SUBMISSION on the
FREEDOM OF SPEECH (REPEAL OF s.18C) BILL 2014

This submission responds to the Attorney General's proposal to enact the Freedom of speech (repeal of s.18C) Bill 2014, which will amend the *Racial Discrimination Act 1975* (Cth), specifically by repealing ss 18B, 18C, 18D and 18E and inserting a new section:

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:
      1. to a person; or
      2. to the property of a person; or
      3. 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."

The rationale for the proposed Bill

We note that the rationale for the Freedom of speech (repeal of s18C) Bill 2014 does not appear with the Attorney General's published proposal. Thus we have garnered the Attorney General's rationale from his media release dated 25 March 2014 (and other media accounts). Summarising the key points of that release, the apparent rationale of the Bill is to:

- 'strengthen the [RDA's] protections against racism, while at the same time removing provisions which unreasonably limit freedom of speech,'
- explicitly proscribe 'racial vilification' to send 'a clear message that it is unacceptable in the Australian community,'

- ensure that laws that 'prohibit racial vilification should not be used as a vehicle to attack legitimate freedoms of speech', and
- send 'a strong message about the kind of society that we want to live in where freedom of speech is able to flourish and racial vilification and intimidation are not tolerated'.[1]

We comment on this proposal and its apparent rationale as follows.

The purpose of section 18C:

The prohibition of racial hatred was inserted into the *Racial Discrimination Act* 1975 (Cth) ('the RDA') by the *Racial Hatred Act 1995* (Cth), and is defined in ss 18B-F of the RDA (Part IIA). When presenting his suite of amendments, then Attorney-General, the Hon Michael Lavarch said:

> "The Racial Hatred Bill is about the protection of groups and individuals from threats of violence and the incitement of racial hatred, which inevitably leads to violence…The bill is intended to close a gap in the legal protection available to the victims of extreme racist behaviour. No Australian should live in fear because of his or her race, colour or national or ethnic origin."

It is notorious that the original draft of the Racial Hatred Bill contained criminal as well as civil sanctions and that the former provisions did not gain parliamentary support. Thus the prohibition of racial hatred has been enacted at the federal level solely in the form of a civil claim, which the Bill's *Explanatory Memorandum* explained was "analogous to that applying to sexual harassment under the *Sex Discrimination Act 1984* in which unwelcome acts are done in circumstances in which a reasonable person would be offended, intimidated or humiliated."[2] The introduction of this prohibition sought to address "concerns highlighted by the findings of the National Inquiry into Racist Violence and the Royal Commission into Aboriginal Deaths in Custody" and was "based on the principle that no Australian need live in fear because of their race, colour or national or ethnic origin" so as to "strengthen and support" the "social cohesion demonstrated by the Australian community at large."[3]

Standing with ss 9 and 10 of the RDA, s 18C is part of the an important set of protections for all Australian citizens that prohibit certain forms of racial discrimination in line with Australia's obligations pursuant to the *International Convention on the Elimination of Racial*

---

1 Available at <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/First%20Quarter/25March2014-RacialDiscriminationAct.aspx>.

2 House of Representatives, Parliament of Australia, *Racial Hatred Bill 1994 Explanatory Memorandum* (Parliament of Australia, Canberra 1994), 10.

3 *Explanatory Memorandum*, above n 2, 1.

Discrimination (ICERD). We note that Part IIA of the Act (and thus s 18C) relates specifically to Article 4 which calls on state parties to the Convention to:

> "…condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or groups of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred or discrimination in any form, and … to eradicate all incitement to, or acts of, such discrimination".

We submit that this purpose – and thus the current provisions in Part IIA – remains significant to the social cohesion of the Australian community because acts of racial discrimination, hatred and violence remain unacceptably prevalent.

Strengthening the RDA's protections, explicitly prohibiting racial vilification

The current provisions protect Australian citizens from acts of racial hatred that offend, insult, humiliate or intimidate a person (or group) and which are done "because of the race, colour or national or ethnic origin" of the person who complains or the race (etc) of the group to which they belong (s 18C(1)). The proposed Bill appears to imply (through deleting these terms) that offensive, insulting and humiliating conduct set the threshold for impugned behaviour too low.

We reject this proposition. In *Hagan v Trustees of the Toowoomba Sports Ground Trust*,[4] Drummond J stated that the act complained of must be tested – objectively – to determine that it "has the necessary offensive, insulting, humiliating or intimidatory quality". Following this, in *Creek v Cairns Post Pty Ltd*[5]Kiefel J explained that to " '*offend, insult, humiliate or intimidate'* are profound and serious effects, not to be likened to mere slights" (at [16]). Kiefel J's statement has been endorsed in *Jones v Toben*[6] at [92], by Branson J who explained that her Honour was referring to the:

> "…legislative intent to render unlawful only acts which fall squarely within the terms of the section and not to reach to '*mere slights*' in the sense of acts which, for example, are reasonably likely to cause technical, but not real, offence or insult[.]"

---

4 [2000] FCA 1615 (10 November 2000).

5 [2001] FCA 1007 (31 July 2001).

6 [2002] FCA 1150 (17 September 2002). In *Jones v Scully* Hely J noted that the Attorney-General's Second Reading Speech stated "that the HREOC [as the body responsible for complaints at first instance] was familiar with the scope of such language and has applied it in a way that deals with serious incidents only: *Hansard* (15 November 1994) p 3341": [2002] FCA 1080 (2 September 2002) at [102]. More recently, as noted below, Branson J applied this reasoning in *Eatock v Bolt* [2011] FCA 1103.

Thus, it the current jurisprudence makes clear that complaints under s 18C require proof of some substantive harm and that s 18C is not directed towards trivial or insignificant matters.

Nonetheless, we welcome the insertion by the Bill of the words 'vilify' and 'incite' to describe acts that are prohibited by the RDA and agree that that these additions would have the effect of strengthening the protections afforded by the RDA. This is because these words clearly describe more extreme forms of racial hatred and capture the capacity of expressions of racial hatred to incite and to encourage others to enact violence on the basis of race.

Moreover, the limited form of complaint proposed by the Bill will impose unreasonable evidential demands that will exacerbate the already known and well-documented difficulties faced by complainants in meeting the requirements of RDA.[7]

With the caveat about the benefits of adding 'vilify' and 'incite' to the description of impugned acts, we submit that if enacted, the Bill will send the wrong message to the Australian community 'about the kind of society' in which we want to live by weakening the legal threshold that informs community standards of acceptable and tolerable behaviour. It will do so by making it legally acceptable to express or distribute views that are racially offensive, insulting and humiliating, and thereby legalise the significant physical and emotional harm that the expression of these types of views produce.

Thus, we reject the repeal of s 18C as this would have the effect of reducing the protections afforded by the RDA – and thus would weaken the protections against racial discrimination afforded by it. In particular, given the effect of the harm of race discrimination (as explained further below), we do not agree that there is a justification to remove the RDA's protections from racially offensive, humiliating and insulting acts (s 18C(1)(a)) and limiting complaints to acts that 'incite hatred' or intimidate through causing fear of 'physical harm'.

The harm caused by racial discrimination, racial hatred and racial vilification

---

[7] Margaret Thornton, 'Revisiting Race', in RDC, *The Racial Discrimination Act – A Review* (1995), HREOC, Sydney; PJ Rajapakse, 'An Analysis of the Methods of Proof in Direct Discrimination Cases in Australia' (1998) 20 *UQLJ* 90; Loretta de Plevitz, 'The *Briginshaw* "Standard of Proof" in anti-discrimination law: "pointing with a wavering finger" ' (2003) 27 *University of Melbourne Law Review* 308; Jonathon Hunyor, 'Skin-deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25 *Sydney Law Review* 535; Jennifer Nielsen, ' "There's always an easy out": how "innocence" and "probability" whitewash race discrimination' *ACRAWSA e-journal* (2007) 3(1) [http://www.acrawsa.org.au/]; and Neil Rees, Simon Rice and Dominique Allen, Australian Anti-Discrimination Law (2nd ed, 2014, The Federation Press, Sydney), [4.41]-[4.5.5].

The racial hatred provisions were introduced by the *Racial Hatred Act 1995* in response, partly, to the (then) Human Rights and Equal Opportunity Commission's significant report – the *National Inquiry into Racist Violence* (1992).[8] That Inquiry found that Aboriginal and Torres Strait Islander peoples "are faced with racism in almost every aspect of their daily lives" and that violence against them is "endemic."[9] It also found that "[r]acist violence on the basis of ethnic identity" existed "at a level that causes concern."[10] Many subsequent studies have consistently confirmed unacceptable and concerning levels of racism and racist attitudes in our community and that they have significant and negative impact on social inclusion,[11] economic participation[12] and health.[13] The known impacts of racism and race discrimination are profound: they impede social inclusion through reducing a person's sense of belonging, and by limiting access to housing, healthcare, and employment; they have significant impact on economic participation through reduced rates of educational attainments and employment, and impeding productivity; and they cause serious health problems including anxiety and depression, psychological adjustment, and cause victims to internalise negative stereotypes, experience poor self-esteem, and to disengage socially.[14] As part of its strategies to reduce and eliminate racial discrimination, the AHRC is promoting the *Racism. It stops with me Campaign*,[15] and has prepared an *Agenda for Racial Equality 2012-2016*. It is notable that in explaining this *Agenda*, the Commission states:

> Racism is poorly understood in Australia. Many people are very cautious about naming racist behaviour - research shows that those who do not experience racism believe that it involves major incidents or acts of violence on a scale that is, thankfully, rarely seen in this country. Few

[8] HREOC, National Inquiry Into Racist Violence (HREOC, Sydney, 1992).
[9] Ibid 1
[10] Ibid 1-2.
[11] See, eg, H McCaskill and P Molone, *A Consultation Project with Aboriginal and Torres Strait Islander Women*, HREOC, Sydney, 1994; A Goodstone and P Ranald, *'Discrimination ... Have You Got All Day?' Indigenous Women, Discrimination and Complaints Processes in NSW*, Public Interest Advocacy Centre and Wirringa Baiya Aboriginal Women's Legal Centre, Sydney, 2001; and Fiona Allison, Chris Cunneen and Melanie Schwartz, ' "That's discrimination!" Indigenous peoples experiences of discrimination in the Northern Territory' (2013) 8(5) *Indigenous Law Bulletin* 8-12.
[12] See, eg, F Tilbury and V Colic-Peisker, 'Deflecting Responsibility in Employer Talk about Race Discrimination' (2006) 17 *Discourse & Society* 651, A Moreton-Robinson, 'Witnessing the Workings of White Possession in the Workplace: Leesa's Testimony' (2007) 26 *AFLJ* 81, B Fredericks, '"Getting A Job": Aboriginal Women's Issues and Experiences in the Health Sector' (2009) 2(1) *International Journal of Critical Indigenous Studies* 24; Jennifer Nielsen, 'Whiteness at work' (2013) 26(3) *Australian Journal of Labour Law* 300-325.
[13] See, eg, Paradies Y, Chandrakumar L, Klocker N, Frere M, Webster K, Burrell M, & McLean P, *Building on our strengths: a framework to reduce race-based discrimination and support diversity in Victoria - full report* (Victorian Health Promotion Foundation, Melbourne, 2009).
[14] *Building on our strengths*, above n 9, 35-37. See also Paradies, Y, Harris, R & Anderson, I 2008, *The impact of racism on indigenous health in Australia and Aotearoa: towards a research agenda*, Discussion Paper Series no. 4, Cooperative Research Centre for Aboriginal Health, Darwin.
[15] See <http://itstopswithme.humanrights.gov.au/>.

> recognise that seemingly low-level behaviour can escalate into – or at least soften the environment for – acts of harassment, intimidation or violence.
>
> If we are to achieve racial equality, we must work to prevent racism, racial hatred and racial violence. In order to do this, we first need to acknowledge that racism does exist in Australia and learn to name racist behaviour when it occurs.[16]

Accordingly, we submit that the experience of race discrimination, racial hatred or racial vilification cannot be understood in isolation from the pervasiveness of racism in daily life, and that its impact is likely to be profound and serious.[17] Moreover, those who do not or who are unlikely to experience these forms of race discrimination do not necessarily understand when it occurs or the harm that it inflicts: Race Discrimination Commissioner, Dr Tim Soutphommasane, explains that what one person regards as racially harmless and inoffensive may in fact inflict harm on another.[18] Similarly, the Hon Catherine Branson QC has recently stated that "the views of members of those vulnerable racial minorities most likely to be the targets of race-based insult should be accorded very considerable weight" and that those within "the privileged majority would … be well advised to listen carefully to what those more vulnerable to racial abuse … have to say".[19]

The current jurisprudence appropriately adopts these insights in the formulation of the test applied to assess the 'offensive, insulting, humiliating or intimidating' quality of an act under s 18C. The assessment of whether a particular action is reasonably likely to offend is a "question of fact in every case, depending on the context in which the allegedly offensive word or words"[20] are used. As stated above, the accepted statement of this test was given by Drummond J in *Hagan v Trustees of the Toowoomba Sports Ground Trust*[21] as being an objective test to determine "whether the act complained of has the necessary offensive, insulting, humiliating or intimidatory quality" (at [15]). His Honour also noted that this must be considered from the view of the "reasonable victim",[22] that is, a person possessing the

---

16 AHRC, *Agenda for Racial Equality 2012-2016* (AHRC, Sydney, 2012), 16.

17 See, eg, *Boatshed Declaration On Racism Towards Indigenous Australians*, made at the *National Roundtable on Research on Racism towards Indigenous Australians*, Monday 1st June to Tuesday 2nd June, 2009, University of Western Australia [http://www.aida.org.au/pdf/statements/NationalRoundtableDeclaration.pdf].

18 Dr Tim Soutphommasane, Graduation Speech, Southern Cross University, Sydney 22 March 2014, p 4; see also see, Anna Chapman, 'Australian Racial Hatred laws: Some Comments on Reasonableness and Adjudicative Method in Complaints Brought by Indigenous People' (2004) 30 *Monash University Law Review* 27; Rees et al, above n 1, 622-627.

19 Catherine Branson QC, 'Freedom of speech in a racially diverse society', Opinion Archive 2013, Human Rights Law Centre, 20 December 2013 [http://hrlc.org.au/freedom-of-speech-in-a-racially-diverse-society/].

20 Commissioner Wilson in *Bryant v Queensland Newspapers Pty Ltd*, HREOC, 15 May 1997, unreported, as cited in *Corunna & Ors v West Australian Newspapers Ltd* (2001) EOC ¶93-146, at 75,466.

21 [2000] FCA 1615 (10 November 2000).

22 As stated in *Corunna & Ors v West Australian Newspapers Ltd* (2001) EOC ¶93-146.

racial, ethnic or other relevant attributes of the complainant in the matter but not particularly susceptible to being roused or incited. This approach to the test of community standards was endorsed by Bromberg J in *Eatock v Bolt*.[23]\ Notably the Attorney General seeks to instil a different standard which is described (in 3 above) as 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". In *Eatock v Bolt*, His Honour soundly rejected this proposition because:

> Acceptance of that contention would see a reasonable person test substitute the reasonable representative test and result in the perspective clearly required by the words of s 18C(1)(a) to be ignored. For the reasons I have just outlined, that contention must be rejected. It is the values, standards and other circumstances of the person or group of people to whom s 18C(1)(a) refers that will bear upon the likely reaction of those persons to the act in question. It is the reaction from their perspective which is to be assessed: *Creek* at [16] (Kiefel J); *Scully* at [108] (Hely J). Further, to import general community standards into the test of the reasonable likelihood of offence runs a risk of reinforcing the prevailing level of prejudice. To do that would be antithetical to the promotional purposes of Part IIA. Such an approach has been rejected in relation to sexual harassment: *Ellison v Brady* 924 F.2d 872 (9th Cir. 1991) at 878-879; *Stadnyk v Canada (Employment and Immigration Commission)* (2000) 38 CHRR 290 at [11]; and see *Corunna v West Australian Newspapers Ltd* (2001) EOC 93-146 at [75467]-[75468]. Sexual harassment legislation is the arena from which the words "offend, insult, humiliate or intimidate" were deliberately borrowed: see Explanatory Memorandum at 10 and the Second Reading Speech to the RDA at column 3341.[24]

We submit that the prevailing test as defined in the current jurisprudence is the appropriate standard because it avoids the real risk that the standards of a different person or group to that of the victim of the impugned act are adopted without any sensitivity to cultural differences between groups in the community. As such the proposed test may simply serve to mask racism as it is understood by its victims and in effect defeat the purpose of the Part IIA.

Accordingly, we reject the new definition of racial vilification as proposed in the Bill on the basis that it would weaken – rather than strengthen – the RDA's protections against racism.

Limitations on legitimate expressions of freedom of speech

Is there a limitation?

[23] *Eatock v Bolt* [2011] FCA 1103 (28 September 2011).
[24] *Eatock v Bolt*, para 253.

There is no evidence that the racial hatred provisions have been used as an attack on free speech. We submit that the Attorney Generals' suggestion that they have been so used is inflammatory and unsubstantiated. As was made clear by Bromberg J in *Eatock v Bolt* the competing considerations in ss 18C and 18D of the RDA are designed to strike a balance between the need to reduce the significant harm arising from racial prejudice and protect freedom of expression.[25]

The current limitations are appropriate and do enable legitimate expressions of speech

Freedom of expression has been recognised as a fundamental human right and one that is essential to democracy and to enabling the promotion and protection of other human rights.[26] However, this does not mean that freedom of expression is absolute. The empowerment role that freedom of expression can play in relation to the protection of other rights reflects the principle that 'All human rights are universal, indivisible and interdependent and interrelated.'[27] This same principle of indivisibility is also reflected in the relationship between freedom of expression and anti-discrimination law.[28]

Freedom of expression is protected under Article 19(2) of the *International Covenant on Civil and Political Rights* ('ICCPR'). However, Article 19(3) specifically highlights that '[t]he exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities.' It then provides for a number of limited restrictions to the right, including those aimed at protecting 'the rights and reputations of others' where those restrictions are 'provided prohibited by law and are necessary.' Furthermore, Article 20 was deliberately placed immediately after Article 19 in the Covenant, and paragraph two provides, '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'

The interrelationship between Articles 19 and 20, and the wider tension between regulating hate speech and freedom of expression, have been the subject of considerable debate and

---

[25] *Eatock v Bolt*, para 201

[26] See, eg, Adrienne Stone, 'The Limits of Constitutional Tex and Structure: Standards of Review and the Freedom of Political Communication' [1999] *University of Melbourne Law School Research Series* 1; Thomas Scanlon, 'Freedom of Expression and Categories of Expression' 40 *University of Pittsburg Law Review* 519 (1978-1979).

[27] *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UN Doc A/CONF.157/23 (1993), para 5.

[28] Human Rights Committee, General Comment No.34, para 22.

scholarship.[29] However, a consistent theme has been the recognition of the need to balance freedom of expression with the protection of other rights, including the right to equality, dignity and non-discrimination. In addition to protecting these other rights, it has also been recognised that the regulation of hate speech serves to protect the right to freedom of expression and to public participation for minority groups, as hate speech can hamper their capacity to access these rights. The regulation of hate speech also recognises the real harm that can be caused to victims, including the incitement of fear and the infliction of psychological damage and damage to self-esteem and perceived capacity.

The Canadian Supreme Court has, for example, held that s 319(2) of the Criminal Code, which criminalised hate speech, constitutes a 'reasonable limit upon freedom of expression' because 'Parliament's objective of preventing the harm caused by hate propaganda is of sufficient importance to warrant overriding' Canada's constitutionally protected freedom of expression.[30] The Court also emphasised that the kind of expression targeted by the law 'constitutes a special category, a category only tenuously connected with the values underlying the guarantee of freedom of expression.'[31] The Court went on to find that hate speech contributes little to 'the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged.'[32]

These arguments apply equally to s 18C of the *Racial Discrimination Act 1975.* It is reported that the Attorney-General argues that s 18C is overly broad because it captures the mere expression of a 'controversial opinion'[33] and bans conduct 'merely because it might hurt the feelings of others.'[34] If this were the case, then it might be argued that s 18C is not 'necessary' in that it would not be reasonably adapted and proportionate to the achievement

---

[29] See, eg, Robert C. Post, 'Racist Speech, Democracy, and the First Amendment', 32 *William and Mary Law Review* (1991); Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado and Kimberlè Williams Crenshaw, Eds., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder/San Francisco/Oxford, Westview Press, 1993); Tarlach McGonagle, 'The Council of Europe against online hate speech: Conundrums and challenges' (Expert Paper, Faculty of Law, University of Amsterdam) [http:www.ivir.nl/staff/mcgonagle.html]; Amnesty International 'Written contribution to the thematic discussion on Racist Hate Speech and Freedom of Expression organised by the United Nations Committee on Elimination of Racial Discrimination' (28 August 2012); 'Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression,' 78 *Boston University Law Review* 1275 (1998).

[30] *R v Keestra* [1990] 3 R.C.S., 699.

[31] Ibid 700-701.

[32] Ibid 701.

[33] George Brandis (2013) 'Reclaiming human rights from the fury of ideologues,' on Human Rights Centre [http://hrlc.org.au/reclaiming-human-rights-from-the-fury-of-ideologues/]

[34] George Brandis, Press Conference, Parliament House, 25 March 2014 [http:www.attorneygeneral.gov.au/transcripts/Pages/2014/First%20Quarter/25March2014-PressConference-ParliamentHouse.aspx]

of its purported goals of promoting racial harmony and non-discrimination. However, s 18D provides a broad exemption to s 18C for (amongst other things) 'anything said or done reasonably and in good faith … in making or publishing … a fair comment on any … matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.' As already noted, the jurisprudence clear recognised most recently by Justice Bromberg in *Eatock v Bolt*[35] – that the phrase 'offend, insult, humiliate or intimidate' in s 18C(1)(a) does not extend simply to personal hurt feelings, but rather to conduct that has *profound and serious effects*.

This being the case, s 18C only targets discriminatory expression, which is made in bad faith and results in profound and serious effects. In line with the approach of the Supreme Court of Canada, this kind of expression is of very little value and contributes little to Australian society or to values that are commonly associated with freedom of expression, such as 'the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged.'[36] Therefore, it is a legitimate aim for the law to limit this specific class of expression in order to promote social harmony and the rights to equality, dignity and non-discrimination. Furthermore, unlike the criminal provision upheld in Canada, s 18C is a civil provision. It does not establish criminal sanction. This further strengthens the argument that it is appropriately adapted and reasonably proportion to the achievement of its legitimate aims.

While there has been substantial public discussion about the impact of the findings in *Eatock v Bolt* and purported limits to the right of free expression,[37] on the facts of the case the impugned conduct was found to be unlawful due to a *lack of good faith* because Mr Bolt was not conscientious to exercise freedom of expression with regard to the values of the RDA, and a lack of diligence to minimise offence and to guard against conduct that would reinforce racist attitudes - due to distortions of truth and the inflammatory language used.[38] Further the impugned conduct was found not to be for a *genuine purpose in the public interest* because of these factors.[39] Significantly Justice Bromberg found that the impugned conduct contravened s 18C not because of the

[35] [2011] FCA 1103.
[36] Ibid 701.
[37] Sarah Joseph, 'Free Speech, Racial Intolerance and the Right to Offend: Bolt Before the Court' (2011) 3 *Alternative Law Journal* 225; Katharine Gelber and Luke McNamara, 'Freedom of speech and racial vilification in Australia : 'the Bolt case' in public discourse', (2013) 4 Australian Journal of Political Science 470.
[38] Eatock v Bolt [2011] FCA 1103 at [425].
[39] Eatock v Bolt [2011] FCA 1103 at [442]-[443].

subject matter, but rather the way the subject matter was dealt with.[40] Therefore we submit that the case of *Eatock v Bolt* demonstrates how sections 18C and 18D are effective to balance the right of freedom of expression and the right to live free from racial discrimination, and do not unduly limit 'legitimate freedoms of speech'. We submit that the proposed amendments to the RDA are not necessary to achieve their stated purpose and therefore should be abandoned.

The repeal of ss 18B & 18E

We submit that both ss 18B and 18E should be retained in the RDA and that the Attorney General's apparent rationale for the proposed Bill does not provide any justification for their removal.

Section 18B provides that an act done for two or more reasons can found a complaint of racial hatred provided the race, colour or national or ethnic origin of the complainant is one of the reasons for the doing of the act. This provision is conventional to most Australian anti-discrimination legislation and is line with s 18 of the RDA (which applies the same terms to ss 9 and 10). It accounts for the difficulties of proof that "arise when a respondent has many reasons for treating the complainant less favourably than others", given that, as His Honour Justice Kirby has pointed out, discriminatory conduct "can rarely be ascribed to a single 'reason' or 'ground'."[41] We reject the proposed repeal of the section on the basis that it would weaken – rather than strengthen – the RDA's protections against racism.

Section 18E extends vicarious liability for acts of racial hatred done by a person's employee or agent when done in "connection with his or her duties as an employee or agent" (s 18 E(1)). This liability is not absolute and is qualified by the 'defence' that a person will not be liable if they "took all reasonable steps to prevent the employee or agent from doing the act" (s 18E(2)). Again this provision is conventional and is applied in all Australian anti-discrimination legislation, and aligns with s 18A of the RDA (which applies the same term to ss 9 and 10). The liability created by s 18E is appropriately qualified in that it conforms to the ordinary expectations placed upon employer's under general tort principles as to liability for acts done within the course of employment. The principle of vicarious liability remains an

[40] Eatock v Bolt [2011] FCA 1003 at [463].

[41] *Haines v Leves* (1987) 8 NSWLR 42, at 471, as cited by Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law* (2nd ed, 2014, The Federation Press, Sydney), [4.2.28].

important principle in the common law because it promotes "increased vigilance and risk reduction measures" to be implemented by employers – who are in control of (and thus, also responsible for) their employee's behaviour.[42] The repeal of s 18E would contradict this important objective. Moreover, there is no justification for removal of the liability created by s 18E. Thus, we also reject the proposed repeal of the section on the basis that it would weaken – rather than strengthen – the RDA's protections against racism.

Final remarks

We find it significant that this proposal has also been rejected in total by the National Aboriginal and Torres Strait Islander Legal Services (NATSILS) and the Australian Human Rights Commission, amongst other organisations and individuals. We also note that the proposal has not been informed by or developed through substantive consultation with the Australian community. It is our strong view that no change should be implemented to the RDA without appropriate and considered consultation.

For the reasons outlined in our submission, we reject the Bill in total, and request the Attorney General to do the same.

Finally, we confirm that we consent to this submission being made public.

Dr Jennifer Nielsen
Senior Lecturer
School of Law & Justice
Southern Cross University
jennifer.nielsen@scu.edu.au

Dr Cristy Clark
Lecturer
School of Law & Justice
Southern Cross University
cristy.clark @scu.edu.au

Marcelle Burns
Lecturer
School of Law
Queensland University of Technology
m.burns@qut.edu.au

[42] C Sappideen and others, *Macken's Law of Employment* (Thomson Reuters, 7th ed, 2011), 481.