



**Submission of the
Anti-Discrimination Commissioner of
Tasmania**

on the

**Exposure draft Freedom of Speech
(Repeal of s18C) Bill 2014**

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Office of the Anti-Discrimination Commissioner

Celebrating Difference, Embracing Equality

Level 1, 54 Victoria Street, Hobart • GPO Box 197, Hobart, Tasmania, Australia, 7001

Telephone: [03] 6165 7515 • Statewide: 1300 305 062 • Facsimile: [03] 6233 5333

E-mail: antidiscrimination@justice.tas.gov.au • Website: www.antidiscrimination.tas.gov.au

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1. Introduction

1.1 Thank you for the opportunity to make a submission on the exposure draft of the Freedom of Speech (Repeal of s. 18C) Bill 2014 (the draft Bill).

1.2 The following provides the views of my office on the proposed changes to the *Racial Discrimination Act 1975* (Cth) (the RDA). I would be happy to elaborate on these matters should you wish me to do so.

1.3 The proposed changes to Part IIA of the RDA will have the effect of:

- removing the existing protections available to a person or group of persons who are offended, insulted or humiliated on the basis of their race, colour or national or ethnic origin;
- narrowing the interpretation of 'intimidation' to only that which causes a fear of physical harm;
- restricting actions that could amount to racial vilification to actions that incite hatred toward a person or group of person because of their race, colour or national or ethnic origin;
- removing the requirement to establish the impact of the actions against the standard of a reasonable representative of the race, colour or national or ethnic origin of the complainant and substitute that with the requirement to establish the impact of the action from the perspective of an ordinary reasonable member of the Australian community;
- removing the responsibility of employers or agents who may have vicarious liability for the action under consideration; and
- broadening the scope of the available exceptions to include a wider range of activities and removing the requirement that actions falling within the range of available exceptions be exercised cautiously and in the least discriminatory manner possible.

- 1.4 Such an approach will, in my view, significantly diminish available protections against expressions of public hostility toward people in Australia from diverse race or ethnic backgrounds and undermine the right of all people in Australia to live in a community free of discrimination and offensive conduct.
- 1.5 I do not support the view that the proposed amendments are an appropriate response to the desire to remove unnecessary restrictions on the exercise of the right to freedom of speech. The right to freedom of speech as an implied, limited constitutional right must be balanced against other rights afforded in law, including international law. I believe that the body of case law available that is relevant to section 18C provides adequate guidance on how these matters have been and should be interpreted.
- 1.6 I am also concerned that curtailing the coverage of actions currently within the scope of section 18C will introduce further inconsistency in discrimination law across Australia. I believe that this is at odds with the objective of introducing as much consistency as possible in the level of protection available to all in Australia.
- 1.7 Within my own jurisdiction, the *Anti-Discrimination Act 1998* (Tas) (the Tasmanian Act) includes very similar wording to that currently contained in section 18C. I do not believe that these provisions have been used frivolously, nor do I consider that there is evidence to suggest that they have operated to impede the proper exercise of the right to freedom of expression in this State.
- 1.8 I do not consider there is any great evidence that section 18C has not operated as was originally envisaged. To the contrary, I am of the view that should the current wording be amended in the way proposed, there will be an unacceptable lessening of the protections available against racist behaviours, including hate speech.
- 1.9 The provisions contained within the draft exposure Bill send a public policy message that many forms of racially-motivated actions (including derogatory or insulting speech) are permitted. Indeed since the release of the draft Bill I have received many reports of people claiming that their bigoted views will be 'protected' by the changes.
- 1.10 It will, in my view, sanction behaviour that is unreasonable, dishonest and in bad faith and do much to undermine the strong commitment that exists within Tasmania and elsewhere to stamp out racism wherever it exists.
- 1.11 I appreciate that some hold the view that people have the 'right to be bigots'. Indeed there is no current statute that makes the holding of bigoted beliefs unlawful. What is regulated, however, is the way in which those thoughts are able to be publicly expressed. It is my view that the RDA establishes legitimate responsibilities in the way in which every person, including those with prejudiced views, are able to express those views in public. It does not preclude public discussion in a rational and reasoned way; nor does it preclude discussion associated with legitimate academic or research pursuits. It does, however, preclude the sorts of public discussion that may amount to

hate speech or that has the effect of diminishing the rights of others because of their race or colour of national or ethnic origin. Further, it seeks to ensure that those who are the subject of prejudice are not themselves silenced by those views being expressed in ways that further marginalise and exclude their legitimate voices.

- 1.12 It is my view that this is a fundamental underpinning of the multicultural community that is modern Australia and for this reason it is imperative that the current provisions of Part IIA of the RDA are retained.

2. Protection from conduct that offends, humiliates, intimidates, insults or ridicules and incitement under Tasmanian law

2.1 Tasmanian discrimination law provides for a civil process for complaining of and addressing discrimination and offensive conduct that is within jurisdiction. It operates concurrently with federal discrimination law, including the RDA.

2.2 Section 17(1) of the Tasmanian Act prohibits a person (or organisation) from engaging in conduct that that offends, humiliates, intimidates, insults or ridicules another person on the basis of the following attributes:

- race;
- age;
- disability;
- sexual orientation;
- lawful sexual activity;
- gender;
- gender identity;
- intersex;
- marital status;
- relationship status;
- pregnancy;
- breastfeeding;

- parental status; and/or
 - family responsibilities.
- 2.3 Amendment of the Tasmanian Act in 2013 resulted in additional attributes, including race, being included in section 17(1) of the Act. The new provisions became operational on 1 January 2014. Prior to this the offensive conduct provisions of the Tasmanian Act contained in 17(1) were restricted to attributes related to gender, family status and relationships (gender, marital status, relationship status, pregnancy, breastfeeding, parental status or family responsibilities) by virtue of their inclusion in sex discrimination legislation that was repealed as a result of the introduction of the Tasmanian Act in 1998.
- 2.4 The inconsistency in protection across the attributes protected by the Tasmanian Act prior to the most recent amendments risked sending a message that insulting or humiliating a person on the basis of gender, relationship or family status attributes could be viewed as more serious than doing so, for example, on the basis of race or disability.
- 2.5 Complaints made under section 17(1) of the Tasmanian Act are subject to the requirements of section 22. Section 22 requires that certain prohibited conduct under the Tasmanian Act must be conduct 'by or against a person engaged in, or undertaking any, activity in connection with' specified areas of activity. These areas include employment; education and training; the provision of facilities, goods and services; accommodation; membership and activities of clubs; administration of any law of the State or State program; awards, and/or enterprise agreements or industrial agreements.
- 2.6 There are two requirements to prove conduct in breach of section 17(1):
- There must be conduct that offended, humiliated, intimidated, insulted or ridiculed a person on the basis of one or more of the attributes listed; and
 - The conduct must be such that a reasonable person would have anticipated that the other person would feel offended, humiliated, intimidated, insulted or ridiculed in all the circumstances.
- 2.7 Section 17(1) does not simply provide for an individual to complain because they were offended. It is a prohibition on conduct that offends, humiliates, intimidates, insults or ridicules another person in circumstances that 'a reasonable person, having regard to all the circumstances, would anticipate that the other person would be offended, humiliated, intimidated, insulted or ridiculed'. This test creates a significant threshold to the application of the section and provides an objective test of the impact of the action.

2.8 Section 19 of the Tasmanian Act deals with incitement. It also prohibits a person, by public act, from inciting hatred toward, serious contempt for, or severe ridicule of, a person or group of persons on the grounds of a range of attributes, including race.

2.9 Section 19 is not subject to the requirement that the conduct occur in an area of activity listed in section 22.

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

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

2.11 The effect of section 55 is to provide a defence against conduct within the scope of sections 17(1) or 19 when reporting public acts or if an act is undertaken in good faith for professional reasons or for public purposes. It is important, however, to recognise that section 55 can only be enlivened in respect of sub-section (a) if the report is ‘fair’ and, in relation to sub-section (c) if the act is done in ‘good faith’. In all circumstances it is up to the respondent to make the case for the exception.

2.12 This provision provides the appropriate balance of the right to equality and the right to freedom of expression.

2.13 Table 1 provides information on the total number of complaints received by my office since 2011–12 in which allegations of incitement have been made. You will note that incitement on the basis of race figures highly and is alleged in 13.2% of all complaints in 2012–13.

Table 1: Allegations of incitement by attribute

	2011–12	% of all complaints	2012–13	% of all complaints
Total complaints	133		159	
Complaints alleging incitement	29	21.8%	47	29.6%
Race	14	10.5%	21	13.2%
Disability	13	9.8%	20	12.6%
Sexual orientation/lawful sexual activity	6	4.5%	10	6.3%
Religious belief, affiliation or activity	1	0.8%	8	5.0%

- 2.14 Consistent with the object of the Act to provide for ‘conciliation of ... complaints in relation to ... discrimination and conduct’¹ through low-level, affordable and accessible dispute resolution procedures, I and my staff are required under section 74 of the Tasmanian Act to attempt to ‘resolve by conciliation or in any other way’ any complaint that I believe can be resolved in this manner. This can be done through conducting resolution processes at any stage after the complaint is received.
- 2.15 In 2012–13, 74 resolution meetings were held shortly after the complaint was accepted under the Act and of these 41 resulted in resolution of the complaint at or following the meeting. In addition, my office conducted 29 conciliations after the completion of investigation of the complaint; 18 of which resulted in the complaint being resolved between the parties.
- 2.16 Any outcome can be agreed by the parties through the dispute resolution processes so long as it is not unlawful or illegal. Outcomes commonly include a respondent:
- apologising or making a statement of regret or giving an acknowledgement that the person who made the complaint (the complainant) felt aggrieved as a result of the alleged discrimination or prohibited conduct;
 - paying financial compensation to the complainant;
 - undertaking training or education (including for employees of the respondent);
 - providing the complainant with an employment reference detailing duties undertaken, skills, etc;
 - making changes to policies and procedures to better reflect obligations under the Tasmanian Act;
 - seeking involvement of my office in a review of policies and procedures to improve compliance with the Tasmanian Act;
 - making adjustments to address the complainant’s needs;
 - involving the complainant in future developments to ensure they are responsive to the complainant’s needs; and/or
 - developing a program that increases access to opportunities.
- 2.17 Where a complaint has not resolved through the dispute resolution processes or I am of the view that the complaint should be subject to a Tribunal hearing, I have responsibility under the Tasmanian Act to refer the matter to the Anti-Discrimination Tribunal (the Tribunal). In 2012–13, 23 complaints were referred to the Tribunal. Part 6, Division 4 of the Tasmanian Act provides the Tribunal with the authority to resolve a complaint by conciliation or conduct an inquiry into the matter. If the Tribunal finds after inquiry that the matter is substantiated it may make one or more orders, including an order that the respondent not repeat or continue the discrimination or prohibited conduct; an order to redress any loss or injury or humiliation; an order to re-

¹ *Anti-Discrimination Act 1998* (Tas) long title.

employ; or make a payment to the complainant.² Orders are enforceable by the Supreme Court.³

2.18 Of the complaints referred to the Tribunal that the Tribunal finalised in 2012–13, four were dismissed because the complainant sought to withdraw the complaint; ten were dismissed prior to hearing; nine were resolved between the parties prior to hearing; and two were dismissed following the hearing.⁴

2.19 The procedures available to complainants under the Tasmanian Act provide a cost-effective and efficient means of resolving complaints of discrimination and prohibited conduct. The emphasis in the approaches we have adopted is one of education and the promotion of fair treatment of both complainants and respondents. This is also the approach adopted in relation to complaints made under the RDA and I believe is the most effective way of addressing the harm caused by prejudice and discrimination.

2.20 It is my experience that complaints made under the Tasmanian Act—or discrimination law more generally—are not made lightly or about insignificant matters. To the contrary, in many cases the complainant alleges abusive and threatening behaviour for some time prior to taking the step of lodging a complaint and it is not uncommon for allegations to involve descriptions of repeat or ongoing offending by the same person.

P and his family are newly arrived migrants from Bhutan. After moving into rental accommodation, P and his family have been subjected to verbal abuse; they have had a bag of rotten meat left on their doorstep; water balloons have been thrown at the house including through an open window; ice cream, beer bottles, whole fish, fish heads and soiled nappies have also been thrown at the house. Most recently four of the alleged respondents entered P's yard. They banged on his door and windows and yelled at his daughter in the bathroom, asking her for sexual favours including saying 'come and suck my dick you bitch'. P's request to his real estate agent to move out of the property has been denied. P and his family endured this behaviour for over three months prior to making a complaint under the Tasmanian Act.

L, who is of east Asian background, was subject to racially insulting behaviour and abuse at a bus mall by two young women and a man. One girl bowed to him with her hand clasped together and then pulled her skin outwards from her eyes in a manner L took to be ridiculing his racial background. When L reacted, he was screamed and sworn at by the man in a severe, aggressive manner including racist comments and abuse.

² *Anti-Discrimination Act 1998* (Tas) s 89.

³ *Anti-Discrimination Act 1998* (Tas) s 90.

⁴ Anti-Discrimination Commissioner, Tasmania, *Annual Report 2012–13* (2013) 30.

T was verbally abused on the basis of race whilst getting petrol from a petrol station. The respondent allegedly yelled 'hurry up you fucking whore' and 'go back to where you came from you big fat fucking whore'. T was very shaken by the abuse and has suffered ongoing distress. She would like to feel safe in public and for people to live free of racial and sexual abuse.

- 2.21 In some circumstances, making a complaint under the Tasmanian Act is viewed as an avenue of last resort after attempts have been made to follow up matters through internal complaints mechanisms or finding that the behaviour has continued after doing so. In the case of P cited above, four reports were made to Police prior to them providing advice on ways in which P could act to stop what were clearly distressing actions by his neighbours.
- 2.22 In other cases I have received complaints from individuals who were simply going about their daily business and were abused or harassed in a way that was unacceptable by today's standards. L, for example, was walking through a bus mall. T was simply filling her car at the petrol station. It is often the random and unprovoked actions of this kind which leave a lasting legacy with individuals and which can impact on their confidence and feeling part of a shared community.
- 2.23 In addition to provisions under Tasmanian discrimination legislation enabling protection against such conduct on the basis of race, my office has also instituted a program allowing individuals to report incidents where they have been abused or harassed or have witnessed this occurring to another person.
- 2.24 The Report it! program was established in 2009 to increase the awareness of international students and people from culturally and linguistically diverse (CALD) backgrounds about actions they can take to report incidents of racially-motivated discrimination and harassment, particularly in public places. This program was established, in part, as a consequence of an escalation of incidents of violence and aggressive or abusive behaviour toward international students and other recent arrivals.
- 2.25 Working with the Federal Department of Immigration and Border Control, the Tasmanian Department of Premier and Cabinet and the Tasmanian Settlement Network, my Office introduced an incident reporting form to allow both victims and witnesses of race-based discrimination or harassment to report public incidents. In some cases these reports have formed the basis of a formal complaint.
- 2.26 The incident reporting process has enabled my office to get a better picture of patterns of racial abuse and the profile of both victims and perpetrators and led to more informed and targeted preventative interventions. It also represents an important mechanism for more increasing awareness of rights, enables safe bystander action and action particularly by those who may be afraid to make a formal complaint.

- 2.27 In 2012, my office enhanced the incident reporting process and commenced a drive to roll it out more broadly within the community.
- 2.28 Report it! seeks to engage the broader community in promoting tolerance and respectful relationships within the Tasmanian community and allows my office to take action to address anti-social behaviour based on race and other attributes protected under discrimination law.
- 2.29 A report can be made by anyone: those who are the subject of harassment or abuse and those who witness it. Those making the report can remain anonymous if they wish.
- 2.30 The University of Tasmania has also established a taskforce to develop a student safety reporting and contact network to provide a contact point for students at the University who are victims of discrimination, harassment or intimidation.
- 2.31 Students who report incidents are provided with access to trained and supportive networks of assistance with linkages to my office and other organisations such as Tasmania Police.

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NFS Speak & Listen 1300 555 727 & ask for 1300 305 062

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- 2.32 Through the Report it! project in 2012–13 I received reports of 14 incidents that were race or nationality based. Seven of these involved allegations of physical assault, 15 reported verbal abuse and taunting; six involved harassment, five involved intimidation; eight involved discrimination and three were classified as actions aimed at inciting violence.
- 2.33 In 2013–14 to date, I have received reports of ten incidents that were race or nationality based. Of these, one alleged physical assault; eight involved verbal abuse

and taunting; three involved harassment; two involved discrimination; one involved property damage; and one was classified as an action aimed at inciting violence.

2.34 Many of the situations reported to me involve insults or other offensive conduct in public places. In some cases this was a precursor to physical violence. In others, no physical violence was involved. In all cases, however, the victims felt sufficiently concerned about the behaviour to report it to my office. Where it was possible to identify respondents (using CCTV or other footage) the report proceeded to a formal complaint.

2.35 The following are typical elements of the reports I have received:

- Newly arrived migrants or humanitarian entrants being abused or physically threatened on public streets, bus malls or from passing cars by unknown people. The abuse has commonly involved racist name calling and/or being told to 'go back to where you come from'. In one case, the people reporting had been in Australia for only two days.
- Abuse of those who have come here on work visas.
- Racial taunting of long-term Australian residents. For example I have received a number of reports from an Australian of Indian background who had been subjected to months of racially motivated threats and abuse by his neighbour.

2.36 In some cases those who have been the subject of racist abuse are referred to my office by other State authorities on the basis that a complaint or under the Tasmanian Act is the only effective avenue of redress or resolution. Tasmania Police, for example, advised H and his wife N to make a report to me about verbal abuse endured on a bus by a woman who apparently objected to N's head scarf. This and incidents like it are not matters that are able to be prosecuted summarily and therefore the only avenue available to those who have been abused or harassed in this manner is to make a report to me.

2.37 Taken together, I consider that the provisions contained within the Tasmanian Act making specified conduct unlawful, together with educative campaigns such as Report it!, send a strong message that racism is unacceptable in this State. To repeal critical sections of the RDA will, in my view, undermine the strong commitment Governments have previously shown to challenging racism.

3. The impact of repeal of section 18B

- 3.1 The proposal in the Freedom of Speech (Repeal of s.18C) Bill 2014 to repeal section 18B introduces uncertainty regarding actions that will enliven protection under the RDA.
- 3.2 As currently enacted, section 18B provides that if actions are undertaken for two or more reasons and one of those reasons is the race, colour or national or ethnic origin of a person, then the act is taken to be done 'because of' the person's race, colour or national or ethnic origin.
- 3.3 This is similar to provisions in the Tasmanian Act. See for example, section 14(3)(a), which provides that a prescribed attribute, such as race, does not have to be the sole or dominant ground for the unfavourable treatment as defined under the Act.
- 3.4 Repeal of section 18B will lessen the flexibility to interpret action caught by the proposed redraft of section 18C, which is proposed to require that 'the act is done because of the race, colour or national or ethnic origin of that person or that group of persons'.
- 3.5 Use of the phrase 'because of' in draft subclause (1) will require consideration of the reason for the action. Section 18B means that if the action is done for one or more reasons it is enough that one of those reasons is the race, colour or national or ethnic origin of the person or group of people. If this section is repealed, the complainant will be required to prove that race, colour or national or ethnic origin was '**the** material factor' motivating the act.
- 3.6 This is a matter afforded some consideration by Kiefel J in *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 and by Hely J in *Jones v Scully* [2002] FCA 1080. As her honour outlined in *Creek v Cairns Post Pty Ltd*:

There have been differences of view expressed about the meaning of phrases such as "on the ground of" and "by reason" of in the context of discrimination legislation, and as to whether they require a causal connexion between the act

complained of and the characteristic or attribute of the person identified in the legislation.⁵

- 3.7 She cites the view of McHugh J in *Waters v Public Transport Corporation* [1991] HCA 49; (1991) in which he discusses the meaning to be given to phrases such as ‘on the grounds of’ or ‘because of’:⁶

The words “on the ground of the status or by reason of the private life of another person” in s. 17(1) require that the act of the alleged discriminator be actuated by the status or private life of the person alleged to be discriminated against.

...

The words “on the grounds of” and “by reason of” require a causal connexion between the act of the discriminator which treats a person less favourably and the status or private life of the person the subject of that act (“the victim”). The status or private life of the victim must be at least one of the factors which moved the discriminator to act as he or she did.

- 3.8 Whilst His Honour also found that assessment of the action should not be entirely subjective due to actions often including an unconscious bias or motivation, it is necessary to establish the true basis of the decision, in the instances examined whether race was a factor in the respondent’s decision to take the actions they did.
- 3.9 This was a matter given further consideration by Bromberg J in *Eatock v Bolt* [2011] FCA 1103 (28 September 2011). In the context of 18B(b), His Honour poses the view that the phrase ‘because of’ and suggests that this ‘phase poses the “central question” of why the act was done and motive, purpose and effect may all bear upon that question’.⁷ In the case of Mr Bolt, His Honour was satisfied that Mr Bolt ‘wrote those parts of the Newspaper Articles which convey the imputations, **including** because of the race, ethnic and origin and colour of the people who are the subject of them’ (**emphasis** added).⁸
- 3.10 The issue of causation has the subject of appeal in a number of cases related to the RDA. In *Toben v Jones*, for example, the appellant submitted that the approach taken by Kiefel J in *Creek v Cairns Post Pty Ltd* had the effect of robbing the words ‘because of’ of all meaning and effect and that the act of publication should be ‘actuated’ by the origin of the person concerned.
- 3.11 This was not an approach favoured by all members of the Full Court in *Toben v Jones* [2003] FCAFC 137 (27 June 2003). However, all judgments in related cases drew on

⁵ *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 (31 July 2001) [19].

⁶ Cited in *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 (31 July 2001) [20].

⁷ *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) [306].

⁸ *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) [322].

the requirement that race, colour or national or ethnic origin need only form one of the reasons.

- 3.12 The recommendation to repeal section 18B requires that a stronger causal effect must be demonstrated by the complainant such that a person's race, colour or national or ethnic origin must be the central or primary reason for the action.
- 3.13 Removal of section 18B will shift the requirement to prove that the act was done 'because of the race, colour or national or ethnic origin of that person or group of persons' as provided in paragraph 1(b) of the exposure draft. This will have the effect of requiring that an action is motivated by race, colour or national or ethnic origin alone, thereby creating a higher test of behaviour caught by the RDA.
- 3.14 It is my view that narrowing the requirement to demonstrate singular or dominant motivation will result in additional dispute over the action or behaviour, particularly in circumstances where a variety of motives may be evident.
- 3.15 I consider that this is an unnecessary narrowing of the application of the Act and will make operationalizing the provisions of the Part IIA of the RDA very difficult in most circumstances.
- 3.16 It will also provide much greater scope for litigious argumentation about motive and dominant motive, which takes the focus away from dispute resolution and understanding of the impact of prejudice on both the person holding the prejudice and the person affected by it.

4. Prohibition of specified behaviour and racial hatred in the Racial Discrimination Act

- 4.1 The RDA provides the primary legal framework at the federal level to give effect to the *International Convention on the Elimination of all Forms of Racial Discrimination* (ICERD).
- 4.2 It has operated largely without controversy since being enacted in 1975 to provide protection to those who may have experienced discrimination or related behaviour on the basis of race, colour or national or ethnic origin. Part II of the RDA makes racial discrimination unlawful in a range of circumstances and protects the equal enjoyment or exercise of human rights in public life and the right to equality before the law.
- 4.3 Part IIA of the RDA was inserted into the RDA some twenty years after it was first enacted due to gaps identified in the protections afforded against offensive behaviour based on racial hatred.
- 4.4 Several factors gave rise to the decision to expand the protections available in the RDA to capture behaviour that constituted racial hatred. Among them were a number of national reports that found gaps existed in the RDA to address racial vilification. Recommendation 213 of the Royal Commission into Aboriginal Deaths in Custody (RCADC), for example, recommended the introduction of civil procedures to address acts of racial vilification, including the ability to make representative complaints:⁹

Governments which have not already done so legislate to proscribe racial vilification and to provide a conciliation mechanism for dealing with complaints of racial vilification. The penalties for racial vilification should not involve criminal sanctions. In addition to enabling individuals to lodge complaints, the legislation should empower organisations which can demonstrate a special interest in opposing racial vilification to complain on behalf of any individual or group represented by that organisation.

- 4.5 The recommendation of the RCADC echoed those made in 1991 by the (then) Human Rights and Equal Opportunity Commission (HREOC) in its report of the National

⁹ Royal Commission into Aboriginal Deaths in Custody, *National Report*, Vol 1–5 (AGPS Canberra, 1988–1991) rec 213.

Inquiry into Racist Violence in Australia. Addressing the need to combat racist violence and harassment, HREOC recommended a mix of both civil and criminal remedies to address racist violence and harassment, including:¹⁰

That the Federal Parliament enact in the Federal *Crimes Act 1914* a new criminal offence of racist violence and intimidation;

That the Federal *Crimes Act* be amended to create a clearly identified offence of incitement to racist violence and racial hatred which is likely to lead to violence;

That the Federal *Racial Discrimination Act 1975* be amended to prohibit racist harassment;

That the Federal *Racial Discrimination Act 1975* be amended to prohibit incitement to racial hostility, with civil remedies similar to those already provided for racial discrimination;

That the Federal and State Crimes Acts be amended to enable courts to impose higher penalties where there is a racist motivation or element in the commission of an offence.

- 4.6 In making these recommendations, HREOC emphasised that its recommendations were not intended to protect ‘hurt feelings’ or ‘injured sensibilities’; nor would the proposed changes be aimed at preventing private opinion or trivial actions. Further that it was important to maintain a two-tiered approach involving both criminal and civil penalties such that new criminal offence provisions be enacted to address more serious actions involving allegations of racist violence or incitement to racial violence and that a civil remedy be made available that set a lower (although significant) threshold for addressing actions that might be considered racial harassment.
- 4.7 HREOC referred to the kind of behaviour that involved words or conduct that is ‘so abusive, threatening or intimidatory as to constitute harassment on the ground of race, colour, descent or national or ethnic origin.’¹¹ The purpose of addressing harassment through the provisions of the RDA was to enable the types of behaviours that constituted harassment to be addressed through conciliation and education, with possible redress for the complainant, rather than punishment of the offender under criminal law.
- 4.8 HREOC noted that a number of overseas jurisdictions including New Zealand, Canada and Great Britain, had incorporated incitement to racial hatred provisions within their criminal codes.

¹⁰ Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (AGPS, Canberra, 1991) 301.

¹¹ *Ibid*, 299.

- 4.9 The Australian Law Reform Commission (ALRC) also considered this matter in its report into *Multiculturalism and the Law* in 1992.¹² The ALRC recommended the introduction of a new federal offence of racist violence.¹³ With racist violence being a particularly offensive form of discrimination on the basis of race or ethnic origins.
- 4.10 A key issue for the ALRC was to look at options that would enable a single consistent offence of racist violence throughout Australia. In doing so, the ALRC noted that should racist violence become a federal offence it would also be an offence to incite racist violence by way of provisions that make it unlawful to incite, urge, aid or encourage the offence or print or publish any material that has the same effect.
- 4.11 Consistent with the views of the HREOC, the ALRC preferred the use of conciliation, backed up by civil remedies to address behaviour characterised as racist hatred and hostility.¹⁴ Interestingly, the ALRC also considered the need for appropriate sanctions on those who broadcast material that is likely to incite hatred and hostilities against particular race or ethnic communities and recommended that 'legislation regulating broadcasting should include a provision prohibiting the broadcast of material that is likely to incite hatred or hostility against, or gratuitously vilify, any person or group of persons on the basis of, at least, colour, race, religion or national or ethnic origin'.¹⁵
- 4.12 The Racial Hatred Bill introduced into Federal Parliament in 1994 provided for both civil and criminal penalties. However, in August 1995 the Senate passed the Bill with amendments that deleted the criminal offence provisions. As a consequence, the RDA was amended to insert sections 18A to 18F and these remained the primary mechanism for addressing damaging behaviour based on racial hatred.
- 4.13 It is my view that the absence of a criminal offence for racial vilification remains a serious omission in the protection afforded at the federal level and in those jurisdictions that have not incorporated similar provisions within their criminal code, including Tasmania. It is an omission that my office has consistently sought to have addressed.
- 4.14 I have also endorsed the introduction of sentence aggravation provisions similar to section 5(2) of the *Sentencing Act 1991* (Vic) for offences that are motivated by racial hatred.¹⁶
- 4.15 I do not believe, however, that the failure to introduce criminal penalties for serious instances of racist violence or incitement to racist violence is best addressed by the approach outlined in the draft Bill.

¹² Australian Law Reform Commission, *Multiculturalism and the Law* (ALRC Report 57, 1992).

¹³ *Ibid*, [7.33].

¹⁴ *Ibid*, [7.46].

¹⁵ *Ibid*, [7.49].

¹⁶ *Ibid*, vi.

- 4.16 Repeal of section 18C of the RDA and the substitution of provisions restricting the application of the Act to higher-end offences only such as racist violence or incitement to racist violence are at odds with the approach recommended by the ALRC.
- 4.17 Section 18C currently provides an avenue to address racial harassment through a civil jurisdiction. Repeal of this provision will have the effect of permitting racial harassment of the kind currently covered by section 18C of the RDA. Removal of these provisions would arguably not, for example, allow the following actions that have formed the basis of complaint to me to be considered under the RDA.

O made a complaint on behalf of a local football club of racism during matches involving racist comments from both players and spectators. This included being called 'niggers', 'fucking Africans' and 'black cunts'.

M is Aboriginal and complained that he was playing football and a player from the opposition team said to him 'I would like to knock your head off, you black cunt'. When M got angry he was sent off, but the player who made the comment was allowed to stay on the field.

- 4.18 By significantly narrowing the application of the RDA, protection will no longer be available against racist speech and behaviour and the Act will be considerably diminished in its capacity to give effect to Australia's commitments under the ICERD and to serve as a tool to support the improvement of race relations in the Australian community.
- 4.19 There is no doubt that acts 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate' has the capacity to capture a broader range of behaviours than those that would be considered vilification or intimidation as outlined in the draft exposure Bill. I believe this is consistent with the view that discrimination law is an important instrument for the protection of freedom from racial abuse and humiliation.
- 4.20 This is a matter given some consideration by Carr J in *Toben v Jones* in which His Honour links the provisions of section 18C to the objective of 'detering public expressions of offensive racial prejudice which might lead to acts of racial hatred and discrimination'.¹⁷ In outlining his reasons, Carr J drew particular attention to the decision of the Federal Parliament not to proceed with the creation of criminal offences in respect of racial hatred.¹⁸

- 4.21 Carr J went on to say:

¹⁷ *Toben v Jones* [2003] FCAFC 137 (27 June 2003) [19].
¹⁸ *Ibid*, [18].

In my opinion it is clearly consistent with the provisions of the [International] Convention [on the Elimination of all Forms of Racial Discrimination] and the ICCPR that a State Party should legislate to ‘nip in the bud’ the doing of offensive, insulting, humiliating or intimidating public acts which are done because of race, colour or national or ethnic origin **before such acts can grow into** incitement or promotion of racial hatred or discrimination...¹⁹ [emphasis added]

- 4.22 The intention in providing a civil process and remedy for dealing with and addressing discrimination and offensive behaviour was to enable federal human rights bodies to address and resolve complaints by conciliation, with a determination being made by a court only in circumstances where an outcome could not be achieved. Civil procedures of this nature provide effective dispute resolution procedures for dealing with complaints. It avoids unnecessary and costly recourse to court processes and has a strong educative function. I note in this context that of the almost 200 complaints of racial hatred received by the Australian Human Rights Commission in 2013, only five were unable to be resolved by conciliation and went to court.
- 4.23 The protections available under section 18C were deliberately modelled on those provided in the *Sex Discrimination Act 1984* (Cth) and are intended to be applied in a way that captures only serious incidents. They are:
- a) based on the availability of a remedy in specified circumstances;
 - b) judged against objective criteria of what is reasonably likely, in all the circumstances, to give rise to the requisite harm; and
 - c) are limited and targeted through the application of defences (‘exemptions’ under the federal legislation).
- 4.24 Available case law makes clear that the activity caught by section 18C does not amount to ‘mere slights’ nor is it considered to fetter the proper exercise of the right to freedom of expression.
- 4.25 In *Creek v Cairns Post Pty Ltd*, Kiefel J held that the terms ‘offend, insult, humiliate or intimidate’ should relate to conduct that has ‘profound and serious effects not to be likened to mere slights’.²⁰ This accords with the intention outlined in the Second Reading Speech made at the time of the introduction of the Racial Hatred Bill in which the intention of the civil provisions of the Bill were to address serious incidents of ‘extreme racist behaviour’.
- 4.26 I do not believe there is any or sufficient evidence that section 18C unduly restricts the proper exercise of the right to freedom of speech.

¹⁹ Ibid, [20].

²⁰ *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 (31 July 2001) [16].

4.27 In *Jones v Scully*, Hely J held that the racial hatred provisions of the RDA did not unreasonably limit the right to freedom of communication and that the provisions were 'reasonably appropriate and adapted' to the legitimate purpose of eliminating racial discrimination, including the fulfilment of Australia's obligations under the *Convention for the Elimination of Racial Discrimination* (CERD).²¹ Further, Hely J found that section 18D 'does not render unlawful anything that is said or done "reasonably and in good faith",' and that the exemptions provided in section 18D 'provide an appropriate balance between the legitimate end of eliminating racial discrimination and the requirement of freedom of communication about government and political matters required by the Constitution'.²²

4.28 It is my view that the current provisions of the RDA provide an appropriate balance between the internationally recognised and protected rights to equality and protection from discrimination and to freedom of expression.

²¹ *Jones v Scully* [2002] FCA 1080 (2 September 2002) [240].
²² *Ibid.*

5. Vilify and intimidate

5.1 The concepts of vilification and intimidation are inordinately narrowly defined in the exposure draft Bill.

5.2 Vilify is construed to mean incitement to hatred against a person or persons; and intimidate means to cause fear of physical harm.

5.3 This is at odds with the ordinary meaning of these terms.

vilify ... to speak evil of, defame, traduce²³

intimidate ... (1) to make timid, or inspire with fear; overawe; cow. (2) to force into or deter from some action by inducing fear²⁴

5.4 As the RDA is beneficial and remedial legislation its provisions should be given liberal and beneficial construction consistent with the purposes and objectives of the Act.²⁵

5.5 In relation to the concept of vilification, the interpretation adopted in the exposure draft Bill has the effect of requiring an impact on a third person or group of persons. Not only does this have the effect of shifting consideration away from those who have been the focus of the act to those who are allegedly influenced by the primary act, it also minimises consideration of the behaviour itself.

5.6 In my view the proposed changes introduce a level of complexity that will make the resolution of disputes without recourse to the courts almost impossible to achieve. No longer will it be possible to assess behaviour objectively, it will require consideration of the impact that behaviour has on others. This is particularly important when considering that the standards against which actions in subclause (1)(a) of the exposure draft Bill are to be determined is that of an 'ordinary reasonable member of the Australian community'.

²³ *The Macquarie Dictionary* (3rd ed, 1998) 1305.

²⁴ *Ibid*, 593.

²⁵ See, for example, *IW v City of Perth* (1197) 191 CLR 1 at 12 (Brennan CJ and McHugh J).

- 5.7 As a consequence, it will no longer be possible to consider complaints based on racial abuse alone without also being able to demonstrate that the abuse incited others to hate that persons or persons of that race, colour or nationality or ethnic origin.
- 5.8 The approach proposed has the effect of placing complainants at a significant disadvantage by increasing the number of issues they will be required to prove to sustain a complaint. In effect, the threshold for consideration of allegedly racist behaviour risks being set so high that it will be next to impossible for a complaint to meet the threshold let alone succeed under the RDA.
- 5.9 This has largely been the experience in Victoria where the legal test for vilification contained in the *Racial and Religious Tolerance Act 2001 (Vic)* is conduct that incites hatred.²⁶ Nettle J in *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284 (14 December 2006) established that section 8 of the Victorian Act must be interpreted such that the question is ‘not whether the conduct offends a group of persons but whether it incites hatred or other relevant emotion of or towards that group of persons’. His Honour went on to say:
- Things might well be said of a group of persons which would be deeply offensive to those persons and yet do nothing to encourage hatred or other relevant emotion of or towards those persons. Plainly, therefore, evidence of the feelings of a group of persons about whom statements are made cannot be used under s.8 of the [Racial and Religious Tolerance] Act in the way that Hely J. said that they could be used for the purposes of s18C of the *Racial Discrimination Act 1975 (Cth)*²⁷
- 5.10 As with the changes proposed in the exposure draft Bill, the effect has been to shift the focus away from the offending behaviour and its impact on those at whom it is targeted, to a requirement to prove that the act changed the behaviour of a third party. It does not act to tackle hate speech or other racist speech nor does it address the impact of that speech on the complainant. The experience of the Victorian Equal Opportunity and Human Rights Commission has been that it is difficult for acts to meet the threshold established under the *Racial and Religious Tolerance Act* and that it is likely the proposed amendments to the RDA will have the same result.
- 5.11 Similarly the narrowing of the prohibition against intimidation proposed in the exposure draft to mean an act that causes fear of physical harm will restrict the application of the Act to a very limited range of behaviours.

²⁶ Section 8(1) of the *Racial and Religious Tolerance Act 2001 (Vic)* provides that: ‘A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.’

²⁷ *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284 (14 December 2006) at [67].

- 5.12 Whilst acts of actual or threatened physical harm done because of the race, colour or national or ethnic origin of that person or that group of persons represents an extreme form of racism, it is equally important that a broader range of actions are recognised and addressed.
- 5.13 Subtle forms of racism, including name calling, racial slurs, racist jokes and verbal abuse, for example, across a range of public settings is the everyday reality for many people in Australia. At the same time evidence continues to mount about the flow-on effects in terms of physical, psychological and social health of those who are the target of offensive behaviour.²⁸
- 5.14 In Tasmania, I have received a number of complaints and other reports of racially motivated or targeted acts involving actual or threatened physical harm.

V was fishing from a pontoon. Three people—two men and one woman—arrived and V asked them not to smoke near him or throw their cigarette butts into the water as it was littering and they were toxic to the fish.

The younger of the two men said that V was ‘a stupid fucking nigger’ and ‘should fuck off back to Africa’.

A long verbal exchange took place in which the younger man continued to assault and abuse V. He made numerous threats of physical violence before punching V in the head. V attempted to push the man away and then the older man grabbed V from behind. V managed to break free of both attackers. V was followed to his car and they continued to threaten V with physical harm and racially abuse him.

S and his girlfriend were involved in an incident outside a greengrocer’s shop. After buying some basic goods S and his girlfriend were confronted by a group of eight to ten young kids who called him a ‘Chinese cunt’. The young people then proceeded to assault S, smashing his glasses. This continued until he was bleeding badly. S’s girlfriend begged them to stop but they ignored her.

²⁸ Y Paradies, L Chandrakumar, N Flocker, M Frere, K Webster, M Burrell & P McLean, *Building on our strengths: a framework to reduce race-based discrimination and support diversity in Victoria* (Victorian Health Promotion Foundation, Melbourne, 2009) 36–37.

Two people came up behind H's wife and swore at her and shook her violently saying words like 'fuck you'. They did not ask for money; just yelled and attacked. H believes that the incident occurred because of his nationality or skin colour. H got his wife free and then they tried to catch him. The attackers managed to head butt H. A car stopped for a while then drove off. H and his wife then managed to cross the road and get away. H and his wife are still terrified and don't feel safe. His wife cannot sleep at night.

N and her son G were leaving a shopping centre and were confronted by three young men on the other side of the road. One threw a rock at them that nearly hit G in the face. The young men stared at them so they fled back to their house and reported feeling terrified.

- 5.15 In the cases cited above, the victims quite rightly made reports to police. However, in many cases charges do not result from such reports or are not possible on the level of information available about alleged offender(s). In such cases a complaint or report to my office becomes the only avenue to address the behaviour.
- 5.16 Where the incident is such that charges are able to be laid, it is my view that the impact of racial vilification should be taken into account as an aggravating factor in the offence.
- 5.17 In many cases, however, threats of physical harm are not evident but the act may be no less intimidating or fearful.

M and two friends were walking home from the bus stop. It was dark and there were few street lights. There were lots of celebrations happening that night. As they came to an alley way they were confronted by a group of teenagers. M and her friends were frightened and expected that they would do something. M told us that she had been subject to racial abuse that many times she had lost count. The teenagers started shouting at M and her friends, spitting out vulgar words. No physical threats were made.

- 5.18 The narrowing of the basis on which a complaint under federal legislation is able to proceed will serve to allow intimidatory behaviour of this nature to go unchecked. It will allow 'hate speech' and associated acts to continue. The following report, for example, would be unlikely to be caught under the proposed new provisions.

Z advised that the previous evening she had been approached by a young woman employed in door-to-door sales. The sales person had been the victim of a racist attack a few doors down. This included being abused and threatened because of her skin colour. She was particularly frightened by the sight of Ku Klux Klan and white supremacist images 'decorating' the house.

W made a complaint about her neighbours who have swastikas and a white power sign displayed on their property.

- 5.19 Experiences of discrimination and racism are a key barrier to social inclusion. They diminish a sense of connection and belonging to the community, can create a strong sense of marginalisation and isolation and impact on willingness to participate in education, employment and recreational activities.
- 5.20 The persistence of racist attitudes within the Australian community requires a comprehensive response at all levels within the community. It is my view that the RDA currently provides that level of protection, particularly in relation to circumstances that are not covered by State laws and therefore should not be altered.

6. Removal of the reasonable person test

- 6.1 The proposed text in clause (3) of the exposure draft Bill will have the effect of removing the 'reasonable person' test as currently applied to actions in section 18C.
- 6.2 Under section 18C of the RDA, an act is unlawful if it is 'reasonably likely in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people'.
- 6.3 Under the proposed text an assessment will now be made of the impact of the action on 'an ordinary reasonable member of the Australian community'.
- 6.4 This is at odds with the 'reasonable person' test included at section 28A of the *Sex Discrimination Act 1982* (Cth) (SDA) and section 17(1) of the Tasmanian Act, both of which include a similar test.
- 6.5 The SDA establishes in relation to the operationalisation of its sexual harassment provisions, for example, that actions are only unlawful 'in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated'. Similarly section 17(1) of the Tasmanian Act requires that conduct prohibited under this section was conduct that 'a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed'.
- 6.6 Reference in section 18C(1)(a) to 'reasonably likely, in all the circumstances' has been consistently interpreted by the courts as an objective test of the effect of the conduct. It is not related to how the complainant feels. Nor is it determined by the perspective of all members of a particular community.
- 6.7 In *Bolt v Eatoock*, for example, Bromberg J adopted the perspective of a group constituted by 'Aboriginal persons of mixed descent who have a fair skin and who, by a combination of descent, self-identification and communal recognition are, and are recognised as, Aboriginal persons' and was satisfied that 'at least some members of

this group were reasonably likely to have been offended, insulted, humiliated or intimidated by the imputations conveyed by the newspaper articles'.²⁹

- 6.8 In coming to this view, Bromberg J considered the impact the articles would have on an 'ordinary member of the Australian community'. In doing so, he found that whilst the articles would have carried similar imputations, the 'derogatory nature of those imputations would have been conveyed in starker terms than that which ... would be conveyed to an ordinary reasonable member of the Australian community'.³⁰ He went on to say:

... by that I mean that for such a person, each of the newspaper articles are likely to have conveyed a stronger sense of falsity, dishonesty and pretence to the message that the identification as Aboriginal persons by the people in the 'trend' was not legitimate or genuine. Additionally, such a person will be more sensitive to the use of appearance and in particular pale skin colour as an indicator of non-Aboriginality and an imputation that a genuine Aboriginal person does not have pale skin will be more readily conveyed than for an ordinary member of the Australian community.³¹

- 6.9 It is clear from his reasoning that Bromberg did not consider it appropriate to take the view of an ordinary reasonable member of the Australian community and in doing so recognised that the impacts would be different in the circumstances. Citing Gibbs CJ in *Parkdale Custom Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 199 at [199] Bromberg expressed the view that in the absence of provisions to the contrary 'consideration must be given to the class of consumers likely to be affected by the conduct'.³²

- 6.10 The perspective of the 'reasonable person' does not involve the assessment of the particular effect of the offence on the individual or individuals bringing the claim, it requires consideration of the effect on members of a class or group in general: a hypothetical individual who is adopted as a representative member of that group. Importantly, however, Bromberg makes reference to the wording of section 18C(1)(a) to provide guidance and finds that the conduct being assessed may be reasonably likely to offend 'a person' or 'group of people' which in his view 'must be a reference to an identified person (or persons) that the conduct in question was directed at'.³³ That is, that the offence provided for by section 18C(1)(a) requires consideration of the impact of the action on those toward whom it is directed. Bromberg rejected contention that section 18C(1)(a) a 'reasonable person test' should be substituted for the

²⁹ *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) [284 & 298].

³⁰ *Eatock v Bolt* (2011) FCA 1103 (28 September 2011) [283].

³¹ *Eatock v Bolt* (2011) FCA 1103 (28 September 2011) [283].

³² Cited in *Eatock v Bolt* (2011) FCA 1103 (28 September 2011) [244].

³³ *Ibid*, [246].

‘reasonable representative test’ on the basis that to do so would cause the ‘perspective clearly required by the words in section 18C(1)(a) to be ignored’.³⁴

- 6.11 The proposal to move away from the current test to one whereby the effect is determined by the standards of ‘an ordinary reasonable member of the Australian community’ will substantially change the way in which the test is applied and remove the requirement to take into account the cultural sensitivities and impacts of the action.
- 6.12 The revisions proposed in clause (3) of the exposure draft Bill have the effect therefore of significantly changing the standard, such that an assessment is now required of the impact of the action on an ‘ordinary reasonable member of the Australian community’. In the words of Bromberg J, ‘to import general community standards into the test of the reasonable likelihood of offence runs a risk of reinforcing the prevailing level of prejudice’. To do so would in his view be ‘antithetical to the purposes of Part IIA’ of the Act.³⁵
- 6.13 The issues raised by Bromberg J require careful consideration. It is my view that shifting the perspective from which the conduct is assessed will result in a set of provisions that will be largely unworkable and at odds with the objective of the RDA.
- 6.14 It will remove the ability of particular groups within the Australian community to have claims of being treated differently on the basis of race or ethnic origin properly considered. Racism by its very nature involves actions that seek to undermine the dignity and self-worth of a particular person or group of people based on their race or colour or national or ethnic origin. To assess actions by the impact they may have on a person not of the relevant racial or ethnic group risks would lead to a situation where the point of view used to analyse the behavior will include the perspective of persons who is unlikely to have ever experienced racism personally or have no understanding of the particular impact the action may have in the circumstances. It also runs the risk of requiring that the conduct be considered in isolation as those without the particular attributes are less likely to have a history of experiencing racist slurs or comments and, as, would not be considering the conduct against that background.
- 6.15 As a community we are very diverse and the standard of what an ‘ordinary reasonable member’ of the Australian community might look like will differ greatly. To reduce this diversity to a hypothetical ‘ordinary’ Australian risks overlooking the very diversity on which our country is founded.

³⁴ Ibid, [253].
³⁵ Ibid.

6.16 The ordinary English meaning of the term 'ordinary' is 'something that is commonly met with; of the usual kind'.³⁶

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

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

6.18 Clearly the concept of an 'average' Australian does not take into account the considerable diversity of our community. Nor do the provisions as currently drafted require consideration of the action on the basis of any particular cultural sensitivities or connotations associated with the action for the particular person or group at which it was directed. A term, for example, that has a negative connotation for a particular ethnic sub-group may not be well-understood by or shared with the broader community. This lack of understanding was well demonstrated in the recent incidents involving Aboriginal AFL star Adam Goodes, with references to various primates being seen by many commenting on the incidents as having no racial undertones or relevance.

6.19 It is not clear that the concept of an 'ordinary reasonable member of the Australian community' is any more capable of being accurately defined. Stereotypical or prejudiced beliefs form the basis of treatment of persons or groups within the Australian community as different and, by implication, in many circumstances inferior. It is after all one of the fundamental intentions of the RDA to encourage tolerance among groups that are different and to challenge prejudice both in attitudes and effect. It is the very difference that the concept of an 'ordinary reasonable member of the Australian community' overlooks.

6.20 These difficulties are likely to be amplified to the extent that the complainant will have responsibility for mounting their case on the basis of the impact on an 'ordinary Australian' in circumstances where the intent and meaning of this phrase may be less than clear.

³⁶ *The Macquarie Dictionary*, above n23, 810.

³⁷ Australian Bureau of Statistics, *Australian Social Trends, April 2013 – The 'average' Australian* (Cat No. 4102.0).

7. Defences

7.1 The defences (exemptions) proposed in clause (4) of the draft exposure Bill provide a possible defence for words, sounds, images or writing spoken broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter.

7.2 The proposed wording of clause (4) contrasts significantly to the exemption currently found in section 18D. Section 18D provides the following defence for:

... anything said or done reasonably and in good faith:

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (c) in making or publishing:
 - (i) a fair and accurate report of any event or matter of public interest; or
 - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the [person](#) making the comment.

7.3 The proposed exemption also contrasts strongly with the defence available in the Tasmanian Act. Section 55 of the Tasmanian Act provides that the provisions covering offensive conduct and inciting hatred do not apply if the person's conduct is:

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

- 7.4 As currently drafted subclause (4) is likely to apply to almost every conceivable form of speech or behaviour including the most extremes of racist hate speech, particularly when viewed against the narrowness of the proposed prohibitions outlined in subclause (1).
- 7.5 Removing the requirement that the conduct should be undertaken 'reasonably and in good faith' and adding to it a broader range of permitted contexts and actions has the effect of making the exception so wide as to exempt almost all conceivable forms of behaviour.
- 7.6 It is my view that the defences currently available under section 18D are well understood and permit an appropriate balancing of the proper exercise of the right to freedom of speech and the right to be protection from racist speech and behaviour provided by section 18C. This view is supported by the considerable body of case law now available to provide guidance on how section 18D is to be understood and applied.
- 7.7 In *Bropho v Human Rights and Equal Opportunity Commission*, for example, French J held that the test of whether an act was undertaken 'reasonably and in good faith' contained both an objective and subjective component. The act is required to be proportionate for the purposes it was intended and the harm that may be caused to be considered and minimised to the extent possible. In considering how this approach might operate French J was of the view that:³⁸

It requires a recognition that the law condemns racial vilification of the defined kind but protects freedom of speech and expression in the areas defined in pars (a), (b) and (c) of the section. The good faith exercise of that freedom will, so far as practicable, seek to be faithful to the norms implicit in its protection and to the negative obligations implied by s 18C. It will honestly and conscientiously endeavour to have regard to and minimise the harm it will, by definition, inflict. It will not use those freedoms as a 'cover' to offend, insult, humiliate or intimidate people by reason of their colour or ethnic or national origin.

- 7.8 The requirement to act 'reasonably and in good faith' forms an important part of the test of whether an act represents an appropriate application of the right to freedom of expression. To remove it from Part IIA removes the basis on which the dividing line between the protected exercise of the right to freedom of expression and hate speech is to be determined. It has the effect of permitting a very broad range of activity under the guise of legitimate public debate or discussion.
- 7.9 It is important to understand that section 18D operates only where an action is established as coming within the scope of section 18C. Taken as a whole, therefore, under the proposed new provisions, subclause (4) will provide a defence to vilification and intimidation as proscribed in subclause (1). It is my view that defences to actions

³⁸ *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16 (16 February 2004) [95].

that incite hatred or cause a fear of physical harm of the nature proposed are inconsistent with the objectives of the RDA and of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) on which the Act is based. Article 4 of the ICERD for examples requires that parties to the Convention:³⁹

...condemn all propaganda and all organisations which are based on the ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempts to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination...'

7.10 This includes a requirement that parties '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'.⁴⁰

7.11 The obligations contained in Article 4 of the ICERD are not of the nature that warrant the levels of exceptions proposed in subclause (4) of the draft exposure bill.

7.12 Other international treaties to which Australia is a signatory, most notably the *International Covenant on Civil and Political Rights* (ICCPR), provide that everyone has the right to freedom of thought, conscience and religion. In doing so, however, these rights are limited to the extent necessary to protect the fundamental rights and freedoms of others. Article 19(3) for example of the ICCPR provides that:⁴¹

The exercise of the rights ... carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health and morals.

7.13 Article 20(2) of the ICCPR also expressly prohibits 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence' and Article 26 provides that:⁴²

³⁹ *International Convention on the Elimination of all Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 United Nations Treaty Series 195, Australian Treaty Series 1975 No 40 (entered into force 4 January 1969, entered into force for Australia 30 October 1975 except Article 14 which entered into force for Australia on 28 January 1993) Article 4.

⁴⁰ *Ibid*, Article 4(a).

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

⁴² *Ibid*, Article 26.

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

- 7.14 Taken together, the commitments contained within the ICERD and the ICCPR provisions provide the basis on which to establish a balance in Australian law between the need to protect Australians from racial vilification and hatred and the need to protect freedom of speech and association within reasonable limits. It is a balance that I believe has been applied in a considered manner since the provisions of Part IIA of the RDA were enacted.
- 7.15 The key to enabling an evaluation of the appropriateness of the balance struck is the inclusion of the words ‘reasonably and in good faith’ in section 18D. Together they establish a requirement that the exercise of freedom of speech be conducted in such a way that minimises the harm rendered unlawful by the operation of section 18C.
- 7.16 This is a view expressed by Carr J in *Toben v Jones* [2003] FCAFC 137 (27 June 2003) in which His Honour states ‘... a reasonable person acting in good faith would have made every effort to express the challenge and his views with as much restraint as was consistent with the communication of those views’.⁴³ This is a view that has received support in subsequent cases.
- 7.17 Failure to include the proviso that actions outlined in clause (4) of the draft exposure Bill must be undertaken ‘reasonably and in good faith’ allows for any form of public communication—whether hate speech or derogatory or insulting comment—to be exempt from the operation of the RDA.

⁴³ *Toben v Jones* [2003] FCAFC 137 (27 June 2003) [44]

8. Liability

- 8.1 The draft exposure Bill proposes to remove section 18E from the RDA.
- 8.2 Section 18E operates to ensure employers and principals of those who are potentially in contravention of the RDA are also liable for those actions unless they are able to demonstrate that they took all reasonable steps to prevent the employee or agent from doing the act.
- 8.3 A similar provision exists in relation to prohibitions on discrimination under Part II of the RDA.
- 8.4 Such provisions provide an important legal basis on which to require those who facilitate or permit unlawful actions to be held account. Importantly, for example, it can include internet service providers, publishers, social media platform owners or managers and other bodies that control the medium through which acts inconsistent with discrimination law are undertaken.
- 8.5 Similar provision exists under the Tasmanian Act. Section 104(2) for example provides that an 'organisation is to take reasonable steps to ensure that no member, officer, employee or agent of the organisation engages in discrimination or prohibited conduct' and section 104(3) holds an organisation that does not comply with the section liable for any contravention of the Act.
- 8.6 Failure to provide a legal basis on which to seek remedy from principals or employers of those who contravene Part IIA of the RDA will severely limit the capacity of the AHRC to require organisations to comply with orders against the principal respondent. For example, in situations where a photograph or written material posted to Facebook or other media sites is found to contravene the RDA, there will be little basis on which to require the proprietor or manager of that social media site to remove the material.
- 8.7 The existence of such liability provisions in the RDA and state and territory laws provides the basis on which human rights authorities are able to speak to employers and other organisations about their obligations to give effect to discrimination law. This has included, for example, the basis on which my office has encouraged the development of discrimination policies in various workplaces.

8.8 I believe that there are compelling reasons to retain section 18E and oppose the proposal that it be repealed.

9. Conclusion

- 9.1 As outlined above, passage of the draft exposure Bill would result in a significant redrawing of the line between permitted behaviour and unlawful actions constituting offensive behaviour based on racist views and racial hatred.
- 9.2 It is my view that introduction of these provisions will not achieve an appropriate balance between freedom of speech and the right to be free from discriminatory behaviour based on race.
- 9.3 Further, I consider that the proposed changes are not consistent with the objects of the Convention on which existing human rights protections are based and will seriously undermine the ability of Australia to fulfil its obligations under ICERD.
- 9.4 The effect of passage of the proposed changes would be to create a basis for a resurgence of hate speech on a scale that has not been seen in this country for many years.
- 9.5 Taken together the provisions contained within the draft exposure Bill send a public policy message that many forms of racially-motivated actions (including derogatory or insulting speech) are okay.
- 9.6 It will, in my view, give a green light to behaviour that is unreasonable, dishonest and in bad faith. (Indeed, it has already had this effect to some extent.) Further, hate speech such as that engaged in by Holocaust denier Frederick Toben or Olga Scully is unlikely to be prevented should the changes proceed.
- 9.7 I am aware that the Attorney-General has expressed the view that people have the 'right to be bigots'. No law in Australia has been—or hopefully ever will be—directed toward controlling the thoughts or views of its citizens. What is at stake, however, is whether and how those 'bigots' are permitted by law to express such thoughts or views. The current provisions of the RDA allow the bigot to express his or her views in private. The RDA as it currently stands provides a well-reasoned basis on which to establish legitimate duties and responsibilities in the way in which every person, including those with prejudiced views, is able to express those views in public. It does not preclude public discussion in a rational and reasoned way; it does not preclude

discussion associated with legitimate academic or research pursuits. It does, however, preclude the sorts of public discussion that may amount to hate speech or that has the effect of diminishing the rights of others simply because of their race or colour of national or ethnic origin. Further, it seeks to ensure that those who are the subject of prejudice are not themselves silenced by those views being expressed in ways that further marginalise and exclude their legitimate voices.

- 9.8 It is my view that this is a fundamental underpinning of the multicultural community that is modern Australia and as a consequence it is imperative that the current provisions of Part IIA of the RDA are retained.