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Director
Human Rights Policy Branch
Attorney-General's Department
3–5 National Circuit
BARTON ACT 2600

Dear Madam/Sir,

Proposed amendments to Part IIA *Racial Discrimination Act 1975*

For the reasons I set out below, it is my submission that the proposed amendment should not proceed at all, or in its current form.

1. There is no case for law reform

But for the campaign that followed the decision in *Eatock v Bolt* – a correct decision from which there was no appeal – there has been no concern with the operation of the current law or the reasonableness of the limit it places on speech. The law has operated since 1995. It has stood uncontested as a statement of Australia social and political values. It is a promise to Australia and the world that we take seriously the project of sustaining peaceful and respectful co-existence of many cultures in one society. It is a guarantee of acceptance and inclusion to the migrants we bring to Australia, to the refugees we take into care, and to the indigenous people with whom we seek reconciliation. It provides a touchstone for education, training and awareness programs that address cultural pluralism in Australia. It enables confidential processes that identify harmful conduct, resolve disputes, and reach agreed outcomes. On rare occasions it is the means by which courts have resolved disputes, and offered remedies.

Against this, there is no call beyond those in the post-*Eatock v Bolt* campaign for greater freedom to engage in race-based speech. No private discussion is prevented at all. There is no stifling of public performance, comment, publication, debate or report unless is it is unreasonable and not in good faith. No-one has volunteered there is a race-based comment they want to make, reasonably and in good faith, that they are unable to make. But for the ideological values that underpin it, there is no reason for the proposed amendment.

The only credible rationale for the proposed amendment is an explicit acknowledgement that it reflects a different set of values, that give higher priority than the current law does to

unlimited free speech, and lower priority than the current law does, to nurturing and developing a tolerant and respectful cultural pluralism in Australia.

2. Claims made for the proposed amendment are inaccurate

Claims made in support of the proposed amendment (Sen Brandis, Media Release 25.3.14) cannot be sustained: the proposed amendment does not 'strengthen the Act's protections against racism', and it removes provisions which do not 'unreasonably limit freedom of speech'.

The proposed amendment does not strengthen protection

The proposed amendment does not, as claimed, 'strengthen the Act's protections against racism'. The law currently prohibits conduct that is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate. The proposed amendment would, instead, prohibit conduct that is reasonably likely to incite hatred or to intimidate. This is both a different type of protection, and a lesser level of protection.

The proposed amendment is a *different type of protection* because it is concerned with preventing a type of conduct (incitement) rather than with preventing a type of harm (offence, insult, and humiliation). This different type of protection is less preferable than the existing type of protection because it declares that we are no longer concerned by harm caused by racist speech, it invites people to engage in racist speech that falls short of incitement, it tells minority groups that they are no longer deserving of the protection they once enjoyed, and it identifies Australia as a country willing to reduce its level of human rights protection.

The proposed amendment is *demonstrably a lesser level of protection* in two ways. The first way it is a lesser level of protection is in the defined unlawful conduct: all conduct that would be covered by the proposed amendment is covered by the current law, whereas some conduct that is covered by the current law would not be covered by the proposed amendment. Any conduct that is 'likely to incite' will offend, insult, humiliate or intimidate, but conduct that offends, insults, humiliates or intimidates is not necessarily likely to incite. For example, the current law makes it unlawful to say to an indigenous man 'You and all your kind are lazy, drunken, bludging, violent thieves', but the proposed amendment would permit that to be said, to the indigenous man and to anyone else.

The second way the proposed amendment is a lesser level of protection is in the breadth of exceptions to the defined unlawful conduct: conduct that would be unlawful under the proposed amendment but is permitted by an exception, is unlawful under the current law and would not be permitted by an exception. For example, the current law makes it unlawful to say on an online blog 'It is a proven fact that indigenous people are lazy, drunken, bludging, violent thieves', but the proposed amendment would permit that to be said.

The current law does not unreasonably limit freedom of speech

The proposed amendment removes provisions which do not, as claimed, 'unreasonably limit freedom of speech'. The current law allows race-based speech in any 'performance, exhibition or distribution of an artistic work, fair and accurate report of an event or matter of public interest, or expressing a genuinely held belief on an event or matter of public interest', if done reasonably and in good faith. This gives very wide scope for free speech extending to all matters of public interest.

There are extensive contemporary reports of strong opinion that the limits imposed by the current law are reasonable. Experience of the current law suggest that the limits it imposes on free speech are reasonable. Of those whose speech has been limited, only News Ltd has

campaigned against the reasonableness of the limit, and only because an employee of theirs was found to have acted outside the very extensive available exceptions.

One aspect of the current law has been proposed as an unreasonable limit: the prohibition against causing 'offence', which is said by some to be too low a threshold of harm. This is a claim by some that they are entitled to assess the level of the harm to which others ought be subject: that the limit on free speech should be determined by those who enjoy the freedom without regard to the views of those who are to be protected from abuses of the freedom. Such an approach is perverse, and is perhaps racist in itself. It assumes that, as a test for when a minority is at risk, only the majority's standard of harm is valid, and it demands that a reasonable person of the minority group should experience life as do the majority.

Those in the majority who enjoy freedom of speech are not entitled to say that someone who actually and, in their circumstances, reasonably feels offence should not, or that they are to bear it with resignation. It is the duty of those with the privilege of power to respect and constrain their own use of that power.

Members of a racial minority can live all day, every day, conscious of their different culture and heritage, their different skin colour, their accent, their different practices, customs and preferences. No member of the Australian racial majority can understand what it is to have one's life defined by one's difference. When speech characterises that difference as a deficiency – a sign of inferiority – offence is a real sense that is qualitatively different from any idea of offence that the majority can have. The current law recognises this; the proposed amendment does not.

In summary, the proposed amendment is not supported by claims that it strengthens protections against racism or that removes provisions which unreasonably limit freedom of speech.

3. The proposed amendment is poor policy

The proposed amendment does not represent sound legal policy.

Misplaced reliance on a 'market'

It has been argued that the merits of race-based views to free and effective scrutiny should be assessed in a 'marketplace' of ideas. Reliance on such a market is naïve and misconceived. Race-based conduct causes harm to a minority racial person or group, and because they are in a minority they do not have access to the forums for public comment that the 'speaker' has access to.

Legislative limits are a mechanism of anticipating and remedying the failure of the market in a wide range of circumstances (eg product labelling); the current law recognises that victims of race-based speech do not have the capacity to respond on equal terms, and so sets reasonable limits on the harm that can be inflicted, and on the circumstances in which it can be inflicted.

The exception effectively negates the prohibition

The proposed amendment excepts from the prohibition anything done 'in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter'. This exception is not limited by reference to considerations that are prescribed in other 'likely to incite' laws in Australia: that the act is done reasonably and in good faith. The effect of this is that, in public discussion as defined, the proposed amendment imposes no limit on what can be said or done. Incitement to hatred and

intimidation is permitted. Incitement to hatred and intimidation is permitted even if what is said is irrational or knowingly untruthful.

This is simply bad policy. It abdicates the law's role in setting bounds on public conduct that will minimise unrest and harm. If it is in fact the Government' intention to signal that, as a matter of policy, irrational and untruthful statements that incite hatred and intimidation are permitted in public discussion, then I condemn that policy as divisive, disrespectful, harmful, and unfitting of a government. The exception should require the excepted conduct to be engaged in reasonably and in good faith.

The scope of liability is reduced

The proposed amendment removes any provision for 'vicarious' or 'attributed' liability. As a result, the proposed amendment imposes no responsibility on an employer for the conduct of its employee.

This is contrary to the position in all similar laws in Australia. It is contrary to s 18A in the same Act that makes an employer liable for its employee's racial discrimination. Again this is simply bad policy. It undermines the policy imperative behind imposing such liability, which is to encourage employers to take all reasonable steps to prevent the occurrence of vilifying conduct; in the absence of any risk of liability, there is no incentive for employers to act to prevent vilification by its workers.

The proposed amendment creates constitutional uncertainty

If the proposed exception remains unlimited by reasonableness and good faith, then it threatens the Constitutional validity of other 'likely to incite' laws in Australia. The proposed exception will allow a wider range of conduct than would be allowed under laws of the States and the ACT, so that the established exceptions under those laws will be inconsistent with the federal law.

Similarly, the narrow prohibition in the proposed amendment threatens the Constitutional validity of other 'likely to incite' laws in Australia. Those other laws are concerned, variously, with preventing incitement to hatred, serious contempt, severe ridicule and revulsion. The proposed amendment is limited to preventing incitement to hatred and intimidation and so allows a wider range of conduct than would be allowed under laws of the States and the ACT, meaning that the extent of the prohibition under those laws will be inconsistent with the federal law.

In the same way, the absence in the proposed amendment of any liability on the part of an employer for unlawful conduct raises doubts about the validity of provisions in laws of the States and the ACT that do impose such liability for the same conduct.

The statement of intention in s 18F will not save a State or Territory law that is inconsistent with a federal law.

4. The proposed amendment is poorly drafted

Despite its being practically unnecessary, a weaker form of protection against racism, and poor policy, there is a risk that the proposed amendment will proceed in some form. In that event, I address technical aspects of the proposed amendment.

The proposed amendment is very poorly drafted. A law is poorly drafted if it fails to give clear direction to a regulated party as to how they should behave to avoid liability, and fails to give clear direction to a protected party as to what they must establish to obtain a remedy.

In its current form the proposed amendment will cause confusion, cost and delay, and will fail to achieve even its modest purpose. The drafting shows a failure to know or understand the way in which such laws operate.

The 'race' criterion is misplaced

The proposed amendment incorrectly identifies the causal role that race plays in relation to the prohibited conduct. It is a matter of syntax. As a result, the proposed amendment as drafted will allow a person to easily evade liability.

The proposed amendment switches from 'conduct causing offence etc' to 'conduct likely to incite hatred', without changing the point at which the 'race' element arises:

- The current legislation prohibits conduct – done because of the race of the person/group that is the subject of the conduct – that has a prescribed effect (causing offence etc). The provision addresses the effects of race-based conduct *on a person or group of that race*. The provision asks whether the offending conduct was race-based; if it was not, then the legislation is not concerned to stop it.
- As drafted, the proposed amendment prohibits conduct – done because of the race of the person/groups towards whom hatred or intimidation may be incited – that has a prescribed likely effect (inciting hatred). The provision addresses the effects of race-based conduct *on a person or group who could be incited*. As drafted, the proposed amendment asks whether the inciting conduct was race-based, but the real concern is whether the hatred that was likely to be incited was race-based. The proposed amendment asks the 'race' question of the wrong conduct.

Where a 'likely to incite' provision exists elsewhere in Australia, it does not target race-based conduct, it targets race-based hatred; the question is not 'why did you do the act?', but 'was your act likely to cause race-based hatred?'. There is no question of establishing a reason for the conduct: it does not matter why the act was done, it is the fact that it was likely to cause race-based hatred that matters.

Because the proposed amendment switches to the 'likely to incite model' and continued to use the test of an 'act done because of race', the reason for conduct is made an essential element, and is therefore a way out of liability. Contrary to 'likely to incite' provisions elsewhere in Australia, the proposed amendment, as drafted, is concerned with the reason for the conduct that incited the hatred. Under the proposed amendment, an 'inciter to hatred' can say 'My conduct was not because of the person's/group's race, but because of something else, eg what I believe to be their unsociable conduct, their thieving ways, their disruptive presence, and so on'. In those circumstances – easily claimed and very hard to refute – the person's inciting conduct is not caught by the proposed amendment. This loophole does not exist in other 'likely to incite' laws in Australia, because they have been properly drafted.

The simplest point of reference for the drafter of the proposed amendment would be the established laws to similar effect in the Australian States and ACT. Instead of the proposal's saying 'if … the act is done because of the race, colour or national or ethnic origin of that person or that group of persons', it should define the prohibited conduct as being 'to vilify another person or a group of persons <u>because of their race (etc)</u> or to intimidate another person or a group of persons <u>because of their race (etc)</u>'. Unless this is done, the proposed amendment will completely miss its target.

The test for reasonableness is confused

The proposed amendment requires the likelihood of vilification 'to be determined by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community'. Use of this test is again poor drafting, suggesting an unfamiliarity with the relevant law. It confuses two different circumstances within which a 'reasonableness' test arises.

Under the current law *the imputations of what was said* are determined by reference to an ordinary reasonable member of the Australian community. This approach was taken in, for example, *Eatock v Bolt* (see also *Jones v Scully* [2001] FCA 879 at [125]-[126]). The proposed amendment has nothing to say about the imputations of what was said, which will continue be decided by reference to an ordinary reasonable member of the Australian community. Anyone who is concerned that the views of the 'ordinary reasonable member of the Australian community' should be heard can take comfort in knowing that those views have an established place in the current law.

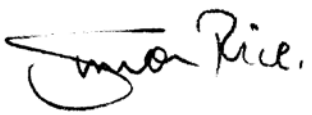
The proposed amendment, however, attaches the 'ordinary reasonable member of the Australian community' test to a different consideration: *the likelihood of a person's being incited*. In established jurisprudence under the 'likely to incite' laws in the Australian States and ACT, this question is answered by reference to an ordinary reasonable member *of the group to whom the conduct was directed* (see eg *Jones v Trad* [2013] NSWCA 389 at [53]-[55]). The proposed amendment is at odds with this jurisprudence. As well, it is irrational: the policy aim is to prevent people being incited, and the likelihood of that happening can only sensibly be assessed by reference to those in a position to be incited, that is, those to whom the conduct is directed.

The exception omits some public conduct

Curiously, the exception to the proposed amendment is limited to 'public discussion' as defined. Differently from the current legislation and other 'likely to incite' laws in Australia, the proposed amendment fails to except performance, exhibition or distribution of an artistic work, fair and accurate report of an event or matter of public interest, or expressing a genuinely held belief on an event or matter of public interest. I suspect that this is a further example of poor drafting, and it should be remedied. If the omission is intentional it is illogical, as it is not supported by the 'promoting free speech' rationale given for the proposed amendment.

For the reasons I set out above, it is my submission that the proposed amendment should not proceed at all. If, despite its being unnecessary, a weaker form of protection, and poor policy, the proposed amendment does proceed, it should not proceed in its current form.

Yours sincerely,



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