

5 December 2016

Committee Secretary
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
Canberra ACT 2600

By email: 18Cinquiry@aph.gov.au

Re: Part IIA of the Racial Discrimination Act 1975

We make this submission as collaborating academics with disciplinary backgrounds in economics, anthropology and law whose research and teaching focuses on issues of public policy, social justice, human rights and Australia's First Peoples.

We note that the terms of reference stipulate several matters for consideration. Our submission will address the following:

Whether the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) imposes unreasonable restrictions upon freedom of speech, and in particular whether, and if so how, ss. 18C and 18D should be reformed.

Section 18C states that:

- (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.
- (2) For the purposes of subsection (1), an act is taken not to be done in private if it:
 - (a) causes words, sounds, images or writing to be communicated to the public; or
 - (b) is done in a public place; or
 - (c) is done in the sight or hearing of people who are in a public place.
- (3) In this section:
public place includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

Section 18D states that:

- 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.

For the reasons elaborated in Attachment A that we had prepared from an earlier departmental rather than parliamentary inquiry on these matters, we are of the view that the current framing of sections 18C and 18D of the *Racial Discrimination Act 1975* (Cth) should remain unaltered. These legislative provisions do not impose unreasonable restrictions on free speech, and they do impose necessary restrictions on speech that is hateful, discriminatory and offensive to ethnic minorities. The exemptions allow for fair and accurate reporting and fair comment regarding matters of public interest. This is sufficient to ensure that the type of free speech that is conducive to a healthy democracy is permitted in the public domain.

Yours sincerely,



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Attachment A

Jon Altman and Shelley Bielefeld, Submission to the Human Rights Policy Branch of the Attorney-General's Department, *Proposal to Amend the Racial Discrimination Act 1975*, 30 April 2014, 1-5.

30 April 2014

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

By email s18cconsultation@ag.gov.au

Re: Amendments to the Racial Discrimination Act 1975

We make this submission as collaborating academics with disciplinary backgrounds in economics, anthropology and law whose research and teaching focuses on issues of public policy, social justice, human rights and Indigenous Australians.

We are strongly opposed to the government's proposal to amend the *Racial Discrimination Act 1975* (Cth) (RDA) by repealing ss 18C, 18D, 18B and 18E and replacing them with a grossly inferior protective mechanism for people of any race, culture or ethnicity that are minorities within Australia. Section 18C is a perfectly reasonable legislative provision for a modern democratic society which should be sensitive to the vulnerability of minorities. The exemptions contained in s 18D are adequate in terms of balancing any tension between free speech and racial vilification. Indeed, sections 18C and 18D contain some crucial standards by which civilised conduct ought to be judged. It is also appropriate that employers be vicariously liable under s 18E where supervision of their employees has been so gravely inadequate that they allow racial vilification to go unchecked.

We submit that the RDA provisions should not be amended as proposed and should be left to stand in their current form. Australia offers very little by way of protection for minority interests and it is unacceptable that the government is planning to dismantle what little protection there is by virtue of its proposed amendments. At present, there is no constitutional protection for Indigenous peoples or other minorities,¹ which makes the current legislative provisions in the RDA of paramount importance.

The RDA, despite having been suspended three times in Australia's fairly recent history,² is enormously important to Indigenous Australians. In the absence of constitutionally protected human rights or a national bill of rights, the RDA is of great practical and symbolic value. This is so because it has been successfully relied upon at times to protect the rights of Aboriginal and Torres Strait Islander peoples to be

¹ *Kartinyeri v Commonwealth* (1998) 195 CLR 337 is a case which illustrates this only too well, allowing legislation with a detrimental impact on Aboriginal people (the *Hindmarsh Island Bridge Act 1997* (Cth)) to be deemed constitutional in order to promote the economic interests of developers.

² *Native Title Amendment Act 1998* (Cth) s 7 (limiting the scope of the RDA); the *Hindmarsh Island Bridge Act 1997* (Cth) s 4 (removing rights to protect Aboriginal cultural heritage – which was inconsistent with s 10 the RDA), and the Intervention legislation – the *Northern Territory National Emergency Response Act 2007* (Cth) s 132(2), the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) s 4(3) and 6(3), and the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) s 4(2) (all excluded the operation of the aspects of the RDA prohibiting racial discrimination).

free from racial discrimination and/or racial vilification.³ As the legislation currently stands, it appropriately indicates that to be treated in a discriminatory or a vilifying manner based upon racial heritage is not acceptable in modern Australia.

The proposed amendments have come about in the wake of popular media representations of the finding in *Eatock v Bolt*.⁴ Journalist Andrew Bolt had published material critical of what he referred to as the 'choice' by some to identify as Aboriginal people for opportunistic or beneficial reasons.⁵ The manner in which these issues were dealt with included a lack of fact checking on the part of Andrew Bolt, numerous blatant errors of fact, and the use of inflammatory language that was likely to intimidate and denigrate Aboriginal people with fair skin. These were matters that could have been rectified in a basic edit of Andrew Bolt's articles; this justified the finding by Bromberg J that Bolt and the Herald & Weekly Times breached the RDA.

In the wake of the *Bolt* case there have been calls to amend the RDA because certain vested interests, especially the conservative Institute for Public Affairs,⁶ claim that the racial vilification provisions unnecessarily override the right to free speech. This reaction has at times bordered on hysteria. There is no sound reason why free speech should trump racial vilification where there is a clash between the two. We have an implied freedom of political communication contained in our Constitution, which has been broadly interpreted,⁷ and this should suffice to protect free speech that is genuinely political.

However, the conduct and speech of Andrew Bolt was not made in good faith as a part of genuine political discourse. As Marcia Langton argues, it was 'racial abuse'.⁸ This has had a detrimental impact on those Bolt characterised in his articles as opportunistically identifying with their Aboriginal heritage. Langton notes that one of the named Aboriginal people, a talented female scientist, has actually withdrawn from public life due to the brutality of Bolt's words.⁹ This illustrates the power of racist words to cause significant harm and generate personal and social costs. Racism is not merely about acts of physical violence – as indicated by the watered down amendment proposal – but includes words publicly spoken and otherwise published

³ *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Eatock v Bolt* [2011] FCA 1103 (28 September 2011).

⁴ *Eatock v Bolt* [2011] FCA 1103 (28 September 2011).

⁵ For example, in an article entitled 'White is the new black'. This column replicated online the contents of an earlier newspaper article by Bolt titled 'It's so hip to be black': Andrew Bolt, 'White is the new black', *Herald Sun*, 15 April 2009, <http://blogs.news.com.au/heraldsun/andrewbolt/index.php/heraldsun/comments/column_white_is_the_new_black>.

⁶ Simon Breheny, 'Abbott government's changes to Racial Discrimination Act a win for freedom of speech - Institute of Public Affairs' (Media release, Institute for Public Affairs) <<http://ipa.org.au/sectors/freedom-of-speech/publication/2252/abbott-government%27s-changes-to-racial-discrimination-act-a-win-for-freedom-of-speech---institute-of-public-affairs>>.

⁷ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

⁸ Australian Broadcasting Commission, Q & A, Monday 10 March, 2014 <<http://www.abc.net.au/tv/qanda/txt/s3946770.htm>>.

⁹ Australian Broadcasting Commission, Q & A, Monday 10 March, 2014 <<http://www.abc.net.au/tv/qanda/txt/s3946770.htm>>.

which can have a significant impact in shaping societal values. It is through words that we establish a people's status as equal or lesser to ourselves.¹⁰

Words can perpetuate negative stereotypes based upon race and have a harmful effect upon those so stereotyped. This has been shown very clearly with discourse analysis by Dr Alissa Macoun in relation to the Northern Territory National Emergency Intervention, where constructs of Aboriginality have characterised Aboriginal people as savage and Aboriginality as primitive.¹¹ Critique of this denigrating construction of Aboriginality has also been prominent in the work of Professor Irene Watson.¹²

Therefore public speech is appropriately a realm for government regulation where that speech is likely to 'offend, insult, humiliate or intimidate another person or a group of people' based on race (s 18C(1)(a)). Furthermore, intimidation should not be limited to 'fear of physical harm', as set out in the proposed amendments. Intimidation can occur just as readily through racially abusive words. Such words constitute a form of emotional and psychological violence, and no-one should have to tolerate such behaviour in a modern democratic society. Moreover, such words can actually be the precursor to physical violence. If governments are serious about addressing racism in Australia then they need to be cognisant of all these forms of intimidation including symbolic violence.

That the government would respond to the finding in *Eatock v Bolt* by seeking to amend the RDA in such a way is an overreaction to what is in fact a limited decision. In *Eatock v Bolt* Bromberg J stated that:¹³

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

This clearly leaves open the possibility that such discussions about racial identification could be deemed non-discriminatory if they are carried out in a manner different to that undertaken by Bolt. This is of some concern because non-Indigenous Australia has long sought to control Aboriginal and Torres Strait Islander peoples by virtue of definition processes. This has been a key element of colonial control of Indigenous peoples that continues in the present. That non-Indigenous people still think they are fit to define who is and who is not legitimately Aboriginal betrays an ongoing colonial logic that serves Australia and its international reputation poorly. Aboriginal and Torres Strait Islander peoples should feel free to identify as they wish without being subject to racial abuse.

¹⁰ Alissa Macoun, 'Aboriginality and the Northern Territory Intervention' (2011) 46 *Australian Journal of Political Science* 519, 520.

¹¹ Alissa Macoun, 'Aboriginality and the Northern Territory Intervention' (2011) 46 *Australian Journal of Political Science* 519, 519.

¹² Irene Watson, 'Aboriginal Women's Laws and Lives: How Might We Keep Growing the Law?' (2007) 26 *Australian Feminist Law Journal* 95, 104; Irene Watson, 'Aboriginality and the Violence of Colonialism' (2009) 8(1) *Borderlands* 1, 4 <http://www.borderlands.net.au/vol8no1_2009/iwatson_aboriginality.htm>.

¹³ *Eatock v Bolt* [2011] FCA 1103 [461].

Given the public perception that the proposed changes are fuelled only by the *Bolt* case, which in turn involved racial vilification of Indigenous people, it sends a perverse message that first he was wrongly judged and second that such 'bigotry' is acceptable. This is something worthy of further reflection in terms of the policy direction the government adopts.

The enactment of the government's proposed amendments would involve the state protecting the rights of those with considerable power to engage in forms of racist abuse unacceptable in today's late modern society. In doing so the government would institutionalise racism well beyond a particular racist incident. As David Theo Goldberg states:

... by state arrangements encouraging racist expression or at least openly refusing to discourage it, [this] magnifies the alienating exclusion well beyond its otherwise isolated moment. In short, the state imprimatur – explicit or implicit – extends the condition, institutionalizing it more deeply than it otherwise would be.¹⁴

If Australia aspires to be a post-racist state, 'state agencies, and most notably law' must be 'vigorous both in refusing racist practice and in public representation of the unacceptability of all forms of discriminatory expression.'¹⁵ The state has a vital role in discouraging racism, because:

... the state is also a conductor of culture – of institutional and social values and meanings, the generator and shaper of historical memory through schools, museums and monuments, public art and ceremonies, rituals and symbols. And as a conductor shapes the orchestra and arranges the score without necessarily making the music, so the state fashions citizens, those representative individuals at once able to play responsibly, by themselves but in concert.¹⁶

By watering down the current protective provisions on racial vilification in the RDA the government would send a message that racist abuse is not a serious issue. Indeed, by this very proposal, the government communicates that the feelings of those subject to these forms of verbal attack are not worthy of being treated with respect, sensitivity, and decency. To replace what is currently an objective test that also allows for consideration of views of those who have experienced racial vilification¹⁷ with a test that excludes their perspectives¹⁸ is to tilt the scales heavily in favour of racism – because there are people in Australia who think if their particular form of racism is not meant to be offensive it is reasonable and therefore excusable. Yet intention is not all: 'harmful effects are harmful regardless of the intent with which they are produced'.¹⁹ The proposed amendments would promote the kind of racism that many Australians find 'reasonable' but members of minorities find offensive. In

¹⁴ David Theo Goldberg, *The Racial State* (Blackwell Publishers, 2002) 244–245.

¹⁵ David Theo Goldberg, *The Racial State* (Blackwell Publishers, 2002) 248.

¹⁶ David Theo Goldberg, *The Racial State* (Blackwell Publishers, 2002) 250.

¹⁷ Section 18C(1)(a) of the RDA, which makes reference to whether 'the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people'

¹⁸ What the proposed (3) would achieve by reference to 'standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community.'

¹⁹ Girardeau Spann, 'Pure Politics', in Richard Delgado and Jean Stefancic (eds), *Critical Race Theory – The Cutting Edge* (Temple University Press, 2nd ed, 2000) p 25.

doing so, the proposed amendments would undermine the purpose of the RDA, which is to provide effective protection for the rights of racial minorities, not to justify and support ongoing racism in the name of free speech.

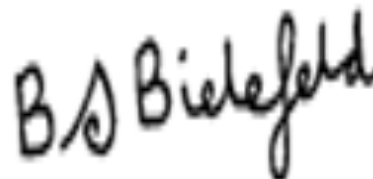
The proposed amendments eliminate from consideration the current requirements contained in s 18D such as 'good faith', 'accurate' reporting, and 'fair comment'. These are not standards that are especially onerous to place upon public speech and they should not be removed from the RDA. To replace these requirements with the proposal to excuse racism so long as it is undertaken 'in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter' is to unduly elevate free public speech regardless of how obnoxious, insulting, and offensive such speech may be.

The Attorney-General has stated that 'people have a right to be bigots'.²⁰ People may have such a right within the confines of private speech, but they currently do not and should not have a right to engage in such speech publicly. People may have a right to be bigots privately — but there is no need for governments to effectively hand them a megaphone. That is in essence what the proposed amendments would accomplish — they would promote the rights of the powerful over those with substantially less political power. The direction outlined in the proposed amendment would set Australia back in the admirable quest to eliminate racial injustice that began in 1975. If implemented it would have negative repercussions on how Australia, already with questionable human rights credentials, is perceived globally.

Yours sincerely,



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²⁰ Australian Broadcasting Commission, Q & A, Monday 10 March, 2014 <<http://www.abc.net.au/tv/qanda/txt/s3946770.htm>>.