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# The Attorney-General's suggested changes to the Racial Discrimination Act 1975

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Law and Bills Digest Section

## Executive summary

- The paper examines the legal implications of changes to the *Racial Discrimination Act 1975* (the *RDA*) suggested by the Attorney-General, Senator Brandis. It does not investigate the policy issues which have been the subject of general discussion, such as the impact of the changes on reconciliation, the proposed constitutional changes or the Close the Gap project, nor does it explore the relative benefits of ensuring more forms of free speech. These issues have been examined extensively elsewhere.
- There are four changes made by Senator Brandis' proposed amendments and these are examined in some depth. Of primary significance is the extension of the pre-existing 'free-speech' provision, which currently provides that relevant speech acts done 'reasonably and in good faith' are not regulated under the *RDA*. The proposed extension would protect a very much broader range of public speech, including speech which would incite racial hatred. To fall outside the proposed section's regulation the communication must simply form part of the 'public discussion' in a very broad range of categories (including, for instance, discussion of a 'political, social or cultural' matter).
- Next, there is the narrowed definition of vilification and intimidation. The requirement that intimidation involve a fear of physical violence would duplicate existing criminal law and tort law provisions. The forms of abuse that would be regulated under the proposed vilification provisions are limited. The examination of these provisions includes an exploration of the nature of race-based insults, which evoke or endorse a significant history of discrimination and prejudice—the difference between such insults and the 'garden-variety' of insults which lack this racial patina is explored.
- The other two changes are more technical, involving a change to the definition of who sets the standard of a 'reasonable' response to racial abuse—the proposed changes would require the judges to cease their current practice of taking race into account when determining what 'reasonably' constitutes a breach of the *RDA*. Finally there is a proposal to delete the section of the Act which recognises that, in determining whether an act is racially motivated, race may be established as simply one of a range of motivations. With this current provision deleted the new section would thus require race to be proved as a more central element of any breach of the Act's racial vilification provisions.
- The paper concludes with a brief examination of the interplay between defamation law and the regulation of speech under the *RDA*. Both are part of a variety of regulatory mechanisms governing speech acts, and both regulate speech which can cause damage, but their history, rationale and processes are different.

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## Introduction

Section 18C of the *Racial Discrimination Act 1975 (RDA)* makes it illegal for someone to do a public act which is 'reasonably likely, in all the circumstances', to 'offend, insult, humiliate or intimidate' someone on the basis of their race. The Government went to the 2013 election with a commitment to reform or repeal section 18C, which falls within [Part IIA of the RDA](#), the part of the Act dealing with the 'prohibition of offensive behaviour based on racial hatred'.<sup>1</sup> This commitment was made on the basis that the ruling in *Eatock v Bolt* should be overturned.<sup>2</sup> *Eatock v Bolt* was a case in which journalist and columnist Andrew Bolt was held to have breached Part IIA of the *RDA* due to his publication of various articles ('It's so hip to be black' and 'White fellas in the black', amongst others). These articles relied in part on inaccurate materials which were designed to illuminate Bolt's thesis that pale-skinned Aborigines illegitimately identify as Aboriginal in order to access assistance designed to benefit Aboriginal people. An earlier Library publication on the *Eatock v Bolt* case, '[Trumping Racial Vilification](#)', gives further background to the case.<sup>3</sup>

Section 18D of the *RDA* provides an overarching freedom of speech limitation on the restrictions of 18C. Section 18D overrides 18C any time it applies — providing that 18C does not 'render unlawful anything said or done reasonably and in good faith' in the course of what might be summarised as public debate or fair comment, including artistic expressions. This means that one is free to give expression to racist ideas, including those that offend, if the expression of these views falls within section 18D's fairly broad definitions of reasonable and good faith free speech. In *Eatock v Bolt* the judge found that section 18D did not apply to save Bolt's publications from the effects of section 18C because 'distortions of fact' in the articles showed a lack of reasonableness and good faith, however he emphasised:

It is important that nothing in the orders I make should suggest that it is unlawful for a publication to deal with racial identification including challenging the genuineness of the identification of a group of people. I have not found Mr Bolt and HWT to have contravened section 18C simply because the Newspaper Articles dealt with subject matter of that kind. I have found a contravention because of the manner in which that subject matter was dealt with.<sup>4</sup>

After the election the plan to change the *RDA* remained an active item on the Attorney-General's agenda and has resulted in [an exposure draft for community consultation being released on 25 March 2014](#).<sup>5</sup> This paper explores Senator Brandis' proposed changes and examines the differences between the current Part IIA arrangements and the proposed new section (currently unnamed and unnumbered).

The proposal is to delete sections 18B-18E of the *RDA* and replace them with one section. This would leave a single pre-extant section in Part IIA, section 18F, which preserves the operation of state and territory laws regulating racial vilification. The current provisions of the *RDA* and the proposed amendment are reproduced at [Appendix A](#).

1. At various stages during the public discussion there has been uncertainty as to what commitments have been made on this matter, with Senator Brandis reported as commenting to the *Australian Jewish News* 'Neither the Prime Minister nor I have ever said we would "repeal Section 18C"' in A Kamien, '[Dreyfus: new law no replacement for 18C](#)', *The Australian Jewish News*, 14 February 2014, p. 6. Senator Brandis conditionally committed himself to the principle that section 18C should be abolished while the Shadow Attorney-General, commenting in 2011 in the immediate aftermath of *Eatock v Bolt* (2011) 197 FCR 261; [\[2011\] FCA 1103](#), that 'Section 18C, as presently worded, has no place in a society that values freedom of expression and democratic governance. If the Bolt decision is not overturned on appeal, the provision in its present form should be repealed.' In G Brandis, '[Section 18C has no place in a society that values freedom of expression](#)', *The Australian*, 30 September 2011, p. 12. The Bolt decision was not overturned on appeal – the opportunity never arose since the decision was never appealed. The Institute of Public Affairs (IPA) media release welcoming Senator Brandis' suggested changes said '[i]n a speech to the Institute of Public Affairs in August 2012 the then Opposition Leader, Tony Abbott, promised to repeal section 18C of the *Racial Discrimination Act*.' The Liberal Party's website seems to be missing [the transcript of this address](#), but the IPA offers [a video of the event](#). The speech was also the subject of an opinion article in which Mr Abbott commented 'The Coalition will repeal section 18C in its present form.' in T Abbott '[The job of government is to foster free speech, not to suppress it](#)', *The Australian*, 6 August 2014, p. 12. The Liberal Party of Australia pre-election document '[Our plan: real solutions for all Australians](#)' provided: 'We will support freedom of speech, particularly in relation to anti-discrimination legislation. Prohibitions on inciting racial hatred or intimidation of particular groups should be focused on offences of incitement and causing fear but not a prohibition on causing offence', January 2013 at p. 44. The document did not explicitly discuss section 18C.; The Nationals pre-election policy outlined in '[Our plan for regional Australia](#)' said 'The Nationals endorse the repeal of s. 18C of the *Racial Discrimination Act 1974 (Cth)* and corresponding sections of state anti-discrimination Acts, in the interests of free speech and a free press', 22 August 2013, p. 87. Finally see more generally, J Wright, '[George Brandis to repeal "Bolt laws" on racial discrimination](#)', *The Sydney Morning Herald*, 8 November 2013.
2. *Eatock v Bolt* refers throughout to *Eatock v Bolt* (2011) 197 FCR 261, [\[2011\] FCA 1103](#) (28 September 2011) although it is noted that the final decision on the judgment was resolved in *Eatock v Bolt (No. 2)* (2011) 284 ALR 114, [\[2011\] FCA 1180](#) (19 October 2011).
3. K Magarey, '[Trumping racial vilification](#)', FlagPost weblog, 19 March 2014, accessed 14 May 2014.
4. *Eatock v Bolt*, op. cit., at para 461.
5. Attorney-General's Department (AGD), '[Amendments to the Racial Discrimination Act 1975](#)', AGD website, accessed 14 May 2014.

It should be noted that, while there is some continuing confusion on this matter, the mooted changes would leave a breach of the *RDA* a civil matter, not a criminal matter. As a civil matter, the consequences of a breach are to be pursued by the victim, rather than the state (as would be the case in a criminal matter). The matter then falls to be determined either through mutual agreement, which can be mediated or ‘conciliated’ by the Australian Human Rights Commission (AHRC), or by an order of a Federal Court, if the matter is continued and mediation is unsuccessful.

This continuing confusion as to whether breaches of the *RDA* constitute ‘offences’ could be due to the fact that the proposed changes would duplicate both existing tort and criminal law. The proposed definition of intimidation involves inducing a fear of physical violence. An action which causes fear of physical harm falls within the existing definition of the tort of assault, and may also constitute a criminal assault. In both cases there is an action inducing a fear of physical violence.

The proposed changes would, however, make four significant textual and jurisprudential changes. These might be summarised as:

- changing the requirement that race is ‘*a*’ reason for doing an act to ‘*the*’ reason for doing an act
- changing the nature of the ‘reasonableness’ comparison
- narrowing the basis for a breach of the Act by redefining racial vilification
- broadening the ‘free speech’ defence.

This paper looks at the four changes in turn in what is, arguably, an ascending order of significance. So we start with the less significant changes and end with the changes that would have a more dramatic impact on the operation of the provisions. Finally the paper looks briefly at the interplay between defamation law and the law governing racial vilification, because the two areas overlap in their coverage and it is possible that restrictions on the operation of the *RDA* will result in more people turning to defamation law for redress.

### **Changing the requirement that race is ‘a’ reason for doing the act to ‘the’ reason for doing the act.**

The proposed deletion of section 18B, which would not be replaced by any comparable provision, would make the operation of the proposed section dealing with racial vilification more restrictive. Both the current and the proposed forms of the legislation (see [Appendix A](#)) require the offending act to have been done ‘because of’ someone’s race (or colour or national or ethnic origin (‘race’)). The current section 18B, which is proposed for deletion, allows a complainant, when proving that an action was done *because of* race, to prove that race was simply one of the reasons for the doing of the act. The complainant can thus avoid having to prove that race was the only or dominant reason, simply requiring race to be established as one of a range of motivations.

This current arrangement reflects experience under other anti-discrimination legislation. It is often difficult to prove motivation, particularly because it is information peculiarly within the knowledge of the ‘defendant’. Thus anti-discrimination law does not often require a targeted proof regarding motivation, simply that it be ‘a’ reason (see, for example, the *Sex Discrimination Act 1984*, [section 8](#)<sup>6</sup>).

The proposed new section requires the act to have been done ‘because of’ the race of that person with no legislative recognition of possible multiple motivations. Subsequent judicial interpretation of whether race is ‘the’ relevant motivation for an act would be guided by traditional principles of statutory interpretation, which would include consideration of the Parliament’s motivation in introducing the modified provision. While this matter is yet to be determined, the current public intention of the Government in introducing the proposed changes is to narrow the conditions in which the prohibition on speech would apply. If enacted the changes are likely to result in any ambiguity being resolved in favour of a narrow interpretation, requiring race to be at least the dominant reason for an act.<sup>7</sup>

### *Practical implications and case studies*

The requirement that an action be taken ‘because of’ the race of a person is often easily established in cases taken under the *RDA*’s racial vilification provisions. It often forms the very rationale for the breach. Nevertheless, there have been cases where this requirement has negated a complaint.

6. [Sex Discrimination Act 1984](#), accessed 14 May 2014.

7. N Rees, S Rice and D Allen, *Australian anti-discrimination law*, second edition, Federation Press, Annandale, 2014. This text explores discrimination law jurisprudence on this issue and, at 4.2.19-20 and 4.2.28, suggests the courts would look for race as a ‘significant reason’ or the ‘true reason’.

An example where it was not established that an action was taken ‘because of’ race is [Creek v Cairns Post Pty Ltd](#).<sup>8</sup> The *Cairns Post* published an article about an Aboriginal child’s contested adoption and custody arrangements. In photos accompanying the article the white couple involved were portrayed in comfortable middle class surroundings, while the Aboriginal woman was shown in a bush setting in front of a fire with children sheltering in a shanty in the background. In fact the Aboriginal woman lived in an urban setting in a comfortable four bedroom house, and the photo was archival, deriving from an incident in which the applicant had assisted in locating some New Zealand backpackers who had become lost in a remote area. In the context of contested arrangements for a child’s care the photo led to a range of unfavourable imputations about the woman’s suitability.

Justice Kiefel found that the *Cairns Post* had not violated section 18C because its publication of the photo was not ‘because of’ race, rather it was due to thoughtlessness, relying as it did on a readily available archival photo, without considering its accuracy or suitability. It may have been defamatory, certainly the judge found it would have caused offence in the relevant reasonable person,<sup>9</sup> but the decision to publish the photo was not proved to have been taken on the basis of race, so it did not offend 18C. This was the finding even when 18C was accompanied by 18B’s more expansive definition of ‘because of race’.

In a counter-factual scenario one can imagine the decision may be taken both because of the immediate convenience of the archival photo and also for race-based reasons. It might, for instance, be possible to establish that the journalist concerned was careless about, or even antagonistic towards, members of the race in question. This attitude could have contributed to the inappropriate use of archival material. Under provisions formulated without section 18B such a duality of purpose would be less likely to satisfy the relevant test.

In [Cairns Post](#) Justice Kiefel also provided a detailed analysis of the terms ‘on the ground of’ and ‘because of’ in anti-discrimination law, and in other contexts. The analysis provides a useful demonstration of the significance of this qualification and also reflects on the nature of the legislative requirement to prove the rationale for an intention.

Justice Kiefel’s consideration of the matter encompassed the idea that an act may be undertaken as an unconscious exercise of discriminatory practice but that it is a matter of establishing the ‘true reason’. Overall

[t]he enquiry [into whether discrimination had occurred] considers what was in truth likely to have given rise to it, when regard is had to all the circumstances, and this would include the nature of the conduct and the words and expressions used.<sup>10</sup>

The proposed deletion of 18B does not affect the nature of the enquiry, but would make it more onerous to establish race as *the* ‘true reason’ for an act.

### Changing the nature of the ‘reasonableness’ comparison

To fall within section 18C’s prohibition, a speech act must be race-based and ‘reasonably likely’ (in all the circumstances) to ‘offend, insult, humiliate or intimidate’. The courts have an established jurisprudence to establish how ‘reasonably’ is to be interpreted. The standard of reasonableness has been established by reference to a group of people who share the complainant’s racial background.

The proposed changes would over-ride this established judicial approach, requiring instead that the relevant standards by which these matters are to be judged must not recognise ‘any particular group’ within the Australian community. The relevant comparators are, instead, to be defined by reference only to ‘an ordinary reasonable member of the Australian community.’ (Proposed subsection (3) of the new section.)<sup>11</sup>

8. *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, [\[2001\] FCA 1007](#).

9. *Ibid.*, per Kiefel J at para 13.

10. *Ibid.*, per Kiefel J at para 22. *Hagan v Trustees of the Toowoomba Sports Ground Trust* [\[2000\] FCA 1615](#) is another case where an act was not shown to be ‘because of’ race. The naming of the ES ‘Nigger’ sports stadium was due to a historical nickname, rather than the race of the individual or an intention to insult. In situations where race cannot be established as any reason section 18B’s removal would be irrelevant, but in cases where race is one of a variety of reasons for the doing of an act, section 18B’s removal will make it more difficult to establish a breach.

11. The logic of the proposed amendment may follow on from a view of the matter offered by J Allan in ‘[Getting it wrong on hate speech](#)’, *The Australian*, 7 March 2014, p. 31. Professor Allan suggests that the test under section 18C ‘is some victim group-specific, hypothetically constructed mishmash that seems to involve taking the self-proclaimed victims and creating some ‘hypothetical representative’ test, whatever that means.’ The jurisprudence of the objective or subjective nature of these decisions is discussed in the following section.

### *Practical implications and case studies*

When discussing the proposed changes Tim Wilson, the Human Rights Commissioner, reflected that the law—through the judges—has frequently had cause to consider how a ‘reasonable’ view is to be established: ‘Courts have had a long standard of establishing what an ordinary person is and assessing it against what they think is reasonable’.<sup>12</sup> The courts in cases under Part IIA of the *RDA* have developed a clear jurisprudence that race is relevant to a racial insult. The proposed changes would, however, override that jurisprudence and would remove the courts’ capacity to make such judgements.

This evaluation as to what is reasonable, and by whose standards this is to be judged, is indeed a vital and oft repeated requirement when applying the law in a number of different legal areas. The classic legal approach is sometimes referred to in the context of the English common law and its appeal to the ‘man on the Clapham omnibus’—the classic English comparator. Over time the law, when establishing a ‘comparator’ to determine ‘reasonableness’, has tended to ensure the comparator is more directly relevant and shares necessarily relevant features with the individual under examination.

The legal question is raised acutely in the case of the criminal law, which frequently requires the courts to establish the ‘reasonableness’ of a response. So, for instance, in deciding whether a person’s violence was a ‘reasonable’ act of self-defence, the courts may contemplate a comparable individual faced with the situation. The law has required the ‘comparator’ to share relevant features with the individual under consideration. Thus, a victim of domestic abuse, responding with violence, is to be judged as ‘reasonable’ according to the hypothetical characteristics of another female (as appropriate), with similar physical dimensions, sharing their history as a victim of domestic abuse. A diminutive female who has been terrorised over time may react with a violence which would be inappropriate if undertaken by a physically stronger male who has not lived in the same circumstances.<sup>13</sup> Thus, a comparator is required to share the relevant features of the individual under examination.

Similarly the nature of the ‘reasonable comparator’ has arisen under the *RDA*’s provisions and has generated a clear jurisprudence. The question of a suitable standard of reasonableness under section 18C was recently explored in [Clarke v Nationwide News Pty Ltd \(trading as The Sunday Times\)](#).<sup>14</sup> In this case Justice Barker agreed with the earlier decision by Justice Bromberg in [Eatock v Bolt](#), and many judges before him, who have concluded that in cases of racial abuse it is suitable to have regard to the racial characteristics of the complainant. It is important to note that at the same time the judges have found that a level of objectivity is required, and the purposes of the *RDA* ‘are to be served by objectively attributing to the ‘ordinary’ or ‘reasonable’ representative of the group, characteristics consistent with what might be expected of a member of a free and tolerant society’.<sup>15</sup>

The judgements exhibit scrupulous attempts to walk a difficult line between the objective and the subjective. There is a continuous attempt to move the perspective away from a subjective reaction to a more objective standard, while preserving the relevant characteristics of the comparator.

An earlier case involving section 18C was [Hagan v Trustees of the Toowoomba Sports Ground Trust](#).<sup>16</sup> In that case the name of a sporting stand, the ‘ES ‘Nigger’ Brown Stand’ was found not to violate section 18C because the terminology failed the test of being reasonably likely to insult or offend. This was partially because evidence was given that many Aboriginal people in the local community did not share the applicant’s offence at the name. The terminology was found to be a factual historical reference to the nickname of a prominent local sporting identity rather than being used as an insult. This contributed to an analysis which found that the complaint had not been shown to be reasonably likely to cause insult according to a reasonable comparator:

It is apparent from the wording of s 18C(1)(a) that whether an act contravenes the section is not governed by the impact the act is subjectively perceived to have by a complainant. An objective test must be applied in determining whether the act complained of has the necessary offensive, insulting, humiliating or intimidatory quality for it to be

12. A Geoghegan and E Harvey, ‘Interview with Tim Wilson’, [ABC News 24 Weekend Breakfast](#), [note: transcript only available], Australian Broadcasting Commission, 29 March 2014, accessed 1 May 2014.

13. See, generally, A Hopkins and P Easteal, ‘Walking in her shoes. Battered women who kill in Victoria, Western Australia and Queensland’, *Alternative Law Journal*, 35(3), 2010, p. 132, accessed 14 May 2014.

14. [Clarke v Nationwide News Pty Ltd \(trading as The Sunday Times\)](#) (2012) FCR 389, [\[2012\] FCA 307](#)

15. *Ibid.*, per Barker J at para 59.

16. [Hagan v Trustees of the Toowoomba Sports Ground Trust](#) [\[2000\] FCA 1615](#).

within the sub-section. The question so far as section 18C(1)(a) is concerned is not: how did the act affect the particular complainant? But rather would the act, in all the circumstances in which it was done, be likely to offend, insult, humiliate or intimidate a person or a group of people of a particular racial, national or ethnic group?<sup>17</sup>

[Clarke v Nationwide News Pty Ltd trading as The Sunday Times](#) was a case in which a grieving mother, who had lost three children in a car accident involving a stolen vehicle, was subject to a range of offensive race-based commentaries.<sup>18</sup> The court found that the perspective of the grieving mother was too subjective. Rather than considering the matter from her perspective they decided that:

... the appropriate perspective is that of adult members of the local Aboriginal community, including parents and carers of children. While a reasonably broad perspective, it encapsulates the persons who are likely to be offended by the statements complained of, but is not so narrowly cast as to invite a consideration of the subjective or emotional concerns of a grieving parent.<sup>19</sup>

The recent case of [Sidhu v Raptis](#) summarised the matter as follows:

... an objective test is required, even where the words were addressed only to a specific individual. However, the test is to be applied with the perspective of a reasonable person living in Australian society in the complainant's position, that is a hypothetical person with a relevant race, colour or national or ethnic origin or with some other reason for possibly being offended by an act of the type complained of ...<sup>20</sup>

This follows the law's general approach that insults directed at an individual are to be interpreted from the perspective of someone with the characteristics that would make such an insult relevant. The judgments also demonstrate an understanding that those with a history of being subjected to such abuse may have cause to 'reasonably' experience a stronger reaction:

Communications about a historically oppressed minority group are far more likely to cause relevant harm to that group, than communications which relate to a dominant majority.<sup>21</sup>

Just as, in cases of self-defence, the history of the behaviour is relevant to determining how 'reasonable' the response is, so in cases of racial vilification it can be seen that part of the exacerbated nature of the offence or insult is their reiterated nature. Being called a 'nigger' for instance, conjures up a history of discrimination and oppression against African-Americans that is long and substantial. By evoking or endorsing this history the insult is arguably more egregious than a racially-neutral term which would otherwise fall at a comparable level. In fact a thought exercise to discover a comparable non-race based insult shows it to be next to impossible. Obviously the egregiousness of an insult will depend on the force and intention with which it is delivered, as well as the history behind the relevant parties, however when the matter is contemplated in the abstract it can be seen that 'garden variety' insults do not measure up to 'nigger' used as an insult, since they lack the racial patina giving race-based insults force. In the end it may be that there is no race-neutral equivalent.

The nature of insults and their contexts is complex, and much has been written on them. It is not possible to examine the matter in detail here, suffice it to say that, in the search for an equivalent race-based insult, gender-specific insults may arise as a plausible equivalent. However gender-specific language and their related degrees of offensiveness raise new complexities. Interestingly gender-specific insults may share with race-related insults a greater level of offensiveness than 'garden variety' insults, presumably because they also evoke a history of discrimination and oppression. Another commonality may be that they reflect features of a person that are traditionally regarded as an inherent or immutable aspect of a person's identity. Evidence has been given that this is part of the heightened offensiveness of the race-based insult.<sup>22</sup>

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17. Ibid., per Drummond J at para 15.

18. [Clarke v Nationwide News Pty Ltd \(trading as The Sunday Times\) \[2012\] FCA 307](#)

19. Ibid., per Barker J at para 191.

20. [Sidhu v Raptis \[2012\] FMCA 338](#) per Smith FM at para 6.

21. [Clarke v Nationwide News Pty Ltd trading as The Sunday Times \[2012\] FCA 307](#) at para 74.

22. N Priest and D Allen, 'Why changing the Racial Discrimination Act is a public health issue', Croakey: the Crikey health blog, in M Sweet, 'The Racial Discrimination Act needs strengthening – not weakening: a public health perspective', *Crikey*, 25 March 2014; and Close the Gap Campaign Steering Committee, 'Close the Gap Campaign submission to the Attorney-General's Department on Part IIA of the Racial Discrimination Act', 30 April 2014, accessed 14 May 2014.

It could be argued that ‘garden-variety’ insults, since they could relevantly be applied to *any* person, do not reach to the deeper levels of identity and history that race-based or gender-based insults do. One commentator on these issues gives the question of the historical nature of race-based insults a sombre turn when he says: ‘Yes, millions of Jews have died through racism. And countless Aborigines have died from the same cause. The ‘simple’ race-based insults [Senator Brandis] would allow will be walking on their graves.’<sup>23</sup> While it is beyond this paper’s ambit to explore this matter further it should be noted that [Coleman v Power](#) offers a legal consideration of the role of the generic insult in Australia’s political life.<sup>24</sup>

Many courts have recognised a need to ‘contextualise’ insults under section 18C without making the matter subjective. With an oft-repeated comment the courts have affirmed that the individual characteristics which lead to a subjectively formed ‘offence’ reaction are not to be taken into account. So, Justice Barker, quoting Justice Bromberg, commented:

... a group of people may include the ‘sensitive as well as the insensitive, the passionate and the dispassionate, the emotional and the impassive’. For that reason it is necessary to consider only the perspective of the ordinary or reasonable member or members of the group, not those at the margins of the group whose view may be considered unrepresentative.<sup>25</sup>

The proposed new section introduces restrictions on these judicially developed interpretations of the *RDA*’s provisions, specifying, as mentioned above, that no ‘particular group’ may be kept in mind. While stripping the alleged victim of a race-based offence of their racial identity may assist in avoiding the ‘over sensitive’, it would also remove the context which gives the insult meaning, thus making it difficult to assess its likely effect. The ‘ordinary’ Australian may find being subject to racial abuse bizarre rather than offensive. The ‘ordinary’ Australian is, traditionally and statistically, likely to be a ‘white’ person of Anglo-Saxon or European descent, and is unlikely to have a history of being racially abused. Since every member of the Australian community falls within a particular racial ‘group’ the proposal to specify that no ‘particular group’ can be taken into account would leave the judges contemplating a composite average that may be devoid of crucial elements of meaning and history.<sup>26</sup>

Considering how the ‘ordinary, reasonable’ Australian would feel to be called a ‘nigger’ ([Sidhu v Raptis](#))<sup>27</sup>, or a ‘black bastard’ ([Trapman v Sydney Water Corporation & Ors](#))<sup>28</sup> might result in bewilderment, rather than giving the statement meaning. The judges’ decisions to take race into account when constructing a ‘reasonable comparator’ might be considered a logical response to racially based offences.

In the end the proposed changes may introduce a further layer of complexity because, to give the proposed prohibition meaning, the hypothetical ‘ordinary reasonable’ Australian may have to consider their reaction if they were of a race relevant to the offence and were subject to the abuse. The judges might therefore be asked to effectively perform a double hypothetical, as they consider the ‘ordinary reasonable’ Australian’s attempts to, in turn, consider the ‘reasonable’ and relevant subject’s reaction to racial vilification. Under the current

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23. P Grant, ‘[An Open Letter to Senator Brandis on the occasion of his address to the Jewish community](#)’, Let’s Talk About That website, 25 April 2014.

24. [Coleman v Power](#) (2004) 220 CLR 1, [2004] HCA 39 was a case involving the constitutionally protected right to freedom of political speech and a student who, when distributing leaflets alleging corruption in the police force, was approached by a police officer named in the leaflets whereupon the student pushed the officer ‘and said loudly: ‘This is Constable Brendan Power, a corrupt police officer’ per Gleeson CJ at para 1. He was then arrested but the High Court subsequently found that the student’s free speech was constitutionally protected, Kirby J commenting at para 239:

One might wish for more rationality, less superficiality, diminished invective and increased logic and persuasion in political discourse. But those of that view must find another homeland. From its earliest history, Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion. They are part and parcel of the struggle of ideas. Anyone in doubt should listen for an hour or two to the broadcasts that bring debates of the Federal Parliament to the living rooms of the nation. This is the way present and potential elected representatives have long campaigned in Australia for the votes of constituents and the support of their policies. It is unlikely to change.

That case was not, however, looking at racially-based insults, and is not, therefore, so directly relevant. When providing constitutional protection to certain forms of political speech the High Court allows for some regulation of speech acts, it just considers whether that regulation imposes a burden on the freedom of political communication that is not reasonably appropriate and adapted to achieving an end, the fulfilment of which is compatible with the system of representative and responsible government prescribed by the *Constitution*.

25. [Clarke v Nationwide News](#), per Barker J at 62.

26. An influential piece on the understanding of this provision was provided by Waleed Ally in W Ally, ‘[Brandis’ race hate laws are whiter than white](#)’, *The Age*, 27 March 2014.

27. [Sidhu v Raptis](#) [2012] FMCA 338.

28. [Trapman v Sydney Water Corporation & Ors](#) [2011] FMCA 398.



arrangement the judges have been in the position of that 'ordinary, reasonable' Australian when attempting to determine how offensive a racial insult is.

Considerations about how to make these comparisons will become less relevant, however, if all of the proposed changes are made. Other redefinitions, discussed below, would render the interpretive role to be played by the courts significantly less important.

### **The redefinition of racial vilification**

The proposed sections would make it unlawful (in public):

- (i) to vilify another person or a group of persons; or
- (ii) to intimidate another person or a group of persons

This definition would significantly narrow the actions prohibited under the *RDA*, both because fewer actions would be prohibited, and because the definitions of the remaining prohibitions (to 'vilify' or to 'intimidate') are given an additional, restrictive interpretation.

#### *To vilify*

Vilification, as defined in paragraph (2a) of the proposed section, has this specialised meaning:

vilify means to incite hatred against a person or a group of persons.

Dictionary and common meanings of the word are broader. The Oxford English Dictionary (OED)<sup>29</sup> gives this current definition of 'vilify':

- 1. a. To lower or lessen in worth or value; to reduce to a lower standing or level; to make of little (or less) account or estimation.
- 2. a. To depreciate with abusive or slanderous language; to defame or traduce; to speak evil of.

The Macquarie Dictionary<sup>30</sup> offers this definition of vilify:

to speak evil of; defame; traduce ...

The proposed section does not cover the 'defame' and 'traduce' aspects of the definition, focussing instead on 'hatred'. This contrasts with state and territory legislation which include definitions of incitement to hatred which cover inciting 'serious contempt for, or severe ridicule of', or 'revulsion'.<sup>31</sup> The proposed amendment does not go on to supply a legislative definition of 'hatred'. In the absence of a legislative definition the courts would have regard to secondary materials, provided during the course of a Bill's passage through Parliament, and the plain English definition, as supplied by a dictionary definition.<sup>32</sup> The OED<sup>33</sup> supplies:

The condition or state of relations in which one person hates another; the emotion or feeling of hate; active dislike, detestation; enmity, ill-will, malevolence.

While the Macquarie Dictionary<sup>34</sup> supplies:

the feeling of someone who hates; intense dislike; detestation. [hate is in turn defined as 'to regard with a strong or passionate dislike; detest.']

#### *Practical implications and case studies*

There has been some debate about what behaviours the proposed Bill will cover. The Attorney-General has suggested that abuse thrown during a sporting event might constitute behaviour that will fall within the Bill's

29. [Oxford English dictionary](#) (OED), Oxford University Press, Oxford, 2010-, accessed 14 May 2014.

30. *Macquarie dictionary and thesaurus* (Macquarie dictionary), Macmillan, Derrimut, Vic, 2012, accessed 14 May 2014.

31. Victoria's [Racial and Religious Tolerance Act 2001](#), defines vilification to cover 'incites hatred against, serious contempt for, or revulsion or severe ridicule of,' see ss. 7, 8, 24, 25, or the ACT's [Discrimination Act 1991](#) s.66(1)(a) which covers 'serious contempt for, or severe ridicule'.

32. They would also turn to state and territory jurisprudence in this area.

33. OED, op. cit.

34. Macquarie dictionary, op. cit.

prohibitions.<sup>35</sup> The President of the AHRC and the Race Discrimination Commissioner have argued that it may not.<sup>36</sup>

A recent case with a comparable level of abusive behaviour is *Kanapathy v In De Braekt (No. 4)*.<sup>37</sup> In that case Judge Lucev found against a lawyer who had abused a security guard who was insisting that the lawyer be subject to a security screen, which included a search of her bag. Her abuse consisted of reflecting that the complainant should return to his country of origin (Singapore) and that he was, severally and variously, 'a prick', 'a short prick' and 'a Singaporean prick'.

This case could be seen to reflect the sort of abuse that might take place at a sporting match. It can be seen that, while it founded a complaint under the current section 18C, it is less clear that it would fall within the definition of 'inciting to hatred'. It would be difficult to argue that the lawyer was intimidating the security guard, and certainly not within the proposed section's narrow definition (requiring a fear of physical violence). The abusive behaviour of the lawyer seems more likely to incite ridicule, or to result in scorn or humiliation, than to incite hatred. To reach the stage at which 'hatred' is the dominant emotion would seem to require a more pointed or personal reflection than the practically inchoate abuse in this case.

The proposed form of the legislation would require a contemplation of the audience to which the speech is directed. The success of an act which induces, or attempts to induce, hatred in a third party may depend on the pre-existing proclivities and propensity to hate of that third party. So, for instance the mere introduction of an African American to a Ku Klux Klan meeting may be enough to induce hatred. Similarly, to choose an Australian context, identifying a pale-skinned Aborigine to the late Lang Hancock might also have constituted an incitement to hatred. Mr Hancock, in an [interview](#) with the ABC in 1984, recommended that all such individuals should be sterilised to stop the growth of 'the problem'.<sup>38</sup>

During debate on an earlier version of the RDA's vilification provisions, which would have criminalised incitement to racial hatred, a former shadow Attorney-General, Daryl Williams, commented that the Bill was inadequate because it did not define incitement to hatred clearly enough. The Coalition opposed the Bill for a number of reasons, including the lack of definitional certainty. Mr Williams warned that:

It has been the experience in Canada that the word 'hatred' is difficult to define and almost impossible to apply in the context of incitement to racial hatred. It is not unprecedented for a court to have to apply a purely subjective abstract concept such as hatred. But it must be possible for the parliament to give the courts more guidance as to what this legislation is aimed at. The Canadian Supreme Court pleaded for such guidance when considering the meaning of the word 'hatred' in this context; the court was split over the interpretation of the expression. The minority judges quoted the *Shorter Oxford English Dictionary* definition of 'hatred' as 'active dislike, detestation; enmity, ill-will, malevolence', saying that 'hatred': ... is a broad term capable of catching a wide variety of emotion.<sup>39</sup>

There is an extensive international jurisprudence on 'hate speech' because two significant international instruments—the [International Convention on the Elimination of All Forms of Racial Discrimination](#)<sup>40</sup> and the [International Covenant on Civil and Political Rights](#)<sup>41</sup>—require such speech to be made illegal. This paper does not have the scope to explore this jurisprudence.<sup>42</sup> Nor does it have the scope to explore the domestic state and

35. Senator Brandis speaking on [ABC Lateline](#), 25 March 2014.

36. T Jones, '[Interview with Gillian Triggs, President of the Australian Human Rights Commission - Proposed changes to Racial Discrimination Act need to be redrafted](#)', *ABC Lateline*, Australian Broadcasting Commission (ABC), 26 March 2014; T Soutphommasane, Race Discrimination Commissioner '[Australian multiculturalism in an Asian century: the case for racial tolerance](#)', *address to the Australia Asia Education Engagement Symposium in Melbourne, Victoria*, 1 April 2014.

37. *Kanapathy v In De Braekt (No. 4)* [2013] FCCA 1386, accessed 14 May 2014.

38. L Hancock, '[Couldn't be fairer](#)', excerpt from the documentary 'Couldn't be fairer' (a collaboration between Mick Miller and Dennis O'Rourke), Australian Screen, National Film and Sound Archive, 1984. The Curator's notes specify: 'The news and interview footage in this clip is from a relatively recent time in Australian history. The openness with which sterilisation is proposed as a solution to the Aboriginal problem – especially the half-castes who are not considered legitimate Aborigines – frames the way in which the Australian public felt justified in having such discussions publicly. Such opinions are very recent, and still surface in race discussions on the ongoing distinction between 'true Aborigines' and 'hybrid' Aborigines.'

39. D Williams, '[Second reading speech: Racial Hatred Bill 1994](#)', House of Representatives, *Debates*, 15 November 1994, p. 3361, accessed 14 May 2014.

40. [International Convention on the Elimination of all Forms of Racial Discrimination](#) done at New York on 7 March 1966, [1975] ATS 40.

41. [International Covenant on Civil and Political Rights](#) done at New York on 16 December 1966 [1980] ATS 23.

42. The Australian Human Rights Commission provides some guidance on these matters, both in its account of '[The International Convention on the Elimination of All Forms of Racial Discrimination](#)' and in its submission on the proposed changes: '[Australian Human Rights Commission submission to the Attorney-General's Department. Amendments to Part IIA, Racial Discrimination Act](#)', 28 April 2014.

territory jurisprudence which may, nevertheless, shed some light on the issues. It is interesting to see, for instance, that the proposed amendments do not follow the legislative approaches taken by the state and territory legislatures, and there are differences in more than just the scope of coverage (see above). In changing the current framework from focussing on the effect of the conduct on a subject (to offend, insult, humiliate or intimidate the subject) to focus on the effect of the conduct on a third party (to incite hatred in them) the proposal, contrary to comparable provisions at state and territory level, leaves the requirement that the motivation be race-based on the person doing the action, rather than the effects of the action.<sup>43</sup>

Another interesting feature of *Eatock v Bolt* was that the publisher and Mr Bolt sought an order that would record the fact they were not trying to cause hatred (they were concerned to have their breach of Part IIA not be considered a violation of the Part's title, which is a 'Prohibition of offensive behaviour based on racial hatred'). The judge declined this request, since there had been no exploration of this matter during the trial. This followed directly from the fact the provisions do not deal with 'hatred' directly. Consequently no such order was warranted.<sup>44</sup>

### *To intimidate*

As with vilify, the definition of 'intimidation' in the proposed Bill (2b) has a specialised, narrow definition:

intimidate means to cause fear of physical harm:

- (i) to a person; or
- (ii) to the property of a person; or
- (iii) to the members of a group of persons.

Once again traditional plain English definitions encompass a broader concept, with the OED offering:<sup>45</sup>

To render timid, inspire with fear; to overawe, cow; in modern use *esp.* to force to or deter from some action by threats or violence.

The Macquarie dictionary<sup>46</sup> offers:

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

### *Practical implications and case studies*

Narrowing the definition of intimidation to inducing a fear of physical violence would preclude a wide variety of actions which would normally be covered by the term vilify. In particular it would preclude the sense of abuse that is encompassed by defamatory references. Traditionally to 'vilify' encompasses 'to defame'. It has been pointed out that narrowing the field of coverage in this manner could mean that individuals will have to choose to go down the path of defamation law rather than utilising the protections offered by the RDA. With respect to the suggested changes the President of the AHRC commented:

It would be a shame for people to be denied the opportunity to use these processes. Instead, they would have to rely upon defamation and other much more costly and inaccessible legal remedies.<sup>47</sup>

The proposed section's focus on physical harm to the exclusion of psychological intimidation would restrict the Act's application significantly. It would also probably result in a duplication of regulatory effort. As discussed in the introduction, both tort law and criminal law prohibit actions which would cause an apprehension of violence to the person.

43. The relevant state and territory legislation is as follows: New South Wales (*Anti-Discrimination Act 1972* s.20C); Victoria (*Racial and Religious Tolerance Act 2001* s.7); South Australia (*Civil Liability Act* 1936 s.73); Queensland (*Anti-Discrimination Act 1991* s.124A); Western Australia (*Criminal Code* ss.76-80G); Tasmania (*Anti-Discrimination Act 1998* s.19A); Australian Capital Territory (*Discrimination Act 1991* s.66(1)(a))

44. *Eatock v Bolt*, op. cit., per Bromberg J at para 458.

45. OED, op. cit.

46. Macquarie dictionary, op. cit.

47. Australian Human Rights Commission, *Changes to the Race Discrimination Act*, media release, 25 March 2014.

There is little case law involving violence under the current provisions of the *RDA*. This is understandable because such cases have generally been taken up under the criminal law rather than the civil provisions of the *RDA*.

Criminal law defines an assault as an act that intentionally or recklessly causes another to apprehend immediate and unlawful personal violence.<sup>48</sup> In criminal law ‘an assault’ may be used as a general term to include both the threat of, and the infliction of, personal violence. However an assault is also a form of the tort of trespass to the person. So, to use an instance supplied by Westlaw, ‘[p]ointing an unloaded gun at the plaintiff is an assault even though there is no intention to commit battery.’<sup>49</sup>

[An assault] consists of an intentional act or threat directly placing the plaintiff in reasonable apprehension of an imminent physical interference with his or her person, or the person of someone under his or her control.<sup>50</sup>

It is important at this stage to make again a distinction referred to in the introduction—the difference between criminal law and a ‘civil wrong’ or ‘tort law’. The criminal law generally involves the prosecution of a case by the state. As civil matters, the *RDA*, defamation law and tort law generally require an aggrieved party to pursue the matter themselves. Thus, under the tort law of ‘assault’, one party takes action against the other allegedly offending party to have the matter addressed. Under the criminal law of assault the burden of prosecuting the case would fall on the state. The necessary burdens of proof are also different under these different areas of law. Under tort law one must establish one’s case according to the balance of probability, whereas a criminal wrong is more difficult to establish as it must be established ‘beyond reasonable doubt’.

Were the proposed changes to be made, one would assume that individuals suffering such intimidation would be well advised to take the case up under tort law rather than the *RDA*. This would be because the issues to be proved under tort law would be simpler (there would be no requirement to prove that the act had been done on the basis of race) and because the damages are likely to be more generous under tort law (see, generally, the discussion of damages below). It would also be possible to take action under tort law against intimidation that occurred in private, whereas the proposed changes to the *RDA* only cover public actions—or as the proposed provision specifies, an act ‘otherwise than in private’. Tort law does not, however, offer the benefits of dispute resolution as has been undertaken by the AHRC in these matters.

### **Broadening the ‘free speech’ defence**

The proposed subsection (4) (see [Appendix A](#)) specifies that any communication made in the course of ‘participating in the public discussion’ of almost any topic would be excluded from the section’s proposed prohibitions. This differs significantly from the current protection of free speech because it contains no proviso (which section 18D does) that the act of free speech must have been done ‘reasonably and in good faith’. Consequently there are few speech acts that would not be encompassed by the proposed exemption. The Attorney-General has argued that ‘pure’ abuse (such as sporting abuse, mentioned above) is unlikely to fall within the exemption because it does not constitute part of the ‘public discussion’. However, as discussed above, such abuse is also unlikely to fall within the proposed definitions of vilification because that definition is set so ‘high’. The inchoate abuse Senator Brandis refers to may not be meaningful or serious enough to constitute an incitement to hatred, while the more considered forms of abuse are likely to be captured by the ‘free speech’ defence.

The proposed defence might also raise interesting questions as to what constitutes ‘the public discussion’. If the community’s focus becomes more directed to matters which might be termed ‘racist’, then presumably ‘the public discussion’ will encompass this focus and protect more free speech. Nazi Germany’s ‘public discussion’ would have encompassed many more issues than modern-day Australia, which would consider the ‘public discussion’ in Germany at that time offensive in the extreme. Defining the parameters of the protected discussion in such value-free terms may lead to the goal posts moving with the times and the political climate. However the very need to address these matters within the political, rather than a legal, framework (where they

48. The definition and the citations are taken from the *Encyclopaedic Australian legal dictionary: Knight* (1988) 35 A Crim R 314; *Criminal Code* (Qld), s 245. There are offences of assault in all jurisdictions: for example, *Criminal Code* (Qld), s 335; (SA) *Criminal Law Consolidation Act 1935* (SA), s20. In New South Wales and Victoria, the offence is one at common law although the penalty is prescribed by statute: *Crimes Act 1900* (NSW), s61; *Crimes Act 1958* (Vic) s 31.

49. WestlawAU, *Laws of Australia*, commentary on [assault](#) [33.8.420], accessed 15 May 2014.

50. LexisNexis, *Encyclopaedic Australian legal dictionary*, definition of assault in criminal law, accessed 15 May 2014.

may be repressed rather than interrogated) is, however, at the heart of support extended to the proposed amendments.<sup>51</sup>

### *Practical Implications and case studies*

*Eatock v Bolt* has been identified by the Attorney-General as the pivotal case upon which the amendments turn. As explained in [‘Trumping Racial Vilification’](#),<sup>52</sup> this case turned on Mr Bolt’s failure to satisfy the ‘reasonably and in good faith’ requirement in the current section 18D. Mr Bolt’s use of ‘errors of fact [and] distortions of the truth’, led Justice Bromberg to conclude that his accusations of self-interested racial identification violated the *RDA*. The suggested changes would remedy this situation and Mr Bolt’s writings would clearly fall within the proposed free speech protection. However, by removing any requirements of ‘reasonableness’ from the protections it would also protect a broad range of speech acts which might not generally be regarded as acceptable. Thus ‘holocaust denialism’ would be likely to fall within the proposed protection as a communication in the course of a public discussion of a political matter. Interestingly the proposed definition does not mention matters ‘historical’, but the range of other categories captured (‘any political, social, cultural, religious, artistic, academic or scientific matter’) is likely to encompass, as the President of the AHRC has said, almost any conceivable ‘speech act’:

It is hard to avoid the conclusion that racial vilification and intimidation – the only forms of racial abuse that would remain illegal – would be permitted in virtually all public arenas.<sup>53</sup>

In a counterfactual using the basic facts of *Kanapathy v In De Braekt (No.4)* (the case discussed above of the lawyer who abused the Singaporean security guard),<sup>54</sup> we might imagine a situation in which the lawyer not only expressed her desire for him to return to his place of origin but also broadened her speech act by referring to a shortage of jobs and suggesting the security guard was taking ‘Australian jobs’. This might render the speech act closer to the requirements for vilification because it might be more likely to constitute incitement to hatred, but at the same time as it becomes more expansive it is more likely to fall within the protections of the ‘public discussion’ defence in the proposed subsection (4). There is a well established public discussion regarding population sustainability in Australia and employment opportunities in Australia, and consequently this counterfactual speech act would be more likely to be protected.

Mr Hancock’s reflections on the problem of the ‘half caste’ and his proposed solution of mass sterilisation would probably fall within the proposed ‘freedom of speech’ protections since they constituted a public discussion of a political, social or cultural matter. Similarly the former Senator Lightfoot’s comments, which were held to have breached the *RDA*, would undoubtedly fall within the exemption. Senator Lightfoot commented to the *Australian Financial Review* with respect to the teaching of Aboriginal culture in schools:

Aboriginal people in their native state are the most primitive people on earth ... [He remained vehemently opposed to the teaching of Aboriginal culture in schools.] If you want to pick out some aspects of Aboriginal culture which are valid in the 21st century, that aren't abhorrent, that don't have some of the terrible sexual and killing practices in them, I'd be happy to listen to those.<sup>55</sup>

It should be noted here that the current defence of ‘freedom of speech’ (section 18D) may have been open to Senator Lightfoot. However, since he chose not to provide any evidence to the court and it is up to the respondent to raise 18D as a defence, the court was unable to assess a claim to the defence.<sup>56</sup>

The Shadow Attorney-General, Mark Dreyfus, has commented that one could ‘drive a truck’ through the proposed exemptions; a conclusion reached by at least one other commentator.<sup>57</sup>

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51. See, for instance, C Berg, [‘Brandis’ race-hate laws bolster democracy](#), *The Age*, p. 17, 31 March 2014, accessed 3 May 2014.

52. Magarey, op. cit.

53. G Triggs, [‘The freedom wars and human rights in Australia’](#), National Press Club address, 9 April 2014.

It is interesting to note that the proposed exemption also does not encompass, as current provisions do, ‘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.’ This, more limited, coverage may reflect the fact that these additional criteria would be encompassed by the broad definition of ‘public discussion’, however, it is odd these additional features are not covered in the proposed section.

54. *Kanapathy v In De Braekt (No. 4)* [2013] FCCA 1368

55. *McGlade v Lightfoot* (2002) 124 FCR 106, [2002] FCA 1457.

56. Carr J at para 74.

## Defamation v the RDA

As mentioned above, the President of the AHRC has raised the prospect that the proposed changes could result in individuals having to take action under defamation law rather than the RDA:

It would be a shame for people to be denied the opportunity to use [the RDA's] processes. Instead, they would have to rely upon defamation and other much more costly and inaccessible legal remedies.<sup>58</sup>

There have also been many questions as to why the individuals involved in *Eatock v Bolt* did not sue for defamation instead of lodging their complaints under the RDA. This indicates a brief contemplation of the inter-relationship of defamation law and the RDA's provisions is warranted, although it is an exercise that has been undertaken in more depth elsewhere.<sup>59</sup> The inter-relationship of defamation law and the RDA's provisions has also been contemplated by some judges. Both Justice Kiefel in *Creek v Cairns Post Pty Ltd* and Justice Bromberg in *Eatock v Bolt* recognised that the two fields overlapped and found guidance in defamation law when deciding what constituted fair and reasonable comment under section 18D. Both judges concluded that truthfulness and an honest and reasonable belief in what is being said are hallmarks of speech which should be protected, or should be treated as 'free speech'.

The two areas of law cover a similar range of activities—effectively regulating abusive, damaging or hurtful communications. The High Court summarises the approach of defamation law: '[t]he tort of defamation, at least as understood in Australia, focuses upon publications causing damage to reputation.'<sup>60</sup> The RDA's provisions would clearly encompass many damaging speech acts, which include damage to reputation, that are race-related. Nevertheless it is necessary to point out the forms of the law are also quite different in many respects, requiring different elements to be proved and having different (although related) defences.

The question as to why the complainants in *Eatock v Bolt* utilised the RDA rather than defamation law would have to include a consideration of the relative financial profitability of a result under defamation law. The complainant in *Creek v Cairns Post Pty Ltd* would also have been likely to have had better success under defamation law (the woman with custody of the Aboriginal child with a comfortable home who was portrayed as living in challenging conditions), in part because she would not have had to prove race as a motivating factor. A variety of other complainants come to mind, including the grieving mother in *Clarke v Nationwide News Pty Ltd*, who may also have been the recipient of profitable damages if a defamation case had been made out. The very fact that all these complainants chose to use the RDA is indicative of a motivation which warrants examination.

### *A different purpose*

Defamation is historically grounded in the economic interest one has in one's 'reputation'—damage to reputation being likely, in turn, to damage one's earning capacity. Over time it has broadened to cover behaviour that could more closely fit Senator Brandis' description of the RDA as a law for 'hurt feelings'. The recent conflict between Marcia Langton and Andrew Bolt played out in various venues demonstrated an attention on both sides to the emotions experienced by Mr Bolt.<sup>61</sup> The history of defamation law, however, is clearly predominantly about economic loss and damage.

The RDA's history, particularly Part IIA's, is shorter than that of defamation law, however, its provisions were introduced to address a problem with an even lengthier history—racism in various forms. The debates and secondary material around the introduction of Part IIA show a clear intention to target discrimination on the

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57. R Griffiths, '[Racial Discrimination Act amendment: Federal Government leaves open possibility of altering proposed changes](#)', ABC website, 26 March 2014.

58. Australian Human Rights Commission, '[Changes to the Racial Discrimination Act](#)', AHRC website, 25 March 2014, accessed 14 May 2014.

59. See, in particular, J Green, '[Surely defamation is the real threat to free speech](#)', *The ABC's The Drum*, 3 April 2014; T Soutphommasane '[Two freedoms: freedom of expression and freedom from racial vilification](#)', Alice Tay Lecture in Law and Human Rights 2014, Herbert and Valmae Freilich Foundation, Australian National University, 3 March 2014; and D Altman '[Bolt, Brandis and the double standard on free speech](#)', *The Conversation*, 21 March 2014.

60. *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575, [2002] HCA 56 at para 25, accessed 14 May 2014.

61. Professor Langton, after the differences she has with Mr Bolt were discussed on the ABC's Q&A program, issued a statement, '[The nature of my apology](#)' in which she commented 'I apologised for causing offence to [Mr Bolt] because he stated that I should apologise to him because I had 'hurt his feelings' and offended him ... It was not my intention to cause offence to Andrew Bolt.' The statement goes on to reiterate Professor Langton's concerns and to suggest that Mr Bolt, having a 'newspaper column, a television program and a blog site .... ought to be capable of a robust debate'. Mr Bolt has also written about his emotional reactions to the situation in '[It feels like I have lost; do I run or resist?](#)' and in a number of other blog pieces, including '[Marcia Langton says sorry for falsely accusing me on ABC TV of racial abuse. Will the ABC?](#)'

basis that it can be an expression of racism, which can in turn find eventual expression in racist violence. The second reading speech of the Racial Hatred Bill 1994 commented:

The Racial Discrimination Act does not eliminate racist attitudes. It does not try to, for a law cannot change what people think. But it does target behaviour—behaviour that causes an individual to suffer discrimination. The Parliament is now being asked to pass a new law dealing with racism in Australia. It too targets behaviour—behaviour which affects not only the individual but the community as a whole. The Racial Hatred Bill is about the protection of groups and individuals from threats of violence and the incitement of racial hatred, which leads inevitably to violence.<sup>62</sup>

The particular reports leading up to the passage of the Bill in its final form were the [National Inquiry into Racist Violence](#),<sup>63</sup> the [Royal Commission into Aboriginal Deaths in Custody](#)<sup>64</sup> and the Law Reform Commission's Report, [Multiculturalism and the Law](#).<sup>65</sup> As mentioned above, another motivating factor was the international commitments made by Australia through its ratification of two international treaties which also impose obligations in this field, the [International Convention on the Elimination of All Forms of Racial Discrimination](#) and the [International Covenant on Civil and Political Rights](#).

While it is difficult to speculate on the specific motivations of those who take action under the *RDA* (including those who eschew a possible case in defamation), these motivations are sometimes articulated in the course of a case. In particular the complainants in [Jones v Toben](#) (a case involving holocaust denialism)<sup>66</sup> and [Eatock v Bolt](#) were concerned to protect young people belonging to racial groups who may suffer the effects of the speech in question. This illuminates another difference in purpose, which is that the *RDA*'s provisions are designed to cover groups and operate for their benefit, whereas defamation law is better suited to an individual complainant. While defamation law's onerous burden of damages may serve as an educative tool to some extent, with individuals anxious to avoid them, there is no capacity to adapt the outcome to ensure a generally educative outcome. This is in contrast to the *RDA*'s provisions, which explicitly enable the Court's findings to function as an educative tool.

Defamation law does have some capacity to be used by groups of people, for instance:

... small companies or not for profit associations ... can sue for defamation if they can demonstrate that the words identified them as a group.<sup>67</sup>

However this branch of the law is not ideally suited to class actions, if at all. [McGlade v Lightfoot](#),<sup>68</sup> for instance, involving the former Senator Lightfoot (mentioned above), might conceivably enable a group complaint regarding the defamatory imputations of his comments (that is, 'Aboriginal people in their native state are the most primitive people on earth'.) The difficulties with such an approach, however, become immediately apparent. While a particular group may be able to demonstrate that the words identify them it is not clear how this could be managed across a population. The *RDA*'s provisions, on the other hand, allowed a successful case to progress (although, it is necessary to mention again that the freedom of speech provisions may have allowed Senator Lightfoot's comments to be protected if he had been prepared to argue the case).

### *A different process*

As the President of the AHRC suggests, the processes in defamation law involve the traditional legal avenues which are more expensive, rigid and cumbersome than processes under the *RDA*. Defamation law does, nevertheless, allow for the traditional demand for, and supply of, apologies. Defamation law does not, however, offer the mediation services which the AHRC is required to provide in cases involving a complaint under Part IIA of the *RDA*.

62. M Lavarch, '[Second reading speech: Racial Hatred Bill 1994](#)', House of Representatives, *Debates*, 15 November 1994, p. 3336, accessed 14 May 2014.

63. National Inquiry into Racist Violence in Australia, [Racist violence: report of the National Inquiry into Racist Violence in Australia](#), (Moss Review), AGPS, Canberra, 1991, accessed 14 May 2014.

64. [Royal Commission into Aboriginal Deaths in Custody](#), electronic resource, accessed 14 May 2014.

65. Australian Law Reform Commission, [Multiculturalism and the law](#), ALRC report 57, 1992, accessed 14 May 2014.

66. *Toben v Jones* (2003) 129 FCR 515, [\[2003\] FCAFC 137](#).

67. The News Manual Online, '[Defamation in Australia](#)', n.d., accessed 14 May 2014.

68. *McGlade v Lightfoot* (2002) 124 FCR 106, [\[2002\] FCA 1457](#).

The AHRC documents that in the 2012-13 year over half the complaints made to it under Part IIA were successfully mediated and only an insignificant three per cent of the original complaints progressed to a hearing.<sup>69</sup> The Commission has documented various successes through the mediation process, including scenarios in which:

- a complaint about racial vilification in the print media resulted in a conciliated complaint with an agreement that the respondents would visit the complainant's community to listen to community members' stories and teach the children how to draw cartoons
- a complaint about racial vilification on the internet was resolved by the Commission through the relevant Internet Service Provider who disabled the website in question as it breached the ISP's Acceptable Use Policy
- a complaint about racial vilification in the workplace that stretched over a considerable period and involved a range of behaviours was resolved by mediation with a 'statement of regret' and a payment of \$45,000.<sup>70</sup>

Senator Brandis referred to another difference in process between defamation law and the *RDA* in his opinion piece on the Bolt case in 2011.<sup>71</sup> He said:

... freedom of speech and expression—and their corollary, freedom of the press—are not interests to be weighed in the scale but fundamental rights, without which individual liberty cannot exist and democratic governance cannot work. It is true to say that they are not absolutes, as defamation law, and laws criminalising sedition or incitement of violence demonstrate. But English law has always defended freedom of speech jealously and read those necessary limitations narrowly. It is for this reason, for instance, that traditionally, the courts would not issue an injunction to restrain a threatened defamation.

A complaint under the *RDA* can only be lodged once the offending act has taken place, whereas in certain circumstances defamation law can be used to restrain a speech act even before it has taken place, by obtaining an injunction from the courts preventing publication. Interestingly, in an even earlier article, Senator Brandis had argued that the courts were giving too much credence to the need to defend freedom of speech, and that they should be prepared to issue such injunctions more readily.<sup>72</sup>

#### *Different outcomes*

In practice the damages awarded under the *RDA* and defamation law are radically different. The Race Discrimination Commissioner pointed out in a recent lecture that there is a disparity between the quantum of damages in defamation cases and those under the *RDA*.<sup>73</sup>

[McGlade v Lightfoot](#) gives an indication as to why the damages under the *RDA* are not so extensive. Justice Carr pondered the nature of the provisions:

Parliament, having chosen ... the balance to be struck between freedom of speech and racial tolerance, has largely left to the Court the task of choosing the appropriate sanctions when a person crosses the line between what is lawful and what is unlawful.<sup>74</sup>

He went on to point out that since the legislation was introduced to promote racial tolerance:

[t]he imposition of a disproportionate sanction for the respondent's conduct in this matter would not, in my view, further that aim.<sup>75</sup>

69. Australian Human Rights Commission, '[Australian Human Rights Commission submission to the Attorney-General's Department. Amendments to Part IIA, Racial Discrimination Act](#)', 28 April 2014. In its submission the Commission provides a general guide on how the law currently operates.

70. Australian Human Rights Commission, '[At a glance: Racial vilification under sections 18C and 18D of the Racial Discrimination Act 1975 \(Cth\)](#)', AHRC website, 12 December 2013, accessed 14 May 2014.

71. G Brandis, '[Section 18C has no place in a society that values freedom of expression](#)', *The Australian*, 30 November 2011, p. 12, accessed 14 May 2014.

72. G Brandis, '[Interlocutory injunctions to restrain speech](#)', *The Queensland Lawyer*, v. 12 (pts. 5-6), 1991, pp. 169-176, accessed 14 May 2014.

73. T Soutphommasane '[Two freedoms: freedom of expression and freedom from racial vilification](#)', op. cit.

74. *McGlade v Lightfoot* (2002) 124 FCR 106, [2002] FCA 1457.

75. *Ibid.* at para 90.



In that case the judge recognised that costs would be carried by Senator Lightfoot but declined to order any award for damages. In particular he declined to order any payment to the Aboriginal Advancement Council (the complainant had requested an order for payment to this body of \$10,000).

In [Eatock v Bolt](#) the penalty which attached to Mr Bolt's inaccuracies and what the judge termed 'inflammatory' language involved no monetary compensation. When determining the appropriate remedy the judge commented:

... in the age in which we live, any attempt made to restrict access to an internet publication is likely to be circumvented by access being made available on online sites beyond the control of [the publisher]. [The applicant's] legitimate objective would be better served by maintaining the Newspaper Articles on the online site to which people looking for them are most likely to go and including at that place a notice of the kind offered by [the publisher]... Accompanied by an appropriate corrective notice, the contravening effect of the Newspaper Articles will be negated. The qualification of online archives in a manner similar to that for which [the publisher] contends is an approach adopted in modern defamation cases in the United Kingdom, informed by the reasoning of the European Court of Human Rights ...<sup>76</sup>

The judge was also concerned to ensure that there was an understanding that it was not the topic of discussion which was problematic, rather it was Mr Bolt's approach, with its specific identified faults, that rendered the articles in question a breach of the *RDA*:

...it is important that nothing in the orders I make should suggest that it is unlawful for a publication to deal with racial identification, including by challenging the genuineness of the identification of a group of people.<sup>77</sup>

The subsequent, final, decision on remedy, [Eatock v Bolt \(No. 2\)](#), was dedicated to a consideration of the appropriate damages and confirmed the judge's earlier thinking.<sup>78</sup> No apology was ordered, because neither the publisher nor Mr Bolt were willing to make the apology, nor were any damages ordered, however, Mr Bolt and the publisher were ordered to pay the taxed costs of the complainant.

Similarly in [Kanapathy v In De Braekt \(No. 4\)](#) the judges declined to order an apology on the grounds that the lawyer concerned would not co-operate, and similarly they refused to order her attendance at an anti-racism training course. The applicant in that case was, however, given an order that the respondent should pay \$12,500 as compensation (being \$10,500 general damages for the offensive behaviour and \$2,000 special damages in relation to the applicant's medical expenses arising from the effects of the unlawful conduct).

As a general rule the *RDA* cases reveal a minimalist approach to damages, particularly when contrasted with defamation awards. As mentioned above, the Race Discrimination Commissioner has explored these differences in a recent speech.<sup>79</sup> He goes on to argue that the discrepancy in the level of damages results in defamation law having a much more dramatic effect on free speech than the *RDA*'s provisions.

## Conclusion

Senator Brandis, when heralding changes to the *RDA*, is reported to have commented: 'I have been very careful in my language because I am, of course, intensely conscious of the sensitivities of this issue.'<sup>80</sup> He also commented:

I'm going about this in a very careful and deliberative way, because the objective is to ensure the Racial Discrimination Act is not used as a vehicle to suppress the expression of opinion, nor to weaken Australia's anti-vilification law.<sup>81</sup>

The changes proposed, however, would have a dramatic effect and would do more than simply repeal section 18C. They would repeal sections 18B-E and would substitute provisions which bear little resemblance to the original laws, substituting 'incitement to hatred' for the previous focus on causing offence (to 'offend, insult,

76. [Eatock v Bolt](#), op. cit., per Bromberg J at para 464.

77. Ibid., at para 461.

78. [Eatock v Bolt \(No. 2\)](#) (2011) 284 ALR 114, [2011] FCA 1180.

79. T Soutphommasane, 'Two freedoms: freedom of expression and freedom from racial vilification', op. cit.

80. A Kamien, 'Dreyfus: new law no replacement for 18C', *The Australian Jewish News*, 14 February 2014, p. 6.

81. N Berkovic, 'Brandis to outlaw inciting hatred', *The Australian*, 31 January 2014, p. 27, accessed 14 May 2014.

humiliate or intimidate’).<sup>82</sup> Each of the proposed changes to the *RDA* would narrow the application of the racial vilification provisions significantly. This would have the impact of increasing the range of exempted free speech as Tim Wilson, the Human Rights Commissioner, expressed was his intention:

There are diverse views on whether section 18C should be left alone, modestly changed or fully repealed. I will be arguing for its full repeal on the grounds it conflicts with other human rights and therefore does not meet the threshold for restricting speech.<sup>83</sup>

The changes proposed would allow speech that goes far beyond the current limits on permissible race-based offences, insults and humiliation. Even permissible acts of intimidation, which both the current and proposed arrangements would render illegal, would be narrowly defined under the proposed changes.

It is, however, the perceived need to remove as many discussions as possible from the field of legal regulation that has led some to welcome the proposed changes. Chris Berg, of the Institute of Public Affairs, has commented that ‘[t]he High Court has rightly found that the very foundation of our liberal democracy is a right to speak freely on matters of political importance.’<sup>84</sup> He goes on to comment that ‘[t]he symbolism of getting the courts out of the business of regulating public debate would be profound, and profoundly democratic.’<sup>85</sup>

The release of a consultation draft indicates the Government has not yet fully committed to the proposed changes, and they are so broad that they could be significantly modified in the light of community input, while still extensively limiting the current legislative arrangement. A modified version of the proposed changes could come closer to Tim Wilson’s reference to ‘modest’ change. Media reports at the time this paper goes to publication suggest the Government will look to follow more ‘modest’ changes.<sup>86</sup>

George Williams, Gillian Triggs and Mark Leibler, all prominent human rights lawyers, have given some credence to a ‘modest’ proposal for change to section 18C. References to ‘insult’ and ‘offend’, for instance, could be amended.<sup>87</sup> A series of cases have established that, to fall outside the *RDA*’s provisions, the conduct must constitute more than a ‘mere slight’ – to breach Part IIA the act must involve ‘profound and serious effects, not to be likened to mere slights’.<sup>88</sup> George Williams suggested that, since the courts have already defined offend and insult so as to restrict them to the upper levels of these concepts, it is not so important to keep the original terminology. Effectively ‘offend’ and ‘insult’ have already been ‘upgraded’ by the courts to ‘seriously offend’ or ‘seriously insult’. Consequently the legislation could be adapted to reflect this judicial interpretation without losing any significant, current aspect of the Act’s provisions.<sup>89</sup> However such ‘concessions’ regarding the need for any amendment are not made by many others.

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82. The Institute of Public Affairs, however, commented on the introduction of the proposed changes: ‘Today’s announcement is almost as good as a full repeal of section 18C of the Act. While a full repeal of 18C would have been preferable, the government’s proposal goes 95% of the way towards ensuring what happened to Andrew Bolt won’t happen again’ in [Abbott Government’s changes to Racial Discrimination Act a win for freedom of speech – Institute of Public Affairs](#), media release, 25 March 2014, accessed 14 May 2014.

83. T Wilson, [‘Why I’ll take the approach of a classical liberal to human rights’](#), *The Australian*, 18 February 2014, p. 10, accessed 14 May 2014.

84. C Berg, [‘Brandis’ race-hate laws bolster democracy’](#), op. cit. It is noted that Mr Berg cites the racist abuse levelled at Mr Adam Goodes as an example of behaviour that would be covered by the proposed amendment, however, for reasons advanced above in the section ‘The redefinition of racial vilification’, such a conclusion has been queried in this paper.

85. Ibid.

86. J Massola and M Kenny, variously [‘Race Act changes back for revision’](#), *Canberra Times*, 28 May 2014, p. 1; [‘Brandis forced to rethink Discrimination Act changes’](#), *Sydney Morning Herald*, 28 May 2014, p. 1; and [‘Brandis backs down on race law change’](#), *The Age*, 28 May 2014, p. 1, all accessed 28 May 2014.

87. Professor George Williams, Anthony Mason Professor of Law at UNSW, Professor Gillian Triggs, President of the Human Rights Commission, and Mark Leibler, a prominent member of the Jewish community. See G Williams [‘George Williams, Politics in the Pub - February 2014’](#), The Australia Institute, *YouTube*, 9 April 2014, accessed 1 May 2014. See also G Williams, [Anti-terrorism laws will be test for Brandis’ commitment to freedoms](#), *The Sydney Morning Herald*, 31 December 2013, p. 14, where he suggests a ‘pared back’ version of the law would be reasonable.

G Triggs, [‘The freedom wars and human rights in Australia’](#), op. cit.

M Leibler is quoted in P Karvelas, [‘Jewish leader eyes middle path on race act reform’](#), *The Australian*, 15 April 2014, p. 2, accessed 1 May 2014.

Note, however, that Professor Triggs’ subsequent endorsement of the Australian Human Rights Commission’s [submission to the Attorney-General’s Department](#), also indicates a rejection of the proposed changes.

88. *Creek v Cairns Post Pty Ltd*, op. cit., per Kiefel J at para 16. See also *Eatock v Bolt* and *Clarke v Nationwide News Pty Ltd trading as The Sunday Times*, op. cit.

89. G Williams, [‘George Williams, Politics in the Pub - February 2014’](#), op. cit.

The Race Discrimination Commissioner's forthright comment is: 'If it ain't broke don't fix it'.<sup>90</sup> The 'leave it alone' approach would seem to have a significant degree of community support, and has been advocated by many associations and prominent members of the community,<sup>91</sup> including the NSW and Victorian governments:

The two most populous states have lodged formal submissions opposing the changes, warning they would weaken protections against racial vilification and threaten social cohesion.

They are urging Federal Attorney-General George Brandis to abandon plans to repeal section 18C of the Racial Discrimination Act.<sup>92</sup>

Prominent members of the Indigenous community have also voiced their opposition, including Warren Mundine,<sup>93</sup> and more recently Noel Pearson. The Cape York Institute's submission said the changes proposed by Senator Brandis are a 'cruel blow'. The submission documents a history of racism and also provides evidence of the current lived reality of racism, concluding that, while '[s]ection 18C and the related provisions are working to curtail racism and to promote tolerance and mutual understanding',

[s]adly, we have no doubt the proposed changes will embolden a minority with bigoted views to amplify their prejudice; indeed we are already observing this to be the case. The proposed changes will hurt Indigenous Australians, and Australian society and multicultural relations in general ... We urge the government to keep the legislation the way it is.<sup>94</sup>

Finally Patrick Dodson, sometimes described as the 'father of reconciliation', has also spoken out against any change, commenting that 'racial abuse is not a triviality':

Perhaps it is easy when you haven't experienced racial abuse almost daily over a lifetime to think that the only solution needed to racial hatred is a debating society... Yet for every Australian who has known the experience of seeing or reading another human being's racist venom directed towards you – based on the colour of your skin or the ancestry you have – we know the damage it inflicts on us, and most heartbreakingly, on our children and grandchildren.<sup>95</sup>

These commentaries, however, go to the merits of the proposal and are not directly engaged with the particular legal expression of suggested changes, which has been the focus of this paper.

There were minimal explanatory materials accompanying the Attorney-General's suggested changes, with neither discussion paper nor draft Explanatory Memorandum. Consequently it has been difficult to fully appreciate the impact of the proposed changes – for instance there are differing interpretations as to whether racial abuse encountered on the sporting field would be captured by the provisions. It will be interesting to discover the outcomes of the community consultation and there are already calls for the Attorney-General's Department to release the submissions which have been approved for public release by their authors, which would allow a more comprehensive overview of the positions being advocated.<sup>96</sup>

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90. T Soutphommasane, '[RN Breakfast: Proposed Racial Discrimination Act changes could be watered down](#)', ABC Radio National, 28 May 2014, accessed 28 2014.

91. See, for instance, Independent Media Centre Australia, '[WGAR News: CommunityRun Petition: Stop the changes to the Racial Discrimination Act: don't remove section 18C](#)', newsletter, 3 May 2014, accessed 1 May 2014.

92. F Bell, '[NSW and Victoria join forces to oppose Coalition changes to Racial Discrimination Act](#)', ABC News, 2 May 2014, accessed 3 May 2014.

93. Mr Mundine was reported as saying: 'I just find it funny that we are quite accepting that no-one should swear in public, but it's OK for people to be bigots and I find that a bizarre situation.

I can assure people, more people died from bigotry than people died from being swore at.

AM, '[Racial Discrimination Act amendment: Warren Mundine warns against changes, labels George Brandis's bigotry comment 'bizarre'](#)', ABC News, 26 March 2014, accessed 1 May 2014.

94. N Pearson and F Jose, Cape York Institute for Policy and Leadership, '[Submission to S 18C exposure draft consultations](#)', Institute website, 29 April 2014, accessed 3 May 2014.

95. D Harrison, '["Father of reconciliation" Patrick Dodson urges George Brandis not to change race-hate laws](#)', *Sydney Morning Herald*, (online edition), 28 May 2014, accessed 28 May 2014.

96. Most recently the Race Discrimination Commissioner suggested the release of submissions was desirable, T Soutphomossane, '[RN Breakfast: Proposed Racial Discrimination Act changes could be watered down](#)', op. cit. Senator Brandis is quoted as having put the number of submissions at 5,300: J Massola and M Kenny, '[Brandis backs down on race law change](#)', op. cit.

### **Part IIA of the Racial Discrimination Act 1975**

#### **Part IIA—Prohibition of offensive behaviour based on racial hatred**

##### **18B Reason for doing an act**

If:

- (a) an act is done for 2 or more reasons; and
- (b) one of the reasons is the race, colour or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act);

then, for the purposes of this Part, the act is taken to be done because of the person's race, colour or national or ethnic origin.

##### **18C Offensive behaviour because of race, colour or national or ethnic origin**

- (1) It is unlawful for a person to do an act, otherwise than in private, if:
  - (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
  - (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Note: Subsection (1) makes certain acts unlawful. Section 46P of the *Australian Human Rights Commission Act 1986* allows people to make complaints to the Australian Human Rights Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.

- (2) For the purposes of subsection (1), an act is taken not to be done in private if it:
  - (a) causes words, sounds, images or writing to be communicated to the public; or
  - (b) is done in a public place; or
  - (c) is done in the sight or hearing of people who are in a public place.
- (3) In this section:
 

*public place* includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

##### **18D Exemptions**

Section 18C does not render unlawful 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.

##### **18E Vicarious liability**

- (1) Subject to subsection (2), if:
  - (a) an employee or agent of a person does an act in connection with his or her duties as an employee or agent; and
  - (b) the act would be unlawful under this Part if it were done by the person;

this Act applies in relation to the person as if the person had also done the act.

- (2) Subsection (1) does not apply to an act done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing the act.

##### **18F State and Territory laws not affected**

This Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory.

## ***Proposed amendments to the RDA***

The *Racial Discrimination Act 1975* is amended as follows:

1. Section 18C is repealed.
2. Sections 18B, 18D and 18E are also repealed.
3. The following section is inserted:
  - (1) It is unlawful for a person to do an act, otherwise than in private, if:
    - (a) the act is reasonably likely:
      - (i) to vilify another person or a group of persons; or
      - (ii) to intimidate another person or a group of persons,
    - and
    - (b) the act is done because of the race, colour or national or ethnic origin of that person or that group of persons.
  - (2) For the purposes of this section:
    - (a) vilify means to incite hatred against a person or a group of persons;
    - (b) intimidate means to cause fear of physical harm:
      - (i) to a person; or
      - (ii) to the property of a person; or
      - (iii) to the members of a group of persons.
  - (3) Whether an act is reasonably likely to have the effect specified in sub-section (1)(a) is to be determined by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community.
  - (4) This section does not apply to words, sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter.

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