

# National Health Leadership Forum

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9 December 2016

Dear Committee Secretary,

## **National Health Leadership Forum submission to the 'Inquiry into Freedom of Speech in Australia'**

On behalf of the National Health Leadership Forum (NHLF), I am providing this letter-submission to the Parliamentary Joint Committee on Human Rights' to inform their *Inquiry into Freedom of Speech in Australia*.

The NHLF was established in 2011 as the national representative health forum for Aboriginal and Torres Strait Islander peak bodies who provide advice on health. The NHLF has become an influential collective of Aboriginal and Torres Strait Islander peak bodies who have negotiated with successive Australian governments on Aboriginal and Torres Strait Islander health. A list of our member organisations is attached below.

Our members are also the leading member organisations of the Close the Gap Campaign Steering Committee.

### **The NHLF Position**

The NHLF's position is that racism is a key social and cultural determinant of health, and that legislative protections are an essential component in addressing racism and racial discrimination. We do not support changes to the *Racial Discrimination Act 1975 (Cth)*, particularly in relation to ss. 18C and 18D. The NHLF values the role of freedom speech but recognises that it must be balanced with other human rights. We uphold that that the sections work together to provide an appropriate balance and do not result in unreasonable restriction of freedom of speech.

In 2014, as part of the Closing the Gap Steering Committee the NHLF provided to the Attorney General's Department a *Submission to the Exposure Draft of the Freedom of Speech (Repeal of S. 18C) Bill 2014* (ATTACHMENT A). Much of the position outlined in this Submission remain relevant to the current Inquiry of the Joint Committee and continue to be upheld by the NHLF.

Furthermore, in relation to the role of the Australian Human Rights Commission (the Commission) in handling complaints made under the *Racial Discrimination Act 1975 (Cth)*, the NHLF believes the Commission's complaints and conciliation function provides an efficient, alternative to litigation and facilitates access to justice for victims of unlawful discrimination.

Additionally, it is entirely consistent with the Paris Principles – the global standards relating to National Human Rights Institutions - for the Commission to have conciliatory or non-judicial complaints handling role on top of the monitoring, reporting, education functions.

It is important that the Commission provides a culturally safe complaints handling process to ensure the participation of Aboriginal and Torres Strait Islander people where necessary.

### **Racism in Australia**

The recent Reconciliation Australia Barometer reported that while many Australians believe the relationship between Aboriginal and Torres Strait Islander people and other Australians is important, trust between the two is low. The Report also found that Aboriginal and Torres Strait Islander people experience high levels of racism with 33 per cent having experienced verbal racial abuse within the last six months.<sup>1</sup>

Racism affects the health and wellbeing of Aboriginal and Torres Strait Islander people. It is well known that Aboriginal and Torres Strait Islander people suffer a much greater burden of ill-health than the rest of the Australian population, with a life expectancy that is up to 17 years lower than that of non-Indigenous Australians – racism must be addressed if we are to overcome this health disadvantage.

The Australian Government's *National Aboriginal and Torres Strait Islander Health Plan 2013-2023* commits to a vision of a health system free of racism as a necessary platform for health equality by 2031 and states that:

*'There are a number of pathways from racism to ill-health – experiences of discrimination, linked with poor self-assessed health status, psychological distress, depression and anxiety, and health risk behaviours such as smoking and alcohol and substance misuse.*

and

*Experiences of racism are compounded by the traumatic legacy of colonisation, forced removals and other past government discriminatory policies. The consequences of these events have been profound, creating historical disadvantage that has been passed from one generation to the next.<sup>i</sup>*

For this reason, it is essential to the success of the Government's Closing the Gap Framework that Australia's First Peoples are provided with reasonable protections from racism in our society.

Freedom from racism<sup>ii</sup> and the right to the highest attainable standard of health<sup>iii</sup> are fundamental human rights. *Article 21* of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) states:

*Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.<sup>iv</sup>*

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<sup>1</sup> Reconciliation Australia [https://www.reconciliation.org.au/wp-content/uploads/2016/02/State-of-Reconciliation-Report\\_SUMMARY.pdf](https://www.reconciliation.org.au/wp-content/uploads/2016/02/State-of-Reconciliation-Report_SUMMARY.pdf)

And Article 24 states:

*Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.<sup>v</sup>*

Not only does racism undermine health it also impedes upon the realisation of these rights for Aboriginal and Torres Strait Islander people.

The Australian Government's *National Aboriginal and Torres Strait Islander Health Plan 2013-2023* also

states that:

*Racism is a key social determinant of health for Aboriginal and Torres Strait Islander people, and can deter people from achieving their full capabilities, by debilitating confidence and self-worth which in turn leads to poorer health outcomes.<sup>vi</sup>*

The National Health Plan has been supported across Parliament and by successive governments. A weakening of the protections made under the Racial Discrimination Act 1975 (Cth) would be counterintuitive to the bi-partisan endorsement of the National Health Plan which articulates the need to address racism in Australia in order to close the gap in health equality between Australia's First Peoples and its non-Indigenous peoples.

The NHLF values 'Freedom of speech' is a fundamental right but notes that it is not an absolute right. The protection of freedom of speech must be balanced against other rights including the right to live free from racial discrimination and vilification. Australian laws limit speech in areas like defamation, making threats to kill, false advertising and sexual harassment.

Protecting against the serious harm that flows from racial vilification is a legitimate restriction on free speech.

The NHLF would welcome any future opportunity to contribute to the Parliamentary Joint Committee's considerations and we ask to be notified of the outcomes of Inquiry.

Yours sincerely

**Richard Weston**

Chair, National Health Leadership Forum  
CEO, The Healing Foundation

ATTACHMENTS:

ATTACHMENT A Close the Gap Campaign Steering Committee Submission

**National Health Leadership Forum**

- Aboriginal and Torres Strait Islander Healing Foundation;
- Australian Indigenous Doctors' Association;
- Australian Indigenous Psychologists' Association;
- Congress of Aboriginal and Torres Strait Islander Nurses and Midwives;
- Indigenous Allied Health Australia Inc.;
- Indigenous Dentists' Association of Australia;
- The Lowitja Institute;
- National Aboriginal and Torres Strait Islander Health Workers' Association;
- National Aboriginal Community Controlled Health Organisation;
- National Aboriginal and Torres Strait Islander Leadership in Mental Health
- National Association of Aboriginal and Torres Strait Islander Physiotherapists; and
- Torres Strait Regional Authority.
- Expert Advisor – A/Professor Ted Wilkes, Indigenous Drug and Alcohol

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<sup>i</sup> National Aboriginal and Torres Strait Islander Health Plan 2013-2023 - <http://www.health.gov.au>

<sup>ii</sup> Racial Discrimination Act 1975 (Cth). Section 9.

<sup>iii</sup> *International Covenant on Economic, Social and Cultural Rights*, 1966, article 12. At <http://www2.ohchr.org/english/law/cescr.htm> (viewed 3 November 2016)

<sup>iv</sup> United Nations Declaration on the Rights of Indigenous Peoples, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007). Article 21. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 3 November 2016)

<sup>v</sup> United Nations Declaration on the Rights of Indigenous Peoples, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007). Article 24. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 3 November 2016)

<sup>vi</sup> Department of Health (2015) *Implementation Plan for the National Aboriginal and Torres Strait Islander Health Plan 2013–2023*, Australian Government, Canberra. Page 56.

# **CLOSE THE GAP**

## **Close the Gap Campaign Steering Committee**

Submission to the Attorney-General's  
Department

Exposure Draft of the Freedom of Speech  
(Repeal of S. 18C) Bill 2014

**30 April 2014**

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## 1 Introduction

1. The Close the Gap Campaign Steering Committee (Campaign Steering Committee) makes this submission on the Exposure Draft of the Freedom of Speech (Repeal of S. 18C) Bill 2014 (Exposure Draft) which proposes to amend Part IIA of the *Racial Discrimination Act 1975* (Cth) (Racial Discrimination Act). The Campaign Steering Committee consents that this submission be made public.
2. The heading of Part IIA of the Racial Discrimination Act is “[p]rohibition of offensive behaviour based on racial hatred”. The wording of the relevant provision, section 18C, makes it unlawful for someone to do an act that is reasonably likely to “offend, insult, humiliate or intimidate” someone because of their race or ethnicity. For the purposes of this submission the Campaign Steering Committee will refer to these legislative protections as “protections against racial hatred”.
3. Australia's peak Aboriginal and Torres Strait Islander and non-Indigenous health bodies, health professional bodies and human rights organisations operate the Close the Gap Campaign.<sup>1</sup> See Appendix 1 for the membership and a brief history of the Close the Gap Campaign.
4. The Campaign Steering Committee notes that racism is a key social determinant of health. In undertaking efforts to close the unacceptable health and life expectancy gap between Aboriginal and Torres Strait Islander people and other Australians, racism must be addressed.
5. The Campaign Steering Committee believes that legislative protections are an essential component in addressing racism and racial discrimination. Legislative protections against racial discrimination play an important role in shaping acceptable social norms. The protections against racial hatred contained in the Part IIA of the Racial Discrimination Act are a particularly important in this regard.
6. The Campaign Steering Committee values the importance of free speech in a liberal democratic society. However, free speech must be balanced with other human rights. The right to free speech can be subject to limitations reasonably necessary to protect the rights of others. There are many current legitimate limitations on free speech such as defamation laws. See the Australian Human Rights Commission's submission for detailed analysis of the balancing of the right to free speech and the prohibition of racial hatred.<sup>2</sup>

## 2 Recommendations

7. The Campaign Steering Committee recommends:

**Recommendation 1:** That the Australian Government does not proceed with introducing the Freedom of Speech (Repeal of S. 18C) Bill 2014 (Cth) into parliament.

**Recommendation 2:** That prior to introducing an amendment to Part IIA of the *Racial Discrimination Act 1975* (Cth), the Australian Government, utilising the existing evidence base, assess the impacts the proposed changes could

have to the physical and mental health of Aboriginal and Torres Strait Islander people and that this assessment be made publicly available.

### **3 Racism as a key determinant of health**

8. Evidence demonstrates that Aboriginal and Torres Strait Islander people experience significant levels of racism and racial discrimination and that these experiences have negative physical and mental health impacts.
  - (a) *Experiences of racism*
    - (i) Interpersonal racism
9. A significant proportion of Australians continue to experience racism and discrimination. In 2013, 19 per cent of Australians surveyed said they had experienced discrimination because of their skin colour or background.<sup>3</sup> Around one in five Australians say they have experienced race-hate talk, such as verbal abuse, racial slurs or name-calling.<sup>4</sup> Around one in ten Australians say they have experienced race-based exclusion in the workplace or at social events.<sup>5</sup> More than one in 20 Australians say they have been physically attacked because of their race.<sup>6</sup>
10. Across a number of studies the prevalence rates of racism experienced by Aboriginal and Torres Strait Islander people varies. However, evidence clearly suggests that Aboriginal and Torres Strait Islander people are particularly vulnerable to experiences of racism and discrimination.
11. In the *National Aboriginal and Torres Strait Islander Social Survey, 2008*<sup>7</sup> Aboriginal and Torres Strait Islander peoples aged 15 years and over were asked whether they felt they had experienced racism<sup>8</sup> (in the 12 months prior to interview). Twenty seven per cent of respondents reported having experienced discrimination.<sup>9</sup> Rates of discrimination did not vary across characteristics in the population: including income, educational attainment and so forth.<sup>10</sup>
12. In the *2012 Reconciliation Barometer*, 70 per cent of non-Indigenous participants acknowledged that the level of prejudice Australians hold towards Aboriginal and Torres Strait Islander people is very high or fairly high.<sup>11</sup>
13. Recent prevalence data is provided by the Localities Embracing and Accepting Diversity (LEAD) Experiences of Racism survey funded by Campaign Steering Committee member the Lowitja Institute. This project surveyed 755 Aboriginal people from four communities across Victoria.<sup>12</sup> This survey found that in the past 12 months:
  - 97 per cent had experienced at least one racist incident
  - 34 per cent had experienced 12 or more racist incidents
  - The average across the sample had experienced 13.7 racist incidents
  - 92 per cent had experienced racist names, jokes, teasing or comments that rely on stereotypes



- 84 per cent had been sworn at or verbally abused
- 67 per cent had been spat at or had something thrown at them
- 66 per cent had been told they do not belong in Australia or that they should “get out” or “go home”
- 55 per cent reported having property vandalised.<sup>13</sup>

(ii) Systemic racism

14. Systemic racism has an impact on an affected individual’s or group’s ability to participate within society:

By limiting an individual’s or group’s access [or equal access] to housing, healthcare, employment and education, [systemic racial discrimination] is a driver of social exclusion.... Affected individuals encounter barriers resulting in incomplete citizenship, undervalued rights and a lack of recognition and participation.<sup>14</sup>

15. Changing entrenched social norms is a fundamental component of addressing systemic racism. As stated in the *National Inquiry into Racist Violence*:

Legislating against incitement and vilification is an important way of addressing the problem directly and provides a strong statement from national leaders that racist violence and behaviour will not be tolerated in Australian society.<sup>15</sup>

Legislative protections against racial discrimination including protections against racial hatred play an important role in shaping acceptable social norms.

16. Aboriginal and Torres Strait Islander people experience systemic discrimination within the health system which contributes to lower levels of access to health care services.<sup>16</sup> A member survey conducted by Campaign Steering Committee member the National Congress of Australia’s First Peoples found that 39.6 per cent of respondents indicated that they had experienced racial discrimination when accessing a health service.<sup>17</sup>
17. Compared to other Australian patients with similar characteristics, Aboriginal and Torres Strait Islander patients are about one-third less likely to receive appropriate medical care across all conditions.<sup>18</sup> Similar rates exist for accessing care for cancer<sup>19</sup> and coronary procedures.<sup>20</sup> In addition to this Aboriginal Torres Strait Islander people are three times less likely to receive kidney transplants compared to other Australians with the same level of need.<sup>21</sup>
18. Evidence also demonstrates systemic racism occurs in a variety of different fields including but not limited to the criminal justice system,<sup>22</sup> employment<sup>23</sup> and education.<sup>24</sup>
19. Systemic racism does not necessarily reflect deliberate ill-will of service providers and others, but rather involves how systems are designed and implemented. It involves inappropriate assumptions made about Aboriginal and Torres Strait Islander people that are built into the operation of systems.<sup>25</sup> In this regard public messaging and speech play an indirect role in perpetuating systemic racism.

(b) *Negative impacts of racism*

(i) Social cohesion and social isolation

20. Experiences of racism undermine trust which is a key element of social cohesion.<sup>26</sup> The *2012 Reconciliation Barometer* demonstrated that both Aboriginal and Torres Strait Islander and non-Indigenous Australians believe there is a low level of trust between the two groups.<sup>27</sup> Evidence also indicates that Aboriginal and Torres Strait Islander people who have experienced racism are less likely to trust the police, their local school, their doctor and/or hospital and other people in general.<sup>28</sup>

21. Data from the LEAD Experiences of Racism survey indicates that racism was most commonly experienced in shops (reported by 67 per cent of participants) and in public spaces (59 per cent).<sup>29</sup> Nearly three-quarters of participants reported that they sometimes, often or very often anticipated experiences of racism. Almost 30 per cent reported avoiding situations in daily life often or very often because of racism. As noted in the survey report this can inhibit Aboriginal and Torres Strait Islander people's freedom to participate in public life:

Experiencing racist incidents in these settings may limit the ability of Aboriginal community members to take part safely in some aspects of community life, including enjoyment of parks and recreation centres, interacting with other community members through sports clubs or events or attending community celebrations or festivals.... This has important implications for the social connectedness of Aboriginal Australians, particularly if these settings are avoided in order to limit personal exposure to racism...

As a high proportion of reported experiences occurred in public and community spaces, strategies to promote social cohesion and support social norms that curtail the expression of racism may be effective in reducing Aboriginal Australians' experiences of racism...

Racism denies Aboriginal Australians access to rights such as the ability to participate equally and freely in community and public life, equitable service provision and freedom from violence.<sup>30</sup>

22. Aboriginal and Torres Strait Islander as well as other students from culturally and linguistically diverse backgrounds have significant experiences of racism at school. Evidence suggests that experiences of racism and bullying are linked to non-attendance at school.<sup>31</sup> Research also indicates that children whose carers felt they were discriminated against because they were an Aboriginal and/or Torres Strait Islander are significantly less likely to attend preschool than those who do not report discrimination.<sup>32</sup>

23. Therefore experiences of racism have negative impacts on educational outcomes, a key social determinant of health and an Australian Government priority. It also further demonstrates how racism operates to impede participation in key aspects of public life.

24. Racism also has negative impacts on "civic health"; it excludes and marginalises people on the basis of their race. The protections contained in the Racial Discrimination Act including protections against racial hatred are an integral

component of promoting a healthy civic culture where people are free from racial discrimination.<sup>33</sup>

(ii) Health impacts

25. There is a significant body of evidence that demonstrates the clear links between racial discrimination and poorer physical and mental health outcomes.<sup>34</sup> The unacceptable health and life expectancy gap between Aboriginal and Torres Strait Islander people and the broader Australian population has instigated research into the negative health impacts of racism.<sup>35</sup> As noted in the LEAD Experiences of Racism survey report “[c]ollectively, these studies support the correlation between experiencing racism and poorer mental and physical health outcomes for Aboriginal [and Torres Strait Islander] Australians”.<sup>36</sup>
26. Research has shown that racial discrimination:
  - restricts access to resources required for good health, such as employment, housing and education, and increases exposure to risks to health such as contact with the criminal justice system
  - those affected internalise negative stereotypes of their own group, leading to poor self-worth, self-esteem and psychological wellbeing
  - stress, negative thoughts and emotions produced may have negative psychological and physiological effects
  - it can result in individuals disengaging from healthy activities, such as exercise, taking medications and maintaining good sleep patterns, as well as attempting to cope by engaging in behaviours that impact negatively on their health such as smoking, excess alcohol consumption and drug use
  - it can lead to injury through racially motivated assault, resulting in negative physical and mental health outcomes.<sup>37</sup>
27. Consistent with the broader literature, racism and discrimination was associated with poorer health outcomes in the *National Aboriginal and Torres Strait Islander Social Survey, 2008*. Aboriginal and Torres Strait Islander people who had experienced discrimination were more likely than those who had not experienced discrimination to report high or very high levels of psychological distress (44 per cent compared with 26 per cent) and to be in fair or poor health (28 per cent compared with 20 per cent). They were also more likely to engage in binge drinking (42 per cent compared with 35 per cent) and to have recently used illicit substances (28 per cent compared with 17 per cent).<sup>38</sup>
28. Racism is linked to or associated with poor self-assessed health status, anxiety, depression, poor mental health, psychological distress, suicide risk, diabetes, smoking, alcohol and substance misuse and emotional and behavioural difficulties.<sup>39</sup> Consequently research indicates that experiences of racism are associated with both poor health outcomes and health risk behaviours.
29. The LEAD Experiences of Racism survey suggests that the volume of racism being experienced can contribute to poorer mental health. In particular it found that:

- racism at any level was associated with poorer mental health
  - mental health impacts were most significant for those who reported more than 11 racist incidents in a year
  - people who experienced high levels of racism were much more likely to be above the threshold for high or very high psychological distress compared to people who experienced less racism
  - 76 per cent felt that racism has affected the lives of friends and family to a great or moderate extent
  - 62 per cent felt that racism had affected their life to a great or moderate extent
  - experiences of social exclusion (see section 3(b)(i)) have a negative impact on mental health.<sup>40</sup>
30. The LEAD Experiences of Racism survey demonstrates the cumulative effect of experiencing racism. Once someone reaches a threshold of one racist incident per month their mental health significantly declines. Sixty-five per cent of survey participants that had experienced 12 or more racist incidents reported high or very high levels of psychological distress (compared to 50 per cent of all participants).<sup>41</sup>
31. In addition to the cumulative effect the survey also demonstrates that the type of racism experienced also has an impact on negative mental health outcomes. Specifically two types of racism were most associated with experiencing high or very high levels of psychological distress: property vandalism and feelings of being excluded and left out.<sup>42</sup> This highlights that subtle forms of racism, particularly those that have a socially exclusionary effect can have significant mental health impact.
32. Finally the survey demonstrates that in avoiding situations because of racism and in worrying about the impacts of racism on friends and families indicates that experiences of racism have an “ongoing deleterious effect on people’s lives and wellbeing even after direct exposure to racism has ended”.<sup>43</sup>
33. The strong association between experiences of racism and negative mental health outcomes is of particular concern to the Campaign Steering Committee. It has been estimated that mental health conditions are the second leading contributor to the disease burden in Aboriginal and Torres Strait Islander Australians. Cardiovascular disease as the leading contributor accounts for 17 per cent of the burden; mental disorders accounts for 15 per cent.<sup>44</sup>

## **4 Part IIA of the Racial Discrimination Act**

### *(a) Background*

34. Australia has obligations to implement protections against racial hatred under the *International Covenant on Civil and Political Rights* and the *International Convention on the Elimination of All Forms of Racial Discrimination*.<sup>45</sup>
35. Part IIA of the Racial Discrimination Act proscribes offensive behaviour based on racial hatred, and was introduced in response to three major reports in the 1990s: *National Inquiry into Racist Violence*, *Royal Commission into Aboriginal Deaths in*

*Custody and Multiculturalism and the Law*. These reports all identified that racial hatred was a significant problem and that such conduct should be prohibited.

36. In *Toben v Jones Allsop J* considered whether Part IIA was supported by the external affairs power and Australia's obligations under *International Convention on the Elimination of All Forms of Racial Discrimination*. His Honour said:

Art 4 is not the only matter in the Convention to which Part IIA can be seen as directed. The context and aim of the Convention were ... racial discrimination and its elimination, in *all* its forms. Sections 18B, 18C and 18D can be seen as intended to assist in the endeavour of eliminating racial discrimination in all its forms, including by dealing with racial hatred.<sup>46</sup> (emphasis in original)

37. The Australian Human Rights Commission has provided a detailed summary of the background of Part IIA of the Racial Discrimination Act in its submission.<sup>47</sup>

(b) *Operation of the provisions*

38. Section 18C makes it unlawful for someone to do an act, otherwise than in private, that is reasonably likely to "offend, insult, humiliate or intimidate" someone because of their race or ethnicity.
39. As it currently stands section 18D provides a free speech exemption to the operation of section 18C.<sup>48</sup> See below at section 5(e) on the operation of this exemption.

(c) *Complaints under the current provisions*<sup>49</sup>

40. Complaints relating to section 18C are to be made to the Australian Human Rights Commission to be conciliated. If the complaint is not resolved through conciliation the complainant can apply for the allegations to be heard and determined by the Federal Court of Australia or the Federal Circuit Court of Australia.
41. Section 18C is a civil provision. Offences are not punishable by imprisonment. Most complaints under section 18C which are resolved by the Australian Human Rights Commission result in some combination of the following outcomes:
- an apology
  - an agreement to remove material
  - systemic outcomes such as changes to policies and procedures, training for staff and individual respondents
  - payment of compensation.
42. The Federal Court of Australia or Federal Circuit Court of Australia may order a range of outcomes including an apology, the removal of material and/or payment of compensation.
43. Over the last five years, the Australian Human Rights Commission received an average of 130 racial hatred complaints per year.

44. During the 2012-2013 financial year, the Australian Human Rights Commission received a 59 per cent increase in complaints under section 18C. Fifty-three per cent of racial hatred complaints in 2012-13 were resolved at conciliation. Four per cent of complaints made under section 18C were terminated or declined for being trivial, misconceived or lacking in substance. And less than three per cent of racial hatred complaints proceeded to court.<sup>50</sup>
45. Making a complaint to the Australian Human Rights Commission and having it conciliated is cost-free. Given that the vast majority of these complaints are resolved without proceeding to court, Part IIA of the Racial Discrimination Act provides an effective and affordable mechanism for people to access justice in relation to allegations of racial hatred.
46. See Appendix 2 for examples of racial hatred complaints that have been resolved.

## **5 Proposed amendments to the Racial Discrimination Act**

47. The Australian Government is seeking to amend Part IIA of the Racial Discrimination Act with the stated intention to “strengthen the Act’s protections against racism, while at the same time removing provisions which unreasonably limit freedom of speech”.<sup>51</sup>
48. The Australian Government’s proposed changes are contained in the Exposure Draft.
49. The Exposure Draft would repeal sections 18B, 18C, 18D and 18E of the Racial Discrimination Act. A new section is to be inserted which would make it unlawful to do anything that is reasonably likely to “vilify” or “intimidate” on the grounds of race. It also seeks to change the reasonable person test and provide broader exemptions to the operation of the section.
50. As stated by the Australian Human Rights Commission Part IIA of the Racial Discrimination Act:

[I]n its current form, as applied by the courts and administered by the Australian Human Rights Commission has successfully resolved hundreds of complaints about racial hatred over the past two decades. Any proposed change requires further justification.<sup>52</sup>

### *(a) Removal of offend, insult and humiliate*

51. The Exposure Draft would remove current protections that make it unlawful to “offend, insult and humiliate” on the basis of race. This proposed reform is based on a view of the scope of conduct currently prohibited by section 18C and that the threshold of harm caused is too low.<sup>53</sup>
52. The ordinary meaning of offend, insult, humiliate and intimidate is broad. However the courts have not interpreted this current wording in its ordinary meaning. Instead courts have interpreted it to apply to conduct that must involve “profound and serious” effects, not “mere slights”.<sup>54</sup> In *Eatock v Bolt* Justice Bromberg stated section 18C:

[I]s concerned with consequences it regards as more serious than mere personal hurt, harm or fear. It seems to me that s 18C is concerned with mischief that extends to the public dimension. A mischief that is not merely injurious to the individual, but is injurious to the public interest and relevantly, the public's interest in a socially cohesive society. ... In my view, "offend, insult, humiliate or intimidate" were not intended to extend to personal hurt unaccompanied by some public consequence of the kind Part IIA is directed to avoid.<sup>55</sup>

53. Therefore the current provision, as interpreted by the court, is only engaged by profound and serious conduct that impacts on the public interest in a socially cohesive society. The Campaign Steering Committee believes this is an appropriate threshold of conduct to make unlawful.

(b) *Vilification*

54. The Exposure Draft seeks to introduce the word "vilify". The term vilify in the Exposure Draft is not given its ordinary meaning. Rather, it is defined to mean "incite hatred against a person or a group of persons".
55. According to the Macquarie Dictionary (3rd ed, 1997), vilify means "to speak evil of; defame; traduce". According to the Shorter Oxford Dictionary (3rd ed, 1992), the current meanings of vilify are:
- To make morally vile; to degrade; also to defile or dirty.
  - To bring disgrace or dishonour upon.
  - To deprecate or disparage in discourse; to defame or traduce; to speak evil of.
  - To regard as worthless or of little value, to contemn or despise.
56. The proposed definition in the Exposure Draft confines vilification to inciting hatred by a third party. Consequently the proposed provision would not be concerned with the impact of racist conduct on the victim. As outlined in detail by the Victorian Equal Opportunity and Human Rights Commission's submission, this proposed incitement test has proven extremely difficult to satisfy in existing state racial vilification laws.<sup>56</sup>
57. The Campaign Steering Committee believes the term vilify should be given its ordinary meaning.

(c) *Intimidation*

58. The Exposure Draft would retain the word "intimidation" from the existing law but introduce a narrow definition of "fear of physical harm". Forms of intimidation that do not involve fear of physical harm such as emotional or psychological harm would not be covered.
59. In all states and territories which have criminal provisions dealing with serious racial vilification, racial intimidation through threats of physical harm is considered to be the most serious form of racial vilification and is subject to criminal sanctions.<sup>57</sup> By making this most serious form of racial vilification the only kind of intimidation that is captured by the civil prohibition in the Racial Discrimination Act, the Exposure Draft would significantly narrow the scope of civil liability. Other

serious conduct that is currently prohibited in the Racial Discrimination Act would be excluded from the proposed definition.

60. Further, as outlined above in section 3(b) of this submission the proposed definition neglects the evidence in relation to Aboriginal and Torres Strait Islander people's experiences of racism and racial discrimination.
61. The Campaign Steering Committee believes the term intimidation should be given its ordinary meaning, which recognises that intimidation is not limited to causing physical harm but includes conduct causing emotional or psychological harm.

(d) *Reasonable person test*

62. The current test under section 18C to determine whether conduct is "reasonably likely" to "offend, insult, humiliate or intimidate" is an objective one.<sup>58</sup> The court does not simply rely on how a particular person or group of people subjectively felt about or reacted to the doing of the act complained of.<sup>59</sup> Rather, the court assesses whether, objectively, the act complained of was reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people.
63. Evidence that a member of a particular racial group was in fact offended by the conduct in question, is admissible on, but not determinative of, the issue of contravention.<sup>60</sup>
64. The Exposure Draft would change the test of what is reasonably likely to vilify or intimidate to be based from the perspective of the "ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community".
65. This proposed test is problematic as many ordinary reasonable members of the Australian community will not have experienced discrimination on the basis of their race and therefore are not in position to conceive of the profound impact of such discrimination. Further, in circumstances where prejudice against a particular group is stronger and more widespread within the community it will be more difficult for a victim from that group to demonstrate racial hatred.
66. As a minimum the impact on the victim's group should remain a relevant consideration when assessing the reasonable person test.

(e) *Exemption*

67. Under existing law, the protections contained in 18C do not apply if a person has acted "reasonably and in good faith" in the "performance, exhibition or distribution of an artistic work" or 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". Additionally, the "reasonable and good faith" exemption applies in making or publishing a "fair and accurate report of any event or matter of public interest" or is "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".



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68. Subsection (4) the Exposure Draft would create an exemption for “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 current requirement that such conduct be reasonable and in good faith has been removed.
69. The main substantive difference between the proposed subsection (4) and the existing exemptions in section 18D is the omission of the requirement for the conduct to be engaged in reasonably and in good faith. This would create an extremely broad exemption. The President of the Australian Human Rights Commission has stated:

This astonishingly broad exemption will positively permit racial vilification and intimidation in virtually all public discussions. Indeed, it is hard to think of examples of racial vilification or intimidation in public that will not be exempted by these changes. Will, for example, racial vilification on public transport, at football matches or the factory canteen be protected because this is a ‘social’, ‘cultural’ or ‘religious’ matter?<sup>61</sup>

70. If a comment on a matter of public interest in relation to a particular ethnic group:
- was written in a way that offered gratuitous insults by, for example, referring to members of the group in derogatory racist slang terms, then it would be unlikely that the comment would be offered “reasonably”.<sup>62</sup>

If subsection (4) of the Exposure Draft is not appropriately qualified, then there is a significant risk that it will protect mere racist abuse offered up in the course of a public discussion.

71. As outlined by the Australian Human Rights Commission:

A requirement of ‘good faith’ would also prohibit racist abuse offered up in the course of a public discussion. In *Toben v Jones*, a case that dealt with a website that contained a range of anti-Semitic material, the trial judge noted that the material did not satisfy the test of ‘good faith’ because it was ‘deliberately provocative and inflammatory’, it was ‘contrived to smear’ Jews and to ‘paint Jews in a bad light’. One example of this was the use of the phrase ‘Jewish-Bolshevik Holocaust’ which, in the context in which it was used, conveyed that Jews as a group were responsible for perpetrating a ‘Holocaust’ comparable to that ascribed in modern history to the Nazis.

The [Racial Discrimination Act] should not permit gratuitous racial abuse, even if it occurs in the course of a ‘public discussion’ about some other issue. If conduct that would otherwise be reasonably likely to humiliate, vilify or intimidate on the basis of race is to be protected by a free speech exemption because it occurred in the course of a public discussion, then it is appropriate to require that discussion to have been carried out in good faith.<sup>63</sup> (notes excluded).

72. The Campaign Steering Committee firmly believes the requirement of good faith is essential for proper operation of exemptions to protections against racial hatred.

(f) *Other changes*

73. The Exposure Draft also seeks to remove the existing section 18B, which provides that if an act is done for two or more reasons and one of those reasons is the race of a person, then the act is taken to be done because of race.
74. No reason for this proposed change has been provided. Provisions like section 18B of the Racial Discrimination Act are common in anti-discrimination law, for example section 10 of *Disability Discrimination Act 1992 (Cth)* contains an identical provision. Removing this provision could make it difficult to establish the necessary causal connection between the conduct and the racial element.<sup>64</sup>
75. The Campaign Steering Committee believes that section 18B should not be removed.
76. The Exposure Draft also proposes to repeal section 18E which provides for vicarious liability for employers and principles for acts done by their employees or agents in connection with their duties.
77. There is no justification for the removal of this section. Vicarious liability provisions exist in each of the federal discrimination acts.<sup>65</sup>
78. The Campaign Steering Committee believes that section 18E should not be removed.

(g) *Concluding views on the proposed amendments*

79. When examined holistically the proposed changes in the Exposure Draft will operate to severely restrict protections against racial hatred. As outlined above in section 5(e) the proposed extremely broad exemptions would ensure that it is difficult to imagine any public discussion that would not be exempted from the protections that remain.
80. See Appendix 3 for case studies on how current protections against racial hatred would be weakened by the Exposure Draft.
81. As demonstrated above in section 3 of this submission, racism and discrimination, both interpersonal and systemic, have significant impacts on the physical and mental health and wellbeing of Aboriginal and Torres Strait Islander people.
82. If the Exposure Draft is enacted into law the Campaign Steering Committee would be extremely concerned about the potential negative impacts the weakening of protections against racial hatred would have on the health of Aboriginal and Torres Strait Islander people.

## **6 Conclusion**

83. Evidence clearly demonstrates that experiences of racism and discrimination have a negative impact on Aboriginal and Torres Strait Islander people's physical and mental health.

84. Addressing racism is therefore a critical component of efforts to close the unacceptable health and life expectancy gap between Aboriginal and Torres Strait Islander people and other Australians.
85. The Campaign Steering Committee firmly believes that strong anti-racism measures are required to combat the ongoing damage caused by interpersonal and systemic racism. This includes the need for strong legislative protections against racial hatred which play an important role in shaping acceptable social norms.
86. Strong legislative protections against racism and racial hatred should be complemented by education and awareness raising programs to promote a community understanding of and respect for human rights and for people's responsibilities. There is a critical role for educative measures that promote cultural diversity, tolerance and the value of the multicultural nature of our society, while also sending a strong message of opposition to racial discrimination and hatred.<sup>66</sup>
87. The Australian Government is committed to the national effort to close the gap in health and life expectancy. The Campaign Steering Committee believes that as part of this effort the Australian Government must fully consider the impacts to the physical and mental health of Aboriginal and Torres Strait Islander people before making any amendment to Part IIA of the Racial Discrimination Act.
88. The Campaign Steering Committee believes that the Exposure Draft should not be introduced into parliament.

## **Appendix 1: Membership and a brief history of the Close the Gap Campaign Steering Committee**

Australia's peak Aboriginal and Torres Strait Islander and non-Indigenous health bodies, health professional bodies and human rights organisations operate the Close the Gap Campaign. The Campaign's goal is to raise the health and life expectancy of Aboriginal and Torres Strait Islander people to that of the non-Indigenous population within a generation: to close the gap by 2030. It aims to do this through the implementation of a human rights-based approach set out in the Aboriginal and Torres Strait Islander Social Justice Commissioner's *Social Justice Report 2005*.<sup>67</sup>

The Campaign Steering Committee first met in March 2006. Our patrons, Catherine Freeman OAM and Ian Thorpe OAM, launched the campaign in April 2007. To date, almost 200,000 Australians have formally pledged their support.<sup>68</sup>

Australian Government and Opposition party representatives, including the then Prime Minister and Opposition Leader, signed the Close the Gap Campaign's *Close the Gap Statement of Intent* in March 2008 at the Campaign's National Indigenous Health Equality Summit. Successive Prime Ministers, Opposition Leaders, and Greens Party leaders have indicated their continuing support. The *Close the Gap Statement of Intent* was subsequently signed by the Governments and Opposition Parties of Victoria in March 2008; Queensland in April 2008, Western Australia in April 2009; the Australian Capital Territory in April 2010, New South Wales in June 2010; and South Australia in November 2010.

As acknowledged in the NIRA, 'the [COAG] Closing the Gap Agenda was developed in response to concerns raised with governments by Indigenous and non-Indigenous persons, including through the Close the Gap Campaign and the National Indigenous Health Equality Summit'.<sup>69</sup> As such, the Campaign has provided significant impetus for the Council of Australian Governments:

- Setting six 'Closing the Gap' Targets, including to achieve Aboriginal and Torres Strait Islander life expectancy equality within a generation, and to halve the Aboriginal and Torres Strait Islander under-fives mortality rate gap within a decade; and
- Agreeing, by November 2008, the 'Closing the Gap' national partnership agreements. These have brought with them approximately five billion dollars in additional resources, including the \$1.57 billion attached to the *National Partnership Agreement on Closing the Gap in Indigenous Health Outcomes* that expired in June 2013; and the \$564 million attached to the *National Partnership Agreement on Indigenous Early Childhood Development* that expires in June 2014.

The Close the Gap Campaign is a growing national movement:

- Every year since 2010 the National Rugby League has dedicated a round of matches to Close the Gap. The Close the Gap rounds are broadcast to between 2.5 and 3.5 million Australians each year.

- In 2007 the first National Close the Gap Day was held. It involved five large State events and more than 300 community events. National Close the Gap Day has become an annual event since 2009. Australians across every state and territory participate in this event. Health services, schools, businesses, hospitals, government departments, ambulance services, non-government organisations and others hold events to raise awareness and show support for the Campaign and its goals. Reflecting the importance of the Campaign to nation, it has become the largest and highest profile Aboriginal and Torres Strait Islander health event in the country. Just under 1,300 community events involving approximately 150,000 Australians were held on National Close the Gap Day in 2014.

The current members of the Close the Gap Campaign Steering Committee are:

### **Co-chairs**

- Ms Kirstie Parker, Co-chair of the National Congress of Australia's First Peoples
- Mr Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission

### **Members**

- Aboriginal and Torres Strait Islander Healing Foundation
- Australian Indigenous Doctors' Association
- Australian Indigenous Psychologists' Association
- Congress of Aboriginal and Torres Strait Islander Nurses and Midwives
- Indigenous Allied Health Australia
- Indigenous Dentists' Association of Australia
- National Aboriginal Community Controlled Health Organisation
- National Aboriginal and Torres Strait Islander Health Workers' Association
- National Association of Aboriginal and Torres Strait Islander Physiotherapists
- National Congress of Australia's First Peoples
- National Coordinator — Tackling Indigenous Smoking (Dr Tom Calma AO - Campaign founder and former Aboriginal and Torres Strait Islander Social Justice Commissioner)
- National Indigenous Drug and Alcohol Committee
- The Lowitja Institute
- Torres Strait Island Regional Authority
- Australian College of Nursing
- Aboriginal Health and Medical Research Council
- Australian Human Rights Commission (Secretariat)
- Australian Medical Association
- Australian Medicare Local Alliance
- Australian Physiotherapy Association
- ANTaR
- Beyondblue
- The Fred Hollows Foundation
- Heart Foundation Australia
- Menzies School of Health Research

- Oxfam Australia
- Palliative Care Australia
- PHILE Network
- Public Health Association of Australia
- The Pharmacy Guild of Australia
- Royal Australasian College of Physicians
- Royal Australian College of General Practitioners

## **Appendix 2: Examples of racial hatred complaints<sup>70</sup>**

Some examples of racial hatred complaints received by the Commission are included below. *Note: these examples contain words and descriptions that may offend.*

1. The complainant, of Jewish ethnic origin, alleged that video clips on a video sharing site advocate hatred towards Jewish people and include content such as offering money to kill Jewish people.
2. The complainant, who is of Asian background, complained about a website which he said advocated violence against Asians. The comments on the website included: 'Asian People Flood our city with their Asian shops with their language all over them, having their own dedicated "china town" and their own suburb ...' '... we understand everyone has different levels of hate for Asians and so we have ... Yellers. Their job is to Yell at the Asians with passion i.e. —YOU GOOK F\*\*K OFF TO CHINA! and do whatever they can to show Asians they are not welcome in Australia ... Fighters ... are there to express their anger physically by laying the Gooks out'.
3. The complainant who is of Aboriginal descent, claimed that he left his employment because, over a number months, he was racially abused by a work colleague while they were working in public areas. The alleged comments included 'nigger', 'nigger c\*\*t', 'abo', 'boong', 'f\*\*king nigger', 'I've never worked with a nigger before', 'spear catcher', 'why don't you go and sit with your black family and get drunk' and 'get f\*\*ked you nigger dog'. Following the cessation of his employment, the complainant was assessed by a psychiatrist and subsequently the company's insurer accepted liability for the psychological injury the complainant had sustained arising from the alleged events.
4. The complainant claimed that video footage of a Pakistani woman and her child had been loaded onto the website of a video sharing site. The complainant claimed that the individual who posted the material also made racially derogatory comments on the site such as 'Paki', 'f\*\*k those Curry munching scum', 'poo faces', 'stupid paki women' and 'silly smelling Pakis, they need to f\*\*k off home'.

### **Appendix 3: Case studies on the impact of the Exposure Draft on current protections<sup>71</sup>**

#### ***Clarke v Nationwide News***

In *Clarke v Nationwide News Pty Ltd*,<sup>72</sup> the Federal Court considered the liability of an online newspaper publisher for 'blog' comments written by members of the public and published underneath online newspaper articles. The comments were actively solicited by the newspaper and were individually moderated and approved before they were published online.

The articles in question were about an Aboriginal woman and the mother of three boys aged 15, 11 and 10 who were killed in a motor vehicle accident. One of the boys' cousins aged 17 was also killed in the accident. A fifth teenage boy survived the accident.

Four of the blog comments were found to have been made because of the race of the boys and were found to contravene s 18C on the basis that they were reasonably likely to offend and insult. One of these comments was found to contravene s 18C on the basis that it was reasonably likely to offend, insult and humiliate. The person making this comment described the boys as 'scum' and claimed that 'I would use these scum as land fill' in disused mineshafts near Kalgoorlie.

This comment would no longer be prohibited if the word 'humiliate' is removed from the RDA and not replaced with an equivalent prohibition

#### ***Jones v Scully***

In *Jones v Scully*,<sup>73</sup> the Federal Court considered a complaint about the distribution of eight pamphlets containing anti-Semitic material to letterboxes in Launceston, Tasmania.

There were a number of imputations in the pamphlets that were held to have been directed towards Jewish people and were found to contravene s 18C on the basis that they were reasonably likely to offend and insult. One of these imputations was found to contravene s 18C on the basis that it was reasonably likely to offend, insult, humiliate and intimidate.

This imputation was that Jews are fraudulent liars, immoral, deceitful and part of a conspiracy to defraud the world in perpetrating the 'myth' of the Holocaust.

These comments were held to be reasonably likely to intimidate, but not because they caused a fear of physical harm. If the meaning of intimidate is narrowed in the sense proposed in the draft Bill, it is unlikely that comments of this nature would be captured by it.



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<sup>1</sup> The Australian Human Rights Commission hosts the Close the Gap Campaign Steering Committee's Secretariat and the Aboriginal and Torres Strait Islander Social Justice Commissioner is the Co-Chair of the Campaign's Steering Committee. The Secretariat is Steering Committee member funded.

<sup>2</sup> Australian Human Rights Commission, *Submission to the Attorney-General's Department: Amendments to Part IIA, Racial Discrimination Act*, 29 April 2014. At <https://www.humanrights.gov.au/submissions/amendments-part-ii-a-racial-discrimination-act-1975> (viewed 29 April 2014).

<sup>3</sup> A Markus, *Mapping Social Cohesion 2013: the Scanlon Foundation Survey* (2013). At <http://www.arts.monash.edu.au/mapping-population/scanlon-foundation-surveys.php> (viewed 4 April 2014).

<sup>4</sup> The Challenging Racism Project included research based on random phone surveys with 12,500 people conducted between 2001 and 2008. K Dunn, *Challenging Racism: The Anti-Racism Research Project*. At [http://www.uws.edu.au/social\\_sciences/soss/research/challenging\\_racism/findings\\_by\\_region](http://www.uws.edu.au/social_sciences/soss/research/challenging_racism/findings_by_region) (viewed 4 April 2014).

<sup>5</sup> Above note 4.

<sup>6</sup> Above note 4.

<sup>7</sup> Updated national data will be available in June 2014 when the Australian Bureau of Statistics releases the data from the *National Aboriginal and Torres Strait Islander Health Survey* which will include discrimination and social and emotional wellbeing.

<sup>8</sup> Defined in the survey as "treated unfairly in certain situations because they are Aboriginal or Torres Strait Islander".

<sup>9</sup> Australian Bureau of Statistics, *4704.0 - The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples, Social and Emotional Wellbeing: Discrimination* (2010). At <http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter450Oct+2010> (viewed 4 April 2014).

<sup>10</sup> Above note 9.

<sup>11</sup> Reconciliation Australia, *Australian Reconciliation Barometer 2012* (2013), p 9. At <http://www.reconciliation.org.au/wp-content/uploads/2013/12/2012-Australian-Reconciliation-Barometer-Report-by-Auspoll.pdf> (viewed 4 April 2014).

<sup>12</sup> A Ferdinand, Y Paradies & M Kelaher, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: The Localities Embracing and Accepting Diversity (LEAD) Experiences of Racism Survey*, The Lowitja Institute (2013). At [https://www.lowitja.org.au/sites/default/files/docs/LEAD%20Report-WEB\\_0.pdf](https://www.lowitja.org.au/sites/default/files/docs/LEAD%20Report-WEB_0.pdf) (viewed 4 April 2014).

<sup>13</sup> Above note 12.

<sup>14</sup> Y Paradies, L Chandrakumar, N Klocker, M Frere, K Webster, M Burrell, & P McLean, *Building on our strengths: A framework to reduce race-based discrimination and support diversity in Victoria, Full report*, Victorian Health Promotion Foundation, (2009), p 37. At <http://www.vichealth.vic.gov.au/Publications/Freedom-from-discrimination/Building-on-our-strengths.aspx> (viewed 4 April 2014).

<sup>15</sup> Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into Racist Violence* (1991), p 269. At <http://www.humanrights.gov.au/sites/default/files/document/publication/NIRV.pdf> (viewed 4 April 2014).

<sup>16</sup> N Awofeso, 'Racism: a major impediment to optimal Indigenous health and health care in Australia', (2011) 11(3) *Australian Indigenous Health Bulletin*.

<sup>17</sup> S Avery, National Congress of Australia's First Peoples, *Experiences of institutional racism in the health sector: Preliminary findings from a member survey by the National Congress of Australia's First Peoples* (Speech delivered at AIATSIS National Indigenous Studies Conference, Canberra, 27 March 2014).

<sup>18</sup> J Cunningham, 'Diagnostic and therapeutic procedures among Australian hospital patients identified as indigenous' (2002). 176(2) *Medical Journal of Australia* 58. At <https://www.mja.com.au/journal/2002/176/2/diagnostic-and-therapeutic-procedures-among-australian-hospital-patients> (viewed 4 April 2014).

<sup>19</sup> S Hall, C Bulsara, M Bulsara, D Hendrie, C Holman, T Leahy & M Culbong 'Treatment patterns for cancer in Western Australia: does being Indigenous make a difference?' (2004) 181(4) *Medical Journal of Australia* 191. At <https://www.mja.com.au/journal/2004/181/4/treatment-patterns-cancer-western-australia-does-being-indigenous-make-difference> (viewed 4 April 2014); P Vallery, M Coory, J

Stirling, & A Green 'Cancer diagnosis, treatment, and survival in Indigenous and non-Indigenous Australians: a matched cohort study' (2006) 367(9525) *The Lancet* 1842. At [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(06\)68806-5/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(06)68806-5/fulltext) (viewed 4 April 2014).

<sup>20</sup> M Coory & W Walsh 'Rates of percutaneous coronary interventions and bypass surgery after acute myocardial infarction in Indigenous patients' (2005) 182(10) *Medical Journal of Australia* 507. At <https://www.mja.com.au/journal/2005/182/10/rates-percutaneous-coronary-interventions-and-bypass-surgery-after-acute> (viewed 24 April 2014).

<sup>21</sup> A Cass, J Devitt, C Preece, J Cunningham, K Anderson, P Snelling, J Eris & J Ayanian 'Barriers to access by Indigenous Australians to kidney transplantation: The IMPAKT study' (2004) 9 *Nephrology*, S144.

<sup>22</sup> Victorian Department of Justice, *Victorian Aboriginal Justice Agreement, Phase Two*(2006). At [http://multimedia.justice.vic.gov.au/comms/Koori/resources/Victorian\\_Aboriginal\\_Justice\\_Agreement/p\\_hase2/index.html](http://multimedia.justice.vic.gov.au/comms/Koori/resources/Victorian_Aboriginal_Justice_Agreement/p_hase2/index.html) (Viewed 4 April 2014); H Blagg, N Morgan, C Cunneen, & A Ferrante, *Systemic racism as a factor in the overrepresentation of Aboriginal people in the Victorian criminal justice system* (2005).

<sup>23</sup> A Booth, A Leigh, & E Varganova, *Does Racial and Ethnic Discrimination Vary Across Minority Groups? Evidence From Three Experiments* (2009). At [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1521229](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1521229) (viewed 4 April 2014).

<sup>24</sup> Bodkin-Andrews, G., V. O'Rourke, et al. (2011) 'Validating Racism and Cultural Respect: Understanding the Educational Impact of Perceived Discrimination and Multiculturalism for Indigenous and Non-Indigenous Students' (2010) 16(6) *Educational Research and Evaluation* 471. At <http://www.tandfonline.com/doi/abs/10.1080/13803611.2010.550497#preview> (viewed 4 April 2014).

<sup>25</sup> P Anderson, *Racism as a Public Health Issue* (Speech delivered at Dreaming up the future of Aboriginal and Torres Strait Islander Public Health, the School of Public Health and Community Medicine, UNSW Annual Research Symposium, Sydney, 11 October 2013. At [http://www.lowitja.org.au/sites/default/files/docs/Chairperson-uns-w-public-health-symposium-oct2013\\_0.pdf](http://www.lowitja.org.au/sites/default/files/docs/Chairperson-uns-w-public-health-symposium-oct2013_0.pdf) (viewed 4 April 2014).

<sup>26</sup> A Markus, *Mapping Social Cohesion 2013: the Scanlon Foundation surveys national report* (2013). At [http://www.scanlonfoundation.org.au/docs/2013\\_SocC\\_report\\_final.pdf](http://www.scanlonfoundation.org.au/docs/2013_SocC_report_final.pdf) (viewed 4 April 2014).

<sup>27</sup> There is a low level of mutual trust between the two groups. 78% of general community respondents believe that Indigenous people have "fairly low" or "very low" levels of trust for other Australians, while 78% also believe that other Australians have the same low levels of trust towards Indigenous people. Perceptions amongst Indigenous respondents are similar with 84% of them believing that Indigenous people have "fairly low" or "very low" levels of trust towards other Australians, and 93% believing that other Australians have "very low" or "fairly low" levels of trust towards Indigenous people: Above note 11.

<sup>28</sup> Australian Institute of Health and Welfare, *The health and welfare of Australia's Aboriginal and Torres Strait Islander people, an overview 2011* (2011), p 39. At <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737418955> (viewed 4 April 2014).

<sup>29</sup> Above note 12.

<sup>30</sup> Above note 12, p 20, 23-24.

<sup>31</sup> See N Biddle and N Priest, 'Indigenous students skipping school to avoid bullying and racism', *The Conversation*, 11 April 2014. At <http://theconversation.com/indigenous-students-skipping-school-to-avoid-bullying-and-racism-25433> (viewed 11 April 2014).

<sup>32</sup> Longitudinal Study of Indigenous Children cited in Dr N Biddle, 'Experiences and effects of racism in school: The Indigenous context' (Speech delivered at AIFS Seminar Series, Melbourne, 9 April 2014).

<sup>33</sup> Dr T Soutphommasane, Race Discrimination Commissioner, 'Moral solidarity on race and recognition' (Speech delivered at Congress Lowitja, Melbourne, 20 March 2014). At <https://www.humanrights.gov.au/news/speeches/moral-solidarity-race-and-recognition> (viewed 16 April 2014).

<sup>34</sup> See Y Paradies, 'A systematic review of empirical research on self-reported racism and health' (2006) 35(4) *International Journal of Epidemiology* 888; D Williams & R Williams-Morris, 'Racism and mental health: The African American experience' (2000) 5(3–4) *Ethnicity and Health* 243; J Soto, N Dawson-Andoh & R BeLue, 'The relationship between perceived discrimination and generalized anxiety disorder among African Americans, Afro Caribbeans, and non-Hispanic whites' (2011) 25(2) *Journal of Anxiety Disorders* 258; E Pascoe & L Richman L, 'Perceived discrimination and health: A meta-analytic review', (2009) 135(4) *Psychological Bulletin* 531.

<sup>35</sup> See A Larson, M Gillies P Howard and J Coffin, 'It's enough to make you sick: The impact of racism on the health of Aboriginal Australians' (2007) 31(4) *Australian and New Zealand Journal of Public Health* 322. At <http://onlinelibrary.wiley.com/doi/10.1111/j.1753-6405.2007.00079.x/abstract> (viewed 4 April 2014); N Priest, Y Paradies, W Gunthorpe, S Cairney & S Sayers, 'Racism as a determinant of social and emotional wellbeing for Aboriginal Australian youth' (2011) 194(10) *Medical Journal of Australia* 546. At <https://www.mja.com.au/journal/2011/194/10/racism-determinant-social-and-emotional-wellbeing-aboriginal-australian-youth> (viewed 4 April 2014); N Priest, Y Paradies, P Stewart & J Luke, 'Racism and health among urban Aboriginal young people', (2011) 11 *BMC Public Health* 568. At ; <http://www.biomedcentral.com/1471-2458/11/568> (viewed 4 April 2014); A Ziersch, G Gallaher, F Baum & M Bentley, 'Racism, social resources and mental health for Aboriginal people living in Adelaide' (2011) 35(3) *Australian and New Zealand Journal of Public Health*, 2011, 231. At <http://onlinelibrary.wiley.com/doi/10.1111/j.1753-6405.2011.00681.x/abstract> (viewed 4 April 2014); Y Paradies & J Cunningham, 'The DRUID study: Racism and self-assessed health status in an Indigenous population', (2012) 12 *BMC Public Health* 131. At <http://www.biomedcentral.com/1471-2458/12/131> (viewed 4 April 2014).

<sup>36</sup> Above note 12, p 4.

<sup>37</sup> Above note 14, pp 34-35.

<sup>38</sup> Above note 14.

<sup>39</sup> Y Paradies, R Harris & I Anderson 'Exploring the Health Effects of Racism for Indigenous people' *The Impact of Racism on Indigenous Health in Australia and Aotearoa: Towards a Research Agenda*, Cooperative Research Centre for Aboriginal Health Discussion Paper Series: No. 4 (2008); Y Paradies, Y. (2006a). *Race, Racism, Stress and Indigenous Health*. PhD thesis, Department of Public Health, The University of Melbourne (2006); Y Paradies & J Cunningham 'The DRUID study: Exploring mediating pathways between racism and depressive symptoms among Indigenous Australians' (2012) 47 *Social Psychiatry and Psychiatric Epidemiology* 165; S Zubrick, S Silburn, D Lawrence, F Mitrou, R Dalby, E Blair, J Griffin, H Milroy, J De Maio, A Cox & J Li *Western Australian Aboriginal Child Health Survey: The Social and Emotional Wellbeing of Aboriginal Children and Young People*, Curtin University of Technology and Telethon Institute for Child Health Research (2005); L Jamieson, Y Paradies, W Gunthorpe, S Cairney & S Sayers, 'Oral health and social and emotional well-being in a birth cohort of Aboriginal Australian young adults' (2011) 11 *BMC Public Health* 656. At <http://www.biomedcentral.com/1471-2458/11/656> (viewed 4 April 2014); N Priest et al, above note 35.

<sup>40</sup> Above note 12.

<sup>41</sup> Above note 12.

<sup>42</sup> Above note 12.

<sup>43</sup> Above note 12, p 21.

<sup>44</sup> T Vos, B Barker, L Stanley & A Lopez, *The Burden of Disease and Injury in Aboriginal and Torres Strait Islander Peoples 2003*, School of Population Health, The University Queensland (2007). At <http://www.lowitja.org.au/sites/default/files/docs/Indigenous-BoD-Report.pdf> (viewed 4 April 2014).

<sup>45</sup> See Australian Human Rights Commission, *At a glance: Racial vilification under sections 18C and 18D of the Racial Discrimination Act 1975 (Cth)*. At <https://www.humanrights.gov.au/sites/default/files/18C%20%26%20D%20FactsheetFINAL.pdf> (viewed 4 April 2014).

<sup>46</sup> *Toben v Jones* (2003) 129 FCR 515, para 136.

<sup>47</sup> Above note 2, paras 42-61.

<sup>48</sup> Section 18D provides that "section 18C does not render unlawful anything said or done reasonably and in good faith" in the "performance, exhibition or distribution of an artistic work" or "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 in making or publishing a "fair and accurate report of any event or matter of public interest" or 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".

<sup>49</sup> This section was largely drawn from the Australian Human Rights Commission's submission, above note 2. See also above note 45.

<sup>50</sup> This section was largely drawn from the Australian Human Rights Commission's submission, above note 2. See also above note 45.

<sup>51</sup> Senator the Hon G Brandis, Attorney-General for Australia, 'Racial Discrimination Act' (Media Release, 25 March 2014). At

<http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/First%20Quarter/25March2014-RacialDiscriminationAct.aspx> (viewed 4 April 2014).

<sup>52</sup> Above note 2, para 3, observation 3.

<sup>53</sup> Senator the Hon G Brandis, Attorney-General for Australia, Racial Discrimination Act (Press Conference Transcript, Parliament House, 25 March 2014). At <http://www.attorneygeneral.gov.au/transcripts/Pages/2014/First%20Quarter/25March2014-PressConference-ParliamentHouse.aspx> (viewed 4 April 2014).

<sup>54</sup> *Creek v Cairns Post Pty Ltd* [(2001) 112 FCR 352 at [16]. See also above note 45.

<sup>55</sup> *Eatoock v Bolt* (2011) 197 FCR 261 at [263]-[267].

<sup>56</sup> Victorian Equal Opportunity and Human Rights Commission, Submission to the Australian Government: Freedom of Speech (Repeal of s 18C) Bill 2014, 15 April 2014, pp 8-10. At <http://www.humanrightscommission.vic.gov.au/index.php/news-and-events/commission-news/item/778-submission-to-proposed-amendments-to-racial-discrimination-act> (viewed 15 April 2014). See also the Australian Human Rights Commission's submission, above note 2.

<sup>57</sup> *Discrimination Act 1991* (ACT) s 67; *Anti-Discrimination Act 1977* (NSW) s 20D; *Anti-Discrimination Act 1991* (Qld) s 131A; *Racial Vilification Act 1996* (SA) s 4; *Racial and Religious Tolerance Act 2001* (Vic) s 24; *Criminal Code* (WA) ss 77, 78, 80A and 80B. The exceptions are Tasmania and the Northern Territory which do not have any criminal prohibitions on racial vilification.

<sup>58</sup> *McGlade v Lightfoot* (2002) 124 FCR 106 at 116 [42] (citing with approval *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615, *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 at 355 [12], and *Jones v Scully* (2002) 120 FCR 243, 268-269 [98]-[100]); *Eatoock v Bolt* (2011) 197 FCR 261 at [242]; *Clarke v Nationwide News Pty Ltd trading as The Sunday Times* (2012) 201 FCR 389 at [46]. See also the Explanatory Memorandum to the Racial Hatred Bill 1994 (Cth), p 10, dealing with the analogous position under the *Sex Discrimination Act 1984* (Cth).

<sup>59</sup> *Clarke v Nationwide News Pty Ltd trading as The Sunday Times* (2012) 201 FCR 389 at [46].

<sup>60</sup> *Jones v Scully* (2002) 120 FCR 243 at [99]; *McGlade v Lightfoot* (2002) 124 FCR 106 at [44]-[45].

<sup>61</sup> Gillian Triggs, President Australian Human Rights Commission, *Race law changes seriously undermine protections*. At <http://www.humanrights.gov.au/news/stories/race-law-changes-seriously-undermine-protections> (viewed 4 April 2014). Article originally published in The Australian on Friday 28 March 2014.

<sup>62</sup> *Bropho v HREOC* (2004) 135 FCR 105 at 128-129 [81] (French J).

<sup>63</sup> Above note 2, paras 138-139.

<sup>64</sup> See *IW v City of Perth* [1997] HCA 30 at [63] (Kirby J).

<sup>65</sup> *Racial Discrimination Act 1975* (Cth) s 18A (this section does not apply to Part IIA of the RDA); *Sex Discrimination Act 1984* (Cth) s 106; *Disability Discrimination Act 1992* (Cth) s 123; *Age Discrimination Act 2004* (Cth) s 57.

<sup>66</sup> Above note 2, section 11.

<sup>67</sup> T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, Human Rights and Equal Opportunity Commission (2005), chapter 2. At <http://www.humanrights.gov.au/publications/social-justice-report-2005-home> (viewed 4 April 2005).

<sup>68</sup> See Oxfam Australia, Sign the Close the Gap pledge, <https://www.oxfam.org.au/my/act/sign-the-close-the-gap-pledge> (viewed 4 April 2014).

<sup>69</sup> *National Indigenous Reform Agreement*, Council of Australian Governments, p A-16. At [http://www.federalfinancialrelations.gov.au/content/npa/health\\_indigenous/indigenous-reform/national-agreement\\_sept\\_12.pdf](http://www.federalfinancialrelations.gov.au/content/npa/health_indigenous/indigenous-reform/national-agreement_sept_12.pdf) (viewed 4 April 2014).

<sup>70</sup> Drawn from the Australian Human Rights Commission's submission: above note 2.

<sup>71</sup> Drawn from the Australian Human Rights Commission's submission: above note 2.

<sup>72</sup> *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389.

<sup>73</sup> *Jones v Scully* (2002) 120 FCR 243.