Australian Human Rights Commission

Amendments to Part IIA, Racial Discrimination Act

Australian Human Rights Commission submission to the Attorney-General's Department

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Table of Contents

1 Introduction

1. The Australian Human Rights Commission makes this submission to the Attorney-General's Department in relation to the exposure draft Bill on proposed changes to the racial hatred provisions of the *Racial Discrimination Act 1975* (Cth) (RDA).

2. The Commission welcomes the opportunity for community consultation on this important and complex issue. The Commission encourages the Attorney-General's Department to make information about the key issues identified through the consultation process publicly available to inform future public debate.

3. The Commission's general observations on the proposal to amend the RDA and its specific observations on the text of the draft Bill are as follows.

General observations on any proposal to change Part IIA

(1) The Commission considers that the exposure Bill as drafted should not proceed. This submission sets out concerns that any future draft Bill would need to appropriately address. The Commission looks forward to engaging with any future proposal.

(2) Any proposal to amend the law should involve extensive public consultation as it has the capacity to affect the human rights of all Australians, and particularly consultation with those communities whose members are most vulnerable to experiencing racial discrimination.

(3) Proposals to change the law are recent and it should be recognised that, in its current form, the Racial Discrimination Act as applied by the courts and administered by the Australian Human Rights Commission has successfully resolved hundreds of complaints about racial hatred over the past two decades. Any proposed change requires further justification.

(4) The Commission considers that the legislation could be clarified so that it more plainly reflects the way in which it has been interpreted in practice by the courts. That is, to confirm that Part IIA deals with 'profound and serious effects, not to be likened to mere slights'.

(5) It is also important to recognise that racial vilification cannot be addressed only by legal prohibitions. Complementary education and awareness raising measures are also required to promote a culture of respect for human rights and responsibilities. The Commission will continue to play a key role in this regard.

Particular observations on the draft Bill

The Commission has a number of particular concerns about the exposure Bill as drafted. If, following the consultation described above, the Government were to proceed with the draft Bill, the Commission considers that each of the following amendments would be necessary.

(6) The Commission is concerned about the narrow definition given to 'vilify'. It considers that if there is a change to Part IIA that includes a prohibition on 'vilification' then this term should be given its ordinary meaning, including conduct that is degrading.

(7) The Commission is concerned about the narrow definition given to 'intimidate'. It considers that if there is a change to Part IIA that includes a prohibition on 'intimidation' then this term should be given its ordinary meaning, which recognises that intimidation is not limited to causing fear of physical harm but includes conduct causing emotional or psychological harm.

(8) The Commission considers that an assessment of whether an act is reasonably likely to contravene the law must be made 'in all the circumstances'. The Commission considers that the words 'in all the circumstances' should be inserted into subsection 1(a) of the draft Bill following the words 'is reasonably likely'. On the basis that the legislation and any extrinsic material make clear that all the circumstances of the act including the likely impact on the target person or group must be considered, the Commission does not express any other concerns about the proposed community standards test.

(9) The Commission considers that the exemption for artistic works should be retained. This could be effected by inserting the words 'the performance, exhibition or distribution of an artistic work, or' after 'in the course of' in subsection (4) of the draft Bill.

(10) The Commission is concerned about the breadth of the exemption in subsection (4) of the draft Bill. The subsection removes the requirement that acts be done reasonably and in good faith. At the very least, including a requirement of 'good faith' as a minimum would prevent racist abuse offered up in the course of public discussion being permitted.

(11) The Commission considers that employers are well placed to address the risk of racial vilification by putting in place programs including training and codes of conduct for employees. The Commission considers that existing section 18E, which provides for vicarious liability for racial vilification, should be retained.

(12) The Commission considers that a person who engages in racial vilification should not be able to avoid liability by arguing that the act was also done for another reason. Section 18B provides that if an act is done for two or more reasons and one of those reasons is the race of a person, then the act is taken to be done because of race. Each of the federal discrimination Acts contains a provision equivalent to section 18B and its removal would make Part IIA inconsistent with all other federal anti-discrimination law. The Commission considers that this provision should be retained.

4. The right to freedom of expression is of fundamental importance, and extends to expression that may be regarded as deeply offensive. It is not,

however, an absolute or unfettered right and carries with it special duties and responsibilities.

5. Racial vilification can also harm the freedom of those who are its targets. It can have a silencing effect and harm the ability of victims to exercise their freedom of speech, among other freedoms.

6. It is important to retain strong and effective legal protections against racial vilification. Such laws send an important message about civility and tolerance in a multicultural society, and ensure those who experience the harms of racial vilification have access to a legal remedy.

7. Throughout this submission, the Commission has been particularly concerned to ensure that it strikes the appropriate balance between freedom of expression and freedom from racial vilification.

8. In this submission, the Commission reflects on three areas of particular expertise relating to the draft Bill:

    - how the draft Bill relates to Australia's international human rights obligations;
    - how the draft Bill would alter the existing level of protection of both freedom of expression and freedom from racial hatred; and
    - the social harm that can result from racial vilification.

9. The Commission is uniquely placed to comment on these issues given our legislative mandate under the RDA and *Australian Human Rights Commission Act 1986* (Cth),[1] and our role in investigating and conciliating complaints alleging breaches of section 18C of the RDA.

10. In the submission, we use case studies of matters dealt with under the legislation to provide concrete examples of how the proposed changes would alter the level of protection that currently exists.

11. This submission addresses the following issues in turn:

    a. Australia's international obligations to provide for freedom of expression while also protecting people from racial hatred;
    b. the background to the enactment of Part IIA of the RDA, and how it currently operates;
    c. in particular, a description of the seriousness of the conduct caught by Part IIA in the context of the recent public debate;
    d. the Commission's concerns about aspects of the draft Bill;
    e. other measures to combat racial hatred in Australia.

12. In addition to this submission, the Human Rights Commissioner has also prepared an additional letter. It contains comments that are intended to

complements this submission, and provide further elaboration on the key points of concern to the Human Rights Commissioner.

2 International human rights law – providing for freedom of expression while also protecting people from racial hatred

13. Australia has accepted binding legal obligations under the *International Covenant on Civil and Political Rights* (ICCPR) and *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD).

14. These instruments require the complementary protection of the right to freedom of expression and the responsibility to enact laws against racial hatred.

2.1 Freedom of expression

15. Article 19(2) of the ICCPR provides that 'everyone shall have the right to freedom of expression'. As the United Nations Human Rights Council has stated:

> The exercise of the right to freedom of opinion and expression is one of the essential foundations of a democratic society, is enabled by a democratic environment, which offers, inter alia, guarantees for its protection, is essential to full and effective participation in a free and democratic society, and is instrumental to the development and strengthening of effective democratic systems.[2]

16. The right to freedom of expression should 'be understood to be an essential instrument for the promotion and protection of other human rights'.[3] As the UN Special Rapporteur on Freedom of Expression has stated:

> The importance of the right to freedom of opinion and expression for the development and reinforcement of truly democratic systems lies in the fact that this right is closely linked to the rights to freedom of association, assembly, thought, conscience and religion, and participation in public affairs. It symbolizes, more than any other right, the indivisibility and interdependence of all human rights. As such, the effective enjoyment of this right is an important indicator with respect to the protection of other human rights and fundamental freedoms.[4]

2.2 Permissible restrictions and limitations on freedom of expression

17. The right to freedom of expression is of fundamental importance, and extends to 'expression that may be regarded as deeply offensive'.[5] It is not, however, an absolute or unfettered right and 'carries with it special duties and responsibilities. It may therefore be subject to certain restrictions'.[6]

18. Accepted restrictions to the right to freedom of expression are set out in Article 19(3) of the ICCPR. Other restrictions are also required by Article 20 of the ICCPR and Article 4 of the ICERD in order to ensure that rights of others are protected.

19. Article 19(3) of the ICCPR requires that three conditions be met when assessing whether restrictions on freedom of expression are permissible:

    a. they must be provided for by law;

    b. they must be necessary; and

    c. they must pursue one of the legitimate aims set forth in the article, i.e. (i) the respect of the rights or reputations of others; (ii) the protection of national security or public order (ordre public); or (iii) the protection of public health or morals.

20. The UN Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion has developed a set of principles to assist in determining what constitutes a legitimate restriction or limitation of freedom of expression, and what constitutes an 'abuse' of that right. These principles are **Attachment 1** to this submission.

21. As a general principle, the Rapporteur notes that 'permissible limitations and restrictions must constitute an exception to the rule and must be kept to the minimum necessary to pursue the legitimate aim of safeguarding other human rights'.[7] In this context, 'necessary' has been interpreted as meaning that any proposed restriction is pursuant to a legitimate aim, is proportionate to that aim and is no more restrictive than is required for the achievement of the desired purpose.[8] Put differently, 'the relationship between the right and the limitation / restriction or between the rule and the exception must not be reversed'.[9]

2.3 Prohibition of hate speech in Art 20 ICCPR and Art 4 ICERD

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

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

    - **Article 4(a) of the ICERD** which establishes the requirement to 'declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin ...'.

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

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

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

25. The **ICERD** provides for a broader range of racial hate speech that may be limited and still be regarded as consistent with article 19 of the ICCPR.

26. The Committee on the Elimination of Racial Discrimination, the monitoring body established under the ICERD, has noted that when this treaty was adopted, the prohibition of hate speech was regarded as integral to the elimination of racial discrimination in all of its forms:

> At that time, there was a widespread fear of the revival of authoritarian ideologies. The proscription of the dissemination of ideas of racial superiority, and of organised activity likely to incite persons to racial violence, was properly regarded as crucial.[13]
>
> The drafters of the Convention were acutely aware of the contribution of speech to creating climate of racial hatred and discrimination, and reflected at length on the dangers it posed.[14]

27. Justice Allsop elaborated on the crucial link between prohibiting racial hatred and preventing racial discrimination in the landmark case, *Toben v Jones* as follows:

> The unexpected recrudescence, in the winter of 1959-1960, of some of the most recent and horrific manifestations of racist behaviour enlivened the world community to act swiftly and … unanimously, to takes steps towards the elimination of the perceived evil. The perceived evil was all forms of racial discrimination and racial prejudice, the manifestation of which had been, in recent generations, at times horrifically violent and strident, at times overt, and at times less overt and less brutal, but nevertheless insidiously pervasive. In any form, it was recognised by all nations in the international community, to strike at the dignity and equality of all human beings.
>
> Racial hatred was … the form of the perceived evil most likely to lead to brutality and violence … .[15]

28. The Committee has noted that combating race hate speech is embedded in several articles of the ICERD:

    - Article 4 provides the most explicit requirements by requiring that some forms of race hate speech be made punishable by law

    - Article 7 highlights the role of 'teaching, education, culture and information' to promote inter-ethnic understanding and tolerance

    - Article 2 requires measures by States to eliminate racial discrimination and Article 6 to ensure effective protection and remedies for victims.

29. Each of these articles was considered by Allsop J when assessing whether Part IIA was supported by the external affairs power and Australia's obligations under ICERD. His Honour said:

> Art 4 is not the only matter in the Convention to which Part IIA can be seen as directed. The context and aim of the Convention were … racial discrimination and its elimination, in *all* its forms. Sections 18B, 18C and 18D can be seen as intended to assist in the endeavour of eliminating racial discrimination in all its forms, including by dealing with racial hatred.[16] (emphasis in original)

30. Article 5 of ICERD also acknowledges that all people have the right to equality before the law. This includes the right to enjoy their rights without discrimination, including the enjoyment of the right to freedom of expression. Racial vilification can harm the freedom of those who are its targets. It can have a silencing effect and harm the ability of victims to exercise their freedom of speech, among other freedoms. As the Committee on the Elimination of Racial Discrimination has stated:

> The protection of persons from racist hate speech is not simply one of opposition between the right to freedom of expression and its restriction for the benefit of protected groups: the persons and groups entitled to the protection of the Convention also enjoy the right to freedom of expression and freedom from racial discrimination in the exercise of that right. *Racist hate speech potentially silences the free speech of its victims.*[17] (emphasis added)

31. The chapeau of **Article 4 of ICERD** requires that States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form. States Parties are also required to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination. This includes by taking the measures referred to in Article 4(a) of the ICERD that they:

> 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 ... .

32. This requires States to take actions to prohibit four main areas of conduct:

- Dissemination of ideas based upon racial superiority or hatred
- Incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent or national or ethnic origin
- Threats or incitement to violence against persons or groups
- Expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination, when it clearly amounts to incitement to hatred or discrimination.[18]

33. The Committee on the Elimination of Racial Discrimination has commented that 'the expression of ideas and opinions made in the context of academic debates, political engagement or similar activity, and without incitement to hatred, contempt, violence or discrimination, should be regarded as legitimate exercises of the right to freedom of expression, even where such ideas are controversial'.[19]

34. As the Committee has noted, Article 4 'serves the functions of prevention and deterrence, and provides for sanctions when deterrence fails'.[20] It also has:

> an expressive function in underlining the international community's abhorrence of racist hate speech, understood as a form of other-directed speech which rejects the core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society.[21]

2.4 Reservations by Australia

35. Australia has a reservation to Article 20 of the ICCPR which relevantly provides that: 'Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interest of public order (*ordre public*), the right is reserved not to introduce any further legislative provision on these matters'.

36. Australia also has a reservation to Article 4(a) of ICERD which relevantly provides that: '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'.

37. The reservation in relation to Article 4(a) of ICERD is explicitly limited to the creation of offences contemplated by that article, rather than the creation of civil prohibitions, such as those contained in Part IIA of the RDA.[22] It appears that the reservation in Article 20 of the ICCPR takes into account the reservation previously made in relation to Article 4(a) of CERD and deals with the same issue.

38. While Australia's reservations to these articles mean that it does not have an obligation under international law to introduce further laws beyond the existing protections against hate speech, the nature of Australia's reservations recognise the importance of preventing the harm to which those articles are directed.

2.5 Response to international obligations

39. The UN Special Rapporteur on Freedom of Expression has usefully characterised forms of expression into three categories of response. Expression that:

    - constitutes an offence under international law and which States are required to prohibit;
    - is not criminally publishable but may justify a civil suit; and
    - does not give rise to criminal or civil sanctions, but still raises concerns in terms of tolerance, civility and respect for others.[23]

40. Different types of race hate speech will require responses in each of these categories.

41. The challenge confronting us in Australia is identifying where we appropriately place the threshold between these different levels of protection and response.

3 Part IIA of the *Racial Discrimination Act 1975* (Cth)

3.1 Background

42. Consideration has been given to proscribing racial hatred at the national level since 1973 when the original draft of the Racial Discrimination Act proposed the introduction of criminal sanctions. Those provisions were ultimately not included in the final version of the RDA due to concerns that protections at the criminal level would unduly restrict freedom of expression.

43. The Human Rights Commission, the predecessor to the current AHRC, then published a report (Number 7) in 1983 entitled *Proposal for Amendments to the Racial Discrimination Act to cover Incitement to Racial Hatred and Racial Defamation*. This proposed the insertion into the Racial Discrimination Act of a protection against incitement to racial hatred. The Commission proposed making it unlawful:

    > for a person publicly to utter or to publish words or engage in conduct which, having regard to all the circumstances, is likely to result in hatred, contempt or violence against a person or persons, or a group of persons, distinguished by race, colour, descent or national or ethnic origin.

44. It was proposed that the provision also ensure that 'certain valid activities are not brought within its scope, e.g. the publication or performance of bona fide works of art; genuine academic discussion; news reporting of demonstrations against particular countries; or the serious and non-inflammatory discussion of the issues of public policy'.

45. It was not until 1992 that the federal government committed to introducing legislative protections, in the wake of the findings and recommendations of three significant national inquiries:

    - The Human Rights and Equal Opportunity Commission's National Inquiry into Racist Violence – which proposed the introduction of a mix of criminal and civil sanctions;

    - The national report of the Royal Commission into Aboriginal Deaths in Custody – which supported the introduction of civil, but not criminal sanctions; and

    - The Australian Law Reform Commission's report on multiculturalism and the law – in which the majority of the Commission supported criminal sanctions and a minority supported civil sanctions.

46. The Report of the National Inquiry into Racist Violence stated the case for introducing protections as follows:

> Evidence to the Inquiry indicates that existing laws are failing to deal with the problems of racist violence and intimidation, racist harassment and incitement to racial hostility. Legislative change was seen by many groups as an essential part of the solution to the violence they suffered.[24]
>
> Political leaders and opinion makers must work to break the silence and build a culture which condemns racism and racist violence and encourages respect for cultural differences.[25]

47. The Inquiry expressed concern about 'a climate conducive to racist harassment, intimidation and violence. Legislating against incitement and vilification is an important way of addressing the problem directly and provides a strong statement from national leaders that racist violence and behaviour will not be tolerated in Australian society'.[26]

48. Both the earlier Human Rights Commission report and the National Inquiry into Racist Violence sought the introduction of protections to address pervasive and serious instances of racial abuse.

49. As the National Inquiry into Racist Violence explained:

> No prohibition or penalty is recommended for the simple holding of racist opinions without public expression or promotion of them or in the absence of conduct motivated by them. Nor would any of the proposed measures outlaw 'casual racism', for example the exchange of 'Irish jokes'.

The Inquiry is not talking about protecting hurt feelings or injured sensibilities. Its concern is with conduct with adverse effects on the quality of life and well-being of individuals or groups who have been targeted because of their race.

The legislation would outlaw public expressions or acts of incitement, not private opinions. As in the case of defamation laws, the context, purpose and effect of the words or material need to be considered before determining whether or not they are acceptable under the Act. Savings clauses should make it clear that the legislation will not impede freedom of speech in the following forms:

- private conversations and jokes;
- genuine political debate;
- fair reporting of issues or events;
- literary and other artistic expressions;
- scientific or other academic opinions, research or publications.

The threshold for prohibited conduct needs to be higher than expressions of mere ill will to prevent the situation which occurred in New Zealand, where legislation produced a host of trivial complaints. The Inquiry is of the opinion that the term 'incitement of racial hostility' conveys the level and degree of conduct with which the legislation would be concerned.

Incitement of racial hostility is not as serious as outright racist violence and intimidation. It need not, therefore, be subject to criminal laws and criminal penalties. It should be dealt with as a civil matter under the Racial Discrimination Act, with the same remedies (conciliation and compensation) as provided for racial discrimination.[27]

3.2 The passage of the Racial Hatred Act 1995 (Cth)

50. The *Racial Hatred Act 1995* (Cth) was adopted by the federal Parliament in 1995 following an extensive debate that had stretched over nearly a full parliamentary sitting year. The Act inserted Part IIA into the RDA (comprising sections 18B-18E). These provisions in the RDA have remained unamended since their introduction.

51. Section 18C provides that it is unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people, and the act is done because of the race, colour or national or ethnic origin of the other person or some or all of the people in the group.

52. Section 18B provides that if an act is done for two or more reasons and one of those reasons is the race of a person, then the act is taken to be done because of race.

53. Section 18D provides for a number of exemptions from the prohibition in section 18C. The exemptions cover anything done reasonably and in good faith in three contexts:

    a. in the performance, exhibition or distribution of an artistic work

b. in the course of any statements, publications, 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 making or publishing:

   i. a fair and accurate report of any event or matter of public interest;

   ii. a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

54. Section 18E provides for vicarious liability for employers and principals for acts done by their employees and agents in connection with their duties. However, vicarious liability does not apply if the employer or principal took all reasonable steps to prevent the employee or agent from doing the act.

55. The Explanatory Memorandum to the Racial Hatred Bill 1994 noted that a balance between competing rights was carefully considered in the drafting of the legislation:[28]

> The Bill is not intended to limit public debate about issues that are in the public interest. It is not intended to prohibit people from having and expressing ideas. The Bill does not apply to statements made during a private conversation or within the confines of a private home.
>
> The Bill maintains a balance between the right to free speech and the protection of individuals and groups from harassment and fear because of their race, colour or national or ethnic origin.

56. This was particularly the case in drafting the exemptions in s 18D:[29]

> Proposed section 18D provides a number of very important exemptions to the civil prohibition created by proposed section 18C. The exemptions are needed to ensure that debate can occur freely and without restriction in respect of matters of legitimate public interest.
>
> However, the operation of proposed section 18D is governed by the requirement that to be exempt, anything said or done must be said or done reasonably and in good faith.

57. The then Attorney-General also provided the following reasons for introducing the legislation as a whole, including both criminal and civil provisions:[30]

> This bill is an appropriate and measured response to closing the identified gap in the legal protection of all Australians from extreme racist behaviour. It strikes a balance between the right of free speech and other rights and interests of Australia and Australians. It provides a safety net for racial harmony in Australia and sends a clear warning to those who might attack the principle of tolerance. And importantly this bill provides Australians who are the victims of racial hatred or violence with protection.

58. Notably, the Racial Hatred Act was not adopted in the form proposed by the then government. As had occurred in 1973-75, there was significant concern from the opposition parties to the inclusion of criminal sanctions in the Bill. These were ultimately removed from the Bill.

59. It is instructive to note the other concerns expressed at the time by the then opposition parties, given their similarity to concerns expressed in the current debate about the scope of section 18C.

60. The Hon Phillip Ruddock MP argued that:

> The Commonwealth standard of 'insult and offend' is both broad and vague in our view in that an extraordinary range of statements are likely to be included under this definition.[31]

61. The Hon Daryl Williams MP stated the concern of the opposition that the government sought to justify the low threshold established by s18C on the basis of the reports of the ALRC, Human Rights and Equal Opportunity Commission and Royal Commission into Aboriginal Deaths in Custody:

> While these reports may have prompted a racial hatred bill, it is difficult to see how their recommendations are reflected in this bill. All three reports recommended against the creation of a criminal offence of incitement to racial hatred or hostility. This bill creates such an offence. The reports favoured the creation of a civil offence of incitement to racial hatred where a high degree of serious conduct is involved. This bill establishes a civil offence with the significantly lower threshold of behaviour which 'offends, insults, humiliates or intimidates'.[32]

3.3 How does the law currently operate?

62. Complaints that conduct has breached Part IIA of the RDA must be made to the Commission in the first instance. The first requirement for a complaint to be accepted is that it is by or on behalf of a person who is aggrieved by the alleged unlawful conduct. The Commission enquires into the complaint and, if there is no apparent basis on which to terminate it – for example, on the ground that it is misconceived or lacking in substance – the Commission will attempt to resolve the complaint by conciliation.

63. If the complaint is not resolved through conciliation, the complainant can apply for the allegations to be heard and determined by the Federal Court of Australia or Federal Circuit Court of Australia.

64. Although it is sometimes thought that a breach of section 18C is punishable by imprisonment, this is not the case as it is a civil, not a criminal, provision. Most complaints under section 18C which are resolved by the Commission result in some combination of the following outcomes:

- an apology
- an agreement to remove material
- systemic outcomes such as changes to policies and procedures, training for staff and training for individual respondents

- payment of compensation.

65. The Federal Court of Australia or Federal Circuit Court of Australia may order a range of outcomes including an apology, the removal of material or payment of compensation.

66. Over the last five years, the Commission received an average of 130 complaints per year alleging a breach of section 18C.

67. The last reporting year has seen a sharp increase in the number of these complaints to the Commission, from 121 complaints in 2011-12 to 192 complaints in 2012-13. This increase is largely due to complaints of cyber-racism, with more than 40 per cent of complaints under section 18C received by the Commission in 2012-13 concerning internet material.

68. A review of complaints under section 18C received by the Commission in 2012-13 indicates that 53 per cent were resolved at conciliation, 19 per cent were withdrawn and 23 per cent were terminated by the Commission. Of these, 17 per cent were terminated on the basis that there was no reasonable prospect of settlement, and four per cent were terminated on the basis that they were trivial, misconceived or lacked substance.

69. Of all of the complaints received by the Commission in 2012-13 under section 18C, less than three per cent proceeded to court. This outcome is consistent with the intent of discrimination law to provide a quick, accessible and inexpensive means of resolving complaints without recourse to judicial processes.

70. It is also noted that the conciliation process, as conducted by the Commission, fulfils an educative function, assisting those involved in complaints to understand more about rights and responsibilities in relation to racial discrimination.

71. The relatively low number of complaints received by the Commission overall suggests that section 18C of the Racial Discrimination Act is used in moderation, and not vexatiously.

3.4 Examples of racial hatred complaints

Some examples of racial hatred complaints received by the Commission are included below. *Note: these examples contain words and descriptions that may offend.*

1. The complainant, of Jewish ethnic origin, alleged that video clips on a video sharing site advocate hatred towards Jewish people and include content such as offering money to kill Jewish people.

2. The complainant, who is of Asian background, complained about a website which he said advocated violence against Asians. The comments on the website included: ‘Asian People Flood our city with their Asian shops with their language all over them, having their own dedicated “china town” and their own suburb ...’ ‘... we understand everyone has different levels of hate for Asians and so we have ... Yellers. Their job

is to Yell at the Asians with passion i.e. —YOU GOOK F**K OFF TO CHINA! and do whatever they can to show Asians they are not welcome in Australia ... Fighters ... are there to express their anger physically by laying the Gooks out'.

3. The complainant who is of Aboriginal descent, claimed that he left his employment because, over a number months, he was racially abused by a work colleague while they were working in public areas. The alleged comments included 'nigger', 'nigger c**t', 'abo', 'boong', 'f**king nigger', 'I've never worked with a nigger before', 'spear catcher', 'why don't you go and sit with your black bastard family and get drunk' and 'get f**ked you nigger dog'. Following the cessation of his employment, the complainant was assessed by a psychiatrist and subsequently the company's insurer accepted liability for the psychological injury the complainant had sustained arising from the alleged events.

4. The complainant claimed that video footage of a Pakistani woman and her child had been loaded onto the website of a video sharing site. The complainant claimed that the individual who posted the material also made racially derogatory comments on the site such as 'Paki bastards', 'f**k those Curry munching scum', 'poo faces', 'stupid paki women' and 'silly shit smelling Pakis, they need to f**k off home'.

4 Seriousness of the conduct caught by Part IIA

72. The Commission recognises that there has been legitimate debate about the scope of the conduct prohibited in s 18C, namely, acts done because of someone's race that are reasonably likely to 'offend, insult, humiliate or intimidate' them.

73. The Commission considers that the legislation could be clarified so that it more plainly reflects the way in which it has been interpreted in practice.

74. While the ordinary meaning of these words is potentially broad, the Federal Court has interpreted these words, with regard to the context in which they are used, as referring to 'profound and serious effects, not to be likened to mere slights'.[33] Because s 18C is directed to serve public and not private purposes, the section has been interpreted as being concerned with consequences that are 'more serious than mere personal hurt, harm or fear'.[34]

75. In the second reading speech for the Racial Hatred Bill 1994 (Cth), the Attorney-General noted that the language of 'offend, insult, humiliate or intimidate' was substantially the same as that used to establish sexual harassment in s 28A of the *Sex Discrimination Act 1984* (Cth) and that, in the context of sexual harassment, those words had been applied in a way that dealt with 'serious incidents only'. The Federal Court has also had regard to those comments in interpreting the scope of s 18C.[35]

76. Despite the court requiring a high threshold for conduct to fall within the terms of s 18C, some commentators have suggested that s 18C should be amended so as not to include conduct done because of a person's race that is reasonably likely to 'offend' or 'insult'.

77. Similarly, Justice French (as he then was) noted in *Bropho v HREOC*:

> The lower registers of the preceding definitions [in 18C] and in particular those of 'offend' and 'insult' seem a long way removed from the mischief to which Art 4 of CERD is directed. They also seem a long way from some of the evils to which Part IIA [of the RDA] is directed as described in the Second Reading Speech.[36]

78. In saying this, French J recognised that 'offend' and 'insult' were supported by ICERD more generally.[37] The Full Court of the Federal Court had previously held that Part IIA of the RDA was constitutionally valid and supported by the external affairs power on the basis that it was consistent with Australia's obligations under ICERD and the ICCPR.[38] As noted in paragraph 29 above, in that earlier case, Allsop J said:

> Art 4 is not the only matter in the Convention to which Part IIA can be seen as directed. The context and aim of the Convention were … racial discrimination and its elimination, in *all* its forms. Sections 18B, 18C and 18D can be seen as intended to assist in the endeavour of eliminating racial discrimination in all its forms, including by dealing with racial hatred.[39] (emphasis in original)

79. In considering the scope of s 18C French J noted that 'freedom of expression is not limited to speech or expression which is polite or inoffensive'.[40] His Honour referred to a judgment of *Handyside v United Kingdom* in which the European Court of Human Rights observed that the guarantee of freedom of expression in article 10 of the European Convention on Human Rights applies not only to information or ideas that are favourably received or regarded as inoffensive but also to:

> … those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broad mindedness without which there is no 'democratic society'.[41]

80. Justice French and the European Court noted that this right to freedom of expression was subject to limitations in article 10(2). In particular, the Convention provides that:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society … for the protection of the reputation or rights of others … .

81. That is, while it is important to protect freedom of expression, including the use of language that may offend, the exercise of freedom of expression carries duties and responsibilities. These common responsibilities mean that it is appropriate to regulate expression where this is necessary to protect the reputation or rights of others.

82. In 1991, prior to the enactment of Part IIA of the RDA, the Commission published its Report of the National Inquiry into Racist Violence in Australia. The Commission recommended that the Federal Government accept ultimate responsibility for ensuring, through national leadership and legislative action, that no person in Australia is subject to violence, intimidation or harassment on the basis of race.[42]

83. As the Commission noted at the time, the Inquiry was not concerned with 'protecting hurt feelings or injured sensibilities. Its concern is with adverse effects on quality of life and well-being of individuals or groups who have been targeted because of their race'. The recommendations made by the Commission and others were taken up in the enactment of Part IIA.

84. As noted above, some commentators have suggested that the removal of the words 'offend' and 'insult' from s 18C would align the ordinary meaning of the words used in the section with the way in which those words have been interpreted in practice; and would also more clearly indicate the significant scope for freedom of expression that is protected by the RDA.

85. It is far more difficult to justify the removal of the word 'humiliate' from s 18C. Conduct that is done because of a person's race that is reasonably likely to humiliate the person is serious conduct. This has been recognised by a number of leaders of community groups.[43]

86. An alternative way to clarify the seriousness of the conduct captured by Part IIA of the RDA may be to include the language used by the Federal Court in interpreting the current provision, namely, that it refers to 'profound and serious effects, not to be likened to mere slights'.

5 Amendments proposed in the draft Bill

87. The exposure draft of the *Freedom of Speech (Repeal of s. 18C) Bill 2014* (Cth) contains a number of significant proposed changes to Part IIA of the RDA.

88. The Commission considers that the exposure Bill as drafted should not proceed. This section of the submission sets out in more detail the particular concerns that the Commission has about the draft Bill. The Commission considers that these concerns would need to be addressed by any future Bill. The Commission looks forward to engaging with any future proposal.

89. The most significant changes proposed by the draft Bill are:

    a. a narrowing of the conduct based on race that may be prohibited to include only:

        i. the incitement in others of hatred against a person or group of persons; and

        ii. the causing of fear of physical harm;

    b. the introduction of a 'community standards' test;

    c. the broadening of the exemptions to include conduct that is not done either reasonably or in good faith;

d. the removal of section 18E which provides for vicarious liability for employers and principals for conduct done by their employees or agents in connection with their duties;

e. the removal of section 18B which provides that if an act is done for two or more reasons and one of those reasons is the race of a person, then the act is taken to be done because of race.

90. Each of these proposed changes is considered in turn.

6 Narrowing of prohibited conduct

6.1 'Vilify'

91. The draft Bill proposes to prohibit conduct done because of race that is reasonably likely to 'vilify' another person or a group of persons. The Attorney-General's Media Release accompanying the draft Bill said that 'this will be the first time that racial vilification is proscribed in Commonwealth legislation sending a clear message that it is unacceptable in the Australian community'.

92. The term 'vilify' in the draft Bill is not given its ordinary meaning. Rather, 'vilify' is defined to mean 'incite hatred against a person or a group of persons'.

93. According to the *Macquarie Dictionary* (3rd ed, 1997), 'vilify' means 'to speak evil of; defame; traduce'. According to the Shorter Oxford Dictionary (3rd ed, 1992), the current meanings of 'vilify' are:

> To make morally vile; to degrade; also to defile or dirty.
>
> To bring disgrace or dishonour upon.
>
> To deprecate or disparage in discourse; to defame or traduce; to speak evil of.
>
> To regard as worthless or of little value, to contemn or despise.

94. Giving 'vilify' its ordinary meaning would be consistent with the standards articulated in ICERD and described in section 2.3 above.

95. The proposed language in the draft Bill would also merely duplicate the civil prohibitions that currently exist at State and Territory level but, as discussed below, in a narrower form. The Commission is concerned that this is unlikely to provide any substantive protection from racial vilification that does not already exist. This concern is magnified when regard is had to the difficulty in establishing a breach of State and Territory vilification laws.

96. For example, in New South Wales, section 20C of the *Anti-Discrimination Act 1977* (NSW) provides:[44]

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

97. A key problem with existing State and Territory racial vilification laws is that they focus on the impact of racial vilification on a third party, and whether that third party could be incited to hatred towards the victim as a result of the conduct, rather than focussing on the impact of racial vilification on the victim. In this sense, the laws sidestep the significant harm that is done by racial vilification to victims themselves. Similar criticisms made of the incitement provisions in New South Wales were acknowledged as valid by the New South Wales Legislative Council's Standing Committee on Law and Justice.[45] By contrast, s 18C of the RDA deals directly with the impact that the conduct was reasonably likely to have on the victim or victims.

98. By focussing on the potential reaction of third parties, the State and Territory laws also make racial vilification very difficult to prove. Tribunals interpreting the New South Wales law have held that the conduct must do more than convey hatred, serious contempt or severe ridicule: it must have the capacity to incite those responses in others towards the victim.[46] Moreover, these responses must be incited because of the race of the person or group said to be vilified by the conduct.[47]

99. Similar concerns have been expressed by the Victorian Equal Opportunity and Human Rights Commission in relation to the vilification provisions of the *Racial and Religious Tolerance Act 1995* (Vic) (RRTA):

> The incitement test sets a high threshold for redress. Complainants are often surprised that their personal reactions to hate conduct are irrelevant to proving the elements of vilification.
>
> The RRTA does not invite an assessment of whether the conduct was offensive but only whether the impugned conduct has incited, or was likely to incite, a third person to feel hatred towards the complainant because of their membership to the relevant racial or religious group. …
>
> This approach is unsatisfactory because it dismisses the complainant's sense of grievance and the respondent's reasons/motive for the impugned conduct.[48]

100. The requirement to establish 'incitement', rather than vilification as it is ordinarily understood, may mean that the conduct described in some or all of the cases in section 3.4 above may no longer be prohibited.

101. If the draft Bill is passed in the form proposed, it is unlikely that the prohibition against 'vilification' will add to the existing protections at State and Territory law because:

a. the scope of the term 'vilify' in the draft Bill is narrower than in equivalent State and Territory law. In the draft Bill, it means 'incite hatred against'; in most State and Territory laws it means 'incite hatred towards, serious contempt for, or severe ridicule of' a person or group of persons'.

b. the exceptions in subsection (4) of the draft Bill, unlike all civil prohibitions in State and Territory law, do not require the person engaging in the conduct to act reasonably, honestly or in good faith. This issue is considered in more detail in section 8.3 below.

102. Given that the prohibition in most State and Territory law provides greater protection against vilification than the proposal in the draft Bill,[49] it is of concern that federal law which applies to all parts of Australia would not provide at least the same level of coverage.

103. The Commission is concerned about the narrow definition given to 'vilify'. It considers that if there is a change to Part IIA that includes a prohibition on 'vilification' then this term should be given its ordinary meaning, including conduct that is degrading.

6.2 'Intimidate'

104. The draft Bill proposes to limit the existing prohibition on conduct that 'intimidates' a person or group because of their race, to conduct that causes fear of physical harm to people or property.

105. In all States and Territories which have criminal provisions dealing with serious racial vilification, racial intimidation through threats of physical harm is considered to be the most serious form of racial vilification and is subject to criminal sanctions.[50] By making this most serious form of racial vilification the *only* kind of intimidation that is captured by the civil prohibition in the RDA, the draft Bill would significantly narrow the scope of civil liability. Other serious conduct that is currently prohibited in the RDA would be excluded from the proposed definition.

106. There have been a number of cases in which the Federal Court has found conduct to be in breach of s 18C because it was found to be reasonably likely to intimidate a person or group and was done because of that person or group's race.

Case study

In *Jones v Scully*,[51] the Federal Court considered a complaint about the distribution of eight pamphlets containing anti-Semitic material to letterboxes in Launceston, Tasmania.

There were a number of imputations in the pamphlets that were held to have been directed towards Jewish people and were found to contravene s 18C on the basis that they were reasonably likely to offend and insult. One of these imputations was found to contravene s 18C on the basis that it was reasonably likely to offend, insult, humiliate and intimidate.

This imputation was that Jews are fraudulent liars, immoral, deceitful and part of a conspiracy to defraud the world in perpetrating the 'myth' of the Holocaust.

These comments were held to be reasonably likely to intimidate, but not because they caused a fear of physical harm. If the meaning of intimidate is narrowed in the sense proposed in the draft Bill, it is unlikely that comments of this nature would be captured by it.

107. Limiting the meaning of 'intimidation' to a fear of physical harm ignores the emotional and psychological harm that can result from intimidation on the basis of race.[52] The scope of harm caused by racist violence was a matter of critical importance in the Commission's National Inquiry into Racist Violence in Australia. It found as follows:

> The Inquiry defined racist violence in such a way as to include not only physical attack upon persons and property but also verbal and non-verbal intimidation, harassment and incitement to racial hatred. By this definition, racist graffiti, intimidating and abusive telephone calls as well as threatening insults and gestures are included. …
>
> Evidence to the Inquiry from all sources showed that most people agreed strongly with the Inquiry's definition of racist violence. The sub-physical forms of intimidation and aggression were considered by many victims to have a more severe impact than isolated cases of physical assault, particularly if the harassment was continual and carried out by neighbours, workmates and classmates.[53]

108. In setting out the need for change in that report, the Commission noted:

> As evidence to the Inquiry confirms, actual physical attack is only one aspect of the problem for victims. While the physical results of violence can be readily observed, the emotional effects which are not so observed are, nevertheless, crippling.[54]

109. Those on the receiving end of racial abuse can feel fear, alarm, humiliation, degradation, isolation and even self-loathing which can impact on their self-worth and sense of acceptance.[55]

110. According to the *Macquarie Dictionary* (3rd ed, 1997) the primary meaning of 'intimidate' is 'to make timid, or inspire with fear; overawe; cow' and a secondary meaning is 'to force into or deter from some action by

inducing fear'. According to the Shorter Oxford Dictionary (3rd ed, 1992), the primary meaning of 'intimidate' is 'to render timid, inspire with fear; to overawe, cow'. It goes on to say that it is especially (but not exclusively) to force to or deter from action by threats or violence.

111. The Commission is concerned about the narrow definition given to 'intimidate'. It considers that if there is a change to Part IIA that includes a prohibition on 'intimidation' then this term should be given its ordinary meaning, which recognises that intimidation is not limited to causing fear of physical harm but includes conduct causing emotional or psychological harm.

7 Community standards test

112. The draft Bill includes in subsection (3) what has been described as a 'community standards' test. It reads:

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

113. The current test under s 18C to determine whether conduct is reasonably likely to offend, insult, humiliate or intimidate is an objective one.[56] The court does not simply rely on how a particular person or group of people subjectively felt about or reacted to the doing of the act complained of.[57] Rather, the court assesses whether, objectively, the act complained of was reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people.

114. Evidence that a member of a particular racial group was in fact offended by the conduct in question, is admissible on, but not determinative of, the issue of contravention.[58]

115. To the extent that subsection (3) of the draft Bill confirms that the relevant test is an objective test, it does not present any particular difficulties. Applying that test would require a court to consider whether an ordinary reasonable member of the Australian community would consider that the act complained of was reasonably likely to vilify or intimidate another person or group of persons (the target person or group). However, the assessment must be whether the target person or group would be likely to be vilified or intimidated, not whether the 'ordinary reasonably member of the Australian community' would be likely to be vilified or intimidated if they were in the same situation. Thus, it will still be necessary for the court to take into account the relevant circumstances and attributes of the target person or group.

116. Sub-section (1) of the draft Bill does not include the words 'in all the circumstances' which appears in s 18C of the RDA. It would seem odd for a court not to consider the circumstances in which the relevant act was done in determining its impact. In order to make this clear, the Commission

recommends that these words be inserted into sub-section (1) of the draft Bill.

117. The Commission considers that an assessment of whether an act is reasonably likely to contravene the law must be made 'in all the circumstances'. The Commission considers that the words 'in all the circumstances' should be inserted into subsection 1(a) of the draft Bill following the words 'is reasonably likely'. On the basis that the legislation and any extrinsic material make clear that all the circumstances of the act including the likely impact on the target person or group must be considered, the Commission does not express any other concerns about the proposed community standards test.

8 Scope of exemptions

118. Section 18D of the RDA contains a number of exemptions to the prohibition in section 18C which are designed to protect freedom of expression.

119. The proposed draft Bill reduces the scope of these free speech exemptions in relation to the protection of artistic works. The Commission considers that the exemption for artistic works should be retained.

120. However, the draft Bill also widens the scope of the exemptions in other ways, by removing the requirement that the relevant act be done 'reasonably and in good faith'.

121. As discussed in more detail below, the Commission is concerned about the breadth of the exemption in subsection (4) of the draft Bill, particularly the removal of the requirement that acts be done reasonably and in good faith. At the very least, including a requirement of 'good faith' as a minimum would prevent racist abuse offered up in the course of public discussion being permitted.

8.1 Artistic works

122. The draft Bill proposes no longer to protect the performance, exhibition or distribution of artistic works. Rather, the proposed exemption in subsection (3) extends only to the 'public discussion of any … artistic … matter'. The Commission considers that this is a significant omission and considers that the exemption for artistic works should be retained.

123. There are a number of cases in which the exemption for artistic works in s 18D(a) of the RDA has operated to prevent conduct that otherwise fell within the terms of s 18C breaching the RDA.

Case study

In *Bropho v HREOC*,[59] the Full Court of the Federal Court considered a cartoon published in the West Australian newspaper in 1997. The cartoon dealt with the return from the United Kingdom of the head of an Aboriginal

warrior, Yagan, who had been killed by settlers in 1833. There was debate within the Aboriginal community about who had the appropriate cultural claims, by descent, to bring the remains back to Western Australia.

The Nyungar Circle of Elders had lodged a complaint with the Commission about the cartoon.

On appeal, French J noted that the cartoon:

- reflected upon the mixed ancestry of some of the Aboriginal people involved;
- implied an unseemly desire on the part of some of them to travel to England on public money;
- suggested that their conduct had caused disunity among the Nyungar people of the Perth area;
- showed a frivolous use by an Aboriginal leader of a dreamtime serpent to frighten a child who was sceptical about the trip; and
- showed Yagan's head in a cardboard box expressing a desire to go back to England.

The Commission had found that the cartoon was reasonably likely to be offensive to a Nyungar person or to an Aboriginal person more generally. There was little doubt that at least one of the reasons for the publication of the cartoon was the Aboriginality of the people involved.

However, the Commission found that the cartoon was an artistic work and that the newspaper had published it reasonably and in good faith. The issue was an issue of importance for the West Australian community. The context in which it was published suggested that the newspaper had taken a balanced approach. The appeal against the Commission's decision was unsuccessful.

124. In *Kelly-Country v Beers*, Brown FM found that a comedy performance fell within the definition of an 'artistic work'.[60]

125. The Commission considers that artistic works, including comedy, satire and parody should not be prohibited by the RDA. For the reasons set out in the following section, artistic works and the other exemptions to racial vilification should be, as a minimum, subject to a good faith requirement.

126. The Commission considers that the exemption for artistic works should be retained. This could be effected by inserting the words 'the performance, exhibition or distribution of an artistic work, or' after 'in the course of' in subsection (4) of the draft Bill.

8.2 Public discussion

127. Subsection (4) of the draft Bill is structured differently to s 18D. However, but for the omission of protection for artistic works and the requirements of reasonableness and good faith, it largely conforms to the exemptions that currently apply.

128. Section 18D(b) protects anything said or done reasonably and in good faith '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'.

129. Subsection (4) of the draft Bill makes reference to 'words, sounds, images or writing': this reference is taken from the existing s 18C(2)(a). In addition to 'academic, artistic or scientific' matters, subsection (4) adds 'any political, social, cultural [or] religious' matter. These kinds of subject matter are arguably included in the existing protection of 'any other genuine purpose in the public interest'. Little is lost by omitting the word 'genuine': either the public discussion is about these matters or it is not.

130. Subsection (4) does not contain a requirement that these additional subject matters of public discussion be 'in the public interest'. It would be necessary to consider the reason for the proposed removal of the public interest test and what impact its removal would have. Some further explanation for the removal of the public interest test is required.

131. Further, it is unclear what would be covered by the description of 'social' matters. For example, the Commission notes the description 'social media' is commonly applied to various forms of online communication. Given the recent dramatic increase in complaints of cyber racism (see paragraph 67 above) it would be a matter of concern if conduct in this form was entirely exempt from the operation of Part IIA. Some further explanation of the basis for this proposal is required.

132. However, the most substantive difference between the proposed subsection (4) and the existing exemptions in s 18D is the omission of the requirement for the conduct to be engaged in reasonably and in good faith.

8.3 Reasonableness and good faith

133. Section 18D of the RDA and each of the State and Territory Acts that contain civil prohibitions on racial vilification contain free speech exemptions for matters of public discussion and debate in similar forms. In order for these exemptions to apply, all of these Acts require that the conduct was done 'reasonably and honestly'[61] or 'reasonably and in good faith'[62] or 'in good faith'.[63]

134. In the context of s 18D of the RDA, whether an act was done 'reasonably' does not involve an evaluative judgment about whether a court agrees with the conduct. As French J explained in *Bropho v HREOC*, an act is done reasonably in relation to discussions or debates for genuine academic, artistic or scientific purposes if it bears a rational relationship to the activity and is not disproportionate to what is necessary to carry it out.[64]

Case study

In *Walsh v Hanson*,[65] the Commission considered whether a book published by Ms Pauline Hanson and Mr David Etteridge of the One Nation Party contravened s 18C of the RDA.

The book argued that the Aboriginal community was being unfairly favoured by governments and the courts. The hearing Commissioner said that these statements were part of a genuine political debate and 'whether valid or not, the statements of the respondents must be regarded as done reasonably and in good faith for a genuine purpose in the public interest, namely the course of a political debate concerning the fairness of the distribution of social welfare payments in the Australian community'.

135. By contrast, if a comment on a matter of public interest in relation to a particular ethnic group 'was written in a way that offered gratuitous insults by, for example, referring to members of the group in derogatory racist slang terms, then it would be unlikely that the comment would be offered "reasonably"'.[66] If subsection (4) of the draft Bill is not appropriately qualified, then there is a significant risk that it will protect racist abuse offered up in the course of a public discussion.

136. The requirement in s 18D that the act be done 'reasonably' in order to fall within the exemption is a low threshold to satisfy. The Commission recognises that, although it has not been interpreted this way for the purposes of s 18C, the ordinary meaning of 'reasonable' includes behaviour that is 'moderate' or 'not excessive' and that the Australian public could expect to have vigorous and strident discussion and debate protected.

137. In the Commission's view, the more important requirement in s 18D is that the act be done in 'good faith'. Again, this does not require an assessment by the court as to whether it agrees with or approves of the act. Rather, it requires that the conduct was engaged in honestly and in accordance with the spirit of the law.[67]

138. A requirement of 'good faith' would also prohibit racist abuse offered up in the course of a public discussion. In *Toben v Jones*, a case that dealt with a website that contained a range of anti-Semitic material, the trial judge noted that the material did not satisfy the test of 'good faith' because it was 'deliberately provocative and inflammatory', it was 'contrived to smear' Jews and to 'paint Jews in a bad light'.[68] One example of this was the use of the phrase 'Jewish-Bolshevik Holocaust' which, in the context in which it was used, conveyed that Jews as a group were responsible for perpetrating a 'Holocaust' comparable to that ascribed in modern history to the Nazis.

139. The RDA should not permit gratuitous racial abuse, even if it occurs in the course of a 'public discussion' about some other issue. If conduct that would otherwise be reasonably likely to breach s 18C is to be protected by a free speech exemption because it occurred in the course of a public discussion, then it is appropriate to require that conduct to have been done in good faith.

140. The Commission is concerned about the breadth of the exemption in subsection (4) of the draft Bill, particularly the removal of the requirement that acts be done reasonably and in good faith. At the very least, including

a requirement of 'good faith' as a minimum would prevent racist abuse offered up in the course of public discussion being permitted.

9 Vicarious liability

141. The draft Bill proposes to repeal s 18E which provides for vicarious liability for employers and principals for acts done by their employees or agents in connection with their duties.

142. Vicarious liability does not attach if it is established that the employer took all reasonable steps to prevent the employee from doing the act.

143. Vicarious liability provisions exist in each of the federal discrimination Acts.[69] The Commission considers that vicarious liability for racial vilification should be retained. Unfortunately, acts of racial vilification regularly occur in the workplace. Employers are well placed to address the risk of racial vilification by putting in place programs including training and codes of conduct for employees.

144. A distinguishing feature of vicarious liability is that liability is strict and does not depend on the existence of fault on the part of the employer. As a result, the imposition of liability and the determination of the scope of liability involve questions of policy rather than merely a deduction from legal premises.[70] This is equally true of vicarious liability in tort law, and analogous statutory provisions such as s 18E.

145. The starting point from a policy perspective is that there is a social need to provide a 'just and practical remedy' for persons who are adversely affected by wrongs.[71] Employers are typically better placed to provide compensation than their employees, either as a result of greater resources or a better ability to obtain insurance. Further, it is reasonable that the conduct by an employer of an enterprise should carry with it an obligation to compensate third parties for injury to them by employed representatives 'which may be fairly said to be characteristic of the conduct of that enterprise'.[72] This provides both a justification for the imposition of liability on particular employers (as opposed to just anyone with a capacity to pay), while also identifying the scope of liability. Employers are properly held liable for acts that are sufficiently related to the conduct of their own enterprise.

146. A separate rationale for vicarious liability is the deterrence of future harm by providing an incentive to employers to take steps to reduce the risk of injury to third parties. In *Bazley v Curry*, McLachlin J in the Supreme Court of Canada (in a passage referred to with approval by the High Court of Australia) noted:[73]

> Employers are often in a position to reduce accidents and intentional wrongs by efficient organisation and supervision. …
>
> Beyond the narrow band of employer conduct that attracts direct liability in negligence lies a vast area where imaginative and efficient administration and supervision can reduce the risk that the employer has introduced into the

> community. Holding the employer vicariously liable for the wrongs of its employees may encourage the employer to take such steps, and hence, reduce the risk of future harm.

147. This incentive is provided through the provisions of s 18E(2). Employers can avoid liability for aberrant acts of racial vilification that were undertaken by their employees if the employer has taken all reasonable steps to avoid such conduct. This recognises the important role that employers play in creating and managing the environment in which their employees operate. In order for discrimination law to be as effective as possible, it is important that employers play an active role to prevent discrimination prior to it occurring.

148. The Commission considers that employers are well placed to address the risk of racial vilification by putting in place programs including training and codes of conduct for employees. The Commission considers that vicarious liability for racial vilification should be retained.

10 The reasons for doing acts amounting to racial vilification

149. The draft Bill proposes to repeal s 18B which provides that if an act is done for two or more reasons and one of those reasons is the race of a person, then the act is taken to be done because of race.

150. Both s 18C and the proposed section in the draft Bill provide that an essential element of the conduct that is prohibited is that it is done 'because of the race, colour or national or ethnic origin' of the target person or group.

151. The Commission considers that a person who engages in racial vilification should not be able to avoid liability by arguing that the act was also done for another reason. The Commission considers that s 18B should be retained.

152. Each of the federal discrimination Acts contains a provision equivalent to s 18B.[74] Both the RDA and the *Age Discrimination Act 2004* (Cth) (ADA) had previously incorporated a 'dominant purpose' test; that is, an act would only be considered to be done because of race or age if this was the dominant reason for the conduct. In both cases this requirement was abandoned and the Act was amended because of concerns about its application.

153. In the case of the ADA, the change came into effect in August 2009.[75] The change implemented a recommendation by the House Standing Committee on Legal and Constitutional Affairs in its 2007 report, *Older People and the Law*.[76] The then President of the Commission, the Hon John von Doussa, gave evidence to the House Committee in favour of replacing the 'dominant purpose' test saying:[77]

> In most events in life there is usually more than one thing that is acting to produce a result in a complex situation.

> To identify the dominant purpose is difficult. It was removed from the Racial Discrimination Act in 1990 because it was perceived then as effectively rendering the act almost useless in providing a remedy. My personal view, when I saw the dominant purpose sneaking in here, was that it was largely gutting what was otherwise going to be an effective remedial process. I suspect that as cases start to unfold we are going to find people who are able to prove that age was one of the factors that brought about a result but fail to prove that it was a dominant reason as opposed to one of perhaps equal or lesser importance than some other issue.

154. Concerns had also been expressed by a Senate Committee prior to the enactment of the ADA. The Senate Legal and Constitutional Affairs Committee in its review of the Age Discrimination Bill said:[78]

> The Committee is concerned that the dominant purpose has been proposed without broad consultation. This test was removed from the Racial Discrimination Act in 1990 on the basis of its impractical application. In the Committee's view, the proposed test's inconsistency with other anti-discrimination law will present significant problems for the bill, particularly in achieving the aim of attitudinal change. A more stringent test than other anti-discrimination law signals to the community the lesser importance of age discrimination when compared with other prohibited discriminatory conduct.

155. The Commission has similar concerns about the removal of section 18B. There is a risk that by repealing this provision, the meaning of 'because of race' in s 18C would change.[79] This would make Part IIA inconsistent with all other federal anti-discrimination law and, as observed by the Senate Committee, may signal to the community that racial vilification is considered to be of lesser importance. In practice, it may also lead to real problems with the effectiveness of s 18C for the reasons given by the Hon John von Doussa. The Commission considers that s 18B should be retained.

11 Other measures to combat racial hatred in Australia

156. As noted at paragraph 41 above, the main challenge posed by racial hatred is determining the most appropriate mechanisms to address it. This includes ensuring that whatever measures are introduced are consistent with other rights such as freedom of expression and equality before the law.

157. The Commonwealth Parliament has rejected criminal sanctions as the appropriate response to most instances of racial hatred on several occasions (such as at the time of the passage of the RDA in 1975 and again at the time of the passage of the Racial hatred Act in 1995). Through the passage of the Racial Hatred Act, however, support has been expressed for civil protections to exist for serious instances of racial hatred.

158. It is also important to recognise that racial vilification cannot be addressed only by legal prohibitions. Education and awareness raising is also required to promote a community understanding of and respect for human rights and for people's responsibilities.

159. Notably, all sides of politics have supported the need for complementary non-legislative measures alongside racial hatred laws. There is a critical role for educative measures that promote cultural diversity, tolerance and the value of the multicultural nature of our society, while also sending a strong message of opposition to racial discrimination and hatred.

160. The Commission has the function of undertaking educational programs for the purpose of promoting human rights. One example of this is the National Anti-Racism Partnership and Strategy which the Commission has led since 2011. This was formally launched in Melbourne on 24 August 2012, and is currently being implemented between 2012 and 2015.

161. A key component of the strategy is a national anti-racism campaign, *Racism. It Stops with Me.*[80] The campaign now has over 230 organisational supporters, from across local and state governments, business, sporting organisations, the arts and civil society.

162. The Commission considers that a continuing commitment to public education in relation to the harms caused by racial vilification and hatred, and ways of addressing it, remains a vital element in combatting this kind of conduct and spreading a strong anti-racism message.

Attachment 1 – Principles to determine when freedom of expression might appropriately be restricted

The following principles were developed by the UN Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion in order to assist in determining what constitutes a legitimate restriction or limitation of freedom of expression, and what constitutes an 'abuse' of that right.[81]

79. The Special Rapporteur proposes the following principles for determining the conditions that must be satisfied in order for a limitation or restriction on freedom of expression to be permissible:

(a) The restriction or limitation must not undermine or jeopardize the essence of the right of freedom of expression;

(b) The relationship between the right and the limitation/restriction or between the rule and the exception must not be reversed;

(c) All restrictions must be provided for by pre-existing statutory laws issued by the legislative body of the State;

(d) Laws imposing restrictions or limitations must be accessible, concrete, clear and unambiguous, such that they can be understood by everyone and applied to everyone. They must also be compatible with international human rights law, with the burden of proving this congruence lying with the State;

(e) Laws imposing a restriction or limitation must set out the remedy against or mechanisms for challenging the illegal or abusive application of that limitation or restriction, which must include a prompt, comprehensive and efficient judicial review of the validity of the restriction by an independent court or tribunal;

(f) Laws imposing restrictions or limitations must not be arbitrary or unreasonable and must not be used as a means of political censorship or of silencing criticism of public officials or public policies;

(g) Any restrictions imposed on the exercise of a right must be "necessary", which means that the limitation or restriction must:

> (i) Be based on one of the grounds for limitations recognized by the Covenant;
>
> (ii) Address a pressing public or social need which must be met in order to prevent the violation of a legal right that is protected to an even greater extent;
>
> (iii) Pursue a legitimate aim;
>
> (iv) Be proportionate to that aim and be no more restrictive than is required for the achievement of the desired purpose. The burden of demonstrating the legitimacy and the necessity of the limitation or restriction shall lie with the State;

(h) Certain very specific limitations are legitimate if they are necessary in order for the State to fulfil an obligation to prohibit certain expressions on the grounds that they

cause serious injury to the human rights of others. These include the following:

(i) Article 20 of the Covenant, which establishes that "any propaganda for war" and "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law";

(ii) Article 3, paragraph 1 (c), of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, which provides that States must ensure that their criminal law covers "producing, distributing, disseminating, importing, exporting, offering, selling or possessing [...] child pornography";

(iii) Article 4 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination, which establishes the requirement to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin";

(iv) Article III (c) of the Convention on the Prevention and Punishment of the Crime of Genocide, which states that "direct and public incitement to commit genocide" shall be punishable;

(i) Restrictions already established must be reviewed and their continued relevance analysed periodically;

(j) In states of emergency which threaten the life of the nation and which have been officially proclaimed, States are permitted to temporarily suspend certain rights, including the right to freedom of expression. However, such suspensions shall be legitimate only if the state of emergency is declared in accordance with article 4 of the Covenant and general comment No. 29 of the Human Rights Committee. A state of emergency may not under any circumstances be used for the sole aim of restricting freedom of expression and preventing criticism of those who hold power;

(k) Any restriction or limitation must be consistent with other rights recognized in the Covenant and in other international human rights instruments, as well as with the fundamental principles of universality, interdependence, equality and non-discrimination as to race, colour, sex, language, religion, political or other belief, national or social origin, property, birth or any other status;

(l) All restrictions and limitations shall be interpreted in the light and context of the particular right concerned. Wherever doubt exists as to the interpretation or scope of a law imposing limitations or restrictions, the protection of fundamental human rights shall be the prevailing consideration.

80. The principles set out herein should be understood to be of an exceptional nature. They are suggested as a means of ensuring that States do not abuse restrictions or limitations for political ends and that the application of such restrictions or limitations does not cause other rights to be violated. The principles should be applied in a comprehensive manner.

81. The Special Rapporteur also wishes to stress that, as provided in paragraph 5 (p) of Human Rights Council resolution 12/16, restrictions on the following aspects of the right to freedom of expression are not permissible:

> (i) Discussion of government policies and political debate; reporting on human rights, government activities and corruption in government; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups;
>
> (ii) The free flow of information and ideas, including practices such as the banning or closing of publications or other media and the abuse of administrative measures and censorship;
>
> (iii) Access to or use of information and communication technologies, including radio, television and the Internet.

Endnotes

[1] In particular s 20 of the RDA and s 11(1)(e), (g) and (h) of the AHRC Act.
[2] UN Human Rights Council, Resolution 12/16, preamble.
[3] La Rue, F, *2010 Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, UN Doc: A/HRC/14/23, 20 April 2010, para 28.
[4] Ibid., para 27.
[5] United Nations Human Rights Committee, General Comment 34 – Article 19: Freedom of opinion and expression, UN Doc: CCPR/C/GC/34, 12 September 2011, para 11.
[6] Article 19(3), ICCPR.
[7] La Rue, F, *2010 Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, op.cit, para 77.
[8] Ibid., para 77. See also United Nations Human Rights Committee, General Comment 34 – Article 19: Freedom of opinion and expression, op.cit., para 22.
[9] La Rue, F, *2010 Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, op.cit., para 79.
[10] Ibid., para 79(h).
[11] La Rue, F, *2011 Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, UN Doc: A/66/290, 10 August 2011, para 28.
[12] United Nations Human Rights Committee, General Comment 34 – Article 19: Freedom of opinion and expression, *op.cit.,* para 50.
[13] Ibid., para 1.
[14] UN Committee on the Elimination of Racial Discrimination, General Comment 35 – Combating racist hate speech, UN Doc: CERD/C/GC/35, 26 September 2013.
[15] *Toben v Jones* (2003) 129 FCR 515, at paras 98, 100.
[16] *Toben v Jones* (2003) 129 FCR 515, at para 136.
[17] UN Committee on the Elimination of Racial Discrimination, General Comment 35 – Combating racist hate speech, UN Doc: CERD/C/GC/35, 26 September 2013, para 28.
[18] Ibid., para 13.
[19] Ibid., para 25.
[20]Ibid., para 10.
[21] Ibid.
[22] See the reports submitted by Australia to the United Nations Committee on the Elimination of Racial Discrimination pursuant to Art 9 of CERD on 20 July 1999 (CERD/C/335/Add.2) at [416]; and on 7 January 2010 (CERD/C/AUS/15-17) at [26].
[23] La Rue, F, *2011 Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, op.cit, para 79.
[24] Human Rights and Equal Opportunity Commission, Report of the National Inquiry into Racist Violence, HREOC Sydney 1991, p 269.
[25] Ibid., p 268.
[26] Ibid.
[27] Ibid., pp 299-300.
[28] Explanatory Memorandum to the Racial Hatred Bill 1994 (Cth) p 1.
[29] Explanatory Memorandum to the Racial Hatred Bill 1994 (Cth) pp 10-11.
[30] The Hon Michael Lavarch MP, House of Representatives – Hansard, 15 November 1994, p 3336.
[31] The Hon Phillip Ruddock MP, House of Representatives – Hansard, 15 November 1994, p 3347.
[32] The Hon Daryl Williams MP, House of Representatives – Hansard, 15 November 1994, p 3359. See also: The Hon Peter Nugent, House of Representatives – Hansard, 16 November 1994, p 3423.
[33] *Creek v Cairns Post* (2001) 112 FCR 352 at 356 [16] (Kiefel J); see also French J in *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at 124 [70].
[34] *Eatock v Bolt* (2011) 197 FCR 261 at [263].
[35] *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at 124 [70].
[36] Ibid., at 123 [68].
[37] Ibid.
[38] *Toben v Jones* (2003) 129 FCR 515.
[39] *Toben v Jones* (2003) 129 FCR 515, at para 136.
[40] *Bropho v HREOC* (2004) 135 FCR 105 at 124 [69].
[41] *Handyside v United Kingdom* (1976) 1 EHRR 737. Article 10 of the European Convention on Human Rights is the equivalent of article 19 of the ICCPR.

[42] Human Rights and Equal Opportunity Commission, Report of the National Inquiry into Racist Violence, HREOC Sydney 1991, p 270.
[43] For example, see the joint statement published by leaders of Indigenous, Armenian, Arab, Chinese, Korean, Greek and Jewish communities at https://nationalcongress.com.au/joint-statment-race-hate-laws/ (viewed 11 April 2014).
[44] The equivalent sections in legislation other jurisdictions, each of which broadly follow the New South Wales model, are: *Discrimination Act 1991* (ACT) s 66; *Anti-Discrimination Act 1991* (Qld) s 124A; *Civil Liability Act 1936* (SA) s 73; *Anti-Discrimination Act 1998* (Tas); s 19; *Racial and Religious Tolerance Act 2001* (Vic) ss 7-8. Western Australia has a number of criminal offences dealing with racial animosity and racial harassment in *Criminal Code* (WA) ss 78, 80, 80B and 80D but not civil prohibitions. There are no racial vilification prohibitions in the Northern Territory other than those that apply there by virtue of s 18C of the RDA.
[45] New South Wales, Legislative Council, Standing Committee on Law and Justice, *Racial Vilification Laws in New South Wales* (December 2013) p 51 [4.113]. Because the review was focused on the criminal offence in s 20D, no change to the test of incitement was recommended: at [4.114].
[46] *Veloskey v Karagiannakis* [2002] NSWADTAP 18 at [20] citing *Wagga Wagga Aboriginal Action Group v Eldridge* (1995) EOC ¶92-701; *Malco v Massaris* [1998] NSWEOT (12/2/98); *Kazak v John Fairfax Publications Ltd* [2000] NSWADT 77; *Western Aboriginal Legal Service Ltd v Jones* [2000] NSWADT 102.
[47] *Veloskey v Karagiannakis* [2002] NSWADTAP 18 at [30]. A recent review of the NSW criminal provisions found that it was extremely difficult to prove incitement, resulting in matters not proceeding to prosecution: see New South Wales, Legislative Council, Standing Committee on Law and Justice, *Racial Vilification Laws in New South Wales* (December 2013) pp 31 [4.4], 43 [4.69]. Eleven matters have been referred to the NSW DPP for consideration of prosecution under s 20D of the Anti-Discrimination Act 1977 (NSW). None of the referrals has resulted in a prosecution being commenced. In 9 of those cases, the Office of the DPP said that a lack of evidence of incitement may have been an issue.
[48] Victorian Equal Opportunity and Human Rights Commission, *Submission to the Review of Identity-Motivated Hate Crime* (May 2010), p 16. At http://www.victorianhumanrightscommission.com/www/resources-686/submissions/item/589-submission-to-the-review-of-identity-motivated-hate-crime (viewed 11 April 2014).
[49] The exception to this is racial vilification occurring in Western Australia and the Northern Territory where there are no equivalent civil prohibitions.
[50] *Discrimination Act 1991* (ACT) s 67; *Anti-Discrimination Act 1977* (NSW) s 20D; *Anti-Discrimination Act 1991* (Qld) s 131A; *Racial Vilification Act 1996* (SA) s 4; *Racial and Religious Tolerance Act 2001* (Vic) s 24; *Criminal Code* (WA) ss 77, 78, 80A and 80B. The exceptions are Tasmania and the Northern Territory which do not have any criminal prohibitions on racial vilification.
[51] *Jones v Scully* (2002) 120 FCR 243.
[52] For a survey of these impacts, see S Akmeemana and M Jones, 'Fighting Racial Hatred' in Race Discrimination Commissioner, *Racial Discrimination Act 1975: A Review* (1995), pp 147-153.
[53] Human Rights and Equal Opportunity Commission, Report of the National Inquiry into Racist Violence, HREOC Sydney 1991, p 15.
[54] Ibid., p 259.
[55] R Delgado 'Words that Wound: A Test Action for Racial Insults, Epithets and Name-Calling', (1982) 17 *Harvard Civil Rights – Civil Liberties Review* 133 at 143.
[56] *McGlade v Lightfoot* (2002) 124 FCR 106 at 116 [42] (citing with approval *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615, *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 at 355 [12], and *Jones v Scully* (2002) 120 FCR 243, 268-269 [98]-[100]); *Eatock v Bolt* (2011) 197 FCR 261 at [242]; *Clarke v Nationwide News Pty Ltd trading as The Sunday Times* (2012) 201 FCR 389 at [46]. See also the Explanatory Memorandum to the Racial Hatred Bill 1994 (Cth) p 10, dealing with the analogous position under the *Sex Discrimination Act 1984* (Cth).
[57] *Clarke v Nationwide News Pty Ltd trading as The Sunday Times* (2012) 201 FCR 389 at [46].
[58] *Jones v Scully* (2002) 120 FCR 243 at [99]; *McGlade v Lightfoot* (2002) 124 FCR 106 at [44]-[45].
[59] *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105.
[60] *Kelly-Country v Beers* (2004) 207 ALR 421 at 448 [121].
[61] *Discrimination Act 1991* (ACT) s 66.
[62] *Anti-Discrimination Act 1977* (NSW) s 20C; *Anti-Discrimination Act 1991* (Qld) s 124A; *Civil Liability Act 1936* (SA) s 73; *Racial and Religious Tolerance Act 2001* (Vic) s 11.

[63] *Anti-Discrimination Act 1998* (Tas) s 19.
[64] *Bropho v HREOC* (2004) 135 FCR 105 at 128 [80].
[65] *Walsh v Hanson*, unreported, HREOC, Commissioner Nader, 2 March 2000.
[66] *Bropho v HREOC* (2004) 135 FCR 105 at 128-129 [81] (French J).
[67] *Bropho v HREOC* (2004) 135 FCR 105 at 131 [93] (French J).
[68] *Toben v Jones* (2003) 129 FCR 515 at 554 [161] (Allsop J, referring to comments by Carr J at first instance).
[69] *Racial Discrimination Act 1975* (Cth) s 18A (this section does not apply to Part IIA of the RDA); *Sex Discrimination Act 1984* (Cth) s 106; *Disability Discrimination Act 1992* (Cth) s 123; *Age Discrimination Act 2004* (Cth) s 57.
[70] *Hollis v Vabu Pty Limited* (2001) 207 CLR 21 at [86] per McHugh J; *New South Wales v Lepore* (2003) 212 CLR 511 at [300] per Kirby J.
[71] *Bazley v Curry* [1999] 2 SCR 534, approved by the High Court in *Hollis v Vabu* and *NSW v Lepore*.
[72] *Hollis v Vabu* at [42] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ.
[73] *Bazley v Curry* [1999] 2 SCR 534 at 554-555, quoted in *Hollis v Vabu* at [53].
[74] *Age Discrimination Act 2004* (Cth) s 16; *Disability Discrimination Act 1992* (Cth) s 10; *Racial Discrimination Act 1975* (Cth) s 18; *Sex Discrimination Act 1984* (Cth) s 8.
[75] *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), Sch 1.
[76] Explanatory Memorandum to the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2009 (Cth) at [11].
[77] Commonwealth, House Standing Committee on Legal and Constitutional Affairs, *Older People and the Law* (2007), p 197 [6.31].
[78] Ibid., p 197 [6.32].
[79] See the analysis of *R v Lavender* (2005) 222 CLR 67 in Pearce and Geddes, *Statutory Interpretation in Australia* (7th ed, 2011), p 97.
[80] See: http://itstopswithme.humanrights.gov.au/it-stops-with-me/strategy.
[81] La Rue, F, *2010 Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, op.cit, paras 77 – 81.