THE LAW SOCIETY
OF NEW SOUTH WALES

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

By email: s18cconsultation@ag.gov.au

Dear Attorney-General,

Exposure draft Freedom of Speech (Repeal of S. 18C) Bill 2014

I am writing on behalf of the Indigenous Issues and Human Rights Committees of the Law Society of NSW. The Indigenous Issues Committee represents the Law Society on issues which impact upon Indigenous peoples in NSW. The Human Rights Committee is responsible for considering and monitoring Australia's obligations under international law in respect of human rights; considering reform proposals and draft legislation with respect to issues of human rights; and advising the Law Society accordingly. Both Committees include experts drawn from the ranks of the Law Society's membership.

Attached are the submissions of the Committees in response to the exposure draft of the Freedom of Speech (Repeal of s 18C) Bill 2014. The Committees have contributed to the submission of the Law Council of Australia, but wished to also provide these submissions directly to the Attorney-General's Department.

Thank you for the opportunity to provide comments.

Questions may be directed to Vicky Kuek, A/Principal Policy Lawyer, at victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours sincerely,

Ros Everett
President

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Human Rights Committee of the Law Society of NSW comments on the exposure draft Freedom of Speech (Repeal of S. 18C) Bill 2014

The Human Rights Committee of the Law Society of NSW ("HRC") submits that the exposure draft of its Freedom of Speech (Repeal of S.18C) Bill 2014 ("exposure draft Bill") should be opposed in its entirety, as its effect would be to put Australia in breach of its international human rights obligations, which Australia has an obligation under international law to incorporate and maintain in its domestic law.

The HRC sets out its comments below.

1. International obligations

Australia ratified the International Covenant on Civil and Political Rights ("ICCPR") in 1980. Article 20 of the ICCPR is as follows:

> Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Secondly, Australia ratified the International Convention on the Elimination of all Forms of Racial Discrimination ("CERD") in 1975. Article 4 of CERD is as follows:

> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
>
> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
>
> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

In part, Articles 5(a) and 5(b) of CERD is as follows:

> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
>
> (a) The right to equal treatment before the tribunals and all other organs administering justice;
>
> (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

Relevant to discussion about ss 18C and 18D, and the exposure draft Bill, the HRC notes particularly that Article 20 of the ICCPR focuses on advocacy of "... racial ... hatred that constitutes incitement to discrimination, hostility or violence."

Further, Article 4 of CERD requires "... measures designed to eradicate all incitement to or acts of .... discrimination" including a criminal offence proscribing "all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement of such acts" ... Article 4 further requires proscription of "any assistance to racist activities ..." and requires activities to be declared illegal "which promote and incite racial discrimination ..."

Article 5 of CERD sets out certain of the rights protected under Article 4 including a wide range of familiar human rights, including in Article 5(b), the right to "security of person and protection by the State against violence or **bodily harm**..." [emphasis added]."

Given these requirements, the HRC's view is that the exposure draft Bill is, on the face of it, inadequate to meet the international human rights obligations Australia to which Australia is answerable. Further detail on this point is provided in section 3 of these comments below.

The HRC notes that Australia's ratification of the CERD is subject to this reservation to CERD:

> The Government of Australia ... declares that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4(a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4(a).[1]

2. Racial Discrimination Act 1975

The *Racial Discrimination Act 1975* (Cth) ("RDA") was passed by the Federal Parliament in 1975 to implement the terms of CERD into Australian domestic law. It was very closely based on that treaty because, at the time, it was thought that the only basis upon which it could survive a constitutional challenge in the High Court, was to base it closely on the treaty which had been ratified by Australia and which the Parliament would have power to legislate into domestic law under the External Affairs power (s 51 (xxix) of the Australian Constitution).

At the time of the enactment of the RDA, the inclusion of provisions by the *Racial Hatred Act 1995* (Cth) prohibiting so-called "race hate speech" was controversial as they were viewed by some politicians as being in conflict with the right of freedom of opinion and expression contained in Article 19 of the ICCPR. For that reason, there were no race hate provisions in the RDA initially and they were not introduced until 1995. However, the protections against race hate speech were eventually introduced. According to the Australian Human Rights Commission:

> ...sections 18C and 18D were introduced in response to recommendations of major inquiries including the *National Inquiry into Racist Violence* and the *Royal Commission into Aboriginal Deaths in Custody*. These inquiries found that racial hatred and vilification can cause emotional and psychological harm to their

[1] See http://www.bayefsky.com/html/australia_t2_cerd.php (accessed 14 April 2014).

> targets, and reinforce other forms of discrimination and exclusion. They found that seemingly low-level behaviour can soften the environment for more severe acts of harassment, intimidation or violence by impliedly condoning such acts. [2]

The HRC submits that the social landscape in Australia has not changed so dramatically since 1995 that these protections are no longer required to protect minority groups against race hate speech.

In some respects, the present race hate provisions introduced in 1995 in Part IIA of the RDA fell short of the requirements of Article 4 of CERD, in that they do not generally make the prohibitions in the s 18C of the Act a criminal offence.[3]

In Part IIA, s 18C is the operative section. It renders unlawful the doing of:

> 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 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.

3. The Exposure Draft Bill: discussion

The HRC notes that the exposure draft Bill is set out as follows (adopting the numbering used in the exposure draft Bill):

> 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:

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[2] Australian Human Rights Commission, "At a glance: Racial vilification under sections 18C and 18D of the Racial Discrimination Act 1975 (Cth)" available online: *https://www.humanrights.gov.ou/sites/default/files/18C%20%26%20D%20FactsheetFINAL.docx* (accessed 7 April 2014).

[3] The Committee notes the importance of maintaining civil remedies and of maintaining access to conciliation at the Australian Human Rights Commission, and is not advocating for criminal sanctions to replace civil remedies.

(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."

3.1. Subclause 3(1) of the exposure draft Bill

In the HRC's view, the proposed replacement of the words "offends, insults and humiliates" by the word "vilify" in the exposure draft is inadequate to meet the requirements of the ICCPR and the CERD. "Vilify" is defined by the exposure draft Bill only to mean the incitement of hatred. Under Article 20 of the ICCPR, the advocacy of racial hatred is referred to, and Article 4(a) of the CERD requires State parties to make "all dissemination of ideas based on racial superiority or hatred" an offence. The Committee submits that if the term "vilify" is to be used, it should, at the least, be defined to mean "to advocate or incite hatred..."

If the definition of "vilify" is confined to inciting hatred, an additional element may need to be proved: the inciting of a third party. In the HRC's view, this proposed approach, together with proposed subclause 3(3) discussed further below, will diminish what the Committee sees as a strength of s18C as it currently stands, which is to address racially vilifying speech from the perspective of the "reasonable victim"[4].

The exposure draft Bill also narrowly defines "intimidate" to mean "to cause fear of physical harm". No reason is advanced by the Government to explain why the term "bodily harm", in Article 5(b) of the CERD, has not been used. The HRC notes that this term would include psychological harm as part of that definition.

3.2. Subclause 3(3) of the exposure draft Bill

The Exposure Draft, in proposed subclause 3(3) amends the RDA by introducing a community or "reasonable person" test for the assessment of whether the new section's acts are "reasonably likely" to have the effects referred to in subclause (1)(a).

As noted above, s 18C requires a "reasonable victim" test. Under the latter standard the test is of a reasonable member of the racial community subjected to the act or words. The HRC's view is that as racial slurs are typically directed towards members of minorities who, by reason of historical or other context, may be affected by such slurs more strongly than those of members of the majority, there seems no good reason why this change needs to be made. To this point, the HRC notes the view cited by the Australian Human Rights Commission that "the 'reasonable victim' test allows the standards of the dominant class to be challenged by ensuring cultural sensitivity when decided the types of comments that are considered offensive."[5]

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[4] *Corunna v West Australian Newspapers* (2001) EOC 93-146 at 8.4

[5] Australian Human Rights Commission, "Racial vilification law in Australia", Race Discrimination Unit, HREOC, October 2002, available online: *https://www.humanrights.gov.au/publications/racial-vilification-*

3.3. Subclause 3(4) of the exposure draft Bill

The HRC's view is that proposed subclause 3(4) of the exposure draft Bill will have the effect of defeating the provision almost entirely. Subclause 3(4) exempts from prohibition words spoken or otherwise communicated "in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter."

This is so wide as to clearly infringe international law by allowing the vilification or intimidation of persons, regardless of the extent of the fear of harm or incitement of hatred involved as long as the vilification (as defined) or intimidation is done in the course of public discussion.

The HRC notes that subclause 3(4) is so broad that it is difficult to identify many circumstances in which the new section could apply. For example, if a spectator directed a diatribe of racial hate to a player at a football match that made in response to another comment, it may not be caught by the section. If the comment was made in response to recent media comments it may also not be caught – because the element of "public discussion" may be present. The HRC notes the recent analysis of past prominent cases undertaken by Professor Sarah Joseph, Director of the Castan Centre for Human Rights Law.[6] As this analysis is illustrative, the Committee sets it out below in full, as reported in the *Sydney Morning Herald*:

> **EATOCK v BOLT 2011**
> *Herald Sun* columnist Andrew Bolt was found to have breached section 18C in two articles suggesting prominent fair-skinned Aborigines had falsely identified as indigenous to claim benefits available only to Aboriginal people. The judge ruled Bolt could not rely on the exemption for a matter of public interest because he had not acted reasonably or in good faith, and his articles contained gross inaccuracies.
>
> Professor Sarah Joseph: Bolt would not have lost the case. His articles were found to have been likely to intimidate, but intimidation has been narrowed to mean "cause fear of physical harm" and it is unlikely that the articles would make someone fear physical harm. It is also unlikely they would be found to vilify fair-skinned Aboriginal people, as it would be hard to establish they would cause third parties to hate that group. In any case, the defence for anything written as part of public discussion is so broad it seems to "save" almost any column written in the mainstream media, and probably any blog.
>
> **CAMPBELL v KIRSTENFELDT 2008**
> In what started as a neighbourhood dispute in a town outside Perth, Mervyn Kirstenfeldt was found to have breached section 18C by repeatedly calling his neighbour Kaye Campbell, an Aboriginal woman, names such as "Gin", "nigger", "coon" "lying black mole c---" and telling her to go "back to the scrub where you belong". The abuse was often made in the presence of Campbell's family and friends.
> Joseph: This could be perceived as intimidating or vilifying. The repetition could make an ordinary person fear physical harm. The abuse could be interpreted as vilifying, though it is unlikely Campbell's friends and family would be turned against her. The public discussion defence would not apply, as the abuse is not in the

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law-australia#10 (accessed 8 April 2014) citing Saku Akmeemana and Melinda Jones, "Fighting Racial Hatred" in *Racial Discrimination Act 1975: A Review,* (Race Discrimination Commissioner, Commonwealth of Australia, 1995) 129 at p168

[6] Gay Alcorn, "Locked in a war of words to define free speech", *Sydney Morning Herald,* 29 March 2014, available online: *www.smh.com.au/national/locked-in-a-war-of-words-to-define-free-speech-20140328-35oi1.html* (accessed 8 April 2014)

context of political or social commentary. Such "neighbourhood" abuse would still be against the law.

JONES v TOBEN 2002
In the first case to do with racial abuse on the internet, Holocaust denier Fredrick Toben was found to have breached the act and was ordered to remove offensive material from the web. Toben expressed doubt that the Holocaust ever happened, said it was unlikely there were gas chambers at Auschwitz, and claimed Jewish people, for reasons including financial gain, had exaggerated the numbers of Jews killed.

He was found to have lacked good faith because of his "deliberately provocative and inflammatory" language.

Joseph: Toben would likely not be found in breach of the new law. It is unlikely his speech intimidates so as to make people afraid for their physical, as opposed to psychological, wellbeing. It could however be interpreted as vilification. Holocaust denial indicates that the Jews have concocted the Holocaust for self-serving purposes, a classic anti-Semitic idea that has historically provoked hatred against Jewish people.

However, Toben would likely be saved by the exemption, as he could claim his website was published as part of political, social, cultural, or academic discussion. There is no requirement the discussion be reasonable or be conducted in good faith.

This analysis demonstrates that racially vilifying speech that was caught under section 18C would only fall foul of the current proposal in a relatively "private" context of, for example, racial vilification by a neighbour. Instances where the racially vilifying speech is carried out by people who potentially have far greater reach and far greater potential for harm would not be caught by the current proposal. The HRC submits that this outcome is clearly counter-intuitive.

3.4. Proposed repeal of the provisions cognate with section 18C

The Exposure Draft also proposes to repeal sections 18B, 18D and 18E of the RDA. Section 18B provides that race hate acts or speech occur if only one of the reasons for it has a racial element. Similar provisions exist in the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the anti-discrimination Acts of all of the eight States and territories. No reason has been advanced for this limiting change and it is submitted s 18B should not be repealed.

Section18D is as follows:

> 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.

This section is designed to protect free speech by protecting acts done "reasonably" and "in good faith." The HRC submits that the Government has not demonstrated any good reason to repeal that section and to replace it with the proposed subclause 3(4).

Section 18E imputes to an employer the acts of employees done in connection with their employment unless the employer takes "all reasonable steps" to prevent the doing of the impugned act. This section is surely necessary to prevent media organisations from escaping liability for the writings of their employees, most or all of which are subject to editorial supervision.

4. Concluding comments

The HRC notes the Government's contention that even seriously offensive, insulting or humiliating words should not be the subject of legal prohibition because of free speech concerns. This is surprising when there has been no hint of criticism of the legislation of most states and territories which criminalises offensive language.

In NSW more than 4,000 people have been fined in the twelve months prior to September 2013 for the criminal offence of offensive language, likely resulting from abuse of police officers who it is submitted, are less likely to be offended by those words than members of racial minorities offended by serious racial slurs. Section 18C is not a criminal offence, just a civil prohibition and it has resulted in punitive action only a few times over the last decade, not 4,000 times over the last year. The HRC notes that the NSW Government has recently increased the applicable fine for offensive language from $150 to $500[7] ostensibly as part of a package to counter drug and alcohol related violence.

In the Committee's view, the overall effect of the exposure draft Bill is to confine the prohibition of racial hate speech to circumstances where (narrowly defined) vilifying or intimidating acts or words are communicated in public but only if they are not made in the course of public discussion. That may mean very few or no statements of vilification or intimidation in public are ever caught.

For those reasons, the HRC submits that the exposure draft Bill should be opposed in its entirety, as it would put Australia in breach of its international obligations. Further, the HRC submits that Australia's reservation to the CERD should be withdrawn.

[7] *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW) which received assent on 31 January 2014.

Comments of the Indigenous Issues Committee of the Law Society of NSW

The Indigenous Issues Committee of the Law Society of NSW ("Committee") refers to the exposure draft of the Freedom of Speech (Repeal of s 18C) Bill 2014 (the "Bill").

The Committee strongly opposes the Bill. It should be noted that there is extraordinary unity among Indigenous and Ethnic communities in opposing any change to the existing provision. The Committee's view is that this is because those that have experienced racial vilification have no wish to have their children experience it as well. There is also a common understanding that the foundation stone of a cohesive society is tolerance, inclusion and equality, not hate or the facilitation and promotion of bigotry.

The Committee provides a threefold response to the Bill. First, to reaffirm the need not to facilitate racial discrimination, hatred or bigotry; second, to respond to the deficiencies of the Bill; and third, to affirm the existing purpose for the provision and to challenge the misinformation about the Court's reasoning in *Eatock v Bolt* [2011] FCA 1103.

In relation to each of these matters the Committee makes the following observations.

1. Importance of protection against hate speech

It is well accepted that freedom of speech is an important democratic right and one which is fundamental to a free society. However, it is also well accepted that it is not an absolute right. There are many restrictions on free speech, including laws concerning defamation, restrictions on misleading conduct, false advertising, and offensive language and behaviour. These laws are enacted to ensure people's reputation and dignity are protected, to prohibit harm from misinformation and false representations and to ensure that public spaces can be enjoyed freely by all citizens.

In addition, all Australian states and territories have prohibitions on racial vilification in one form or other.

In *Eatock v Bolt* [2011] FCA 1103 Justice Bromberg noted (at [212]) that "At the heart of any attempt to secure freedom from racial prejudice and intolerance is the protection of equality and the inherent dignity of all human beings."

At [215] he noted that:

> Racial discrimination is a product of the dissemination of racial prejudice. At the core of racial prejudice is the idea that some people are less worthy than others because of their race. The dissemination of racial prejudice usually involves attributing negative characteristics or traits to a specific group of people. As Neave JA said in *Catch the Fire* at [176]:
>
> > Attributing characteristics to people on the basis of their group membership is the essence of racial and religious prejudice and the discrimination which flows from it.

At [215]-[216] he observed:

> Ascribing negative traits to people by reason of their group membership disseminates the idea that members of the group are not worthy or less worthy and

are thus deserving of disdain and unequal treatment. As Dickson CJ said delivering the judgment of the majority in *Keegstra* at 756:

> The message of the expressive activity covered by s 319(2) [racial hatred] is that members of identifiable groups are not to be given equal standing in society, and are not human beings equally deserving of concern, respect and consideration. The harms caused by this message run directly counter to the values central to a free and democratic society, and in restricting the promotion of hatred Parliament is therefore seeking to bolster the notion of mutual respect necessary in a nation which venerates the equality of all persons.

The majority in *Keegstra* found that hate speech was not only an affront to individual dignity but noted the potential risk "that prejudiced messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups in ...society" (at 748).

Similarly, the majority of the Canadian Supreme Court in *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892 at 919 (Dickson CJ, delivering the majority judgment) said:

> ...messages of hate propaganda undermine the dignity and self-worth of target group members and, more generally, contribute to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open mindedness that must flourish in a multicultural society which is committed to the idea of equality.

These judicial observations recognise that the effects of hate speech are not limited to personal harm against individuals but the broader effects which prevent those affected from enjoying their human rights and participating in a society free of discrimination. As Justice Bromberg explained in *Eatock v Bolt* [2011] FCA 1103 at [264]:

> Proscribing offensive conduct in a public place not only preserves public order but protects against personal offence. The wounding of a person's feelings, the lowering of their pride, self-image and dignity can have an important public dimension in the context of an Act which seeks to promote tolerance and social cohesion. Proscribing conduct with such consequences will clearly serve a public purpose. Where racially based disparagement is communicated publicly it has the capacity to hurt more than the private interests of those targeted. That capacity includes injury to the standing or social acceptance of the person or group of people attacked. Social cohesion is dependent upon harmonious interactions between members of a society. As earlier explained, harmonious social interactions are fostered by respectful interpersonal relations in which citizens accord each other the assurance of dignity. Dignity serves as the key to participatory equality in the affairs of the community. Dignity and reputation are closely linked and, like reputation, dignity is a fundamental foundation upon which people interact, it fosters self-image and a sense of self-worth: *O'Neill* at [160]-[161] (Kirby J) and *Hill v Church of Scientology of Toronto* [1995] 2 S.C.R. 1130 [117] and [120].

The Committee agrees with these observations and submits that ss 18C and 18D provide an appropriate balance between free speech and the entitlement of all citizens to be free from being the subject of hate speech on the basis of their race, colour or national or ethnic origin.

Australia's international obligations

Australia is a party to a number of international instruments that require action to prevent freedom from discrimination including racial vilification. They include the International Covenant on Civil and Political Rights ("ICCPR"), the International Convention on the Elimination of all Forms of Racial Discrimination ("CERD") and the United Nations Declaration on the Rights of Indigenous People ("UNDRIP").

Article 8(2)(e) of the UNDRIP provides:

> States shall provide effective mechanisms for prevention of, and redress for:
> ....
> (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Similarly, Article 15(2) of the UNDRIP provides:

> States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

The Australian Government has an obligation to ensure that national anti-discrimination legislation ensures those international obligations incorporated under the *Racial Discrimination Act 1975* (Cth) are not impaired. The Bill fails to meet that objective. The proposed amendments have not been drafted in consultation and cooperation with Indigenous peoples as required by Art. 15(2) of the UNDRIP.

2. Comments on the Bill

The Bill proposes to repeal ss 18B - 18E of the *Racial Discrimination Act 1975* (Cth) ("RDA") and replaces it with a single provision in the following form:

> (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.

The following observations can be made about the proposed amendments:

(1) The effect of the amendment is to wholly remove the protection currently provided by s 18C, and replace it with a very narrow prohibition against racial vilification,[8] which is itself the subject to a broad exclusion, which makes the protection largely meaningless.

(2) The combined effect of the proposed ss (1) and (2) is to limit the protection to "incitement of hatred" to where the hate speech causes fear of "physical harm" to persons or property. This is an extremely limited form of protection leaving a broad range of hate speech without sanction. Confined in this way the Bill ignores racial vilification which causes ridicule and humiliation on the basis of race (as opposed to hatred), and the effects that such vilification has on its victims.

(3) The Committee respectfully submits that contrary to the Attorney-General's Press Release the Bill does not "preserve the existing protection against intimidation and create a new protection from racial vilification". The new definition significantly limits its operation. The existing reference to "intimidation" in s 18C is not defined in the restrictive way that is in the Bill. Under the current provision the word "intimidate" has been interpreted in accordance with its ordinary dictionary meaning of "To make timid, or inspire with fear; overawe; cow" or "To force into or deter from some action by inducing fear."[9] In *Eatock v Bolt* at [265] Bromberg J noted that "the word "intimidate" is apt to describe the silencing consequences of the dignity denying impact of racial prejudice **as well as** the use of threats of violence". [emphasis added]

(4) The protection afforded by the new provision is narrower than what is provided in most States where there is legislation providing protection against acts which incite "serious contempt" and "severe ridicule" as well as acts which incite racial hatred.[10]

(5) Most State legislation makes a distinction between racial vilification which involves threats of physical harm to person(s) or property and racial vilification which does not. In some States the former is a criminal offence which is punishable by a term of imprisonment.[11] Where this distinction is made, the defence of fair comment which is otherwise available, is not available in relation

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[8] Contrary to the Attorney-General's Press Release the Bill is not "the first time that racial vilification is proscribed in Commonwealth legislation sending a clear message that it is unacceptable in the Australian community." It is nonsense to suggest that the existing provision does not protect against vilification simply because the word is not used. What is relevant is the effect of the existing provision. The terms of the existing s 18C clearly provides protection against a broad range of racial vilification.

[9] *Eatock v Bolt* [2011] FCA 1103 per Bromberg J at [262].

[10] See ss 20C(1) and 20D(1), *Anti-Discrimination Act 1977* (NSW); ss 66(1) and 67(1), *Discrimination Act 1991* (ACT); ss 124A and 131A, *Anti-Discrimination Act 1991* (Qld); s 4, *Racial Vilification Act 1996* (SA); s 73 *Civil Liability Act 1936* (SA); s 7(1), *Racial and Religious Intolerance Act 2001* (Vic); and s 19, *Anti-Discrimination Act 1998* (Tas).

[11] See for example "serious racial vilification" which is prohibited under s 20D(1), *Anti-Discrimination Act 1977* (NSW) and punishable by up to 6 months imprisonment, see offence of "serious racial, religious, sexuality or gender identity vilification" in s 131A, *Anti-Discrimination Act 1991* (Qld) which is punishable by 6 months imprisonment ; offence of "racial vilification" in s 4, *Racial Vilification Act 1996* (SA) which is punishable by up to 3 years in prison

to hate speech involving threats of physical harm to person(s) or property.[12] This is presumably out of an acknowledgement that it is not necessary for the proper discussion of issues to cause fear of physical harm to person(s) or property. The proposed Commonwealth legislation proceeds on the basis that it is acceptable to do so in a broad range of circumstances.

(6) Despite covering matters which would constitute a criminal offence in some States, the Bill proposes a broad exclusion contained in subsection (4) which operates on the principle that a person can:

a. incite hatred against a person or group of persons because of their race, colour or national or ethnic origin; and

b. intimidate by causing fear of physical harm against a person, their property or members of a group because of their race, colour or national ethnic origin,

as long as, they do so through "words, sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter."

(7) The exclusion proposed in subsection (4) of the Bill raises the question of why there is any need to be able to:

a. incite hatred against a person or group of persons because of their race, colour or national or ethnic origin; or

b. intimidate by causing fear of physical harm against a person, their property or members of a group because of their race, colour or national ethnic origin;

in order to participate or contribute to public discussion on any issue.

(8) The exclusion in subsection (4) of the Bill is broad. It is difficult to identify any activity which could not be covered by "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".

(9) The Committee's view is that every internet forum or chat room, every published newspaper or internet article, opinion, blog or comment would fall within this category. Furthermore the *modus operandi* of the Nazi Party in Germany in the 1930s was to vilify and intimidate people on the basis of their ethnic origin. Each edition of *Der Sturmer* and the vile anti-semitism of Julius Streicher would be excusable under the proposed law. Such publications would be no more "words" "spoken, broadcast ... or otherwise communicated in the course of participating in the public discussion" of "any political, social ... matter". It is arguable that the radio broadcasts that led to mass murder in Rwanda would fall within the same category. Needless to say, all of the

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[12] See ss 20C(1) and 20D(1), *Anti-Discrimination Act* 1977 (NSW); ss 66(1) and 67(1), *Discrimination Act 1991* (ACT); ss 124A and 131A, *Anti-Discrimination Act 1991* (Qld); s 4, *Racial Vilification Act 1996* (SA); s 73 *Civil Liability Act 1936* (SA); s 7(1), *Racial and Religious Intolerance Act 2001* (Vic); and s 19, *Anti-Discrimination Act 1998* (Tas).

material which was at issue in *Jones v Scully* (2002) 120 FCR 243 and *Jones v Toben* [2002] FCA 1150 would be likely to fall within the exception; even if it fell within the terms of subsection (1) of the Bill, which is doubtful.

(10) Most State legislation only provides a defence to racial vilification on the basis that it is done "reasonably and in good faith",[13] in "good faith"[14] or "reasonably or honestly"[15] as part of, or for, academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter. As noted above that defence is not available in some States in relation to serious vilification involving incitement in relation to threats of harm to persons or property. No such limitation is proposed in the Bill, meaning that the incitement to hatred can occur in bad faith and with no genuine attempt to be truthful. Indeed, the Attorney-General has since clarified that this is the intention of the provision.[16]

(11) The Committee is of the view that no public benefit can be achieved by facilitating racial vilification, including vilification that involves intimidation through threats to persons and property on the basis of misinformation or lies. It does not assist public discussion of issues in the search for truth. People do not have equal access to the media to respond to character assassination or the vilification of their communities. They are entitled to remedies for distortions of fact.

The Committee is of the view that the proposed provision is flawed, and is a retrograde step to the protection of the rights of Indigenous people and other sections of the community. The proposed repeal of the existing provision, and the proposed new legislation is contrary to Australia's obligations under international law including Articles 20 and 26 of the ICCPR; Articles (2)(1) and 4(a) of the CERD; and Articles 8(2)(e) and 15(2) of the UNDRIP.

3. No defect in the existing provision

The Committee is of the view that no deficiency has been identified in the existing protections afforded by the RDA. The use of that provision has been limited with only a small number of matters going to Court. It has been in force for nearly 20 years without any concern as to its operation. While the scope of s 18C is broad, it has been noted that it only applies to "profound and serious effects, not to be likened to mere slights".[17] The need to protect free speech is achieved through s 18D including on the basis that it is "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". This broad defence is similar to the defences available under State legislation referred to above.

The RDA has been effective in allowing the Jewish community to take action to prevent the distribution of anti-Semitic material: see *Jones v Scully* (2002) 120 FCR 243 and *Jones v Toben* [2002] FCA 1150.

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[13] Section 20C(2)(c), *Anti-Discrimination Act 1977* (NSW); s 73(1)(c) *Civil Liability Act 1936* (SA); s 11(1), *Racial and Religious Intolerance Act 2001* (Vic).
[14] *Section 55, Anti-Discrimination Act 1998* (Tas).
[15] Section 66(2)(c), *Discrimination Act 1991* (ACT).
[16] See note 13.
[17] *Eatock v Bolt* [2011] FCA 1103 per Bromberg J at [268].

The current debate in relation to the provision has been fuelled by criticism of the outcome in *Eatock v Bolt* [2011] FCA 1103, but much of that criticism has been premised on misinformation about this case and the relationship between ss 18C and 18D. In particular:

(1) At issue in *Eatock v Bolt* were a number of articles published by Andrew Bolt asserting that a number of prominent Aboriginal people had chosen to identify as Aboriginal people for financial gain. In addition to the broad assertion in relation to Aboriginal identity the articles contained personal attacks on the reputation of the individuals concerned. Those personal attacks were found to be premised on "errors of fact" and "distortions of the truth".[18]

(2) Because of the lack of any factual basis to those attacks, it is widely accepted that the individuals concerned could have maintained actions for defamation. Accordingly, the articles were already within a class of speech which could receive sanction. Section 18C did not therefore provide any further restriction in the circumstances of that case, than what would otherwise be available to the plaintiffs in that case.

(3) Apart from the finding that Andrew Bolt breached s 18C, the only remedy provided was that the articles contain corrective notices: see *Eatock v Bolt (No 2)* [2011] FCA 1180. No monetary compensation was sought, and no apology was received by the applicants. One might ask how free speech is infringed by being required to correct the factual errors in the article. The judgment remains the only public document correcting the errors. In order to achieve that result the Aboriginal applicants exposed themselves to public scrutiny and were able to be cross-examined in Court. Andrew Bolt had every opportunity to publicly justify the position in his articles. He was unable to do so, nor did he seek to appeal the decision.

(4) In its current form, s 18C(1) provides:

> (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. [emphasis added]

(5) The provision does not render unlawful acts which merely offend, insult, humiliate or intimidate. It renders acts which offend, insult, humiliate or intimidate because of the race, colour or national or ethnic origin. It is difficult to see how public discourse would benefit from a person being able to offend, insult, humiliate or intimidate people simply because of their race, colour or national or ethnic origin. As Bromberg J noted in *Eatock v Bolt* [2011] FCA 1103 per Bromberg J at [334] and [335]:

> 334. In seeking to promote tolerance and protect against intolerance in a multicultural society, the RDA must be taken to include in its objective tolerance for and acceptance of racial and ethnic diversity. At the core of multiculturalism is the idea that people may identify with and express their racial or ethnic heritage free of pressure not to do so. Racial identification may be public or private. Pressure which serves to negate it will include

[18] *Eatock v Bolt* [2011] FCA 1103 per Bromberg J at [8] and [384].

> conduct that causes discomfort, hurt, fear or apprehension in the assertion by a person of his or her racial identity. Such pressure may ultimately cause a person to renounce their racial identity. Conduct with negating consequences such as those that I have described, is conduct inimical to the values which the RDA seeks to honour.
>
> 335. People should be free to fully identify with their race without fear of public disdain or loss of esteem for so identifying. Disparagement directed at the legitimacy of racial or religious identification of a group of people is a common cause for racial or religious tension. A slur upon the racial legitimacy of a group of people is just as, if not more, destructive of racial tolerance than a slur directed at the real or imagined practices or traits of those people.

(6) Moreover, much of the commentary around this matter focuses on s 18C, but that ignores the very broad exemption contained in 18D. This defence was not available to Andrew Bolt because his accusations were without a factual foundation. The errors in the articles were comprehensive and included distortions of fact, errors of fact and selective presentation of information which misled and are there for everyone to read.[19] If he had done his research and got his facts right the proceedings against him would have failed. In this context, complaints that the result in that case inappropriately impinged on free speech, is really an appeal to being able offend, humiliate and intimidate people on the basis of their race, including on the basis to say whatever you want about people or a group of people regardless of whether it is accurate.

(7) The Committee is of the view that if a person sets out to humiliate or offend a person on the basis of their race, colour or national or ethnic origin they should be able to justify it with a factual basis. Section 18D provides a suitable balance to ensure free speech is protected. In this respect, the Committee notes comments made by the Attorney-General in an interview on ABC's *Lateline* program that people should have the "freedom to spread untruths" (except in certain circumstances such as trade and commerce).[20] The Committee is opposed to this policy position as it is fundamentally incompatible with the aims of the CERD.[21]

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[19] See for example the errors and distortions set out in *Eatock v Bolt* [2011] FCA 1103 per Bromberg J at [381]-[407].

[20] The interviewer noted that the judgment in *Eatock v Bolt* was not about the freedom of opinion, but rather the freedom to spread untruths, and put to the Attorney-General that his position is that this freedom should exist. The Attorney-General agreed, but carved out certain instances where such a freedom to spread untruths should not apply, such as in trade and commerce. See *Lateline* transcript 25 March 2014, available online: http://www.abc.net.au/lateline/content/2014/s3971446.htm (accessed 8 April 2014).

[21] The Attorney-General's position is also contrary to the findings of the Report of the Royal Commission into Aboriginal Deaths in Custody (National Report Volume 4, (Canberra, 1991)), which states:

> 28.3.33 National legislation relating to racial vilification, then, has to take into account the potential conflict between these two rights in a democratic society: the right to freedom of speech, and the fight of the state to limit certain kinds of speech that can lead to overt conflict among its citizens.
> 28.3.34 Legislation in this area recognises the important fact that language itself can be a form of violence. This principle was enunciated by Justice Felix Frankfurter of the United States Supreme Court:
>
> *[I]nsulting or fighting words, which by their very utterance inflict injury or tend to incite to immediate breach of the peace,* ***these utterances have no essential value as a***

(8) A person who wishes to avail herself of the protection afforded by s 18C of the RDA is not required to apply to the court to resolve a matter. The Australian Human Rights Commission ("AHRC") is empowered under the *Australian Human Rights Commission Act 1986* (Cth) ("AHRCA") to do what is necessary or convenient to be done in connection with the performance of its functions[22]. The AHRC's functions include making further inquiries into the issues alleged and to attempt to conciliate complaints of unlawful discrimination under Part IIB of the AHRCA[23].

Under Division 1 of Part IIB, the President of the AHRC can attempt to conciliate a resolution to the complaint. The President also has a number of powers to assist with the resolution, including the power to obtain information[24] and the power to compel[25] the parties and other necessary persons to attend a compulsory conference[26].

The conference can afford the parties an opportunity to discuss the alleged acts of discrimination, how it occurred, its impact and what measures could be undertaken to rectify it. Some agreed resolutions between the parties could include a range of remedies such as an apology or compensation or both, and agreement may be subject to a confidentiality agreement which can be beneficial to either or both parties. The Committee notes that in 2012-2013, the AHRC facilitated 1,650 conciliations (of all types of complaints), of which 1,079 (64%) were successfully resolved.[27] In this period, the Commission received 500 complaints under the RDA, 35.5% of the complainants were Aboriginal or Torres Strait Islander; 44% of these complaints were referred for conciliation and 61% were successfully resolved.[28]

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step to the truth. *Any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.*

Wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free ordered life in a metropolitan polyglot community. [emphasis added, footnote deleted]

[22] Section 13 of the *Australian Human Rights Commission Act 1986* (Cth).

[23] See section 11(1)(aa) of the *Australian Human Rights Commission Act 1986* (Cth).

[24] Section 46PI(2) of the *Australian Human Rights Commission Act 1986* (Cth).

[25] Section 46PL(1) of the *Australian Human Rights Commission Act 1986* (Cth) makes it an offence to not attend a compulsory conference with a penalty of 10 penalty units.

[26] Section 46PJ of the *Australian Human Rights Commission Act 1986* (Cth).

[27] Australian Human Rights Commission Annual Report 2012-2013 page 8 available online: https://www.humanrights.gov.au/sites/default/files/document/publication/ahrc_annual_report_2012-13.pdf (accessed 3 April 2014).

[28] Australian Human Rights Commission Annual Report 2012-2013 at p 130-134 available online: https://www.humanrights.gov.au/sites/default/files/document/publication/ahrc_annual_report_2012-13.pdf (accessed 3 April 2014).