

Submission

to

Attorney-General's Department

**Exposure Draft - *Freedom of Speech*
(*Repeal of s.18C*) *Bill 2014***

April 2014

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Introduction

1. The Anti-Discrimination Commission Queensland is an independent statutory authority established under the Queensland *Anti-Discrimination Act 1991*.
2. The functions of the Commission include promoting an understanding, acceptance and public discussion of human rights in Queensland. 'Human rights' is defined by reference to the seven core international human rights instruments, which include the *International Convention on the Elimination of All Forms of Racial Discrimination*.
3. The Commission also deals with complaints alleging contraventions of the *Anti-Discrimination Act 1991* and of whistle-blower reprisal. Complaints that are not resolved through conciliation can be referred to the Queensland Civil and Administrative Tribunal for hearing and determination.
4. The Queensland *Anti-Discrimination Act 1991* was enacted to extend the Commonwealth human rights legislation, and commenced on 30 June 1992. It contains vilification provisions that prohibit the incitement of hatred, serious contempt for and severe ridicule of a person or group on the basis of their race, religion, sexuality or gender identity.
5. This submission focuses on the impacts of racism and the effectiveness of the proposed changes to the federal *Racial Discrimination Act 1975*.

Recommendations

6. The Anti-Discrimination Commission Queensland recommends that in reforming the federal *Racial Discrimination Act 1975* to achieve the objectives of strengthening protections against racism and removing unreasonable limitations on freedom of speech, the government:
 - I. Reframe the proposed provisions and adopt the Queensland and New South Wales vilification provisions as a model.
 - II. Ensure that vicarious liability extends to the new racial vilification prohibition.

- III. If the recommendation to adopt the Queensland and New South Wales model is not accepted, then:
- (a) Vilification should include 'serious contempt for' and 'severe ridicule of' as well as 'hatred of';
 - (b) The test for incitement should be the 'reasonable person' test;
 - (c) The exception should be narrowed to a fair report of a public act and public acts done reasonably and in good faith; and
 - (d) The meaning of 'intimidate' should not be confined to threats of physical harm to person and property.

Background and history of the RDA offensive behaviour provisions

7. In 1995 the Parliament of Australia passed the *Racial Hatred Act 1995*. This legislation inserted sections 18B to F into the *Racial Discrimination Act 1975* (RDA), and amended the *Crimes Act 1914* to provide for three new criminal offences.
8. The reasons given in the explanatory notes for the need to amend the RDA, was to address concerns highlighted by the National Inquiry into Racist Violence¹ and the Royal Commission into Aboriginal Deaths in Custody.

National Inquiry into Racist Violence

9. The National Inquiry into Racist Violence was announced in December 1988, and was motivated by a widespread community perception that racist attacks, both verbal and physical, were increasing.
10. The Inquiry defined the term 'racist violence' to include **verbal and non-verbal intimidation, harassment and incitement to racial hatred** (emphasis added) as well as physical violence against people and property. The Inquiry received a large number of submissions and

¹ Human Rights and Equal Opportunity Commission, *Racist violence: Report of the National Inquiry into Racist Violence in Australia* (Australian Government Publishing Service, 1991).

evidence about verbal abuse and other forms of intimidation or harassment motivated by racism².

11. Evidence to the Inquiry revealed that:

The sub-physical forms of intimidation and aggression were considered by many victims to have a more severe impact than isolated cases of physical assault, particularly if the harassment was continual and carried out by neighbours, workmates and classmates. Several cases of breakdown in physical and mental health as a result of sustained neighbourhood harassment came to our attention. Some victims always kept their children inside their own premises and accompanied them to school. Adults kept going out alone to a minimum and one woman gave up her evening classes rather than face threats and insults as she rode her bicycle.³

12. The Inquiry observed that many cases of racist violence went unreported, and there was a reluctance to speak about violence due to fear of reprisals. This bore:

most heavily on those who had to continue in stressful situations, such as residents of public housing estates, employees who had difficulty finding jobs in the first place, people who could not conveniently move their premises, and those in educational institutions.⁴

13. The Inquiry examined the adequacy of existing criminal and civil laws that existed in Australia at that time to deal with cases of racial violence or intimidation, and found that evidence to the Inquiry indicated existing laws were failing to deal with the problems of racist violence and intimidation, racist harassment and incitement to racial hostility.⁵

14. The Inquiry stated that:

The publication and expression of racist material causes offence to many Australians, including those from minority racial and ethnic groups. Anomalies in existing laws mean that an individual or group conducting a racist poster campaign can be prosecuted only for defacing another's property; they can display the same material on their own premises with impunity. Incitement to racial hostility is a significant element in creating a climate conducive to racist harassment, intimidation and violence.⁶

² Ibid 14.

³ Ibid 15.

⁴ Ibid 19.

⁵ Ibid 269.

⁶ Ibid.

15. The Inquiry recognised the need to balance the right of free speech with other rights:

In recommending the amendment of the *Racial Discrimination Act* to prohibit the incitement of racial hostility, the Inquiry is not talking about protecting hurt feelings or injured sensibilities. Its concern is with conduct with adverse effects on the quality of life and well-being of individuals or groups who have been targeted because of their race. The legislation would outlaw public expressions or acts of incitement, *not* private opinions. As in the case of defamation laws, the context, purpose and effect of the words or material need to be considered before determining whether or not they are acceptable under the Act. Savings clauses should make it clear that the legislation will not impede freedom of speech in the following forms:

- private conversations and jokes;
- genuine political debate;
- fair reporting of issues or events;
- literary and other artistic expressions;
- scientific or other academic opinions, research or publications.

The threshold for prohibited conduct needs to be higher than expressions of mere ill will to prevent the situation which occurred in New Zealand, where legislation produced a host of trivial complaints. The Inquiry is of the opinion that the term 'incitement of racial hostility' conveys the level and degree of conduct with which the legislation would be concerned.

Incitement of racial hostility is not as serious as outright racist violence and intimidation. It need not, therefore, be subject to criminal laws and criminal penalties. It should be dealt with as a civil matter under the *Racial Discrimination Act*, with the same remedies (conciliation and compensation) as provided for racial discrimination.⁷

16. The Inquiry's recommendations included:

- That the Federal Parliament enact in the *Federal Crimes Act 1914* a new criminal offence of racist violence and intimidation.
- That the *Federal Crimes Act* be amended to create a clearly identified offence of incitement to racist violence and racial hatred which is likely to lead to violence.
- That the *Federal Racial Discrimination Act 1975* be amended to prohibit racist harassment.
- That the *Federal Racial Discrimination Act* be amended to prohibit incitement of racial hostility, with civil remedies similar to those already provided for racial discrimination.

Royal Commission into Aboriginal Deaths in Custody

17. The Royal Commission into Aboriginal Deaths in Custody announced in 1987 by Prime Minister Hawke was established in response to growing public

⁷ Ibid 299-300.

concern that there was an unacceptable number of deaths in custody of Aboriginal people, and the reasons for those deaths was inadequately explained.

18. The Commission examined all deaths in custody in each state and territory between 1 January 1980 and 31 May 1989, and the actions taken in respect of each death. The Commission's terms of reference enabled it to take account of social, cultural and legal factors which may have had a bearing on the deaths under investigation. The final report of the Commission was released in 1991. The report findings established that there was a highly disproportionate rate of incarceration of Aboriginal and Torres Strait Islander people across Australia, and the underlying causes of this very high rate of incarceration were examined.
19. The Commission made 339 recommendations mainly concerned with procedures for persons in custody, liaison with Aboriginal groups, police education and improved access to information. In addition, the Commission examined the issue of racial discrimination and vilification, which it identified as one of the factors contributing to high incarceration rates.
20. In the racial vilification chapter of the national report, Commissioner Elliott Johnston, QC said at 28.3.33 and following:

28.3.33 National legislation relating to racial vilification, then, has to take into account the potential conflict between these two rights in a democratic society: the right to freedom of speech, and the right of the state to limit certain kinds of speech that can lead to overt conflict among its citizens.

28.3.34 Legislation in this area recognises the important fact that language itself can be a form of violence. This principle was enunciated by Justice Felix Frankfurter of the United States Supreme Court:

[I]nsulting or fighting words, which by their very utterance inflict injury or tend to incite to immediate breach of the peace, these utterances have no essential value as a step to the truth. Any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

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

28.3.35 What is at issue in the legislation, therefore, is the matter of balancing the individual's rights, in this case to freedom of speech, with

the rights of other individuals and groups and the legitimate interests of the state in the promotion of civil order. There is another issue, however, that is perhaps even more fundamental: that is, the question of the rights of the individual that is the basis of much of liberal western thought as distinct from the rights of the collective, the group that exists by virtue of its treatment in the society as a whole. The Royal Commission hearings have demonstrated that Aboriginal people are such a group. They have also shown that, within the systemic discrimination that Aboriginal people receive from police, language is one of the forms of violence that has most impact on relations between the two. Indeed, one quarter of all complaints of racist statements lodged with the Human Rights Commission up to 1984 - by various groups - concerned statements made by officials such as public servants and members of the police. It is therefore appropriate that this Royal Commission address the issue.⁸

21. The Commissioner's recommendation 213 in the final report was:

That governments which have not already done so legislate to proscribe racial vilification and to provide a conciliation mechanism for dealing with complaints of racial vilification. The penalties for racial vilification should not involve criminal sanctions. In addition to enabling individuals to lodge complaints, the legislation should empower organisations which can demonstrate a special interest in opposing racial vilification to complain on behalf of any individual or group represented by that organisation.

22. It was in the context of these two highly significant and influential inquiries that sections 18B to 18F were inserted into the *Racial Discrimination Act 1975*. All state and territory governments except for the Northern Territory have passed legislation in their jurisdictions to deal with the issue of racial vilification, including Queensland, which passed laws prohibiting racial vilification in 2001.⁹

Impacts of racial vilification on community and individuals

Individual health and wellbeing

23. The evidence presented in the *Report of the National Inquiry into Racist Violence in Australia* in 1991 showed a significant proportion of violence and intimidation takes place at the local community level – at or near the victims' homes, on streets and public transport, at shopping centres, clubs and hotels and on the way to, from or at school. Here racist

⁸ Royal Commission into Aboriginal Deaths in Custody, *National report: Volume 4* (Australian Government Publishing Service, 1991).

⁹ *Anti-Discrimination Amendment Act 2001* (No. 35 of 2001).

violence or the threat of violence can become part of people's everyday lives.¹⁰

24. The Inquiry reported that 'many groups reported that continual exposure to abusive and insulting language had an adverse psychological effect on some victims, making them feel inferior and causing depression and insecurity'¹¹ and that 'Aboriginal people and people from non-English speaking backgrounds who experience violence and harassment reported feeling marginalised from the rest of society, and unable to participate in social activities because of the constant threat of racism and violence'¹². In the two decades that have passed since the Report was finalised, there is no evidence that this is less of an issue in contemporary Australia.
25. Racism, including vilification, can have a significant impact on the health and wellbeing of an individual. Contemporary research has found that health among human populations is a multifaceted and complex phenomenon, and for Indigenous peoples, unlike white Australians, racism is a fundamental driver of ill-health. There is now a strong argument and evidence that experiencing racist treatment should be recognised as a social determinant of health.¹³ Improved health care and other initiatives, such as those prompted through the Closing the Gap strategy, may not eliminate health inequalities of Aboriginal and Torres Strait Islander people in the absence of fundamental changes in how non-Aboriginal and Torres Strait Islander people behave towards Aboriginal and Torres Strait Islander people.¹⁴
26. Reactions to racism (including racism in the form of racial vilification) may produce ill-health effects, including:
- stress and negative emotion reactions that contribute to mental ill health, as well as adversely affecting the immune, endocrine and cardiovascular systems; and

¹⁰ Human Rights and Equal Opportunity Commission, above n 1, 374.

¹¹ Ibid 16.

¹² Ibid 260.

¹³ A Larson et al, 'It's Enough to Make You Sick: The impact of racism on the health of Aboriginal Australians', (2007) 31 (4) *Australian and New Zealand Journal of Public Health*, 322–9.

¹⁴ Ibid.

- harmful coping behaviours such as smoking, alcohol and other drug use.¹⁵
27. For children and youth from all racial and ethnic groups, contemporary research shows an association between racial discrimination and negative outcomes concerning self-esteem, self-worth and psychological adjustment. There is also a strong association between racial discrimination with poor mental health outcomes (e.g. depression, anxiety) and problem behaviour in children and youth.¹⁶
28. In the light of this evidence, as part of prevention and wellbeing strategies, it is important that legislation that prohibits racial discrimination and public conduct amounting to racial vilification is maintained.

Community cohesion

29. Australia has one of the highest proportions of overseas born persons in the western world (approximately 23%) and one of the highest rates of ethnic and language diversity. In Queensland over 20% of the population is overseas-born. Queensland also has the second highest proportion of Aboriginal and Torres Strait Islander people in Australia. In Queensland, over 3.6% of Queenslanders are Aborigines and Torres Strait Islanders.¹⁷
30. With such diversity, it is important to build community cohesion. Cohesion is principally the process that must happen in all communities to ensure different groups of people get on well together.
31. Racist violence, harassment and vilification erodes community cohesion, limits the cultural expression and quality of life of members of our diverse community, and can create an environment of fear and intimidation. It can affect such fundamental choices as where people live or work, whether they

¹⁵ Y Paradies, R Harris, and I Anderson, *The Impact of Racism on Indigenous Health in Australia and Aotearoa: Towards a Research Agenda - Discussion Paper No. 4* (Cooperative Research Centre for Aboriginal Health 2008) 9.

¹⁶ N Priest et al, 'A systematic review of studies examining the relationship between reported racism and health and wellbeing for children and young people' (2013) 95 *Social Science and Medicine* 115-127.

¹⁷ According to the Australian Bureau of Statistics, as at 30 June 2006, the preliminary Estimated Indigenous Resident Population (ERP) in Queensland was 146,429 (3.6% of all people in Queensland).

socialise outside the home and how they engage in their religious observances.

32. The National Inquiry into Racist Violence reported that:

Racist violence and harassment reduces self esteem, promotes insecurity and leads to victims being ashamed of their identity. Consultative group participants in the Inquiry:

... reported feeling like 'losers', unwelcome and different in a strange land. They also felt a very high level of frustration and helplessness!

The harm done to children is particularly disturbing in this respect, as discriminatory attitudes and actions can make them feel they have no rights to fair treatment and are second class citizens.¹⁸

33. Recent research further establishes that:

Institutional and individual racism is a key barrier to immigrant integration. Racism persists in Australian society, with Indigenous Australian and immigrant minorities, particularly those of Muslim faith and/or Middle Eastern appearance, the main victims of racist attitudes and practices (Dunn, Klocker and Salabay 2007; Dunn et al 2009; Dunn and Nelson 2011). A 2012 national survey found that while 12 per cent of respondents reported experiences of discrimination, 31 per cent of respondents of Islamic faith, 21 per cent of respondents born in Africa and the Middle East and 20 per cent of respondents born in Asia reported experiences of discrimination (Markus 2012: 2).¹⁹

34. Community cohesion should be a primary consideration in the formulation of policy and legislative frameworks. Dismantling or substantially watering down existing legislation that prohibits public incitement of racial hostility risks eroding the relatively high levels of community cohesion and immigrant integration already achieved in Australia.

Economic impacts

35. There is limited high quality data available in Australia about the prevalence of racism/discrimination and its impact on health outcomes for the general population, in order to model the economic costs of racism.²⁰

¹⁸ Human Rights and Equal Opportunity Commission, above n 1, 261.

¹⁹ JH Collins, 'Multiculturalism and Immigrant Integration in Australia', (2013) 45 (3) *Canadian Ethnic Studies* 133-149.

²⁰ N Priest and Y Paradies, *Economic Costs of Racism in Australia: Scoping Project Report* (University of Melbourne) Social Justice Initiative, 2010.

36. On a macro level, it is generally accepted that Australia's existing and future economic prosperity is intrinsically linked to the economic and strategic transformation of our region in the world - the Asia-Pacific region. Evolving partnerships in the Asia-Pacific region contribute to Australia's prosperity and Australia has nurtured partnerships and relationships by promoting a commitment to multiculturalism and social harmony.
37. On purely economic terms, Australia cannot afford to be perceived by its Asia-Pacific neighbours as being a racist country, and needs to pay close attention to its international image. Over the years there have been numerous challenges to the view that Australia is a country that values its diverse and multicultural society and is committed to the Asia-Pacific region.²¹
38. One of the economic strategies Australia actively pursues in the Asia-Pacific region is to attract international students. In 2012-13, overseas students who came to Australia to live and study contributed \$14.461 billion to the economy. Queensland, New South Wales and Victoria were the main beneficiaries of this lucrative market. To attract international students, Australia presents a positive picture of Australian society. Australia ranks third highest in the world for its share of international students, and regulates student welfare²² through a code for the safety and well-being of international students.
39. Despite these precautions, recent social debate and remonstrations by Indian and other Asian students has called into question whether Australia has done enough to curb racism and hate crimes that threaten international students. A series of attacks on Indian students in 2009 and 2010 in Victoria contributed to a reduction of 66% in the number of Indian students travelling to Australia to study between 2010 and 2012.²³
40. Dismantling or substantially watering down existing legislation that prohibits public incitement of racial hostility has risks for Australia's international

²¹ Human Rights and Equal Opportunity Commission, above n 1, 263; Andrew Jakubowicz, *Is Australia a racist society?: reflections on globalisation, multiculturalism and Pauline Hanson* (Australia-Indonesia Institute, 1997).

²² Gaby Ramia; Simon Marginson, and Erlenawati Sawir, 'The regulation of international student welfare in Australia' (2013) 71. *Journal of Australian Political Economy* 106-129.

²³ *Murder down under: is Australia a dangerous place to visit?* (16 April 2014) SBS The Conversation.

reputation. There is the potential to invoke negative overseas press coverage, decreasing numbers of enquiries from skilled Asian and other people wishing to migrate and/or invest in Australia, with a subsequent loss of earnings to Australia both in terms of tourism and business.²⁴

What types of public conduct should be proscribed by racial vilification laws?

41. In the current debate about the proposed repeal of sections 18B to 18E of the *Racial Discrimination Act*, the federal Attorney-General said:

People do have a right to be bigots, you know. In a free country, people do have rights to say things that other people find offensive, insulting or bigoted.²⁵

42. Freedom of speech has long been an integral component of the western liberal tradition, and an important pillar of modern democracies. Freedom of opinion and expression is also a human right.

43. The 1948 United Nations *Universal Declaration of Human Rights* contains the following:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.²⁶

44. There are two elements to freedom of speech - freedom of opinion and freedom of expression. Freedom of opinion is the right to hold opinions without interference, and is not subject to any exception or restriction. The right to freedom of expression is not specifically stated in the Australian Constitution, but it is an implied freedom within our democratic form of government. Australia has ratified the *International Covenant on Civil and Political Rights* which specifically sets out this human right.

45. However, this right is not absolute. Civil and criminal laws strike a balance between preserving this freedom and protecting other public interests including the protection of people from discrimination, unfair treatment and

²⁴ Human Rights and Equal Opportunity Commission, above n 1, 263.

²⁵ Australia, *Parliamentary Debates*, Senate, 24 March 2014, (George Brandis, Attorney- General).

²⁶ Article 19.

harm. The laws of defamation, contempt and consumer protection limit the right of persons to say whatever they wish. The criminal law also imposes restrictions on freedom of expression in some circumstances.²⁷

46. Human rights law also recognises that the freedom has limitations. The *Convention on the Elimination of All Forms of Racial Discrimination*, which Australia has ratified, includes a statement in Article 4 that:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination ...

47. The Attorney-General proposes, by replacing sections 18B to 18E of the RDA with a new exemption, to allow any:

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

48. The President of the Human Rights Commission, Professor Gillian Triggs has said of the proposal:

This astonishingly broad exemption will positively permit racial vilification and intimidation in virtually all public discussions. Indeed, it is hard to think of examples of racial vilification or intimidation in public that will not be exempted by these changes.

Will, for example, racial vilification on public transport, at football matches or the factory canteen be protected because this is a 'social', 'cultural' or 'religious' matter?

Under the proposed changes, intimidation is confined to fear of physical harm. The Australian Human Rights Commission is in a unique position to know that the hundreds of inquiries or complaints we receive each year alleging racial abuse, typically on the internet, are not about a fear of physical violence. If psychological and social impacts are excluded from the prohibition, few cases will be covered by the legislation.

It is unwise to disregard the experiences of racial abuse regularly complained of by minority and community groups in Australia. If there is an evil to be addressed by legislation, it should send the strong message

²⁷ For example, section 6 of the *Summary Offences Act 2005* (Qld) states a person commits a public nuisance offence if the person behaves in an offensive way and the person's behaviour interferes, or is likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public. A person behaves in an offensive way if the person uses offensive, obscene, indecent or abusive language.

that Australia rejects racial hatred in our successful multicultural society.²⁸

49. Australian National University law Professor Simon Rice says of the Exposure Draft:

The effect of this is that the proposed law does not prohibit race-based conduct that incites, for example, serious contempt or severe ridicule of a person, or revulsion towards them. Nor does it prohibit race-based conduct that causes offence, insult or humiliation.

...

The proposed new law allows prohibited conduct simply if it is done in the course of public discussion. (Oddly, it doesn't make an exception for artistic work, so artists, actors, and some authors would be less free to express themselves than would columnists and bloggers).

The proposed exception is not limited. It allows race-based conduct in public discussion (by, for example, columnists, bloggers and public officials) that is unreasonable, in bad faith, dishonest, inaccurate or irrational, *even if* it could intimidate or incite hatred. In public discussion, absolutely nothing is prohibited by the proposed law.²⁹

50. Given the potential negative impacts of racial vilification on the health and wellbeing of individuals and on the broader community, the critical questions to be asked are:

- What public conduct concerning the issue of race should or should not be permitted to occur under the law, in Australia?; and
- How should freedom of expression be balanced with an individual's right to protection from incitement to racial discrimination, and acts of violence or incitement to acts of violence, on the basis of their race, colour or ethnic origin?

51. Listed below are examples of race-based conduct which have occurred in public spaces in Australia, for consideration in answering these questions.

²⁸ Gillian Triggs, 'Race law changes seriously undermine protections'. *The Australian*, 28 March 2014, 12.

²⁹ Simon Rice, 'This is free speech on steroids', *The Drum*, Australian Broadcasting Corporation (online), 27 March 2014.

Conduct on public transport

52. Because of the use of personal mobile devices, the Australian public has become more aware of racial abuse occurring on public transport. For example:

- On a Melbourne bus in 2012, a man launched a racist verbal attack on a French woman, who with her friends was singing in French. He told her to 'speak English or die'.³⁰
- In 2013, while travelling on a bus with his young daughter, ABC newsreader Jeremy Fernandez was verbally abused by a woman who told him to 'go back to his country' and called him a 'black c***'.
- In April 2013, a man on a Sydney bus screamed and swore at tourists, who are believed to be Korean. He asked why they came to Australia, and yelled about Japanese bombing in World War II.

Public conduct on the sporting field

53. Racist abuse in the sporting arena is still a frequent occurrence.

- In 1995 AFL player Michael Long lodged a formal complaint about racial abuse between players on the field. As a result, in June 1995 the AFL implemented 'Rule 30: A Rule to Combat Racial and Religious Vilification'. These vilification rules have now filtered down to junior, suburban and regional football competitions in all states, and have been replicated by other sporting organisations and codes.
- In 2005 former South Sydney NRL captain Bryan Fletcher racially abused Aboriginal player Dean Widders in an NRL game.
- In 2005, Australian rugby union player Justin Harrison used racial slurs towards a South African player.
- In the summer of 2005–06, crowd racism occurred at the WACA ground in Perth as spectators hurled racist insults at black members of the South African cricket team. This behaviour continued at the Melbourne, Brisbane and Sydney test matches.

³⁰ This matter did ultimately result in a criminal conviction. However, it is highly likely the victim would have no civil remedy under the RDA if the proposed amendments are passed.

- In 2005-06 the visiting Sri Lankan cricket team was subjected to racist abuse from spectators during matches in Adelaide and Sydney.
- In June 2012 during a rugby league State of Origin match in Sydney, a section of the crowd made vicious racist chants, gibes and signs about Aboriginal members of the Queensland Origin team.
- In May 2013 AFL Swans player Adam Goodes was called an 'ape' by a 13-year-old female spectator.
- In March 2014 Bronco's Ben Barba was called a 'filthy abo' on Instagram by a country rugby league fan.

Public conduct on social media and websites

54. The use of the internet and social media is part of everyday life for many Australians.

- In *Jones v Toben*,³¹ the Federal Court required the removal of material from a website which called into question the Holocaust ever happening. Mr Toben claimed that his right to freedom of speech allowed him to publish material questioning the existence of evidence for the Holocaust and implying that it was a Jewish invention or exaggeration. In dismissing an appeal against this decision, the Full Bench of the Federal Court³² found that the publication was 'designed and intended, amongst other things, to smear, hurt, offend, insult and humiliate Jews' and that 'On no conception of the phrase "good faith" could the Document be so characterised'.
- Readers' comments were published on a newspaper blog site about the paper's articles reporting that three Aboriginal children had been killed in a car accident while in a stolen car. The comments from readers of the newspaper cast aspersions on the mother of the children, her parenting skills and the Aboriginal race.³³

³¹ *Jones v Toben* [2002] FCA 1150.

³² *Toben v Jones* [2003] FCAFC 137, at [163] and [164].

³³ The mother subsequently made a complaint about the newspaper. See *Clarke v Nationwide News Pty Ltd trading as The Sunday Times* [2012] FCA 307.

- Following a high profile criminal case in Queensland, media reports publicised the racial background of the alleged offenders. Vilifying messages soon appeared on a popular, local news blog, suggesting that all people of that racial background should be sent back home ‘... where they can kill, rape and maim till their hearts are content’. It went on... ‘Surely we [have] enough problems with our own home grown “locals”...And why can’t we know what colour or race these offenders are. Stand up Aussies and fight for your right to know just who your enemy within really is’.

Public discussions by ‘personalities,’ columnists, commentators and community leaders in news media and other places

55. Hosts of popular radio and television programs and public figures have a wide audience.

- In 2005, just prior to the Cronulla riots, radio talkback host Alan Jones broadcast material that the Australian Communications and Media Authority ruled was ‘likely to encourage violence or brutality’.³⁴

He quoted a text message which encouraged people to attend ‘a Leb and wog bashing day’. He also referred to ‘Middle-Eastern grubs’, endorsed a suggestion that biker gangs intimidate rail passengers, and made comments that people of Lebanese or Middle-Eastern background were forming gangs intent on causing harm to ‘Australians’.

Jones made on air comments earlier in the year about Lebanese males and said:

If ever there was a clear example that Lebanese males in their vast numbers not only hate our country and our heritage, this was it. They have no connection to us. They simply rape, pillage and plunder a nation that’s taken them in... What did we do as a nation to have this vermin infest our shores?³⁵

This was the subject of a successful vilification complaint under New South Wales anti-discrimination law.

³⁴ Australian Communications and Media Authority, *Investigation Report No. 1485 – Breakfast with Alan Jones*.

³⁵ *Trad v Jones & Anor (No. 3)* [2009] NSWADT 318 [13].

- A local council Alderman disrupted proceedings at the public launch of the 1993 International Year for the World's Indigenous People in Wagga Wagga. The Alderman made references to native title claims by local Aborigines calling them 'these radical half-castes'. He also made comments at a council meeting saying 'my people, the white people of this city, have been subject to a reign of terror' and referred to a land claim as a 'declaration of war'.³⁶
- Radio broadcaster Alan Jones referring to a NSW Equal Opportunity Tribunal finding that a Dubbo real estate agent had discriminated against an Aboriginal woman by refusing to rent a house to her, described the woman's \$6,000 award in damages as a 'joke'. He went on: 'If I owned a property...and a bloke walked through the door, and I don't care what colour he is, looking like a skunk and smelling like a skunk, with a sardine can on one foot and a sandshoe on the other and a half drunk bottle of beer under the arm and he wanted to rent ... I'd expect the agent to say no without giving reasons'.³⁷
- In the March 2014 edition of *Surfing Life* magazine, surfing journalist Nathan Myers wrote an article about upcoming Aboriginal surfer Otis Carey. He wrote 'with his apeish face and cowering hair-curtains, I expect little more than Cro-Magnon grunts from his mouth. I am caught off guard by the clarity and eloquence of his speech'. Otis Carey is reported to be devastated by the description. The magazine has since issued a formal apology to Mr Carey.

Public conduct in local neighbourhoods

56. It is a common experience for Indigenous Australians and migrants from non-Anglo backgrounds to experience racial vilification in their local neighbourhoods.³⁸

³⁶ *Wagga Wagga Aboriginal Action Group & Ors v Eldridge* (1995) EOC 92-701 (The court found that the Alderman's conduct at the launch and at the council meeting was such that it would incite serious contempt of Aboriginal people, and found his conduct was more than insulting and objectionable).

³⁷ *Western Aboriginal Legal Service Ltd v Jones* [2000] NSWADT 102 (on appeal from a finding that this conduct was racial vilification, the decision was overturned on a technicality).

³⁸ Human Rights and Equal Opportunity Commission, above n 1.

- Members of the public have been known to shout or rant at people from different ethnic backgrounds while they are walking down a street, at the shopping centre, or even when they are in their own yards. Another not uncommon experience is for places of worship and graveyards to be desecrated by racist graffiti, and for other acts of vilification to occur.
- A man and his family who were of Indian origin lived in a block of units. Another person who also lived in the units, thumped on his door and shouted abuse including 'shut the f*** up you Indian c****; 'f***ing Indians' and 'what can you do you Indian pussy?'
- A woman followed an Aboriginal man to his car parked in a busy street and yelled at him 'I hate you black people' in front of many people, including the woman's child.

Existing state and territory laws

57. In the context of the current public debate and public discussion about racial vilification laws, the seriousness of the problems at which racial hatred laws are directed demands well considered and constructive analysis, which must include consideration of the operation of existing racial vilification laws.³⁹
58. Queensland, New South Wales, Victoria, Tasmania and the ACT all prohibit vilification in essentially the same terms. In South Australia racial vilification is an offence where damages can be awarded on conviction, and an 'act of racial victimisation'⁴⁰ that results in detriment is actionable as a tort. In Western Australia racial harassment is prohibited in employment, education and accommodation. The Northern Territory does not have its own legislation prohibiting racial vilification, however the federal *Racial Discrimination Act 1975* applies.
59. In Queensland from the period from the commencement of the *Anti-Discrimination Act* in mid-1992 until the commencement of the new racial and religious vilification prohibition in mid-2001, it was an offence to incite unlawful

³⁹ L McNamara, 'Confronting the reality of Hate Speech' (1995) 20 (5) *Alternative Law Journal*, 231.

⁴⁰ A public act inciting hatred, serious contempt or severe ridicule of a person or group of persons on the ground of their race, excluding a fair report of the act, where the publication would be subject to a defence of absolute privilege or a reasonable act done in good faith for purposes in the public interest.

discrimination by advocating racial or religious hatred or hostility. From April 2003 the prohibition of vilification was extended to the attributes sexuality and gender identity.

60. The Queensland Act currently provides:

124A Vilification on grounds of race, religion, sexuality or gender identity unlawful

- (1) A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of person on the ground of race, religion, sexuality or gender identity of the person or members of the group.
- (2) Subsection (1) does not make unlawful –
 - (a) the publication of a fair report of a public act mentioned in subsection (1); or
 - (b) the publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation; or
 - (c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including public discussion or debate about, and expositions of, any act or matter.

61. A 'public act' is defined in section 4A of the *Anti-Discrimination Act 1991* as follows:

4A Meaning of *public act*

- (1) A ***public act*** includes –
 - (a) any form of communication to the public, including by speaking, writing, printing, displaying notices, broadcasting, telecasting, screening or playing tapes or other recorded material, or by electronic means; and
 - (b) any conduct that is observable by the public, including actions, gestures and the wearing or display of clothing, signs, flags, emblems or insignia.
- (2) Despite anything in subsection (1), a ***public act*** does not include the distribution or dissemination of any matter by a person to the public if the person does not know, and could not reasonably be expected to know, the content of the matter.

62. These provisions make it clear that the threshold for indicating alleged vilification is much higher than to harass, insult or offend, and that the prohibition does not impinge on private interactions.

63. Vilification which includes the threat of physical harm to person or property - called 'serious vilification'- is an offence in Queensland. The maximum

penalty is 6 months imprisonment or 70 penalty units for an individual, and 350 penalty units for a corporation.⁴¹

64. Queensland's racial vilification laws in their current form have been operating now for almost 13 years. The number and type of vilification complaints accepted⁴² by the Queensland Commission are set out in **Appendix A**. Racial vilification comprises 58% of the accepted vilification grounds, and vilification overall comprises 2.4% of the total of all accepted grounds in the period from 1 July 2001 to 31 March 2014.
65. There have been 11 decided and published decisions under the Queensland law, of which 6 were upheld and 5 failed. These decisions are listed in **Appendix B**. Another decision of the former Anti-Discrimination Tribunal, which found in favour of the complainants, was set aside on appeal because an issue of constitutionality raised by the respondent had not been referred to a court of record for determination.⁴³
66. The statistics and the decisions indicate that the practical application of Queensland's vilification laws have not resulted in any untoward impingement on freedom of expression. Where complaints have proceeded to hearing and determination, those upheld have involved the type of conduct that is unacceptable in a civil society. The complaints of racial vilification involved a woman being subjected to racial epithets and abuse over a CB radio, encouraging others to do the same, to 'give her as much shit as you like' and giving out her address as a place to go for sex.⁴⁴ Other objectionable behaviour in the successful complaints involved publishing in a local newspaper that homosexuals leave local beaches, saying 'poofers beware'

⁴¹ A penalty unit is currently \$110.

⁴² Complaints are accepted into the Commission's complaint handling process if they meet the threshold requirement of indicating an alleged contravention of the Act – *Anti-Discrimination Act 1991*, section 136.

⁴³ *Menzies v Owen* [2008] QADT 20; set aside by the Supreme Court of Queensland in *Owen v Menzies* [2010] QSC 387; and the constitutional issue determined by the Court of Appeal on a case stated in *Owen v Menzies* [2013] 2 Qd R 327.

⁴⁴ *Casey v Flanagan* [2011] QCAT 320; and *Casey v Blume* [2012] QCAT 627.

and threatening vigilante action;⁴⁵ and shouting profanity from the street to a person in their home and threatening to burn their home down.⁴⁶

67. The Queensland tribunals have interpreted and applied the vilification laws consistent with other jurisdictions with similar provisions, most notably New South Wales. For example:

- the communication to the public must be capable of being seen or heard without undue intrusion by a non-participant;⁴⁷
- it is not necessary to show an intention to incite or actual incitement;⁴⁸
- the provisions do not make unlawful the use of words that merely convey hatred towards a person or the expression of serious contempt of severe ridicule; and⁴⁹
- a trivial joke or comment will not be a breach of the provision⁵⁰.

68. The exceptions, or defences, are an integral part of vilification provisions. They 'recognise that there are circumstances in which it is not wrong to do acts which might have the tendency to incite'.⁵¹ The exception most commonly dealt with by the tribunals and courts is the exception for acts done reasonably and in good faith for various public interest purposes. In Queensland, this exception applied to the dissemination by a candidate in a federal election of a pamphlet which incited serious contempt for and hatred of Muslims, representing that they were prone to disobey Australian laws to the extent of being prepared to commit murder. The tribunal held that the exception was effective to ensure that a candidate in an election is free to make statements of a political character without fear of offending the

⁴⁵ *GLBTI v Wilks* [2007] QADT 27.

⁴⁶ *Brosnahan v Ronoff* [2011] QCAT 439.

⁴⁷ *Peters v Constance* [2005] QADT 9; *Z v University of A (No. 7)* [2004] NSWADT 81.

⁴⁸ *Deen v Lamb* [2001] QADT 20; *Peters v Constance* [2005] QADT 9.

⁴⁹ *Wagga Wagga Aboriginal Action Group v Eldridge* [1995] EOC 92-701; *Cohen v Hargous; Karellicki v Hargous* [2006] NSWADT 209.

⁵⁰ *Menzies v Owen* [2008] QADT 20.

⁵¹ *Deen v Lamb* [2001] QADT 9.

prohibition against vilification, provided the candidate publishes words in good faith and acts reasonably.⁵²

69. The High Court has held that the Australian *Constitution* contains an implied freedom of communication on matters relevant to political discussion.⁵³ A restriction on communication which infringes upon the freedom to communicate on political matters may be inconsistent with the implied freedom and invalid in the *Constitution*.
70. The issue of the constitutional validity of the Queensland vilification provision, section 124A, was one of the matters for determination in the case stated to the Queensland Court of Appeal in *Owen v Menzies*.⁵⁴ The Court held that section 124A of the *Anti-Discrimination Act 1991* is not inconsistent with the implied protection of freedom of political communication provided by the *Constitution*.⁵⁵ President McMurdo held that in its terms, operation or effect, section 124A does not effectively burden freedom of communication about government or political matters.⁵⁶ However, all three judges of the Court held:
- That if section 124A does burden the implied constitutional freedom, any burden is incidental and 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.⁵⁷ and
 - That end is the promotion of equality of opportunity for all members of the community by prohibiting objectionable conduct inconsistent with the purpose of the Act and the Parliament's desire to improve the quality of democratic life through an educated community appreciative and respectful of the dignity and worth of all its members. The legislature's desire to balance that end with the implied constitutional freedom of communication is manifested by section 124A(2)(c) which ensures that section 124A

⁵² *Ibid.*

⁵³ *Australia Capital Television Limited v The Commonwealth* (1992) 177 CLR 106.

⁵⁴ *Owen v Menzies* 2 [2013] Qd R 327.

⁵⁵ *Ibid* [4], [77] – [80], [156] – [157].

⁵⁶ *Ibid* [70] – [76].

⁵⁷ *Ibid* [4], [77] – [80], [156] – [157].

provides a reasonably appropriate balance between it and the implied freedom.⁵⁸

The Chief Justice agreed with Muir JA that because section 124A only incidentally restricts the subject freedom of communication, any such restriction is confined and controlled by section 124A(2); and the implied freedom is not absolute so that laws which do no more than promote or protect relevant communications, or those who participate in the prescribed system, are not impermissible.⁵⁹

The High Court refused special leave to appeal the decision of the Court of Appeal.

71. Although the tribunal at first instance found there had been unlawful vilification of the complainants, not all of the conduct complained of was found to be unlawful.⁶⁰ For example, the tribunal said:

1. Ron Owen is entitled to be a homophobe and he is entitled to publicly express his homophobic views. That much is required in a society that values freedom of thought and expression.
2. However, there are limits. One of those limits is established by s.124A of the *Anti-Discrimination Act 1991* ...
- ...
35. ... A trivial joke will or comment will not breach.124A(1) ...
- ...
110. However, I am not satisfied that his comments *incited* hatred of, serious contempt for or severe ridicule of homosexuals. An ordinary bystander, hearing the whole of the exchange, would have regarded Mr Owen as defending his personal views about homosexuals in circumstances where he had been caught by surprise. The making of the comments are in the category of mere conveyance of a hatred already held by the speaker. An ordinary bystander, would not, in the circumstances have regarded the comments as urging on or stimulating the bystander to hatred of, severe contempt for or severe ridicule of homosexuals.

72. Analysis of the case law on the Queensland and New South Wales vilification provisions demonstrates that in applying these laws the courts and tribunals have struck a balance between the competing rights of freedom of expression and freedom from discrimination.

⁵⁸ *Ibid* [4], [77] – [80], [157].

⁵⁹ *Ibid* [4], [157].

⁶⁰ *Menzies v Owen* [2008] QADT 20.

Analysis of Exposure Draft

73. The objectives of the reforms to the *Racial Discrimination Act* are to strengthen protections against racism and remove unreasonable limitations on freedom of speech.⁶¹ The intention is to proscribe racial vilification, for the first time in Commonwealth legislation, and send a clear message that racial vilification is unacceptable in the Australian community.
74. The Anti-Discrimination Commission Queensland is not convinced that decisions interpreting existing sections 18B to 18E of the *Racial Discrimination Act* fail to properly balance the right to freedom of expression with the right to be protected from racial discrimination, including racial vilification. However the federal Attorney-General has made clear that the government will recast the existing federal law. While the Anti-Discrimination Commission Queensland supports the stated objectives it is concerned the current Exposure Draft fails to meet them.
75. The Exposure Draft has a number of impediments, including:
- the limitation of 'vilify' to incitement to hatred;
 - the ordinary reasonable Australian test;
 - the exception;
 - removal of vicarious liability; and
 - the limitation of the definition of intimidate.

Limitation of 'vilify' to incitement of hatred

76. A feature of vilification laws in Australia is that they prohibit the incitement of hatred towards, serious contempt for and severe ridicule of person or groups by public acts. Racial vilification laws in this form and with civil remedies are in place in Queensland, New South Wales, the ACT, Victoria and Tasmania.⁶²

⁶¹ Media Release, Senator the Hon George Brandis QC Attorney-General Minister for the Arts, *Racial Discrimination Act*, 25 March 2014.

⁶² *Anti-Discrimination Act 1991* (Qld), sections 124A and 131A; *Anti-Discrimination Act 1977* (NSW), sections 20C and 20D; *Discrimination Act 1991* (ACT), sections 66 and 67; *Racial and Religious Tolerance Act 2001* (Vic), sections 7 and 24; *Anti-Discrimination Act 1998* (Tas) section 19.

77. The rationale for limiting vilification to the incitement of racial hatred is not apparent, and would seem inconsistent with the objective of proscribing racial vilification.
78. The Anti-Discrimination Commission Queensland recommends that ‘serious contempt for’ and ‘severe ridicule of’ be included in the new law.

Ordinary reasonable Australian test

79. The Exposure Draft introduces a new test for the reasonable likelihood of conduct to vilify or intimidate – ‘the ordinary reasonable member of the Australian community’ test. It is uncertain how this test will be interpreted by the courts, and whether it is in effect different to the well-known ‘reasonable person’ test.
80. The test for the element of incitement in existing state vilification provisions has been adopted from the test in defamation. It is an objective test: Could the ordinary reasonable person understand from the public act that he or she is being incited to hatred towards, serious contempt for or severe ridicule of a person or person on the relevant ground (race)?
81. The principles were outlined by the Queensland Anti-Discrimination Tribunal in *GLBTI v Wilks*,⁶³ as follows (emphasis added):
- (a) The respondents’ intent to incite is irrelevant.
 - (b) What is required is that there has been incitement to another to hate etc. rather than a mere conveyance of a hatred already held by the speaker.
 - (c) ‘Incite’, ‘hatred’, ‘contempt’ and ‘ridicule’ should all be given the ordinary natural meaning i.e. to incite – urge on, stimulate or prompt to action.
 - (d) It is not necessary that it be proved that any particular person was incited but that the **capacity of the public act to incite the ordinary reasonable person** is what must be made out.
 - (e) The incitement to hatred must be on ‘the grounds of sexuality’ meaning that that matter was a ‘substantially contributing factor’
82. These principles have been followed in subsequent decisions of the Queensland tribunals.⁶⁴

⁶³ *GLBTI v Wilks* [2007] QADT 27.

83. The reasonable person test has also been adopted in decisions under the New South Wales vilification provision (which is essentially the same as the Queensland provision).⁶⁵
84. The Anti-Discrimination Commission Queensland recommends that the ordinary reasonable Australian test be replaced with the 'reasonable person' test by modelling the new law on the Queensland and New South Wales vilification provisions.

The exception

85. The Exposure Draft would exempt from the vilification prohibition:
- words, sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter.
86. The phrase 'participating in public discussion' could mean any discussion in public. It is not clear whether more than one participant is necessary, or whether someone in public could simply state that they are starting or joining a public discussion and then proceed to vilify a person or group on the basis of their race. On its ordinary meaning, 'public discussion' would seem unduly wide and likely to cover almost all public conduct. It is difficult to envisage a situation where a public utterance would not be 'participating in a public discussion'.
87. Just as laws which are designed to prohibit racial vilification should not be used as a vehicle to attack legitimate freedom of speech,⁶⁶ so too freedom of speech should not be used as a vehicle to racially vilify. The proposed exemption would be unreasonably broad.
88. In existing state vilification laws the limitation of freedom of speech is balanced by exceptions formulated on the well-known and understood

⁶⁴ See for example *Wilson & McCollum v Lawson* [2008] QADT 27; *Sailor v Hubbucks and Black & White (Quick Service) Taxis Ltd (No. 2)* [2008] QADT 33; *Casey v Flanagan* [2001] QCAT 320; *Brosnahan v Ronoff* [2011] QCAT 439; *Casey v Blume* [2012] QCAT 627.

⁶⁵ See for example *Veloskey v Karagiannakis* [2002] NSWADTAP 18; *John Fairfax Publications Pty Ltd v Kazak* [2002] NSWADTAP 35; *Burns v Laws (No. 2)* [2007] NSWADT 47.

⁶⁶ Media Release, above n 62.

concepts of reasonableness and good faith. The Queensland provision (the same as New South Wales) makes lawful:

- (a) the publication of a fair report of a public act mentioned in subsection (1);
- (b) the publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation; and
- (c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including public discussion or debate about, and expositions of, any act or matter.

89. As noted earlier (paragraph 68) the exception in (c) above was applied in *Deen v Lamb* in relation to the distribution of a pamphlet as part of a campaign in a federal election. Also noted earlier (paragraph 70) these exceptions are a reasonable and appropriate balance of the right of people to live in the community free from hostility and abuse and the right of free expression.

90. The Anti-Discrimination Commission Queensland recommends that the exception in the new law be framed on the Queensland and New South Wales exceptions.

Removal of vicarious liability

91. Vicarious liability is a common law principle that employers and principals are liable for the acts and omissions of their workers and agents in connection with the work or agency. Generally this means liability for the wrong rests with both the worker and employer, or principal and agent, and action can be brought against one or either of them. As the rights and responsibilities in relation to discrimination are created by statute, the principle of vicarious liability is incorporated into the relevant statutes by specific provisions.⁶⁷ The *Racial Discrimination Act* currently provides for vicarious liability in part II, the prohibition of racial discrimination,⁶⁸ and in part IIA, the prohibition of offensive behaviour based on racial hatred⁶⁹ (i.e. the provisions the subject of the Exposure Draft).

⁶⁷ See for example the Queensland provision, *Anti-Discrimination Act 1991*, section 133.

⁶⁸ *Racial Discrimination Act 1975*, section 18A.

⁶⁹ *Racial Discrimination Act 1975*, section 18E.

92. The Exposure Draft removes the vicarious liability provision in section 18E. The rationale for not holding employers and principals responsible for racial vilification by their workers and agents is not apparent. Whilst many forms of racial vilification occur outside an employment or agency relationship, vilification through the media (newspapers, radio and television) will usually involve an employment or agency relationship. This form of vilification potentially has a greater audience and the potential for greater harm.
93. Racial vilification can cause more than hurt and humiliation; it can result in personal injury in the nature of psychological or other medical conditions. Where compensation for the hurt, humiliation and personal injury caused by racial vilification is sought, a complainant might be dissuaded from bringing a complaint if a vicarious liability provision is not included in the new law.
94. The Anti-Discrimination Commission Queensland recommends that a vicarious liability provision be included in the new law.

Limitation of the definition of ‘intimidate’

95. The meaning of ‘intimidate’ in the Exposure Draft is limited to causing fear of physical harm to person or property. This narrowing of the term does not take account of the fact that intimidation occurs notwithstanding the absence of the threat of physical harm. Intimidation by verbal and non-physical abuse can cause people to withdraw and suffer severe emotional and psychological damage.
96. Vilification that involves threats of physical harm to person or property is, in the state legislation, dealt with as an offence, with or without the right to make a civil claim.
97. If, as recommended in this submission, the new law is modelled on the Queensland and New South Wales vilification provisions, non-physical intimidation would also be prohibited.

Conclusion

98. The Australian *Constitution* provides that when a law of a state is inconsistent with a federal law, the federal law prevails and the state law is invalid to the extent of the inconsistency.⁷⁰ Inconsistency can arise where a state law would alter, impair or detract from the operation of a law of the Commonwealth.⁷¹
99. The Exposure Draft would set a much lower standard than that under existing state laws. Arguably then the existing state vilification laws might impair or detract from the operation of the federal RDA as amended by the Exposure Draft. A provision in a federal law that it is not intended to exclude or limit the concurrent operation of any state or territory law has been held to be relevant to inconsistency but not determinative of it.⁷² It is of concern that the implementation of the Exposure Draft may result in the implied repeal of the state vilification provisions so far as they relate to racial vilification.
100. The Anti-Discrimination Commission Queensland suggests there is no need to amend the existing provisions in the RDA. However, if changes to the RDA are to be pursued, as demonstrated in this submission, a body of case law has developed (based on the Queensland and New South Wales vilification provisions) that is consistent with the objectives and intentions of the reforms to the RDA.
101. Rather than introducing new untested concepts, and rather than amending the existing section 18C of the RDA, it is recommended that any new provisions of the RDA be framed on the Queensland and New South Wales model. This would better achieve the objectives and intentions of the reforms, as well as preserving the jurisprudence and ensuring the continued operation of the state vilification laws.

⁷⁰ *Constitution*, section 109.

⁷¹ *Telstra Corporation v Worthing; Attorney-General v Telstra Corporation* (1999) 161 ALR 489.

⁷² *Momcilovic v The Queen* [2011] HCA 34.

Appendix A

Vilification complaints accepted by the Anti-Discrimination Commission Queensland

Year	Race	Religion	Sexuality	Gender identity	Total	Total – all accepted grounds
2001-02	7	4	Not applicable	Not applicable	11	658
2002-03	14	1	0	0	15	830
2003-04	13	4	1	0	18	908
2004-05	16	1	5	2	24	1,118
2005-06	14	2	14	1	31	812
2006-07	9	1	6	1	17	821
2007-08	1	2	1	1	5	667
2008-09	7	0	3	1	11	728
2009-10	10	1	0	2	13	600
2010-11	15	1	17	2	35	789
2011-12	11	3	6	0	20	604
2012-13	6	5	1	0	12	610
2013-March 2014	4	0	4	0	8	481
Totals	127	25	58	10	220	9,145

Appendix B

Queensland Vilification Decisions

Where complaint succeeded

Case	Type	Conduct
<i>Peters v Constance</i> [2005] QADT 9	Sexuality	Verbal abuse outside home – ‘paedophile’, asked if had any weapons
<i>GLBTI v Wilks</i> [2007] QADT 27	Sexuality	Publication in local newspaper – ‘Poofers Beware’ – vigilante threats
<i>Wilson & McCollum v Lawson</i> [2008] QADT 27	Sexuality	Verbal abuse by neighbours in front of others, ‘faggot’, ‘poof’, ‘princess’
<i>Casey v Flanagan</i> [2011] QCAT 320	Race	Abuse over CB radio – ‘wog’, ‘import’, ‘dago’, ‘give her a much shit as you like’
<i>Brosnahan v Ronoff</i> [2011] QCAT 439	Gender Identity	Verbal abuse outside home – ‘dick in a jar’, with threats of violence
<i>Casey v Blume</i> [2012] QCAT 627	Race	Verbal abuse over CB radio – ‘wog’, ‘slut’, ‘dago’, ‘gypsy’ – place to go for sex

Where complaint failed

Case	Type	Conduct
<i>Deen v Lamb</i> [2001] QADT 20	Religion	Pamphlet denigrating Koran and Muslims disseminated as part of campaign for election to Federal Parliament Public act done reasonably and in good faith
<i>M v S & G</i> [2008] QADT 24	Gender Identity	‘That’s a boy’ in a shop Not a public act nor incitement
<i>Sailor v Hubbocks and Black & White (Quick Service) Taxis Ltd (No. 2)</i> [2008] QADT 33	Race	Racial insults by taxi driver to member of public ‘incitement’ requires communication directed to a 3 rd party
<i>Conde v Hunter & Karakan Hostels</i> [2009] QADT 11	Race	Verbal racial abuse – personal insults Not communication to public
<i>Chen v Groom & Lozcas Investments Pty Ltd</i> [2013] QCAT 511	Race	Verbal abuse by neighbour, not the respondent Active conduct on the part of the respondent needs to be shown