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Dear Mr Goodenough

Thank you for the opportunity to contribute to the Parliament Joint Committee on Human Rights' Inquiry Into Freedom of Speech in Australia.

We make this submission in our capacity as members of the Centre for Comparative Constitutional Studies and staff of the Melbourne Law School, University of Melbourne. We are solely responsible for its content.

This submission has been prepared on behalf of the Centre by the Centre Director, Professor Adrienne Stone, Joshua Quinn-Watson, Anna Saunders, and Dr Coel Kirkby.

If you have any questions relating to the submission, or if we can be of any further assistance, please do not hesitate to contact us.

Yours sincerely

Professor Adrienne Stone  
Director, Centre for Comparative Constitutional Studies

## CENTRE FOR COMPARATIVE CONSTITUTIONAL STUDIES: SUBMISSION TO INQUIRY INTO FREEDOM OF SPEECH IN AUSTRALIA

### 1. Introduction

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The Centre for Comparative Constitutional Studies (**Centre**) is a research centre of Melbourne Law School at the University of Melbourne. The Centre undertakes research, teaching and engagement in relation to the Australian constitutional system as well as comparative constitutional law.

We welcome the opportunity to contribute to the Inquiry into Freedom of Speech in Australia.

This submission has been prepared on behalf of the Centre by the Centre Director, Professor Adrienne Stone, Joshua Quinn-Watson, Anna Saunders, and Dr Coel Kirkby. The research was supported by the Australian Research Council.

### 2. Summary of Submission

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The purpose of this submission is not to advocate for any particular course of action.

Rather, it is to provide information within the Centre's expertise relevant to the matters set out in the Terms of Reference.

This submission consists of two parts.

Part One addresses the first issue identified by the Terms of Reference. *First*, it addresses the nature and history of Pt IIA of the *Racial Discrimination Act 1975* (Cth) (**Act**). *Second*, it considers the extent to which Pt IIA restricts freedom of speech and expression. *Third*, it considers issues relevant to the constitutionality of Pt IIA. *Fourth*, it notes potential options for reform.

Part Two briefly addresses the second issue identified by the Terms of Reference by placing the complaint-handling procedure in a comparative perspective.

## PART ONE

### 1. Nature and History of Pt IIA

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#### *a) Nature of the Provisions*

Pt IIA of the Act is titled 'Prohibition of Offensive Behaviour Based on Racial Hatred.' Section 18C of the *Racial Discrimination Act 1975* (Cth), contained within Pt IIA, set out a civil offence. It provides:

- (1) It is unlawful for a person to do an act, otherwise than in private, if:
  - (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
  - (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Section 18D exempts from s 18C 'anything said or done reasonably and in good faith':

- (a) in the performance, exhibition or distribution of an artistic work; or

- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (c) in making or publishing:
  - (i) a fair and accurate report of any event or matter of public interest; or
  - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

Writing extra-judicially, Justice Keane of the High Court has described the effect of these provisions as ‘render[ing] unlawful, but not criminal, untrue and dishonest statements uttered in public which disparage another person on the grounds of race.’<sup>1</sup>

### *b) History*

Whilst Pt IIA has been the subject of much recent debate, it is important to note that the introduction of Pt IIA, and its final form, was also shaped by considerable contemporaneous debate.

Pt IIA was introduced by the *Racial Hatred Act 1995* (Cth) (**Amending Act**). The *Racial Hatred Bill 1994* (Cth) (**Bill**) was introduced in November 1994. A predecessor bill, the *Racial Hatred Bill 1992* (Cth) had been introduced in December 1992, but lapsed in March 1993.<sup>2</sup>

The Bill was the subject of extensive parliamentary debate that occupied most of the parliamentary sitting year, before it passed in late August 1995. Between introduction and passage it was substantially amended.

The form of the Bill was informed by the findings and recommendation of three landmark reports: Australian Law Reform Council, *Multiculturalism and the Law* (1991), Human Rights and Equal Opportunity Commission, *Racist Violence: National Inquiry into Racist Violence in Australia* (1991), and the Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991). Collectively, these reports identified certain gaps ‘in the legal protection available to the victims of extreme racist behaviour,’<sup>3</sup> which it was intended that Pt IIA would close.

A second factor shaping the form of the Bill was a desire to bring Australia into closer compliance with its international obligations, including those under the *International Convention on the Elimination of All Forms of Racial Discrimination* (**CERD**),<sup>4</sup> and the *International Covenant on Civil and Political Rights* (**ICCPR**).<sup>5</sup> The Attorney General, in the Bill’s Second Reading Speech, stated that the Amending Act would ‘honour those commitments made on behalf of Australia’ and improve Australia’s compliance with its treaty obligations in relation to ‘racial hostility and racial violence’.<sup>6</sup>

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<sup>1</sup> Patrick Keane, ‘Sticks and Stones May Break My Bones, But Names Will Never Hurt Me’ (2011)

<sup>2</sup> For a history of the passage of the legislation, see Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Institute of Criminology, 2002) 35-50.

<sup>3</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1994, 3341 (Michael Lavarch, Attorney-General) (*Second Reading Speech*).

<sup>4</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).

<sup>5</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 23 March 1976).

<sup>6</sup> *Second Reading Speech*.

The explanatory material indicates that Parliament was alert to the need to balance extending protections against racial hostility and preserving the right to freedom of speech and expression. The Attorney General, in the Bill's Second Reading Speech, stated:<sup>7</sup>

In the bill, free speech has been balanced against the rights of Australian to live free of fear and racial harassment.

Similarly, the Explanatory Memorandum stated:<sup>8</sup>

While it is highly valued, the right to free speech must... be balanced against other rights and interests.

The Bill is not intended to limit public debate about issues that are in the public interest. It is not intended to prohibit people from having and expressing ideas...

The Bill maintains a balance between the right to free speech and the protection of individuals and groups from harassment and fear because of their race, colour or national or ethnic origin. The Bill is intended to prevent people from seriously undermining tolerance within society by inciting racial hatred or threatening violence against individuals or groups because of their race, colour or national or ethnic origin.

Free speech concerns shaped the passage, and eventual content of Pt IIA in two key respects.

*First*, the Bill was amended to delete provisions which would have amended the *Crimes Act 1914* (Cth) to create three criminal offences prohibiting the making of racially motivated threats to persons and property, and intentionally inciting racial hatred.

*Second*, and significantly, the Bill was designed to provide relatively broad exemptions, so as to counterbalance the broad formulation of s 18C. As the Explanatory Memorandum put it, the exemptions provide by s 18D:

are needed to ensure that debate can occur freely and without restriction in respect of matters of legitimate public interest

Section 18D gave effect to Parliament's intention that s18C not 'prohibit a person from stating in public what may be considered generally to be an extreme view', provided that statement is made reasonably and in good faith, and in the areas of public interest identified by s 18D, which include art, public debate, and reportage.<sup>9</sup>

## **2. Extent of the Restriction on Freedom of Speech**

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A prominent concern raised in the public debate concerning Pt IIA is that it is unduly restrictive of freedom of speech because Pt IIA sets too low a threshold, and is thus capable of capturing benign or even beneficial speech.

That concern may be at least somewhat allayed by considering four matters relevant to the Pt IIA threshold: *first*, the legal meaning of the S 18 C formulation — 'offend, insult, humiliate or intimidate'; *second*, the objective nature of the s 18 C test; *third*, the operation of the defences; and *fourth*, similar legal provisions which have comparable thresholds. This part will address those matters in turn.

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<sup>7</sup> Ibid.

<sup>8</sup> Explanatory Memorandum, *Racial Hatred Bill 1994* (Cth) ('*Explanatory Memorandum*').

<sup>9</sup> Ibid.

*a) The Legal Meaning of ‘Offend, Insult, Humiliate, or Intimidate’*

One aspect of the concern identified above is the apparently wide scope offered by the s 18C formulation: ‘offend, insult, humiliate or intimidate’.

This formulation is not found in racial vilification statutes in other Australian jurisdictions,<sup>10</sup> nor is it found in racial vilification legislation in comparable nations. The formulation is derived instead from the sexual harassment provisions contained in the *Sex Discrimination Act 1984* (Cth).<sup>11</sup> It was adopted in part because it was a legal standard with which the Human Rights and Equal Opportunity Commission had experience applying, and which was understood in that context to capture only ‘serious incidents.’<sup>12</sup>

The concern with the formulation stems from the fact that the words ‘offend’ and ‘insult’ appear capable of capturing non-serious conduct

However, it is important to note that the *legal meaning* of a statutory provision does not always correspond with the ordinary meanings of its component words. Statutory provisions are subject to judicial interpretation. Well-established principles of statutory interpretation provide that the ordinary meaning of words is a single, and not always decisive, guide to legal meaning. Also relevant are the statutory context in which those words appear, statutory purpose and policy, and the particular mischief to which the provisions are addressed.<sup>13</sup> In certain circumstances, courts may call upon further interpretative aids such as a provision’s legislative history, Second Reading Speech and any explanatory memoranda. As a result, the legal meaning of a provision may in some instances depart somewhat from the ordinary meaning of its words.

Such has been the case with s 18C. In *Creek v Cairns Post Ltd*<sup>14</sup> Justice Kiefel, then a member of the Federal Court, construed s 18C as capturing only **‘profound and serious effects, not to be likened to mere slights.’**<sup>15</sup> Several factors informed Her Honour’s construction, including that:

- a) the heading of Pt IIA indicates an intention that the provisions contained in that part capture conduct *‘based on racial hatred* (emphasis added);<sup>16</sup> and
- b) the Explanatory Memorandum and Second Reading Speech both indicate that Pt IIA was intended to provide ‘legal protection available to the victims of *extreme* racist behaviour’ (emphasis added).<sup>17</sup>

In *Bropho v Human Rights and Equal Opportunity Commission*,<sup>18</sup> Justice French, then a member of the Federal Court, approved and adopted Justice Kiefel’s construction. His Honour noted that the words ‘offend, insult, humiliate or intimidate’ are ‘open textured’ and have a ‘somewhat elastic content’.<sup>19</sup> Whilst in ‘ordinary parlance’ those words may capture relatively benign

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<sup>10</sup> McNamara, above n 2, 50.

<sup>11</sup> Ibid.

<sup>12</sup> *Second Reading Speech*.

<sup>13</sup> See, eg, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

<sup>14</sup> *Creek v Cairns Post Ltd* (2011) 112 FCR 352 (*‘Creek’*).

<sup>15</sup> Ibid [16].

<sup>16</sup> Ibid. It is a well-established principle of statutory interpretation that sections titles are relevant to interpreting provisions within a section.

<sup>17</sup> Ibid [14].

<sup>18</sup> *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 (*‘Bropho’*).

<sup>19</sup> Ibid [69].

conduct, that is not the case in the particular context of Pt IIA. There, they are only capable of capturing serious conduct.

The above construction has been adopted in a line of Federal Court decisions concerning s 18C, and appears reasonably settled. These include, in addition to the decisions noted above, the Federal Court's decisions in *Jones v Scully*;<sup>20</sup> *Clarke v Nationwide News*;<sup>21</sup> and *Eatock v Bolt*.<sup>22</sup>

### *b) Nature of the Test*

A related concern is that s 18C(1)(a) provides for a subjective test,<sup>23</sup> such that the threshold may be reached on the basis of the subjective reaction of a complainant, irrespective of whether the reaction is idiosyncratic or unreasonable.

However, s 18C has not been applied this way by courts. The Federal Court has repeatedly held that, properly construed, s 18 (1)(a) imports an **objective test**.

At least two factors have informed this construction. The first factor is the language of the provision. Specifically, s 18(1)(a) uses the word 'reasonably' and the phrase 'all the circumstances', which typically connote an objective legal standard.<sup>24</sup> The second factor is Parliament's intent that an objective test be applied. In the Second Reading Speech, the Attorney-General stated 'the Bill requires an objective test to be applied' in which the 'subjective views of the complainant' are not to be taken into account.<sup>25</sup>

Thus, as Justice Drummond of the Federal Court noted in *Hagan v Trustees of the Toowoomba Sports Ground Trust*,<sup>26</sup> s 18C 'is not directed to protecting the *personal sensitivities of individuals*' (emphasis added).<sup>27</sup> Rather:

an objective test must be applied in determining whether the act complained of has the necessary offensive, insulting, humiliating or intimidatory quality for it to be within the subsection. The question so far as s 18C(1)(a) is concerned is not: how did the act affect the particular complainant? But rather would the act, in all the circumstances in which it was done, be likely to offend, insult, humiliate or intimidate a person or a group of people of a particular racial, national or ethnic group?

Justice Kiefel approved of the above test in *Creek*, adding: 'for this enquiry what brought about the action...in question and what the applicant felt are not relevant.'<sup>28</sup>

The objective test requires assessing the likely effect of the impugned conduct on a **reasonable hypothetical member** of a particular racial or ethnic group of which the complainant is a member.<sup>29</sup>

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<sup>20</sup> *Jones v Scully* (2002) 120 FCR 243 ('*Scully*').

<sup>21</sup> *Clarke v Nationwide News Pty Ltd trading as The Sunday Times* (2012) 201 FCR 389.

<sup>22</sup> *Eatock v Bolt* (2011) 197 FCR 261 ('*Eatock*').

<sup>23</sup> See, eg, Bernard Keane, 'Racial Vilification: Why Defenders of Section 18C Fail', *Crikey* (online), 20 March 2014 <<https://www.crikey.com.au/2014/03/20/racial-vilification-why-defenders-of-section-18c-fail/>>.

<sup>24</sup> *Bropho* [69].

<sup>25</sup> *Second Reading Speech*.

<sup>26</sup> *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2001) 105 FLR 56, [15].

<sup>27</sup> *Ibid* [38].

<sup>28</sup> *Creek* [12].

<sup>29</sup> *Eatock* [243].

It is important to note that the fact the objective test is applied in relation to a discrete group and not the community-at-large does not make it any less an objective test. Applying objective tests by reference to hypothetical reasonable members of groups of which an individual litigant is a member is a common and well-accepted legal device employed in a wide range of legal contexts, including in commercial legal contexts.<sup>30</sup>

### c) *The Defences*

An unfortunate feature of the public debate surrounding Pt IIA has been the making of the unqualified claim that s 18C makes it unlawful to ‘offend or insult’ a person on the grounds of their race.<sup>31</sup> Such claims overlook the extensive defences provided by s 18D.

As noted above, the defences may be relied upon by artists, academics, journalists, public commentators — indeed, anyone who can show a ‘genuine purpose in the public interest.’ They thus qualify the operation of s 18C in contexts critical to public debate. In fact, provided a defence is available, it *is* entirely possible, and lawful, to engage in offensive, insulting and even humiliating and intimidating speech on the grounds of race. This point was emphasised by Justice Bromberg in *Eatock*. His Honour stated:<sup>32</sup>

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

In *Eatock* the respondents unsuccessfully sought to avail themselves of the defence provided by s 18D(c)(ii): acting reasonably and in good faith in making or publishing a fair and accurate report of any event or matter of public interest. Justice Bromberg considered that making out this defence required demonstrating that the relevant report was based on facts, and that those facts were true, expressly stated, or well known. It was because the impugned reports were ‘substantially proven to be untrue’, and involved exaggeration, and ‘significant distortion of the facts’, that the defence was unavailable.<sup>33</sup>

It should be emphasised that Justice Bromberg’s reasons make plain that the principal, and decisive basis on which the defence failed was a lack of truth. Certain commentary has fixated on Justice Bromberg’s comments in relation to the tone of Mr Bolt’s articles. However, on a fair reading of the judgment, issues of tone should be understood as secondary, and not independently decisive: they no more than ‘reinforced’ a conclusion already reached on the basis of lack of truth.<sup>34</sup>

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<sup>30</sup> For the use of test of the nature in commercial contexts, see: *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45, [102]; *National Exchange Pty Ltd v Australian Securities and Investments Commission* [2004] FCAFC 90, [24].

<sup>31</sup> See Adrienne Stone, ‘The Ironic Aftermath of *Eatock v Bolt*’ (2015) *Melbourne University Law Review* 926, 937, citing Alan Tudge: ‘Is it a Crime to Offend Someone under the *Racial Discrimination Act*?’, *Fact Check, ABC News* (online), 30 April 2014 <<http://www.abc.net.au/news/2014-04-30/alan-tudge-incorrect-on-racial-discrimination-act/5378960>>; David Kemp, ‘Enemies of Free Speech’ (2012) 64(1) *IPA Review* 30, 32.

<sup>32</sup> *Eatock* [461].

<sup>33</sup> *Eatock* [378], [381], [384].

<sup>34</sup> *Eatock* [424]. See also Stone, above n 31, 935-6.

*d) The Restriction on Freedom of Speech Relative to Other Laws*

Further, it is important as matter of context to note that whilst Pt IIA restricts the freedom of speech to a certain extent, it is not necessarily any more restrictive than other laws which have excited considerably less critique.

One example is the law of defamation. Each Australian jurisdiction has laws which create civil actions for defamation. Arguably, these laws represent a greater threat to freedom of speech and expression than Pt IIA of the Act,<sup>35</sup> for two reasons. First, making out a civil action for defamation requires meeting a relatively low threshold. For this reason, Matt Collins QC, a defamation expert, has recently suggested that defamation law has become a ‘de facto remedy’ for conduct which offends and insults, available on the basis of ‘hurt feelings’, and irrespective of actual reputational damage.<sup>36</sup> Second, and significantly, successful defamation actions potentially sound in onerous damages.

Indeed, it is likely that the plaintiffs in *Eatock* would have been successful were they to have brought an action for defamation rather than, or in addition to, the action under Pt IIA. Such an action would have sounded in damages, rather than the relatively insubstantial remedies awarded in that case: a corrective notice and an order restraining further publication of the offending articles.<sup>37</sup>

A second example is sch s 471.12 of the *Criminal Code Act 1995* (Cth), which has certain parallels with s 18C. It creates an offence for using a ‘postal or similar service’ that ‘reasonable people would regard as being, in all the circumstances, menacing, harassing or *offensive*’ (emphasis added). However, in three important respects, it restricts freedom of speech more severely than Pt IIA: (a) it creates a criminal offence; (b) it is not subject to the sort of ‘public interest’ defences provided by s 18D; and (c) it applies to private, as well as public communication.<sup>38</sup> This provision narrowly survived a High Court constitutional challenge in *Monis*,<sup>39</sup> a decision which will be discussed in more detail below.

A third example are provisions which create criminal offences for insulting or disturbing a member of a Commission or Tribunal,<sup>40</sup> at least some of which also make it an offence to use words false and defamatory of a Commission or calculated to bring a Member or Commission into disrepute.<sup>41</sup>

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<sup>35</sup> See, eg, Jonathon Green, ‘Surely Defamation is the Real Threat to Free Speech’, *ABC News* (online), 3 April 2014 <<http://www.abc.net.au/news/2014094093/green---defamation/5362868>> cited in Stone, above n 31, 941

<sup>36</sup> Matt Collins QC, quoted in Michael Bachelard, ‘Defamation, not 18C, the Real Threat to Free Speech’, *Sydney Morning Herald* (online), 12 November 2016 <<http://www.smh.com.au/federal-politics/political-news/defamation-not-18c-the-real-threat-to-free-speech-20161111-gsnms0.html>>.

<sup>37</sup> See Stone, above n 31, 941.

<sup>38</sup> Ibid. See also, Centre for Comparative Constitutional Studies, Submission No 58 to Australian Law Reform Commission, *Freedoms Inquiry*, 6 March 2015, 6-8.

<sup>39</sup> *Monis v The Queen* (2013) 249 CLR 92 (*Monis*).

<sup>40</sup> *Fair Work Act* 2009 (Cth), s 674; *Administrative Appeals Tribunal Act* 1975 (Cth), s 63; *Bankruptcy Act* 1966 (Cth), s 264; *Copyright Act* 1968 (Cth), s 173; *Defence Act* 1903 (Cth), s 89; *Environment Protection and Biodiversity Conservation Act* 1999 (Cth), s 119; *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act* 2012 (Cth), s 61; *Law Enforcement Integrity Commissioner Act* 2006 (Cth), s 94; *Royal Commissions Act* 1902 (Cth), s 60. See also Centre for Comparative Constitutional Studies, above n 38, 8-10.

<sup>41</sup> *Bankruptcy Act* 1966 (Cth), s 264E; *Fair Work Act* 2009 (Cth), s 674; *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act* 2012 (Cth), s 61; *Royal Commissions Act* 1902 (Cth), s 60. See Centre for Comparative Constitutional Studies, above n 38, 10.

These examples are not exhaustive. The Australian Law Reform Commission's *Traditional Rights and Freedoms* report lists additional examples of laws similarly restrictive of the freedom of speech.<sup>42</sup> In a recent survey, Professor George Williams lists a considerable number of Commonwealth and State laws which restrict freedom of speech. Many bear similarities to s 18C;<sup>43</sup> none have excited comparable debate.

To note that Pt IIA of the Act is not the only Australian law restricting freedom of speech and expression, and amongst those laws is not uniquely restrictive, is not to suggest that its reform is unwarranted. It is, however, to suggest that any rationales for the reform of Pt IIA of the Act are likely more widely applicable, and that any reform of Pt IIA may lack utility if undertaken in isolation.<sup>44</sup>

### 3. Constitutionality

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It has been suggested that the constitutionality of Pt IIA cannot be assured, and that it may be vulnerable to a constitutional challenge on either or both of two bases:<sup>45</sup>

- (a) that it impermissibly restricts the implied freedom of political communication; and
- (b) that it is beyond the legislative power of the Commonwealth because it is not supported by the external affairs power.

This part will not attempt to predict the outcome of a constitutional challenge on either basis, but rather clarify the relevant legal framework, and note instructive case law.

#### *a) The Implied Freedom of Political Communication*

The implied freedom of political communication is a Constitutional limitation on Parliament's legislative power. It recognises that there must be a degree of freedom of communication on political matters in order for voters to make informed choices. Freedom of political communication is therefore an 'indispensable incident' of the constitutionally mandated system of representative and responsible government.<sup>46</sup>

Determining whether a law infringes the implied freedom of political communication requires undertaking a three-stage enquiry, which can be set out as follows.

#### **Stage 1: Does the law in its terms, operation or effect impose an effective burden on the implied freedom of political communication?**<sup>47</sup>

This stage involves two enquiries.

*First*, to qualify for protection, the communication that the law is said to burden must be political communication for the purposes of the Constitution. Broadly speaking, this extends to all communication relevant to political choices by voters at the local, State and Federal levels.<sup>48</sup>

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<sup>42</sup> See Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws*, Report No 129 (2016).

<sup>43</sup> George Williams, 'The Legal Assault on Australian Democracy' (2015) 16 *QUT Law Review* 19.

<sup>44</sup> See Australian Law Reform Commission, above n 42, 119.

<sup>45</sup> See, eg, Rosalind Croucher, "'Offence" under section 18C is a Provision Too Broad', *The Australian* (online), 3 March 2016 < <http://www.theaustralian.com.au/opinion/offence-under-section-18c-is-a-provision-too-broad/news-story/6a785a0514241fc047498e003b7f1d3f>>.

<sup>46</sup> *Wotton v Queensland* (2012) 246 CLR 1, 20.

<sup>47</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 ('*Lange*').

<sup>48</sup> *Unions NSW v New South Wales* (2013) 252 CLR 530, [25]-[27], [34], [42].

Conversely, the implied freedom offers no protection to communications not relevant to political choice. For example, it has been held that communications that are essentially commercial in nature are not protected.<sup>49</sup>

*Second*, a law will only effectively burden communication on political matters if it ‘restricts or limits the content of those communications or the time, place, manner or conditions of their occurrence’.<sup>50</sup>

If the Stage 1 question is answered in the negative, the law will not be constitutionally invalid and there is no need to proceed to Stage 2.

**Stage 2: If yes, is the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense of being compatible with the maintenance of the constitutionally prescribed system of representative government?**<sup>51</sup>

It is important to note here that it is the High Court has held that the prevention of offence and insult is not *alone* a legitimate purpose.<sup>52</sup> This is because, as Justices Gummow and Hayne noted in *Coleman*, insult and invective has long been an important aspect of political communication.<sup>53</sup> Therefore to satisfy the Stage 2 question it is necessary to identify a legitimate legislative purpose other than merely the prevention of offence, or the promotion of political civility.

**Stage 3: If yes, is the law reasonably appropriate and adapted to advance that legitimate object?**<sup>54</sup>

This stage involves a further three enquiries, which have been collectively termed ‘proportionality testing’.

*First*, is the law suitable, in the sense of having a rational connection to the purpose of the provision?

*Second*, is the law necessary, in that there is not an alternative, compelling, and reasonably practicable means of achieving that purpose that would have a less restrictive effect on the freedom?

*Third*, is the law adequate in its balance, in the sense of achieving proportionality between the importance of the purpose to be achieved and the restriction it imposes on the freedom?<sup>55</sup>

#### *Case Law*

The High Court has not yet considered whether Pt IIA is consistent with the implied freedom of political communication. However, the Federal Court considered the issue in *Scully*. There, Justice Hely held that Pt IIA **did not** impermissibly restrict the implied freedom.

<sup>49</sup> *APLA v Legal Services Commissioner of NSW* (2005) 224 CLR 322, [28].

<sup>50</sup> *Coleman v Power* (2004) 220 CLR 1, [91] (*Coleman*).

<sup>51</sup> *Ibid* [96]; *McCloy v New South Wales* (2015) 325 ALR 15, [2] (*McCloy*).

<sup>52</sup> See generally Adrienne Stone and Simon Evans, ‘Australia: Freedom of Speech and Insult in the High Court of Australia’ (2006) 4 *International Journal of Constitutional Law* 677.

<sup>53</sup> *Coleman* [197].

<sup>54</sup> *Lange* 567; *McCloy* [2].

<sup>55</sup> *McCloy* [2].

Specifically, and in terms of the three-stage enquiry outline above, Justice Hely held that:<sup>56</sup>

- a) Pt IIA burdens the freedom of communication by ascribing penalties and injunctive relief in respect of at least certain forms of political communication;
- b) Pt IIA pursued legitimate ends; namely, the fulfilment of Australia's international obligations under the CERD and the protection of individuals from seriously offensive acts based on race;<sup>57</sup> and
- c) Pt IIA was reasonably appropriate and adapted to those ends. Significantly, by providing for broad exemptions covering acts done 'reasonably and in good faith', Pt IIA negotiated an appropriate balance between the legitimate ends pursued and the requirement of freedom of political communication.<sup>58</sup>

Some further guidance may be provided by the High Court's decision in *Monis*. As noted above, *Monis* concerned a provision in some respects similar to Pt IIA — s 470.12 of the *Criminal Code Act 1995* (Cth), which makes a criminal offence of using a postal service in a way which is 'menacing, harassing or offensive'. The Court evenly divided on the question of whether that provision impermissibly restricted the implied freedom of political communication.

It was common ground amongst the Justices that the Stage 1 question was answered positively: the provision, by penalising offensive communication necessarily burdened political communication. The decisive stages were therefore Stages 2 and 3.

Justices Crennan, Kiefel and Bell held that the provision was consistent with the implied freedom of political communication. Their Honours answered the Stage 2 question positively. They considered that a legitimate end other than protecting recipients from offence could be identified; namely, preserving the integrity of the post by preventing the dissemination of emotionally or psychologically harmful material in the home or workplace. In part, their Honours reached this conclusion by 'reading down', or interpreting, the provision such that it captured only offence that causes 'significant emotional reaction or psychological response'.<sup>59</sup> Further, their Honours answered the Stage 3 question positively. Their Honours considered the provision was appropriate and adapted to the purpose identified: it addressed the dissemination of harmful material in a sufficiently restrained way.

Conversely, Chief Justice French, Justices Hayne and Justice Heydon held that the enquiry was cut off at Stage 2. In their Honours' view, the relevant end was illegitimate: preventing the receipt of offensive communication.<sup>60</sup> Justice Nettle of the High Court has speculated extra-judicially that if this position is correct, it may carry implications for the constitutionality of Pt IIA.<sup>61</sup> However, the extent to which implications can be drawn is unclear. The position reached by Chief Justice French, Justice Hayne and Justice Heydon was shaped by several factors specific to s 470.12, and not replicated in Pt IIA, including that the provision was a criminal offence and was not subject to exemptions for communications made reasonably, truthfully, or

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<sup>56</sup> *Scully* [239]-[240].

<sup>57</sup> Whilst Justice Hely did not expressly use the qualifier 'seriously', he accepted the construction noted above which limits Pt IIA's applicability to serious offences.

<sup>58</sup> Justice Hely drew analogy with the protection of reputation, which in *Lange* was considered a legitimate end. His Honour considered protection from serious race-based offence conducive to the public good 'in the same way that the protection of the reputations of those who take part in the government and political life from false and defamatory statements.' *Scully* [240].

<sup>59</sup> *Monis* [319].

<sup>60</sup> *Monis* [73] (French CJ); [97] (Hayne J).

<sup>61</sup> Geoffrey Nettle, 'Justice Hayne's Contribution to Public Law: An Overview' (2015) 26 *Public Law Review* 280, 282.

in good faith. These factors shaped their Honours' conclusion that the provision was overly broad and incompatible with the constitutionally mandated system of representative government.<sup>62</sup>

#### *Application to Pt IIA*

In light of the above, several observations may be made.

*First*, it is clear that Pt IIA burdens political communication. Thus, determining the constitutionality of Pt IIA will turn on the Stage 2 and Stage 3 questions: whether Part IIA is directed to achieving a legitimate purpose; and whether Part IIA is sufficiently narrowly tailored, or proportionate, to that purpose.

*Second*, as noted above, satisfying the second stage will require identifying a legitimate purpose or purposes for Pt IIA other than the mere prevention of offence. The legitimate purposes identified by Hely J in *Scully* — compliance with international obligations, and the protection of individuals from seriously offensive acts based on race — may circumvent the obstacles faced by s 470.12 of the *Criminal Code* (Cth) in *Monis*.

*Third*, satisfying the third stage requires succeeding in a proportionality analysis. In this analysis, there are several factors that appear promising for Pt IIA's validity. As noted above, the Pt IIA threshold has been judicially interpreted or 'read down', so that it does not catch non-serious conduct, and is thus less restrictive of the freedom of speech than the bare language of the provision suggests. Further, s 18D provides for broad exemptions deliberately protective of the right to the freedom of political communication, including insulting political communication. It is also noteworthy that, in contrast to the provisions considered by the High Court in *Coleman* and *Monis*, Pt IIA creates a civil, rather than criminal offence.

#### *b) The External Affairs Power*

It has been suggested that Pt IIA is not supported by the external affairs power, s 51 (xxix) of the Constitution, and is thus beyond the legislative power of the Commonwealth. Suggestions of this type have emphasised the 'textual distance' between the language of Pt IIA and the relevant international obligations it purports to enact.

The external affairs power empowers the Commonwealth Parliament to alter domestic law to comply with its obligations under international treaties ratified by the Commonwealth Executive. The power, however, is subject to certain limitations.

*First*, and significantly for present purposes, the external affairs power is 'subject to this Constitution.' Thus, legislation implementing a treaty cannot be otherwise contrary to the Constitution. Specifically, such legislation cannot contravene express constitutional provisions<sup>63</sup> or implied limitations,<sup>64</sup> including the implied freedom of political communication. Thus, the question addressed above — whether Pt IIA of the Act impermissibly restricts the implied freedom of political communication — may also bear on the availability of the external affairs power.

<sup>62</sup> *Monis* [73] (French CJ); [97] (Hayne J).

<sup>63</sup> For example the express prohibitions in ss 92 and 116 of the Constitution.

<sup>64</sup> For the implied limitations deriving from Chapter III, see *Plaintiff M68 v Minister for Immigration and Border Protection* (2016) 90 ALJR 297 (Gordon J, dissenting); for the implied limitations protecting the existence of States and their capacities as governments, see *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

*Second*, to be supported by the external affairs power, the relevant legislation must give effect to an international legal obligation. This means that the external affairs power will not support legislation implementing treaties expressed in non-obligatory, or ‘aspirational’ terms.<sup>65</sup>

*Third*, there must be a sufficient *nexus* between the treaty obligations and enacting legislation. As the High Court put it in the *Industrial Relations Act Case*:<sup>66</sup>

The law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states.

Whether the relevant legislation satisfies the nexus requirement is tested by a two-step process. The first step is to identify the scope of the obligations imposed, by interpreting the relevant treaty or treaties according to applicable international law principles.<sup>67</sup> The second step is to determine whether the legislation in question sufficiently conforms to the treaty obligations.<sup>68</sup> To satisfy this second step, ‘the law must be reasonably capable of being considered appropriate and adapted to implementing the treaty’ obligations.<sup>69</sup> This requires interpreting the enacting legislation in order to ascertain the rights, duties and liabilities that it creates.<sup>70</sup>

It should be emphasised that satisfying this requirement does not require that the treaty obligations and enacting legislation exactly correspond. A law which only partly implements treaty obligations may still be supported by the external affairs power provided any deficiency is not ‘so substantial as to deny the law a character of a measure implementing the Convention.’<sup>71</sup>

#### *Application to Pt IIA*

Thus, for Pt IIA to be supported by the external affairs power, it is necessary that that it be reasonably capable of being seen as reasonably appropriate and adapted to implementing relevant international legal obligations.

As noted above, Pt IIA was enacted pursuant to Australia’s treaty obligations under the CERD and the ICCPR. For the purposes of the external affairs enquiry there are two primary treaty obligations.

*First*, article 4(a) of the CERD provides that States shall:

declare an offence punishable by law all dissemination of ideas based *on racial superiority or hatred, incitement to racial discrimination*, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin... (emphasis added)

*Second*, article 20(2) of the ICCPR obliges States Parties to prohibit by law:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence...

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<sup>65</sup> See James Stellios, *Zines’s The High Court and the Constitution* (Federation Press, 2015), 435-6.

<sup>66</sup> *Victoria v Commonwealth* (1996) 187 CLR 416, 480 (*‘Industrial Relations Act Case’*).

<sup>67</sup> *Queensland v The Commonwealth* (1989) 167 CLR 232, 240; Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* (3<sup>rd</sup> edn, LexisNexis Butterworths 2012) 483.

<sup>68</sup> See, eg, *R v Burgess; Ex parte Henry* (1936) 55 CLR 608.

<sup>69</sup> *Industrial Relations Act Case* 487.

<sup>70</sup> See, eg, *Minister for Immigration and Citizenship v MZYYL* (2012) 207 FCR 211, [18]-[20].

<sup>71</sup> *Industrial Relations Act Case* 489.

As is readily apparent, there is a certain textual difference between these provisions, which target incitement to discrimination and violence motivated by racial hatred, and Pt IIA, which extends to offence and insult on the basis of race.

#### *Case Law*

The High Court has not yet considered whether Pt IIA is supported by the external affairs power. However, the Full Court of the Federal Court of Australia (Justices Carr, Kiefel and Allsop) considered the issue in *Toben*.<sup>72</sup> The Court unanimously held that Pt IIA **is supported** by the external affairs power.<sup>73</sup>

Justice Carr, with whom Justice Kiefel agreed, considered the textual differences between the relevant provision of Pt IIA and the primary treaty obligations no obstacle.<sup>74</sup> His Honour held that the primary treaty obligations<sup>75</sup> should be read in light of Australia's other relevant treaty obligations. These included article 2 of the CERD, which contains a broader obligation to 'take measures to prohibit racial discrimination.' In that light, the obligations could 'be seen to be directed not only at acts of racial discrimination and hatred', but also to deterring 'public expressions of offensive racial prejudice which *might lead to* acts of racial hatred and discrimination' (emphasis added). In other words, the prohibition of offensive racial discrimination served an important prophylactic function: it 'nipped in the bud' the acts of racial hatred which are the subject of the primary treaty obligations.<sup>76</sup>

Allsop J also held Pt IIA constitutional, emphasising that the 'reasonably capable of being considered as appropriate and adapted' test is somewhat deferential to Parliament. It does not require that the enacting legislation be seen as the 'best method' of implementing a treaty obligation. Questions of policy merits and the appropriate balance to be struck in implementing treaty obligations are questions for Parliament, not Courts. The test requires only that the enacting legislation be seen as '*one means*' of implementing treaty obligations.<sup>77</sup> His Honour considered that Pt IIA satisfied that standard: though it imprecisely implemented Australia's primary treaty obligations, any imprecision was within the constitutionally permissible range of legislative choice, and could be understood in part as a concession to other relevant treaty obligations.<sup>78</sup>

#### **4. Options for Reform**

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As noted at the outset, the purpose of this submission is not to advocate for any particular course of action.

However, this section will briefly note three potential courses of action, and relevant considerations that emerge from the analysis above.

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<sup>72</sup> *Toben v Jones* (2003) 129 FCR 515 (*Toben*).

<sup>73</sup> *Ibid* [19]–[20] (Carr J); [50] (Kiefel J); [144]–[145] (Allsop J).

<sup>74</sup> *Ibid* [19].

<sup>75</sup> Allsop J considered that the relevant obligations were arts 2(ii)–(iv), 4(ii)–(iii)(a), 6 and 7 of the CERD: *Ibid* 551 [144].

<sup>76</sup> *Ibid* [19].

<sup>77</sup> *Ibid* [144].

<sup>78</sup> *Ibid* [143] (Allsop J).

*a) Option 1: Maintain the Status Quo*

One course of action is to preserve Pt IIA in its current form.

Preserving Pt IIA would also preserve a relatively predictable and sophisticated body of case law interpreting and applying Pt IIA in its current form. As noted above, this jurisprudence gives a relatively narrow operation to Pt IIA, somewhat undercutting the ‘low threshold’ rationale for reform. Conversely, the extent to which the legal operation of Pt IIA depends upon that jurisprudence, and departs from the ordinary meaning of the provision’s words, may be an obstacle to public understanding of, and confidence in, Pt IIA.

*b) Option 2: Reformulate Threshold; Remove ‘Insult’ and ‘Offend’*

A second course of action is to reformulate Pt IIA, by bringing the language of the provision into closer alignment with its present legal operation. As Justice Sackville has argued:<sup>79</sup>

Laws curtailing hate speech are justifiable not because they protect people from being offended or insulted by prejudiced and ill-informed views, but because they help to protect vulnerable groups from more serious harm such as intimidation, discrimination, social exclusion and, ultimately violence. These principles suggest that Part IIA should be amended by eliminating references to conduct that is merely likely to offend or insult members of a particular group. This could be achieved, for example, if the legislation was confined to hate speech or conduct that is likely to intimidate, degrade or incite hatred or contempt for members of the group. Amendments of this kind, however, will not of themselves overcome the difficulties associated with the mix of objective and subjective standards incorporated in the legislation.

Three benefits of this approach may be noted. *First*, the obvious benefit in bringing the plain meaning of the text into closer alignment with its legal meaning is publicly clarifying Pt IIA’s legal operation, without significantly altering the legal coverage it presently provides. *Second*, the removal of references to conduct which ‘offends’ and ‘insults’ may, for reasons noted above, dispel any doubts about Pt IIA’s consistency with the implied freedom of political communication. *Third*, altering the formulation to refer to ‘incitement’ and ‘racial hatred’ would make clearer the nexus between Pt IIA and Australia’s primary treaty obligations, and thus dispel any doubts about the availability of the external affairs power.

*c) Option 3: Harmonise with State Provisions*

A related course of action would be to harmonise the wording of Pt IIA with racial vilification legislation at the State and Territory level.

All Australian jurisdictions other than the Northern Territory and Western Australia have similar racial vilification legislation.<sup>80</sup> Relevant portions of this legislation are extracted in the **Appendix**. A common component of that legislation is a version of the following provision:

<sup>79</sup> Ronald Sackville, ‘Anti-Semitism, Hate Speech, and Pt IIA of the *Racial Discrimination Act*’ (2016) 90 *Australian Law Journal* 631, 646.

<sup>80</sup> *Discrimination Act 1991* (ACT) s 67A; *Anti-Discrimination Act 1997* (NSW) s 20C; *Anti-Discrimination Act 1991* (Qld) s 124A; *Civil Liability Act 1936* (SA) s 73; *Anti-Discrimination Act 1998* (Tas) s 19; *Racial and Religious Tolerance Act 2001* (Vic) s 7. See generally Australian Human Rights Commission, *Racial Vilification Law in Australia* <[humanrights.gov.au/publications/racial-vilification-law-australia](http://humanrights.gov.au/publications/racial-vilification-law-australia)>. See also Appendix, which sets out the relevant state provisions.

A person must not, on the ground of the race of another person or class of persons, engage in conduct that *incites hatred against, serious contempt for, or severe ridicule of*, that other person or class of persons (emphasis added).<sup>81</sup>

The benefits of such an approach include those benefits identified above in respect of the second course of action, with the added benefit of nationally harmonising racial vilification protections.

However, should this course of action be pursued, it would need to be accompanied by a thorough examination of the accompanying differences between State and Federal provisions and conciliation processes, else the benefits of harmonisation be lost. An example of such a difference is that the Victorian legislation uniquely provides that offending conduct ‘may be constituted by a single occasion or by a number of occasions over a period of time’.<sup>82</sup>

## PART II

### 1. Complaints Process: A Comparative Perspective

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For the purposes of the second issue identified by the Terms of Reference, it may be useful to put Australia’s complaints process in a comparative perspective.

The table on the following pages compares, in necessarily general terms, Australia’s complaints process with those of two comparator nations: Canada and South Africa.

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<sup>81</sup> The *Racial and Religious Tolerance Act 2001* (Vic) and the *Discrimination Act 1991* (ACT) also prohibit the incitement of ‘revulsion’.

<sup>82</sup> *Racial and Religious Tolerance Act 2001* (Vic), s 7(2).

	<b>Australia</b>	<b>Canada</b>	<b>South Africa</b>
<b>Standing to Lodge Complaint</b>	Only persons aggrieved by specific act. <sup>83</sup>	All persons with 'reasonable grounds' that discrimination occurred. <sup>84</sup> But consent of victim required if specific act. <sup>85</sup>	Any person affected or group acting in their members' interest, or any person acting in the public interest. <sup>86</sup>
<b>Preliminary Decision</b>	Decline complaints that are 'vexatious,' outside jurisdiction, etc. <sup>87</sup> If declined, complainant may apply to Federal Court. <sup>88</sup>	Decline complaints that are 'vexatious,' outside jurisdiction, etc. <sup>89</sup>	Decline complaints that are 'vexatious,' outside jurisdiction, etc. <sup>90</sup> Also, determine which process best suits complaint.
<b>Investigation</b>	Investigator may compel production of documents <sup>91</sup> and examine witnesses under oath. <sup>92</sup>	Investigator may get warrant to search premises and compel production of documents, <sup>93</sup> and may examine witnesses under oath	Investigator may get warrant to search premises and compel production of documents, and may examine witnesses under oath. <sup>94</sup>
<b>Resolving complaints</b>	Complainant and respondent must enter compulsory conciliation mediated by Commission. <sup>95</sup>	Complainant and respondent enter compulsory conciliation mediated by Commission. <sup>96</sup>	Three processes: (i) negotiation and conciliation process; or (ii) mediation process; or (iii) hearing process. <sup>97</sup>
<b>Adjudication and Judicial Review</b>	After a complaint is terminated, complainant may apply to Federal Court. <sup>98</sup>	Commission may request quasi-judicial Tribunal to hear a complaint. <sup>99</sup> Complainants and respondent may attend in person or by counsel. Decisions appealed to Federal Court.	At any point, the Commission may litigate complaint in its own name or on behalf of complainant in an appropriate Tribunal or Court. <sup>100</sup>

<sup>83</sup> *Australian Human Rights Commission Act 1986* (Cth), s 46 ('AHRCA').

<sup>84</sup> *Canadian Human Rights Act 1985*, s 40(1) ('CHRA').

<sup>85</sup> *Ibid*, s 40(2).

<sup>86</sup> *South African Human Rights Commission Act 2013* (South Africa), ss 6, 9(6) ('SAHRCA').

<sup>87</sup> CHRA, s 20(2)(c).

<sup>88</sup> AHRCA, s 46.

<sup>89</sup> CHRA, s 41(1)(d).

<sup>90</sup> SAHRCA, s 4(2).

<sup>91</sup> AHRCA, s 21.

<sup>92</sup> AHRCA, s 22.

<sup>93</sup> CHRA, s 43.

<sup>94</sup> SAHRCA, s 13.

<sup>95</sup> AHRCA, s 46.

<sup>96</sup> CHRA, s 47.

<sup>97</sup> SAHRCA, ss 15-19.

<sup>98</sup> AHRCA, s 46.

<sup>99</sup> CHRA, s 48.

<sup>100</sup> SAHRCA, s 42.

## APPENDIX: RELEVANT STATE PROVISIONS

State/Territory	Legislation	Provision
<b>Australian Capital Territory</b>	<i>Discrimination Act 1991</i> (ACT)	<p><b>Section 67A — Unlawful vilification</b></p> <p>(1) It is unlawful for a person to incite hatred toward, revulsion of, serious contempt for, or severe ridicule of a person or group of people on the ground of any of the following, other than in private:</p> <p>...</p> <p>(d) race</p> <p>(2) However, it is not unlawful to—</p> <p>(a) make a fair report about an act mentioned in subsection (1); or</p> <p>(b) communicate, distribute or disseminate any matter consisting of a publication that is subject to a defence of absolute privilege in a proceeding for defamation; or</p> <p>(c) do an act mentioned in subsection (1) reasonably and honestly, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and presentations of any matter.</p>
<b>New South Wales</b>	<i>Anti-Discrimination Act 1997</i> (NSW)	<p><b>Section 20C — Racial vilification unlawful</b></p> <p>(1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.</p> <p>(2) Nothing in this section renders unlawful:</p> <p>(a) a fair report of a public act referred to in subsection (1), or</p> <p>(b) a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege (whether under the Defamation Act 2005 or otherwise) in proceedings for defamation, or</p> <p>(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 discussion or debate about and expositions of any act or matter.</p>
<b>Queensland</b>	<i>Anti-Discrimination Act 1991</i> (Qld)	<p><b>Section 124A — Vilification on grounds of race, religion, sexuality or gender identity unlawful</b></p> <p>(1) A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group.</p> <p>(2) Subsection (1) does not make unlawful—</p> <p>(a) the publication of a fair report of a public act mentioned in subsection (1); or</p> <p>(b) the publication of material in circumstances in which the publication would be subject to a</p>

		<p>defence of absolute privilege in proceedings for defamation; or</p> <p>(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.</p>
<b>South Australia</b>	<i>Civil Liability Act 1936 (SA)</i>	<p><b>Section 73 — Racial victimisation</b></p> <p>(1) In this section—  "act of racial victimisation" means a public act inciting hatred, serious contempt or severe ridicule of a person or group of persons on the ground of their race but does not include—  (a) publication of a fair report of the act of another person; or  (b) 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 reasonable act, done in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest (including reasonable public discussion, debate or expositions)</p> <p>(2) An act of racial victimisation that results in detriment is actionable as a tort by the person who suffers the detriment.</p>
<b>Tasmania</b>	<i>Anti-Discrimination Act 1998 (Tas)</i>	<p><b>Section 19 — Inciting hatred</b></p> <p>A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of –</p> <p>(a) the race of the person or any member of the group; or  (b) any disability of the person or any member of the group; or  (c) the sexual orientation or lawful sexual activity of the person or any member of the group; or  (d) the religious belief or affiliation or religious activity of the person or any member of the group.</p>
<b>Victoria</b>	<i>Racial and Religious Tolerance Act 2001 (Vic)</i>	<p><b>Section 7 — Racial vilification unlawful</b></p> <p>(1) A person must not, on the ground of the race of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.</p> <p>(2) For the purposes of subsection (1), conduct—  (a) may be constituted by a single occasion or by a number of occasions over a period of time; and  (b) may occur in or outside Victoria.</p> <p>Note  "Engage in conduct" includes use of the internet or e-mail to publish or transmit statements or other material.</p> <p><b>Section 11 — Exceptions—public conduct</b></p> <p>(1) A person does not contravene section 7 or 8 if the</p>

		<p>person establishes that the person's conduct was engaged in reasonably and in good faith—</p> <ul style="list-style-type: none"> <li>(a) in the performance, exhibition or distribution of an artistic work; or</li> <li>(b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for— <ul style="list-style-type: none"> <li>(i) any genuine academic, artistic, religious or scientific purpose; or</li> <li>(ii) any purpose that is in the public interest; or</li> </ul> </li> <li>(c) in making or publishing a fair and accurate report of any event or matter of public interest.</li> </ul> <p><b>Section 12 — Exceptions—private conduct</b></p> <p>(1) A person does not contravene section 7 or 8 if the person establishes that the person engaged in the conduct in circumstances that may reasonably be taken to indicate that the parties to the conduct desire it to be heard or seen only by themselves.</p> <p>(2) Subsection (1) does not apply in relation to conduct in any circumstances in which the parties to the conduct ought reasonably to expect that it may be heard or seen by someone else.</p>
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