Australian Council of Human Rights Authorities

Submission of the Australian Council of Human Rights Authorities

to the

Exposure draft: Freedom of Speech (repeal of s. 18C) Bill 2014

April 2014

Contents

1. Introduction

1.1 The Australian Council of Human Rights Authorities (ACHRA) welcomes the opportunity to make a submission in response to the exposure draft of the Freedom of Speech (repeal of s. 18C) Bill 2014 (the draft exposure Bill) released by the Federal Attorney-General on 25 March 2014.

1.2 ACHRA is comprised of the State, Territory and Federal statutory human rights and discrimination authorities. This submission is made on behalf of the following ACHRA members:

- Anti-Discrimination Commission (Northern Territory)
- Anti-Discrimination Commission (Queensland)
- Equal Opportunity Commission (South Australia)
- Equal Opportunity Commission (Western Australia)
- Human Rights and Discrimination Commissioner (ACT)
- Office of the Anti-Discrimination Commissioner (Tasmania)

1.3 Individual authorities also propose to make separate submissions on matters relevant to them.

1.4 ACHRA would welcome the opportunity to provide further detailed comment in response to any amendments to the draft Bill as such proposed amendments are made available.

2. Background

2.1 ACHRA is of the view that federal law should represent the strongest standards in discrimination and human rights law and give full effect to international human rights obligations. In particular, federal law should provide a standard of protection in Australia that represents international best practice.

2.2 We consider that any amendments to existing law should promote consistency across jurisdictions to provide every person in Australia, to the fullest extent possible, a standard of protection of their human rights, including the right to equality and non-discrimination, under discrimination and human rights law regardless of location.

2.3 Accordingly, this submission is framed on the basis of the following objectives for national discrimination and human rights law:

- Consistency in law across jurisdictions
- No reduction of existing protections in the law
- Clarification of protections where it is appropriate
- Equality before the law and equal access to the law

2.4 The proposed changes to the RDA will:

- remove the existing protections available to a person or group of persons who are offended, insulted or humiliated on the basis of their race, colour or national or ethnic origin;
- narrow the interpretation of 'intimidation' to that which causes a fear of physical harm;
- restrict actions that could amount to racial vilification to actions that incite hatred toward a person or group of person because of their race, colour or national or ethnic origin;
- remove the requirement to establish the impact of the actions against the standard of a reasonable representative of the race, colour or national or ethnic origin of the complainant and substitute that with the requirement to establish the impact of the action from the perspective of an ordinary reasonable member of the Australian community;

- remove the responsibility of employers or agents who may have vicarious liability for the action under consideration; and

- broaden the scope of the available exceptions to include a wider range of activities and remove the requirement that actions falling within the range of available exceptions be exercised cautiously and in the least discriminatory manner possible.

2.5 Taken as a whole ACHRA considers that the changes will considerably lessen the protections available to people in Australia against racism, and particularly those who are most vulnerable to the impact of discrimination and racial hatred.

2.6 It is our view that the draft Bill should not proceed in its current form.

3. Human rights

3.1 ACHRA is concerned that current discussion around the proposed amendments to the *Racial Discrimination Act 1975* (Cth) (the RDA) is focussed on promoting protection of the right to freedom of expression in a way that misconstrues the nature of that right in international law and fails to take into account the full range of Australia's human rights obligations (see Appendix 1).

3.2 Human rights, as recognised at the international level, are founded on the *Universal Declaration of Human Rights*.[1] The Declaration importantly recognises that in exercising our human rights we have the potential to interfere with the human rights of others and, appropriately, requires that our exercise of human rights is limited to avoid such interference:

> **Article 29**
>
> 1 Everyone has duties to the community in which alone the free and full development of his personality is possible.
>
> 2 In exercising his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
>
> 3 These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.
>
> **Article 30**
>
> Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

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1 *Universal Declaration of Human Rights*, GA Res 217A, 3rd sess, 183rd plen mtg, UN Doc A/810 at 71 (1948).

3.3 The purposes and principles of the United Nations are set out in Chapter I of the *Charter of the United Nations*.[2]

3.4 The purposes of the United Nations are found in Article 1 of the Charter:

> 1. To maintain international peace and security …
>
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of people, and to take other appropriate measures to strengthen universal peace;
>
> 3. To achieve international cooperation in solving international problems … and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
>
> 4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

3.5 The Universal Declaration of Human Rights (UDHR) forms the foundation for the development and adoption of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other international human rights treaties. Together, the UDHR, ICCPR and ICESCR form what is referred to as the International Bill of Rights.

3.6 Article 18(1) of the *International Covenant on Civil and Political Rights* (ICCPR) provides that everyone shall have the right to freedom of thought, conscience and religion. However Article 18(3) limits that right to the extent necessary to protect the fundamental rights and freedoms of others.[3]

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2 *Charter of the United Nations*, opened for signature 26 June 1945, Australian Treaty Series 1945 No 1 (entered into force 24 October 1945, entered into force for Australia 1 November 1945.

3 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, GA Res 2200A (XXI), 999 United Nations Treaty Series 171, Australian Treaty Series 1980 No 23, UN Doc A/6316 (1966) (entered into force 23 March 1976, entered into force for Australia 13 November 1980, except Article 41 which entered into force on 29 January 1993).

3.7 At the same time Article 19(1) makes provision for everyone to have the right to hold opinions without interference and Article 19(2) provides that everyone has the right to freedom of expression. However Article 19(3) provides that:[4]

> The exercise of the rights provided for in paragraph [19]2 … carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health and morals.

3.8 Article 20(2) also expressly prohibits 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence' and Article 26 of the ICCPR provides that:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3.9 ACHRA is of the view that arguments seeking to have sections 18C to 18E of the RDA repealed on the basis that they unduly interfere with the right to freedom of expression are misconceived and risk undermining fundamental rights contained in the ICCPR and other international instruments.

3.10 We recognise that there may be situations where human rights compete and decisions may be required to balance those rights. Such circumstances require careful consideration of the full range of rights and a willingness to look for solutions that respect the rights of all persons to the fullest possible extent whilst minimising the diminution of rights where any limitation is unavoidable.

3.11 We are of the view that the current provisions contained in sections 18C to 18E of the RDA represent an appropriate balance between the right to equality and protection from discrimination and the right to freedom of expression.

3.12 Sections 18B to 18E were introduced in 1995 to extend the RDA to complaint about racially offensive or abusive behaviour. Section 18C is modelled on the sexual

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4 Ibid.

harassment provisions in section 28A(1) of the *Sex Discrimination Act 1984* (Cth) (SDA):

> … a person sexually harasses another person (the person harassed) if:
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> (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
>
> (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;
>
> in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

3.13 For the purposes of section 28A 'conduct of a sexual nature includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing'.[5]

3.14 Further, ACHRA notes that the existing provisions of section 18C are similar in their intent to provisions contained within other statutes at both the Commonwealth, Territory and State levels. Laws dealing with defamation, use of postal and telecommunications services, copyright, sedition, obscenity, secrecy and censorship all impose limits on that which may be expressed in public. Some can and do result in criminal sanctions for the expression of views in breach of the relevant provisions. These limits have been imposed, arguably, because of recognition that some ideas expressed publicly can and do cause harm to others and interfere with the enjoyment of rights by others, including their freedom of expression and right to participation.

3.15 Relevant to consideration of the balance is an understanding of why freedom of expression is an internationally recognised right and the context in which it developed. The right to freedom of expression is found alongside other civil and political rights in the ICCPR. These are rights related to our capacity to be active in decision making, including representative democracy, that affects us and to be protected from unnecessary interference from governments. We do not have the right to freedom of expression for the sake of expression itself, but rather as a means to ensure we are able to exercise other rights and freedoms related to representative democracy and to challenge infringements on our other rights and freedoms.

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5 *Sex Discrimination Act 1984* (Cth) s 28A(a).

3.16 The fact that freedom of expression is not an absolute right is clearly demonstrated by Articles 18(3) and 19(3) of the ICCPR. Both provide that States party to the convention can legitimately limit the right in specific circumstances, consistent with the underpinning principle that we are not permitted to exercise our rights in ways that infringe or interfere with the enjoyment of rights of others.

3.17 It is recognised that the unfettered exercise of freedom of expression by the powerful can even have the impact of limiting or excluding the right of less powerful and more marginalised people to exercise their freedom of expression.

4. Repeal provisions

4.1 The draft exposure Bill includes provisions to delete sections 18B, 18C, 18D and 18E from the RDA. The effect of the proposal to repeal these sections will be to exclude from the Act the prohibition on public behaviour that is 'reasonably likely, in all the circumstances to offend, insult or humiliate' on the basis of a person's race, colour or national or ethnic origins.

4.2 Sections 18B-E of the RDA were introduced in August 1995 in response to the reports of a range of national inquiries including the Australian Law Reform Commission's report, *Multiculturalism and the Law*[6]; the Human Rights and Equal Opportunity Commission's *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*[7]; and the findings of the Royal Commission into Aboriginal Deaths in Custody.[8]

4.3 Each of these major inquiries found gaps in the protections provided in the RDA and recommended that incitement to racial hatred and hostility should be unlawful, whether through the introduction of criminal offence provisions or by the establishment of civil remedies. In doing so, extensive consideration was given to the potential conflict between freedom of speech and placing limits on speech where it is used to undermine social cohesion or diminish the right to equal access to the law. Careful consideration was given by pre-eminent law-makers about the most appropriate way in which apparently inconsistent objectives under international law were to be met. The ALRC, for example, commented:

> At several points in the inquiry, the Commission has had to consider conflicts of this kind. For example, should limits be set on free speech where it is used to undermine the cohesion of the society by stirring up hatred of a particular group or member of a group? The legal solution to these apparently inconsistent objectives must ensure that each right is given its proper scope of operation, and that no right is excluded or jeopardised because too much emphasis is given to another. They have to be kept in balance. While that balance may reflect the needs of the

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6 Australian Law Reform Commission, *Multiculturalism and the Law* (ALRC Report 57, 1992).

7 Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (AGPS, Canberra, 1991).

8 Royal Commission into Aboriginal Deaths in Custody, *National Report*, Vol 1-5 (AGPS, Canberra, 1988–1991).

particular society, it should also be compatible with the universal quality of the rights in question.

4.4 The legal manifestation of these and other debates was the *Racial Hatred Act 1995* (Cth), which operated to introduce sections 18B to 18E of the RDA.

4.5 While ACHRA welcomes discussion on the specific way in which these provisions are cast, we are of the view that there is no demonstrated need to re-visit issues previously addressed in a comprehensive manner at a national level.

4.6 To the contrary we consider that the provisions contained in Part IIA of the RDA have worked well in the 20 years in which they have been in place. Most complaints have been resolved in a quick and cost-effective way and very few cases have proceeded to court.

4.7 Case law in relation to section 18C does not support the view that the mere causing of offence is unlawful or that the test of whether an act contravenes the provisions of the existing section are subjectively determined by the complainant.

4.8 For conduct to be unlawful under section 18C it must be reasonably likely to cause offence or insult and humiliation; it must be done on the basis of a person's race, colour, national or ethnic origin and it must not be protected by one of the exemptions found in section 18D.

4.9 ACHRA draws attention to the Federal Court's findings in *Jones v Scully* where Hely J held that the racial hatred provisions of the RDA did not unreasonably limit the right to freedom of communication and that the provisions were 'reasonably appropriate and adapted' to the legitimate purpose of eliminating racial discrimination, including the fulfilment of Australia's obligations under the *Convention for the Elimination of Racial Discrimination* (CERD).[9] Further, Hely J found that section 18D 'does not render unlawful anything that is said or done "reasonably and in good faith"', and that the exemptions provided in section 18D 'provide an appropriate balance between the legitimate end of eliminating racial discrimination and the requirement of freedom of communication about government and political matters required by the Constitution'.[10]

4.10 At both the Commonwealth level and in jurisdictions where similar provisions exist in discrimination law, such provisions have operated largely without incident and been

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9 *Jones v Scully* [2002] FCA 1080 (2 September 2002) [240].

10 Ibid.

linked to successful national campaigns such as *Racism. It stops with me*, which are built on the principle of each of us taking responsibility for taking appropriate action to counter racist behaviour.

4.11 We believe that any attempt to reduce protections available under the RDA is at odds with actions being taken to address racism and other harmful behaviour across Australia including strategies to address bullying in the workplace and throughout the broader community. Provisions of the *Fair Work Act 2009* (Cth), which came into effect on 1 January 2014, for example, enable bullying to be legally challenged:

> (1) A worker is ***bullied at work*** if:
>
> (a) while the worker is at work in a constitutionally-covered business:
>
> (i) an individual; or
>
> (ii) a group of individuals;
>
> repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and
>
> (c) that behaviour creates a risk to health and safety.[11]

4.12 According to the Fair Work Commission:

> Bullying behaviour may involve any of the following types of behaviour:
>
> - aggressive or intimidating conduct
> - belittling or humiliating comments
> - spreading malicious rumours
> - teasing, practical jokes or 'initiation ceremonies'
> - exclusion from work-related events
> - unreasonable work expectations, including too much or too little work, or work below or beyond a worker's skill level
> - displaying offensive material
> - pressure to behave in an inappropriate manner. [12]

4.13 Bullying is, in some instances, based on discriminatory attitudes and is discriminatory in effect, including discrimination on the basis of race.

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11 *Fair Work Act 2009* (Cth) s 789FD.

12 Fair Work Commission, *Guide: Anti-Bullying* (2014) <https://www.fwc.gov.au/documents/documents/antibullying/Guide_antibullying.pdf> at 24 April 2014.

4.14 We also note extensive public concern and discussion about the need to address cyber-bullying and other forms of offensive and harmful conduct manifested through social media. Where bullying behaviour is based on or targets a person or group's race or involves an element of racially offensive comments or actions, it is often manifested as the same behaviour that section 18C is intended to make unlawful.

4.15 It would, in our submission, be inconsistent to be concerned about and provide legal protection against such conduct in employment and through, for example, regulating online conduct, but not maintain the current protections found in section 18C of the RDA.

4.16 We are of the view that the availability of civil remedies for harmful behaviour based on racial intolerance or hatred is an appropriate and proportionate response to concerns expressed within the broader community and that, in light of the defences available in section 18D, provide an appropriate balance between the right to freedom of expression and the right to protection from behaviour that causes harm through racial abuse.

4.17 Section 18C does not operate to curtail private conduct. Further, the inclusion of the 'reasonably likely' test in section 18C(1)(a) provides an appropriate mechanism by which to ensure that objectivity is maintained.

4.18 The way in which section 18C is cast is consistent with section 28A of the SDA and its retention allows for the continued development of a more coherent jurisprudence.

4.19 We appreciate concerns regarding the subjectivity of concepts such as 'offend' or 'insult'. However we are of the view that concerns about the alleged subjectivity of particular terms ignores the impact of the 'reasonably likely' test in section 18C(1)(a) and are not sufficient justification for the removal of the protections available under section 18C in their entirety. Nor does it recognise the significant standard set in relating to these concepts in case law.

4.20 Our preference is that the words 'offend' and 'insult' are retained in 18C provided that the test contained in section 18C(1)(a) is also retained. We would, however, support the inclusion of language in the Act to clarify that Part IIA deals with conduct that has 'profound and serious' effects.

4.21 Procedures in the Australian Human Rights Commission to deal with complaints alleging breaches of the RDA involve fast and cost-effective dispute-resolution mechanisms. As with all similar provisions in discrimination laws in Australia, the RDA does not provide for criminal sanctions for conduct in breach of section 18C and instead requires the Commission to facilitate dispute resolution between the parties with a view to avoiding the need to have recourse to court processes to determine the dispute. If the current provisions are repealed, those who feel aggrieved will have little

option other than to pursue more costly and inaccessible court-based legal remedies or for the conduct to go unchallenged. We submit that this is not in the public interest and is inconsistent with moves to increase use of dispute resolution mechanisms other than courts. To repeal the current provisions risks undermining access to justice for those who face particular barriers in the formal justice system due, for example, to limited economic capacity, disability or language barriers.

4.22 While not opposed to the introduction of measures to provide enhanced protection against behaviours that incite racial hatred, ACHRA submits this would be more usefully achieved through the introduction of additional provisions in the RDA and/or criminal sanctions of the nature available in a number of jurisdictions.[13]

[13] Western Australia, New South Wales, Queensland, Victoria, South Australia and the ACT have criminal provisions and penalties for acts of serious racial vilification.

5. State and Territory racial vilification provisions

5.1 Provisions in Commonwealth discrimination laws, including the RDA, preserve the effect of state or territory discrimination laws that are capable of operating concurrently and, in the case of the RDA and the SDA, further the objectives of relevant international instruments.

5.2 All Australian State and Territory jurisdictions (with the exception of Western Australia and the Northern Territory) have civil-based complaints procedures relating to racial vilification, including serious acts of racial hatred. In addition, New South Wales, Queensland, Victoria, South Australia and the ACT also have criminal sanctions for acts of serious vilification. Western Australia by contrast has introduced provisions into its *Criminal Code* specifically aimed at addressing racial vilification. South Australia prohibits racial vilification under the *Racial Vilification Act 1996* (SA); the *Anti-Discrimination Act 1991* (Qld); the *Discrimination Act 1991* (ACT); and the *Racial and Religious Tolerance Act 2001* (Vic) makes racial vilification unlawful. The Northern Territory *Sentencing Act* (NT) includes specific sentence aggravation provisions for racial hatred offences. Both New South Wales and Victoria have also included sentence aggravation provisions related to race hatred or prejudice.

5.3 A key problem with State and Territory racial vilification laws, however, is the focus on the impacts on third parties.

5.4 The South Australian *Racial Vilification Act 1996* (SA), for example, defines racial vilification as a public act that 'incites hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of their race' by 'threatening physical harm to the person, or members of the group, or to property of the person or members of the group or by inciting others to threaten physical harm to the person, or members of the group, or property of the person or members of the group.'[14]

5.5 A prosecution for an offence under the *Racial Vilification Act 1996* (SA) cannot be commenced without the consent of the Director of Public Prosecutions. The offence attracts a penalty (between $5,000 and $25,000 or 3 years imprisonment). Further, a Court may award damages to the person or group of people to whom the conduct was directed.

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[14] *Racial Vilification Act 1996* (SA) s 4

5.6 Section 37 of the *Civil Liability Act 1936* (SA) also provides a remedy in tort for an act of 'racial victimisation'. It defines an 'act of racial victimisation' as a public act inciting hatred, serious contempt or severe ridicule of a person or group of persons on the ground of their race. It does not include:

- publication of a fair report of the act of another person; or
- publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation; or
- a reasonable act, done in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest (including reasonable public discussion, debate or expositions).

5.7 The South Australian laws set a very high 'harm threshold'. This makes it very difficult to successfully litigate a case of racial vilification or victimisation, and to our knowledge there have been no cases brought under either piece of legislation.

5.8 Similar concerns have been expressed about the laws in other states and territories, including those in place in Western Australia, Victoria and New South Wales.

5.9 In Western Australia, in December 2004 the Criminal Code (Racial Vilification) Bill repealed the racial hatred provisions in the WA *Criminal Code*, which had become ineffective over the previous 14 years due to the difficulty of proving intent and the relatively low penalties available. They were replaced with a two-tiered range of offences for public acts intended or likely to incite racial animosity or harassment towards an individual or group.[15] Where intent is proven, penalties are substantial – up to 14 years imprisonment. The lesser offence of conduct likely to incite animosity or harassment does not require intent to be demonstrated. The penalty is up to 5 years of imprisonment, or 2 years or a fine up to $24,000 on a summary conviction. A defence to the lesser offence can be used if it is proved that the conduct was engaged in, reasonably and in good faith, as part of an artistic work, for genuine academic, religious or scientific purpose or any other purpose in the public interest, or as a fair and accurate report of an event or matter. The offences of public acts intended or likely to racially harass were also created, with lower penalties, with the defence applying to the lesser offence. In summary, conduct that incites others to racially harass or to express animosity towards an individual or group on the ground of race constitutes a more serious offence than racial harassment of an individual or group directly.

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15 Part II, Chapter XI *Criminal Code* (Western Australia)

Notwithstanding the creation of the lesser offence, lacking the element of intent, only two prosecutions have been brought to trial since 2004. Both were successful.

5.10 In Victoria, the legal test of racial vilification is incitement: whether the act has incited, or is likely to incite a third person to feel hatred toward the complainant. Not only does this dismiss the personal impact of the action, the higher test in the *Racial and Religious Tolerance Act 1995* (Vic) makes it almost impossible to get a vilification claim considered.

5.11 In effect the higher test in state and territory racial vilification laws has resulted in few, if any, successful prosecutions under criminal law provisions.

Civil Provisions

5.12 Civil provisions for addressing racial vilification are contained in some, but not all, state and territory laws.[16]

5.13 In Tasmania, section 17(1) of the *Anti-Discrimination Act 1998* (Tas) makes it unlawful for a person (or organisation) to engage in conduct that offends, humiliates, intimidates, insults or ridicules another person on the basis of any of the following attributes:

- race;
- age;
- disability;
- sexual orientation;
- lawful sexual activity;
- gender;
- gender identity;
- intersex;
- marital status;
- relationship status;
- pregnancy;
- breastfeeding;
- parental status; and/or
- family responsibilities.

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[16] The Northern Territory and Western Australia do not have civil provisions to address racial vilification. For a full overview of provisions in State and Territory law see Tasmanian Law Reform Institute, *Racial Vilification and Racially Motivated Offences* (Issues Paper No 16, June 2010) 15.

5.14 There are two requirements to prove a breach of this provision:

- there must be conduct that offended, humiliated, intimidated, insulted or ridiculed a person on the basis of one or more of the fourteen attributes listed; and

- the conduct must be such that a reasonable person would have anticipated that the other person would feel offended, humiliated, intimidated, insulted or ridiculed in the circumstances.

5.15 Section 17(1) does not simply provide for an individual to succeed in their legal action alleged a breach of section 17(1) because they were offended. It is a prohibition on conduct that offends, humiliates, intimidates, insults or ridicules another person in circumstances that a reasonable person, having regard to all the circumstances, would anticipate that the other person would be offended, humiliated, intimidated, insulted or ridiculed. This is a test that places a significant threshold on the application of the provision.

5.16 Section 19 of the *Anti-Discrimination Act 1998* (Tas) makes it unlawful for a person (or organisation), by public act, to incite hatred toward, serious contempt for, or severe ridicule of, a person or group of persons on the grounds of a range of attributes, including race.

5.17 By virtue of section 55, however, the provisions of both section 17(1) and section 19 do not apply if the conduct is:

(a) a fair report of a public act; or
(b) a communication or dissemination of a matter that is subject to a defence of absolute privilege in proceedings for defamation; or
(c) a public act done in good faith for –
    (i) academic, artistic, scientific or research purposes; or
    (ii) any purpose in the public interest.

5.18 In the ACT, sections 66 and 67 of the *Discrimination Act 1991* (ACT) deal with vilification on a number of grounds in including race. Section 66 defines vilification and reads in part:

> It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of people on the ground of their race.

5.19 Subsection 66(2) of the Act does not make unlawful:

1) A fair report of an act mentioned in subsection (1); or

2) A communication of the distribution or dissemination of any matter consisting of a publication that is subject to a defence of absolute privilege in a proceeding for defamation; or

3) A public act, done reasonably and honestly, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and presentations of any matter.'

5.20 Section 65 defines public act to include:

> Any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material.

5.21 Section 12A makes a person liable for the acts of their representatives (including employees) unless they have taken steps to prevent it. Section 4A(2) provides that race does not have to be the dominant or substantial reason for an act, merely one of the reasons why it was done.

5.22 Under the *Human Rights Commission Act 2005* (ACT) complaints of vilification must first be made to the ACT Human Rights Commission. If the matter is not resolved, the complainant may request that the Human Rights and Discrimination Commissioner refer the matter to the ACT Civil and Administrative Tribunal.

5.23 The Queensland *Anti-Discrimination Act 1991* (Qld) includes the following provisions:

> **124A Vilification on grounds of race, religion, sexuality or gender identity unlawful**
>
> (1) A person must not, by a public act, incite hatred towards, serious contempt for, or sever ridicule of, a person or group of person on the ground of race, religion, sexuality or gender identity of the person or members of the group.
>
> (2) Subsection (1) does not make unlawful –
>
> (a) the publication of a fair report of a public act mentioned in subsection (1); or
>
> (b) the publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation; or
>
> (c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including public discussion or debate about, and expositions of, any act or matter.

A 'public act' is defined in section 4A of the *Act* as follows:

> **4A Meaning of *public act***
>
> (1) A ***public act*** includes –

(a) any form of communication to the public, including by speaking, writing, printing, displaying notices, broadcasting, telecasting, screening or playing tapes or other recorded material, or by electronic means; and

(b) any conduct that is observable by the public, including actions, gestures and the wearing or display of clothing, signs, flags, emblems or insignia.

Despite anything in subsection (1), a ***public act*** does not include the distribution or dissemination of any matter by a person to the public if the person does not know, and could not reasonably be expected to know, the content of the matter

5.24 The exceptions, or defences, are an integral part of the vilification provisions contained in the Queensland Act. The exception most commonly relied upon is the exception for acts done reasonably and in good faith for academic, artistic, scientific or research purposes or for other purposes in the public interest, including public discussion or debate about any act or matter.

5.25 Vilification, which includes the threat of physical harm to person or property and is called 'serious vilification', is also an offence in Queensland. The maximum penalty is 6 months imprisonment or 70 penalty units for an individual, and 350 penalty units for a corporation.

5.26 Under the *Anti-Discrimination Act 1991* (Qld), a two-tiered dispute-resolution system operates to resolve vilification complaints. Complaints can be resolved through conciliation by the Anti-Discrimination Commission Queensland or by a hearing at the Queensland Civil and Administrative Tribunal where conciliation is unsuccessful.

5.27 ACHRA is concerned that the effect of curtailing the coverage of actions currently within the scope of section 18C will be to introduce further inconsistency in discrimination law across Australia. By limiting the provisions in Part IIA of the RDA to a very narrowly scoped understanding of vilification and intimidation, federal law will not only have coverage that is narrower than criminal sanctions available within state and territory law, it will also considerably narrow access to civil remedy under federal law.

5.28 Of particular concern is the potential impact in those jurisdictions that do not have access to civil remedies for racial vilification: Western Australia and the Northern Territory. For these jurisdictions, the RDA is the only source of protection against such conduct and changes of the nature proposed will remove the minimal levels of protection afforded by the RDA.

5.29 We submit that this is at odds with the objective of improving consistency in the level of protection available to all people in Australia and will result in a significant lessening of protection available across all states and territories.

6. Vilification and intimidation

Proposed 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 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 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 person.

6.1 ACHRA notes that the proposed wording in subclauses (1) and (2) of the draft exposure Bill will have the effect of narrowing the protections available to those experiencing racial abuse in public settings.

6.2 Limiting the behaviour the law regulates to actions that incite hatred or cause fear of physical harm represents a significant departure from existing levels of protection. Behaviour that amounts to abuse or threats on the basis of race will no longer be caught by the Act.

6.3 We understand that the intention to amend Part IIA of the RDA arises, at least in part, from the desire to introduce into the RDA specific provisions covering racial vilification and to address the perception that existing provisions are too broadly construed.

6.4 We do not agree with either premise.

6.5 We submit that acts that racially vilify are caught by the current provisions of the RDA and that available case law provides ample guidance on the behaviours caught by section 18C. Further, as we have previously stated, we consider that any strengthening of protection against racial vilification be pursued by adding provisions to the RDA and/or amendment to the federal *Criminal Code* rather than repealing the provisions currently contained within the RDA.

6.6 We strongly reject the view that the current wording of section 18C is aimed at protection against 'hurt feelings'. As is evident from recent highly publicised cases, there is a crucial difference between holding racist views and acting on or expressing

those in a way which causes harm to others. In *Eatock v Bolt*, for example, Bromberg J noted that section 18C was not intended to prohibit conduct that may 'hurt or irritate the feelings of another person' where the conduct was 'unaccompanied by some public consequences'.[17]

6.7 While racism at its most serious can involve actions that attempt to incite hatred against a person or group of persons or threats or acts of physical harm, racism takes many forms. Insults, jokes or comments that cause offence or hurt are just as likely to perpetuate division between those of diverse national or ethnic origin and to make marginalised members of the community even more marginalised. Further it is clear that casual racism of the kind made unlawful under section 18C of the RDA has much more pervasive consequences than simply causing 'hurt feelings'. Expressing hatred, while not the same as inciting hatred or threatening harm, still has a serious and negative impact on those who are the subject of the hatred, whether specifically or generally because they share the characteristic of being of a particular race or ethnic origin.

6.8 Research provides evidence that significant levels of racism exist within the broader community.

6.9 The *Challenging Racism: the Anti-Racism Research Project* undertaken by the Scanlon Foundation between 2001 and 2008 surveyed the views of over 12,500 respondents:[18]

- 41 per cent believed that there are cultural groups that do not belong in our society;
- approximately 10 per cent believed that some races were naturally inferior or superior and that groups should remain separated;
- around 20 per cent had experienced some form of race-hate talk (verbal abuse, name calling, racial slurs, offensive gestures); and
- six per cent had experienced physical violence.

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17 *Eatock v Bolt* [2011] FCA 1103 at [267].

18 See *Challenging Racism: The Anti-Racism Research Project* (2011) <http://www.uws.edu.au/ssap/school_of_social_sciences_and_psychology/research/challenging_racism> at 29 April 2014.

6.10 A smaller survey of around 4,000 respondents in 2006 provided more detail on individual experiences of racism:

- Verbal racism had been experienced by 19 per cent. Of these, approximately three-quarters (75 per cent) had been called an offensive slang name for their cultural group.

- Other incidences of racist language included racist jokes (52%), stereotypes in the media (63%); verbal abuse (65%) and offensive gestures (51%).

6.11 More recently, a survey of people from culturally and linguistically diverse backgrounds conducted on behalf of the Victorian Health Promotion Foundation found that nearly two-thirds of those surveyed had reported at least one racist experience in the previous 12 months.[19] Of these around 40% reported six or more experiences in the preceding 12 months. Over half of the incidents reports (55.3%) included being called racist names, being the target of racist jokes or teasing and/or comments that relied on racial, ethnic, cultural or religious stereotypes of one form or another.[20] Those surveyed reported that racism most commonly occurred in public spaces, followed by employment and in shops and public transport. Over 92% of perpetrators were those of a different race, ethnic, cultural or religious background and in only 19% of cases were they known to victim.[21] Importantly those surveyed also exhibited worse mental health and higher levels of psychological stress compared with those who had not experienced racism and the levels of distress increased for those who had repeatedly been subject to racist behaviour.[22] It is noteworthy that levels of psychological distress were associated with the volume of racist experiences and not necessarily the type – suggesting that experiences of everyday racism are just as harmful to mental health as other more severe episodes.

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19 A Ferdinand, M Kelaher and Y Paradies, *Mental health impacts of racial discrimination in Victorian culturally and linguistically diverse communities: Full Report* (Victorian Health Promotion Foundation, Melbourne 2013) 17.

20 Ibid.

21 Ibid 19.

22 Ibid 39.

6.12 Findings with regard to experience of racism by Aboriginal Australian are even more alarming.[23] A 2011 survey of Aboriginal Australians in Victoria found that nearly all participants (97%) had experienced racism in the past twelve months, with over 70% experiencing multiple incidents (over eight times in the past year) and around 44% also reported witnessing others being treated in the same manner at least once per week. Over 50% of those surveyed scored high or very high levels of psychological distress. Of particular concern were the reports that a high number of racially motivated incidents involved telling Aboriginal Australians that they should 'go home' or that they 'didn't belong' characterising high rates of social exclusion and an underlying perception of deeply embedded racism within the Australian community.[24]

6.13 Ongoing concern about racial intolerance is also evident in the complaints received by members of ACHRA:

- In the Northern Territory, race discrimination complaints have been the number one area of complaint since the inception of the *Anti-Discrimination Act* (NT) 21 years ago. In some years doubling the number of complaints concerning other attributes. In 2012–13, 101 complaints were received where the attribute of race was identified. A majority of these complaints relate to race discrimination against Indigenous people, however there are many other races also represented in these figures.

- In Tasmania, 21.4% of complaints received in 2012–13 involved allegations of discrimination on the basis of race; and 13.2% of all complaints involved allegations of incitement on the basis of race.

- In South Australia, 19% of all complaints received in 2012–13 involved allegations of discrimination on the basis of race, making race discrimination South Australia's second highest area of complaints after disability discrimination.

- In Victoria, 41 vilification complaint issues were received in 2012–13 (20 complaint files) under the *Racial and Religious Tolerance Act 2001* (Vic) and five were resolved. In addition, a further 276 race complaint issues were raised (113 complaint files) in 2012–13 with 40 resolved or otherwise settled under the *Equal Opportunity Act 1995* (Vic)

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23 A Ferdinand, Y Paradies and M Kelaher, *Mental health impacts of racial discrimination in Victorian Aboriginal communities: the Localities Embracing and Accepting Diversity (LEAD) experiences of racism survey* (the Lowitja Institute, Melbourne 2012) 9.

24 Ibid 19.

- There have been 11 decided and published decisions under the Queensland vilification laws, of which six were upheld and five dismissed. The ADCQ received six complaints of vilification on the basis of race in 2012–13.

- In Western Australia, 434 enquiries regarding race discrimination were received in 2012–13. This translated into 162 race complaints and 33 racial harassment complaints.

- In the Australian Capital Territory there were 8 (9%) civil race vilification complaints to the ACT Human Rights Commissioner in 2012-13. Race was the highest ground of complaint with 33 cases (22%), followed by disability at 29 cases (18%) of 140 allegations.

6.14 For the same period, the following racial hatred complaints were made under the federal law:

Location of complainant	Number	Percentage
ACT	2	1%
NSW	103	54%
NT	6	3%
QLD	21	11%
SA	13	7%
TAS	2	1%
VIC	25	13%
WA	20	10%
TOTAL	**192**	**100%**

6.15 It is evident, however, that the level of formal complaint received by ACHRA members represents what might be described as only the 'tip of the iceberg'. A survey conducted by the Victorian Equal Opportunity and Human Rights Commission in 2013 found that almost 55% of those who witnessed or experienced racism did not report the incident, primarily because they did not think anything would be done about it.[25]

6.16 Low level of reporting remains concerning to ACHRA and work has begun across a range of jurisdictions to reduce barriers to reporting, including the introduction of third-party or bystander reporting systems.

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25 Victorian Equal Opportunity and Human Rights Commission, *Reporting racism: what you say matters (*VEOHRC May 2013) 14.

6.17 Clearly, however, state, territory and federal discrimination laws form an important defence against race discrimination. Whilst legal frameworks alone will not deal with all forms of behaviour, the existence of race discrimination laws sets the bar for acceptable community standards and provides a timely, accessible and affordable avenue to resolve disputes should individuals wish to pursue a complaint.

6.18 As currently drafted, subclauses (1) and (2) of the draft exposure Bill limit the range of conduct caught by the Act to that which is likely to incite hatred or cause fear of physical harm.

6.19 The effect of the changes will be to permit a person to insult or humiliate another in public. In doing so, the changes if enacted will send a strong message that racist speech and related actions are okay.

6.20 ACHRA submits that it is imperative that national laws operate to send a strong message that behaviour of this nature is unacceptable and provide for a legal mechanism to deal with complaints of such conduct.

6.21 We are also concerned that the removal of existing provisions within the RDA will undermine action to address systemic disadvantage experienced on the basis of race or national or ethnic origin.

6.22 Racism clearly has impacts beyond those immediately felt by the victim. It is linked to increased rates of depression, anxiety and suicide.[26] We know from related inquiries, for example, that the psycho-social impact of bullying in the workplace is estimated to have an impact on the Australian economy of between $6 billion and $36 billion every year.[27]

6.23 At the same time, racism contributes toward the lack of accessible services. It is clear that people from diverse racial and ethnic backgrounds face barriers in access to services such as health care, education, employment and accommodation. Children from non-English speaking backgrounds participate at a much lower rate in child care; are under-represented in access to aged-care services; and access disability services

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[26] See Close the Gap Campaign Steering Committee, *Progress and Priorities Report 2014* (2014) < https://www.humanrights.gov.au/sites/default/files/document/publication/ctg-progress-and-priorities-report.pdf> and the Australian Human Rights Commission, *National Anti-Racism Strategy* (2012) <http://www.humanrights.gov.au> at 28 April 2014.

[27] Productivity Commission, *Benchmarking Business Regulation: Occupational Health and Safety* (March 2010).

at a much lower rate than the broader community.[28] Similar findings are also well-documented in relation indigenous service use. Structural discrimination of this nature is driven in large part by culturally exclusive service delivery models that involve subtle attitudes and perceptions of race that are entrenched in institutional policies and inform the delivery of services. Bias of this nature can have cumulative effects and deepen intergenerational disadvantage. Facilitating a greater understanding and respect for cultural difference across key services in the broader Australian community is crucial to eradicating discrimination. It is ACHRA's view that the development of mutual understanding and respect must be driven from the top and be underpinned by legal safeguards such as those contained in section 18C.

6.24 ACHRA remains deeply concerned that the changes proposed in relation to section 18C, in conjunction with the broadening of defences contained in the exposure draft, if enacted would provide the basis for the resurgence of hate speech, increased levels of day-to-day exclusion and intolerance, and give license to unrestrained racial abuse in public discussion. It is unlikely, for example, that holocaust denier Frederick Toben would have breached racial vilification laws should the proposed changes have been in place at the time.

6.25 ACHRA does not agree with the sentiment that freedom of expression must include a license to perpetrate prejudice or cause psychological harm.

6.26 Effective laws are crucial to addressing race-based discrimination and ensuring that everyone in Australia has the right to feel part of our diverse community. They are not only effective as a means of providing an avenue for seeking redress, they are also important tools for establishing the standards and behaviours we see as appropriate within our community.

6.27 Restricting unlawful acts to vilification and intimidation in the way cast in the draft exposure Bill will remove the ability to intervene in acts that insult, humiliate or intimidate before they manifest as acts of vilification or threat of physical harm.

6.28 This is a matter given some consideration by Carr J in *Toben v Jones* in which his Honour links the provisions of section 18C to the objective of 'deterring public expressions of offensive racial prejudice which might lead to acts of racial hatred and discrimination'.[29] In outlining his reasons, Carr J drew particular attention to the

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[28] Productivity Commission, *Report on Government Services 2014* (2014) <http://www.pc.gov.au/gsp/rogs> at 17 April 2014.

[29] *Toben v Jones* [2003] FCAFC 137 (27 June 2003) at [19].

decision of the Federal Parliament not to proceed with the creation of criminal offences in respect of racial hatred.[30]

6.29 Carr J went on to say:

> In my opinion it is clearly consistent with the provisions of the [International] Convention [on the Elimination of all Forms of Racial Discrimination] and the ICCPR that State Party should legislate to 'nip in the bud' the doing of offensive, insulting, humiliating or intimidating public acts which are done because of race, colour or national or ethnic origin **before such acts can grow into** incitement or promotion of racial hatred or discrimination…[31] [**emphasis added**]

6.30 As previously noted, ACHRA appreciates that a desire to amend section 18C may arise from concerns about the perceived subjectivity of terms such as 'offend'. We note, however, that section 18C already requires the application of an objective test against which the conduct is assessed by virtue of the inclusion of the words 'reasonably likely to offend'.

6.31 We also submit that the case law in relation to the terms contained in section 18C indicates that the courts have carefully considered and made clear that those terms apply only to conduct that has profound or serious effect.

6.32 In *Kelly-Country v Beers*, for example, the Federal Magistrates Court found that a comedy performance in which the respondent played an Aboriginal character called 'King Billy Cokebottle' did not breach the provisions of the RDA because a reasonable Aboriginal person would not have been sufficiently offended or insulted by the respondent's performance.[32]

6.33 In *Hagan v Trustees of the Toowoomba Sports Ground Trust*, Drummond J dismissed Mr Hagan's application, finding the naming of a stand at the Athletic Oval 'the ES "Nigger" Brown stand' was not intended to have a racial connotation and the appeal was without merit.[33]

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30 Ibid [18].

31 Ibid [20].

32 *Kelly-Country v Beers & Anor* [2004] FMCA 336 (21 May 2004) at [114].

33 *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2001] FCA 1615 at [15].

6.34 In *Creek v Cairns Post Pty Ltd*, Kiefel J held that the terms 'offend, insult, humiliate or intimidate' should relate to conduct which has 'profound and serious effects not to be likened to mere slights'.[34]

6.35 ACHRA also notes that while the law is not the only means by which societies deal with the types of conduct that are dealt with under section 18C of the RDA, it provides an important statement of the expectations our Parliaments have of all people in Australia and provides a backstop against such conduct becoming seen as acceptable.

6.36 As with many laws that regulate behaviour, including criminal laws, these are provisions with which most of us will have no difficulty complying and they generally reflect the community's expectations of behaviour. That said, however, it is necessary to ensure—just as with laws criminalising theft and assault, for example—that there is a mechanism for formally and legally challenging behaviour when the line is crossed.

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[34] *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 (31 July 2001) at [16].

7. Standards of effect

Proposed text:

> (3) Whether an action 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.

7.1 The effect of the proposed text at clause (3) of the exposure draft is to reverse the relevant standard against which conduct is assessed.

7.2 Under the existing provisions of the RDA at section 18C, an act is unlawful if it is 'reasonably likely in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people'. The test applied to the provisions contained in section 18C(1)(a) is an objective one.

7.3 The proposal to move away from consideration of the impact on a 'reasonable person' to whom the conduct is directed to introduce a test based on an assessment of the impact on 'an ordinary reasonable member of the Australian community' represents a significant change in approach. Actions will now be judged against an 'Australian' standard, rather than the likely effect on the group toward which the conduct was directed.

7.4 ACHRA is concerned about the way in which this approach may be understood and applied.

7.5 Again it is important to understand the operation of the current provisions. Reference in section 18C(1)(a) to 'reasonably likely, in all the circumstances' has been consistently interpreted by the courts as an objective test of the effect of whether an act contravenes the RDA. It is not related to how the complainant feels. Nor is it determined by the perspective of all members of a particular community. Thus in *Creek v Cairns Post Pty Ltd*, Kiefel J, in considering the publication of photos (in an article relating to child custody proceedings) of the applicant in a bush camp with an open fire and a shed or lean-to alongside another family pictured in a living room with comfortable chairs and books around them, adopted the perspective of an Aboriginal mother with child-caring responsibilities residing in the township of Coen as the reasonable person in the circumstances.

7.6 In *Hagan v Trustees of the Toowoomba Sports Ground Trust*, Drummond J accepted that Mr Hagan was offended by the actions of the respondent, but rejected the appeal on the basis that this was not the general view of the local Aboriginal community.

7.7 The reasonable person is an ordinary person that shares the racial ethnic or other characteristics of the complainant. For example, in *Toben v Jones*, the relevant group was defined as 'members of the Australian Jewish community vulnerable to attacks on their pride and self-respect by reason of youth, inexperience or psychological vulnerability'.[35]

7.8 The proposal to move away from the current test to one whereby the effect is determined by the standards of 'an ordinary reasonable member of the Australian community' will substantially change the way in which the test is applied and remove the requirement to take into account the cultural sensitivities and impacts of the action.

7.9 This is a matter afforded some consideration by Bromberg J in *Eatock v Bolt*.[36] The perspective of the 'reasonable person' does not involve the assessment of the particular effect of the offence on the individual or individuals bringing the claim, it requires consideration of the effect on members of a class or group in general: a hypothetical individual who is adopted as a representative member of that group. Importantly, however, Bromberg makes reference to the wording of section 18C(1)(a) to provide guidance and finds that the conduct being assessed may be reasonably likely to offend 'a person' or 'group of people' which in his view 'must be a reference to an identified person (or persons) that the conduct in question was directed at'.[37] That is, that the offence provided for by section 18C(1)(a) requires consideration of the impact of the action on those toward whom it is directed. Bromberg rejected contention that section 18C(1)(a) a 'reasonable person test' should be substituted for the 'reasonable representative test' on the basis that to do so would cause the 'perspective clearly required by the words in section 18C(1)(a) to be ignored'.[38]

7.10 The inclusion of proposed clause (3) has the effect therefore of reversing the standard, such that an assessment is now required of the impact of the action on an 'ordinary reasonable member of the Australian community'. In the words of Bromberg J, 'to import general community standards into the test of the reasonable likelihood of

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35 *Toben v Jones* [2003] FCAFC 137 (27 June 2003) at [25]

36 *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) at [241]–[256].

37 Ibid [246].

38 Ibid [253].

offence runs a risk of reinforcing the prevailing level of prejudice'. To do so would in his Honor's view be 'antithetical to the purposes of Part IIA' of the Act.[39]

7.11 ACHRA considers that the revised approach provided in clause (3) of the draft Bill will be unworkable and by its very nature remove the ability of particular groups within the Australian community to have claims of being treated differently on the basis of race or ethnic origin considered. It requires the actions in question to be judged by their impact on a 'reasonable' third party and not on the basis of the likely effect on a 'reasonable' member of the affected group. It seriously undermines the protection to assess actions for their capacity to impact on a person not of the relevant racial or ethnic groups, a person who is unlikely to have ever experienced racism personally.

7.12 As a community we are very diverse and the standard of what an 'ordinary reasonable member' of the Australian community might look like will differ greatly. To reduce this diversity to a hypothetical 'ordinary' Australian risks overlooking the very diversity on which our country is founded.

7.13 The ordinary English meaning of the term 'ordinary' is 'something that is commonly met with; of the usual kind'.[40]

7.14 The Australian Bureau of Statistics, for example, describes an 'average' Australian as:

> … a 37 year old women, born in Australia and with both of her parents also born in Australia. She has English, Australian, Irish or Scottish ancestry. She speaks only English at home and belongs to a Christian religion, most likely Catholic. She is married, and lives with her husband and two children (a boy and a girl aged nine and six) in a separate house with three bedrooms and two cars in a suburb of one of Australia's capital cities. They have lived in that house for at least five years, and have a mortgage where they pay $1800 a month. She has a Certificate in Business and Management, and drives to her job as a sales assistant, where she works 32 hours a week. She also does unpaid work around the house for five or more hours per week.[41]

7.15 Clearly the concept of an 'average' Australian does not take into account the considerable diversity of our community. Nor do the provisions as currently drafted

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39 Ibid.

40 *The Macquarie Dictionary* (3rd ed, 1998).

41 Australian Bureau of Statistics, *Australian Social Trends, April 2013 – The 'average' Australian* (Cat No. 4102.0).

require consideration of the action on the basis of any particular cultural sensitivities or connotations associated with the action for the particular person or group at which it was directed. A term, for example, that has a negative connotation for a particular ethnic sub-group may not be well-understood by or shared with the broader community.

8. Exemptions

Proposed text:

> (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.

8.1 Of particular concern to ACHRA is the broadness of the exemptions proposed in clause (4) of the draft exposure Bill. The wide exception of the proposed clause would permit a wide range of behaviour, which we consider will lead to a greater risk of inflaming race intolerance. This is of particular concern when viewed against the narrowness of the proposed prohibitions outlined in clause (1).

8.2 The exemptions currently included in section 18D of the RDA include the requirement that, to be protected by the exemption, the conduct should be undertaken 'reasonably and in good faith'. Removing this requirement and adding to it a broader range of actions has the effect of making the exception so wide as to permit exempting almost all conceivable forms of behaviour.

8.3 Considerable understanding of the way in which the current exemptions in the RDA operate has been developed through case law. In *Bropho v Human Rights and Equal Opportunity Commission*, for example, the Full Bench of the Federal Court held that the test of whether an act was undertaken 'reasonably and in good faith' contained both an objective (reasonableness) and subjective (good faith) component such that the freedom of speech or expression provided for under section 18D is exercised in a way which honestly and conscientiously endeavours to 'have regard to and minimise the harm it will, by definition, inflict'.[42] The act is required to be proportionate for the purposes it was intended and the harm that may be caused to be considered and minimised to the extent possible. In considering the approach taken in interpreting sections 18C and 18D, His Honour stated:

> How does this approach operate in the context of s 18D? It requires a recognition that the law condemns racial vilification of the defined kind but protects freedom of speech and expression in the areas define din pars (a), (b) and (c) of the section. The good faith exercise of that freedom will, so far as practicable, seek to be

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[42] *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16 (16 February 2004) at [95].

> faithful to the norms implicit in its protection and to the negative obligations implied by s 18C… It will not use those freedoms as a 'cover' to offend, insult, humiliate or intimidate people by reason of their colour or ethnic or national origin.

8.4 ACHRA considers that the requirement to act 'reasonably and in good faith' forms an important part of the test of whether an act represents an appropriate application of the right to freedom of expression or whether it represents an act that, in the absence of caution and diligence, must be considered unlawful under the terms of the RDA and not appropriately protected as an exercise of the internationally recognised right to freedom of expression.

8.5 The omission of 'reasonably and in good faith' removes the basis on which the dividing line between the protected exercise of the right to freedom of expression and hate speech is to be determined. It has the effect of permitting a very broad range of activity under the guise of legitimate public debate or discussion.

8.6 We are of the view that Bromberg J in *Eatock v Bolt* was correct in concluding that the articles written by Mr Bolt were not written 'reasonably and in good faith' on the basis that not only were 'facts' relied upon to make the comments untrue, the language used was inflammatory and provocative.[43]

8.7 ACHRA considers that the way in which the provisions of section 18D have been approached appropriately balances the right to freedom of expression with the requirement to express views in a way which respects the sensibilities of those persons who may be the subject of the communication. It is an appropriate balance between freedom of expression and freedom from racial discrimination and vilification.

8.8 A requirement to balance the interests of those affected by an action is not novel in federal law. In defamation proceedings, for example, a case can be made on the basis of truthfulness or otherwise of the allegation or comment and/or whether the reporting of a matter meets the test of being in the public interest. The need to weigh these matters is incumbent on all those who foray into public discussion. To remove these requirements from the RDA alone risks setting a double standard based on the intention to remove protections against hate speech whilst maintaining protections for other purposes. The public policy message of the proposed law is one in which racial intolerance is acceptable and un-restrained racism is encouraged.

8.9 Racism is not the mere expression of a 'wrong opinion' in a public arena. It is not something that we should be encouraging those who are affected to 'shrug off'. The

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[43] Ibid, [380] and [412].

RDA only proscribes conduct when a person causes offence or insult or humiliation on the basis of a person's race where such an effect was reasonably likely and it was done in bad faith and unfairly. Section 18D provides for a range of exceptions to protect things said or done reasonably and in good faith in a range of circumstances.

APPENDIX 1

Chart of related rights and articles in human rights instruments[44]

	ICCPR	ICESCR	ICERD	CEDAW	CAT	CRC	CRPD	DRIP
	Article	**Article**	**Article**	**Article**	**Article**	**Article**	**Article**	**Article**
Right to self-determination	1	1					3(a)	3-4,23, 33,35
Public emergencies; limitation of rights; derogation from rights	4-5	4-5	1(2) 1(3)		2(2-3)	15(2) 37	11	46
Non-discrimination; equality before the law; general policy	2(1),3 26	2(2), 3	2(1) 5(a)	2,9-16 15(1)		2(1-2)	5(1-4) 12(1-4)	1-2,27
Racial segregation			3					2,7(2) 8(2c), 9-10
Right to an effective remedy	2(3)		6	2(c)		37(d)39	13(1)	12(2) 20(2)
The right to procedural guarantees	14-16		5(a)	15(2-3)	12-15	12(2) 37(d)40	5,12-14	27,40
The right to life; the right to physical and moral integrity; slavery, forced labour and traffic in persons	6-8			6	1 16	6,11, 32-36	15-17 27(2)	7,29 43
The right to privacy: the right to freedom of thought, conscience and religion	17 18		5(d-vii)			14 16		9 11-12
The right to marry and found a family; protection of the family, mother, child	23 24	10	5(d-iv)	16,12, 4(2),5(b), 11(2)		16,19-20, 22-23,34, 36,38	23	14,22
The right to a nationality	24(3)		5(d-iii)	9		7-8	18	6

44 Australian Human Rights Commission, *Human Rights At Your Fingertips* (AHRC) 2012 at 6.

	ICCPR	ICESCR	ICERD	CEDAW	CAT	CRC	CRPD	DRIP
	Article	**Article**	**Article**	**Article**	**Article**	**Article**	**Article**	**Article**
Political rights and access to public service	25		5(c)	7 8		18(2-3,23 26(3-4)	27(g) 29	5
The right to own property, to inherit and obtain financial credits			5(d-v) 5(d-vi)	13(b) 15(b)			12(5)	10-11 26
Rights of vulnerable people (Temporary special measures)	27	2(3)	1(4) 2(2)	4,14 [14(1)(2)]		22-23 30	6-7	15(2) 21(2) 22(2)
Right to work		6(1)	5(e-i)	11(1a-c)			27(1)	36
The right to just and favourable conditions of work		7	5(e-ii)	11(1-d,f) 11(2) 11(3)			27(1-2)	17
The right to social security		9	5(e-iv)	11(1-e) 13(a) 14(2-c)		26	28 (2)	21
The right to adequate food and clothing	6(1)	11	5(e-iii)	14(2-h)		27(3)	28	20
The right to enjoy the highest standard of physical and mental health	6(1)	12	5(e-iv)	12 14(2-b)		24	17 25-26	17(2) 20,23-24,29
The right to education; other cultural rights	27	13-15	5(e-v) 5(e-vi)	10 13(c) 14(2-d)		23 24(2)(c) 28,31	24	13-15 17(2) 21