Submission to the Commonwealth Attorney-General on the Proposed Amendments to the *Racial Discrimination Act 1975* (Cth)

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This submission is written by a group of four academics from the University of Adelaide's Public Law and Policy Research Unit. We are joined by the Honourable Catherine Branson QC, an adjunct professor at the Adelaide Law School, former President of the Australian Human Rights Commission and former Federal Court Judge. In addition, the submission is supported by 14 scholars from across the University (including academics, PhD students and adjunct academics).

We do not support the proposed amendments to the *Racial Discrimination Act 1975* (Cth). Sections 18B, 18C, 18D and 18E of the *Racial Discrimination Act*, as they are currently drafted, represent an appropriate restriction on freedom of speech in a multicultural and democratic society that values diversity.

This submission has three parts:

(i) the first part explains why protections against racially motivated hate speech are an appropriate and necessary restriction on free speech in modern Australia;

(ii) the second part argues that the protections in the current ss 18C and 18D, together, establish an appropriate balance between protecting against racially motivated hate speech and ensuring that free speech on matters of public importance is not unduly infringed; and

(iii) the third and final part argues that the proposed repeal of ss 18B and 18E is misconceived and that the provisions as currently drafted should be retained.

(i) Free Speech in Australian Society Today

Australian society is amongst the oldest in the world. Tens of thousands of years before colonisation by the British, Australia's first peoples lived from the land and practised their culture, language and laws. Today, Australian society is among the most diverse in the world. As at June 2013 an estimated 27.7 per cent of our resident population was born overseas.[1] Persons born in the UK made up of 5.3 per cent of our overseas born residents, followed by persons born in New Zealand (2.6%), China (1.8%), India (1.6%) and Vietnam (0.9%). Australian residents born in Nepal, India, Pakistan, Bangladesh and Sudan have been the fastest increasing groups in the last decade.

This historical and contemporary multicultural diversity provides us with great benefits and strengths as well as posing challenges. Those challenges include the importance of maintaining social cohesion within a multicultural society and the need to protect vulnerable individuals and groups from persecution by others. In recent memory in Australia, there have been a number of incidences where racist attacks have threatened this social cohesion and individuals within the community.

These challenges directly confront the fundamental democratic value of freedom of speech. Freedom of speech is recognised as both a *fundamental* value within a democratic society[2]

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1 Australian Bureau of Statistics, *Australia's population by country of birth,* http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/3412.0Chapter12011-12%20and%202012-13

2 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197 [151] (Heydon J) citing *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 283; *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 at 551; *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 125-127; *Momcilovic v The Queen* (2011) 245 CLR 1 at 178 [444]

and a necessarily *limited* value.[3] Article 19 of the *International Covenant on Civil and Political Rights* recognises this inherent internal conflict:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are 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, or of public health or morals.

Importantly, article 19 emphasises that while the exercise of the right to freedom of *expression* may be subject to restrictions, the right to freedom of *opinion* should not be limited. Thus, the right to freedom of opinion is absolute, but its expression, which may cause harm to others or broader social harm, may be limited in certain circumstances.

Restrictions on freedom of speech must, no doubt, be carefully crafted to prevent their abuse, resulting in unjustified and dangerous limitations on public discourse and criticism. Indeed, democracy is necessarily built on the freedom of speech. There is something attractive about conceptualising this as a complete freedom. Echoing JS Mill, Justice Holmes expressed the notion that it is only through competition in a free market that truth will be uncovered, good ideas will flourish and bad ideas will fail.[4] But this is a highly idealised view, and could only operate where there is equality of access to public discourse.

Australia today remains far from this free speech utopia. An unregulated marketplace of ideas in modern Australian society would simply allow those with money, power and access to mass media to distort the truth. The voices of vulnerable racial minorities would not always be heard. Racially motivated hate speech often silences their voices. It may be targeted to vilify and silence groups who have, historically, been denied equality and participation within society. Professor Jeremy Waldron has explained that hate speech is designed to tell its targets they are not welcome within society, to remind them of their historically lower status.[5] Even if they choose to speak out, their voices will often be unable to rival the reach of other voices that can be, and are, broadcast through the mass media. It may also lead to these groups brooding over their treatment, and this disaffection may breed extremism and violence, further threatening social cohesion.

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3 *Coleman v Power* (2004) 220 CLR 1, [185] (Gummow and Hayne JJ). See also Stanley Fish, *There's No Such Thing as Freedom of Speech and It's a Good Thing Too* (Oxford University Press 1994).

4 *Abrams v. United States*, 250 US 616 (1919), 630 (in dissent); see also JS Mill *On Liberty*.

5 Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012); see also Catherine Branson, 'Can One Have Too Much of a Good Thing? Reflections on Freedom of Speech in a Diverse Society' (Annual Sylvia Walton Equity and Diversity Annual Public Lecture, 10 December 2013, State Library of Victoria).

In a liberal democracy, freedom of speech ought to be limited by prohibitions against racially based hate speech such as those contained in the current ss 18C and 18D of the *Racial Discrimination Act 1975* (Cth). These limits achieve three important goals. They protect against the harm caused to individuals by this speech: discrimination is now proven to be linked to poor physical and mental health.[6] They protect the social cohesion that forms the basis of the strength of our multicultural society. Finally, they protect our democracy by seeking to ensure public discourse is not dominated by the rich and powerful.[7]

If restrictions to freedom of speech are properly crafted, which we submit is the case with the combined operation of ss 18C and 18D, they should not encroach on democratic values, nor on the pursuit of truth. Well-crafted restrictions advance democratic values and the pursuit of truth by promoting equal participation and preventing distortion. The sections do not prevent any group within the Australian community from engaging in public debate, provided that engagement is reasonable, and not based on falsehoods so as to distort the debate.

(ii)(a) The protection provided by the current s 18C is of an appropriate breadth

In a consideration of the breadth of s 18C as it stands, the critical wording is 'reasonably likely … to offend, insult, humiliate or intimidate another person or a group of people'. It seems to us beyond question that conduct which is reasonably likely to intimidate a person on the basis of their race should be unlawful, and indeed the proposed replacement provisions render unlawful both intimidation and vilification.

Whether conduct that offends, insults or humiliates should be unlawful is the subject of the present debate. What is missed, however, in this debate is that judicial interpretations of 'offend', 'insult' and 'humiliate' in s 18C are very narrow. Courts have repeatedly held that only conduct capable of causing 'profound and serious effects' upon a person comes within s 18C, and that a 'mere slight or insult' is not rendered unlawful by s 18C.[8]

The present s 18C of the *Racial Discrimination Act*, as interpreted by the courts, ensures that only racially offensive acts, racial insults and acts causing racial humiliation *that in fact have profound or serious effects* are rendered unlawful. In our view, this strikes the appropriate balance between free speech and the right of all members of society to live their lives free from debilitating racial attacks.

It may be that it is appropriate to amend s 18C to read 'reasonably likely … (i) to cause profound or serious offence, insult, or humiliation or (ii) intimidate another person or a group of people' so that the words of the section make clear to all members of the public that only conduct causing profound or serious offence, insult or humiliation is rendered unlawful. This amendment would enshrine the current judicial interpretation of s 18C.

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6 See, eg, M Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate 2002) 193.

7 Dan Meagher, 'So Far So Good? A Critical Evaluation of Racial Vilification Laws in Australia' (2004) 32 *Federal Law Review* 225.

8 The authorities establish that s 18C applies only to acts which have 'profound and serious effects, not to be likened to mere slights': *Creek v Cairns Post* (2001) 112 FCR 352, [16] (Kiefel J); that 'a mere slight or insult is insufficient': *Kelly-Country v Beers* (2004) 207 ALR 421, [87] (Brown FM); and that it applies only to conduct 'more serious than mere personal hurt, harm or fear' which 'is injurious to the public interest … in a socially cohesive society': *Eatock v Bolt* [2011] FCA 1103, [263] (Bromberg J). See also: *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105, 123 (French J); *Jones v Toben* [2002] FCA 1150, [92] (Branson J).

(ii)(b) The defence contained in the current s 18D strikes an appropriate balance with free speech

The current s18D ensures that the restrictions placed on freedom of speech in s 18C are reasonable and appropriately balanced against the need to ensure free and equal democratic discourse. The replacement of s18D by the new sub-s (4) provides such a wide exemption as to make the protections provided in sub-s (1) meaningless.

Section 18D ensures s 18C does not render anything unlawful that was said or done 'reasonably and in good faith':

> (a) in the performance, exhibition or distribution of an artistic work;
>
> (b) in the course of any statement, publication, discussion of 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.

The judgment and penalty applied against columnist Andrew Bolt in *Eatock v Bolt*[9] demonstrates the *appropriateness* of this exemption, not, as it has been widely reported and argued, its *unacceptable* restriction on free speech. In that case, Bromberg J of the Federal Court took a wide approach to the elements of the exemption. However, even so, he found that Mr Bolt (and his publisher, Herald & Weekly Times) were not entitled to the exemption in s18D because the articles in question were not written or published 'reasonably and in good faith', they were not written for a general purpose of being in the public interest and they were not fair comment on a matter of public interest. The articles imputed that 'fair skinned' Aboriginal people were not genuinely Aboriginal persons, but were motivated by personal gain to falsely identify as Aboriginal.

Bromberg J based these conclusions on his findings that the articles contained 'material' deficiencies and 'significant distortions' of fact.[10] Bromberg J found that Mr Bolt had used inflammatory and provocative language and engaged in mockery and derision of Aboriginal peoples and particularly targeted to sting those people he identified,[11] and that the 'extent of mockery and inflammatory language utilised by Mr Bolt to disparage many of the individuals … far exceeded that which was necessary to make Mr Bolt's point.'[12] Further, Bromberg J found that Mr Bolt could have provided fair comment in the public interest without including the racially offensive imputations.[13]

What Bromberg J's judgment demonstrates is that ss 18C and 18D do not provide an outright prohibition on commentary of the kind provided by Mr Bolt, but that a number of reasonable

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9 [2011] FCA 1103.
10 Ibid [384].
11 Ibid [412].
12 Ibid [414]. See also at [341].
13 Ibid [445-6].

limits existed to this commentary. These limits included that it not be based on known-distorted facts or include irrelevant and gratuitous insulting or offensive comments.

Importantly, Bromberg J noted that the restrictions placed on Mr Bolt's speech by s 18C were 'of no greater magnitude than that which would have been imposed by the law of defamation'.[14] Indeed, had Mr Bolt been pursued for defamation, it is highly likely he would have been required to pay substantial damages to the plaintiffs for his comments (based as they were on incorrect facts) in addition to his legal costs. The law of defamation, as a long-standing and acceptable limit on free speech, provides a good yardstick to assess the reasonableness of the restrictions in ss 18C and D.

In contrast to the appropriate balance struck in ss 18C and 18D, the proposed sub-s(4) creates an unreasonable exemption that undermines the protections provided. This subsection declares the 'section does not apply to words, sounds, images, or writing, spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter.' It is difficult to conceive of speech that would not fall within this exemption. It would allow speech based on manifest, known falsehoods, which vilifies and intimidates. It is fundamentally inconsistent with the protections supposedly provided in sub-s (1).

(iii)(a) Section 18B should be retained

The proposed sub-s(1)(b) replaces s18B of the *Racial Discrimination Act*. This appears to replace a 'multiple causes' provision with a single cause provision. This proposed amendment would make the *Racial Discrimination Act* out of step with all existing Commonwealth anti-discrimination legislation which contains 'multiple causes' provisions. Anti-discrimination legislation in most Australian State and Territories (with the exception of South Australia, Queensland and Victoria, where the prohibited ground must be a 'substantial reason' for the conduct in question) contains such a 'multiple causes' provision.

The reasoning behind this shift to 'multiple causes' (through, for example, the amendment of the *Racial Discrimination Act* and *Sex Discrimination Act*, respectively in 1990 and 1992) can be understood by reading the relevant Australian case law. In regard to Western Australia's anti-discrimination legislation which includes a 'multiple causes' provision, Kirby J pointed out that:

> It involves a recognition of the fact that, typically, human motivation is complex. Discriminatory conduct can rarely be ascribed to a single "reason" or "ground" … Because persons, faced with allegations of discrimination, genuinely or otherwise, assert multiple and complex reasons - and because affirmative proof of an unlawful reason is often difficult - the [WA] Act has simplified the task for the decision-maker.'[15]

In 1987 Kirby P (as he then was) had observed the factual difficulties presented by a single reason provision, such as that proposed by the exposure draft, as follows:

> 'the words of connection "on the ground of" require judgment and the characterisation of conduct in terms of its causation. Most activities of life have multiple causes. … In

[14] Ibid [423].

[15] *IW v City of Perth* (1997) 191 CLR 1, 63

> some cases, where multiple possible causes for discrimination are presented, the task of characterising the "grounds" is a difficult one which calls for judgment and discernment.'[16]

From these observations it is clear that 'multiple causes' provisions better reflect the complex nature of human action and enable the courts to apply the law according to its purpose without the need for straining it.

Evidence indicates that race discrimination is particularly difficult for complainants to prove in Australian courts: the complainant's current heavy burden of proof means that very few race discrimination complaints have been successful. [17] The proposed amendment would increase this burden of proof, making this a legal protection against race discrimination in name only.

(iii)(b) Section 18E should be retained

The exposure draft proposes the repeal of section 18E of the *Racial Discrimination Act*.

Section 18E imposes vicarious liability on a person where their employee or agent does an act in connection with his or her duties as employee or agent that would be unlawful under Part IIA if it were done by the person (s18E(1)). However, this provision does not apply where the person took all reasonable steps to prevent the employee or agent from doing the act (s18E(2)).

We support the retention of s18E for the following reasons:

Section 18E is an appropriate mechanism through which to apportion responsibility for the dissemination of comments that breach Part IIA of the Act. In this way section 18E plays an important role in ensuring that Part IIA of the legislation is effective in fulfilling its purposes.

Section 18E is particularly important given the nature of modern communications, especially those conducted through the mass media (such as television, radio, and print) and/or on the internet. In today's world, acts/comments which are made by individuals in breach of Part IIA can often reach a very large and widespread audience and achieve notoriety because, for example, they are broadcast on radio, published in a newspaper, and/or posted as comments on websites that are owned, hosted or set up by others. While a breach of Part IIA by the individual author may be readily proved, it may not be the case that those responsible for the broad dissemination of the comments will have directly breached the legislation themselves. Causation may prove difficult, for example, where the sole reason/motivation of the media owner/controller is simply to provide a forum for public debate. Yet in a society which abhors racist comments of the type prohibited by Part IIA, it would be a 'remarkable outcome' if those controlling and facilitating their dissemination through mass media were not held responsible for their role in that dissemination.[18]

Section 18E imposes vicarious liability only on those who are employers or agents. In many instances the individual who breaches Part IIA may be the employee of those who own or

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16 *Haines v Leves* (1987) 8 NSWLR 442, 471.

17 Jonathon Hunyor, 'Skin-deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25 *Sydney Law Review* 535.

18 *Clarke v Nationwide News Ltd t/as The Sunday Times* [2012] FCA 307, [97] (Barker J)

control the relevant medium of communication.[19] But this will not always the case, as for instance someone who is a guest on a television or radio program or who posts comments on a website run and administered by a media owner or even a group and its volunteers.[20]

Where agency is established, the case for liability is possibly more readily apparent is the case where the relationship is one of employment.

However, in imposing vicarious liability on employers s 18E merely adapts well established legal principle to ensure greater effectiveness of the legislation in addressing the harm/wrong with which Part IIA deals. The common law has long recognised that employers will be vicariously liable for the negligent acts of their employees that are done in connection with their employment. In part at least, this arises because in most employment situations there is an element of control exercised by employers over their workplaces, and because employees are working to achieve or forward the business purposes of the employer. Quite apart from the importance of the values of respect for the dignity of others and civility, because participation in the labour market is a social policy goal, it is important that at work a sense of social inclusion for all is fostered. Workplaces are therefore important sites that must be free from racist acts/comments. However, s 18E is not so extensive as to impose liability in relation to all racist comments in a workplace because of the substantive provisions of Part IIA. Thus, judicial interpretation of the requirement in s 18C(2)(b) that the relevant act be done in a 'public place' has rejected its applicability to areas of a workplace, such as an office, where only the victim and perpetrator are present or the comments are made in a private way. This reinforces the point that the work done by the vicarious liability provisions is related to the public culture of the workplace.

Finally, if the agent or employer demonstrates that they have taken 'reasonable steps' to prevent the racist act/comment they have no liability at all (s 18E(2)). Judicial interpretation of similar legislative provisions demonstrates that such a requirement need not be at all onerous when all the circumstances are considered.

Conclusion

In conclusion, we submit that the current sections 18B, 18C, 18D and 18E of the *Racial Discrimination Act* provide measured restrictions on freedom of speech that allow our multicultural and democratic society to thrive. We do not believe that there is a case for reforming these provisions. If any reform is warranted, it should be directed to amending s18C so that it applies to conduct which is 'reasonably likely …. (i) to cause *profound or serious* offence, insult or humiliation or (ii) intimidate another person or a group of people'. Such an amendment would be useful in bringing this section in line with judicial interpretation and it would thereby offer a clearer guide for public behaviour in our democratic and multicultural society.

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19 For example Bolt in *Eatock v Bolt and The Herald and Weekly Times Pty Ltd*; Sattler in *Wanjurri v Southern Cross Broadcasting*.

20 See for example *Wanjurri v Southern Cross Broadcasting; Clarke v NWN; Silberberg v Builders Collective of Australia Inc; Jones v Toben*).