New South Wales Society of
Labor Lawyers

Response to the Commonwealth Government's proposed reforms to the *Racial Discrimination Act 1975*

April 2014

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Submission to the Attorney-General's Department regarding the Commonwealth Government's proposed reforms to the *Racial Discrimination Act 1975*

April 2014.

The New South Wales Society of Labor Lawyers aims, through scholarship and advocacy, to effect positive and equitable change in the substantive and procedural law, the administration of justice, the legal profession, the provision of legal services and legal aid, and legal education.

This submission was approved by the New South Wales Society of Labor Lawyers Executive. It is in line with the Society's principles, objectives and values.

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Executive summary

1 There is no compelling case for any change to section 18 of the *Racial Discrimination Act 1975* (Cth) (**the Act**), particularly in the form of the Government's proposals.

2 The changes proposed by the Government would result in bad law, effectively denuding the Act of most of its weaponry to combat racial hate speech.

3 There is no evidence to suggest that public discourse is adversely affected by the current section 18C, and the accompanying exemption in section 18D that allows for (otherwise racially vilifying) comments that are made reasonably and in good faith.

4 The 'Bolt case' provides no rationale for a change to the legislation, given the Court found Mr Bolt's articles were not written and published reasonably and in good faith.

Background

5 On 25 March 2014, the Commonwealth Attorney General, Senator George Brandis, announced the Coalition Government's Party Room had approved changes to the Act and called for "stakeholders" to comment on the proposed reforms.[1]

6 The proposed changes are to repeal section 18B, 18C, 18D, and 18E of the Act and to insert a new section prescribing the conditions in which certain vilifying and intimidating conduct based upon race, colour or ethnic or national origin would be unlawful.

7 The Government's proposal to change the Act has occurred against the backdrop of the 'Bolt case',[2] where the Herald and Weekly Times journalist, Andrew Bolt was found to have written two articles that were reasonably likely to offend, insult, humiliate or intimidate fair-skinned Aboriginal persons.

8 We, the NSW Society of Labor Lawyers (**Labor Lawyers**) are pleased to have the opportunity to provide this submission in response to the Exposure Draft (**the proposed reforms**).

The legal case for retaining Part IIA of the *Racial Discrimination Act* in its current form

9 Sections 18B, 18C, 18D and 18E (Part IIA) were inserted into the *Racial Discrimination Act* and commenced operation in October 1995.[3]

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[1] Senator the Hon George Brandis QC Media Release 25 March 2014 http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/First%20Quarter/25March2014-RacialDiscriminationAct.aspx

[2] *Eatock v Bolt* [2011] FCA 1103 (28 September 2011)

[3] *Racial Hatred Act 1995*, No. 101, 1995, assented to 15 September 1995, date of commencement 13 October 1995

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10 Individuals who want to take action under 18C cannot go directly to court. They must first make a complaint to the Australian Human Rights Commission, who will generally attempt to mediate the complaint.

11 In the 2012-2013 year:

(a) 53% of complaints were resolved at conciliation;

(b) 4% of complaints were terminated or declined for being trivial, misconceived or lacking in substance; and

(c) less than 3% of racial hatred complaints proceeded to court.[4]

12 The Federal Court of Australia and the Federal Magistrates Court (now the Federal Circuit Court) have been the principal fora for those cases brought under section 18C that do proceed to court.

A. 'Offend, insult, humiliate or intimidate' in the current legislation means "more than mere slights"

13 Since 1995, the Federal Court (principally) has established a body of law on how the provisions of Part IIA should be interpreted. The prohibition in section 18C against behaviour likely to "offend, insult, humiliate or intimidate" has been interpreted to mean a prohibition against acts or words causing "profound and serious effects, not to be likened to mere slights".[5]

14 Thus, whilst a layperson's reading of the Act's prohibitions against offensive, insulting or humiliating conduct based on race, ethnicity or nationality may seem to set a low bar for unlawful conduct, the reality of the courtroom has shown that only conduct reasonably likely to give rise to "profound and serious effects" is caught.

15 In the 'Bolt case',[6] the Court found Mr Bolt's articles were likely to have caused a profound and serious effect on fair-skinned Aboriginal persons whom Mr Bolt had said were not genuinely Aboriginal persons but who, motivated by career opportunities available to Aboriginal people or by political activism, had chosen to falsely identify as Aboriginal.[7]

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[4] Australian Human Rights Commission, 'At a glance: Racial vilification under sections 18C and 18D of the Racial Discrimination Act 1975 (Cth)', https://www.humanrights.gov.au/glance-racial-vilification-under-sections-18c-and-18d-racial-discrimination-act-1975-cth.

[5] *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 (31 July 2001) (Kiefel J); *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 at [70] (French J); *Jones v Scully* [2002] FCA 1080 at [102] (Hely J); or, as Branson J put it in *Jones v Toben* [2002] FCA 1150 at [92] "[Not conduct] reasonably likely to cause technical, but not real, offence or insult".

[6] *Eatock v Bolt* [2011] FCA 1103 (28 September 2011).

[7] *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) at [284].

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16 This profound and serious effect was to lower the pride and self-image of the persons attacked, thereby inhibiting their participatory equality in the affairs of the community; an entitlement of all citizens.[8]

B. *The current legislation exempts 'fair comment' made reasonably and in good faith*

17 Section 18D of the Act, as it presently stands, exempts from prohibition any conduct done reasonably and in good faith.

18 The courts have identified that reasonableness is to be judged against the possible degree of harm the conduct may cause. To quote Lee J in *Bropho*, "such harm, in the context of the Act, would be the extent to which that part of the community which consisted of persons who held racially-based views destructive of social cohesion, or persons susceptible to the formation of such opinions, may be reinforced, encouraged or emboldened in such attitudes..."[9]

19 As to acting in good faith, the person doing the act should exercise prudence, caution and diligence, which, in the context of the Act would mean due care to avoid or minimise consequences identified by s 18C.[10]

20 Again, turning to the 'Bolt case', the Court examined Mr Bolt's conduct of first, stating or implying that a 'trend' had emerged whereby people had disingenuously chosen to identify as Aboriginal for ulterior motives including career and political aspirations, and then secondly, setting out and examining a range of purported facts about particular individuals in support of his identified trend.[11]

21 The Court found that many of the 'facts' put forward by Mr Bolt were false.[12] In fact, Mr Bolt himself accepted that many of his purported facts were wrong.[13]

22 The Court also found that Mr Bolt (and his publisher) had not acted reasonably and in good faith as they had not taken the necessary reasonable measures to ensure the truthfulness of the articles, and the articles deployed "inflammatory and provocative" language replete with "mockery and derision"[14] likely to offend those identified as part of the 'trend'.[15]

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[8] *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) at [297]
[9] *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 at [136]; *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) at [342]
[10] *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290 at 298 (Gummow, Hill, Drummond JJ); *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) at [345].
[11] *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) at [372]
[12] *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) at [380]
[13] *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) at [381]
[14] *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) at [412]
[15] *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) at [412], [417]

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23 Put simply, Mr Bolt went out of his way to make an example of a group of people on the basis of their race without carefully checking his facts or doing anything to minimise the profound and serious harm he was likely to cause to the group.[16]

C. The current legislation addresses international law obligations

24 In its current form, the Act goes a considerable way towards meeting Australia's obligations under ratified human rights conventions to:

(a) prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (Art 20, ICCPR);

(b) make it an offence to disseminate ideas based on racial superiority or hatred, or to incite 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 (Art 4, CERD); and to

(c) prohibit and eliminate racial discrimination in all its forms, and (following from this) to guarantee the right to security of person and protection by the State against violence or bodily harm (Art 5, CERD). It seems clear "bodily harm" includes not only physical but psychological harm, as it does in the criminal laws of NSW,[17] Britain[18] and Canada[19].

25 In contrast, the Exposure Draft falls short of our international obligations in three key respects.

26 First, the government proposes to replace "offend", "insult" and "humiliate" with the word "vilify". This is inadequate because "vilify" is defined only to mean the incitement of hatred. Under Article 19 of the ICCPR, the **advocacy** of racial hatred is referred to; it is submitted that "vilify" should, at the least, be defined to mean "to *advocate* or incite hatred...".

27 Second, the Exposure Draft also narrowly defines "intimidate" to mean "to cause fear of physical harm". No reason has been advanced by the Government as to why the Article 5(b) term, "bodily harm" - which would include psychological harm - has not been used.

28 Third, the proposed subsection 4 in the Exposure Draft exempts from prohibition words spoken or otherwise communicated "in the course of participating in the public

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[16] Mr Bolt chose his words with the intention to "confront those that he had accused with 'the consequences of their actions'": *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) at [412].

[17] Li v R, 2005 NSWCCA 442 at [445]

[18] R v Ireland, R v Burstow [1998] 1 Cr App R 177

[19] R v McCraw 1991, 66 C.C.C (3d) 517

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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. This issue is discussed further in paragraphs 36-38, below.

D. The proposed changes would produce poor legal results

Definition of vilification as inciting others

29 The move to define "vilify" as inciting hatred amongst others would significantly limit the circumstances in which profound and serious racial abuse would be unlawful. Currently, section 18C requires the offending conduct to be done "otherwise than in private". That is, the conduct must occur in public. Conduct which occurs in public will be unlawful if it offends, insults, humiliates or intimidates another person (or group of persons), including the person(s) the subject of the conduct.

30 Under the proposed changes, unless the conduct induced hatred by others towards the victim, it would not be unlawful, no matter what the effect of the conduct on the victim(s).

31 By way of example, the recent racial abuse directed at sporting figures such as Adam Goodes and Timana Tahu would not be in breach of the proposed legislation unless it could be proved that the vilification incited others to hatred of those persons because of their national/racial/ethnic origin.

32 The case of *Kanapathy v In De Braekt* further illustrates the limiting effect of the proposed reforms.[21] In that case, the applicant was a security guard at a court who was viciously abused by the respondent after he attempted to conduct a routine security check when she entered the court building. The abuse directed at the applicant was concerned with his national origin. There was no requirement for the applicant to prove that the respondent's conduct incited hatred toward him on the grounds of his race. Under the proposed reforms, unless he could have done so, the abuse would be lawful.

Introduction of community standards test

33 The Exposure Draft, in proposed subsection 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 subsection (1)(a). The current section 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 change to a "reasonable person" test is problematic because members of the wider community may not necessarily attach the same meaning or significance, or feel the weight of a racial slur, in the same way as someone of the affected minority group.

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[21] [2013] FCCA 1368

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Repeal of sections 18B and 18E

34 The Exposure Draft also proposes to repeal sections 18B and 18E of the RDA. Section 18B makes unlawful race hate acts or speech even if only one of the reasons for it (if there is more than one reason) is race. Similar provisions exist in the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the Anti-Discrimination Acts of all of the eight states and territories. No reason has been advanced for this limiting change. It opens up an unacceptably wide exemption whereby the conduct will be rendered lawful if a respondent can prove that the impugned conduct was done for another predominant reason even if race was also a factor. For example, a talk show radio host may establish that racially vilifying material was broadcast simply because that was the view expressed by a caller. Currently, that material would be prima facie unlawful. However, the radio host would have access to the exemptions under section 18D in relation to discussion or debate for a genuine purpose in the public interest, fair and accurate reporting or fair comment of a matter of public interest. These measures are appropriate to balance the need for open discussion whilst protecting human rights against unwarranted racial vilification. There is no proper basis on which the current section 18B ought be repealed.

35 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 provision ensures that conduct in the workplace, such as employees putting up offensive racist posters, becomes the responsibility of the workplace, as well as the person involved. It is also, surely necessary to prevent media organisations from escaping liability for work done by their employees under editorial supervision. We submit that the current section 18E should not be repealed.

Introduction of an extremely wide exemption

36 The proposed subsection 4 in the Exposure Draft 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. Its width is so great, it is difficult to identify many circumstances of racial abuse or vilification that would *not* fall within the exemption.

37 In each of the following examples, the respondent would most likely be able rely on this extremely wide exemption if the case was run under the proposed legislation:

- A retired school teacher in Tasmania, Olga Scully, was distributing anti-Semitic leaflets and cassettes and selling racist books and videos at a market. A complaint was made to the Human Rights and Equal Opportunities Commission (as it was then). The HREOC investigation found that Scully had breached the Act and made declarations that she stop selling the material and make an apology. Scully did not comply with the

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declarations and the matter was taken to the Federal Court. Hely J made orders that Scully be restrained from repeating or continuing her unlawful conduct.[22]

- In *Jones v Toben*[23] the Federal Court found that Toben had breached the Act by publishing material on a website which suggested that Jewish people who believed that the Holocaust occurred were of limited intelligence and that some have exaggerated the number of Jews killed in the Second World War for improper purposes including financial gain.

- A newspaper run by the Queensland branch of the political party One Nation published an article and an accompanying anti-Semitic cartoon alleging Jews were taking over Australia's economic and political system through the control of pornography. Proceedings were commenced in the Federal Court, the editor consented to an order that he be restrained from republishing the offensive material and apologised.

- The Bible Believers' Church in northern NSW and its founder Anthony Grigor-Scott published anti-Semitic material on a website which was linked to an extremist organisation in the USA. The Federal Court found that the material complained of was unlawful under the Act and ordered that it be removed from the website and the respondents be restrained from publishing similar material in the future[24].

38 In contrast to this proposed "public discussion" exemption, the current section 18D is designed to uphold free speech by protecting acts done "reasonably" and "in good faith." It is submitted that there is no good reason to repeal that section and replace it with the proposed subsection 4.

Penalising racial vilification is good public policy

39 The current section 18C (and the supporting provisions in ss. 18B, 18D and 18E) are not only good law; they are also directed towards sound public policy goals.

A. Words can harm

40 Much of the focus of the Government has been on preventing speech or actions that lead to physical violence or incite hatred. While this is unquestionably an important function of this (and other related) legislation, it is important to recognise that hate speech causes harm in and of itself, as well as being a possible catalyst for physical harm and incitement of racial hatred.

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[22] *Jones v Scully* (2002) 120 FCR 243
[23] [2002] FCA 1150
[24] *Jones v Bible Believers' Church* [2007] FCA 55

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41 A range of emotional and psychological harm has been shown to result from hate speech, including the likelihood of fear being felt on the part of the victim.[25]

42 While a common response to hate speech is to suggest that the remedy is free speech, this ignores the fact that free speech is not a level playing field. Many of the victims of racism do not speak English well, are in a minority within our community and there is also often a power imbalance depending on the medium of the conversation.

43 We submit that limits on free speech are justified to prevent the harm that results from hate speech. Already, a range of other laws exist that limit our free speech in order to prevent harm being suffered by potentially vulnerable classes of people. Some examples include:[26]

- Defamation laws;
- Other vilification laws (e.g, on the grounds of HIV status, disability or sexuality);
- Laws against fraud;
- Consumer law prohibitions on misleading or deceptive conduct;
- Classification laws, including protection of minors through prohibitions on child pornography;
- Criminal and public order laws prohibiting incitement to violence; and
- Treason laws.

44 While free speech is vital for a vibrant democracy, it is important that limits on free speech be maintained, to protect vulnerable sections of the community and to discourage attitudes that destroy community cohesion. As Lee J stated in *Bropho*:

> *"The [Racial Discrimination] Act is a statement, first, that acts done because of race promote a significant mischief in the community, sufficient to require intervention by statutory prohibition, and second, unless good cause is shown for the conduct concerned, it is in the greater public interest that the right of free expression be controlled by removing from public discourse racially based acts that offend, insult, humiliate or intimidate members of a race within the community thereby tending to set one part of the community against another."*[27]

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[25] See, for example, Rigby, Ken, *What Harm Does Bullying Do?* Paper presented at the Children and Crime: Victims and Offenders Conference convened by the Australian Institute of Criminology and held in Brisbane, 17-18 June 1999. See also http://aic.gov.au/media_library/conferences/children/rigby.pdf and Don Chipp, 'The Most Delicate Ground in Politics' in Andrew Markus and Radha Rasmussen (eds), *Prejudice in the Public Arena: Racism.* Melbourne: Centre for Migrant and Intercultural Studies, 1987.

[26] See http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/Righttofreedomofopinionandexpression.aspx#6can and http://www.artslaw.com.au/info-sheets/info-sheet/limitations-on-freedom-of-expression/#headingh23

[27] *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 at [137].

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B. An institutional response to racism

45 The proposed reforms do not meet the public policy goal of protecting minority groups and the wider community from the effects of racial hate speech. By narrowing the scope of what classifies as hate speech, by changing the test from a reasonable member of the community in question to a member of the broader Australian community, and by including extremely broad exemptions, the very rights that the Act was designed to protect are undermined. The existing provisions represent a careful balance between free speech concerns and offering protection to racial minorities and the community more generally. The proposed reforms dramatically shift this balance away from the law's protective functions.

Conclusion

46 In summary, the overall effect of the proposed reforms is to:

- alter a good piece of law in the absence of any compelling case for change;
- retreat from Australia' international obligations;
- confine the prohibition of racial hate speech to an extremely limited set of circumstances - so limited that disturbing conduct which has been previously litigated against would probably not be caught; and
- diminish the ability of the legislation to achieve the public policy goal of protecting minority groups and the community from racial hate speech.

47 The Government's contention that offensive, insulting or humiliating words that have "profound and serious effects" should not be the subject of legal prohibition because of free speech concerns, is surprising when the Government does not criticise 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 are to be offended by serious racial slurs. In this context, it seems strange that the Abbot Government would frame section 18 of the Act (which has only resulted in several pieces of litigation over the last decade) as the major threat to free speech.

48 For all these reasons, Labor Lawyers opposes the Government's proposed reforms.

49 One change to section 18C which would be justified, in our view, would be to expressly limit the coverage of section 18C to acts or words which result in "profound and serious effects", effectively codifying the Federal Court's current interpretation of the section. That reform would prevent any later judicial alteration of the Federal Court's interpretation and may save the government some face. It would not however save

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Andrew Bolt from the need to adhere to the restrictions of section 18C - seemingly the Government's aim in proposing this Bill.