Online Hate
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Committee Secretary
Parliamentary Joint Committee on Human Rights
PO Box 6100,
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Re: inquiry into the freedom of speech in Australia

The Online Hate Prevention Institute (OHPI) is Australia's only Harm Prevention Charity dedicated to the issue of online hate. A large part of our work relates to identifying and combating cyber-racism against various parts of the community. In our work, we seek to strike a balance between protecting freedom of expression and protecting the right to human dignity. We have presented on this topic at international conferences,[1] in published articles,[2] through our website,[3] and in the media.[4] We have been cited as a leader in this field in two recent reports by UNESCO.[5] We welcome the opportunity to make this submission.

Our submission focuses on the first aspect of the consultation, namely, "Whether the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) imposes unreasonable restrictions upon freedom of speech, and in particular whether, and if so how, ss. 18C and 18D should be reformed". We do so primarily with regard to the balance between the protection of freedom of expression online and the protection of human dignity through the elimination of all forms of racial discrimination online.

Recent research by ourselves and others has highlighted a critical problem of rising online hate and Australia is not immune to this. In December 2015 I told the BBC that "2015 saw a greater normalisation of hate speech in society than in previous years… Where previously a person might make a vague negative allusion to race, religion, gender or sexuality, by the end of 2015 the comments on social media were blatant and overt… Where previously people hid behind pages and fake accounts, by the end of

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[1] E.g. "Tracking Hatred: An International Dialogue on Hate Speech in the Media", United Nations Alliance of Civilizations (UNAOC) conference, United Nations Headquarters in New York, 2nd December 2015. Our presentation: http://ohpi.org.au/unaoc/ Video of the session: http://www.unaoc.org/2015/12/hate-speech-part-3/

[2] E.g. Andre Oboler, "After the Charlie Hebdo attack: the line between freedom of expression and hate speech", Kantor Center Position Papers, July 2015. Online at: http://kantorcenter.tau.ac.il/sites/default/files/1507%20Charlie%20Hebdo_0.pdf

[3] E.g. "Responding to Racism with Vigilante Justice", 28 May 2016. Online at: http://ohpi.org.au/responding-to-racism-vigilante-justice/

[4] E.g. Paul Toohey, "Mind wars: The extremists taking Australia to dark places", The Daily Telegraph, 19 June 2016. Online at: http://www.dailytelegraph.com.au/news/special-features/in-depth/white-extremism-in-australia/news-story/f45b4ed749f14a632e318fc9a93e82b1

[5] Rachel Pollack Ichou (Ed), "World Trends in Freedom of Expression and Media Development: Special Digital Focus 2015", United Nations Educational, Scientific and Cultural Organization (UNESCO), 2 November 2015. Online at: http://unesdoc.unesco.org/images/0023/002349/234933e.pdf; Gargliardone I, Gal D, Alves T, Martinez G "Countering Online Hate Speech", United Nations Educational, Scientific and Cultural Organization (UNESCO), June 20, 2015. Online at: http://unesdoc.unesco.org/images/0023/002332/233231e.pdf

2015 many people felt their hate was acceptable and were comfortable posting it under their real name or their regular social media account".[6]

Evidence of rise in 2015 was supported not only by our own data, but also by data from DEMOS, a UK based think tank, which noted a 4800 per cent increase in hate speech in social media in 2015 compared to three years earlier – growth rate far higher than the growth of social media itself in the same period. A recent report by the International Network Against Cyber Hate, a European Commission funded organisation, repeats and supports these findings.[7]

While 2016 is not yet over, it is already clear that the title wave of hate, including online hate, has continued to grow. USA Today reports a "massive rise" in hate speech on Twitter during the US Presidential election,[8] SBS reports that "more than 13,000 racist or xenophobic tweets were sent in the week following the [Brexit] referendum" and that DEMOS reported "60,000 tweets considered Islamophobic in the week after the Brussels terror attacks".[9]

This surge in online hate poses a threat to freedom of expression. It has a chilling effect on participation in society and the expression of ideas by members of our indigenous, ethnic and culturally diverse communities as well as those who speak out against discrimination. This takes place not only online, but also when hate speech occurs in public spaces, in the course of employment, in trade and commerce, in education and in other facets of public life. The surge in hate speech is harming our society - we need to address this growing problem, not give it room for further growth.

The Australian Courts have already investigated the law and found that it strikes the right balance between eliminating racial discrimination and protecting freedom of speech. The words "offend, insult, humiliate or intimidate" in S18C of the Racial Discrimination Act are given a technical legal meaning: it is not about the hurt feelings of individuals, but rather about preventing the sort of distress which damages the public good of an inclusive society. Change to the wording would force the courts to reinterpret the law, rending previous case law unsafe.

Gaps in the civil law provisions of the Racial Discrimination Act will in the case of online hate be filled by S 474.17 of the Commonwealth Criminal Code. Efforts to reduce the scope of Part IIA of the Racial Discrimination Act will therefore harden Australia's legal position on online hate. We believe this would be counter-productive.

At a time of an unprecedented rise of hate globally, which is spreading internationally through the internet and inciting extremism and violence, creating uncertainty which may take decades to settle would be incredibly damaging to both our national security and our fundamental freedoms. Such a move would undermine, rather than advance, our core values as Australians.

Dr Andre Oboler
CEO, Online Hate Prevention Institute

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[6] Mike Wendling, "2015: The year that angry won the internet", BBC News, 30 December 2015. Online at: http://www.bbc.com/news/blogs-trending-35111707

[7] "Kick them back into the sea - Online hate speech against refugees", International Network Against Cyber Hate, 2016. Online at: http://www.zara.or.at/_wp/wp-content/uploads/2016/11/Refugee_Report2016.pdf

[8] http://www.usatoday.com/story/tech/news/2016/10/21/massive-rise-in-hate-speech-twitter-during-presidential-election-donald-trump/92486210/

[9] http://www.sbs.com.au/news/dateline/story/racist-britain

Feedback regarding the terms of reference

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

1.1 **The operation of Part IIA of the Racial Discrimination Act is by current international standards overly favourable towards freedom of speech as it fails to criminalize hate speech**

The most recent international treaty in this area is *The Additional Protocol to the Convention on Cybercrime*.[10] Australia is a signatory to the main Convention but as yet, not to the Additional Protocol. As we explained in a recent journal article:

> "The Additional Protocol has five substantive provisions, each of which calls for criminalisation under national laws for particular conduct. Article 3 relates to the 'dissemination of racist and xenophobic material through computer systems'; article 4 relates to 'racist and xenophobic threats'; article 5 relates to 'racist and xenophobic motivated insult'; article 6 relates to 'denial, gross minimisation, approval or justification of genocide or crimes against humanity'; and article 7 relates to 'aiding and abetting' in relation to the first four types of conduct… The Commonwealth provisions [S18C] may be insufficient to meet the requirements of the Additional Protocol. They fail to provide criminalisation, so compliance would rest on the effectiveness of s 18C as an alternative response".[11]

1.2 **Existing criminal provision are broad enough to cover racial vilification and religious vilification online, but not offline such as on public transport. Reducing the scope of Part IIA would see a hardening of the legal position for online hate.**

Any gaps in the civil law provisions of the Racial Discrimination Act, either existing or those which could emerge as a result of future legislative change, will in the case of online hate be covered by the criminal law provisions of the S 474.17 of the Commonwealth Criminal Code. This provision relates to "using a carriage service to menace, harass or cause offence".

This provision is already being used to tackle online abuse against the Muslim community which does not fall within the protection of Part IIA of the Racial Discrimination Act. This situation means that efforts to reduce the scope of Part IIA of the Racial Discrimination Act will actually result in a hardening of the legal position.

1.3 **Alternative pathways to resolve less serous racial discrimination and religious discrimination complaints without court proceedings and the risk of imprisonment are needed.**

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[10] Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, opened for signature 28 January 2003 (entered into force 1 March 2006)

[11] Andre Oboler, "Legal Doctrines Applied to Online Hate Speech", *Computers & Law*, Number 87, pp 9—15, July 2014. Online at: http://www.austlii.edu.au/au/journals/ANZCompuLawJl/2014/4.pdf

We believe the softer civil law provisions under Part IIA, starting with an effort at mediation facilitated by the Australian Human Rights Commission, is a better response in less serious cases of racial discrimination than resorting to criminal law provisions. We believe coverage under Part IIA should for this reason be extended to religious vilification. We believe this could be done under the External Affairs Power on the basis of the International Covenant on Civil and Political Rights.

We also believe consideration should be given to a criminal provision allowing for a one penalty unit fine for "using a carriage service to menace, harass or cause offence". Any relevant content remaining online would be a continuing offence, so acceptance of the fine would need to include appropriate action to remove the content. This would allow many instances of online abuse at the low end of the criminal law to be resolved without going to court and would serve as a deterrent as the chance of being perused would significantly increase. This would not only assist with racial discrimination but also issues of domestic violence, homophobia, religious vilification and cyberbullying more generally.

1.4 **A balance between efforts to eliminate racial discrimination and efforts to protect of freedom of speech already took place when the Racial Discrimination Act and S18C & S18D were created**

In our paper on "Legal Doctrines Applied to Online Hate Speech" we note that the empowering treaty of the Racial Discrimination Act, the *International Convention on the Elimination of All Forms of Racial Discrimination*, already allowed for the criminalisation of racially based hate speech. This was decades prior to the creation of the *Additional Protocol*.

The Racial Discrimination Act was intended to provide for criminalisation, but the bill in that form was rejected by the Senate in 1974.[12] Under amendments in 1995, racial hatred became unlawful but not illegal, which is the current state of the law, with S18C providing a course of action under civil but not criminal law. Even then, S18D provides a defense granting additional protection for freedom of speech that occurs on a number of grounds, including anything in the public interest, provided it is exercised reasonably and in good faith.

1.5 **The law is already balanced so far in favour of freedom of speech that any further tilting in this direction may undermine Australia's efforts to meet international treaty obligations**

The state of the law is such that restrictions on freedom of speech under S18C only occur when S18D doesn't provide a protection. This means it only occurs when where is either no basis for claiming the S18D defense as the speech could not conceivably be considered a matter of public interest, art, journalism, etc. or when such a basis is claimed, but the person claiming it was acting in bad faith and / or unreasonably. If even those cases are protected, it is hard to see how the law will implement the obligation to eliminate "all forms of racial discrimination".

1.6 **Reasonableness of restrictions on Freedom of Speech and wording of S18C**

When assessing the impact of a law on people's freedom of speech the consequence of a breach is an important consideration. Criminal provisions which may deprive people of their liberty can have a chilling effect on free speech. When criminal provisions are introduced, exclusions and protections are required.

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[12] Andre Oboler, "Time to Regulate Internet Hate with a New Approach?" (2010) 13 *Internet Law Bulletin*.

An example of a law restricting speech and having the potential to stifle freedom of speech can be seen in Poland's new law intended to "defend the good name of the Polish nation". The law provided for imprisonment of up to 3 years for people who, "publicly and against the facts, accuse the Polish nation, or the Polish state, [of being] responsible or complicit in Nazi crimes committed by the III German Reich."[13] The prosecutor received complaints under this new law against an American academic, Prof. Jan Tomasz Gross from Princeton University, and started an investigation. Prof. Gross is an expert in Polish atrocities during the Holocaust, and while Poland is right to object to Nazi death camps placed on occupied Polish soil being labelled as "Polish Death Camps" the law goes far beyond that and, as the Chairs of the Working Groups and Committees of the International Holocaust Remembrance Alliance warned, it is having a chilling effect on legitimate historical research.[14]

Part IIA of the Racial Discrimination Act is not a criminal provision. There is no chilling effect like that seen with the Polish law. This law's primary value is in its educative and symbolic impact.

The Federal Court in *Jones vs Scully* found that "bearing in mind the exemptions available under s 1 8D, Part IIA of the RDA is reasonably appropriate and adapted to serve the legitimate end of eliminating racial discrimination".[15] That is to say the law has already been found to strike an appropriate balance such that it does not impinge on freedom of expression even in its strongest form in Australia, that of the constitutionally implied freedom of political communication. The Court in *Jones vs Scully* noted that the applicant received complaints about the material from both the targeted group and other members of society who found the material "offensive, insulting and distressing".[16]

The words "offend, insult, humiliate or intimidate" in S18C of the Racial Discrimination Act are given a technical legal meaning by the courts. The legal understanding is not about the hurt feelings of individuals, but rather about preventing the sort of distress which society sees as damaging to the public good of an inclusive society in which all members can productively participate. Change to the wording, particularly where parliament expresses an intent for the words to be given their ordinary meaning and to be taken individually, would force the courts to reinterpret the law, rending previous case law unsafe.

1.7 Usefulness in protecting Australian values online

Part IIA of the Racial Discrimination Act can also help to get content removed from social media platforms where the hosting company refuses to remove content unless it can be shown it breaches local law. The problem with Aboriginal Memes was discussed at length in our report "Aboriginal Memes and Online Hate",[17] which in turn was picked up in UNESCO's "World Trends in Freedom of

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[13] http://www.macleans.ca/news/world/as-poland-re-writes-its-holocaust-history-historians-face-prison/

[14] http://www.jwire.com.au/protecting-memory-holocaust/

[15] Jones vs Scully [2002] FCA 1080 (Unreported, Hely J, 2 September 2002).

[16] Ibid.

[17] http://ohpi.org.au/aboriginal-memes-and-online-hate/

Expression and Media Development: Special Digital Focus 2015".[18] Facebook originally refused to remove racist content targeting Indigenous Australians, but eventually prevented access to it within Australia on the basis that S18C of the Racial Discrimination Act likely made the content unlawful in Australia. This was important as Facebook's content moderation decisions do not take place in Australia and those making the decision lack local knowledge. This places Australia at a disadvantage with respect to protecting Australian values compared to other countries who now have local teams of Facebook staff in place.

1.8 **Hate Speech has a chilling effect on freedom of speech**

Online hate poses a threat to freedom of expression. As was noted earlier this year in a joint statement by the European Commission and the major social media companies:

> "The spread of illegal hate speech online not only negatively affects the groups or individuals that it targets, it also negatively impacts those who speak out for freedom, tolerance and non-discrimination in our open societies and has a chilling effect on the democratic discourse on online platforms."[19]

The chilling effect of hate speech occurs not only online, but also when hate speech occurs in public spaces, in the course of employment, in trade and commerce, in education and in other facets of public life.

1.9 **Protecting freedom of expression of religious groups and ensuring antisemitism remains covered**

Part IIA of the Racial Discrimination Act 1975 (Cth) does not impose restrictions upon freedom of speech when it comes to incitement against or the vilification, intimidation or humiliation of Australians on the basis of their religion. New provisions should be added, or a new law in terms similar to the Racial Discrimination Act should be drafted to provide for such a reasonable restriction, with the including of suitable safeguards for speech made reasonably and in good faith for a proper purpose. We believe the Federal Government may already have power to create such a law under the International Covenant on Civil and Political Rights.

In drafting such a law the concept of religious vilification would need to be carefully defined in order to differentiate such hate speech which would be made unlawful from discussion, even heated discussion, of religious beliefs which should be protected under both freedom of speech and freedom of religion principles. After the Charlie Hebdo attacks we published a report focused on defining and separating these concepts. This report was well received by experts and an updated version has since been published as an academic paper and is shortly to appear as a book chapter.[20]

The key distinction we draw is that freedom of speech takes precedence when it comes to the discussion of ideas, as the right both to express ideas and to hear them is a human right and there

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[18] Rachel Pollack Ichou (Ed), "World Trends in Freedom of Expression and Media Development: Special Digital Focus 2015", United Nations Educational, Scientific and Cultural Organization (UNESCO), 2 November 2015. Online at: http://unesdoc.unesco.org/images/0023/002349/234933e.pdf

[19] http://europa.eu/rapid/press-release_IP-16-1937_en.htm

[20] Andre Oboler, "After the Charlie Hebdo attack: the line between freedom of expression and hate speech", Kantor Center Position Papers, July 2015. Online at: http://kantorcenter.tau.ac.il/sites/default/files/1507%20Charlie%20Hebdo_0.pdf

are no competing human rights. When it comes to discussion of the people who may hold those ideas, then the right to human dignity takes precedence. This is on the principle that one person's right to engage in action ends at the point where their action would cause harm to another person.

Having one's beliefs rejected by others does not harm the person holding those beliefs. Preventing a person from being able to practice their religion does cause harm as it interferes with their right to religious freedom. As such a cartoon of Mohamed would be protected by freedom of speech principles, but a cartoon using a picture of Mohamed to represent all Muslims and make a stereotypical allegation against Muslims would not be protected and would be regarded as vilification of Muslims.

The Jewish community, like Indigenous Australian communities, has an identity based on the concept of peoplehood.[21] Jews are a particular people and that people has a particular religious tradition. Jews are regarded at law as a segment of the community subject to both racial vilification and religious vilification. The Sikh community is similarly regarded as both an ethnic community and a religious community.

Racism / religious vilification against Jews is known as antisemitism. One form of antisemitism is Denial of the Holocaust. This is not a disagreement about an idea, it is a rejection of a well documented fact, and tragedy, of recent history. "The Holocaust is the event from which the very concepts of genocide, and of crimes against humanity, were created. To mock the Holocaust goes beyond insulting Jews, making fun of the dead, or calling survivors liars… [it is] banned out of a desire to prevent a re-emergence of fascism… mocking the Holocaust… is a denial of historical fact and a form of incitement with very real and dangerous implications."[22] It is doubtful whether Holocaust denial would be covered by a law that only spoke of "humiliate" and "intimidate", yet any meaningful racial or religious vilification law should cover Holocaust denial.

It is also unclear how other forms of antisemitism, such as conspiracy theories that Jews control the banks, media, governments etc. would be covered if the scope of the law was narrowed. False accusations designed to imply a group is all powerful inflate the group rather than humiliate them. The suggestion a group is more powerful, wealthy, etc. than it is might not on the face of it be seen as words which would "intimidate" the group. Such antisemitism is never-the-less hate speech and has incited attacks and massacres against the Jewish community both historically and recently. Again, any meaningful racial or religious vilification law should cover antisemitism including the examples outlined in the Working Definition of Antisemitism passed this year by the International Holocaust Remembrance Alliance.[23]

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[21] Noel Pearson, "A People's survival", *The Weekend Australian*, 3–4 October, 2009. Online at: http://capeyorkpartnership.org.au/wp-content/uploads/2014/files/A-People-s-survival.pdf

[22] Ibid.

[23] http://www.holocaustremembrance.com/sites/default/files/press_release_document_antisemitism.pdf