AUSTRALIAN LAWYERS FOR HUMAN RIGHTS

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Committee Secretary
Parliamentary Joint Committee on Human Rights
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Dear Committee Secretary

Inquiry into Freedom of Speech in Australia

Australian Lawyers for Human Rights (**ALHR**) is pleased to provide this submission in relation to this Inquiry.

ALHR was established in 1993 and is a national network of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and a secretariat at La Trobe University Law School in Melbourne. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

Summary

In brief, we respond to the questions in the Terms of Reference as follows:

	Question	Response
1	Whether the operation of Part IIA of the *Racial Discrimination Act 1975* (Cth) imposes unreasonable restrictions upon freedom of speech,	No
	and in particular whether, and if so how, ss. 18C and 18D should be reformed.	By strengthening 18C
2	Whether the handling of complaints made to the Australian Human Rights Commission (**the Commission**) under the *Australian Human Rights Commission Act 1986* (Cth) should be reformed.	No
3	Whether the practice of soliciting complaints to the Commission (whether by officers of the Commission or by third parties) has had an adverse impact upon freedom of speech or constituted an abuse of the powers and functions of the Commission, and whether any such practice should be prohibited or limited.	No
4	Whether the operation of the Commission should be otherwise reformed in order better to protect freedom of speech and, if so, what those reforms should be.	No

ALHR strongly submits that it is not appropriate for Australian legislation to retreat from the values and standards required by international law and which have been associated with adequate protection from racial vilification in so many global jurisdictions.

We re-iterate in this submission many of the concerns we expressed in 2014 in response to the proposed amendments to the *Racial Discrimination Act 1975 (Cth)* (**RDA**) by the *Freedom of Speech (Repeal of s. 18C) Bill 2014* (the **2014 Bill**).

We have considered the recommendations of the Australian Law Reform Commission (the **ALRC**) in its *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* [ALRC Report 129 – December 2015], in particular Chapter 4 – "Freedom of Speech" (the **Report)** and nothing in the recommendations in that Chapter or flowing from it is inconsistent with our views in this submission.

We believe that it is not necessary to amend the RDA but that if any amendment is sought it should involve strengthening section 18C. This is discussed in detail in Section 10.

We respond to the Terms of Reference in a different order from that in which the questions are posed, as set out in the table of contents below.

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How can one truly exercise one's rights and freedoms if one lives in a society that tolerates expression that denies one's equal dignity as a human being?[1]

1. Introduction

ALHR submits that the need for any change to the RDA is not clear. For several years, arguments in favour of a change to the current provisions[2] have been made on the basis of the need to reduce the role of the State in limiting free speech.[3] ALHR submits that these arguments are not persuasive (see Sections 6 and 7) and that international law places a clear obligation on the State to limit racial vilification (see Section 8).

2. The complaints-handling procedures of the Commission: conciliation, not litigation

> *Whether the handling of complaints made to the Australian Human Rights Commission ("the Commission") under the Australian Human Rights Commission Act 1986 (Cth) should be reformed*

2.1 We see no reason why the complaints-handling procedures of the Commission should be reformed. To the best of our knowledge the Commission's procedures work satisfactorily and with minimum cost and inconvenience to all parties.

2.2 Should the Commission itself propose any clarificatory changes to the legislation, we would be likely to support those changes as the Commission is in the best position to know what changes, if any, would assist in streamlining its procedures whilst protecting the human rights of Australians.

> *in particular, in relation to: the appropriate treatment of:*
>
> *(i) trivial or vexatious complaints; and*
> *(ii) complaints which have no reasonable prospect of ultimate success;*

2.3 Trivial and vexatious complaints are already covered under sections 20(2)(c)(ii) and 46PH (1)(c).

2.4 The two questions "*Whether the handling of complaints made to the Australian Human Rights Commission ("the Commission") under the Australian Human Rights Commission Act 1986 (Cth) should be reformed, in particular, in relation to:*

> - *… complaints which have no reasonable prospect of ultimate success [or]*
> - *…. the relationship between the Commission's complaint handling processes and applications to the Court arising from the same facts "*

appear to entirely misunderstand the aim of the legislation.

2.5 The aim of the legislation is to encourage conciliation – for example, by assisting the perpetrator to understand how their words are capable of causing harm not just to the direct victims, but to the fabric of our society.

2.6 The aim of the legislation is not to facilitate 'successful' court cases by victims of racial vilification. Quite the contrary. Therefore the likelihood or otherwise of the victim being able to prosecute a 'successful' court case against the perpetrator is irrelevant to the

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1 Jean-François Gaudreault-DesBiens, "From Sisyphus's Dilemma to Sisyphus's Duty? A Meditation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide" (2001) 46 *McGill L.J.* 1117, 1135.

2 being Part IIA of the RDA.

3 http://www.abc.net.au/lateline/content/2014/s3971446.htm, accessed 14 April 2014.

Commission's educative and conciliatory role. The answer to each of these questions can only – so long as the Commission, through its President, holds the role of conciliator - be "No".

2.7 We do not believe there is any need to reform the legislation in order to ensure that:

(a) persons who are the subject of complaints are afforded natural justice;

(b) complaints are dealt with in an open and transparent manner;

(c) complaints are dealt with without unreasonable delay;

(d) complaints are dealt with fairly and without unreasonable cost being incurred either by the Commission or by persons who are the subject of such complaints.

3. 'Soliciting' complaints

> ***Whether the practice of soliciting complaints to the Commission*** *(whether by officers of the Commission or by third parties) has had an adverse impact upon freedom of speech or constituted an abuse of the powers and functions of the Commission, and whether any such practice should be prohibited or limited**.***

3.1 ALHR is very concerned by what is meant by "soliciting complaints to the Commission." Does it mean people speaking about the Commission's functions and encouraging those who believe their relevant rights have been infringed to seek the Commission's assistance? If so, we strongly support such behaviour.

3.2 Open and equal access to legal redress is fundamental to the rule of law. The right of access to legal redress is protected at international law and the provision of information about rights of redress forms a critical part of ensuring that there is equal access to justice. Educating the community about its own role and function is and should an essential part of the remit of any Court, Tribunal or Commission.

3.3 The provision of information about rights of redress and the role and function of judicial and conciliatory bodies likewise is a valid aspect of the role of any lawyer, community legal centre, or civil society group. Certainly the provision of public information about legal rights and about the functions of judicial and conciliatory bodies should not be prohibited or limited in any way.

> *Whether the practice of soliciting complaints to the Commission (whether by officers of the Commission or by third parties)* ***has had an adverse impact upon freedom of speech*** *or constituted an abuse of the powers and functions of the Commission, and whether any such practice should be prohibited or limited*

3.4 Nor is it clear how encouraging victims of abuses to seek the remedies to which they are entitled by law has an adverse impact upon freedom of speech. Whose speech would thereby be limited? What speech would be discouraged? One can only assume that it would be the speech of persons who don't want the Commission to exist or succeed in its conciliatory tasks, and/or persons who want to use speech which amounts to an offence under the RDA.

3.5 Why do the terms of reference evidence no similar concern about discussing human rights abuses in the area of discrimination against women, for example? No one has suggested that to encourage women who are discriminated against to pursue their legal rights amounts to a restriction on free speech. How could it? The same reasoning must apply here.

> *Whether the practice of soliciting complaints to the Commission* ***(whether by officers of the Commission or by third parties) has*** *had an adverse impact upon freedom of speech or* ***constituted an abuse of the powers and functions of the Commission, and whether any such practice should be prohibited or limited***

3.6 It is extraordinary that the Attorney General's terms of reference appear to suggest that there should be any kind of prohibition or limitation upon any person - in any capacity - who publicly encourages Australians to pursue avenues of redress which are legally open to them. That would indeed be a restriction on free speech. It would also dangerously undermine the rule of law. We trust that we have misunderstood the question but cannot find any other meaning in it.

3.7 ALHR submits that the reference to 'officers of the Commission' appears entirely inappropriate. It is clearly the role of the Commissioners, given their tasks of education, inquiry and conciliation, to engage in public conversations about the work of the Commission and about human rights generally. In doing so they are not in any way abusing their powers or functions. It would be completely inappropriate to limit the speech of officers of the Commission in the manner suggested.

3.8 Nor is it clear what third parties are contemplated in the terms of reference nor why third parties should be prevented from exercising their free speech rights and enforcing the RDA. Is the implication that lawyers should not be able to give advice, or advertise that they can give advice, about an Australian's legal avenues of redress in relation to racial vilification? That would be an outrageous restriction on the free speech of lawyers and an affront to the rule of law that would completely undermine the objects and enforcement of the RDA and leave victims of racial vilification without legal assistance. If this is not the meaning of the terms of reference, ALHR requests the provision of more specific information as to who the 'third parties' referred to are.

4. Racial Discrimination Act and freedom of speech

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

4.1 The operation of Part IIA of the RDA does not impose unreasonable restrictions upon freedom of speech (in the sense given in the terms of reference).

4.2 We do not believe that ss. 18C and 18D need reform but if they are reformed:

(a) it should be by strengthening s 18C and reducing the exemptions in s 18D. In particular the defence of 'genuine belief' in s 18D(c)(ii) should be removed, particularly because of the internal tension in that subclause with the concept of a 'fair comment'; and

(b) the two sections should be combined so that politicians and commentators can no longer talk about the offence of racial vilification without taking account of the extensive exemptions available.

4.3 We note that the ALRC Report recommends that consideration of s 18C "should not take place in isolation" (4.209 and following), which is one problem with this inquiry. As the ALRC Report makes clear,[4] section 18C should be considered in the context of the innumerable laws at both federal and state levels which far more seriously impinge upon freedom of speech than does s 18C, including by allowing civil actions for damage to reputation, as in

4 Page 90 and following, and similarly, see Paul Farrell, "Beyond 18C: six barriers to freedom of speech in Australia, *The Guardian Online*, 7 November 2016, accessed 8 November 2016.

the case of defamation law, or by criminalising particular speech.[5]

4.4 Against the background of such extensive legal restrictions on free speech, it can be seen that despite the harms that it inflicts, racist speech is dealt with much more gently by federal law than is a wide range of other speech.

5. What is racism and how does it work?[6]

5.1 Racist concepts are kept alive through both public and private communication of racist viewpoints and the use of racist scapegoating. Racism justifies discriminatory treatment on the basis of the targeted person's purported 'race' or similar characteristics (cultural, biological, historical etc) which are often inaccurate descriptions of the target group.[7]

5.2 Racism causes direct and indirect harm to the people targeted and their communities[8] including:

(a) emotional pain - reducing the victims' desire and ability to express themselves freely, and to participate fully in education, work and public or political life;

(b) physical harm including, in the case of children, higher risk of anxiety and depression, behaviour difficulties, suicide and self-harm, sleep difficulties, systemic inflammation, risk factors for cardiovascular disease and increased cellular aging,[9]

(c) silencing of those persons, reducing their free speech rights;[10]

(d) discrimination against those persons, limiting their social resources and participation in democratic society.

5.3 Racism also fundamentally harms our democratic processes and encourages Australians to reject the notion of an inclusive democracy by:

(a) encouraging others to mistreat the targeted group;

(b) disseminating misinformation and false stereotypes;

(c) promoting inequality and unequal treatment;

(d) denigrating human dignity;

(e) discouraging or 'chilling' general opposition to racist groups;

(f) discouraging fundamental participatory aspects of democracy.

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5 The Report identifies the following laws which criminalise speech: the *Criminal Code* provisions relating to treason, urging violence, advocating terrorism, the *Crimes Act* offences of treachery and breach of confidentiality, and the *Criminal Code* provisions relating to terrorist acts, offences and organisations, using the postal service in a menacing, harassing or offensive manner or for the purpose of transmitting material relating to committing suicide, incitement to commit an offence. Criminal sanctions in relation to speech that breaches secrecy or confidentiality obligations are also contained in seven other Commonwealth Acts, and provisions which do not expressly impose criminal sanctions but which impose a 'duty not to disclose' which might attract criminal sanctions are contained in another three: ALRC Report, pp 99 – 100.

6 This submission draws upon a number of sections in Tamsin Clarke, *Racism, Pluralism and Democracy in Australia: Re-conceptualising Racial Vilification* http://www.unsworks.unsw.edu.au/primo_library/libweb/action/dlDisplay.do?dscnt=1&fromLogin=true&dstmp=1321253783332&docId=unsworks_631&vid=UNSWORKS, accessed 23 April 2014.

7 Peter Jackson, *Race and Racism: Lessons in Social Geography*, Allen and Unwin, London, 1987, 12 -13.

8 See for example M. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989) *Michigan Law Review* 87(8), 2320 at 2336 cited in Tim Soutphommasane, "Two freedoms: Freedom of expression and freedom from racial vilification" *Alice Tay Lecture in Law and Human Rights 2014,* Australian National University, 3 March 2014 accessed 28 April 2014, https://www.humanrights.gov.au/news/speeches/two-freedoms-freedom-expression-and-freedom-racial-vilification.

9 Dr Naomi Priest, "Research reveals what racism can do to a child's body", Unicef Australia website, accessed 25 November 2016 at: http://www.unicef.org.au/blog/november-2016/research-reveals-what-racism-can-do-to-a-childs-body?utm_source=facebook&utm_campaign=racism&utm_medium=page-post&utm_content=research-reveals-blog-post-1

10 Soutphommasane, op.cit (2014).

It promotes ideas opposed to democratic values and undermines a stable and plural Australian society.

5.4 Justification for limiting racist speech is founded on the realities of that harm. The real impacts of race hate speech in society were recognised in Australia by the introduction of the *Racial Hatred Act 1995* (Cth), in response to three major inquiries in Australia, including the Royal Commission into Aboriginal Deaths in Custody.

5.5 The evidence is that encouraging, accepting and tolerating racism causes it to increase and causes the forms that racism takes to become more harmful and more violent.[11] Regulation is essential in order to protect both targeted groups and the wider society.

5.6 It is generally accepted both in international law and in other countries (see Section 9) that it is possible to achieve an appropriate regulatory balance between free speech, an individual's right to be free from racist vilification and have their human dignity respected, and a society's right to protect itself from false statements and acts which undermine its democratic system.

6. Understanding 'Free Speech'

WITHOUT Freedom of Thought, there can be no such Thing as Wisdom; and no such Thing as public Liberty, without Freedom of Speech; which is the Right of every Man, as far as by it, he does not hurt or control the Right of another.
– Benjamin Franklin

6.1 Changes to the RDA have been promoted by this government and others on the basis of the supposed desirability of reducing the role of the State in limiting free speech – presumably following the United States of America's First Amendment proposition (which is, however, not always observed in practice[12]) that 'free speech' is an absolute value that must not be regulated.

6.2 As explained in Sections 8 and 9, that is not a proposition reflected in international law nor by other first world countries, which recognise that it is not possible to have real freedom without equality and – to return the quotation at the beginning of this submission – human dignity.

6.3 Even if, theoretically, 'more speech' could, if received by the same audience, cancel out or 'cure' the effect of the original public hate speech, there are practical reasons why this cannot occur. "Ordinary" people still have unequal access to mass media outlets such as national newspapers and national television and radio, limiting their actual influence. A letter to the editor or online comment on an article will not have the same prominence and audience as the original speech, or be of the same interest.[13] As the Race Discrimination Commissioner has rightly said:

> … the marketplace of ideas can be distorted; it is not an arena of perfect competition, as economists might put it. We cannot realistically expect that the speech of the strong can be countered by the speech of the weak.[14]

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11 '…sections 18C and 18D were introduced in response to recommendations of major inquiries including the *National Inquiry into Racist Violence* and the *Royal Commission into Aboriginal Deaths in Custody*. These inquiries found that racial hatred and vilification can cause emotional and psychological harm to their targets, and reinforce other forms of discrimination and exclusion. They found that seemingly low-level behaviour can soften the environment for more severe acts of harassment, intimidation or violence by impliedly condoning such acts': Australian Human Rights Commission, "At a glance: Racial vilification under sections 18C and 18D of the Racial Discrimination Act 1975 (Cth)", https://www.humanrights.gov.au/glance-racial-vilification-under-sections-18c-and-18d-racial-discrimination-act-1975-cth, accessed 28 April 2014.

12 See generally, Stanley Fish, *There's No Such Thing as Free Speech and It's a Good Thing Too*, Oxford University Press, Oxford and New York, 1994.

13 Thus in "Filtering the lies, satire and fake news: our defective detectors play us all for fools" *Sydney Morning Herald*, 14 November 2016, p 16, Tim Dick pointed out that while the fake information that the Pope had endorsed Donald Trump was shared 960,000 times, the rebuttal was only shared 36,000 times.

14 Soutphommasane (2014), op.cit.

6.4 The mass media presents complex situations in terms of stereotypes[15] and appeals to prejudices rather than reason. It has acquired an enormous potential for harm[16] which has not been taken into account in philosophically-based arguments for free speech. Proponents of free speech such as John Stuart Mill assumed that the speech to be protected would be rational debate amongst a relatively small, educated elite. They did not envisage how speech, music and imagery would be transmitted across continents in a "systematic avalanche of falsehoods"[17] to manipulate the emotions and opinions of millions.[18]

6.5 Modern analysis of communication understands that racist speech can still have an effect even if its message is rejected. At some level racism is planted in our minds as an idea that may hold some truth.[19] Racism works "by socializing, by establishing the expected and the permissible."[20]

6.6 First Amendment jurisprudence is inadequate in the Australian context. It is heavily dependent upon economic metaphors, individualistic notions of identity and outdated theories of communication. It assumes that 'free speech' in terms of lack of government intervention against racist speech is essential to 'democracy' whereas it would appear from any minimal examination of racist harms that the opposite is the case. It ignores the content, context and effect of harmful speech, except in extreme cases, with the result that socially harmful speech is protected in the name of 'free speech'.

6.7 If Australian legislation is to give primacy to redressing and preventing harm, and if the Australian legal system is to be perceived as a viable system which does not condone racism or racial vilification, we must look outside the First Amendment paradigm which is based on abstract arguments, and seek a contextual engagement with the realities of racist harm.

7. The role of the State as legislator

7.1 ALHR notes comments made by the Attorney-General in an interview on ABC's *Lateline* program that people should have a general "freedom to spread untruths."[21] This suggests that the Government is seeking to allow a society that permits public attacks on human dignity based on race, regardless of the facts, of reasonableness and of good faith. This would leave people already experiencing marginalisation in a position where even the truth cannot provide a basis for remedy. ALHR can see no public benefit to be derived from allowing racial vilification based on factual inaccuracies and distortions of the truth. In the words of the Racial Discrimination Commissioner, "it seems perverse to say that we must all tolerate hate, when not everyone has to bear the burden of tolerance in the same way".[22]

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15 Puplick in his Forward to Anti-Discrimination Board of NSW (principal author, Ruth McCausland), *Race for the Headlines*, 2003, 6, citing Murray Edelman, *The Symbolic Uses of Politics*, University of Illinois Press, Urbana, 1967, 31. See also Peter Manning, *Dog Whistle Politics and Journalism: Reporting Arabic and Muslim people in Sydney newspapers*, Australian Centre for Independent Journalism, University of Technology, Sydney, 2004, discussed on Mike O'Regan's "Media Report", Radio National 4 March 2004.

16 See David Reisman, "Democracy and Defamation: Control of Group Libel" (1942) 42 *Colum L. Rev* 727 at 728 (1942a) and David Riesman, "Democracy and Defamation: Fair Game and Fair Comment I" (1942) 42 *Colum. L. Rev.* 1085 at 1089 ff, discussing the role that vilification and personal defamation played in the rise of the Nazis.

17 Reisman (1942a).

18 Canadian Cohen Committee Report, 1969, quoted in Richard Moon, "Drawing lines in a culture of prejudice: *R.* v. *Keegstra* and the Restriction of Hate Propaganda" (1992) *U.B.C. Law Review* 99 at 117.

19 Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado and Kimberlè Williams Crenshaw, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, Westview Press, Boulder, 1993, 25.

20 See Kathleen E. Mahoney, "*R v. Keegstra*: A rationale for regulating pornography?" (1992) 37 *Mc Gill Law Journal* 242 at 251, discussing the socialisation of pornography.

21 The interviewer noted that *Eatock v Bolt* was not about freedom of opinion, but the freedom to spread untruths, and put to the Attorney-General that his position is that this freedom should exist. He agreed, but carved out certain instances where such a freedom to spread untruths should not apply, such as in trade and commerce. See *Lateline* transcript of 25 March 2014, http://www.abc.net.au/lateline/content/2014/s3971446.htm, accessed 8 April 2014.

22 Dr Tim Soutphommasane, *Two Freedoms: Freedom of expression and freedom from racial vilification*, Alice Tay Lecture in Law and Human Rights 2014, Herbert and Valmae Freilich Foundation, Australian National University, available at:

Further, this position is fundamentally incompatible with the aims of the *International Convention on the Elimination of All Forms of Racial Discrimination* (**CERD**) (to eliminate all forms of racial discrimination), the relevant provisions of the *United Nations Declaration on the Rights of Indigenous Peoples* and the *International Covenant on Civil and Political Rights* (**ICCPR**), and Australia's related obligations. As one commentator has said:

> People don't need to have the right to be bigots – we can be better than that. We can have serious, mature debates about issues of significance without racial discrimination and vilification.[23]

7.2 Justification for limiting racist speech is founded on the acknowledged realities of that harm as a social injustice against which the State should take action. Failure to legislate undermines democracy, justice and equality.

7.3 While it has been argued that the law itself is not the "solution to all of society's ills,"[24] to quote Bhikhu Parekh:

> Because the law throws the society's collective moral and legal weight behind a particular set of norms of good behavior, it does have some influence on attitudes; its role is limited but nonetheless important.[25]

7.4 ALHR submits that the social conditions in Australia have not changed so much since 1995 that we no longer need protection from racial vilification. The very holding of this Inquiry, framed as it is, yet again sends a strong signal by the Federal Government that bigotry is not only acceptable, but that people have a right to publicly engage in it. In ALHR's view the 'right' to bigotry, coupled with the 'freedom' to spread untruths, are not proper policy goals for any modern society.

7.5 ALHR submits that for Indigenous peoples and other minority groups, the issue of how best to approach the issue of freedom of speech and freedom from racial vilification is not an abstract ideological discussion. There was extraordinary and urgent unified community opposition to the 2014 Bill, as no doubt there will be in relation to this Inquiry. ALHR submits that for Indigenous and other minority groups, the lived experience of racism and racial vilification informs this united opposition. The real impacts of racism make this an issue that is too important to be subjected to ideological experimentation. It is those sections of the community that will suffer the effects of getting the balance wrong. ALHR submits that Part IIA of the RDA has served Australia well since 1995, and there has been no case made for the amendment of the RDA as implicitly proposed by this Inquiry.

7.6 The 2014 Bill amounted to a proposal to legalise public racially vilifying speech that was factually incorrect and inflammatory.[26] That attempt should not be repeated. ALHR is a deeply concerned that the Federal Government fails to recognise that social cohesion is a necessary public interest that must be actively pursued in a multicultural society like Australia and that government has a crucial role in this process.

7.7 ALHR notes also that the silencing effect of racial hate speech and racial vilification upon victim communities in practice defeats the Government's stated purpose, which is to promote the freedom of speech.

7.8 Racism develops and reproduces itself within society through racist speech and ideas. While some people may see that as something that law cannot and should not change,

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http://freilich.anu.edu.au/sites/default/files/14%2003%2003%20Alice%20Tay%20Lecture%20Tim%20soutphommasane%20ANU.pdf, accessed 19 November 2016.

23 Dean Sherr, "18C won't stop mature debate on race. But small mindedness and arrogance might", *Guardian Online*, 15 August 2016, accessed 16 August 2016.

24 ABC radio interview with Tim Wilson, Human Rights Commissioner, "Law is not the solution to all of society's ills" 25 March 2014, http://www.abc.net.au/pm/content/2014/s3971254.htm, accessed 15 April 2014.

25 Bhikhu Parekh, "Is there a case for banning hate speech?" *The Content and Context of Hate Speech: rethinking regulation and responses,* Michael Herz and Peter Molnar (eds), Cambridge University Press, Cambridge, 2012,51.

26 See *Eatock v Bolt* [2011] FCA 1103 at [381] , Camb.

international law and legislation in comparable countries demonstrates that State regulation of racist speech is accepted across the world – with no obvious ill-effects upon the democratic structures of those countries. Speech is not so fragile as First Amendment jurisprudence might suggest.

7.9 It is imperative that ideas such as 'free speech' be analysed rather than uncritically accepted as universal values with agreed content. Such deconstruction must be followed by reconstruction, in which law has a primary role to play. As commentator Gay Alcorn recently mused:

> Restraint and politeness may seem quaint, but these are laws that could reflect our best selves, our best attempt at balancing crucial principles.[27]

8. International law

8.1 Australia is a party to the ICCPR. Article 19 protects freedom of expression. Article 19(3) contemplates limits to freedom of expression in the following terms:

> The exercise of the right [to freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

8.2 Article 20 states that, '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.

8.3 Article 4 of the CERD also requires State Parties to criminalise all dissemination of ideas based on racial superiority or hatred and incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any racial or ethnic groups. The Article is preventative in nature "to deter racism and racial discrimination as well as activities aimed at their promotion or incitement".[28]

8.4 Australia continues to have in place a reservation regarding Article 4 of CERD. Part IIA of the RDA is the closest that Commonwealth legislation has come to giving effect to CERD. ALHR submits than the RDA should be strengthened, not weakened (which would have been the effect of the 2014 Bill), including through the inclusion of the concept of 'human dignity'.

8.5 Human dignity has been described as the "foundational concept" of international human rights law.[29] The ICCPR proclaims that the rights in the Covenant derive from the "inherent dignity of the human person".[30] The preamble to CERD recalls that the Charter of the UN is based on the principles of the dignity and equality in all human beings and the UDHR[31] proclaims that all human beings are born free and equal in dignity and rights.[32]

8.6 The *Oxford Dictionary* defines 'dignity' as "the state or quality of being worthy of honour or respect". Human rights law recognises that everyone is inherently worthy of respect because they are human. A person has a fundamental right not to be "unjustly debased".[33] Part IIA of

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27 "I used to think we didn't need 18C. But could a version of it represent our best selves" *The Guardian Online*, 17 November 2016, accessed 17 November 2016.

28 Committee on the Elimination of Racial Discrimination, General Recommendation 7, Measures to eradicate incitement to or acts of discrimination (Thirty-second, 1985), U.N. Doc. A/40/18 at 120.

29 Jack Donnelly, *Human Dignity and Human Rights*, June 2009, 3: http://www.udhr60.ch/report/donnelly-HumanDignity_0609.pdf, accessed 15 April 2014.

30 See preamble to ICCPR and preamble to the *International Covenant on Economic, Social and Cultural Rights*.

31 *Universal Declaration of Human Rights*.

32 Preamble to UDHR.

33 William A Parent, "Constitutional Values and Human Dignity", *The Constitution of Rights: Human Dignity and American Values*, M. J. Meyer and W. A. Parent (eds) Cornell University Press, Ithaca, 1992, 64.

the RDA protects a person from vilification by virtue of their race, colour or national or ethnic origin, qualities which are immutable and inherent to them as human beings. ALHR submits that the current provisions properly protect a person's human dignity while the 2014 Bill provides inadequate protection.

8.7 ALHR submits that the reference to acts 'reasonably likely to offend, insult or humiliate' should not be removed. To 'humiliate' is to injure a person's dignity and self-worth.[34] UNESCO has described humiliation as an offence against human dignity.[35] The UN Committee which monitors the implementation of CERD has commented that states should protect people from abusive and insulting speech and dehumanising discourse on the basis of race, colour or national or ethnic origin.[36] Any narrow focus on incitement of hatred and fear of physical violence would fail to capture the majority of harmful speech amounting to racial vilification.

8.8 It is also likely that racial insults and humiliation violate Article 17(1) of the ICCPR - the right to protection from attacks on honour and reputation.[37] Article 19(3) of the ICCPR places a clear limitation on the freedom of expression in relation to the respect for the reputation of others. The CERD Committee has commented that: "the degree to which acts of racial discrimination and racial insults damage the injured party's perception of his/her own worth and reputation is often underestimated" and in accordance with Art 6 of CERD "authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate."[38]

8.9 ALHR submits that international law:

- places an obligation on the State to proscribe racial hatred and discrimination, and
- confirms that such proscription is a legitimate restriction on freedom of speech.

To properly comply with international law, the RDA definitions of vilification and intimidation should be more broadly defined; protection from actions that offend, insult and humiliate should be retained.

9. Laws in comparable jurisdictions

9.1 This section examines contemporary racial vilification legislation in other comparable jurisdictions, focusing primarily on restrictions through civil and criminal legislation.[39]

9.2 ALHR submits that the Australian Government should be concerned that the RDA does not leave Australians with lesser legal protections against racial vilification than those required by Australia's international law obligations and those currently granted to citizens in most other culturally diverse modern democracies.

9.3 ALHR notes that previous changes suggested to the RDA in 2014 would have provided significantly less protection than that enjoyed by citizens of comparable jurisdictions. ALHR submits that the watering down of the RDA is likely to not only restrict the right of Australians to live a life free from intimidation and harassment on the grounds of race, but would also significantly reduce Australia's international standing.

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34 The *Oxford Dictionary* defines 'humiliate' as: "make (someone) feel ashamed and foolish by injuring their dignity and self-respect, especially publicly".

35 See preamble to UNESCO *Declaration on Race and Racial Prejudice*.

36 Spain, CERD, A/59/18 (2004) 32 at para. 170 (abusive and insulting speech, ill-treatment and violence by police); CERD General Recommendation XXIX (Sixty-first session, 2002): On Article 1, Paragraph 1, of the Convention (Descent), A/57/18 (2002) 111 at paras. a, qq and vv (caste members subject to dehumanizing discourses referring to pollution or untouchability; and generalized lack of respect for their human dignity and equality). See also Finland, CERD, A/58/18 (2003) 69 at para. 407; Argentina, CERD, A/59/18 (2004) 45 at para. 245.

37 *Pinkney v. Canada* (R.7/27) (27/1978), ICCPR, A/37/40 (29 October 1981) 101 at paras. 23, 26 and 27.

38 CERD General Recommendation XXVI (Fifty-sixth session, 2000): Article 6 of the Convention, A/55/18 (2000) 153.

39 It is not possible within the limits of this submission to consider in detail all jurisdictions.

Civil and Criminal Legislative Measures

9.4 The United Kingdom, Canada, New Zealand, Ireland, Germany, the Netherlands, the Council of Europe and most other modern states prohibit racial vilification and racist hate speech[40] in terms similar to, or broader than, the existing Part IIA.

New Zealand

9.5 New Zealand prohibits hate speech under the Human Rights Act 1993. Section 61 (Racial Disharmony) makes it unlawful to publish or distribute "*threatening, abusive, or insulting...matter or words likely to excite hostility against or bring into contempt any group of persons...on the ground of the colour, race, or ethnic or national or ethnic origins of that group of persons*." Inciting Racial Disharmony also creates liability.[41]

Canada

9.6 Under the Canadian Criminal Code it is an offense to advocate or promote genocide against a particular race and to publicly incite hatred against any identifiable group by communicating statements in public which are likely to lead to a breach of the peace.[42] The communication of statements, other than in private, which willfully promote hatred against an identifiable group is also prohibited.[43] These are indictable offences with maximum prison terms of two to fourteen years.[44] It is not necessary to prove that the communication actually caused the hatred of a third party.

United Kingdom

9.7 In the United Kingdom several statutes criminalise hate speech.[45] Any communication which is threatening, abusive, and intended to harass, alarm, or distress is forbidden. The penalties for hate speech include fines, imprisonment, or both. Pursuant to the *Public Order Act 1986 (UK)* it is an offence to use, display, publish, show or distribute any words, images or behaviour (including a public broadcast or a play) which are "threatening or abusive" and which are either intended or likely to stir up racial hatred.[46]

Europe

9.8 On 28 November 2008 the Council of Europe adopted *Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law*. This requires member states take action to criminalise conduct intentionally and publicly inciting violence or hatred directed against a group of persons defined by reference to race, colour, religion, descent or national or ethnic origin.[47]

9.9 States are similarly obliged to criminalise conduct publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes when the conduct is carried out in a manner likely to incite violence or hatred.[48] Article 2 of the Framework

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40 A non-exhaustive list of jurisdictions where racial hate speech is restricted in civil and criminal legislation includes: Belgium; Canada; United Kingdom; Brazil; Chile; Council of Europe; Croatia; Denmark; Finland; France; Germany; Iceland; Ireland; Netherlands; New Zealand; Norway; Serbia; Singapore; South Africa; Sweden. See generally: Australian Human Rights Commission, *An International Comparison of the Racial Discrimination Act 1975,*2008, accessed 28 April 2014, https://www.humanrights.gov.au/publications/international-comparison-racial-discrimination-act-1975-2008-chapter-6-racial.

41 http://en.wikipedia.org/wiki/Hate_speech, accessed 28 April 2014.

42 Criminal Code, RS 1985, c. C-46 s 318 and s 319.

43 Mugesera v. Canada (Minister of Citizenship and Immigration), 2005 SCC 40, [2005] 2 SCR 100 at 100-7.

44 Criminal Code, RS 1985, c. C-46 s 319(1) and 319(7).

45 See the *Public Order Act 1986*, the *Racial and Religious Hatred Act 2006* (England and Wales) and the *Criminal Justice and immigration Act 2008.* On 12 December 2012, the House of Lords voted in favor of amending the *Public Order Act* to remove the word "insulting". The amendment to the *Public Order Act* was duly passed into law, as section 57 of the *Crime and Courts Act 2013* (see http://www.legislation.gov.uk/ukpga/2013/22/section/57/enacted, accessed 28 April 2014.)

46 *Public Order Act 1986* (U.K.) c 64 ss 17-22.

47 Framework Decision 2008/913/JHA - OJ L 328/55 of 6.12.2008 Article 1(1)(a).

48 Ibid Article 1(1)(c) and (d).

Decision requires member states to also make punishable instigating, aiding or abetting the conduct referred to in Article 1.[49]

9.10 Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.[50]

Racial Harassment Legislation

9.11 In addition to the laws discussed above, several comparable jurisdictions have developed racial harassment legislation which also captures racial vilification and hate speech, defined by the European Union as:

> unwanted conduct related to racial or ethnic origin (which) takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.[51]

9.12 In the United Kingdom the *Crime and Disorders Act 1998 (UK*)[52] and the *Race Relations Act*[53] prohibit racial harassment. In Canada, harassment is a 'discriminatory practice' subject to the same civil penalties as racial discrimination.[54]

9.13 ALHR notes that although Australia has no comparable federal racial harassment law, s.18C of the RDA currently operates so as to capture some of the forms of racial harassment discussed above because it captures acts which 'humiliate' and 'insult'.

Balancing Freedom of Speech and restrictions on Racial Vilification

9.14 **In many countries, particularly European countries which enshrine the concept of human dignity, specific legislation against racist speech is not essential because of well established judicial understanding that racist speech attacks a person's human dignity and democratic values and therefore is not a protected form of speech.**

9.15 Article 10 of the European Convention on Human Rights guarantees the right to freedom of expression and to freely *"hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers".*[55] The convention also provides that the exercise of these freedoms carries with it duties and responsibilities, and acknowledges restrictions to this right, including for "*the protection of the reputation or rights of others*"[56].

9.16 The European Court of Human Rights (**ECHR**) has held that remarks directed against the Convention's underlying values do not enjoy protection[57] as "*there can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention*".[58]

9.17 Similarly, while "freedom of thought, belief, opinion and expression" is guaranteed in the Canadian Charter of Human Rights and Freedoms, a majority of the Canadian Supreme Court found prohibitions on racial hate speech are justified in a free and democratic society because:

> the law had a rational connection to its objective, it was not overly limiting, and the seriousness of the violation was not severe, as the content of the hateful expression has little value to protect."

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49 Ibid Article 2.

50 Ibid Article 1(2).

51 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective or racial or ethnic origin [2000] OJ L180/22, art 2(3).

52 *Crime and Disorder Act 1998* (UK) c 37, s 32.

53 *Race Relations Act 1976* (UK) c 74 s 3A.

54 Australian Human Rights Commission (2008) op.cit, Chapter 6 at 6.8.3.

55 *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights, as amended) (ECHR) Article 10.

56 Council of Europe *Fact Sheet on Hate Speech*, Council of Europe, November 2008.

57 Judgements of 4.12.2003 (*Gündüz v. Turkey)* and of 24.6.2003 (*Garaudy v. France)*.

58 *Gunduz v Turkey* (2003) Eur Court HR 35071/97 at para 41.

> "(P)arliament's objective of preventing the harm caused by hate propaganda is of sufficient importance to warrant overriding a constitutional freedom.[59]

9.18 Many countries recognise that specific legal prohibition of hate speech may however be necessary in order to meet their international and regional treaty obligations. Furthermore they have recognised its value to modern legal systems, not only for the protection it affords to individuals and groups, but for the message that it sends. The ECHR recognises that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society[60] and that it may be necessary in '*democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance*'.[61]

9.19 Legislators in the above-mentioned jurisdictions may specifically balance the right to be free from racial vilification and the right to legitimate free expression through defences and exclusions[62].

9.20 For example, under section 319 of the Canadian Criminal Code, an accused is not guilty if the statements communicated were (1) true, (2) a good faith religious argument, (3) relevant to any subject of public interest the discussion of which was for the public benefit, and on reasonable grounds were believed to be true, or (4) a good faith identification of matters tending to produce hatred for the purpose of their removal.[63] The United Kingdom legislation contains one narrow exemption, which applies only to 'fair and accurate reports' of parliamentary or judicial proceedings.[64]

9.21 There is a consensus in other jurisdictions that appropriate exclusions require elements of truth, reasonableness and good faith.

10. Specific drafting problems with previous suggested changes to 18C

RDA should cover not only extremist speech

10.1 The 2014 Bill did not address the issue of direct hurt to victims unless the speech was so extreme as to amount to direct and immediate intimidation. It did not address the issue of how racist speech encourages others to mistreat the target group until the point at which the speech is so extreme that it incites actual hatred against the target group. It dealt only with an extremely narrow band of violent speech likely to be caught already by ordinary criminal law.

10.2 Such restrictions to the RDA are not appropriate. Extremist racist speech is not necessarily the most harmful, because its very extremism makes it less socially acceptable. **The most harmful racist speech is the (generally) 'less extreme' racist speech of public figures,[65] because people have a tendency to conform to the social mores that public figures express**. Racial vilification in 'public' discussions, media stereotyping and racist reporting still causes harm.

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59 *R. v. Keegstra*, [1990] 3 S.C.R. 697.

60 ibid, 8.

61 ECtHR judgments of 23.9.1994 (*Jersild v. Denmark*) and 6.7.2006 (*Erbakan v. Turkey*). See also the Judgment of 9.7.2013 (*Vona v Hungary*), specifically on freedom of assembly and association.

62 Australian Human Rights Commission (2008), op.cit, Chapter 6 at 6.5.

63 http://en.wikipedia.org/wiki/Hate_speech_laws_in_Canada and http://laws-lois.justice.gc.ca/eng/acts/c-46/page-156.html#docCont, accessed on 28 April 2014.

64 *Public Order Act 1986* (UK) c 64 s 26 and Australian Human Rights Commission (2008) op.cit, Chapter 6 at 6.5.

65 When reputable politicians make inflammatory racist statements, said a source at Scotland Yard, racist attacks increase: *Guardian Weekly* Editorial, "What was all that about?" 2-9 May 2001, 11, Matthew Weaver, "'Horrible spike' in hate crime linked to Brexit vote, Met police say", *Guardian on line*, 29 September 2016, accessed 10 November 2016. See also Human Rights and Equal Opportunity Commission, *Racist Violence: Report of National Inquiry into Racist Violence*, AGPS, Canberra, 1991,) 506 to 513 and Amanda Holpuch, 'Almost 100 hate-crime murders linked to a single website, report finds', *The Guardian*, 18 April 2014, http://www.theguardian.com/world/2014/apr/18/hate-crime-murders-website-stormfront-report, accessed on 23 April 2014.

10.3 The normal meaning of 'vilify' is to speak or write about someone in an 'abusively disparaging' manner, which is similar in scope to the current wording of s 18C. Any limitation in the RDA to acts which incite 'hatred' against the target group, as previously suggested, is inappropriate because "hatred" is an unreasonably stringent test, and not well judicially understood. Such a change is also likely to be ineffective: the more outrageous the act, the easier it is to argue that the act was unlikely to convince its audience to experience hatred of the targeted group.

10.4 Defining 'vilify' too narrowly substantially diminishes the scope of the legislation and weakens its efficacy. ALHR submits that section 18C should, if anything, be expanded, including by introduction of the concept of human dignity which is fundamental to human rights law. ALHR submits that any definition of racial vilification should include acts that*: abuse, defame, insult, malign, maliciously ridicule or denigrate the targeted person, including in a way which undermines their human dignity; promote, incite or encourage (1) any of those activities; or (2) hostility, enmity or ill will against, or mistreatment (including by violence) of, the targeted person by others.*

10.5 ALHR also submits that any definition of:

(a) vilification should include the matters covered in the European Union Framework Decision for Combating Racism and Xenophobia (2007)[66] and acts that encourage racial discrimination;[67]

(b) intimidation should cover acts reasonably likely to cause a person to (1) *hold serious fears concerning the life, health or welfare of; or (2) fear injury, violence, damage or harm occurring to: themselves, any dependants or family members or the property of any of them, including a reasonable apprehension of such results occurring if the targeted person responds to the act or acts of intimidation or if the targeted person seeks any public participation or involvement.*

Legislation must deal with race but race is not a reality

10.6 Race is not a biological reality and racists are often incorrect in their categorisations, referring to persons by reference to their supposed 'race' (colour, ethnicity, religion etc) and then claiming that such people have negative characteristics (and therefore by implication should be treated badly). The RDA should still apply in such situations because it is not the correctness or otherwise of the perpetrator's classification which is relevant, but (1) the perpetrator's negative intention, and (2) the effect of the act/speech (which can still hurt the victims and can still encourage racism in others even if the basis for the vilification is incorrect).

10.7 ALHR submits that the proscribed vilification should cover '*the supposed, alleged or perceived race, colour, national, ethno-religious, ethnic or cultural background of the targeted person or their family or dependants, and categorisations which use religion as a pretext or cover for targeting on a racist ground*' and that the connection should be that the act is 'by reference to' the racist grounds,[68] not 'because of' the racist grounds.

The 'reasonable standard' test

10.8 The test of whether an act is 'reasonably likely' to have the effect specified must consider the standards of the target group. The courts acknowledge that applying section 18C calls for an assessment of the reasonably likely reaction of the person or people within the group

66 By expanding 'vilification' to also cover acts that *deny, grossly belittle, trivialise or play down, approve of, attempt to justify or make excuses for the occurrence of, genocide or crimes against humanity.*

67 This would apply to the extent that the matters dealt with in section 9 of the RDA are not already covered in Part IIA: that is, in addition to the matters in the existing section 18C we would recommend also covering acts that *discourage the recognition, enjoyment, exercise or participation, on an equal footing, by targeted persons, of any legal or human right or fundamental freedom, whether in the political, economic, social, cultural or any other field.*

68 As used in the European Union *Framework Decision for Combating Racism and Xenophobia* (2007).

concerned.[69] The courts have compared the test to that applied in misleading and deceptive conduct cases. A hypothetical individual is adopted as a representative member of the class.[70] This standard is vital to the proper functioning of the RDA. The importance of the victim's perspective in determining the reasonableness of the speech has been highlighted in Australian[71] and international law, and psychology and social theory literature.

10.9 ALHR agrees with Justice Bromberg's statement in *Bolt v Eatock*[72] that importing 'general community standards into the test of the reasonable likelihood of offence runs a risk of reinforcing the prevailing level of prejudice.' The Federal Court and the Commission (and its predecessor, HREOC) have made similar comments.[73]

10.10 To change the standard of reasonableness to that of an ordinary reasonable person, rather than a hypothetical reasonable representative of the target group, would make nonsense of the legislation and lead to a perpetuation of dominant values and understanding. 'Ordinary' or majority group members are not themselves hurt by racist slurs which are irrelevant to them. As then HREOC Commissioner Graham Innes said, 'the ordinary reasonable man on the Clapham omnibus (who is not likely to be an Australian Aborigine from Western Australia of the Nyungar group) is not reasonably likely to be offended by something which is said concerning the culture, deceased ancestor or mixed ancestry of an Australian Aborigine living in Western Australia of the Nyungar group.'[74]

10.11 The importance of the viewpoint of the victim of racial vilification can readily be seen when comparison is made with the law's application to victims of sexual harassment. As Justice Beezer said in the US case of *Ellison v Brady,*[75] 'conduct that many men consider unobjectionable may offend many women'.[76] He stated that 'if we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.' As he noted: 'a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.'

10.12 Importantly, Beezer J concluded that 'the reasonable woman standard does not establish a higher level of protection for women than men. Instead, a gender-conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men.'

10.13 ALHR submits that it is necessary for the RDA to take into account the reactions of a reasonable person in the situation and context of a targeted person; that is, a hypothetical reasonable representative of the targeted group.

Section 18D exemptions

10.14 Sections 18C and 18D interact to provide appropriate protection from racial vilification in a way that is consistent with the right to freedom of speech set out in Article 19 of the ICCPR and Australia's international obligations under Articles 19 and 20. The threshold elements of reasonableness and good faith have both objective and subjective elements,[77] and involve

69 *Bolt v Eatock* [2011] FCA 1103, at 241.

70 Ibid, at 244.

71 See *Nyungar Circle of Elders v West Australian Newspapers Ltd* [2001] HREOCA 1 (12 April 2001). HREOC Commissioner Graham Innes noted the wide differences in viewpoints as to the offensiveness of the publication by a West Australian newspaper of a cartoon relating to the return of bones of a deceased Aboriginal ancestor. Notably, in that case, general community standards in the application of the reasonableness test in section 18D of the RDA enabled a finding that the publication was not unlawful.

72 Ibid, 1.

73 *Nyungar Circle of Elders v West Australian Newspapers Ltd* [2001] HREOCA 1 (12 April 2001) and *Wanjurri v Southern Cross Broadcasting (Aus) Ltd* [2001] HREOCA 2.

74 *Nyungar Circle of Elders v West Australian Newspapers Ltd* [2001] HREOCA 1 (12 April 2001).

75 924 F.2d 872.

76 Ibid.

77 Bromberg J sets out the elements of reasonableness and good faith at [341] in *Eatock v Bolt* [2011] FCA 1103.

the concept of proportionality.[78] These elements together strike an appropriate balance between regulation and freedom of speech.[79] Case law[80] demonstrates that s 18C does not protect statements that are a "mere slight or insult".[81]

10.15 The fact that speech is in the course of public discussion is of itself no safeguard. As mentioned, racist public speech is the most dangerous form of racial vilification. Additional safeguards such as requirements of truthfulness, reasonableness, fairness and accuracy are required. Without those safeguards, even reporting or commentary could be carried out in a racially vilifying or intimidating way.

10.16 Some of the worst violence historically has been incited via mass broadcast. The Rwandan genocide was preceded by radio broadcasts by a radio station set up in 1993 and "financed by Hutu extremists to prepare the people of Rwanda for genocide by demonising the Tutsi and encouraging hate and violence."[82] The disc jockeys spoke in code. For example, when the radio station told people to "go to work," it was understood to mean that people should take their machetes to kill Tutsi peoples.[83]

10.17 In civil law jurisdictions, false speech is not protected to the same extent as truthful speech, on the basis (inter alia) that false statements hinder the quality of public discourse. Racist speech is generally inaccurate and involves a number of false classifications and claims, as mentioned above. It is therefore less worthy of protection. Belief in the truth of the false statements should not be a defence.

10.18 On the question of 'good faith', French J held that s 18D:

> requires a recognition that the law condemns racial vilification of the defined kind but protects freedom of speech and expression in the areas defined in pars (a), (b) and (c) of the section. The good faith exercise of that freedom will, so far as practicable, seek to be faithful to the norms implicit in its protection and to the negative obligations implied by s 18C. It will honestly and conscientiously endeavour to have regard to and minimise the harm it will, by definition, inflict. It will not use those freedoms as a 'cover' to offend, insult, humiliate or intimidate people by reason of their race or colour or ethnic or national origin.[84]

Indirect harm should be captured, including Holocaust Denial

10.19 The 2014 Bill effectively limited the scope of the proscribed speech to where the victim perceived a 'clear and present danger' - a concept more appropriate to public 'village hall' discussions of previous centuries than to the effect of receiving media communications in our own homes and on our own screens. The Bill failed to take into account the way in which racist speech is communicated through modern media and can cause harm indirectly.

10.20 We submit that if s 18C is amended, then indirect harm should also be captured, including Holocaust Denial.[85]While Holocaust Denial is clearly antisemitic, it ingeniously pretends to be a reasoned debate about history and it is doubtful whether it could be said to 'incite hatred'

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78 (2004) 135 FCR 105, 128 [79].

79 See Australian Human Rights Commission, "At a glance: Racial vilification under sections 18C and 18D of the Racial Discrimination Act 1975 (Cth)," https://www.humanrights.gov.au/glance-racial-vilification-under-sections-18c-and-18d-racial-discrimination-act-1975-cth , accessed 15 April 2014.

80 See for example *Kelly-Country v Beers & Anor* [2004] FMCA 336 where a non-Aboriginal comedian portrayed Aboriginal people as stupid, rude, dirty, crude, and always either drunk or drinking. The Federal Magistrates Court found that the performances were artistic works under s 18D(a) and although were 'impolite and offensive' to many groups within Australia, were not unlawful. See also *Jones v Scully* (2002) 120 FCR 243.

81 *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356-57 [16]; *Eatock v Bolt* [2011] FCA 1103 at [268].

82 Rwandan Stories, "Hate radio", available online: http://www.rwandanstories.org/genocide/hate_radio.html , accessed 15 April 2014.

83 Ibid.

84 *Bropho v Human Rights and Equal Opportunity Commission* 135 FCR 105 131-132 [95]-[96].

85 This would be the affect of adopting the changes referred to above in relation to the matters covered in the European Union *Framework Decision for Combating Racism and Xenophobia* (2007).

against Jewish people. That does not lessen its hurtfulness to Jews, nor the dangers of the messages it communicates.

Conclusion

Freedom of expression is not an absolute right and the objective of legislation like the current sections 18C and 18D, which seek to prevent the harm caused by racist speech, is of sufficient importance to warrant appropriate restrictions on freedom of speech.

ALHR is concerned that the terms of reference for this inquiry appear to suggest that the right to freedom of speech is superior to the right to freedom from discrimination, in particular in the form of racist vilification. We do not agree. International law clearly establishes human rights as interdependent, interrelated, indivisible and entailing both rights and obligations.

ALHR strongly submits that it is not appropriate to retreat from the values and standards required by international law and which have been associated with adequate protection from racial vilification in so many global jurisdictions. Many Australian men, women and children depend on these protections in order to live their lives free from discrimination, intimidation and harassment on the basis of their race.

We submit that this Inquiry should closely consider Australia's obligations under international human rights law and that the RDA should, if there is to be any change at all (which we do not believe necessary), be strengthened in order to comply with that law.

Yours faithfully

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