Information Paper on proposed changes to Australia's racial vilification laws

About the consultation and this paper

On 25 March 2014, Attorney-General George Brandis released details of proposed changes to Australia's racial vilification laws. The details are set out in what is known as an "exposure draft" of the proposed legislation. The draft legislation *Freedom of Speech (Repeal of s 18C) Bill 2014* has not been introduced into the Federal Parliament but has been released publicly for consultation.

The Federal Government is seeking submissions from interested people and organisations on the proposed changes **by 30 April 2014**.

The Government has not provided a background paper on the laws and the proposed changes to assist interested people and organisations to make submissions. This Information Paper is intended to provide that background, and also inform the community of the Human Rights Law Centre's views about the proposed changes.

This paper provides information on:

- our current Federal racial vilification laws;
- understanding the proposed changes;
- our views on the proposed changes;
- Frequently Asked Questions; and
- ways to obtain more information.

Who should make a submission?

We encourage interested people and organisations to give your feedback to the Federal Government about these proposed changes.

You do not need to be lawyer and you do not need to understand technical legal issues to make a submission.

We think it is particularly important for the Government to hear from people and communities affected by racial vilification. If you, your family or people your organisation works with have experienced racial vilification, we encourage you to write about those experiences in your submission.

If you are writing about someone else's experience, you should check first that they are happy for you to write about their experience or make sure they can't be identified from what you say in your submission.

What should I put in a submission?

There is no required format for a submission.

If you haven't ever made a submission before, you should just think of your submission as a letter to the Government explaining your views on the changes.

In your submission, you may want to put your views about some or all of the following issues:

- whether we need laws to protect against racial vilification in Australia;
- whether the current laws are working well;

- whether you agree with the Government's proposed changes to the laws; and
- any other views you have about how to prevent racial vilification.

As set out above, we think it's also important for the Government to hear people's experiences of racial vilification in the community.

How do I make a submission?

Submissions can be emailed to s18cconsultation@ag.gov.au or mailed to:

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

The details of the proposed changes and basic information on the submission process is here: http://www.ag.gov.au/Consultation

Make your submission public – email us a copy

We understand that the Federal Government will not be making submissions publicly available. We encourage organisations to publish their submissions on their website. We also invite individuals and organisations to email us a copy of your submission to admin@hrlc.org.au so that we can make submissions publicly available on the one website here: http://www.hrlc.org.au/racial-vilification-protections.

Because the Government isn't making submissions publicly available, we also encourage you to consider sending a copy of your submission to your local Member of Federal Parliament. You can find out who your local Member of Parliament is here: http://australia.gov.au/faq/which-federal-electorate-do-i-live-in

About the Human Rights Law Centre

The Human Rights Law Centre protects and promotes human rights in Australia and beyond through a strategic mix of legal action, advocacy, education and capacity building.

It is an independent and not-for-profit organisation.

T: + 61 3 8636 4450
E: admin@hrlc.org.au
W: www.hrlc.org.au

This paper was prepared on 11 April 2014.

Summary of our views

The current racial vilification laws provide important protection against racist hate speech. The laws are being interpreted sensibly by the courts and are operating reasonably effectively. The laws generally strike an appropriate balance between the right to freedom of expression and the right to freedom from racial discrimination and vilification.

The Federal Government's proposed changes substantially weaken the existing racial vilification protections. Of greatest concern is the proposed extremely broad "public discussion" exemption. Most public racial vilification is likely to be covered by the exemption – even if it incites racial hatred or causes racial humiliation or fear of physical harm on the grounds of race.

The proposed exemption is so broad, and the new protection is so narrow, that the combined changes would almost completely remove the existing Federal racial vilification protections.

Understanding our current Federal racial vilification laws

Background to our Federal racial vilification laws

The *Racial Discrimination Act 1975* (Cth) (**RDA**) established the first ever Federal legal protections against racial discrimination. The RDA makes discrimination against people on the basis of their race, colour, descent or national or ethnic origin unlawful and aims to ensure that people of all backgrounds are treated equally and have the same opportunities.

In 1995, the RDA was amended to insert new protections against racial vilification. The new protections were introduced in response to the recommendations of several major inquiries including the National Inquiry into Racist Violence and the Royal Commission into Aboriginal Deaths in Custody.

Prohibiting offensive, insulting, humiliating and intimidating racial conduct in public

The racial vilification protections are set in sections 18C and 18D of the RDA.

Section 18C of the RDA makes it unlawful to engage in public conduct that is reasonably likely to *offend, insult, humiliate or intimidate* another person or group of people on the basis of their race, colour, or national or ethnic origin. Section 18C does not apply to private conduct.

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

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

Section 18D contains free speech exemptions that provide that section 18C does not make it unlawful to say or do something reasonably and in good faith:

- in the performance or distribution of an artistic work;
- 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;

- in the making or publishing of a fair and accurate report of any event or matter of public interest;
- in the making or publishing of a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

In other words, section 18D allows some racially offensive, insulting, humiliating or intimidating conduct if is done reasonably and in good faith in fair reporting, fair comment, artistic works or discussion in the public interest.

The racial vilification protections are civil laws, not criminal laws. You can't be fined or jailed for breaching them.

Individuals who want to take action under section 18C must first make a complaint to the Australian Human Rights Commission. The Commission will normally attempt to mediate the complaint (unless it thinks the complaint is trivial or misconceived).

If the Commission's mediation process is not successful, the individual can apply to the Federal Court or Federal Circuit Court. If the court finds that a person's conduct is unlawful under section 18C, it can make orders including:

- a declaration that the person has committed unlawful conduct and should not repeat this behaviour;
- an order to remove any offensive publication;
- an order to redress any loss or damage suffered; and/or
- the payment of compensation.

The full text of sections 18C and 18D (and related sections 18B and E) are in Appendix 1.

Background to the proposed changes

The Coalition went to the 2013 federal election with a policy of reforming section 18C of the RDA. When he was Shadow Attorney-General, George Brandis wrote that "Section 18C, as presently worded, has no place in a society that values freedom of expression and democratic governance" and that the provision "in its present form should be repealed". As Opposition Leader, Tony Abbott also stated: "we will repeal section 18C of the Racial Discrimination Act, at least in its current form".

These pledges followed the 2011 Federal Court decision in the Eatock v Bolt case, in which the Herald Sun columnist, Andrew Bolt and his publisher were found to have breached the racial vilification provisions of the RDA by writing and publishing articles that suggested that a number of prominent fair-skinned Aboriginal people weren't genuinely Aboriginal and pretended to be Aboriginal to access certain benefits and entitlements.

Following months of debate, the details of the proposed changes were released on 25 March 2014.

Why racial vilification laws are necessary

Racism is a serious, continuing problem in Australia. Beyond the well-publicised recent examples of racial abuse on the sporting field and public transport, research by VicHealth, the Scanlon Foundation and others has documented widespread racial discrimination. Research also confirms that racial discrimination and vilification can cause serious mental health impacts and other social harm. There is an important role for the law to play in addressing the harm caused by racial discrimination and racial vilification.

Protecting against the harm of racial vilification is a legitimate restriction on free speech

International human rights law protects three key human rights which are relevant to this consultation.

Freedom of opinion is the right to hold opinions.

Freedom of expression includes the freedom to impart and receive information and ideas of all kinds, whether orally, in writing, in print, through art or another medium. Freedom of speech is a concept that falls within the ambit of freedom of expression, as speech is one way of conveying opinion or expression.

Freedom from discrimination is the right not to be subjected to unfavourable treatment because of your race, religion, sex or a range of other grounds.

These rights are enshrined in the *International Covenant on Civil and Political Rights* (ICCPR). Australia is a party to the ICCPR.

The right to freedom of opinion is absolute. It cannot be subject to any exception or restriction. In other words, the government can't tell people what to think.

However, the right to freedom of expression is not absolute. Article 19(3) of the ICCPR recognises that the exercise of the right to freedom of expression may be subject to restrictions in certain circumstances, including where necessary to respect the rights and reputations of others. The right to freedom of expression must therefore be balanced against other rights.

In practice, freedom of expression is already legitimately limited in whole range of areas in Australia such as sexual harassment, making threats to kill, defamation, confidentiality, contempt of court and misleading and deceptive conduct.

International human rights law specifically recognises the need to limit freedom of expression to protect against the harm of racial vilification.

Article 20 of the ICCPR specifically provides that states must prohibit by law any advocacy of racial hatred that constitutes incitement to discrimination, hostility or violence.

Australia is also a party to the *International Covenant on the Elimination of All Forms of Racial Discrimination* (ICERD), which requires Australia to take steps to eliminate the promotion and incitement of racial discrimination and hatred.

The laws have been applied sensibly by the courts and are operating effectively

The Federal racial vilification laws have been operating for almost 20 years. It is appropriate to review the laws to ensure they are working well and to see if they could be improved.

The best available research suggests that the laws have been considered in less than 100 finalised court cases since 1995.

An analysis of these cases shows that the laws have been applied sensibly by the courts and are operating reasonably effectively.

In particular, courts have stated that to be unlawful under section 18C, the conduct must have "profound and serious effects, not to be likened to mere slights".

Further, courts have also stated that the conduct must be assessed against an *objective* standard, judged from the perspective of a hypothetical reasonable or ordinary person from the relevant racial group. Courts have said that extreme, atypical or intolerant reactions are not relevant. Even if

someone is personally offended or insulted by conduct, there won't be a breach of racial vilification laws unless the conduct meets the *objective* standard.

Acts which have been held to breach section 18C include:

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

Acts which have been found to be protected by section 18D free speech exemptions include a cartoon, a comedy routine, a play and a book about Pauline Hanson's policies that argued that Aboriginal people were unfairly favoured by social security policies.

Why Andrew Bolt was unable to rely on the free speech exemptions

Andrew Bolt was unable to rely on the section 18D free speech exemptions because the court found he didn't act reasonably or in good faith. The court found his articles contained multiple errors of material fact, distortions of the truth and inflammatory and provocative language.

The following extract from the court's decision provides one example:

> Mr Bolt said of Wayne and Graham Atkinson that they were "Aboriginal because their Indian great-grandfather married a part-Aboriginal woman" (1A-33). In the second article Mr Bolt wrote of Graham Atkinson that "his right to call himself Aboriginal rests on little more than the fact that his Indian great-grandfather married a part-Aboriginal woman" (A2-28). The facts given by Mr Bolt and the comment made upon them are grossly incorrect. The Atkinsons' parents are both Aboriginal as are all four of their grandparents and all of their great grandparents other than one who is the Indian great grandfather that Mr Bolt referred to in the article.

The court in the Bolt case made it very clear that it's not unlawful to publish articles that deal with racial identity or challenge the genuineness of someone's racial identity. If Mr Bolt had been accurate in writing about the light-skinned Aboriginals he discussed in his articles, or even if he had taken reasonable steps to be accurate about them (such as contacting them), it is far more likely that his articles would have been protected by the section 18D free speech exemptions.

The laws provide an accessible dispute resolution service that resolves most complaints

Racial vilification laws provide a very accessible dispute resolution mechanism. The first step in any action is to complain to the Australian Human Rights Commission. Over the past five years, the Commission has received an average of 130 racial vilification complaints each year. A very small percentage of complaints (4% in 2012/13) are terminated because they are trivial, misconceived or lack substance. The majority are resolved through mediation. Only a handful of complaints go on to court (less than 3% in 2012/13).

Most complaints that are resolved by the Commission provide one or more of the following outcomes:

- an apology;

- an agreement to remove the offending publication or comments, for example from a website;
- compensation; and
- changes to policies and procedures or training.

The laws help to set community standards of behaviour

In addition to providing access to legal remedies for people affected by racial vilification, the laws help in the fight against racism by defining appropriate standards of community behaviour.

People are more likely to speak out in public against racism if the law supports their position. People are less likely to engage in racial vilification if the law makes it unlawful.

In this way, the law is an important tool that complements education and other strategies to combat racism.

State and Territory racial vilification laws

The proposed changes will only affect the Federal racial vilification laws. They will not affect State and Territory racial vilification laws. However, it is useful to compare the various laws.

All Australian States and the Australian Capital Territory (but not the Northern Territory) have legislation that prohibits incitement and serious racial vilification. The laws in most jurisdictions create both a civil prohibition and criminal offences for racial vilification. Western Australia has only criminal provisions, whereas in Tasmania there are only civil prohibitions.

The civil laws differ slightly, but in general cover conduct that *incites hatred towards, serious contempt for, or severe ridicule of* someone in public on the ground of race. The conduct is judged from the point of view of a reasonable member of the community, not a member of the racial group affected. To be unlawful, the conduct must do more than just convey or cause hatred: the conduct must have the capacity to generate strong and negative passions, or to 'incite' this response in others.

The State and Territory civil laws therefore set a high 'harm' threshold, which is harder to satisfy than the current "offend, insult, humiliate or intimidate" test in section 18C. The focus in State and Territory laws on the effect on third party bystanders, rather than on the victim, also makes it more difficult to prove.

State and Territory laws have free speech exemptions which are generally qualified by the requirement that the person must have acted "reasonably" and in "good faith" to rely on them.

State and territory laws which make it a criminal offence to vilify someone on the ground of race are very hard to prove: to our knowledge there have been no criminal convictions for racial vilification, other than in Western Australia.

Understanding the proposed changes

The Federal Government is proposing to change the racial vilification protections as set out below. The full detail of the changes is set out in the Appendices 2 and 3.

Remove "offend", "insult" and "humiliate"

The words "offend", "insult" and "humiliate" would be removed from the existing racial vilification protections.

Insert "vilify" and narrowly define "intimidate"

The new provision would make it unlawful to "vilify" or "intimidate" another person or a group of persons on the grounds of race.

The normal meaning of vilify is to disparage or denigrate. In the Government's proposed changes, it would be defined narrowly to mean "incite hatred against a person or a group of persons".

The current word intimidate would be kept but it would be given a much narrower meaning "to cause fear of physical harm" to a person, property or members of a group of persons.

Taken together, these changes would substantially wind back the scope of the existing protection given by section 18C.

State and Territory racial vilification laws which use the "incitement" test have been criticised for being too difficult to prove. They generally prohibit conduct that *incites hatred towards, serious contempt for, or severe ridicule of* someone in public on the ground of race. The proposed changes will be even harder to prove as they would not cover incitement of serious contempt or severe ridicule.

Insert a new community standards test

As set out above, section 18C has been interpreted sensibly by the courts to require an objective standard as to whether conduct is unlawful. This requires an assessment of the conduct from the perspective of a hypothetical reasonable or ordinary person from the relevant racial group.

The new provision would change this test to require an assessment from the standards of an ordinary reasonable member of the Australian community, not from the standards of any particular group within the Australian community. The concern here is that the impact of racial vilification is best assessed from the perspective of the groups who are the targets of that vilification as opposed to the broader community.

Depending on how it would be interpreted by the courts, the new test has the potential to narrow the scope of the protection offered by section 18C.

Insert a new, extremely broad "public discussion" exemption with no reasonable or good faith requirement

The proposed reforms would remove the existing free speech exemptions in section 18D. They would be replaced with a new exemption that would mean the new, narrowed racial vilification protections would 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.*

There is no requirement that to be exempt, the public discussion must be conducted reasonably or in good faith (as required by section 18D currently).

This new test is extraordinarily broad. Most public racial vilification is likely to be covered by the exemption – even if it incites racial hatred or causes racial humiliation or fear of physical harm on the grounds of race.

The Attorney-General has argued that the exemption would not apply to racist abuse on a sporting field. However racial abuse on the sporting field might not be unlawful under the proposed laws because it doesn't "incite" others to racial hatred or because it falls within the exemption for "public discussion of any social, cultural or religious matter".

Remove sections 18B and 18E

The proposed changes would remove section 18B which provides that if conduct is done for two or more reasons, and one of the reasons is because of race, the conduct is taken to be done on the grounds of race for the purposes of the racial vilification protections. Removing this provision has the potential to make it harder to prove racial vilification when there is more than one reason for the vilification.

The proposed changes would also remove section 18E which makes an employer or a principal responsible for racial vilification by their employee or agent, where the vilification is done in connection with their duties as an employee or agent and the employer failed to take reasonable steps to prevent it. It's difficult to predict the impact of removing this provision but it will narrow the scope of the racial vilification protections and reduce the legal obligation on employers to take steps to prevent racial vilification, for example by having proper policies and training.

Our views on the proposed changes

We strongly oppose the proposed changes.

The current racial vilification laws provide important protection against racist hate speech. The laws are being interpreted sensibly by the courts and are operating reasonably effectively. The laws generally strike an appropriate balance between the right to freedom of expression and the right to freedom from racial discrimination and vilification.

The proposed changes substantially weaken the existing racial vilification protections. Of greatest concern is the proposed extremely broad "public discussion" exemption. Most public racial vilification is likely to be covered by the exemption – even if it incites racial hatred or causes racial humiliation or fear of physical harm on the grounds of race.

The proposed exemption is so broad, and the new protection is so narrow, that the combined changes would almost completely remove the existing Federal racial vilification protections.

The radical scope of these proposed changes is confirmed by the commentary on them by the Institute of Public Affairs, which has called for complete removal of Federal racial vilification laws. The Institute welcomed the proposed changes saying they go "95% of the way towards the repeal of 18C", they "neuter 18C" and they are a "magnificent example of how to repeal legislation without admitting you're repealing legislation".

Mitigating the worst of the proposed changes

We strongly believe the proposed changes should be rejected in their entirety.

If however, the Federal Government proceeds with the changes, our view is that the worst aspects of the changes should be mitigated by the following measures:

- giving the words "intimidate" and "vilify" their ordinary meaning;
- reinserting "reasonableness", "good faith" and "public interest" requirements in the exemption;
- ensuring the community standards test requires some consideration of the impact on the relevant racial group affected by the conduct; and
- retaining sections 18B and 18E.

Improving the current drafting of section 18C

As set out above, it is entirely appropriate to review the operation of the racial vilification laws after almost 20 years of operation to ensure they are working well and to see if they could be improved.

Regrettably, the Federal Government's review has been driven by strong ideological view that the outcome in the Eatock v Bolt case was wrong and should be prevented from happening again.

A more objective review of the laws could identify ways to improve the drafting of section 18C in line with the sensible way it has been interpreted by the courts.

For example, we support amendments to section 18C to clarify that:

- it applies only to serious offence, not to minor or trivial conduct;
- the conduct should be judged by an objective standard of a reasonable member of the affected racial group.

We would also support amendments (in addition to the current protections) that make it unlawful in public to encourage or promote racial hatred or discrimination.

Frequently asked questions

The Attorney-General George Brandis in announcing the proposed changes said "These are the strongest protections against racism that have ever appeared in any Commonwealth Act". Is that correct?

Absolutely not. It is an astonishing claim that isn't supported by any basic analysis of the proposed changes. Almost every single one of the proposed changes narrows the existing protection. The proposed exemption is so broad, and the new protection is so narrow, that the combined changes would almost completely remove the existing Federal racial vilification protections. The Institute of Public Affairs, which supports the complete removal of the racial vilification protections, has described the proposed changes as "magnificent example of how to repeal legislation without admitting you're repealing legislation".

Is it true, as the Attorney-General has stated, that section 18C doesn't address racial vilification?

No. Section 18C doesn't currently use the word "vilify" but it addresses racially vilifying behaviour by prohibiting offensive, insulting, humiliating or intimidating racial conduct. To support his misleading claim, George Brandis chooses to define racial vilification narrowly as "incitement to racial hatred". This definition is narrower than the common meaning of vilification. It is also narrower than the protection afforded by State and Territory racial vilification laws which prohibit conduct that *incites hatred towards, serious contempt for, or severe ridicule of* someone in public on the ground of race. The State and Territory laws have been criticised for being too hard to prove.

Isn't offending and insulting and mockery just part of robust public discussion?

Claims like this typically ignore the fact that the racial vilification laws only apply to offensive, insulting, humiliating or intimidating *racial* conduct.

There is no general right not to be offended in Australia. The price of free speech is that we accept that people should generally be able to say offensive things. But there are limits to the kinds of offensive things we can say.

For example, our criminal laws make it a criminal offence to use profane or indecent language or behave in an offensive or insulting way in public. Similarly our sexual harassment laws make it unlawful to engage in unwanted or unwarranted sexual behaviour that is offensive.

Don't the racial vilification laws stifle public debate on race issues?

The court in the Bolt case made it very clear that it's not unlawful to publish articles that deal with racial identity or challenge the genuineness of someone's racial identity.

There are important free speech exemptions in section 18D to make sure matters of public interest and justifiable freedom of expression are not limited. These exemptions protect:

- performances and artistic works;
- statements and discussions for academic, scientific, artistic or public interest purposes;
- fair and accurate reporting of matters of public interest; and
- fair comments on matters of public interest if the comment is the person's genuine belief.

To rely on the free speech exemptions, the offensive racial conduct must be done reasonably and in good faith.

In one case under racial vilification laws, a Pauline Hanson book that argued that Aboriginal people were unfairly favoured by social security policies was found to fall within the free speech safeguards as it was genuine political debate done reasonably and in good faith.

Andrew Bolt's articles didn't fall within the exemption essentially because of poor journalism. The court found that his articles contained multiple errors of material fact, distortions of the truth and inflammatory and provocative language.

Do the racial vilification laws allow thin-skinned people to sue if they are offended?

Even if someone is personally offended or insulted by conduct, there won't be a breach of racial vilification laws unless the conduct meets an *objective* standard.

Courts have clearly stated that the conduct in question must be judged from the perspective of a hypothetical reasonable or ordinary person from the relevant racial group. Courts have said that extreme, atypical or intolerant reactions are not relevant. In other words, the conduct won't be unlawful if it only racially offends a thin-skinned person, but not a reasonable member of the relevant racial group.

Don't defamation laws provide enough protection?

No. Defamation cases are a notoriously costly, complex and unpredictable. They deal with damage to a person's reputation.

Racial vilification laws address the public interest in promoting racial tolerance and addressing the harm caused by racial vilification. While Pat Eatock could have sued Andrew Bolt for defamation, she was entitled to sue Andrew Bolt under racial vilification laws because of the racially offensive conduct engaged in.

Importantly, racial vilification laws provide an accessible dispute resolution mechanism. The first step in any action is to complain to the Australian Human Rights Commission. The Commission receives on average more than a hundred racial vilification complaints each year. The majority are resolved through mediation. Only a handful go on to court.

Isn't the best way to deal with racial vilification issues through public debate, not through the law?

Education to build a culture of tolerance and non-discrimination is incredibly important in the fight against racism. The law is an important tool that helps to achieve this.

The law sets appropriate standards of conduct. People are more likely to speak out in public against racism if the law supports their position. People are less likely to engage in racial vilification if the law makes it unlawful.

In this way, the law is an important tool that complements education and other strategies to combat racism.

It is also important to provide access to legal remedies for victims of racial vilification. Groups that experience racial vilification are often unable to participate in the public debate on an equal footing with others and racial vilification can have the perverse impact of causing affected people and groups to retreat from public participation. The Andrew Bolt case involved Australia's most widely read columnist unreasonably and in bad faith engaging in conduct reasonably likely to racially offend, insult, humiliate and intimidate light-skinned Aboriginal people. The law provided an important tool to address this in a way that public debate couldn't.

As set out above, because the racial vilification laws provide an accessible dispute resolution mechanism, the majority of complaints are resolved by mediation without going to court. There are only a handful of cases brought in court each year.

More information

Further information about freedom of expression and freedom from racial hatred and the racial vilification provisions of the Racial Discrimination Act and relevant background material is available at: http://www.hrlc.org.au/racial-vilification-protections.

APPENDIX 1: Current Part IIA, *Racial Discrimination Act 1975* (Cth)

Part IIA—Prohibition of offensive behaviour based on racial hatred

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.

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

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

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

(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Note: Subsection (1) makes certain acts unlawful. Section 46P of the *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.

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.

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.

18F State and Territory laws not affected

This Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory.

APPENDIX 2: Proposed amendments to *Racial Discrimination Act 1975* (Cth)

Sections 18B, 18C, 18D, 18E are to be repealed.

The following section is to be 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:

(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.

(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."

APPENDIX 3: Effect of amendments to *Racial Discrimination Act 1975* (Cth) proposed by *Freedom of Speech (Repeal of s 18C) Bill 2014*

Part IIA—Prohibition of offensive behaviour based on racial hatred

~~**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.~~

~~**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:

(i) to vilify another person or a group of persons; or

(ii) ~~, 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~~ that person or that group of persons ~~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 this section ~~subsection (1),~~:

(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.

~~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) Whether an act is reasonably likely to have the effect specified in subsection (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 this section:~~

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

~~**18D Exemptions**~~

(4) This section ~~Section 18C~~ does not apply to ~~render unlawful anything said or done reasonably and in good faith:~~ 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.

~~(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.~~

~~**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.~~

18F State and Territory laws not affected

This Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory.