intimidating as physical harm:

*There has been for some time now a considerable body of research that has highlighted the adverse physiological effects of racism. The psychological harms of racism are also well-documented: victims can feel not only anger, but also humiliation and self-loathing. No matter how much victims of racial abuse may resist, they can often end up absorbing messages of hate and inferiority.*<sup>146</sup>

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<sup>144</sup> *Anti-Discrimination Act 1977* (NSW), ss 20C(1) and 20D(1). See also *Discrimination Act 1991* (ACT), ss 66(1) and 67(1); *Anti Discrimination Act 1991* (Qld), ss 124A and 131A; *Racial Vilification Act 1996* (SA), s 4; *Civil Liability Act 1936* (SA), s 73; *Anti Discrimination Act 1998* (Tas), s 19; and, *Racial and Religious Intolerance Act 2001* (Vic), s 7(1).

<sup>145</sup> Professor Triggs, National Press Club.

<sup>146</sup> Dr Tim Soutphommasane, Race Discrimination Commissioner, ‘Racism is a moral issue’ (Speech, 11 April 2014), available at: <http://www.humanrights.gov.au/news/speeches/racism-moral-issue> (‘Dr Tim Soutphommasane, Moral Issue Speech’).

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151. The President of the AHRC, Professor Gillian Triggs, has also observed that:

*...such incidents can still have a devastating impact, and anyone who doubts that needs only recall the testimony of the ABC presenter Jeremy Fernandez, the AFL footballer, and Australian of the year Adam Goodes, and a French woman who sang her national anthem, the Marseilles, each of whom was subjected to racial abuse on the bus or the football field. These are but a few well known examples of the hundreds of complaints we receive about racial abuse in public.*<sup>147</sup>

152. It has also been noted that this approach does not align with relevant State and Territory provisions, particularly when regard is had to the broad scope of the exemption provision. As the LSNSW Indigenous Issues Committee has noted, most State legislation makes a distinction between racial vilification which involves threats of physical harm to person(s) or property and racial vilification which does not. In some States the former is a criminal offence that is punishable by a term of imprisonment.<sup>148</sup> Where this distinction is made, the defence of fair comment which is otherwise available is not available in relation to hate speech involving threats of physical harm to person(s) or property. This presumably arises from an acknowledgement that it is not necessary for the proper discussion of issues to cause fear of physical harm to person(s) or property.

153. As a result of the proposed exemption, the Exposure Draft provisions would cover some matters that would constitute a criminal offence in some States, but then permit conduct which:

- Incites hatred against a person or group of persons because of their race, colour or national or ethnic origin; and
- Intimidates by causing fear of physical harm against a person, their property or members of a group because of their race, colour or national or ethnic origin;

as long as the conduct occurs through '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.'

#### 'Incitement' in the context of racial vilification laws

154. The threshold test in the proposed provision is different in important respects to the current sub-section 18C(1). Like section 20D of the *Anti-Discrimination Act 1977* (NSW), the proposed provision operates by reference to the effect of the public conduct on third parties and on their attitudes or likely conduct to the persons vilified. This can be contrasted with the current provision of the RDA that operates by reference to the effect of the conduct on the vilified person or group.

155. Some of the Law Council's Constituent Bodies have expressed concern that the introduction of the requirement of incitement may mean that the proposed provision would not extend to mere expression of hatred but would require evidence of 'urging on, stimulating or prompting to action' which may result in a threshold that is too high to meet for the majority of complainants who have experienced serious expressions of racial hatred directed towards them.

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<sup>147</sup> Professor Triggs, National Press Club.

<sup>148</sup> See for example: *Anti-Discrimination Act 1977* (NSW), s 20D; *Anti Discrimination Act 1991* (Qld), s 131A; and *Racial Vilification Act 1996* (SA), s 4.

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156. For example, the LSWA has explained that under the proposed definition of ‘vilify’ it will not be sufficient if the action merely incites ridicule or denigration. It ignores the serious harm that racial attacks can cause for people where there is no actual incitement of others to hatred, or at least when that cannot be proved. For example in *Clark v Nationwide News Pty Ltd trading as the Sunday Times*<sup>149</sup> the description of three Aboriginal boys aged 15, 11 and 10, who died in a motor vehicle accident involving a car allegedly stolen by an older cousin as ‘scum’ whom the commentator would use as ‘landfill’ may not incite hatred, but it is, as Barker J concluded, ‘so deeply offensive, insulting and humiliating that it is breathtaking’.<sup>150</sup>

157. As the Race Discrimination Commissioner has explained, under the Exposure Draft provisions:

*...one could be abused by co-workers, customers or strangers in public as a “filthy coon”, “stupid boong”, “slit-eyed gook”, “shifty Jew”, “sand-nigger” or “Arab terrorist”. But unless such abuse is capable of inciting a third party, the target would have no avenue for legal redress.*<sup>151</sup>

158. Other racial vilification provisions that rely on incitement to hatred suggest that in practice incitement will be difficult to prove. This issue was recently considered by the NSW Standing Committee on Law and Justice as part of its inquiry into the criminal offence of serious racial hatred in section 20D of the *Anti-Discrimination Act 1977* (NSW).

159. The NSW Committee noted that although the term ‘incitement’ was not defined in the NSW legislation, the NSW Administrative Decisions Tribunal has used the ordinary dictionary definition of ‘incite’ in making rulings.<sup>152</sup> The NSW Committee also noted that it was suggested during the Inquiry that alternate words or phrases may be more appropriate. For example, Mr Dowd and Professor Rice preferred the term ‘cause’ while others were in favour of the expression ‘promote or express’.<sup>153</sup> Although the NSW Committee did not recommend that the term ‘incite’ be replaced, it concluded that:

*...there are difficulties with proving incitement. As discussed at the beginning of this chapter, the challenge of proving this element has repeatedly been cited as a reason why there have been no prosecutions instituted under s 20D of the Anti-Discrimination Act.*<sup>154</sup>

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<sup>149</sup> [2012] FCA 307.

<sup>150</sup> Ibid [309].

<sup>151</sup> Dr Tim Soutphommasane, Alice Tay Lecture.

<sup>152</sup> Standing Committee on Law and Justice, Parliament of New South Wales, *Racial vilification law in New South Wales*, 3 December 2013, [4.59]-[4.60], available at: [http://www.parliament.nsw.gov.au/Prod/Parlment/committee.nsf/0/e08d4387100a3c56ca257c35007fcc4d/\\$FILE/Racial%20vilification%20law%20in%20New%20South%20Wales%20-%20Final%20report.pdf](http://www.parliament.nsw.gov.au/Prod/Parlment/committee.nsf/0/e08d4387100a3c56ca257c35007fcc4d/$FILE/Racial%20vilification%20law%20in%20New%20South%20Wales%20-%20Final%20report.pdf) (‘Standing Committee on Law and Justice Report’), quoting *Burns v Dye [2002]* NSWADT 32: ‘the word “incite” is to be given its ordinary natural meaning which is to “urge, spur on, ... stir up, animate; stimulate to do something” (New Shorter Oxford English Dictionary, 1993) (Oxford); “urge on; stimulate or prompt to action” (the Macquarie Dictionary, third edition, 1997) (Macquarie).’

<sup>153</sup> Ibid [4.59]-[4.60]. The Law Society of NSW, one of the Law Council’s Constituent Bodies, argued that this terminology was preferable as the words ‘promote or express’ would increase the scope of s 20D of the *Anti-Discrimination Act 1977* (NSW) consistent with Australia’s obligations under the ICERD; make clearer who is inciting whom, and be more readily understood. This alternative terminology was not supported by the NSW Bar Association, also a Constituent Body of the Law Council. The NSW Bar Association expressed the view that the inclusion of the term ‘expresses’ in particular would significantly lower the evidentiary threshold and may unduly impinge on freedom of expression.

<sup>154</sup> Ibid [4.69]-[4.70].

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160. The NSW Committee also looked at the question of what tests apply to establishing 'incitement' under sections 20C or 20D of the *Anti-Discrimination Act 1977 (NSW)*.<sup>155</sup>

161. The NSW Committee noted that case law concerning the civil prohibition in section 20C establishes that 'incitement' can be proved in the absence of evidence that other people have been roused to hatred. This has been described as an objective test based on how the 'ordinary reasonable reader' would react, as set out in *Z v University of A & Ors (No 7)*:<sup>156</sup>

*... in the context of vilification provisions, the question is, could the ordinary reasonable reader understand from the public act that he/she is being incited to hatred towards or serious contempt for, or severe ridicule of a person or persons on the grounds of race?*

162. In its submission to the NSW Committee's Inquiry, the NSW Bar Association was critical of this objective test because it ignores any special characteristics or proclivities to which the audience or potential audience of the alleged offender might be subject. The NSW Bar Association noted that the Victorian Court of Appeal has rejected the use of this objective test when construing the meaning of 'incite hatred'. Drawing on the Victorian case *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc*,<sup>157</sup> the NSW Bar Association proposed a new test that would consider whether the natural or ordinary effect of the conduct incites hatred or other relevant emotion in the circumstances of the case:

*The test for incitement of hatred should be whether the natural or ordinary effect of the conduct is to incite hatred or other relevant emotion in the circumstances of the case. Those circumstances should include both the characteristics of the audience to which the words or conduct is directed and the historical and social context in which the words are spoken or the conduct occurs.*

## The 'reasonably likely' community standards test

### *The Existing 'Reasonable Victim'*<sup>158</sup> *Test*

163. The AHRC has described the current test as follows:<sup>159</sup>

*The victim's perspective is the measure of whether an act is likely to offend, insult, humiliate or intimidate. For example, if derogatory comments are made against Indigenous people, the central question to ask is whether those comments are*

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<sup>155</sup> Ibid [4.72]-[4.76].

<sup>156</sup> [2004] NSWADT 81.

<sup>157</sup> [2006] VSCA 284. This case examined whether a seminar presentation by Catch the Fire Ministries, or publication of articles by the same organisation, incited hatred against, serious contempt for or revulsion or severe ridicule of Muslims on the ground of religious belief. It also considered whether the conduct was engaged in reasonably and in good faith for a genuine religious purpose as set out in ss 8, 9 and 11 of the *Racial and Religious Tolerance Act 2001* (Vic).

<sup>158</sup> In *McLeod v Power* (2003) 173 FLR 31, 45 [65] Brown FM described the objective test as one of the 'reasonable victim', where a reasonable victim of the relevant racial/ ethnic/ colour/ national origin would find the act specifically offensive because of the racial/ ethnic/ colour/ national origin implication.

<sup>159</sup> Australian Human Rights Commission, *Racial Vilification Law in Australia* (accessed 22 April 2014), available at:

<https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&cad=rja&uact=8&ved=0CFUQFjAG&url=https%3A%2F%2Fwww.humanrights.gov.au%2Fpublications%2Fracial-vilification-law-australia&ei=Fv1FU5a4LY1kgXzhYDYCA&usq=AFQjCNEPD4P8bCdo846002EKPxrX15AvTg&bvm=bv.64507335,d.dGI>

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*likely to offend or intimidate an Indigenous person or group, not whether they have this effect upon a non-Indigenous person. At the same time, the victim's response to the words or image must be reasonable. That is, the 'yardstick should not be a person peculiarly susceptible to being roused to enmity, nor one who takes an irrational or extremist view of relations among racial groups.'*<sup>160</sup> The 'reasonable victim' test allows the standards of the dominant class to be challenged by ensuring cultural sensitivity when deciding the types of comments that are considered offensive.<sup>161</sup>

164. Under sub-section 18C(1), it is sufficient to show that a particular group may reasonably be affected by the conduct rather than that all people in the racial/ ethnic/ colour/ national origin group may be offended.<sup>162</sup> However, in determining whether an act is reasonably likely to offend, insult, humiliate or intimidate a person with the complainant's racial or ethnic attributes, the court also considers community standards and the context in which the act was done.<sup>163</sup>

#### *The Proposed Community Standards Test*

165. The proposed provision in the Exposure Draft contains a different test. It provides:

*Whether an act is reasonably likely to have the effect specified in sub-section (1)(a) is to be determined by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community.*

166. This is a significant departure from the existing test that considers the effect of the relevant act on the particular person or a reasonable member of the particular group of persons to whom the act is directed.<sup>164</sup>

167. The rationale behind the new community standards test has been explained by Attorney-General as correcting the 'narrow' view of reasonableness that was applied in *Eatock v Bolt*,<sup>165</sup> that is, 'that the relevant group was a representative member of the so-called victim group rather than a reasonable member of the Australian community'.<sup>166</sup> The Attorney-General has further stated:

*We believe that the test of reasonableness in this area of the law, as in all others, ought to be community standards. And I might say that in the many discussions I had with various members of - and leaders of ethnic community groups, they themselves were of the view that the community standard test should be reinstated.*<sup>167</sup>

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<sup>160</sup> Australian Broadcasting Tribunal, *Inquiry into Broadcasts by Ron Casey* (1989) 3 BR 351 at 357 as cited by Graham Innes AM (Inquiry Commissioner), *Corunna v West Australian Newspapers* (2001) EOC 93-146, [8.4].

<sup>161</sup> Saku Akmeemana and Melinda Jones, 'Fighting Racial Hatred' in *Racial Discrimination Act 1975: A Review*, (Race Discrimination Commissioner, Commonwealth of Australia, 1995) 129, 168.

<sup>162</sup> *McGlade* (2002) 124 FCR 106; *Creek* (2001) 112 FCR 352; *Toben* [2002] FCA 1150; *McLeod v Power* (2003) 173 FLR 31; *Kelly-Country* (2004) 207 ALR 421.

<sup>163</sup> See *Kelly-Country* (2004) 207 ALR 421, [88]-[92]. See also *Hagan* [2000] FCA 1615, [27] and *Bolt* [2011] FCA 1103, [235]-[268].

<sup>164</sup> *Creek* (2001) 112 FCR 352, [16]; *Scully* (2002) 120 FCR 243, [108].

<sup>165</sup> [2011] FCA 1103.

<sup>166</sup> Attorney-General, The Hon Senator George Brandis QC, 'Racial Discrimination Act' (Press Conference, Parliament House, 25 March 2014), available at: <http://www.attorneygeneral.gov.au/transcripts/Pages/2014/First%20Quarter/25March2014-PressConference-ParliamentHouse.aspx>.

<sup>167</sup> *Ibid.*

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168. As noted by members of the Law Council's National Human Rights Committee, this test may pose practical difficulties for those seeking to apply this test by requiring the decision maker to determine the characteristics of the representative member of the entire Australian community. This gives rise to a range of questions, including:

- a) who is such a representative member of the Australian community?
- b) what kind of cultural background does this person have?
- c) is this person someone who embraces cultural diversity or who is sceptical of it?
- d) does this person have prejudicial thoughts about some or all ethnic minority groups?<sup>168</sup>

169. It was also submitted to the Law Council that requiring the relevant conduct to be judged against the ordinary reasonable member of the Australian community may also detract from the primary objective of racial vilification laws, which is to recognise and protect the human right to freedom from discrimination *on the ground of race*. This is because proposed new subsection (3) removes from the assessment the factor which is most relevant to this human right – that is, the 'race, colour or national or ethnic origin' of the person or group of persons in relation to whom the act is done.

170. As the LIV has explained, this means that historical disadvantage experienced by particular groups, and their experience of racism and its effects, cannot be taken into account. As Bromberg J points out in *Eatock v Bolt*,<sup>169</sup> 'to import general community standards into the test of the reasonable likelihood of offence runs a risk of reinforcing the prevailing level of prejudice' and is antithetical to the promotional purposes of Part IIA (that is, to promote racial tolerance).<sup>170</sup> Further, the LSSA has stated that the new community standards test ignores the fact that the racial characteristics of the victim of a racist attack are, in fact, essential to understanding its impact. Similar concerns were raised by the LSWA.

171. The proposed provision has also been criticised for assuming 'racial neutrality' and placing Anglo-Australians in the 'prime position' to determine what people should, and should not, find racist.<sup>171</sup> As Professor Triggs explains:

*The problem with [the proposed provision], rational though it might seem, is that most Australians – those of Anglo-Saxon background, anyway – have not been abused on the basis of their race, and therefore could barely conceive of the profound impact of such behaviour.*<sup>172</sup>

## Exemption

172. As noted above, section 18D currently provides an exemption for conduct found to be unlawful under section 18C if the conduct is undertaken:

- (a) *in the performance, exhibition or distribution of an artistic work; or*

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<sup>168</sup> Dr Tim Soutphommasane, 'In defence of racial tolerance' Australia Asia Education Engagement Symposium (1 April 2014) available at <https://www.humanrights.gov.au/news/speeches>

<sup>169</sup> [2011] FCA 1103.

<sup>170</sup> Ibid [253].

<sup>171</sup> Ibid.

<sup>172</sup> Professor Triggs, National Press Club.

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*(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.*

173. Under the Exposure Draft provisions, section 18D would be repealed and replaced with an exemption for unlawful conduct that applies to:

*...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.*

174. The exemption proposed in the Exposure Draft covers anything that is done in the course of participating in public discussion, but removes the current requirements in section 18D for protected speech to be conducted with reasonableness and in good faith.

175. This feature of the Exposure Draft legislation has also raised concerns among the Law Council's Constituent Bodies and Committees. For example, the Victorian Bar has observed that the proposed exemption provision:

*...exempts almost all public comment from the application of the Act. Many public utterance of a vilifying or intimidating kind (of any note) will be made "in the course of participating in the public discussion of political, social, cultural, religious, artistic, academic or scientific matter". What is more, the proposed sub-section (1) also exempts private actions.*

*Thus, the ambit of operation of the proposed section between the private and public exemptions is excessively narrow. That is, the proposed amended Act would operate to make unlawful many acts which ought be proscribed for the adequate protection of human rights: sub-section (1) would exempt all acts done in private; and sub-section (4) would exempt all acts done in the course of "public discussion" of a wide range of topics.*

176. The Victorian Bar has expressed the view that if sub-section (1) is to be retained (and it accepts that there are good reasons for exempting acts done in private), the sweeping exemption in the proposed sub-section (4) should be deleted in favour of the carefully targeted and balanced exemption in the current section 18D.

177. The LIV also has reservations about the proposed exemption, noting that if enacted it would:

*...effectively permit dissemination of racial prejudice, or even incitement to racial hatred, however serious and harmful, so long as it is communicated on a public platform (including social media). The exemption provision therefore renders the proposed prohibition of racial vilification and intimidation in subs (1) all but meaningless.*

178. The LSNSW Human Rights and Indigenous Issues Committees have further queried why it is considered necessary to be able to incite hatred or intimidate by

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causing fear of physical harm against a person, their property or members of a group because of their race, colour or national or ethnic origin to be able to participate or contribute to public discussion on any issue.

179. As summarised by Professor Triggs, the effects of having such an exception could be profound. It could mean for example that the following cases would be exempt from the coverage of the protective provisions:

- *Racial abuse of an athlete at a football match would be permitted, because it would be unlikely to intimidate that person or incite others to hate him or her on racial grounds.*
- *A Muslim woman wearing the hijab in the local park with her children could be abused on the basis of her religion, quite legally, because she was not physically intimidated and no one was incited to hate her.*<sup>173</sup>

180. As noted by members of the Law Council's National Human Rights Committee, if enacted, the exemption provision could also prevent cases such as *Jones v Toben*<sup>174</sup> (described above) from being captured by the unlawful conduct provisions. In that case, Branson J upheld a complaint that the respondent had published material on a website that conveyed the following imputations:<sup>175</sup>

- (a) there is serious doubt that the Holocaust occurred;
- (b) it is unlikely that there were homicidal gas chambers in Auschwitz;
- (c) Jewish people who are offended by and challenge Holocaust denial are of limited intelligence; and
- (d) some Jewish people, for improper purposes, including financial gain, have exaggerated the number of Jews killed during World War II and the circumstances in which they were killed.

181. The respondent argued unsuccessfully that the statements were made in good faith in the course of a publication held for a genuine academic purpose or a genuine purpose in the public interest. Both Branson J and the Full Court of the Federal Court of Australia rejected that argument.<sup>176</sup>

182. It has been argued that if the case was to be re-heard and decided under the amendments proposed by the Exposure Draft, the exception in sub-section (4) would apply to the effect that the respondent would not be found to have contravened new sub-section (1). This is because the new exception has no good faith requirement.

183. It has also been submitted that there is the risk that the exemption clause in the Exposure Draft may be so broad in scope as to render the protections offered by proposed subsections 18(1)-(3) of little utility. It may in fact operate to legitimise certain forms of racial vilification, including vilification that involves intimidation involving threats to persons and property on the basis of misinformation, provided such conduct occurs within public discussion.

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<sup>173</sup> Professor Triggs, National Press Club.

<sup>174</sup> [2002] FCA 1150.

<sup>175</sup> Ibid [88].

<sup>176</sup> *Toben* [2002] FCA 1150 at [102] and *Toben v Jones* (2003) 129 FCR 515 at [43].

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184. For example, the Race Discrimination Commissioner has warned that:

*One potential danger with the exposure draft is that its enactment may have the effect of exacerbating racist speech, particularly online, which may be defended in the guise of “public discussion”. Were this to happen, there may be especially destructive consequences on children and young people. Children and young people may end up being exposed to a higher level of racial hate speech on the internet. Recent experience warns us against any complacency. Last financial year, the Australian Human Rights Commission received a 59 per cent increase in racial hatred complaints under section 18C – an increase largely driven by cyber-racism on social media and video-sharing websites. The prospect of a change in the law intensifying racial discrimination is well within the bounds of possibility.<sup>177</sup>*

185. Submissions to the Law Council also queried why such a broad exemption is needed, particularly in light of the manner in which the existing exemption in section 18D has been interpreted.

186. It is also noted that the proposed exemption in the Exposure Draft is much broader in scope than exceptions to racial vilification existing at the State and Territory level. Most State legislation only provides a defence to racial vilification on the basis that it is ‘done reasonably and in good faith’, in ‘good faith’ or ‘reasonably or honestly’ as part of, or for, academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter. However, that defence is not available in some States in relation to serious vilification involving incitement in relation to threats to persons or property. For example, sub-section 142A(2) of the *Anti Discrimination Act 1991* (Qld) provides that the vilification provisions do not apply to ‘a public act, *done reasonably and in good faith*, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including public discussion or debate about, and expositions of, any act or matter’ (emphasis added).

187. The proposed sub-section (4) would also appear to sit uncomfortably with other provisions in the RDA, including section 9, which prohibits discrimination on the grounds of race without exception (aside from special measures taken in accordance with section 8 of the RDA).

## **Removal of vicarious liability provision**

188. The Exposure Draft provisions repeal and do not replace existing section 18E of the RDA.

189. Section 18E of the RDA that provides for vicarious liability of employers whose employees have been found to have contravened section 18C. It provides:

(1) *Subject to subsection (2), if:*

(a) *an employee or agent of a person does an act in connection with his or her duties as an employee or agent; and*

(b) *the act would be unlawful under this Part if it were done by the person;*

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<sup>177</sup> Dr Tim Soutphommasane, Moral Issue Speech.

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*this Act applies in relation to the person as if the person had also done the act.*

*(2) Subsection (1) does not apply to an act done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing the act.*

190. This provision is based on similar provisions in other Commonwealth anti-discrimination laws and is designed to promote consistency across the jurisdiction.<sup>178</sup>

191. The LIV has submitted that this positive duty is appropriate and should be retained, because of the special role played by media organisations in generating and contributing to public discussion and debate and their potential to perpetuate racist attitudes.<sup>179</sup>

192. It has been submitted that it is difficult to predict the effect of the repeal of section 18E.

193. This is because the removal of section 18E does not mean that an employer will not be vicariously liable for the actions of their employee. Arguably, employers may be vicariously liable, both civilly and criminally, at common law.

194. Further, an employer may be liable for the unauthorised acts at common law if those acts are:

*...so connected with authorised acts that they may be regarded as modes — although improper modes — of doing them, but the employer is not responsible if the unauthorised and wrongful act is not so connected with the authorised act as to be a mode of doing it, but is an independent act.*<sup>180</sup>

195. There can also be circumstances where a company is vicariously liable for the actions of a person who is not an employee.<sup>181</sup> For example, in the context of the NSW racial vilification laws, it has been held that both the speaker and the broadcaster of the speaker's words have committed the requisite public act, even though the speaker had no capacity to communicate to the public in his own right.<sup>182</sup> If a similar interpretative approach was taken to the racial vilification laws in the RDA, then there would arguably be no effect, at least in respect of liability, by the removal of section 18E. In other words, both speakers and broadcasters, and authors and publishers could be found to have contravened new sub-section (1), notwithstanding the absence of an equivalent to section 18E.

196. However, some commentators have speculated that the removal of section 18E may make it more difficult for persons who are the subject of hate speech to get publishers, particularly internet service providers and social media platform providers, to remove the offending material.<sup>183</sup> For example, the LIV has observed that if employers are not held vicariously liable for conduct by employees in the course of their employment, it would substantially undermine the effectiveness of Part IIA of the RDA in an employment context as it would remove any need for an employer to

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<sup>178</sup>See, for example: *Equal Opportunity Act 1995* (Vic), s 109.

<sup>179</sup>See, for example: Teun A. van Dijk, 'Mediating Racism: The Role of the Media in the Reproduction of Racism' in Ruth Wodak (ed), *Language, Power and Ideology* (John Benjamins Publishing Company, 1989).

<sup>180</sup>*New South Wales v Lepore* (2003) 212 CLR 511, [42] per Gleeson CJ quoting *Salmond on Torts*, 9th ed, 1936, pp 94–5.

<sup>181</sup>*Nationwide News Pty Ltd v Naidu* [2007] NSWCA 377.

<sup>182</sup>*Jones v Trad* [2013] NSWCA 389, [44].

<sup>183</sup>Dr Tim Soutphommasane, Australia Asia Education Engagement Symposium.

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encourage appropriate behaviour in the workplace. The LIV has also observed that it would greatly limit the opportunities for redress if action can only be taken against an individual perpetrator. The LSSA, LSWA, and the Human Rights Committee of the LSNSW also do not support the repeal of section 18E.

## Conclusion

197. The Law Council has a long standing commitment to ensuring Australia's laws adhere to the full range of Australia's human rights obligations including those relating to racial equality and has for many years promoted, at every opportunity, the advancement of multiculturalism and of indigenous interests in Australia. The delicate balance established by the current terms of the RDA must be disturbed only after careful consideration of those interests and mindful of the possible fragility of national reconciliation.
198. Further, as noted above, the Law Council in its past advocacy on Commonwealth anti-discrimination law,<sup>184</sup> long called for a comprehensive review of the RDA to determine whether it is effective at meeting its legislative objects to eliminate discrimination and implement Australia's obligations under the ICERD. The Law Council recognises that the RDA covers a broad range of racial and ethnic groups and has a long standing commitment to ensuring Australia's laws adhere to the full range of Australia's human rights obligations, including those relating to racial equality.
199. The Law Council welcomes continued debate about the way in which the law can best give effect to the full range to Australia's international human rights obligations, as well as consideration of other non-legal mechanisms to promote racial tolerance and respect in our community.
200. Accordingly, the Law Council opposes the current proposals and strongly counsels a careful and broad ranging investigation of improvements to the Australian laws regarding hate speech as applied in respect of race, religion, gender, or any other characteristic.

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<sup>184</sup> A summary of the Law Council's past advocacy in relation to Commonwealth anti-discrimination law can be found at: <http://www.lawcouncil.asn.au/lawcouncil/index.php/current-issues/anti-discrimination>.

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

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## Attachment B: The Bolt Decision

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1. The Attorney-General has identified the decision in *Eatock v Bolt*<sup>185</sup> as the point at which the 'over-reach' of section 18C was best demonstrated.<sup>186</sup>
2. The Attorney-General has identified two main reasons why the *Eatock v Bolt* case should result in changes to the RDA:

*First, it is clear that freedom of political expression in Australia is subject to a significant new constraint, which had not existed before. It is in the nature of political argument that it is commonly offensive to those who have the opposite view. By making the reasonable likelihood of causing offence or insult the test of unacceptable behaviour, in any political context, section 18C is a grotesque limitation on ordinary political discourse.*

*Second, restrictions on freedom of political discourse inevitably lead to restrictions on political opinion itself. What section 18C of the RDA seeks to do, by prohibiting the expression of political views that mainstream society finds unattractive and objectionable, is to penalise the holding of those views at all.*<sup>187</sup>

3. The case also demonstrates how Part IIA of the RDA seeks to balance the protection and promote of the right to free speech with the prohibition of racial vilification. As outlined below, Andrew Bolt was found to have breached section 18C because of the way in which he wrote the articles that were the subject of complaint, and the factually erroneous basis on which he pursued discussion. Mr Bolt did not violate the RDA because he wrote about racial identity or questioned a person's racial identity, or because he sought to challenge the legitimacy of certain benefits or awards. In this case, the Court found that the articles' untruthful facts and distortions of the truth, together with a derisive tone and provocative and inflammatory language among other matters, defeated the defences available under section 18D.
4. The case concerned two newspaper articles written by Mr Andrew Bolt and published by the Second Respondent (HWT) in the *Herald Sun* newspaper and on that paper's online site, as well as two blog articles written by Mr Bolt and published by HWT on the *Herald Sun* website. The class action was brought by Ms Eatock, who was mentioned in those articles, on her own behalf and on the behalf of the other people mentioned in the articles.

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<sup>185</sup> [2011] FCA 1103.

<sup>186</sup> Attorney-General, The Hon Senator George Brandis QC, 'Racial Discrimination Act' (Press Conference, Parliament House, 25 March 2014), available at: <http://www.attorneygeneral.gov.au/transcripts/Pages/2014/First%20Quarter/25March2014-PressConference-ParliamentHouse.aspx>.

<sup>187</sup> George Brandis, 'Section 18C has no place in a society that values freedom of expression,' that values freedom of expression,' *The Australian*, 30 September 2011, <http://www.theaustralian.com.au/national-affairs/opinion/section-18c-has-no-place-in-a-society-that-values-freedom-of-expression/story-e6frgd0x-1226152196836>.

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5. The nature of Ms Eatock's complaint was that 'the articles conveyed offensive messages about her and people like her, by saying that they were not genuinely Aboriginal and were pretending to be Aboriginal so they could access benefits that are available to Aboriginal people'. In order to succeed in her claim, Ms Eatock needed to establish that:
    - It was reasonably likely that she and the people like her (or some of them) were offended, insulted, humiliated or intimidated by the conduct; and
    - That the conduct was done by Mr Bolt and HWT including because of the race, colour or ethnic origin of Ms Eatock or of the people like her.
  6. Mr Bolt and the publisher disputed the alleged imputations of the publications; denied that any offence taken was reasonably likely to be caused by the articles; and that race, colour or ethnic origin had nothing to do with the writing and publication of the articles. Further, even if Ms Eatock could establish those elements, Mr Bolt and HWT stated that the publications should not be considered unlawful because the conduct should be exempted or excused pursuant to section 18D of the RDA.
  7. The Federal Court of Australia found that the messages that were conveyed by the articles were reasonably likely to offend, insult, humiliate or intimidate the people who were the subject of those articles, in accordance with section 18C(1)(a) of the RDA; and were published because of racial or other characteristics of the persons concerned, in accordance with section 18C(1)(b). The Court found that Mr Bolt's conduct was 'not done reasonably and in good faith in the making or publishing of a fair comment, within the terms of section 18D(c)(ii); or done reasonably and in good faith in the course of any statement, publication or discussion, made or held for a genuine purpose in the public interest, within the terms of s 18D(b)'.
  8. Justice Bromberg determined that the imputations conveyed by the articles were that:
    - *There are fair-skinned people in Australia with essentially European ancestry but with some Aboriginal descent, of which the identified individuals are examples, who are not genuinely Aboriginal persons but who, motivated by career opportunities available to Aboriginal people or by political activism, have chosen to falsely identify as Aboriginal; and*
    - *Fair skin colour indicates a person who is not sufficiently Aboriginal to be genuinely identifying as an Aboriginal person.*
  9. In determining the standard of this issue, the Court considered the likely impact upon 'reasonable', yet tolerant, members of the group who were the subject of the articles rather than applying 'community standards' to determine whether those imputations would likely cause offence. Justice Bromberg took into account the standard by assessing the historical context in which Aboriginal people would likely be offended.
  10. Justice Bromberg found that there was a causal nexus between the writing and the publication of the articles and that race motivated Mr Bolt's conduct in writing the articles to 'plainly intend to convey a message about the Aboriginal identity' of the group. As a result, His Honour found that Mr Bolt wrote the articles because of the race, ethnic origin and colour of the people who were subject of them.
  11. In respect of HWT, the Court found that the necessary motivation may be lacking on the part of a publisher which is a 'mere passive conduit of information and comment'. However, the Court found that where the publisher is aware that an author's motivation includes race, colour, national or ethnic origin of the people dealt with in the

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article, then the act of publication will also be done because of those attributes which motivated the author. The Court inferred that HWT knew of and understood the contents of the newspaper articles and was aware of the imputation conveyed by them, and therefore had also contravened section 18C(1)(b).

12. Having found that both Mr Both and HWT had contravened section 18C, Bromberg J went on to consider whether the articles fell within the exemption provided by section 18D, that applies to material written and published on a matter of public interest 'reasonably' and 'in good faith'. His Honour held that the exemption did not apply because:
  - the articles used inflammatory and provocative language and engaged in extensive mockery and derision of the Aboriginal people in the articles;
  - the articles included 'gratuitously, insulting or offensive matters, irrelevant to the question of public interest under discussion'; and
  - it was the Court's task to undertake an assessment of whether the 'freedom of expression in question' was 'exercised in a manner designed to minimise offence, insult, humiliation or intimidation'.
13. In relation to whether the articles were a fair comment on a matter of public interest, His Honour held that the articles contained 'material deficiencies' and 'significant distortions' of fact which were central to the imputations conveyed. Justice Bromberg considered the relationship between the issue of public interest and the imputations contained in the articles and held that it was neither 'necessary' or 'essential' for Mr Bolt to have imputed that members of the Aboriginal people were not 'genuinely Aboriginal'.
14. His Honour suggested that an alternative approach that would not have fallen foul of the provisions would have been to draw attention to the underlying policies which served to create the perceived injustice in the Aboriginal community.
15. Justice Bromberg finally held that HWT could not escape liability under section 18D of the RDA given that it had the capacity to appreciate that the imputation were conveyed by the articles and had the editorial means to guard against them.
16. The Court did not make an order for relief but directed the parties to confer with each other with a view to agreeing on orders to give effect to the Court's reasons for judgement. However, it was ordered that:
  - HWT publish two corrective notices within a fortnight, to be published alongside Mr Bolt's regular column and that the content of the notice will provide a summary of the judgement; and
  - The republication of the articles was restricted to 'historical or archival purposes' and should only accompanied by the corrective.