Human Rights Law Centre

Federal racial vilification laws

Submission on the Exposure Draft of the *Freedom of Speech (Repeal of s 18C) Bill 2014*

30 April 2014

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Contact

Hugh de Kretser
Human Rights Law Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

T: + 61 3 8636 4420
F: + 61 3 8636 4455
E: hugh.dekretser@hrlc.org.au
W: www.hrlc.org.au

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1. Introduction

1.1 Background

1. On 25 March 2014, Attorney-General George Brandis released an Exposure Draft of the *Freedom of Speech (Repeal of s 18C) Bill 2014* (**the Bill**).

2. The Federal Government has invited submissions on the Bill by 30 April 2014. This submission responds to that invitation.

1.2 Executive Summary

3. It is entirely appropriate to review the operation of the racial vilification provisions of the *Racial Discrimination Act* 1975 (Cth) (**RDA**) after almost 20 years of operation to ensure they are working well and to see if they can be improved.

4. An objective analysis of these laws shows that they 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. They provide important access to remedies for victims of racial vilification with most complaints resolved through an accessible mediation process. By setting standards of conduct, they also complement education strategies to address racism and racial vilification.

5. Regrettably, the Federal Government's review of these laws has been driven by a strong ideological view that the outcome in the 2011 Eatock v Bolt court case was wrong and should be prevented from happening again. This view has led to a Bill that would radically reduce the scope of the existing racial vilification protections in the RDA.

6. Of greatest concern is the 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.

7. Under the Bill, the 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.

8. The HRLC urges the Federal Government not to proceed with the Bill.

1.3 Summary of recommendations

Recommendation 1:

The Federal Government should not proceed with the Bill.

Recommendation 2:

If the Federal Government proceeds with the Bill, the worst aspects of the Bill should be mitigated by the following measures:

(a) giving the words "intimidate" and "vilify" their ordinary meaning;

(b) reinserting "reasonableness", "good faith" and "public interest" requirements in the exemption;

(c) ensuring the community standards test requires some consideration of the impact on the relevant racial group affected by the conduct; and

(d) retaining sections 18B and 18E.

2. Why we need racial vilification laws

2.1 The problem of racism in Australia

9. Racism is a serious, continuing problem in Australia. Beyond the well-publicised recent incidents of racial abuse on the sporting field and public transport, the prevalence of racism, including racial vilification, in Australia is well documented.

10. There is evidence of a 'disturbing reality of everyday racist abuse'.[1] Around one in five Australians say they have experienced race-hate talk, such as verbal abuse, racial slurs or name-calling and more than one in 20 Australians say they have been physically attacked because of their race.[2] The latest Scanlon Foundation Social Cohesion Survey documented relatively high levels of racial and religious discrimination experienced by recent non-English speaking migrants.[3]

11. There are also increasing problems with cyber-racism and the significant potential for material published on the internet to contribute to racial hatred.

[1] 'Racial and Religious Vilification in the ACT: Investigating the effectiveness of Part 6 of the ACT Discrimination Act 1991', ACT Human Rights Office Issues Paper (2006), page 3.

[2] Australian Human Rights Commission campaign 'Racism. It stops with me.' Available at: http://itstopswithme.humanrights.gov.au/about-racism.html;

[3] Professor Andrew Markus, *Mapping Social Cohesion, Scanlon Foundation Surveys, Recent Arrivals Report 2013* http://www.scanlonfoundation.org.au/docs/Recent_Arrivals_report.pdf

12. Racism and racial vilification cause harm to individuals, to groups and society as a whole.[4] VicHealth has conducted extensive research into the negative physical and mental health effects of race based discrimination. For example, a 2007 survey found that high levels of racism towards Aboriginal communities in Victoria was associated with poorer mental health and reduced life chances for Aboriginal Victorians.[5] The report concluded that '[r]educing the experience of racism is an important approach to improving health in this population. As one of the 'attitudinal engines of the exclusion, denigration, and subordination that make up and propel social inequality' racial vilification affects whole groups and communities.[6]

13. Racial vilification increases the likelihood of racial discrimination and racist violence.

2.2 The law is an important tool to combat racial discrimination and vilification

14. The law has an important role to play in addressing the harm caused by racial discrimination and racial vilification.

15. 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 complements education strategies.

16. The law sets 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 prohibits it.

17. 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. Racial vilification cases like the Andrew Bolt and Alan Jones cases[7] involved prominent media personalities racially vilifying minority groups. The law provided an important tool to address this behaviour in a way that public debate couldn't.

[4] Professor Chesterman cited in Rees, Lindsay and Rice, *Australian anti-discrimination law: Text, Cases and Materials,* The Federation Press (2008), page 532.

[5] VicHealth et al, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal communities*, 2007, available at: http://visions-download.unimelb.edu.au/Mental%20health%20impacts_racial%20discrim_Indigenous-4.pdf. See also VicHealth et al, *Building on Our Strengths: A Framework to Race Based Discrimination and Support Diversity in Victoria*, 2011 (available at: http://www.vichealth.vic.gov.au/Publications/Freedom-from-discrimination/Building-on-our-strengths.aspx)

[6] Ibid.

[7] *Eatock v Bolt* [2011] FCA 1103; *Trad v Jones* (No. 3) (EOD) [2012] NSWADT 33 decided under the NSW racial vilification laws

3. Protecting against the harm of racial vilification is a legitimate limit on free speech

3.1 Freedom of opinion, freedom of expression and freedom from discrimination

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

19. *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.

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

21. 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.

22. The right to freedom of expression is a 'foundation stone for every free and democratic society'.[8] It extends not only to information and ideas that are favourably received or seen as 'inoffensive' but also to ideas that may 'offend, shock or disturb'. As the European Court of Human Rights has stated, freedom to hold and express unpopular views is essential to the "demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'".[9]

23. The right to freedom of expression however, 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.

24. In practice, freedom of expression in Australia is limited by laws in a number of areas such as sexual harassment, making threats to kill, defamation, confidentiality, contempt of court and misleading and deceptive conduct. Each of these laws seeks to strike an appropriate balance between freedom of expression and protection of other rights and interests.

[8] UN Human Rights Committee, *General Comment 34*, UN Doc CCPR/C/GC/34.

[9] *Handyside v United Kingdom* [1976] 1 EHRR 737.

3.2 Racial vilification is not protected expression

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

26. Article 20(2) of the ICCPR specifically provides that states must prohibit by law any advocacy of racial hatred that constitutes incitement to discrimination, hostility or violence.

27. 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.

28. Article 4 of ICERD imposes a positive obligation on State parties to eliminate harmful hate speech. It provides:

> States Parties […] undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
>
> […]

29. Article 4 imposes four distinct obligations on state parties. Those obligations are to prohibit:

- dissemination of ideas based on racial superiority;
- dissemination of ideas based on racial hatred;
- incitement to racial discrimination; and
- incitement to acts of racially motivated violence.

The Committee on the Elimination of Racial Discrimination has stated that Article 4(a) requires legislation that criminalises serious acts of racial hatred, incitement to such acts and incitement to racial hatred.

3.3 Reservations to ICERD and the ICCPR

30. Australia has a reservation regarding article 4(a) which states:

> The Government of Australia ... declares that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4 (a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4(a).

31. Australia also has a reservation regarding article 20(2) of the ICCPR which provides in broad terms that Australia has laws dealing with public order matters covered by article 20(2) and

which reserves its right not to introduce further legislation on the matters covered by the article.

32. These reservations limit Australia's international law obligations to implement legislation in accordance with these specific articles.

4. Overview of our current Federal racial vilification laws

4.1 Background to the laws

33. The 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.

34. In 1995, the RDA was amended to insert new protections against racial vilification. The new protections were introduced in response to the recommendations of three major national inquiries; the National Inquiry into Racist Violence, the Australian Law Reform Commission Inquiry into multiculturalism and the law and the Royal Commission into Aboriginal Deaths in Custody.

4.2 Overview of the key provisions

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

36. 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.

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

    (a) done otherwise than in private;

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

    (c) 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.

38. 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:

    (a) in the performance or distribution of an artistic work;

(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;

(c) in the making or publishing of a fair and accurate report of any event or matter of public interest;

(d) 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.

39. 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.

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

41. 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).

42. 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) a declaration that the person has committed unlawful conduct and should not repeat this behaviour;

(b) an order to remove any offensive publication;

(c) an order to redress any loss or damage suffered; and/or

(d) the payment of compensation.

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

43. The Federal racial vilification laws have been operating for almost 20 years.

44. Our understanding is that the laws have been considered in less than 100 finalised court cases since 1995.

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

46. 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".[10]

47. 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.[11] 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.

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

(a) 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;[12]

(b) 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;[13] and

(c) a comment in a meeting by a Perth councillor that a local Aboriginal group should be shot.[14]

49. 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.[15]

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

50. 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.

51. 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

[10] *Creek v Cairns Post* (2001) 112 FCR 352 at 356 [16]; see also French J in *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at 124 [70]

[11] *Eatock v Bolt* [2011] FCA 1103 at 243-252

[12] *Toben v Jones* (2003) 129 FCR 515; [2003] FCAFC 137

[13] *Rugema v Gadsten Pty Ltd & Derkes* [1997] HREOCA 34

[14] *Jacobs v Fardig* [1999] HREOCA 9

[15] *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105, [2004] FCAFC 16; *Kelly-Country v Beers & Anor* [2004] FMCA 336; *Bryl v Anna Kovacevic and Louis Nowra and Melbourne Theatre Company* [1999] HREOCA 11; *Walsh v Hanson* [2000] HREOCA 8

> 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.[16]

52. The court in the Bolt case made it clear that it is not unlawful to publish articles that deal with racial identity or challenge the genuineness of someone's racial identity.[17]

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

53. 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).[18]

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

    (a) an apology;

    (b) an agreement to remove the offending publication or comments, for example from a website;

    (c) compensation; and

    (d) changes to policies and procedures or training.

5. State and Territory racial vilification laws

55. The Bill would only amend the Federal RDA. It will not amend State and Territory racial vilification laws. However, it is useful to compare the various laws in assessing the appropriate threshold for conduct to be unlawful under the RDA.

56. 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

[16] *Eatock v Bolt* [2011] FCA 1103 at 406

[17] *Eatock v Bolt* [2011] FCA 1103 at 461

[18] Submission to this consultation from the Australian Human Rights Commission 28 April 2014, paras 66-69: https://www.humanrights.gov.au/submissions/amendments-part-iia-racial-discrimination-act-1975#fn33

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.

57. 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. 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.

58. 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 conduct is unlawful.

59. The Victorian Equal Opportunity and Human Rights Commission, in its submission to this consultation, describes the "incitement to hatred" test as a very high threshold and notes problems with the way the state laws operate saying they have "been difficult for the community to use" because there are limited cases where third persons will be moved to extreme emotions by the conduct.[19]

60. 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.

61. State and Territory laws that 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 a small number of convictions in Western Australia.

62. There is also a risk that the Bill would increase the likelihood that State and Territory racial vilification laws will be found to be constitutionally invalid, despite the retention of section 18F of the RDA that provides that the Federal racial vilification laws are not intended to exclude or limit the concurrent operation of State and Territory laws.

63. The risk would arguably increase because the inconsistency between the Federal and State and Territory laws would be greater if the state laws made conduct unlawful that was expressly permitted under the broad exemption for public discussion under the Federal law.[20]

[19] Victorian Equal Opportunity and Human Rights Commission submission to this consultation, 15 April 2014 pp 9-10: http://www.humanrightscommission.vic.gov.au/index.php/news-and-events/commission-news/item/778-submission-to-proposed-amendments-to-racial-discrimination-act

[20] For a general discussion on potential constitutional invalidity see Rees, Rice and Allen, *Australian anti-discrimination law,* The Federation Press (2014), pages 618-619 and pages 54-61.

6. The Bill would in effect almost entirely remove Federal racial vilification protections

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

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

6.2 Insert "vilify" and narrowly define "intimidate"

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

66. The normal meaning of vilify is to disparage or denigrate. In the Bill however, it is defined narrowly to mean "incite hatred against a person or a group of persons".

67. 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.

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

69. 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.

6.3 Insert a new community standards test

70. 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.

71. The Bill 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.

72. This concern is heightened because the words "in all the circumstances" currently in section 18C of the RDA, would be removed by the Bill. Allowing courts to assess the reasonable

likelihood of racial offence, insult, humiliation and intimidation "in all the circumstances" arguably provides greater scope for courts to assess the impact of the conduct.

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

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

74. The Bill 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.*

75. Under the Bill, 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).

76. This new exemption would be 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.

77. 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".

6.5 Remove sections 18B: multiple reasons for the vilification

78. A person engaging in racial vilification should not be able to avoid liability for their conduct by showing there were one or more reasons for the conduct in addition to race. Section 18B protects against this outcome.

79. Section 18B 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.

80. The Bill would remove section 18B. This has the potential to make it harder to prove racial vilification when there is more than one reason for the vilification.

6.6 Remove section 18E: vicarious liability

81. The Bill 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.

82. Section 18E provides an important and appropriate incentive for employers to take reasonable steps to prevent racial vilification, for example by having proper policies and training. Employers are well-placed to undertake steps to prevent racial vilification. Similar vicarious liability provisions are a common feature of discrimination laws across Australia and vicarious liability applies to other wrongs committed by employees in the course of their employment under tort law.

83. Removing this provision will narrow the scope of the racial vilification protections by reducing the legal obligation on employers to take steps to prevent racial vilification.

7. Our views on the proposed changes

7.1 The Bill should not proceed

84. We strongly oppose the proposed changes.

85. 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.

86. The Bill would substantially weaken the existing racial vilification protections. Of greatest concern is the 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.

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

88. The radical scope of the Bill is confirmed by the commentary on it 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".[21]

89. We strongly believe the Federal Government should not proceed with the Bill.

[21] Chris Berg, Politics stands in the way of a full 18C repeal, *The Drum* 25 March 2014 http://www.abc.net.au/news/2014-03-25/berg-rda/5344302 and http://www.ipa.org.au/publications/2252/abbott-government's-changes-to-racial-discrimination-act-a-win-for-freedom-of-speech---institute-of-public-affairs

7.2 Mitigating the worst of the proposed changes

90. If however, the Federal Government proceeds with the Bill, the worst aspects of the Bill should be mitigated by the following measures:

(a) giving the words "intimidate" and "vilify" their ordinary meaning;

(b) reinserting "reasonableness", "good faith" and "public interest" requirements in the exemption;

(c) ensuring the community standards test requires some consideration of the impact on the relevant racial group affected by the conduct; and

(d) retaining sections 18B and 18E.

7.3 Improving the current drafting of section 18C

91. 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 a strong ideological view that the outcome in the Eatock v Bolt case was wrong and should be prevented from happening again.

92. 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.

93. For example, we would support amendments to section 18C to confirm that:

(a) it applies only to serious offence, not to minor or trivial conduct;

(b) the conduct should be judged by an objective standard of a reasonable member of the affected racial group.

94. There is also scope for reasonable debate about the wording of section 18C and for example, whether the words "offend, insult" could be replaced with wording such as "vilify" with its ordinary meaning.

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