Victorian Equal Opportunity
& Human Rights Commission

15 April 2014

Senator the Hon George Brandis QC
Attorney-General
PO Box 6100
Senate
Parliament House
CANBERRA ACT 2600

Dear Attorney-General

Submission on Freedom of Speech (Repeal of s 18C) Bill 2014 – Exposure Draft

I refer to your Exposure Draft of proposed amendments to the *Racial Discrimination Act 1975* (Cth) and call for submissions dated 25 March 2014.

I attach the submission from the Victorian Equal Opportunity and Human Rights Commission.

In summary, we submit:

1. Effective State and Federal laws proscribing racial vilification are important for multicultural communities such as Victoria. The Commission has very serious concerns that the proposal set out in the Exposure Draft will not provide the protection from racist speech and behaviour that the Australian community has a right to expect and that the Australian Government has stated that the legislation is intended to achieve.

2. Based on the experience of the Victorian *Racial and Religious Tolerance Act 2001* and other discrimination laws across Australia, we believe the proposed new laws will be ineffective because:

    a. the new test provides that racist intimidation and vilification are unlawful only if an act is done solely because of race, colour or national or ethnic origin of a person or group which is targeted. This will be very difficult for the complainant to prove.

    b. the test of 'incitement to hatred' relies on proving that the conduct moved the emotional state of a third person. This is a very high threshold to meet. The test would be more effective if it related to the abhorrence of the conduct or the impact on the person or a reasonable person in the victim's position.

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c. the definition of intimidation is limited to conduct which will cause fear of physical harm (conduct which is already prohibited as criminal conduct).

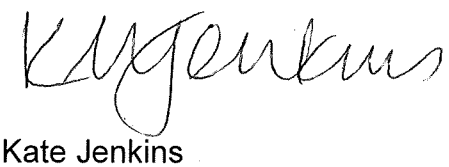
d. substituting the exemption for acts done 'reasonably and in good faith' with a broad exemption for any 'words, sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter', will remove almost all conduct from the operation of the Act.

3. In combination, the Commission believes the proposed amendments in Exposure Draft will remove any effective mechanism to combat racist speech and behaviour which impacts the rights of others (outside of specific relationships where discrimination can occur).

4. It is essential for there to be serious consideration of these issues and the implications of any legislative amendments. Adequate community consultation and a thorough examination of the case law and the experiences of other jurisdictions should be part of any genuine law reform work in this area.

Please contact me on 03 9032 3403 or kate.jenkins@veohrc.vic.gov.au if you would like any further information.

Yours sincerely



Kate Jenkins
Commissioner

Victorian Equal Opportunity
& Human Rights Commission

Freedom of Speech (Repeal of s 18C) Bill 2014

> Submission to the Australian Government

15 April 2014

1. Overview

The Victorian Equal Opportunity and Human Rights Commission welcomes the Australian Government's consultation on the Freedom of Speech (Repeal of s 18C) Bill 2014 – Exposure Draft. The issues raised by this Bill are significant for the community and warrant detailed consideration.

The Commission supports protection from racial and religious vilification. An effective legal framework is an important part of these protections. We welcome the Government's intention to proscribe racial vilification in Commonwealth law for the first time.

The Commission also recognises the challenges of ensuring an appropriate balance is struck between freedom of speech and protection from hate conduct. The right to hold an opinion is protected absolutely under human rights law. The right to express those views in public can be subject to limitations reasonably necessary to protect the rights of others.

Our legal system recognises limitations on expressions that cause harm to other people. For example, Parliaments in Australia have placed limitations on expression through defamation and consumer protection laws. They have also made decisions about limitations under racial hatred and vilification laws.

We also note that racial hatred can be a form of harassment that limits some people's rights to freedom of expression and participation in public life. As noted by the Committee on the Elimination of Racial Discrimination in 2013:

> *The protection of persons from racist hate speech is not simply one of opposition between the right to freedom of expression and its restriction for the benefit of protected groups; the persons and groups entitled to the protection of the Convention also enjoy the right to freedom of expression and freedom from racial discrimination in the exercise of that right. Racist hate speech potentially silences the free speech of its victims.*[1]

The Commission has very serious concerns that the proposal set out in the Exposure Draft will not provide the protection from racist speech and behaviour that the Australian community has a right to and that the Australian Government has stated that the legislation is intended to achieve.

We note that the Attorney-General, Senator the Hon George Brandis QC, is quoted as saying that 'the legitimate right of racial minorities to be protected from vilification and the incitement of hatred and intimidation and fear. That's a right that our amendments protect and in fact enlarge' (ABC Radio, quoted by Jared Owens, 'George Brandis rejects concerns Holocaust denial will become lawful', *The Australian*, 26 March 2014).

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[1] Committee on the Elimination of Racial Discrimination issued a new *General recommendation No 35 – Combating racist hate speech* (CERD/C/GC/35), September 2013, para 26-28.

In this submission, the Commission outlines its experience of the 'incitement to hatred' test for vilification that has operated in Victoria since 1 January 2002. We believe an understanding of the Victorian law and how it has worked in practice is important to inform the current Australian Government consultation. Based on this experience, we believe that the proposal to make 'incitement to hatred' unlawful will be a limited, uncertain and inadequate mechanism.

We also note areas where the proposed Bill would create uncertainty and would significantly narrow the current protections. For example, while the word 'intimidate' would be left in the text, the Government's proposal is to define it narrowly with reference to something that causes fear of physical harm. This does not address the psychological and emotional harm that people in the community can experience.

Finally, the proposed exemption for public discussion is so broad that it will apply to most foreseeable conduct except assault or property damage.

It is essential for there to be serious consideration of these issues and the implications of any legislative amendments. Adequate community consultation and a thorough examination of the case law and the experiences of other jurisdictions should be part of any genuine law reform work in this area.

2. About the Commission

The Commission is an independent statutory authority with responsibilities under three state laws: the *Equal Opportunity Act 2010* (Vic), the *Charter of Human Rights and Responsibilities Act 2006* (Vic), and the *Racial and Religious Tolerance Act 2001* (Vic).

The Commission has a statutory role to provide education to the public about the operation of the Racial and Religious Tolerance Act (under s 156(1)(c) of the Equal Opportunity Act).

Subsection 4(1) of the Racial and Religious Tolerance Act sets out the law's objectives which are:

> *(a) to promote the full and equal participation of every person in a society that values freedom of expression and is an open and multicultural democracy;*
>
> *(b) to maintain the right of all Victorians to engage in robust discussion of any matter of public interest or to engage in, or comment on, any form of artistic expression, discussion of religious issues or academic debate where such discussion, expression, debate or comment does not vilify or marginalise any person or class of person;*
>
> *(c) to promote conciliation and resolve tensions between persons who (as a result of their ignorance of the attributes of others and the effect that their conduct may have on others) vilify others on the ground of race or religious belief or activity and those who are vilified.*

The Commission also has a statutory role to promote and advance the objectives of the Equal Opportunity Act and to be an advocate for the Act (s 155(1)(b)).

These objectives include the elimination of discrimination to the greatest extent possible, encouraging the elimination of systemic causes of discrimination, and promoting and facilitating the progressive realisation of equality, recognising that discrimination can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society.

The Commission recognises that experiences of racist speech and behaviour in the community contribute to discrimination and create barriers to equality of opportunity. As the UN Committee on the Elimination of Racial Discrimination has noted in the international context, the 'identification and combating of hate speech practices is integral to the achievement of the objectives of the Convention – which is dedicated to the elimination of racial discrimination in all its forms' (*General recommendation No 35*, CERD/C/GC/35 at 8).

The Commission also has a role in providing education about human rights and the Charter (s 41(d) of the Charter). The Charter includes the right to equality in s 8 and the right to freedom of expression in s 15. The Charter is founded on the following principles set out in its preamble:

- *human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;*
- *human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;*
- *human rights come with responsibilities and must be exercised in a way that respects the human rights of others;*
- *human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.*

It is with the objectives of these laws in mind that the Commission makes this submission.

3. Current proposal to change federal protections from racial hatred

The Commission notes that the amendments in the Freedom of Speech (Repeal of s 18C) Bill 2014 – Exposure Draft would narrow each element of the existing federal law prohibiting acts of racial hatred (in Part IIA of the *Racial Discrimination Act 1974* (Cth)) and would greatly expand the exemptions. Specifically, we note that the Government proposes to:

1. Repeal s 18B, which currently states that where an act is done for two or more reasons and one of the reasons is the race of a person (whether or not the dominant reason), the act is taken to be done *because of* race for the purposes of Part IIA. In view of the proposed repeal of the section, it is possible that the new provision may be interpreted to mean that racist intimidation and vilification are unlawful only if an act is done solely because of

race, colour or national or ethnic origin of a person or group which is targeted. This would be an element for the complainant to prove. Without further explanation from the Government, it is not apparent whether this is intended – and if so, why. It is not uncommon for acts of intimidation and vilification to occur in circumstances where more than one reason is involved, for example a dispute between parties. Another relevant context would be where a person would have to show that holocaust denial was motivated by race alone, rather than historical debate and also because of the race of the group.

2. Narrow the type of conduct that will be covered by the provision by:

   (a) Repealing the s 18C prohibition of acts done because of the race of a person or group of persons that is reasonably likely to 'offend, insult or humiliate' that person or group of persons. We note that the current provision has been interpreted by the Courts to require 'profound and serious effects, not to be likened to mere slights' (Bromberg J, *Eatock v Bolt* [2011] FCA 1103, 28 September 2011 at 268). The public representations of the current provision applying to 'mere' insults is not supported by the case law under the Act.

   (b) Narrowing the existing prohibition in s 18C of acts reasonably likely to 'intimidate' another person by defining 'intimidate' to mean 'to cause fear of *physical harm* to a person, to the property of a person or members of a group of persons.' This is an additional element to be proven by the person making a complaint and removes any room for inclusion of other forms of intimidation, for example, intimidation that causes someone to disengage from public life but may not be a physical threat. For example, intimidation could cause emotional and psychological damage. It could prevent people from walking down the street, going to the park, or going to work.

3. Insert a test that the determination of whether an act is 'reasonably likely' to vilify or intimidate 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'. This has two consequences: (1) it excludes reference to incitement of a specific audience to more remotely connect to acts likely to incite based on the standards of an 'ordinary Australian'; and (2) whether something is reasonably likely to intimidate a person is considered with reference to an 'ordinary Australia' test, rather than that of a group that may experience frequent abuse.

   The Government has explicitly chosen the terms 'ordinary Australian' rather than the more usual term found in laws of the 'reasonable person'. This creates uncertainty about how the provision will be interpreted. It is not clear how an 'ordinary Australian' test will be interpreted compared to a 'reasonable person'. We note that the Government has not chosen options like s 28A of the *Sex Discrimination Act 1982* (Cth) which uses a 'reasonable person' test for sexual harassment saying that the conduct is unlawful 'in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated'. Similarly, s 17 of the *Anti-Discrimination Act 1998* (Tas) inserts a reasonable person test by making certain behaviour unlawful

'in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed'. These provisions provide useful examples of how objectivity can be reflected in a legal test in ways that are more settled and readily understood.

We are also concerned that determining the harm done by reference to an 'ordinary Australian' is not an appropriate policy position given the very specific experiences and histories of some racial and ethnic groups in Australia. It is appropriate to recognise the harm done to the victim and that this damage can be remedies through a civil action.

4. Replace the current s 18D exemption for acts done 'reasonably and in good faith' with a broad exemption for 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.' This covers a very broad range of conduct that could be classed as 'public discussion' including any publication, speech, and social media. The Commission is concerned that this will remove almost all conduct from the operation of the Act. This is not an appropriate outcome.

5. Repeal the current s 18E vicarious liability provision, under which an employer can be liable for prohibited acts of racial hatred where a person does those acts in connection with their duties as an employee or agent. This may signal to employers that they do not have to take reasonable precautions to prevent racial hatred in the workplace – a public place under discrimination and vilification laws. Many employers will have these obligations to prevent racial discrimination under other parts of the Act. We have not seen an explanation for this proposed amendment.

6. The Exposure Draft would then add a new clause making it unlawful to vilify another person or group of persons because of their race. Vilify is defined as inciting hatred. This incitement test focuses on whether the conduct has moved the emotional status of a third person, rather than an objective assessment of the severity or seriousness of the conduct or the impact of the conduct on the target.

4. Experiences of racism in the community – more than physical harm

The Commission is very concerned that the proposed changes to the Racial Discrimination Act will mean that people in Victoria will have less protection from racist speech and behaviour. While the state laws continue to operate, the federal layer of protection will be significantly reduced. At the moment, people in Victoria have access to two layers of protection, one at the state level - the Racial and Religious Tolerance Act which applies to vilification by inciting hatred, and one at the federal level - the Racial Discrimination Act, which applies to racial hatred reasonably likely to offend, insult, humiliate or intimidate another person.

Having strong legal protections from racial hatred and vilification is particularly important in Victoria which values its Aboriginal people and people from diverse ethnic groups. Being proudly multicultural is one of the Victorian community's values.

The 2011 Census recorded that:

- 26% of Victorians were born overseas in more than 200 countries
- nearly 47% were either born overseas or have at least one parent born overseas
- 23% of Victorians spoke a language other than English at home, and
- 67.7% follow 135 faiths.

This diversity enriches Victoria and every member of our community has the right to equality of opportunity and protection from serious racist hate speech and behaviour which can create barriers to people's participation in public life. The proposed changes also have the potential to adversely impact on the relative social cohesion and harmony that Victoria currently enjoys.

The importance Victoria places on this is recognised in the Equal Opportunity Act, the Racial and Religious Tolerance Act, and the *Multicultural Victoria Act 2011* (Vic). In establishing the Multicultural Act, the Victoria Parliament explicitly recognised the importance of promoting and preserving diversity; that all individuals in Victoria are equally entitled to access to opportunities and to participate in and contribute to the social, cultural, economic and political life of the State; and to equal protection and responsibilities under the law (s 4).

Studies illustrate how experiences of racist speech and behaviour can be frequent. For example, one VicHealth survey (*Mental health impacts of racial discrimination in Victorian Aboriginal communities*, 2012) found that 97 per cent of Aboriginal Victorians surveyed had experienced racism in the previous 12 months and over 70 per cent experienced eight or more racist incidents. Forty-four per cent reported seeing people being treated unfairly because of their race, ethnicity, culture or religion at least once a week.

In 2013, the Commission conducted research into Victorians' experience of racism, including conducting surveys, interviews and paper-based research, culminating in the publication of our report *Reporting Racism: What you say matters*. This small sample report found that racism is still prevalent. Of the 227 survey responses received, 123 reported racist incidents that happened to them personally (54%), 102 had witnessed racism (44%), and 40 people had seen or received racist materials (18%).

Both VicHealth and the Commission's studies illustrated that the consequences of racism can be profound. There does not need to be a fear of physical harm for real damage to be done. Experiences of racism can undermine an individual's sense of self-worth, leave them feeling vulnerable and isolated, and affect their physical and mental health. Members of communities targeted by racism can feel anxious, unwelcome and less confident to participate in public life and debate. The VicHealth research concluded that racism and race-based discrimination are associated with poorer health outcomes, particularly poor mental health and reduced quality of life, for both Indigenous Australians and Culturally and Linguistically Diverse Victorians.[2]

[2] Victorian Health Promotion Foundation, *Mental health impacts of racial discrimination in Victorian* Aboriginal Communities – Experiences of racism survey: a summary, 2012, p 2.

The Commission notes that the strong association between negative health outcomes and racism for Indigenous Australians has also been recognised by the Close the Gap Campaign.[3]

The Australian Human Rights Commission also conducted similar research in 2012, which relevantly found that respondents reported that racism made them feel divided, like second class citizens, insecure, angry and less connected to Australia.[4] These kinds of experiences and detrimental effects are unlikely to amount to physical harm for the purposes of the Government's proposed amendments to s 18C and will no longer be covered by the Racial Discrimination Act.

5. Victorian law – incitement to hatred

The Commission's experience with vilification laws in the Victorian context is that rarely do acts of racial hatred reach the threshold of 'inciting hatred' against a person or a group of persons.

The implications of this test are not well understood. This has been evident during the current public debate.

One example of this is the opinion piece by Justin Quill, 'Debate on free speech should concern us all', published in the *Herald Sun* on 10 March 2014. In this piece, Mr Quill stated that:

> *Keep in mind, if someone is generalising about a particular race to the extent that members of that race are offended, there's a good chance the speaker is probably not just causing offence, but also inciting hatred.*
>
> *In that case, they would be caught even if the federal legislation were changed to be the same as the Victorian legislation.*

Our experience of the state law does not support this conclusion. As part of our education function, it is important for the Commission to be clear about what the Victorian law has been found to cover.

5.1 Protections under the Racial and Religious Tolerance Act

The Racial and Religious Tolerance Act was introduced in Victoria in 2001 to make racial and religious vilification unlawful. The Act provides that a person must not, on the ground of race or religious belief, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

The Racial and Religious Tolerance Act makes provision for both civil and criminal remedies.

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[3] http://www.humanrights.gov.au/news/stories/close-gap-warns-impact-rda-changes
[4] Australian Human Rights Commission, *National Anti Racism Strategy – Consultation Report,* 2012, pp 3–5.

There are similar exceptions for public comments in s 11 of the Racial and Religious Tolerance Act to those found in s 18D of the Racial Discrimination Act. These include exceptions for comments made in good faith in making or publishing a fair and accurate report of any event or matter of public interest.

5.2 Threshold test of 'inciting'

As a starting point, the legal tests of racial vilification under the Racial and Religious Tolerance Act, and that proposed in the Exposure Draft, differ from the common understanding of 'vilification'. Vilification in its ordinary sense is defined in the Macquarie Dictionary as 'to speak evil of or defame'. Doing this on the basis of race is racial vilification. The legal test of racial vilification is conduct that incites hatred - it is directed at action that moves the emotions of a third party. The ordinary meaning is directed at the action of the accused alone.

Under state law, the onus on a complainant or the prosecution to show that the respondent's conduct incited, or was likely to incite, a third person/s to feel hatred towards the complainant, or a particular group, because of their race or religion, has made this law difficult to apply in practice. A court or tribunal does not assess whether the respondent's conduct was serious based on a reasonable person test or whether it caused serious injury to the complainant in some way, but only that it incited, or was likely to incite, a third person to strong emotions such as hatred.

The Victorian Court of Appeal considered the Racial and Religious Tolerance Act in *Catch the Fire Ministries Inc, Nalliah & Scot v Islamic Council of Victoria and Attorney-General for the State of Victoria* [2006] VSCA 284. This is the only superior court decision on the Victorian Act. In this case, the Court made clear that 'incites' means to 'urge, spur on, animate or stimulate'. It involves inciting serious negative emotion about a person because of their religious beliefs or their race.

The Court considered that the test to be applied was 'whether the natural and ordinary effect of the conduct is to incite hatred or other relevant emotion in the circumstances of the case'. The reaction which the conduct incites must not be mild or trivial; rather, the conduct 'must incite the strongest feelings of antipathy'. A tendency to incite was sufficient without the need to show that the actions actually incited the reaction.

The Racial and Religious Tolerance Act is concerned with conduct that incites 'extreme' responses in third persons. It therefore brings some of the elements of seriousness and objectivity that are being considered in the current federal discussions. However, the Victoria legislation has been difficult for the community to use because of the incitement focus of the test. The cases where a third person is going to be moved to extreme emotions is limited. For example, most people can walk by someone directing racist speech at another person in the street, on public transport, or at a sporting event, without being moved to the 'strongest feelings of antipathy' themselves.

In one case the Victorian Tribunal found that incitement does not apply where people are 'preaching to the converted' and people already hold feelings of hatred (*Macedonian Advisory Council Inc v LIVV Pty Limited trading as Australian Macedonian Weekly* [2011] VCAT 1647). This focus of the incitement test on moving

a third party to change their emotional status does not tackle the racist speech and behaviour that many people experience in public life. As noted above, it does not address the seriousness of the conduct as it could be understood by a reasonable person, nor does it address the impact of the conduct on the target.

5.3 Exemptions and exceptions

The federal Exposure Draft also proposes amendments to create a broad exemption which would provide that: '[t]his section does not apply to words, sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter'. The ordinary meaning of public discussion is so broad that this exemption appears to apply to most imaginable public forms of racist speech and behaviour, except perhaps abuse hurled in the street or at another public venue like a sporting match or property damage.

The Victorian Act has a similar exception for public comment, but says in s 11 that actions must be engaged in reasonably and in good faith, and that reporting must be fair and accurate to be exempt. Whereas under the proposed federal law, people may be subject to racist speech, it may be dishonest, unreasonable and in bad faith, it may harm individuals, but it will be protected speech under the proposed amendments if it is part of public discussion.

There are other ways of considering this balance for public discourse. For example, when looking at whether the exemption in s 11 of the Racial and Religious Tolerance Act applied, the Court of Appeal in *Catch the Fire Ministries* determined that whether conduct was engaged in 'reasonably' for a genuine religious purpose 'must be decided according to whether it would be so regarded by reasonable persons in general judged by the standards of an open and just multicultural society' (para 94).

In that case, Justice Nettle stated that:

> *Such an assessment may not always be easy. A society which consists of varied cultural groups necessarily has the benefit, and bears the burden, of a plurality of standards. Hence, in this society, to speak of persons in general is to speak of persons who in large part have different standards. And to speak of what is reasonable among them it is to invoke an idea which as between them is to be a considerable extent informed by different standards. Nevertheless, experience has taught us that reasonable members of an open and just multicultural society are inclined to agree on the basics.*
>
> *In my view one is entitled to assume that a fair and just multicultural society is a moderately intelligent society. Its members allow for the possibility that others may be right. Equally, I think, one is entitled to assume that it is a tolerant society. Its members acknowledge that what appears to some as ignorant, misguided or bigoted may sometimes appear to others as inspired. Above all, however, one is entitled to assume that it is a free society and so, therefore, one which insists upon the right of each of its members to seek to persuade others to his or her point of view, even if it is anathema to them. But of course there are limits. Tolerance cuts both ways. Members of a tolerant society are as much*

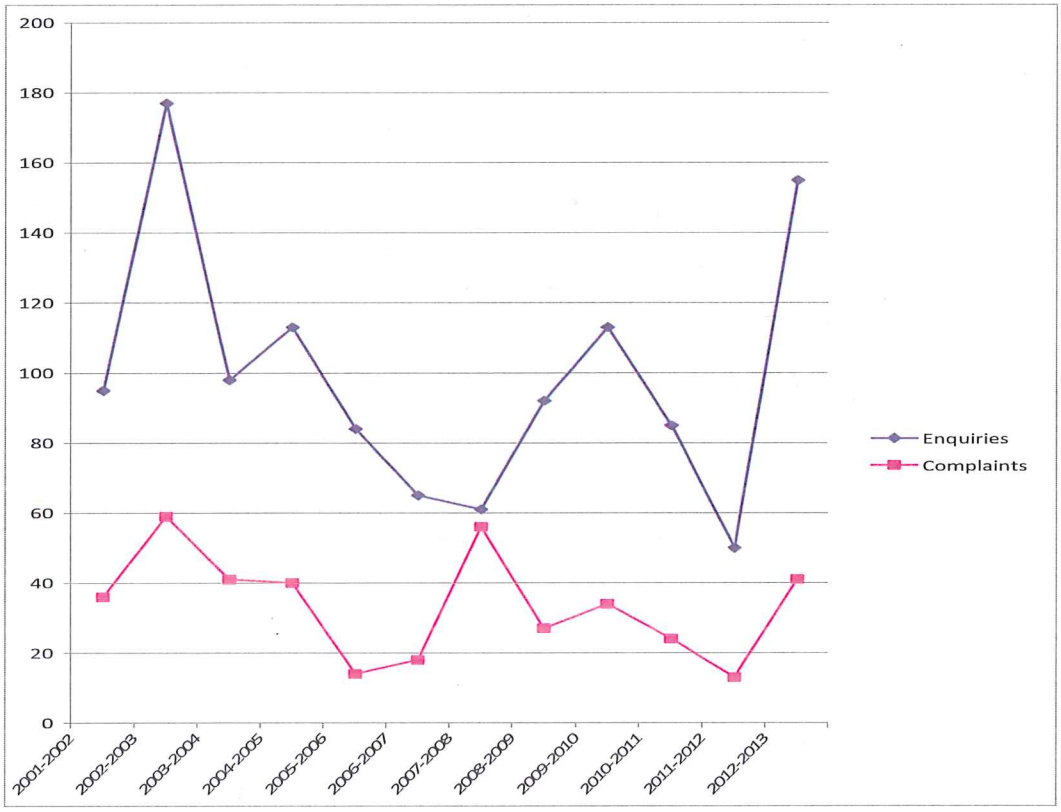
entitled to expect tolerance as they are bound to extend it to each other. And, in the scheme of human affairs, tolerance can extend each way only so far. When something goes beyond that boundary an open and just multicultural society will perceive it to be intolerable despite its apparent purpose, so judge it to be unreasonable for the purpose for which it was said.

5.4 Use of the civil provisions

Civil provisions under the Victorian law allow complaints to be brought to the Commission for dispute resolution and applications to be made to the Victorian Civil and Administrative Tribunal to be determined.

The Commission does not receive a large number of complaints under the Act. For example, in the last financial year there were 41 complaints.

Chart: Complaints and enquiries under the RRTA since its introduction



The Commission can help some members of the community resolve disputes about vilification through its free, impartial and voluntary dispute resolution service. For example:

- In a case concerning alleged religious vilification in relation to comments made on television show where both the television network and the production company were named as respondents, both respondents provided the complainant with a written apology.

- In a case concerning alleged racial and religious vilification by a publication which allegedly published statements that were disparaging towards business or community figures as Jews, the matter was resolved with an apology.

- In a case where a complainant alleged his neighbour racially vilified him for being of Middle Eastern descent, by verbally abusing his family on a daily basis to the extent he feared for his family's safety, there was a resolution by an undertaking from the respondent to cease such behaviour.

- In a case where a complainant who is Indian was involved in a minor car accident, he asked for the other driver's details, and the other driver allegedly refused and threatened to kill him and crack his head open and racially vilified him, the matter resolved for a written apology and $2,000 compensation.

In over ten years of operation, the Commission is aware of reported decisions by a court or tribunal in 11 cases under the Racial and Religious Tolerance Act. A summary of each of these matters is at **Attachment A**. Two of these cases were successful:

- *Ordo Templi Orientis v Legg* [2007] VCAT 1484 where the Tribunal found that religious vilification had occurred when the respondent published on a website allegations that Ordo Templi Orientis was a protected paedophile ring.

- *Khalil v Sturgess* [2005] VCAT 4446 where vilification was found when a neighbour made repeated vilifying comments in public. It is possible that this case would be decided differently in light of the threshold test later set by the Court of Appeal in *Catch the Fire Ministries.*

5.5 Use of the criminal provisions

Serious racial and religious vilification is a criminal offence under the Victorian Act. This covers conduct amounting to incitement to threaten, or incite others to threaten, physical harm towards, or towards the property of, persons or a class of persons on the grounds of race or religion.

Prosecutions for offences under the Act cannot be commenced without the written consent of the Director of Public Prosecutions. The Commission is not aware of any successful criminal prosecutions under the Racial and Religious Tolerance Act.

The lack of prosecution is often attributed to lack of evidence, the need to prove intent and incitement, a victim's unwillingness to proceed, inability to identify the offender, the pursuit of alternative charges which are easier to establish, and concern that prosecution will give racist groups further publicity.

One recent Victorian case raised the issue of when officials choose to use racial vilification offences. A prosecution under the Racial and Religious Tolerance Act can only be commenced with the written consent of the Director of Public Prosecutions.

Last year, there was a well-publicised incident of a French woman being racially abused on a bus in Melbourne. There was video of the event and it appears that there were violent threats towards the woman and a bus window was smashed. Third parties got involved in the abuse. While three people involved in the incident have

been charged[5], some people have expressed concern to the Commission that no charges were laid under the Racial and Religious Tolerance Act. One of the issues raised in this case is that all of the abuse was directed toward the victim rather than at third parties. Even though third parties did appear to get involved, there is a feeling by some that the lack of direct appeal to third parties by the accused makes the 'incitement' test difficult to prove to a criminal standard. This has not been tested in court.

People in the community have expressed concerns to the Commission that the Racial and Religious Tolerance Act provisions are not being used to send a message that deters racial or religious vilification in the community.

6. The scope of the proposed federal law

Applying the Victorian experience of the vilification test provides a useful illustration for the current federal consultation. Its application to three examples is discussed below.

Example 1: Football fan racially abuses a player

When asked how the amended law would handle a case of a football fan abusing an indigenous player on the field, the Attorney-General responded that it was his view that the amended law was 'written with cases like that in mind; racial abuse is not participation in public discussion' (Transcript – Press Conference, Parliament House, 25 March 2014).

However, in most cases, the point of considering the public discussion exemption will not be reached.

If you consider the test of incitement of hatred, the Victorian experience says that this test would not be fulfilled unless it was likely to move a third person to the serious emotion of hatred. Most cases would fail on this point. The impact on the target of the conduct is irrelevant to the incitement test.

The other issue to consider would be whether it provoked a fear of physical harm, before any exemption about public discussion had to be addressed. Again, this is not a likely outcome in the scenario described. For example, in the incident involving Adam Goodes, he said he was very affected emotionally by the comments, not that he felt at physical risk.

Example 2: Holocaust denial

The Attorney-General is also quoted as saying that 'racial vilification would always capture the concept of holocaust denial', noting that material posted to a website is not part of public discussion (article by Jared Owens noted above).

However, if you apply the legal test, it is unlikely that holocaust denial would meet the initial threshold for incitement.

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[5] Two men pleaded guilty and have been sentenced to two months imprisonment and 21 days imprisonment respectively. The 21 day sentence is subject to appeal. The third defendant failed to appear at Court.

It may be difficult to show that denying the holocaust of itself moves a third person to feel hatred (rather than some other emotion such as distrust) and that this was done because of race rather than a difference of opinion about historical debate, as the new test in the Exposure Draft would require.

Even if you then get to the step of considering the public discussion exemption, it would appear that it does apply in this scenario, if you apply the ordinary meaning of the words proposed.

Example 3: A neo-Nazi rally

A neo-Nazi rally where a person is encouraging hate against people of the Jewish faith is likely to be seen as 'preaching to the converted' if you apply Victorian case law such as the *Macedonian Weekly* case to the incitement element of the test. It is also unlikely to move an 'ordinary Australia' to hatred. It could therefore fail on an incitement test before getting to the point of considering what falls within the proposed public discussion exemption. We note that the public discussion exemption is also likely to apply.

When you work through examples, taking into account the high threshold for incitement, the narrow definition of intimidation and the broad exemption for any public discussion, it is hard to imagine a situation that would be covered by the Act if it is amended in the way proposed, except perhaps a racially-based threat of, or actual, physical assault or property damage, which is a criminal offence under state laws.

7. Conclusion

There is no place for racism in Australia and people have a right to legal protection from serious acts of racist speech and behaviour. The Government's proposed amendments will make the federal legal protections practically inoperative and this is not acceptable in a modern and multicultural Australia. There is a role for state and federal Parliaments to ensure that there is a safe place for all people to exercise their rights and freedoms.

On the evidence available to the Commission, the case for such profound change to the law has not been demonstrably made out.

The Australian Government should give further consideration to the need for the change and the likely impacts of its proposals. This should not be done in isolation from community input and a detailed analysis of the case law and experiences of other jurisdictions.

The Commission acknowledges that legal protections are only part of what is required to address racism. There is work to be done at the community, organisational and individual levels.

The Commission works across this spectrum and not only helps people to resolve complaints, but publishes research on key issues and strategies, provides education, and helps organisations to bring about cultural change. The Commission's *Anti-Hate campaign* encourages people to stand up against racism when they see it in the community. We can all take steps to remove the authorising environment for racial

hatred in our community. However, effective legal protection is a foundation stone for this work as we continue to build a community where every Australian can enjoy their right to live freely, and with dignity and as equals.

We hope that the experience of the Victorian laws in practice can help to shed light on the likely application of the proposed law and that a better understanding of the Racial and Religious Tolerance Act will inform the dialogue between the Australian Government and the community on this important issue.

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Court and Tribunal decisions under the *Racial and Religious Tolerance Act 2001* (Vic)

Decision	Summary
Bennett v Dingle [2013] VCAT 1945	No finding of vilification. The respondent said to the applicant 'you're a big fat Jewish slob' and 'Hitler was right about you bastards' while they were walking their dogs at a park. Although a friend of the applicant overheard the exchange, there was no evidence that anyone else heard the words or was close enough to hear them. VCAT found that even on a generous interpretation of who comprised the audience (that is, anyone in the park), it was doubtful that 'the ordinary non-Jewish person would perceive the words as going beyond venting, in the context of a heated altercation between two men'.
Unthank v Watchtower Bible and Tract Society of Australia [2013] VCAT 1810	No finding of vilification. A former Jehovah's Witness made a complaint about an article published in *Watchtower* which stated that 'apostates are mentally diseased'. Although VCAT noted that a casual reader might regard the language as 'hateful' or 'spiteful', the application was dismissed on the basis that there was no evidentiary basis for a finding of incitement.
Australian Macedonian Advisory Council v LIVV Pty Ltd t/a Australian Macedonian Weekly [2011] VCAT 1647	No finding of vilification. VCAT found that an article published in the *Australian Macedonian Weekly* was incapable of inciting hatred because it was 'preaching to the converted'. In doing so, VCAT confirmed that limitations on free speech must only be made in the most 'egregious' cases. The Australian Macedonian Advisory Council Inc (AMAC) was established in 2008 for the

	'welfare and advancement of the Greek-Australian community'. The respondent newspaper is a weekly publication mostly in the Macedonian language. In May 2009, the newspaper published an article with the heading 'Who in this celestial world gave the Greeks the right to take away the Macedonian language'. The article was one of the only English-language articles in the paper and included phrases such as 'Greek deranged bastardly monsters' and 'freaks of nature'. VCAT was not satisfied that the article, as a whole, in its social and historical context, amounted to incitement to hatred of Greek people. VCAT emphasised the need to consider the nature of the relevant audience in determining whether the Act has been breached. In this case, VCAT noted the limits of the potential audience. Even though the article was published on the respondent's website, it was unlikely to be accessed by the public at large or by people who did not read the Macedonian language. Further, even if a casual reader 'stumbled across' the article, they would be unlikely to understand the content without a knowledge and understanding of the history of the dispute. This led VCAT to conclude that: *For the average Macedonian reader, this article is probably just "preaching to the converted" and is not likely to stir up such raw emotion as to breach the Act. I suspect that the average non-Macedonian reader who might stumble across the article on the website or who might flick through it at the local shop would just wonder what it was all about without being incited to any extreme emotion about Greeks.* Although VCAT viewed the article as an 'intemperate and (in many parts) hyperbolical rant', it was not persuaded that it breached the Act.
Chakraborty v Regional Publishers (Western Victoria) Pty Ltd & Ors [2009] VCAT 1862	VCAT granted leave to the applicant to bring proceedings under the RRTA against a co-worker, the Bendigo Advertiser and the Herald Sun (Note: This case was heard prior to the changes under the Equal Opportunity Act which now allow an applicant to apply directly to the Tribunal without leave). The applicant claimed that newspaper articles based on statements made by his co-worker, as well as corresponding online comments, incited hatred and other relevant emotions against him, other Indian doctors in Bendigo, and other persons of Indian

	descent in Victoria. In relation to the online comments posted by readers of the newspaper, VCAT emphasised that each comment should not be looked at in isolation. VCAT noted that it 'may be that individuals post comments, but a newspaper which puts those posts on its website must be taken to have published them and be responsible for their content'. VCAT considered that it was clearly arguable that the 'extreme' comments published online could constitute racial vilification. In particular, 'many of the posts suggest in quite offensive language that a particular doctor of Indian origin is not one of us, or should return to his country of origin'. In relation to the applicant's co-worker and her statements to the media, VCAT considered that: *[i]t is conceivable that a person might breach s 7 of the Act by speaking even to one person, if it was found proven on the facts that that conversation had the effect of inciting hatred by putting into motion a chain of events such as publication of vilifying material against a particular person or race. But in any event, I think it is arguable that a person who makes comments to a journalist is thereby addressing the readership of a newspaper, and not an individual, and that the relevant audience is not the journalist, but the readership of the media in which the journalist is employed.*
Ordo Templi Orientis v Legg [2007] VCAT 1484	Vilification found. A representative complaint was lodged by Ordo Templi Orientis (a religious organisation whose members practice the religion known as Thelema). The complaint alleged that a website, produced and maintained by the respondents, vilified the complainants on the basis of their religion. In particular, the website claimed that the Ordo Templi Orientis was a protected paedophile and satanic group that tortured and killed children, and demanded that readers take action. VCAT found that the website incited hatred, contempt, revulsion and severe ridicule against the complainants on the grounds of their religious belief. The respondents were ordered to remove the offensive material from the website, and were subsequently

	sentenced to nine months' imprisonment for failing to do so (for contempt of the Tribunal).
Francis v YWCA Australia [2006] VCAT 2456	No vilification found. The applicant (a devout practising Catholic) complained that the sale and distribution of a t-shirt with the slogan 'Abbott, get your rosaries off my ovaries', amounted to religious vilification. The t-shirts were produced in the course of a significant debate concerning the availability of the abortion drug RU 486. The subject of that debate was 'whether responsibility for the approval of this drug should be removed from the Minister for Health and Ageing, Mr Abbott, who is a devout Catholic and be given to another body'. VCAT accepted that the slogan 'may well be deeply offensive to a great many adherents to the Roman Catholic faith'. However, it concluded that the sale and distribution of the t-shirts did not incite hatred or other relevant emotions against Mr Abbott or any other Catholic person. Rather, 'many people would find the slogan to be distasteful and recognise that it would be highly offensive to a great many others. The slogan might generate a more negative response towards those who wear the t-shirts bearing it than towards Mr Abbott or any other devotee of the Catholic faith'.
Catch the Fire Ministries Inc v Islamic Council of Victoria [2006] VSCA 284	No finding of vilification. In the only superior court decision on the RRTA, the Victorian Court of Appeal considered whether statements made by Catch the Fire Ministries (CTFM) amounted to religious vilification. In doing so, the Court confirmed that the threshold for breaching the RRTA is high – it is concerned with conduct that incites extreme responses. Conduct which is merely critical, offensive or insulting will not amount to vilification. The Court also clarified that the RRTA is concerned with vilification of people, not of beliefs. In particular, there is a distinction between behaviour which incites hatred of a religious belief (which is not prohibited by the RRTA) and behaviour which incites hatred of people who hold that belief. In this case, the Islamic Council of Victoria Inc complained that CTFM and two of its pastors had made statements that incited hatred against, serious contempt for, or revulsion or severe ridicule of the Islamic faith. The statements were made at a CTFM seminar, in a newsletter and on its website. At first instance, VCAT found that the conduct

	breached section 8 of the RRTA and ordered CTFM to place an apology on its website and to take out newspaper advertisements highlighting its decision. On appeal, the Supreme Court ordered that the matter be returned to VCAT for reconsideration. A confidential out-of-court agreement was subsequently reached. **The test for vilification** The Court found that the test for vilification is 'whether the natural and ordinary effect of the conduct is to incite hatred or other relevant emotion in the circumstances of the case' (including the characteristics of the audience to which the conduct is directed and the historical and social context in which the conduct occurs). The test therefore focuses on the response of the relevant audience (rather than what motivated the respondent to engage in conduct, or whether the conduct caused offence). This requires consideration of the nature of the particular audience to which conduct was directed. In this case, the pastor's plea to his audience to love and 'witness' to Muslims was relevant to the question of whether those statements had the effect of preventing hatred towards Muslims. The Court noted that the correct test was whether the seminar or the statements 'as a whole' incited hatred of Muslims based on their religious beliefs. **The meaning of 'incites'** The Court accepted that the word 'incites' should be interpreted in accordance with its 'plain and ordinary meaning' to urge, spur on, stir up, animate or stimulate. Nettle J.A. stated that section 8 of the RRTA is 'not a prohibition against saying things about the religious beliefs of persons which are offensive to those persons, or even against saying things about the religious beliefs of one group of persons which would cause another group of persons to despise those beliefs. It is against saying things about the religious beliefs and practices of persons which go so far as to incite other persons to hate persons who adhere to those religious beliefs'. The majority of the Court also held that the balance and accuracy of statements is not determinative of whether those statements were likely to incite hatred.

	Proof of breach The majority of the Court found that conduct can be found to incite for the purposes of section 8 without proof that hatred against, serious contempt for, or revulsion or severe ridicule of a person or class of persons actually occurred. In other words, the inciting conduct does not have to 'succeed' in provoking a particular response for there to be a breach of section 8. Rather, a breach may occur if the words or conduct are 'capable of causing' or 'have a tendency to incite' that response. **The meaning of 'on the ground of religious belief'** At first instance, VCAT found that the words 'on the ground of the religious belief or activity' required a causal connection between the conduct and the religious belief or activity (that is, requiring that the respondent engaged in conduct because of a person's religious belief). This conclusion was reached by interpreting the words 'on the ground of' in the same way as 'because of" in the Racial Discrimination Act. However, the Supreme Court held that the correct application of those words is whether the relevant audience was incited to hatred towards a person or class of persons based on their religious beliefs. As a result, it is irrelevant what motivated the respondent to engage in the conduct. **Public conduct exception** The Court also provided guidance on how to apply the exemption in section 11 of the RRTA which exempts conduct engaged in reasonably and in good faith for any genuine academic, artistic, religious or scientific purpose. The Court noted that conduct will have been engaged in 'reasonably' if reasonable people, living in an open and just multicultural society would view it so, and in 'good faith' if the conduct was engaged in honestly and conscientiously for a genuine religious purpose.
Fletcher v Salvation Army [2005] VCAT 1523	No vilification found. VCAT dismissed a complaint made by a prisoner who identified as 'Wiccan' that the Salvation Army incited hatred against witches when it carried out an introduction to Christianity at a prison. The applicant had alleged that the program made a number of

	disparaging remarks about 'witches', and that the program included an implication that witches were 'Satanists'. In finding that the program did not incite hatred, VCAT noted that: *The key word is "incites". In its context, this does not mean "causes". Rather it carries the connotation of "inflame" or "set alight". The section is not concerned with conduct that provokes thought; it is directed at conduct that is likely to generate strong and negative passions in the ordinary person. An example of such passions would be where persons are so moved that violence might result.*
National Italian Australian Foundation v Herald and Weekly Times and Bolt [2005] VCAT 2704	The *Herald Sun* published an article by Andrew Bolt entitled 'The Power of Lies'. The article stated that 'the Italian Government did what we imagine Italians do and panicked'. According to VCAT, the 'thrust of the article was to criticise a journalist portrayed as naïve and perhaps untruthful, and the Italian Government needlessly paying ransom money to this journalist's kidnappers – money which according to the article might then have been used for improper purposes by the captors. The particular phrase was irrelevant to the article's main theme and it's inclusion in my view was both unnecessary and an error of judgment'. Ultimately, VCAT did not consider that 'as a statement which an ordinary reader may reasonably take to mean that non-Italians expect Italians to panic, the statement would inflame passions of the very serious kind' to which the RRTA is directed.
Khalil v Sturgess [2005] VCAT 4446	Vilification found. VCAT found that an Arabic family had been racially vilified when they were subjected to continuous abuse from a neighbouring family (including offensive comments, obscenities and sexual references). VCAT found that the respondents had incited hatred against the complainants because of their colour and Arabic origin. In doing so, VCAT confirmed that the word 'incite' means more than 'urge, prompt or bring about. It relates to strong violent emotions or feelings'. VCAT ordered the neighbours to publish an apology in the *Herald Sun* and to pay compensation totalling $7,000. In particular, VCAT considered the 'very serious and

	persistent nature of the respondents' abuse, the need not to trivialise what has happened, the objectives of the Act which include to promote participation in a multicultural society, and the great disruption and humiliation caused to the complainants by the conduct of the respondents'. This decision was handed down prior to the Catch the Fire Ministries decisions. It may have been decided differently if VCAT had applied the high threshold for vilification set out by the Court of Appeal.
Judeh v Jewish National Fund of Australia [2003] VCAT 1254	No vilification found. The applicant claimed that the respondent placed a monthly advertisement in the *Australian Jewish News*, displaying a map that inaccurately omitted reference to Palestine. The advertisement encouraged Jewish people to make a will including a legacy to Israel. The applicant (a man of Palestinian descent) claimed that he was racially vilified by the respondent. VCAT dismissed the complaint, finding that it was 'difficult to see how the placing of an advertisement including a map of this kind could constitute conduct with race as a substantial actuating basis for the conduct'.