Protecting people from racism AND ensuring freedom of speech

Submission in relation to Exposure Draft of Freedom of Speech (Repeal of s18C) Bill 2014

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Summary of recommendations

Recommendation 1

PIAC recommends that consideration be given to including in the legislation a criminal offence of inciting racial hatred and ensuring there are suitable remedies for racial harassment.

The provisions of the Exposure Draft

Recommendation 2

PIAC recommends that the respective definitions of the terms 'vilify' and 'intimidate' be broadened and given their ordinary meanings.

If 'vilify' is not given its ordinary meaning, including conduct that is degrading, 'vilify' should encompass conduct that incites hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the basis of their race. PIAC also recommends that the provision should require consideration of the effects of the vilification on its victims.

Recommendation 3

PIAC recommends that the community standards test should require consideration of the impact of the act on the relevant racial group, as distinct from being determined solely by reference to the standards of an ordinary reasonable member of the Australian community.

Recommendation 4

PIAC recommends that the statutory defence to racial vilification should require reasonableness and good faith on the part of anyone seeking to rely on it. PIAC also recommends that 'public interest' should be reintroduced into the defence.

Alternatively, the defence could be replaced with a general limitations clause that allows a public act done in good faith if the act is a proportionate means of achieving a legitimate aim.

The repeal of ss 18B, 18C, 18D and 18E

Recommendation 5

PIAC recommends that it should be unlawful to do an act that is reasonably likely, in all the circumstances, to offend, insult or humiliate another person on the ground of race, colour or national or ethnic origin. Even if the words 'offend' and 'insult' are not included, PIAC recommends that the word 'humiliate' should be included.

Recommendation 6

PIAC recommends that sections 18B and 18E be retained.

Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from NSW Trade & Investment for its work on energy and water, and from Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work on racism and freedom of speech

PIAC has a long history as a strong advocate for the protection of people from racial discrimination and also as an advocate of freedom of expression. PIAC has provided legal advice, assistance and representation to clients in a number of matters involving the *Racial Discrimination Act 1975* (the Act) and other matters that are relevant to vilification and defamation law in Australia.[1] PIAC has contributed its experience to a number of law reform processes in the area, most recently to the Legislative Council Standing Committee on Law and Justice Inquiry into Racial Vilification Law in NSW.[2]

PIAC congratulates the Attorney-General on releasing an Exposure Draft on proposed changes to the Act and consulting with the community on this issue. As the Attorney-General has said

1 For example, *Burns v Radio 2UE Sydney Pty Ltd and Ors* [2004] NSWADT 267 in relation to homosexual vilification, and *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183 in relation to defamation.

2 Camilla Pandolfini and Edward Santow, *Regulating racial vilification in NSW – Submission to the Legislative Council Standing Committee on Law and Justice Inquiry Into Racial Vilification Law in NSW,* March 2013.

himself, this is an important and emotional issue[3] and it will contribute to good law making that the community is able to have input into the proposed legislation.

This submission draws, as far as possible, on an evidence base acquired through PIAC's experience from its own litigation, policy and training work.

PIAC gratefully acknowledges the assistance in writing this submission provided by College of Law placements Julian Laurens and Errin Walker and Sydney University Law School student Prajesh Shrestha.

Contextual issues

The effect of racism

Underlying the debate about possible amendments to Part IIA of the Act should be a consideration of what kind of society we want Australia to be. Two streams run through the Australian community. On one hand, there is a strong culture of tolerance and acceptance of difference, based on factors such as Australia's multicultural history and its liberal-democratic institutions and laws. On the other hand, that culture is not universal, nor is it immune from attack. Racial discrimination and harassment remain prevalent in Australia,[4] and there have been a number of government initiatives to try to reduce racism in society. A functioning, cohesive society is based on acceptance and inclusion.

It is important to understand that there is a human cost to racism. Racism itself diminishes people's freedom of speech and ability to fully participate in society. Many of PIAC's clients who have suffered racial insults, offence or humiliation have told us how it affects them – emotionally, financially, mentally and physically. In explaining his experience of racism towards Aboriginal people on social media, one of PIAC's clients described feelings of annoyance, anger and disgust. He worried about the effect of discrimination on young Aboriginal people and feared the prevalence of discrimination in mainstream social media may encourage non-Aboriginal young people to think racism is socially acceptable.

The Aboriginal and Torres Strait Islander community, in particular, has made it clear that there can be serious mental health consequences from racial discrimination. A study by VicHealth identified an increased risk of mental illness among Aboriginal people who experience racism. Those people who experienced the most racism had the most severe psychological distress score.[5] The Close the Gap Campaign has also outlined the strong association between racism and distress, depression and anxiety. Campaign Co-Chair Kirstie Parker has said that mental

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3 Senator George Brandis, Attorney-General, 'Why the law has to change', *Australian Jewish News* (online) 3 April 2014 <http://www.jewishnews.net.au/why-the-law-has-to-change/34588>.

4 See, eg, Dr Helen Szoke, Race Discrimination Commissioner, Australian Human Rights Commission, 'Racism exists in Australia – are we doing enough to address it?' (Speech delivered at the Queensland University of Technology, Brisbane, 16 February 2012) <https://www.humanrights.gov.au/news/speeches/racism-exists-australia-are-we-doing-enough-address-it>.

5 VicHealth, *Mental health impacts of racial discrimination in Victorian Aboriginal communities – Experiences of racism survey: A summary* (2012) 2 <http://www.vichealth.vic.gov.au/~/media/ResourceCentre/PublicationsandResources/Discrimination/Mental%20health%20impacts_racial%20discrim_Indigenous.ashx>.

health is the second leading driver of the health gap, contributing 15% of the Aboriginal and Torres Strait Islander burden of disease.[6]

The Australian Human Rights Commission report on the experiences of African Australians found many experience discrimination as part of their every daily lives.[7] Community members reported discrimination in the workforce, and in the heath care, education and legal systems. Discrimination was the primary contributor undermining African Australians' rights as equal citizens in Australia. Some reported family breakdown as a result of discrimination and many people, especially young people, considered themselves to experience greater police attention. Social exclusion has been clearly associated with discrimination,[8] and many community members reported feelings of confusion and isolation.[9]

The Centre for Cultural Research survey on the experiences of discrimination by Arab and Muslim Australians found widespread discrimination.[10] They reported experiences of intimidation, humiliation and harassment resulting from discriminatory threats, abuse and violence. The report noted a range of difficulties in the workplace associated with discrimination, including fear of job loss.[11] Some respondents felt the need to stay indoors and even considered emigration as a result of discrimination.[12]

The law is an important tool to combat racism. People are more likely to speak up and against racism if they feel that they are protected under the law.

Freedom of speech

The Attorney-General, in PIAC's view correctly, has adverted to the Voltairean position that if one is sincere in one's belief in freedom of speech, the true test is whether one will defend to the death the right of people to say things that one finds deeply offensive.[13] But free speech has never been absolute: the common law and Australian legislation (and, presumably, Voltaire himself) have always accommodated other rights and interests. For example, defamation law permits some limited restriction of free speech to protect reputation. As PIAC's work defending freedom of speech and protecting against harmful speech reflects, the critical task for our community involves finding the appropriate balance between competing public interests. In relation to racial vilification, the law must strike a balance between permitting the expression of

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6 Close the Gap Campaign, 'RDA change endangers efforts to close the Aboriginal and Torres Strait Islander health gap' (Press Release, 31 March 2014) <https://www.humanrights.gov.au/news/media-releases/rda-change-endangers-efforts-close-aboriginal-and-torres-strait-islander-health>.

7 Australian Human Rights Commission, *In our own words – African Australians: A review of human rights and social inclusion* (2010) 8 <https://www.humanrights.gov.au/sites/default/files/content/africanaus/review/in_our_own_words.pdf>.

8 Ibid.

9 Ibid 36.

10 Scott Poynting and Greg Noble, 'Living with Racism: The experiences and reporting by Arab and Muslim Australians of discrimination, abuse and violence since 11 September 2001' (Report of the Centre for Cultural Research, University of Western Sydney to the Human Rights and Equal Opportunity Commission, 19 April 2004) 9-13 <https://www.humanrights.gov.au/sites/default/files/content/racial_discrimination/isma/research/UWSReport.pdf>.

11 Ibid 14.

12 Ibid 10.

13 Senator George Brandis, Attorney-General, 'Why the law has to change', *Australian Jewish News* (online) 3 April 2014 <http://www.jewishnews.net.au/why-the-law-has-to-change/34588>.

views that might be disagreeable or worse, but drawing a line at speech that causes unreasonable harm to others.

It is also important to acknowledge that freedom of speech cannot always be equally exercised. Not everyone has the power or ability to speak up against racism when it happens. Racial abuse can actually restrict freedom of speech, due to the debilitating effect of racism on its victim's participation in public discussion, as outlined by a number of the surveys and reports mentioned above. Part IIA of the Act exists to protect those people. The groups of people who have been protected by Part IIA of the Act in the past generally come from vulnerable and marginalised sections of society. Paradoxically, people need to be protected from racial discrimination to ensure their right to freedom of speech can actually be exercised.

The fact that freedom of speech is not absolute is evident from the numerous restrictions on freedom of speech, both according to international human rights law and Australian common law.

International law

According to Article 19(3) of the *International Covenant on Civil and Political Rights* (ICCPR), the exercise of the freedom of expression provided for in paragraph 2 carries with it

> special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order, or of public health or morals.

Article 20 of the ICCPR outlines that freedom of expression must be balanced with prohibition of racial hatred:

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

Australia is also a party to the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD). Article 4 of ICERD says that State Parties should:

> (a) 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; and
> (b) declare illegal and prohibit ... all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such ... activities as an offence punishable by law.

Common law

The common law 'right' or 'freedom' of free speech is not, and never has been considered, to be absolute.[14] Similarly, the implied right to freedom of political communication, derived from the text

[14] See for example *Coleman v Power* (2004) 209 ALR 182, per Gummow and Hayne JJ at [185], Kirby J at [225], [250], 253]; *R v Secretary of State for the Home Department; Ex parte Simms* 1999 WL 477443; [2000] 2 AC 115; [1999] 3 All ER 400 per Lord Steyn.

of the Constitution, particularly ss 7 and 24 which provide that the Senate and the House of Representatives shall be 'directly chosen by the people', is also not absolute.[15] In relation to the implied right, McHugh J has said:

> The freedom protected by the Constitution is not, however, a freedom to communicate. It is a freedom from laws that effectively prevent the members of the Australian Community from communicating with each other about political and government matters relevant to the system of representative and responsible government provided for by the Constitution.[16]

As noted above, Australian law already limits freedom of speech to protect other rights and interests – for example, defamation, misleading and deceptive conduct and false advertising.[17] It is a criminal offence to use profane or indecent language or behave in an offensive or insulting way in public. Sexual harassment laws make it unlawful to engage in unwanted or unwarranted sexual behaviour (including speech) that is offensive.

Largely through the prism of defamation, the High Court has considered the contours and limits of the implied freedom of political communication. In *Lange*, the Court made clear that the Constitutional protection is activated only if the following two questions are answered 'yes' and 'no' respectively:

> First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people.[18]

In other words, the High Court has stated that, even in relation to *political* speech, which is a sub-species of speech deserving of strong constitutional protection, there are limits to the scope of the protection that the law will provide. Instead, the Court applies a proportionality-type test. This means that, to merit constitutional protection, the speech in question must not just be shown to be political speech. It must also be shown that any incursion on that political speech is disproportionate to the pursuit of an alternative legitimate end. It is necessary to infer that such incursions are permitted in appropriate circumstances – an inference borne out by the number of decided cases in which a litigant has sought to invoke the constitutional protection of political speech, has satisfied the first limb of the *Lange* test, but has then had their hopes dashed on the jagged rocks of the second limb of the test.

The principles of reform

PIAC endorses the view, expressed by the Attorney-General among others, that freedom of speech and the need to protect people from racial vilification are not inconsistent objectives.

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15 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 51, 76-7, 94-5

16 *Levy v Victoria* (1996-1997) 189 CLR 579, 622.

17 The classic common law statement on this is *Toogood v Spyring* (1834) 149 ER 1044 per Parke B. See also *Adam v Ward* [1917] AC 309 per Lord Atkinson. It is now found in statute as well.

18 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567.

PIAC also agrees that the reform of Part IIA sends 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. PIAC believes that both of these objectives can be achieved, but that the current Exposure Draft of legislation does not fully achieve the latter objective.

As the President of the Australian Human Rights Commission said in her address to the National Press Club, 'protecting vulnerable members of the community against discrimination and ensuring fundamental freedoms is not a choice between alternatives. Rather, we should focus on how to protect and accommodate all freedoms for an inclusive and fair society.'[19]

Part IIA of the Act was the product of widespread public consultation and debate in the 1990s in response to the recommendations of several major inquiries including The National Inquiry into Racist Violence and the Royal Commission into Aboriginal Deaths in Custody. The good reasons for their introduction still exist today. PIAC believes that the laws have generally operated effectively.

When changes to Part IIA of the Act were originally mooted, the Attorney-General discussed introducing a criminal offence of inciting racial hatred.[20] However, this is not part of the Exposure Draft. In addition, the Attorney-General mentioned that people should have a remedy for racial harassment, including substantial verbal or other abusive conduct, in addition to physical harm. This is also not part of the Exposure Draft. PIAC urges the Attorney-General to consider including a criminal offence of inciting racial hatred, and ensuring there are suitable remedies for racial harassment.

Recommendation 1

PIAC recommends that consideration be given to including in the legislation a criminal offence of inciting racial hatred and ensuring there are suitable remedies for racial harassment.

The provisions of the Exposure Draft

Definitions

'Vilify'

PIAC supports the addition of vilification as a protection against racism. PIAC regards it as problematic that the current Act does not prohibit racial vilification.

However, PIAC is concerned about the narrow definition of 'vilify' in the Exposure Draft. 'Vilify' is defined as 'to incite hatred against a person or a group of persons.'

Its ordinary meaning is speech that denigrates, degrades or slanders a person or group.

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19 Professor Gillian Triggs, 'The freedom wars and the future of human rights in Australia' (Speech delivered to the National Press Club, Canberra, 9 April 2014) <https://www.humanrights.gov.au/news/speeches/freedom-wars-and-future-human-rights-australia>.

20 See, for example, Nicola Berkovic, 'Brandis to outlaw inciting hatred', *The Australian* (online), 31 January 2014 < http://www.theaustralian.com.au/business/legal-affairs/brandis-to-outlaw-inciting-hatred/story-e6frg97x-1226814283793#mm-premium>.

This narrow definition has significant consequences. It means that the law would not be concerned with the harm that the behaviour inflicts on its victim. Instead, the law only considers the effect of the behaviour on a third party.

Existing state vilification laws have shown that this incitement test is very difficult to satisfy.

State and territory vilification laws

All Australian jurisdictions have racial vilification laws, with the exception of the Northern Territory, and many have both a civil prohibition and criminal offences for racial vilification. The civil laws generally cover conduct that 'incites hatred towards, serious contempt for, or severe ridicule of' a person or group of persons in public on the ground of race.

According to s 20C of the *Anti-Discrimination Act 1977* (NSW) (ADA) there are four elements that must be satisfied for racial vilification claims in civil cases. These are:

1. a public act;
2. which incites;
3. hatred towards, serious contempt for, or serious ridicule of a person or group of persons;
4. on the ground of the race of the person or members of the group.

Section 20D deals with the offence of serious racial vilification that incurs criminal penalty. It has an additional fifth element that requires threatening physical harm or inciting others to threaten physical harm. Section 20D must be proved beyond a reasonable doubt.

Key cases considering the meaning of 'incite hatred' within the context of the ADA include *Wagga Wagga Aboriginal Action Group & Ors v Eldridge* [1995] EOC 92-701*, Western Aboriginal Legal Service v Jones & Anor* [2000] NSWADT 102, and *Harou-Sourdon v TCN Channel Nine Pty Ltd* [1994] EOC 92-604.

The courts and tribunals have adopted a plain language meaning of 'incite', namely 'to urge on; stimulate or prompt to action'.[21] It is not unlawful under the ADA to merely use words that convey hatred towards a person.[22] A complainant, thus, cannot simply show that statements were incorrect or wrong or the article could possibly be inflammatory. There must be 'incitement'. Consequently, the law shifts the focus on the effects of the act to a hypothetical third party rather than on the wrong-doer. The court approaches the conduct of the defendant through the filter of a fictional hypothetical person rather than focusing on the egregiousness of the action or statement or item itself.

The high harm threshold has been very challenging in a number of cases.

For example, in *Harou-Sourdon v TCN Channel Nine Pty Ltd,*[23] where a comment by Clive Robertson was alleged to constitute racial vilification of French people, the Tribunal held that the

21 For example, *Kazak v John Fairfax Publications Ltd* [2000] NSWADT 77, [23].
22 *Wagga Wagga Aboriginal Action Group & Ors v Eldridge* [1995] EOC 92-701, [78,266].
23 [1994] EOC 92-604.

vilifying statements made in that case could be distasteful but did not satisfy 'the higher threshold of conduct which s 20C proscribes.'[24]

Another example is *Western Aboriginal Legal Service v Jones & Ors*,[25] where the Western Aboriginal Legal Service alleged that Alan Jones and Radio 2UE breached the racial vilification provision of the ADA in a broadcast. Jones had made derogatory comments on air about an Aboriginal person as being someone who was offensive to look at, offensive to smell and comparable to a 'black skunk'.

The difficulty of satisfying the threshold of 'inciting hatred' is evident in the fact that the Tribunal held that the ordinary reasonable listener would not have been incited to hatred because the statement does not tend to stimulate feelings of intense dislike or detestation.

The Tribunal held, however, that the description does stimulate a significant degree of scorn or derision that the reasonable listener would have been incited to significant contempt or scorn. However, it is important to note that the terms 'serious contempt' or 'severe ridicule' have not been incorporated in the definition in the Exposure Draft.

The courts have also held that s 20C does not require proof of intent to incite nor that any person was actually incited.[26] Thus, a person could be held responsible for inciting regardless of whether or not the specific consequences were intended; there is no requirement for specific intention.

The test is an objective question as to whether a hypothetical person who is not malevolent or racially prejudiced would be incited to hatred. The Equal Opportunity Tribunal in *Harou-Sardon v TCN Channel Nine Pty Ltd* cited the *Inquiry into broadcasts by Ron Casey*[27] in saying that, as to the question of who must be incited, the yardstick is an ordinary, reasonable person not immune from susceptibility to incitement, nor holding racially prejudicial views.

The New South Wales Law Reform Commission has suggested that there should be more flexibility allowed to a tribunal of fact when determining capability to incite given the particular circumstances, noting:

> [M]ost people are susceptible to prejudice or prejudgment in some degree and there is little basis, other than intuition, for assessing whether particular words in a particular context are likely to induce others to feel hatred or serious contempt. On the other hand, it is not appropriate to assume that an audience will necessarily include the most malevolent and unthinking person … [the tribunal of fact] … should not assume that all members of the audience are necessarily free from prejudice or that some may be particularly susceptible to incitement.[28]

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24 *Harou-Sourdon v TCN Channel Nine Pty Ltd* (1994) EOC 92-604, [77,239].

25 [2000] NSWADT 102.

26 *Kazak v John Fairfax Publications Ltd* [2000] NSWADT 77, [26]; *Wagga Wagga Aboriginal Action Group & Ors v Eldridge* (1995) EOC 92-701, [78,265].

27 (1989) 3 BR 351.

28 New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Vol 1), Report 92, (1999), 545, [7.126].

PIAC acted on behalf of the complainant in *Burns v Radio 2UE Sydney Pty Ltd & Ors* [2004] NSWADT 267, which concerned an allegation of homosexual vilification. The provisions relevant to homosexual vilification contain a similar threshold for proving vilification as is provided for in NSW in respect of racial vilification.

In relation to the meaning of 'severe ridicule', the Tribunal noted:

> It is clear from the debates in relation to both the racial vilification and homosexual vilification provisions that the Parliament was concerned to 'achieve a balance between the right to free speech and the right to an existence free from ... vilification and its attendant harms'... We must have that consideration in mind when deciding where the line is to be drawn for purposes of characterising conduct as vilification.
>
> We consider the ordinary meaning of the term 'severe ridicule' having regard to the guidance given by the parliamentary debates, by common dictionary definitions ... and by our own understanding of the ordinary meaning of the words. A distinction can be drawn between 'mild ridicule, mere mockery or derision', and 'harsh or extreme mockery derision'.
>
> We understand 'severe ridicule' to be 'harsh or extreme mockery or derision'. As a tribunal of fact, we make an evaluative judgment within a broad discretion as to whether the conduct amounts to 'severe ridicule'…[29]

The proposed changes will be even harder to prove than State and Territory racial vilification laws, as they would not cover incitement of serious contempt or severe ridicule. It is concerning that the prohibition against vilification in the Exposure Draft provides less protection than the existing protections at State and Territory law.

'Intimidate'

'Intimidate' is defined as '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.'

The Attorney-General said that the Exposure Draft 'preserve[s] the existing protection against intimidation',[30] but this definition is much more restrictive than the definition that is currently in s 18C.[31] The ordinary meaning of intimidate is simply to frighten or overawe someone. Its origin is 'made timid'.

PIAC regards this limitation to physical harm as especially problematic. This limits the applicability of the provision to the unusual situations where there is physical violence.

Most of the cases of racial abuse that PIAC has dealt with do not involve threats of physical violence. Intimidation causing psychological, emotional and economic harm should also be prohibited.

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29 *Burns v Radio 2UE Sydney Pty Ltd & Ors* [2004] NSWADT 267, [39] – [42].

30 Attorney-General (Cth), 'Racial Discrimination Act' (Media Release, 25 March 2014) <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/First%20Quarter/25March2014-RacialDiscriminationAct.aspx>.

31 The existing reference to 'intimidation' in s 18C is not defined in the restrictive way that it is in the Exposure Draft.

For example, PIAC was consulted in a matter in 2003 in relation to a t-shirt in the window of a shop which had printed on it 'Kill them all – let Allah sort them out'. It is unclear whether this phrase would meet the proposed narrow definitions of vilify or intimidate in the Exposure Draft.

Previous cases may have also been interpreted differently. For example, in *Kanapathy v In De Braekt (No. 4)* [2013] FCCA 1368, a lawyer was found to have racially abused a security guard of Singaporean background when he was trying to legitimately search her handbag. This may not constitute intimidation or vilification under the proposed law, as it may not meet the definition of causing fear of physical harm or inciting hatred.

Recommendation 2

PIAC recommends that the respective definitions of the terms 'vilify' and 'intimidate' be broadened and given their ordinary meanings.

If 'vilify' is not given its ordinary meaning, including conduct that is degrading, 'vilify' should encompass conduct that incites hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the basis of their race. PIAC also recommends that the provision should require consideration of the effects of the vilification on its victims.

'Reasonable person' test

The proposed sub-section (3) states:

> 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.

PIAC does not support the proposed wording of sub-section (3). PIAC does not believe that the relevant test should be an ordinary reasonable member of the Australian community. Rather, for the following three reasons, PIAC suggests that the relevant test should be the standards of the particular group within the Australian community.

First, under the current s 18C, conduct must be assessed against an objective standard, judged from the perspective of a hypothetical reasonable or ordinary person from the relevant racial group.[32] This has generally worked well and PIAC believes this test should remain. The courts have rightly said that extreme, atypical or intolerant reactions are not relevant. It does not matter if an individual is personally offended or insulted by conduct, rather it actually needs to meet the objective standard.

Secondly, most State vilification laws assess conduct from the perspective of a hypothetical reasonable or ordinary person, and not a person who is a member of the racial group that is affected. As explained above, vilification under State and Territory civil laws is very hard to prove, and this is not a desirable situation.

[32] *Corunna & Ors v West Australian Newspapers Ltd* (2001) EOC 93-146, [6.1.1].

Thirdly, PIAC is concerned about racial prejudices that may be so widely held that they actually form part of the standards of an ordinary reasonable member of the Australian community. There is limited evidence of this to date, but a University of Western Sydney study found that 48.6 per cent of Australians self-identified as having anti-Muslim attitudes.[33] This is a very worrying situation.

The court should be required to take into account the relevant circumstances and attributes of the particular target person or group. In other words, the relevant question should be assessed against an objective standard, judged from the perspective of a hypothetical reasonable or ordinary person from the relevant racial group.

Recommendation 3

PIAC recommends that the community standards test should require consideration of the impact of the act on the relevant racial group, as distinct from being determined solely by reference to the standards of an ordinary reasonable member of the Australian community.

Exemption

The proposed exemption in sub-section (4) states that the entire section will not apply to

> words, sounds, images written, spoken, broadcast or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter.

The breadth of this proposed exemption is very concerning.

The existing s 18D uses the phrase 'in the course of' only in relation to sub-section (b):

> Section 18C does not render unlawful anything said or done reasonably and in good faith:
> ….
> (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.

The term 'in the course of' has not been judicially considered specifically in relation to s 18D(b) of the Act. However, there has been considerable statutory interpretation of the words 'in the course of' in the employment context, especially in relation to work place injuries and claims for compensation.[34] In *Kavanagh v The Commonwealth,*[35] one of the foundational cases in employment injury compensation matters, it was generally felt that the words 'out of' imported a degree of causation where the words 'in the course of' did not.[36] The analysis has since been

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33 Professor Kevin Dunn et al, *Challenging Racism: The Anti Racism Research Project National Level Findings* (2011) The University of Western Sydney <http://www.uws.edu.au/ssap/ssap/research/challenging_racism/findings_by_region>.

34 For statutory basis, see for example *Safety, Rehabilitation and Compensation Act 1988* (Cth), ss 6, 6A.

35 (1960) 103 CLR 547.

36 Per Taylor J at [4], per Fullagar J at [6], per Menzies J at [12]; This temporal characterization was applied by the Court again in *Weston v The Great Boulder Gold Mines Ltd* (1964) 112 CLR 30. See recently *Comcare v PVYM* [2013] HCA 41 were a causal connection was attributed to the expression "arising out of …" at [53]. See also for example *Re Peter James Felton and Commonwealth of Australia* [1984] AATA 162 acknowledging that no more

referred to in the context of criminal law. In *Kelly v R*,[37] the High Court considered the phrase 'in the course of official questioning'. Citing *Kavanagh*, it was noted that the words 'in the course of' ordinarily had a temporal and not a causal connotation, with Gleeson CJ, Hayne and Heydon JJ noting that the words 'in the course of' do not require that there be any causal connection between the admission and the official questioning.[38] However in both *Kavanagh* and *Kelly v R*, the importance of context was highlighted.[39]

Given that it has been widely interpreted in other contexts, PIAC is concerned by the use of the phrase 'in the course of' in the proposed new exemption, particularly given the removal of he concepts of reasonableness, good faith, genuine purpose and public interest. The current wording implies that there is no need for a direct connection with political, cultural, religious, artistic, academic or scientific matter.

Reasonableness and good faith

Currently, the defence in Part IIA provides that the impugned speech must have been conducted reasonably and in good faith. However, the Exposure Draft expands the defence such that it becomes difficult to imagine scenarios of racial vilification where the defence would not apply. Even if racial vilification incites hatred or intimidation causing fear of physical harm, the defence is likely to apply.

The current good faith requirement narrows the scope of the public interest defences as a person will not avoid liability for conduct that occasions racial vilification but otherwise satisfies one of the defences under the current s 18D if the actions were not in good faith.

State and Territory laws have free speech exemptions that are generally qualified by the requirement that the person seeking to rely on the defence must have acted 'reasonably' and in 'good faith'.

The existing Federal case law illustrates that the requirement to act in good faith has generally worked effectively, and PIAC believes that it must be included in any new legislation.

The case of *Bropho v HREOC* [2004] FCAFC 16 concerned the Western Australian Aboriginal Leader Yagan who was killed by white settlers in 1833. In 1997, the head of Yagan was recovered in Liverpool, England and transported back to Australia. The defendant published a cartoon in a West Australian newspaper, which was critical of the conduct of the Aboriginal people and implied a desire on their part to take advantage of public funding to travel to England.

Justice French (as he then was), in discussing extensively the meaning of the term 'good faith,' held that:

> [I]n a statutory setting a requirement to act in good faith, absent any contrary intention, express or implied, will require honest action and fidelity to whatever norm, or rule or

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than a temporal connection between the applicants employment and the occurrence of the injuries was required.

37 (2004) 218 CLR 216.

38 At [45].

39 For example in *Kavanagh* Windeyer J at [4] noted that "in the course of" taken by itself does not necessarily have a purely temporal sense. See particularly *Kelly v R* per McHugh J at [83] and [105].

> obligation the statute prescribes as attracting the requirement of good faith observance. That fidelity may extend beyond compliance with the black letter of the law absent the good faith requirement.[40]

He went on to state that courts should adopt a subjective and objective test of good faith: he held that good faith requires subjective honesty and legitimate purposes (subjective aspect) *as well as* a conscientious approach to the task of honouring the values asserted by the act (objective).[41]

Thus, a person acting seeking to rely on the defence in s 18D will act in good faith if he or she is subjectively honest, and objectively viewed, has taken a conscientious approach to expressing themselves in a way that is designed to minimise the offence or insult, humiliation or intimidation suffered by the people affected by it (at 102).

A person who exercises the freedom carelessly, disregarding or wilfully blind to its effect on people who will be hurt by it, or in such a way as to enhance that hurt, may be found not to have been acting in good faith.

In *Burns v Laws* [2008] NSWADTAP 32, the Tribunal followed *Bropho* in its analysis of the concept of good faith, accepting that the test enunciated by French J 'imposes a higher standard on the doing of the act than merely an absence of bad faith or the like. It requires a conscientious approach to the doing of the act once a decision is taken to engage in conduct which prima facie contravenes anti-vilification provisions'.[42]

The duty to act in good faith has imported an obligation to exercise conscientiousness and a duty to minimise the harm of materials that racially vilify or intimidate people. In *Bropho*, French J recognised that while freedom of speech is not limited to expressions that are polite or inoffensive, it also includes a restraint upon unnecessarily inflammatory and provocative language. The duty to act in good faith serves as this restraint.

Furthermore, the duty to act in good faith has also imported an obligation to act honestly. Justice French in *Bropho* said that the law requires that the publisher of defamatory statements demonstrate that reasonable measures were taken to adhere to the value of truth and the protection of reputation. Such measures include that publishers take reasonable steps to verify the accuracy of the information or to seek responses from the likely victims.

The removal of the requirement to act in good faith would mean that the scope of the public discussion defence would be significantly expanded, if not completely unlimited. There would be no obligation on a person to act conscientiously or honestly in minimising the harm done by that person as long as the person was 'participating in public discussion'. Harm in this context means 'the extent to which that part of the community which consisted of persons who held racially-held views destructive of social cohesion, or person susceptible to the formation of such opinions, may be reinforced, encouraged or emboldened in such attitudes by the [act]'.[43]

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40 *Bropho v HREOC* [2004] FCAFC 16 per French J at [93].
41 *Bropho v HREOC* [2004] FCAFC 16 at [96].
42 *Burns v Laws* [2008] NSWADTSAP 32 at [71].
43 *Bropho v HREOC* [2004] FCAFC 16 per Lee J at [136].

Thus, the removal of good faith requirements would mean that a person would be entitled to be oblivious to the possible degree of harm that his or her conduct may cause. As long as something is done or said in the course of participating in public discussion, a person would be entitled to reinforce, encourage or embolden 'racially-held views destructive of social cohesion'. Furthermore, a person would also be under no obligation to exercise sufficient care and diligence to minimise the intimidation and vilification suffered by the likely victims.

In light of the fact that intimidation and vilification have already received a stymied, and constrictive, definition, this could have serious public policy implications. Existing cases would have been considered very differently. For example, the Federal Court in *Jones v Toben* [2002] FCA 1150 found that the online publication of material denying that the Holocaust had ever occurred, as well as derogatory generalisations about Jewish people as a group, breached s 18C as the respondent could not demonstrate that he had acted reasonably or in good faith. If there is no requirement to demonstrate reasonableness or good faith, it is likely such material would have been allowed to be published.

An alternative approach could be the introduction of a general limitations provision, as PIAC previously submitted to the Legislative Council Standing Committee on Law and Justice Inquiry into Racial Vilification Law in NSW.[44] PIAC suggested that the defences, or exemptions, to racial vilification could be replaced with a general limitations provision, such as:

> (1) Nothing in this section renders unlawful a public act that is justifiable.
> (2) A public act is justifiable if it is done in good faith, for the purpose of achieving a particular aim; and
> (a) That aim is a legitimate aim; and
> (b) The person who did the public act considered, and a reasonable person in the circumstances of the person would have considered, that engaging in the conduct would achieve that aim; and
> (c) The public act is a proportionate means of achieving that aim.

The clause could also include a non-exhaustive list of the matters to be taken into account in determining whether any act is a proportionate means of achieving a legitimate aim.

A general limitations clause would enhance the flexibility of racial vilification law and create a standard that can adapt over time in line with changing community expectations.

A general limitations clause would also allow for an examination of any public act complained of, no matter the 'purpose' of the act. This would ensure that no specific area is privileged or exempted from racial vilification laws more than any other.

The Human Rights and Anti-Discrimination Exposure Draft Bill 2012 (Cth) introduced a general limitations clause in cl 23. This clause has been quite widely supported. A general limitations clause would also be consistent with Australia's international human rights obligations under the ICCPR and the ICERD.

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[44] Camilla Pandolfini and Edward Santow, *Regulating racial vilification in NSW – Submission to the Legislative Council Standing Committee on Law and Justice Inquiry Into Racial Vilification Law in NSW,* March 2013.

Recommendation 4

PIAC recommends that the statutory defence to racial vilification should require reasonableness and good faith on the part of anyone seeking to rely on it. PIAC also recommends that 'public interest' should be reintroduced into the defence.

Alternatively, the defence could be replaced with a general limitations clause that allows a public act done in good faith if the act is a proportionate means of achieving a legitimate aim.

The repeal of ss 18B, 18C, 18D and 18E

Section 18C – offend, insult and humiliate

Section 18C of the Act currently makes it unlawful to do an act that is 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people' on racial or ethnic grounds. The Exposure Draft removes the concepts of offence, insult and humiliation. PIAC believes that this amendment would be problematic.

It has been noted by the courts that conduct that does 'offend, insult, humiliate or intimidate' another person or persons on the basis of 'race, colour or national or ethnic origin' under the current s 18C must have 'profound and serious effects, not to be likened to mere slights'.[45] Given the courts have in this way 'read up' the provision, PIAC does not regard the inclusion of offensive and insulting conduct as an undesirable limit on free speech. This judicial interpretation could be enshrined in legislation by adding the word 'serious' to the provision. This would mean that it is not sufficient for a person or a group of people to be insulted or offended, but that there must be a serious level of harm that results from the act.

The common law in relation to freedom of speech is also informative in respect of offensive and insulting language. In *Coleman v Power*,[46] Callinan J was not comfortable with the majority view that insulting language could be covered by the implied freedom to political communication and argued that 'it is only reasonable conduct that the implication protects. Threatening, insulting, or abusive language to a person in a public place is unreasonable conduct'.[47] Justice Heydon also felt that the use of insulting language was detrimental 'to the exchange of useful communications' and '[t]o address insulting words to person in a public place is conduct sufficiently alien to the virtues of free and informed debate on which the constitutional freedom rests that it falls outside of it'.[48]

If the Government is not minded to re-introduce 'offend, insult and humiliate', consideration should be given at least to reintroducing 'humiliate'. There are many examples of conduct that humiliates, but is unlikely to meet even an expanded definition of vilify or intimidate (let alone the narrow proposed definitions of 'vilify' or 'intimidate' in the Exposure Draft). Acts that are reasonably likely to humiliate a person because of their race amount to serious conduct that should be protected by Australia's anti-discrimination law.

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45 *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 per Kiefel J at [16].
46 (2004) 209 ALR 182.
47 At [300].
48 At [332].

One of PIAC's recent matters is particularly incisive on this point. PIAC advised a young Aboriginal man about memes published on Facebook that focused on negative stereotypes of Aboriginal people. Internet memes are multimedia messages consisting of an image that contains both a picture and a text-based message. Memes are essentially images that have been taken out of context and include a small number of words or a sentence ostensibly to make light of a phenomenon, person, group or thing. These memes were deeply offensive and humiliating, but did not necessarily cause immediate fear of physical harm, as they were on the internet. For example, one of the memes had a picture of an Aboriginal man with the words 'How do you kill 1,000 flies at once?' above the face, and 'Slap me in the face' below the face. Another meme said 'My land?' above the face, and 'Liquorland' below the face. Other Facebook users then made racially offensive remarks and 'liked' (indicated support) for the Aboriginal memes pages.

PIAC believes that this type of conduct should be prohibited under Australia's anti-discrimination law, but it is unlikely to meet the proposed definitions of 'vilify' or 'intimidate' in the Exposure Draft. Even if these comments were said face to face, they may not cause fear of physical harm. This case illustrates the importance of at least including 'humiliate' in the provision, if not 'offend', 'insult' and 'humiliate'.

A 2013 University of Western Sydney survey showed that between 66 and 74% of Australians agreed or strongly agreed that it should be unlawful to offend, insult, or humiliate on the basis of race.[49] Furthermore, a March 2014 survey by *The Conversation* of internet users, showed similar results to the UWS survey.[50] Over 70% of respondents believed that it should be unlawful to humiliate or insult someone based on their race. Similarly, and most recently, an April 2014 Fairfax-Nielsen poll found that 88% (statistically 9 out of 10) of respondents believed that it should remain unlawful to offend insult or humiliate somebody based upon their race.[51]

Section 18D

PIAC believes that it is possible to have vigorous public debate and also retain the reference to offend, insult and humiliate, because s 18D operates effectively as an exclusion.

Section 18D seeks to balance the objectives of s 18C with the need to protect justifiable freedoms of speech and expression. It allows some racially offensive, insulting, humiliating or intimidating conduct if it is done reasonably and in good faith in fair reporting, fair comment, performance or artistic works or discussion in the public interest.

The way 18C and 18D operated was not such that everything offensive or insulting was against the law. It only covered acts with a clear racial basis that were not done reasonably and in good faith.

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49 The University of Western Sydney, *Challenging Racism: The Anti Racism Research Project* (forthcoming) <http://www.uws.edu.au/ssap/ssap/research/challenging_racism>.

50 'What do Australian internet users think about racial vilification?,' The Conversation (online), 17 March 2014 < http://theconversation.com/what-do-australian-internet-users-think-about-racial-vilification-24280>.

51 Mark Kenny, 'Race hate: voters tell Brandis to back off', *The Age* (online), 13 April 2014. <http://www.theage.com.au/federal-politics/political-news/race-hate-voters-tell-brandis-to-back-off-20140413-zqubv.html>.

There are numerous examples of cases where the court found that the act was protected by section 18D free speech protections. Such acts include:

- a cartoon lampooning Aboriginal people in *Bropho v HREOC* [2004] FCAFC 16;
- a comedy performer impersonating an Aboriginal man in *Kelly-Country v Beers* [2004] FMCA 336;
- a plan and a book about Pauline Hanson's policies. In the conciliation before the then Human Rights and Equal Opportunity Commission in *Walsh v Hanson*, Commissioner Nader found that Ms Hanson would be exempt under s 18D because the views expressed were genuinely held and formed part of a genuine political debate. The Commissioner found Hanson's statements were put forward reasonably and in good faith, and there was a public interest at play – namely, political debate concerning the fairness of distribution of social welfare payments in the Australian community.

A significant catalyst for the proposed changes appears to be the reaction to the judgment in *Eatock v Bolt*[52] and perhaps also the earlier case also involving Andrew Bolt, *The Herald & Weekly Times Ltd & Andrew Bolt v Jelena Popovic*.[53] There seem to be a number of misunderstandings about the *Eatock v Bolt* case. Andrew Bolt was found to have breached the racial vilification provisions of the Act by writing articles that suggested that a number of fair-skinned Aboriginal people were not genuinely Aboriginal, and pretended to be Aboriginal to access Aboriginal benefits and entitlements. The judge said that the conduct would have fallen within the scope of s 18D, but because the articles 'contained errors of fact, distortions of the truth and inflammatory and provocative language',[54] he was unable to establish good faith. The court made it clear that if Mr Bolt had been accurate in writing about the fair-skinned Aboriginal people in his articles, they may have been protected by s 18D.

Recommendation 5

PIAC recommends that it should be unlawful to do an act that is reasonably likely, in all the circumstances, to offend, insult or humiliate another person on the ground of race, colour or national or ethnic origin. Even if the words 'offend' and 'insult' are not included, PIAC recommends that the word 'humiliate' should be included.

Section 18B

Section 18B of the Act specifies that if conduct is done for two or more reasons, and one of the reasons is because of race, the conduct is taken to be done on the grounds of race for the purposes of the racial vilification protections.

Repealing this provision could make it even harder to prove racial vilification or intimidation if there is more than one reason for the vilification or intimidation. It also leaves a gap in interpretation that is simply not necessary.

52 [2011] FCA 1103.
53 [2003] VSCA 161
54 *Eatock v Bolt* [2011] FCA 1103 per Bromberg J at [23].

Section 18E

Section 18E makes an employer or principal responsible for racial vilification by their employee or agent, where the vilification is done in connection with their duties as an employee or agent and the employer did not take reasonable steps to prevent it.

Repealing this provision may reduce the obligation on employers to prevent racial vilification.

Recommendation 6

PIAC recommends that sections 18B and 18E be retained.

Conclusion

Freedom of speech is a crucial element of informed participation in representative democracy. However, allowing people to insult, offend and humiliate other people does not improve Australia's democracy.

Although PIAC supports the Attorney-General's stated objects of reform, it does not believe that the Exposure Draft strikes the right balance between the various objects. PIAC proposes that the current Exposure Draft be significantly amended before a Bill is tabled in Parliament. PIAC looks forward to contributing to any further consultation about an amended proposal.