Submission on proposed amendments to Part IIA of the Racial Discrimination Act

Robert Corr

I refer to the Exposure Draft of the Freedom of Speech (Repeal of s. 18C) Bill 2014.[1] These submissions address the purported rationale for legislative change before turning to the specific amendments proposed. A table comparing the existing law to the Exposure Draft is produced as Annexure A for convenience.

The lack of a clear rationale for change to the Racial Discrimination Act 1975

There was no public call for change to the *Racial Discrimination Act 1975* until columnist Andrew Bolt was found to have breached section 18C.[2]

Significant misinformation has been spread about this case. Bolt was not "convicted", as it was a civil claim. He was not fined, or threatened with jail. He was not banned from discussing issues of Aboriginal identity, he was not forced to apologise, and he was not forced to remove the offending columns from the *Herald Sun* website. The only orders made were that Bolt and the *Herald Sun* could not republish the same offensive material in future, that the internet archive include a statement explaining the judgment.[3]

Bolt and the *Herald Sun* elected not to appeal the decision, preferring instead to agitate through the Institute for Public Affairs for a change to the law.[4] It is a very selective freedom of speech campaign. The Attorney-General has declared its guiding principle to be:

> The measure of a society's commitment to political freedom is the extent of its willingness to respect the right of every one of its citizens to express their views, no matter how offensive, unattractive or eccentric they may seem to others.[5]

Where, then, is his complaint about section 471.12 of the Commonwealth Criminal Code, which makes it a crime to "use a postal or similar service … in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, … offensive". The penalty is imprisonment for up to 2 years.[6] (A similar provision applies to offensive conduct using the phone or internet.)[7]

This is not a dusty, unused provision. Last year the High Court held that this provision applies even if the letters are about political issues.[8] Katharine Gelber notes that there has been "no significant commentary from politicians" despite the fact that "in the case of Monis, the term 'offensive' was included in a criminal provision that impacted on freedom of

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[1] Exposure Draft of Freedom of Speech (Repeal of s. 18C) Bill 2014 [http://www.ag.gov.au/Consultations/Documents/Attachment%20A.pdf]
[2] *Eatock v Bolt* [2011] FCA 1103 at [263]-[267] [http://www.austlii.edu.au/au/cases/cth/FCA/2011/1103.html]
[3] *Eatock v Bolt (No 2)* [2011] FCA 1180 [http://www.austlii.edu.au/au/cases/cth/FCA/2011/1180.html]
[4] See, for example, "Institute of Public Affairs runs ad in The Australian campaigning for freedom of speech", *Mumbrella*, 5 October 2011 [http://mumbrella.com.au/institute-of-public-affairs-runs-ad-in-the-australian-campaigning-for-freedom-of-speech-60026]
[5] Attorney-General George Brandis, "In Defence of Freedom of Speech", *Quadrant Magazine*, 1 October 2012 [http://quadrant.org.au/magazine/2012/10/in-defence-of-freedom-of-speech/]
[6] *Criminal Code 1995* (Cth), section 474.12 [http://www.comlaw.gov.au/Details/C2014C00151/Html/Volume_2#_Toc384295938]
[7] *Criminal Code 1995* (Cth), section 474.17 [http://www.comlaw.gov.au/Details/C2014C00151/Html/Volume_2#_Toc384295990]
[8] *Monis v The Queen* [2013] HCA 4 [http://www.austlii.edu.au/au/cases/cth/HCA/2013/4.html]

speech."[9] But Monis was a Muslim man making offensive comments about Australian soldiers, not a white man making offensive comments about Aboriginal people he decided were too pale. The right to be a bigot has its limits.

Even when the discussion is limited to section 18C, it is not clear that there is any compelling need for change. In his press conference releasing the Exposure Draft bill, the Attorney-General claimed "as illustrated by the decision in the Bolt case, although not only by that decision, the current language of Section 18C is unreasonably restrictive on freedom of speech".[10] Pressed in an interview to nominate even one other decision, he was unable to do so:

> *Attorney-General:* First, that as it was previously written, Section 18C penalised legitimate public discussion of issues concerning race.
>
> *Speers:* What evidence is there of that?
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> *Attorney-General:* Well we saw it infamously in the Bolt case itself.
>
> *Speers:* That's one case.
>
> *Attorney-General:* There's a lot of anecdotal evidence of the chill effect that that had upon newspapers and other media outlets in publishing or otherwise discussing….
>
> *Speers:* Really?
>
> *Attorney-General:* Yes, I've heard a lot of anecdotal evidence from your colleagues about that.
>
> *Speers:* Are there any other cases that you believe [inaudible] stifling of free speech?
>
> *Attorney-General:* I want to focus on the Bolt case because I think that's the extreme example.
>
> *Speers:* Any others?
>
> *Attorney-General:* Yes there are but let's concentrate on Mr Bolt's case…[11]

It is difficult to take seriously the idea that there is a major problem with the law demanding urgent reform, when the Attorney-General can not substantiate his own claim that there are multiple cases that have been unjustly decided under the current provision.

The suggestion that the Bolt case has had a "chilling" effect on debate about racial issues is similarly hard to accept. Against the Attorney-General's secret anecdotal evidence, there is direct evidence that the public discussion of Aboriginal identity continues:

- Bolt himself continues to single out pale Aboriginal people and suggest that his unlawful comments should be extended to these new targets. He does so by posting

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[9] Katharine Gelber, "Monis v The Queen; A-G South Australia v City of Adelaide – Consequences for Freedom of Expression", Speech to Constitutional Law Conference, Gilbert + Tobin Centre of Public Law, 14 February 2014 [http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/2014_con_law_conf_papers_kath_gelber.pdf]

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

[11] Attorney-General George Brandis, Interview with David Speers, Sky News, 25 March 2014 [http://www.attorneygeneral.gov.au/transcripts/Pages/2014/First%20Quarter/25March2014DavidSpeersSkyNews.aspx]

photos on his blog and writing along the lines of "No comment for legal reasons, thanks to the Racial Discrimination Act".[12] This is akin to a child who is told to stop poking their sibling, who shifts strategy and instead holds their finger millimetres from their sibling's face, saying, "I'm not touching you! I'm not touching you!" The form of conduct is different, but the effect is similar. Of course, Bolt would be free to fulsomely discuss the issue of Aboriginal identity if he was willing to conduct proper research, to avoid "grossly incorrect" comments and "significant distortion of the facts",[13] and refrain from gratuitous abuse. He chooses not to do so.

- Neither are the commenters on Bolt's blog "chilled", despite the fact that they must be acutely sensitive to the *Eatock v Bolt* decision given his frequent references to it. The @boltcomments Twitter account preserves these posts for posterity. An example: "I'm sick of traitors and wreckers from other cultures and religions wrecking what we the White (yes White) founders of the modern Australian nation have built."[14] Another: "Repeal … the immigration program,we were never consulted to see if we wanted Primitives from africa and islamofascist countries or whether we shoul pay the keep of thousands of white 'aborigines' ,scrap special treatment for aborigines liberate them from socialist Nannies ,let the be like everyone else."[15] If public discussion including the use of racial slurs has not been deterred at Andrew Bolt's own website, it is hard to see how it could have been deterred elsewhere.

- In November 2011, just over a month after the Bolt decision, Anthony Dillon wrote a column for ABC's *The Drum* observing that "while identification as an Aboriginal Australian is a matter for individuals to decide for themselves, the way in which we allocate funds and resources to helping those Aboriginal people who are most disadvantaged is a matter of public concern".[16] In 2012, he wrote another column noting that "there are benefits for identifying as Aboriginal… typically relate[d] to schemes and incentives to address the disadvantage experienced by many Aboriginal people. … Should all people who identify as being Aboriginal be entitled to access such benefits?" He wondered, "if the gentleman using the coffee analogy was to order a cup of coffee in a shop and was presented with a cup of milk with a small sprinkling of coffee powder, would he be satisfied that he received a cup of coffee?"[17] Lively debate ensued in the comments thread below these articles, as is typical of posts on that website. This discussion about the definition of Aboriginal identity and how it relates to qualification for financial benefits was not "chilled" by the Bolt decision.

- On the very day that the Attorney-General released the Exposure Draft, *The Australian* published a column by Gary Johns about "the mind-numbing nonsense of

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[12] This strategy is described by Marcia Langton, "The Nature of My Q&A Apology to Andrew Bolt", 18 March 2014 [http://nacchocommunique.com/2014/03/18/naccho-aboriginal-health-and-racism-marcia-langton-the-nature-of-my-q-and-a-apology-to-andrew-bolt/]

[13] "Andrew Bolt: Australia's least accurate columnist?" *The Age, 2 October 2011* [http://www.theage.com.au/victoria/andrew-bolt-australias-least-accurate-columnist-20111001-1l2zl.html]

[14] Screen capture taken by @boltcomments, 27 March 2014 [https://twitter.com/boltcomments/status/448976000039129090]

[15] Screen capture taken by @boltcomments, 28 March 2014 [https://twitter.com/boltcomments/status/449363303312015360]

[16] Anthony Dillon, "Addressing disadvantage is no identity game", *The Drum*, ABC, 3 November 2011 [http://www.abc.net.au/unleashed/3617602.html]

[17] Anthony Dillon, "Indigenous identity distracts from the real issues", *The Drum*, ABC, 27 March 2012 [http://www.abc.net.au/unleashed/3915412.html]

> Aboriginal recognition", in which he criticised what he calls "the Aboriginal industry" for using Aboriginal identity to "seek advantage over others and to -excuse behaviour tolerated in no other citizens. Aboriginality itself has become problematic." He complained that "Aboriginal benefit[s] such as a housing or business loan, Abstudy, special -assistance, or the waiver of school or TAFE fees… and 'indigenous' graduate positions" in the public service. This is *precisely* the issue that Bolt claims motivated the articles that infringed section 18C. Gary Johns has not been deterred from discussing this issue in strident terms; indeed, the column is advance marketing for a book to be published in May.[18]

The Attorney-General has offered no evidence that debate of these issues has been "chilled". He has not nominated any case other than Bolt's to illustrate flaws in the Act. Other commentators are able to make the same arguments as Bolt, in strong terms, without resorting to gratuitous abuse. The Attorney-General has not explained why Bolt's freedom of speech should not be tempered by a responsibility to avoid unduly harming others.

There is no good reason to alter section 18C and the related provisions of the Act. Nevertheless, I will address each of the proposed amendments in detail.

Amendments to subsection 18C(1)

Current provision	*Exposure Draft provision*
18C. Offensive behaviour because of race, colour or national or ethnic origin (1) It is unlawful for a person to do an act, otherwise than in private, if: (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.	(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: (a) vilify means to incite hatred against a person or a group of persons; (b) intimidate means to cause fear of physical harm: (i) to a person; or (ii) to the property of a person; or (iii) to the members of a group of persons.

[18] Gary Johns, "Equality at risk as consequences of recognition are unclear", *The Australian*, 25 March 2014 [http://www.theaustralian.com.au/opinion/columnists/equality-at-risk-as-consequences-of-recognition-are-unclear/story-fn8v83qk-1226863594422]

Removal of "offend, insult, humiliate"

The core of the Attorney-General's proposal is the removal of the words "offend, insult, humiliate" from subsection 18C(1)(a). (In addition, the definition of the word "intimidate" been significantly altered by the new subsection (2)(b). This aspect is addressed separately below.)

Announcing the proposed reform, the Attorney-General remarked, "Those three words – offend, insult and humiliate – describe what has sometimes been called hurt feelings. It is not in the Government's view the role of the state to ban conduct merely because it might hurt the feelings of others."[19] In a subsequent interview he referred to "things may be said which they find personally wounding or offensive or insulting".[20] With respect, these comments reflect a significant misunderstanding of the way in which the current legislation operates.

The first issue is that the Attorney-General implies that determinations under section 18C are made on the basis of the personal, subjective "hurt feelings" of the complainant. That is not the case. Decisions have consistently required an objective test be applied—the question is how would an ordinary, reasonable member of the affected community have been harmed by the conduct.

The phrase "offend, insult, humiliate or intimidate" is not defined in the Act. It has been interpreted by judges over almost twenty years, and they have clearly and consistently ruled that mere "hurt feelings" do not attract sanction under subsection 18C(1)(a).

Justice French (then of the Federal Court) noted that "[t]he criteria for determining the outer limits of the conduct caught by Pt IIA and the words 'offend, insult, humiliate or intimidate' must be judged … having regard to the objectives of the legislation".[21] As to the latter, he quoted Attorney-General Michael Lavarche's second reading speech, which indicated that a narrow interpretation should be taken:

> 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.[22]

Similarly, Justice Kiefel ruled: "To 'offend, insult, humiliate or intimidate' are profound and serious effects, not to be likened to mere slights."[23] More recently, Justice Barker confirmed

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

[20] Attorney-General George Brandis, Interview with Rafael Epstein, ABC 774 Drive, 27 March 2014 [http://www.attorneygeneral.gov.au/transcripts/Pages/2014/First%20Quarter/27March2014-RaphaelEpsteinABC774Drive.aspx]

[21] Bropho v Human Rights & Equal Opportunity Commission [2004] FCAFC 16 [http://www.austlii.edu.au/au/cases/cth/FCAFC/2004/16.html]

[22] Attorney-General Michael Lavarche, Second Reading Speech on the Racial Hatred Bill 1994, House of Representatives Hansard, 15 November 2004 [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F1994-11-15%2F0052%22]

[23] *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 at [16] [http://www.austlii.edu.au/au/cases/cth/federal_ct/2001/1007.html]

that the view that subsection 18C(1)(a) "is intended, put generally, to deal with serious effects or consequences, has now been generally adopted and applied".[24]

Justice Bromberg offered this explanation for limiting the scope of the phrase:

> [T]he section is at least primarily directed to serve public and not private purposes… That suggests that the section is concerned with consequences it regards as more serious than mere personal hurt, harm or fear. It seems to me that s 18C is concerned with mischief that extends to the public dimension. A mischief that is not merely injurious to the individual, but is injurious to the public interest and relevantly, the public's interest in a socially cohesive society. … In my view, "offend, insult, humiliate or intimidate" were not intended to extend to personal hurt unaccompanied by some public consequence of the kind Part IIA is directed to avoid.[25]

It is clear from the second reading speech and judicial decisions that "offend, insult, humiliate" is not the same as "hurt feelings"; it is not the same as the subjective feelings of the complainant, it must involve profound or serious effects, and it must involve some public consequence.

It is concerning that the Attorney-General's rationale for removing the words does not reflect the way they have been defined in the courts. Nevertheless, if a Queen's Counsel has difficulty understanding how statutory terms are interpreted by the courts, it can be assumed that the general public might hold similar misconceptions. Certainly the "hurt feelings" fallacy can be observed in much of the commentary around the proposed amendment.[26]

It is appropriate, then, to clarify the text of the Act to reflect the judicial definition. This would improve public understanding of the provision by providing a clear, statutory indication of the scope of prohibited conduct. As Dan Meagher has argued, better aligning the words of the statute with parliament's intention "may assist citizens in better understanding the scope of racial vilification laws and their corresponding legal rights and obligations and facilitate more consistent and predictable judicial and administrative decision-making".[27]

Recommendation: The words "offend, insult, humiliate" should be retained, but Section 18C should be amended to insert the following after subsection (1)(a):

"(aa) the act is reasonably likely, in all the circumstances, to have profound or serious effects; and"

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[24] *Clarke v Nationwide News Pty Ltd trading as The Sunday Times* [2012] FCA 307at [69] [http://www.austlii.edu.au/au/cases/cth/FCA/2012/307.html]

[25] *Eatock v Bolt* [2011] FCA 1103 at [263]-[267] [http://www.austlii.edu.au/au/cases/cth/FCA/2011/1103.html]

[26] Chris Merritt writes of "the caretaker for the hurt feelings of every citizen" [http://www.theaustralian.com.au/business/opinion/community-standards-form-the-benchmark/story-e6frg9uf-1226873926985] Anthony Dillon suggests claims under the Act amount to a complainant saying "you hurt my feelings" [http://www.theaustralian.com.au/opinion/claims-of-racism-more-damaging-than-the-real-thing/story-e6frg6zo-1226865662773] Frank Salter complains that supporters of the Act "dwell on the hurt feelings and their own sense of outrage" [http://quadrant.org.au/opinion/qed/2014/03/section-18c-multiculturalism-power/]

[27] Dan Meagher, "So Far So Good? A Critical Evaluation of Racial Vilification Laws in Australia" (2004) 32 *Federal Law Review* 225 at 252 [http://flr.law.anu.edu.au/sites/flr.anulaw.anu.edu.au/files/flr/Meagher_0.pdf]

Inclusion of a new, narrowly defined "intimidate"

In announcing his proposed amendment, the Attorney-General claimed: "Intimidate, however, stays, because intimidate is not about hurting peoples' feelings. … So intimidation, in our view, should stay."[28] In an interview he said "we have decided to remove offend, insult, humiliate, retain intimidate".[29] In a later opinion column, he wrote, "Conduct which intimidates (i.e., causes fear) will remain."[30]

However, this misrepresents the proposal. Rather than give "intimidate" its ordinary meaning, the proposed subsection (2)(b), would statutorily constrain it by excluding threats of non-physical harm. This is of significant concern because psychological impacts are a common feature of racial vilification cases, and a narrow definition of "intimidation" may exclude some serious examples of racial abuse from sanction.

For example, in *Rugema v Gadsten Pty Ltd & Derkes*, there was no suggestion of physical intimidation, but "Mr Rugema suffered a severe major depressive disorder with significant pain and suffering and loss of enjoyment of life as the result of the racial abuse."[31] In *Gama v Qantas Airways Ltd (No 2)*, again there was no physical intimidation, but "the found discriminatory events did contribute to Mr Gama's depressive illness" and "[t]he medical evidence is quite clear that Mr Gama's condition is very serious".[32] Under the proposed, narrow definition of "intimidate", it is not clear that these complainants would have had grounds to proceed.

Daniel Meyerowitz-Katz shares this concern:

> Limiting intimidation to fear of physical harm to person or property would exclude cases where persons were fearful for their dignity or quality of life, but not necessarily of violence. For example, it would make legal the incident in *Kanapathy v In De Braekt*,[33] in which a Singaporean security guard at a court was viciously abused by a lawyer after trying to conduct a routine security check on her. It is unlikely that he would have felt fearful of physical harm and she most likely did not incite hatred towards him, but the incident was sufficiently serious to have her stricken from the roll of legal practitioners for bringing the profession into disrepute, and to cause him to suffer significant psychological harm.[34]

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

[29] Attorney-General George Brandis, Interview with David Speers, Sky News, 25 March 2014 [http://www.attorneygeneral.gov.au/transcripts/Pages/2014/First%20Quarter/25March2014DavidSpeersSkyNews.aspx]

[30] Attorney-General George Brandis, "Why the law has to change", Australian Jewish News, 3 April 2014 [http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/SecondQuarter/3April2014-Opinionpiece-Whythelawhastochange.aspx]

[31] *Rugema v Gadsten Pty Ltd & Derkes* [1997] HREOCA 34 [http://www.austlii.edu.au/au/cases/cth/HREOCA/1997/34.html]

[32] *Gama v Qantas Airways Ltd* (No.2) [2006] FMCA 1767 at [125] [http://www.austlii.edu.au/au/cases/cth/FMCA/2006/1767.html]

[33] *Kanapathy v In De Braekt (No.4)* [2013] FCCA 1368 [http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCCA/2013/1368.html]

[34] Daniel Meyerowitz-Katz, "Exposure draft of the Freedom of Speech (Repeal of S. 18C) Bill 2014: Initial Analysis", Australia-Israel Jewish Affairs Council, 25 March 2014 [http://aijac.org.au/news/article/exposure-draft-of-the-freedom-of-speech-repeal-o]

Any move to legalise racial abuse that causes serious psychological harm should be rejected.

Inclusion of a narrowly defined "vilify"

Despite removing "offend, insult, humiliate" and circumscribing "intimidate", the Attorney-General nevertheless claimed, "These are the strongest protections against racism that have ever appeared in any Commonwealth act".[35] He made this claim on the basis that the word "vilify" had not previously featured in section 18C, and that therefore "there was a huge gap in the heart of the Racial Discrimination Act … there was no prohibition on racial vilification".[36]

This keyword-search approach to legal analysis is flawed, as Sarah Joseph explains:

> Vilification is already effectively banned under the current provisions. Speech which vilifies must surely simultaneously offend, insult, humiliate or intimidate. Nevertheless, the new proposed additional prohibition is welcome. It encapsulates even worse behaviour than that which intimidates.[37]

I concur. While it is misleading to suggest that vilification is not currently prohibited by the Act, it is nevertheless desirable to specifically include the word "vilify". Doing so would clarify the intent of the law, and bring it into line with State legislation.

However, the definition of "vilify" in the proposed subsection (2)(a) is too narrow. It is limited to "inciting hatred", whereas the commonly understood meaning of "vilify" extends to "inciting serious contempt or severe ridicule".

A comparison of the various State provisions prohibiting racial vilification illustrates this point:

Discrimination Act 1991 (ACT), s66	incite hatred towards, serious contempt for, or severe ridicule of, a person or group of people
Anti-Discrimination Act 1977 (NSW), s20C	incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons
Anti-Discrimination Act 1991 (Qld), s124A	incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons
Racial Vilification Act 1996 (SA), s4	incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons
Anti-Discrimination Act 1997 (Tas), s19	incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons

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

[36] Attorney-General George Brandis, Interview with Ben Fordham, 2GB, 25 March 2014 [http://www.attorneygeneral.gov.au/transcripts/Pages/2014/First%20Quarter/25March2014TranscriptBenFordham2GB.aspx]

[37] Sarah Joseph, "Rights to bigotry and green lights to hate", *The Conversation*, 28 March 2014 [https://theconversation.com/rights-to-bigotry-and-green-lights-to-hate-24946]

Racial and Religious Tolerance Act 2001 (Vic), s7	incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons
Criminal Code (WA), s67 and s66	create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group '*animosity towards*' means hatred of or serious contempt for

The Commonwealth legislation should reflect the widely adopted definition of vilification. It is reasonable to expect that the States and the Commonwealth would adopt a standard position, at least in order to minimise public confusion as to the limits of acceptable conduct.

Given that the Attorney-General has publicly stated his belief that the inclusion of "vilify" is intended to be a strong protection for racial minority groups, it is important that the legislation does not include a watered-down version of vilification.

Recommendation: Subsection 18C(1)(a) should be amended as follows:

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

In addition, a definition of "vilify" should be added to subsection 18C(3), as follows:

"(3) … ***vilify*** means incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons."

Removal of "in all the circumstances"

One of the unexplained changes in the proposal is the removal of the phrase "in all the circumstances" from section 18C(1). As far as I can determine, the Attorney-General has not commented on this aspect of the Exposure Draft. It is therefore not clear why the change is considered necessary. The inclusion of the phrase "in all the circumstances" ensures that courts give proper consideration to the facts and context of an individual case. It may be that the Attorney-General does not agree that context is important in assessing allegations of racist speech.

His recent appointment to the Human Rights Commission, Tim Wilson, told newspapers that the current law is "bizarre" and "unequal" because it prevents a white person calling a black person a "nigger", but doesn't prevent black people using the term themselves. This is a farcical view of equality before the law. Context is crucially important in determining whether conduct ought to be sanctioned.

The word "nigger" has, not surprisingly, been the subject of judicial determination in relation to the existing section 18C, and it illustrates the importance of considering "all the circumstances" of the case. In *Sidhu v Raptis*, the white respondent said to the complainant, "You look like a nigger… Nigger, nigger, nigger, nigger, nigger. What are you going to do

nigger? Are you offended yet? … you do look like a nigger."[38] In all the circumstances, this was unacceptable racial abuse. By contrast, in *Hagan v Trustees of the Toowoomba Sports Ground Trust*, the word "nigger" was repeatedly said over the public address system at a stadium, in describing The ES 'Nigger' Brown Stand. The grandstand had been named in 1960 to honour a white player whose nickname was "nigger". After considering the history of the epithet and the grandstand, Justice Drummond concluded:

> On the evidence before me and when regard is had to the context in which the word "Nigger" complained of here is used, something required by the words of s 18C(1)(a), I do not consider that the applicant has established that the trustee's decision is an act reasonably likely in all the circumstances to offend, insult, humiliate or intimidate an indigenous Australian or indigenous Australians generally.[39]

In my submission, this is precisely the type of context that ought to be considered in determining whether conduct amounts to an offence under the Act. The ability to distinguish between the use of racial epithets in different circumstances is essential to the proper functioning of the law, and the mechanical application of a list of banned words would expose the law to ridicule.

The idea that we would serve "equality before the law" by stripping context and nuance from the decision-making process is absurd. The phrase "in all the circumstances" should be retained in subsection 18C(1)(a).

Removal of "some or all of the people in the group"

Currently, s18C(1)(b) requires that where an act is reasonably likely to harm a group of people, the act must have been motivated by "the race, colour or national or ethnic origin of … some or all of the people in the group". Under the Exposure Draft version, the act must have been motivated by "the race, colour or national or ethnic origin of … that group of persons". This precludes consideration of cases where the abuse of a larger group is due to the race of some of its members.

I have not been able to identify any cases where this issue has been specifically raised, but that does not mean it has not come up in some of the thousands of conciliated matters for which there is no published decision. At best, this amendment would merely remove superfluous words. At worst, it could impinge on people's right to be free from racial abuse.

In the absence of a clear statement explaining why this provision requires amendment, it should be retained in its current form.

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[38] *Sidhu v Raptis* [2012] FMCA 338 at [33] and [41] http://www.austlii.edu.au/au/cases/cth/FMCA/2012/338.html

[39] *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 at [31] [http://www.austlii.edu.au/au/cases/cth/FCA/2000/1615.html]

Repeal of subsections 18C(2) and (3) relating to "in private" and "public place"

Current provision	*Exposure Draft provision*
(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.	*[Repealed]*

Repealing the extended definition of "otherwise than in private"

During an interview on Lateline, the Attorney-General claimed, "you said that our changes don't mean that the Act doesn't apply to conduct engaged and in private. That's true but they're not the product of our changes. That was a provision in the pre-existing act. So there's no change there."[40] In a later interview on ABC Radio, the Attorney-General repeated: "It doesn't apply to anything that happens in private and the pre-existing act, Section 18C in its current form is the same. So there's no change there."[41]

This was misleading. The Exposure Draft significantly alters the definitions of "in private" and "in a public place" by deleting the existing subsections (2) and (3). This is significant because only acts done "otherwise than in private" are caught by subsection 18C(1)(a). The changed definition of "otherwise than in private" would effectively legalise a category of serious racist abuse that is currently prohibited by the Act.

The most significant change is that at present, pursuant to subsection 18C(2)(c), anything "done in the sight or hearing of people who are in a public place" is deemed "not to be done in private". Removing this deeming provision would protect racist abuse as long as the perpetrator remains on private property.

This is particularly concerning in the context of neighbourhood disputes. For example, in *Campbell v Kirstenfeldt*, a dispute between neighbours led to the respondent calling the Aboriginal complainant "a lying black mole cunt", calling her family "niggers", "coons", "black bastards", and telling them to "go back to the scrub". The abuse continued over a period of years. Discussing this case in the context of the proposal, Sarah Joseph opined: "The public discussion defence would not apply, as the abuse is not in the context of political or social commentary. Such 'neighbourhood' abuse would still be against the law."

[40] Attorney-General George Brandis, Interview with Emma Alberici, Lateline, 25 March 2014 [http://www.abc.net.au/lateline/content/2014/s3971446.htm]
[41] Attorney-General George Brandis, Interview with Rafael Epstein, ABC 774 Drive, 27 March 2014 [http://www.attorneygeneral.gov.au/transcripts/Pages/2014/First%20Quarter/27March2014-RaphaelEpsteinABC774Drive.aspx]

In my view, this conclusion is incorrect. The public discussion defence is not required, because the change to the definition of "otherwise than in private" excludes the case from the purview of the Act. The abuse occurred from the respondent's property, but was heard by the complainant and her family on their side of the fence, and in a park across the road. This would have been conduct "done in private" if subsection18C(2)(c) did not extend to conduct done in the hearing of people in a public place.[42]

Other cases further support this interpretation. In *McMahon v Bowman*, racial abuse was yelled from the verandah of the respondent's house when his neighbours hit a ball over the fence. Federal Magistrate Raphael noted that "There was no concession that the respondent's house was a public place."[43] It was only on the basis that the shouting could have been heard by people on the street that this was deemed "otherwise than in private".[44]

Similarly, in *Chambers v Darley*, the issue was whether racist comments shouted over a back fence from one property to another were "otherwise than in private". Federal Magistrate Baumann found:

> I am satisfied the incidents occurring over the fence dividing the two backyards did not occur "in a public place" for the purposes of section 18C(2)(b). These particular backyards are not accessible to the public "as of right", and no invitation either express or implied had been given. A common sense interpretation suggests to me that few if any citizens regard their backyard as a public place.[45]

However:

> The fact that persons in the form of Mrs Braggins and Mrs George were attracted to observe the altercation between the parties suggests they may well have heard the alleged remarks and it may have been in a public place at such time. These are triable issues in my view.[46]

In other words, the conduct would only be considered to have been done "otherwise than in private" if it could have been heard from a public place (such as a nearby public street).

Another aspect is the removal of subsection 18C(2)(a), "causes words, sounds, images or writing to be communicated to the public". In *McGlade v Lightfoot*, it was held that an on-the-record conversation with a journalist was done "otherwise than in private" because it "caused [the respondent's comments] to be communicated to the public".[47] Absent subsection (a), it is not clear that would be the case.

It may be that racial comments made to a journalist form part of a good faith public debate about related matters. However, it is equally likely that racially abusive comments made by a high profile individual would be newsworthy in and of themselves, unconnected to any broader public discussion. It would be perverse to subject a journalist to the threat of legal

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[42] *Campbell v Kirstenfeldt* [2008] FMCA 1356 at [29] [http://www.austlii.edu.au/au/cases/cth/FMCA/2008/1356.html]
[43] *McMahon v Bowman* [2000] FMCA 3 at [21] [http://www.austlii.edu.au/au/cases/cth/FMCA/2000/3.html]
[44] *McMahon v Bowman* [2000] FMCA 3 at [29] [http://www.austlii.edu.au/au/cases/cth/FMCA/2000/3.html]
[45] *Chambers v Darley* [2002] FMCA 3 at [8] [http://www.austlii.edu.au/au/cases/cth/FMCA/2002/3.html]
[46] *Chambers v Darley* [2002] FMCA 3 at [11] [http://www.austlii.edu.au/au/cases/cth/FMCA/2002/3.html]
[47] *McGlade v Lightfoot* [2002] FCA 1457 [http://www.austlii.edu.au/au/cases/cth/FCA/2002/1457.html]

action for publishing the comments, while the person who made the comments is offered a shield because the interview was conducted on private property.

Likewise, Fredrick Toben's Holocaust denialism might have been protected by this proposed change. Defending the suggestion that the Exposure Draft amendments would have changed the outcome, the Attorney-General said, "Toben, as I understand his particular case, wasn't involved in a public discussion of the matter. He just put some racist nonsense on his website."[48] With respect to Queen's Counsel, it was precisely the fact that Toben "put some racist nonsense on his website" that made his action public. Justice Branson explained:

> Section 18C(2) of the RDA relevantly provides:
>
> "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;…"
>
> In my view, the placing of material, whether text, graphics, audio or video, on a website which is not password protected is an act which causes words, sounds, images or writing to be communicated to the public in the sense that they are communicated to any person who utilises a browser to gain access to that website.
>
> I conclude that the placing of material on a website which is not password protected is an act which, for the purposes of the RDA, is taken not to be done in private.[49]

Absent subsection 18C(2)(a), it is not clear that using a computer in the privacy of your own home constitutes an act done "otherwise than in private", even if that involves "putting up some racist nonsense on [your] website". It is far from certain that the case against Toben would have succeeded if the proposed amendment had been in place at the time.

Removing subsection 18C(2) would therefore legalise vile abuse as long as the conduct was done on private property, even if it could be heard from a public area (whether real or virtual), and even if it was directed towards a person or a group of people in that public area. This is a significant change, and no justification has been offered—indeed, the Attorney-General denies that any change in this area has been proposed at all.

The extended definition of "otherwise than in private" contained in subsection 18C(2) should be retained in its current form.

Repealing the codified definition of "public place"

No reason has been offered for the removal of the codified definition of "public place" in subsection 18C(3), which broadly reflects the common law meaning of the phrase.[50] However, in *Ward v Marsh*, Lord Howe observed that parliaments resorted to legislative

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[48] Attorney-General George Brandis, Interview with Fran Kelly, ABC Radio National, 26 March 2014 [http://www.attorneygeneral.gov.au/transcripts/Pages/2014/First%20Quarter/26March2014-TranscriptFranKellyABCRadioNational.aspx]

[49] *Jones v Toben* [2002] FCA 1150 at [73]-[74] [http://www.austlii.edu.au/au/cases/cth/FCA/2002/1150.html]

[50] See, for example, McIvor v Garlick [1972] VR 129 at 133-134, quote in *Nilsson v McDonald* [2009] TASSC 1 at [27] [https://jade.barnet.com.au/Jade.html#article=88844]

definitions because the common law "public place" was not broad enough for their purposes.[51] It follows that a reversion to the common law might exclude some places that were previously included by the Act. In the absence of a clear explanation as to why the change is needed, and in order to avoid unintended consequences, no change should be made.

Insertion of subsection (3) to prescribe the group whose standards are considered

Current provision	*Exposure Draft provision*
[No equivalent]	(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.

In his press conference announcing the release of the Exposure Draft, the Attorney-General made the following comments about the proposed subsection (3):

> Subsection 3 restates the community standards test. That was always understood to be the law, the meaning of Section 18C before the Bolt case. But in that case, the judge took a very narrow view of how reasonableness was to be decided. He thought that the relevant group was a representative member of the so-called victim group rather than a reasonable member of the Australian community. The community standards test, in other words, didn't survive the Bolt case.[52]

Again, this reveals a worrying lack of familiarity with the law, and an obsession with one case that is in fact an unremarkable application of long-standing principles. The precedents on section 18C clearly establish that the test is from the perspective of an ordinary, reasonable member of the affected group. The following table illustrates how this has been consistently applied for more than a decade before the Bolt case.

Bryant v Queensland Newspaper Pty Ltd [1997] HREOCA 23	The question that is now before me is the same question that the Race Discrimination Commissioner was required to answer, namely, was the use of the word "Pom" or its derivatives in the material published by the respondent and submitted by the complainant as the basis of his complaint "reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate" the complainant or some or all of a group of people whose national origin is English.
Shron v Telstra Corporation Ltd [1998] HREOCA 24	I have also assumed, for the purpose of dealing with the substance of this complaint, that the origin of the complainant is, as he has indicated, Jewish. … But is the depiction reasonably likely to offend, insult, humiliate or intimidate the complainant or some people of Jewish origin?
Hagan v Trustees of the Toowoomba	It is apparent from the wording of s 18C(1)(a) that whether an act contravenes the section is not governed by the impact the act is subjectively perceived to have by a

[51] *Ward v Marsh* [1959] VR 26

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

Sports Ground Trust [2000] FCA 1615	complainant. An objective test must be applied in determining whether the act complained of has the necessary offensive, insulting, humiliating or intimidatory quality for it to be within the sub-section. The question so far as s 18C(1)(a) is concerned is not: how did the act affect the particular complainant? But rather would the act, in all the circumstances in which it was done, be likely to offend, insult, humiliate or intimidate a person or a group of people of a particular racial, national or ethnic group?
Wanjurri v Southern Cross Broadcasting (Aus) Ltd [2001] HREOCA 2	The test is objective. However, the objective test must take into account the race, colour, national or ethnic origin of the group of persons offended. The test is "what is reasonably likely to offend a person who is an Australian Aborigine of the Nyungah group". It is well accepted in tort that the particular circumstances or characteristics of a person should be taken into account in respect of an objective standard. It is a clear inference from s.18C that the comment must be offensive to the person or group of the particular race, colour or national or ethnic origin. This approach to the determination of the objective standard is informed by an appeal to substantive rather than formal equality.
Creek v Cairns Post Pty Ltd [2001] FCA 1007	It is necessary first to consider the perspective under consideration, which is to say the hypothetical person in the applicant's position or the group of which the applicant is one. A reference to the person's race may be too wide a description in some cases. That would be so here, where Aboriginal peoples' views, about being portrayed as having a more traditional lifestyle, will differ depending upon where and in what circumstances they live. In that respect I consider the perspective suggested by the applicant's counsel in submissions to be apposite, namely that of an Aboriginal mother, or one cares for children, and who resides in the township of Coen.
Jones v Scully [2002] FCA 1080	In assessing whether the respondent's actions offend s 18C(1)(a), it is necessary to consider the perspective from which these actions are to be viewed, namely the hypothetical person in the applicant's position, or the group of which the applicant is one. The perspective suggested by the applicant's counsel in submissions is that of a "Jew in Australia". Considering that the leaflets have what the respondent admits to be a theme that "relates to the actions of Jews", and that the leaflets were distributed in Australia (notwithstanding that they may have also been distributed or published elsewhere), I consider such a perspective to be appropriate.
Kelly-Country v Beers & Anor [2004] FMCA 336	In applying the reasonable victim test, it is obviously necessary to apply a yardstick of reasonableness to the act complained of. This yardstick should not be a particularly susceptible person to be aroused or incited, but rather a reasonable and ordinary person and in addition should be a reasonable person with the racial, ethnic or relevant attributes of the complainant in the matter.
Campbell v Kirstenfeldt [2008] FMCA 1356	Again, viewed objectively, the use of those terms over a period of time, is reasonably likely to offend or insult a person, and in particular, a person in Mrs Campbell's circumstances, which, on the evidence, appears to be those of an aboriginal woman trying to lead an ordinary family life with her husband, children and extended family.
Eatock v Bolt [2011] FCA 1103	It is the values, standards and other circumstances of the person or group of people to whom s 18C(1)(a) refers that will bear upon the likely reaction of those persons to the act in question.

As this table demonstrates, the requirement in the proposed subsection (3) that the likelihood of offence be determined "not by the standards of any particular group within the Australian community" is a complete reversal of the settled law on section 18C. What's more, the so-called "reasonable victim" test is crucial to the effective operation of the Act.

Replacing it with a "reasonable Australian" test risks entrenching the very prejudice the Act is intended to discourage. Indeed, the perverse logic of the Exposure Draft amendment is that minority groups have less chance of demonstrating racial vilification when prejudice is stronger and more widespread in the community! As Waleed Aly has pointed out:

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

It is vital that the perspective of the affected group is considered. As Justice Barker explained, "an act done, something said, that might not offend one group of Australians because it will be considered by them as a mere slight only, may well be considered reasonably likely, in the circumstances, to offend another, minority group."[53] Sarah Joseph offers a specific example: "the word "cockroach" has genocidal connotations amongst the people of Rwanda and Burundi: would that connotation be understood by Australia's general community?"[54]

Of course, there is no guarantee that judges, even when attempting to apply the "reasonable victim" test, will be able to step outside their own privileged position. Anna Chapman, for instance, has queried how the view of a "reasonable Aboriginal person" was objectively determined to be unoffended by the E S 'Nigger' Brown Stand, given conflicting evidence from a number of Aboriginal witnesses.[55] Dan Meagher agreed, wondering:

But surely the opposite conclusion was reasonably open, the point being that the application of this legal standard still left the decision-maker with much, if not all, to do. The critical decision is in truth a question of fact for which 'there is no single "right" answer.'

> When the outcomes arising from the application of a legal rule are not in most cases directed, or at least suggested, as a matter of law and are not therefore susceptible to ordinary, justificatory legal reasoning, the relevant law lacks sufficient precision and clarity.[56]

There is some force to these complaints. There is scope for judicial discretion in determining the appropriate group and then in assessing the reasonableness of their claimed injury. This creates a degree of uncertainty, and it can cause a "second injury" to the complainant who is

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[53] *Clarke v Nationwide News Pty Ltd trading as The Sunday Times* [2012] FCA 307at [69] [http://www.austlii.edu.au/au/cases/cth/FCA/2012/307.html]

[54] Sarah Joseph, "Rights to bigotry and green lights to hate", *The Conversation*, 28 March 2014 [https://theconversation.com/rights-to-bigotry-and-green-lights-to-hate-24946]

[55] Anna Chapman, "Australian Racial Hatred Law: Some Comments on Reasonableness and Adjudicative Method in Complaints Brought by Aboriginal People" (2004) 30(1) *Monash University Law Review* 27 at 39-40 [http://www.austlii.edu.au/au/journals/MonashULawRw/2004/2.pdf]

[56] Dan Meagher, "So Far So Good? A Critical Evaluation of Racial Vilification Laws in Australia" (2004) 32 *Federal Law Review* 225 at 237 [http://flr.law.anu.edu.au/sites/flr.anulaw.anu.edu.au/files/flr/Meagher_0.pdf]

told by an almost certainly white judge that their genuine humiliation is "unreasonable".[57] However, the solution is to provide greater guidance to the judicial decision-maker, not less. Broadening the category from which the "reasonable person" is drawn can only exacerbate the problem of uncertainty, as well as potentially reinforcing prejudicial racial discourse.

Given the fact that the Attorney-General erroneously believes that the proposed subsection (3) does not change the existing law, the fact that it does not address the real issue with the application of the "reasonable victim" test, and the fact that the proposal would likely entrench racial prejudice within the community, the new subsection should be rejected.

Amendments to subsection 18D

Current provision	*Exposure Draft provision*
18D. Exemptions Section 18C does not render unlawful anything said or done reasonably and in good faith: (a) in the performance, exhibition or distribution of an artistic work; or (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or (c) in making or publishing: (i) a fair and accurate report of any event or matter of public interest; or (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.	(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.

Insertion of "communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter"

The existing legislation provides "free speech" protection for academic, artistic and scientific work (subsection 18D(b)) and discussion, as well as for "comment on any event or matter of public interest" (subsection 18D(c)). The latter will be replaced by specified topics: political, social, cultural and religious matters.

It has been suggested that this is an extremely broad exemption. That is certainly so when the removal of qualifiers is considered (see below), but in terms of the subject matter it is not clear that the replacement of "matters of public interest" with "political, social, cultural and religious" covers any topics of discussion that were not already covered by the legislation.

[57] Anna Chapman, "Australian Racial Hatred Law: Some Comments on Reasonableness and Adjudicative Method in Complaints Brought by Aboriginal People" (2004) 30(1) *Monash University Law Review* 27 at 46-48 [http://www.austlii.edu.au/au/journals/MonashULawRw/2004/2.pdf]

This is, unfortunately, another area in which the Attorney-General's expectation of how the proposed law might work does not match the actual text of the Exposure Draft. Speaking in relation to the Toben case, he said Holocaust denial "wouldn't be exempted under any of the category in subsection 4 because it isn't a matter of participation in public discussion and it doesn't fall within the seven defined topics of public discussion".[58]

This does not reflect the ordinary meaning of the words in the draft bill. Discussion of the Holocaust would comfortably fall into at least one of the categories of political, social, cultural, religious and academic matters, and probably all of them. It is ridiculous to suggest otherwise. If the Attorney-General is suggesting that there are tight boundaries on the meanings of the "seven defined topics of public discussion"—which would be an odd position for a champion of free speech—he should explain what they are and where they are to be found in the Exposure Draft.

As mentioned previously, the Attorney-General also claimed that "Toben, as I understand his particular case, wasn't involved in a public discussion of the matter. He just put some racist nonsense on his website."[59] It must be observed that If the Attorney-General is suggesting that "participating in the public discussion" cannot be done by publishing words and images, he should explain why not and how this is reflected in the Exposure Draft. (He might also, as a courtesy, warn Andrew Bolt that his blog would not be protected by the new "free speech" defence.)

Given that the Attorney-General has suggested a narrower application of the proposed provision than is apparent on the face of the Exposure Draft, no change should be contemplated until the discrepancy is addressed.

Removal of "done reasonably and in good faith", "genuine", "in the public interest", "fair", "accurate" and "genuine belief"

It should be trite to say that freedom of expression is not absolute, and brings with it a concomitant responsibility. Justice French (as he then was) points out that the Act reflects the terms of the International Covenant on Civil and Political Rights and the International Convention for the Elimination of All Forms of Racial Descrimination in this regard:

> The Convention article which underpins Pt IIA of the *Racial Discrimination Act* allows States to strike a balance between the need to prohibit the evil of racial vilification and hatred and the need to protect freedom of speech and association within their reasonable limits. Part IIA reflects a like balance in the prohibitions imposed by s 18C and the exemptions it allows by s 18D.[60]

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[58] Attorney-General George Brandis, Interview with Rafael Epstein, ABC 774 Drive, 27 March 2014 [http://www.attorneygeneral.gov.au/transcripts/Pages/2014/First%20Quarter/27March2014-RaphaelEpsteinABC774Drive.aspx]

[59] Attorney-General George Brandis, Interview with Fran Kelly, ABC Radio National, 26 March 2014 [http://www.attorneygeneral.gov.au/transcripts/Pages/2014/First%20Quarter/26March2014-TranscriptFranKellyABCRadioNational.aspx]

[60] Bropho v Human Rights & Equal Opportunity Commission [2004] FCAFC 16 at [58]-[62] [http://www.austlii.edu.au/au/cases/cth/FCAFC/2004/16.html]

The inclusion of qualifiers like "reasonably and in good faith" in section 18D ensures that the Act protects free speech, but not where it is exercised irresponsibly and in a way that causes harm to others.

This is the crux of the amended defence outlined in the Exposure Draft, as the lack of reasonableness and good faith excluded Andrew Bolt from relying on the section 18D defence,[61] and the legislation is aimed primarily at ensuring that the same case could not succeed in future.[62]

By stripping the Act of these qualifiers, the Exposure Draft makes no attempt at balance. Instead, freedom of speech trumps freedom from harm. It is difficult to imagine any example of speech that would not be protected. Daniel Meyerowitz-Katz observes:

> Unlike 18D or defamation defences such as 'fair comment', the proposed provision does not require any degree of factual accuracy or reasonableness in order for an act to be exempt. Consequently, any communication at all which purports to be a part of a public discussion on essentially any issue would be exempt. In virtually all previous decisions under 18C, the respondent could have claimed to have been engaging in public discussion on one of the included categories.
>
> For example, in *Clarke v Nationwide News*, commenters on the perthnow.com.au website could claim they were making comments in the course of public discussion over whether the people of Perth were 'fed up of' the crime, drunkenness and bad behaviour of Aboriginal Australians, and whether or not Aboriginal Australians could behave themselves at their children's funerals. This is of no real value to public life in Australia, but is nevertheless a public discussion of social issues.[63]

It is worth observing that even the new "vilification"—that is, speech that causes fear of physical harm—would be protected by the new defence, as long as the comments were made in public discussion on almost any conceivable topic. The Criminal Code provisions outlawing "urging violence against groups" only apply where the intention is that violence will be used (proved beyond reasonable doubt), not where the publisher is reckless as to the risk.[64] Shrill campaigns aimed at creating racial tensions would be protected, even if that meant that ethnic minorities felt unsafe in their homes. Likewise, calls for "Aussies" to take unspecified action against foreign landlords would be protected, even if they led to bricks being thrown through windows.

Again, the Attorney-General appears to be unaware of the breadth of these changes. Responding to a question about Toben's Holocaust denial, he said: "in certain circumstances

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[61] *Eatock v Bolt* [2011] FCA 1103 at [424]-[427] & [440] [http://www.austlii.edu.au/au/cases/cth/FCA/2011/1103.html]

[62] Although the Attorney-General insists that there are "other cases", he has been unable to identify any: see for example Attorney-General George Brandis, Interview with David Speers, Sky News, 25 March 2014 [http://www.attorneygeneral.gov.au/transcripts/Pages/2014/First%20Quarter/25March2014DavidSpeersSkyNews.aspx]

[63] Meyerowitz-Katz, "Exposure draft of the Freedom of Speech (Repeal of S. 18C) Bill 2014: Initial Analysis", Australia-Israel Jewish Affairs Council, 25 March 2014 [http://aijac.org.au/news/article/exposure-draft-of-the-freedom-of-speech-repeal-o]

[64] *Criminal Code 1995* (Cth), sections 80.2A & 80.2B [http://www.comlaw.gov.au/Details/C2014C00151/Html/Volume_1#_Toc384131831]

conduct like that might constitute vilification. It all depends on how it's expressed."[65] That is simply untrue; the removal of "good faith", "reasonableness" and the other qualifiers means that the mode of expression does not affect whether the comment attracts the free speech defence.

> Similarly, in another interview:
>
> *Speers:* If I was to write an article in the name of science and say, white people are scientifically smarter or better therefore it's okay to physically intimidate by their colour, is not against…?
>
> *Attorney-General:* No because that would violate the intimidation provision.
>
> *Speers:* Not because, it's exempted in that last clause isn't it because it's involving scientific discussion?
>
> *Attorney-General:* It would have to be a bona fide participation in public debate.

"Bona fide" is the Latin for "good faith". This requirement has been explicitly removed in the Exposure Draft. The interview continued:

> *Speers:* [inaudible]
>
> *Attorney-General:* Well, no, because they way in which this is written is to strike the balance between those areas which are properly matters of public discussion and those areas in which are prohibited – namely vilification and intimidation.

This is another clear misrepresentation of the proposal. Subsection (1) makes vilification and intimidation unlawful, but subsection (4) states that "this section does not apply to [communications made] in the course of participating in the public discussion". There is no requirement that the contribution to public discussion be fair, accurate, reasonable, made in good faith or in the public interest. These qualifications would all be stripped from the Act. Any speech, all speech, made even superficially in the course of public discussion, would absolutely trump the prohibition on racial vilification.

The Attorney-General's expectation of how the law would operate, balancing the prohibition on racial abuse against freedom of speech in the course of legitimate public discussion, is better achieved by the existing legislation.

Removal of protection for "artistic work"

The Exposure Draft's proposed defence removes protection for "the performance, exhibition or distribution of an artistic work". Instead, it restricts protection to "the public discussion of any… artistic… matter". According to this logic, King Billy Cokebottle, a horrendously racist blackface character that was nevertheless protected by section 18D(a), would not be protected by the amended Act. However, an article discussing and endorsing the racist

[65] Attorney-General George Brandis, Interview with Alan Jones, 2GB, 26 March 2014 [http://www.attorneygeneral.gov.au/transcripts/Pages/2014/First%20Quarter/26March2014-TranscriptAlanJones2GB.aspx]

stereotypes conveyed by the character would be protected by the new subsection (4). This is surely an oversight that reflects the hasty drafting process.

Repeal of section 18B relating to acts done for multiple reasons

Current provision	*Exposure Draft provision*
18B. Reason for doing an act 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.	*[Repealed]*

The proposed repeal of section 16B has not been explained by the Attorney-General. It is difficult to understand why it has been omitted from the Exposure Draft, as it is unrelated to "free speech" (the purported reason for amending the Act). There is no public controversy over provisions like section 18B. A provision in identical terms is found in section 18, which applies to Part II of the Act, prohibiting racial discrimination.[66] It does not extend to Part IIA, prohibiting offensive behaviour based on racial hatred, which is why section 18B was created. It is possible that the Attorney-General intends the racial vilification provision to be moved from Part IIA to Part II, which would render section 18B unnecessary, but there is no indication of this on the face of the Exposure Draft document.

Provisions of this nature are a standard part of anti-discrimination legislation. Identical formulations are found in:

- *Disability Discrimination Act 1992* (Cth), section 10
- *Anti-Discrimination Act 1977* (NSW), section 4A

Different statutory language with similar intent is found in:

- *Sex Discrimination Act 1984* (Cth), section 8
- *Anti-Discrimination Act 1992* (NT), subsection 20(3)
- *Equal Opportunity Act 1984* (SA), subsection 6(2)
- *Equal Opportunity Act 1984* (WA), section 5
- *Discrimination Act 1991* (ACT), subsection 4A(2)
- *Anti-Discrimination Act 1991* (Qld), subsection 10(4)
- *Equal Opportunity Act 2010* (Vic), subsection 8(2)(b)
- *Racial and Religious Tolerance Act 2001* (Vic), subsection 9(2)
- *Anti-Discrimination Act 1998* (Tas), subsection 14(3)(a)

[66] *Racial Discrimination Act 1975* (Cth), section 18 [http://www.austlii.edu.au/au/legis/cth/consol_act/rda1975202/s18.html]

In relation to the provision in the WA *Equal Opportunity Act*, Justice Kirby explained the rationale for such provisions:

> The object of the Act is to exclude the unlawful and discriminatory reasons from the relevant conduct. This is because such reasons can infect that conduct with prejudice and irrelevant or irrational considerations which the Act is designed to prevent. Because persons, faced with allegations of discrimination, genuinely or otherwise, assert multiple and complex reasons — and because affirmative proof of an unlawful reason is often difficult — the Act has simplified the task for the decision-maker. It is enough that it be shown that the doing of the act was 'by reason' or 'on the ground' of the particular matter in the sense that the unlawful consideration was included in the alleged discriminator's reasons or grounds. It must be a real 'reason' or 'ground'. It is not enough to show that it was a trivial or insubstantial one. But once it is shown that the unlawful consideration truly played a causative part in the decision of the alleged discriminator, that is sufficient to attract a remedy under the Act.[67]

This does not mean that any connection with a racial aspect attracts sanction under the Act. The racial component must be a real causative factor. For example, in *Korzcak v Commonwealth*, Commissioner Innes held that "race was a factor in the work environment" and that "Mr Korzcak's accent might have provided the opportunity for abuse", but he nevertheless concluded that "race or national origin" was not a substantial cause of the teasing; rather it was "a result of personality differences and a juvenile gang mentality."[68]

However, removing section 18B would create an almost insurmountable hurdle, even where cases involve quite serious racial abuse. For example, in *Campbell v Kirstenfeldt*, vicious racial abuse arose in disputes over "cuttings from overhanging vines", "the activities of her cat", and "collecting dry sticks to make a fire".[69] Despite the use of the strongest racial epithets, it is impossible to say that racial animosity was the only reason for the abuse, and in the absence of section 18B there may be no redress.

Similarly, in *McMahon v Bowman*, the case was summarised as follows:

> It is alleged by the applicant that after his children hit a ball from their property into the neighbouring property owned by the respondent that the respondent made a series of racially offensive remarks addressed to the occupants of the applicant's house and made further remarks addressed to the applicant himself when the applicant walked over the respondent's property to retrieve the ball.[70]

Again, in the absence of section 18B it would be impossible to say that the abuse was motivated by the applicant's race rather than by the inconvenience of a ball being hit into the respondent's property. Removing the "multiple causes" provision from the Act would create an unreasonable hurdle that would prevent the victims of racial vilification obtaining justice.

Consistent with other parts of the Act and with other anti-discrimination legislation, section 18B should be retained in its current form.

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[67] *IW v City of Perth* [1997] HCA 30 at [63] [http://www.austlii.edu.au/au/cases/cth/HCA/1997/30.html]
[68] *Korczak v Commonwealth* [1999] HREOCA 29 at 8.4 [http://www.austlii.edu.au/au/cases/cth/HREOCA/1999/29.html]
[69] *Campbell v Kirstenfeldt* [2008] FMCA 1356 at [7] [http://www.austlii.edu.au/au/cases/cth/FMCA/2008/1356.html]
[70] *McMahon v Bowman* [2000] FMCA 3 at [2] [http://www.austlii.edu.au/au/cases/cth/FMCA/2000/3.html]

Repeal of section 18E to remove vicarious liability

Current provision	*Exposure Draft provision*
18E. Vicarious liability (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; 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.	*[Repealed]*

The removal of the vicarious liability provision in section 18E is another unexplained component of the Exposure Draft. Like the "multiple causes" provision, a vicarious liability provision also exists in section 18A in relation to Part II of the Act, but there is no proposal to remove it. Vicarious liability is a standard feature of anti-discrimination legislation, and provisions can be found in the following legislation:

- *Disability Discrimination Act 1992* (Cth), section 123
- *Sex Discrimination Act 1984* (Cth), section 106
- *Anti-Discrimination Act 1977* (NSW), section 53
- *Anti-Discrimination Act 1992* (NT), section 105
- *Equal Opportunity Act 1984* (SA), section 91
- *Equal Opportunity Act 1984* (WA), section 161
- *Discrimination Act 1991* (ACT), section 121A
- *Anti-Discrimination Act 1991* (Qld), section 133
- *Equal Opportunity Act 2010* (Vic), sections 9 and 10
- *Racial and Religious Tolerance Act 2001* (Vic), sections 17 and 18
- *Anti-Discrimination Act 1998* (Tas), section 104

The intention of these provisions is to ensure that a culture of equal opportunity is established in organisations. The Tasmanian legislation conveys this through its construction:

> **104. Obligation of organisations**
> (1) An organisation is to ensure that –
> (a) its members, officers, employees and agents are made aware of the discrimination and prohibited conduct to which this Act relates; and …
> (c) no member, officer, employee or agent of the organisation engages in, repeats or continues such conduct.
> (2) An organisation is to take reasonable steps to ensure that no member, officer, employee or agent of the organisation engages in discrimination or prohibited conduct.

> (3) An organisation that does not comply with this section is liable for any contravention of this Act committed by any of its members, officers, employees and agents.

It is important to note that the vicarious liability provision in section 18E only applies to racially abusive conduct by an employee "in connection with his or her duties". The harm of racial abuse in this context is magnified by the implication that it is endorsed by an organisation or institution. It is for that reason that an obligation is imposed on organisations to implement strategies to prevent racial abuse, and to sanction it when it does occur.

Unfortunately, many incidents of racial abuse occur in workplaces. In *Rugema v Derkes*, the applicant was subjected to prolonged racial abuse by his manager, and the company took no action to prevent it even after complaints were made:

> On 2 November he was transferred to the Rescroll Department and Mr Derkes became his acting supervisor. Mr Rugema alleges that between November 1995 and December 1995 Mr Rugema was subjected to racial abuse by Mr Derkes and taunted by Mr Derkes who called him "a black cunt", and "a fucking black lazy bastard", and "fucking black cunt". Mr Derkes also made "monkey" gestures to Mr Rugema. He claims that signs were displayed at work with racist comments such as "Whites are Superior".
>
> Mr Rugema gave evidence that he complained to his managers whilst working in the Auto Department about the racial abuse to which he was subjected, but that nothing was done to stop the racial abuse to which he was subjected. He also complained about the racial abuse by Mr Derkes, but again, nothing was done to remedy the situation.
>
> In November, 1995 Mr Derkes was transferred and was no longer Mr Rugema's immediate supervisor, however Mr Derkes still came into daily contact with Mr Rugema and the racial abuse continued, even after Mr Rugema had lodged the complaint to the Commission and last occurred on 5 February 1996 when Mr Rugema ceased work due to the continual abuse.[71]

Other cases raised similar issues:

- In *San v Dirluck Pty Ltd & Anor,* a woman working in a butcher's shop was subjected to a combination of racial abuse and sexual harassment. Comments like "That's right, fuck off ching chong, go back home" were made while other employees laughed. When she complained, a manager said "No", he didn't want to hear her side of the story, and "I don't want you here".

- In *Horman v Distribution Group*, a spare part interpreter at an automotive parts business was subjected to ongoing racial abuse. The office manager said "I can't stand wogs" and "I am finally getting rid of that fucking wog". Another employee called her a "half caste" and a "wog bitch". In addition, "The word 'wog' was entered in the time sheet next to the name of the Applicant."[72]

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[71] *Rugema v Gadsten Pty Ltd & Derkes* [1997] HREOCA 34 [http://www.austlii.edu.au/au/cases/cth/HREOCA/1997/34.html]
[72] *Horman v Distribution Group* [2001] FMCA 52 at [10], [30] [http://www.austlii.edu.au/au/cases/cth/FMCA/2001/52.html]

It is clear in all of these cases that the problem was not the isolated conduct of an employee, but a culture that either actively encouraged or at the very least did not take seriously and did not attempt to address racial abuse in the workplace. It is entirely appropriate that organisations that fail to take reasonable steps to prevent racial abuse by their employees should be liable for the contraventions. Section 18E should be retained.

Other matters

Title of the bill

The proposed title does not accurately describe the content of the bill. A comparision of the existing and proposed provisions (see Appendix A) shows that it would be more accurate to say that sections 18C and 18D are amended, while sections 18B and 18E are repealed. The inclusion of "Freedom of Speech" in the title of the bill is misleading, especially when many of the changes (such as the repeal of sections 18B and 18E) are entirely unrelated to that issue. Furthermore, the bill amends only one Act, the *Racial Discrimination Act 1975*, but this is not apparent from the title of the bill.

The use of "freedom of speech" and "repeal of s 18C" in the title seems designed to appease the Institute of Public Affairs, who spent a great deal of money promoting the repeal of the provision, and who were upset that the government appeared likely to amend it instead. The government had promised to "repeal it in its current form", which is an unorthodox way to describe amending a law. The trend towards political naming of bills is to be deplored, and the weasel-words used in election commitments should not form the basis for the titles of legislation.

A more appropriate title would be the Racial Discrimination Amendment Bill 2014.

Numbering

It is unclear how the Government intends the new provisions to be numbered. The Exposure Draft of the bill does not provide a section number. For the sake of clarity, and to aid the public, the legal profession and the judiciary in understanding the changes that have been made, the provisions of the bill should be numbered so as to match the existing sections that they amend. That is, subsections (1), (2) and (3) of the Exposure Draft should be numbered 18C(1), (2) and (3). Subsection (4) of the Exposure Draft should be numbered 18D.

Concluding comments

In my view, there is no compelling rationale for change. Section 18C is not a threat to freedom of speech, and does not chill debate about racial issues—though it does require people to bear in mind their responsibility not to unduly harm people because of their race, colour, ethnic or national origin. In particular:

- There is no justification for removing protections against serious offence, insult, or humiliation.

- There is no justification for narrowing the definition of intimidation to exclude non-physical harm.
- There is no justification for removing "in all the circumstances".
- There is no justification for removing the reference to "some or all members of the group".
- There is no justification for changing the definition of "otherwise than in public" by repealing section 18C(3).
- There is no justification for moving away from the "reasonable victim" test that has applied since the provisions were first introduced.
- There is no justification for changing the "free speech" defence in section 18D, especially by removing important qualifiers that uphold the responsibility not to exercise freedom of expression in a way that causes undue harm.
- There is no justification for removing protection for the performance of artistic works.
- There is no justification for altering the treatment of acts that are done for 2 or more reasons including because of a person's race, colour, or ethnic or national origin.
- There is no justification for removing vicarious liability.

Nevertheless, there are some minor aspects of the Attorney-General's proposal that, while not urgent, would improve the existing legislation by providing further clarity:

- Judicial decisions limiting "offence, insult, humiliation, and intimidation" to acts likely to have "profound or serious effects" should be codified in section 18C.
- Vilification should be added to the list of proscribed conduct, but it should be defined consistently with State legislation.

A proposed draft bill consistent with these submissions is attached for your reference.

Robert Corr

9 April 2014

Annexure A: Table comparing existing law to Exposure Draft

Current provision	***Exposure Draft provision***
18C. Offensive behaviour because of race, colour or national or ethnic origin (1) It is unlawful for a person to do an act, otherwise than in private, if: (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group. Text	(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: (a) vilify means to incite hatred against a person or a group of persons; (b) intimidate means to cause fear of physical harm: (i) to a person; or (ii) to the property of a person; or (iii) to the members of a group of persons.
(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.	*[Repealed]*
[No equivalent]	(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.

Current provision	***Exposure Draft provision***
18D. Exemptions Section 18C does not render unlawful anything said or done reasonably and in good faith: (a) in the performance, exhibition or distribution of an artistic work; or (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or (c) in making or publishing: (i) a fair and accurate report of any event or matter of public interest; or (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.	(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.
18B. Reason for doing an act 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.	*[Repealed]*
18E. Vicarious liability (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; 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.	*[Repealed]*

Annexure B: Draft bill reflecting these submissions

Racial Discrimination Amendment Bill 2014

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

[1] Subsection 18C(1)

Omit "or intimidate". Insert instead ", intimidate or vilify".

[2] Subsection 18C(1)(aa)

Insert after subsection 18C(1)(a):

(aa) the act is reasonably likely, in all the circumstances, to have profound or serious effects; and

[2] Subsection 18C(3)

Insert after the definition of ***public place***:

vilify means incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons.