Additional comments by Labor members

1.1 All of history has shown us that racism will regularly raise its ugly head, especially whenever there is a marginalised or repressed minority. Even people who would otherwise lead decent lives, can suddenly be caught up in racist hysteria, saying and doing atrocious things. Society's better angels can be silenced, suddenly, and horror visited on peace, tolerance and security.

1.2 There are many recent examples, such as America in the 1950's during the Civil Rights Movement and Germany in the 1930's where racism became official ideology and law. Whenever racism thrives, skin colour or religion are used to determine how people are treated; even whether some people live or die.

1.3 Australians don't need to look too far afield to find racism. Sadly, there is ample evidence in our own backyard. The Australian Constitution still discriminates against Indigenous Australians. In 1967 our nation's birth certificate was amended to allow Indigenous Australians to be treated equally under Commonwealth laws, but even then, ten per cent of us voted against inclusion. The 'White Australia Policy' was not completely dismantled until 1973.

1.4 The drafters of our Constitution, the designers of the 'White Australia Policy', reflected the racist ideology of their times.

1.5 Laws help set the standard of acceptable community behaviour. Once our Constitution was amended; once the 'White Australia Policy' was dismantled; Australians, on the whole, respected that Indigenous Australians should be treated equally and that immigrants from non-European countries are welcome and accepted. This powerful message has helped to make us the most successful multicultural nation in the world.

1.6 Everyday Australians take their cues from the laws set by their Parliament.

1.7 Labor Members do not consider that any case has been made out to alter Part II of the *Racial Discrimination Act* (RDA).

Twenty years of helping to prevent racial hatred

1.8 Part IIA of the RDA was introduced by the *Racial Hatred Bill* 1995.

1.9 The introduction of the Bill followed the handing down of three landmark reports: Australian Law Reform Council, *Multiculturalism and the Law* (1991), Human Rights and Equal Opportunity Commission, *Racist Violence: National Inquiry into Racist Violence in Australia* (1991), and the Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

1.10 The Bill also reinforced Australia's international obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) and the *International Covenant on Civil and Political Rights* (ICCPR).

1.11 Complaints to the AHRC under Part IIA of the RDA form only a small part of the work of the AHRC, making up only 3.8 per cent of the commission's work. There were only 77 complaints made last year under section 18C and fewer than four complaints a year proceed to court.

1.12 Part IIA has a wider importance than just providing a means of redress for race hate speech. Professor Gillian Triggs, President, AHRC, told the Committee:

> The commission believes that sections 18C and 18D, interpreted and applied consistently by federal courts over 20 years, strike an appropriate balance between freedom of speech and freedom from racial abuse. These provisions have served our multicultural democracy well in sending a message that race hate speech is not acceptable in Australia.

Current law is settled

1.13 The overwhelming majority of witnesses with legal expertise and experience, in their evidence to the Committee, agreed that the legal jurisprudence around section 18C was settled.

1.14 Only the most serious offending is captured by the provision.

1.15 The construction put forward by Justice Kiefel, as she then was, in *Creek v Cairns Post Ltd*[1] that only 'profound and serious effects, not to be likened to mere slights' has been approved and adopted by the line of cases that have followed.[2]

1.16 A plethora of evidence given to the Committee asserted that any change to the wording of sections 18C and 18D of the RDA would definitely cause uncertainty and would be likely to create even more litigation and confusion.

1.17 Mr Iain Anderson, Deputy Secretary of the Attorney-General, Senator George Brandis' own Department said in his evidence to the Committee that:

> …while on the one hand the committee has had evidence and has formed some views as to whether the existing provisions are well understood by the community, on the other hand they are well understood judicially. We do have very clear jurisprudence on what they mean taken together as a package. As a matter of generality, in my experience any time you change a judicially well understood set of terms, you will create an incentive for people to then relitigate those matters because no matter how well the drafters do their job, there will always be question as to have they managed, in trying to change words or codify or whatever, to actually still capture the right intention? I think you would find more litigation and uncertainty as to what any new terms actually meant.

1 (2011) 112 FCR 352

2 See submission by Professor Adrienne Stone (sub 137) pages 5 and 6.

1.18 Professor Gillian Triggs, President of the AHRC, agreed with Mr Anderson and went on to say:

> That is a significant danger. And when we do have clear law, and it has been applied very carefully and conservatively by the courts, I would think you need a strong case to argue for legislative change.

1.19 Mr Gregory McIntyre SC in his evidence on behalf of the International Commission of Jurists, Western Australia branch, said:

> …the courts have developed what these words mean in the legislation and they have done it repeatedly. That is a form of creation of law by judicial decision-making, which has been part of our common law since its inception. So my short answer is no, I do not think codification would assist, and it may in fact cut off possibilities.

1.20 Dr Karen O'Connell from the Discrimination Law Experts Group said in evidence to the Committee in Sydney:

> …we would have a concern with changing the language, where that language did not need changing. If it is to address public misunderstanding, it is better to address that misunderstanding through education rather than law reform that may not be warranted.

Changing section 18C would send a dangerous message

1.21 The Castan Centre for Human Rights said in their submission:

> The rolling back of a law sends a message, as does the passage of one. It can send a message that it is acceptable to offend and insult another person on the basis of their race.

1.22 This concern was echoed by many of the witnesses appearing before the Inquiry including Mr Benedict Coyne, National President, Australian Lawyers for Human Rights, Ms Sally Sievers, Anti-Discrimination Commissioner, Northern Territory Anti-Discrimination Commission and Ms Penny Taylor, Research Fellow and PhD Candidate at University of Tasmania.

1.23 Mr Hugh de Kretser, Executive Director of the Human Rights Law Centre told the Committee:

> …the debate around section 18C over the past few years is so highly charged and politicised that any perceived weakening – we may call it a codification, but ethnic communities will see that as a weakening – of the law will also be seen by those who are against 18C as enabling the kind of racial vilification that we try to prohibit though this law.

1.24 Mr Romlie Mokak, Chief Executive Officer, Lowitja Institute, said in evidence to the Committee in Melbourne:

> Rolling it back sends a very clear message not only to Aboriginal and Torres Strait Islander people but to others who have to deal with these issues regularly and persistently.

1.25 Mr Thinethavone Soutphommasane, Race Discrimination Commissioner, AHRC told the Committee:

> There is a significant risk indeed of sending a signal, perhaps even unintended, to people if there were to be a change in the Racial Discrimination Act.

1.26 Even witnesses, whose submissions supported some changes to section 18C, expressed some concern about what message a change would send to the community.

1.27 For instance, Professor Anne Twomey said:

> I am concerned about that. I think that is a real issue…

1.28 Professor Adrienne Stone, Director, Centre for Comparative Constitutional Studies, University of Melbourne said:

> …repealing section 18C and not replacing it would send a message irrespective of what changes it effects in the world. Equally, I think amending the law, even if only to codify what is already found in the judicial decisions, lends the imprimatur of the parliament to it. I take that seriously, and I think the Australian people will take that seriously. So I think that whatever you do – whatever you do – whether you amend it or do not amend it, whether you codify it, whether you completely change it, will send a message.

1.29 There has been a very public debate around section 18C by media commentators calling for its repeal. Any change to the language of the section, including codifying the judicial interpretation, is likely to be seen as a watering down of the section. That message could cause real harm to the community by unwittingly permitting unconstrained racist language.

Racism causes harm

1.30 The Committee has heard witness after witness, from communities spanning the breadth and width of Australia, telling of the harm that racism causes to the individuals who are targeted and to their communities.

1.31 Equal Opportunity Tasmania referred in their submission to a 2013 survey of culturally and linguistically diverse backgrounds conducted by the Victorian Health Promotion Foundation and said about the results obtained:

> Importantly, those surveyed exhibited poorer mental health and higher levels of psychological stress compared with those who had not experienced racism; and the levels of distress increased for those who had repeatedly been subjected to racist behaviour… levels of psychological distress were associated with the volume of racist experiences and not necessarily the type… experiences of everyday racism may be just as harmful to mental health as other more severe episodes.

1.32 Associate Professor Clair Andersen, representing the National Indigenous Education Consultative Bodies Network said in relation to the harm that could be caused to Indigenous children by watering down section 18C:

> Closing the Gap focuses on education outcomes and health outcomes. If kids are not happy, then they will not do well at school. We already have that going on. If you are not well educated, your health is generally poorer. Those two things are tied up together. If we water it down, it will only make things worse—it will not make things better.

1.33 Mr Peter Wertheim gave evidence on behalf of the Executive Council of Australian Jewry. He said:

> The contentions about political theory which are put forward by critics of Part IIA, and of section 18C in particular, do not resonate with the lived experience of most members of communities like ours. From the Jewish people's own long and painful historical experience, we have learned that acts of racially motivated violence invariably begin with racist words.

1.34 Ms Penelope Taylor, former Head Researcher at the Larrakia Nation Aboriginal Corporation said in her evidence, which was based on the results of a three year project which interviewed over 500 Aboriginal people residing in Darwin about their views on race relations:

> …the message that the research sent, of people feeling excluded, and that exclusion and marginalisation has health consequences, consequences for employment, consequences for sticking it out in education against the odds, consequences for violence and consequences for alcohol addiction and self-medication, because of this constant humiliation and exclusion from society. So it is not just sticks and stones and, 'Oh, don't say mean things'. It has huge ramifications for this thing which our society says it cares passionately about, which is the equality of Aboriginal people and undoing the terrible disadvantage that we have created. It is not merely symbolic; it has a huge and profound impact on many, many practical outcomes for Aboriginal people.

Economic cost of racism

1.35 The Diversity Council Australia gave evidence to the Committee in Darwin. They represent 400 members including all the major Australian banks and many of the international global banks, major retail groups including Myer and Coles, IBM Australia, Google, Microsoft, Orica, Rio Tinto and many government departments. Their members' employees comprise about ten per cent of the Australian labour market. Their evidence considered the economic cost of racism to their member organisations. The Chief Executive Office, Ms Lisa Annese in her evidence to the Committee said:

> …when we create inclusive workplaces, so when workplaces tap into and value the differences between people – and that could be differences based on race and culture but also other areas of diversity such as

> disability, LGBTI identity, Indigenous identity or gender… individuals feel more engaged in their workplace. They are more likely to be productive, and they are more likely to be present. There is less absenteeism. And then, if you follow the money on that one, it leads to greater profitability and productivity.

1.36 In relation to proposals to change the existing legislation, Ms Annese said:

> …organisations have created their workplace structures, policies and training, and the way they demonstrate their vicarious liability is centred around the existing legislation. For those organisations that are committed to that it appears to be working very well. It would then follow that, if that were watered down, organisations may have to deal with issues in their workplace that they currently do not have to deal with at the moment.

There is no substantive evidence of a 'chilling effect'

1.37 A few witnesses before the Committee claimed that section 18C had a 'chilling effect' on free speech. The Committee did not hear any substantive evidence to back up such a claim.

1.38 Mr Justin Quill appeared before the Committee in his capacity as legal representative for Nationwide News. His evidence was that he approved the content of between 200 and 300 articles a week on behalf of Nationwide News. He said that out of that number there may only be ten where he would need to turn his mind to section 18C.

1.39 Mr Quill said that he had been practising for 20 years exclusively in media law but only six cases in that time, including the Bolt case and the Leak case, had 'gone on to some sort of hearing or conciliation'.

1.40 When pressed by the Committee about what articles Nationwide News had been unable to publish because of section 18C, Mr Quill eventually admitted that only a series of articles written by Mr Bolt had not been published.

1.41 Mr Paul Zanetti, cartoonist, told the Committee that he had published 'hundreds of thousands' of cartoons but had only ever had one claim against him under section 18C.

1.42 Mr Jonathan Holmes, former presenter of ABC TV's *Media Watch*, and practising journalist for more than 40 years, gave evidence to the Committee in relation to his time on *Media Watch*:

> Ninety per cent of what I said had to be based on very solid factual evidence that we very carefully researched, and it was then my fair comment on those facts. We never got sued while I was in that chair. But that, you can call it a chilling effect, I do not think was unhealthy. I think it is actually quite a good thing. I do not remember ever being in the least concerned about the Racial Discrimination Act in the work that I was doing… To be honest, Senator, I do not know of any particular instance

> that I could point to, with the exception of Andrew Bolt and Bill Leak, where people have been constrained in what they say.

1.43 Free TV Australia was represented at the hearing in Adelaide by their Chief Executive Officer, Mr Brett Savill. When asked if he was able to give some examples of content that their legal teams have stopped them from airing because of concerns about section 18C, he said:

> This is one that we have been wrestling with. One of the issues we raised in our submission was that this act and this section do not exist in isolation… When we have gone around it we cannot point to specific single instances where this alone was the issue.

1.44 Even some speech which has been found to be unlawful under section 18C is still available to be viewed. Andrew Bolt's article, the subject of the complaint against him under section 18C, is still available online in the original format with the addition of a notice declaring that his article is unlawful under section 18C.

Removing or watering down section 18C may have an isolating effect on minority communities

1.45 The Committee heard many witnesses tell of the isolating effect that racism has on the targeted individual. Ms Robin Banks, the Anti-Discrimination Commissioner at Equal Opportunity Tasmania, explained the effects of racist speech and behaviour:

> …they end up being silenced, which is an anathema to freedom of speech. It causes people to feel that they have to hide from society, shut themselves down, withdraw from active engagement and not speak out because of fear of being further attacked for being different.

1.46 Professor Andrew Jakubowicz, Chief Investigator, Cyber Racism and Community Resilience Research Project commented on the effect of watering down section 18C:

> …if you have a community standard that exists, as we do in Australia with 18C, making a decision to remove one of those provisions is actually a very strong signal. Essentially, what that does is open up… opportunities for people to push it further… If you make intercultural communication more stressful and threatening than it has been, then people withdraw. That means that the basis of cohesion in society starts to erode, which I would have thought is exactly the opposite of what government would want to be doing at the moment.

1.47 Ms Penelope Taylor, former Head Researcher at the Larrakia Nation Aboriginal Corporation told the Committee:

> …the reality is that groups such as Aboriginal people – and it varies within the Aboriginal population, of course – do not have the same level of freedom of speech as the groups that we seem to be advocating for by talking about amending this provision.

Hard cases make bad law

1.48 The vast majority of media attention around section 18C in recent years has centred on two complaints made under s18C: *Prior v Queensland University of Technology & Ors* (QUT case) and a complaint about cartoonist, Mr Bill Leak.

1.49 The QUT case is currently on appeal from a decision of the Federal Circuit Court to dismiss the complaint.

1.50 One aspect of the public criticism over the QUT case was that not all of the students had been notified before the conciliation conference took place. The AHRC has recommended a change in that regard, that all respondents be notified contemporaneously.

1.51 The complaint against Mr Bill Leak was withdrawn.

1.52 In both of these cases the AHRC has been criticised over its handling of the complaints.

1.53 Neither the QUT case, nor the Bill Leak case, provides any cogent reason for amending section 18C. As Professor Triggs said in her evidence, "hard cases make bad law".

Importance of Access to Justice

1.54 Labor Members of the Committee agree that current procedure adopted by the Australian Human Rights Commission (AHRC), in processing claims under Part IIA RDA, could be amended to ensure the process is as efficient as possible. Indeed, the AHRC have themselves recommended amending their procedures in their own submission to this Inquiry.

1.55 However, Labor Members are concerned that any changes to the current procedures should not restrict access to justice for people seeking to assert their human rights.

1.56 While agreeing to the premise of the recommendations in the report, it is imperative that the implementation of those recommendations continues to uphold access to justice as a fundamental tenet of our legal system.

Resourcing of the AHRC

1.57 Some of the recommendations in the report will impact the workload of the AHRC.

1.58 Labor Members of the Committee are concerned that any recommendations that increase the workload of the AHRC should be coupled with appropriate funding measures to ensure the AHRC is able to fulfil those additional obligations.

1.59 Labor Members also note that Recommendation 1 of the Report requires an increased education program around racism and Part IIA. Labor Members are concerned that if the AHRC is to be responsible for that education campaign, appropriate funding should be provided to the AHRC to carry out that function.

Consideration of law reform requires careful consideration not rushed consultation

1.60 Labor Members were very concerned about the rushed timeframe of this Inquiry.

1.61 Ms Sally Sievers, Anti-Discrimination Commissioner from the Northern Territory Anti-Discrimination Commission commented in her submission to the Inquiry that:

> Many people had not heard of the Inquiry or the time frame to comments. To enable full consultation across the breadth of the NT a time frame much longer than two months is required.

1.62 If an issue is considered important enough to be referred to Committee for an Inquiry, and Commonwealth resources are utilised to conduct that Inquiry, it is incumbent on the Government to ensure that all relevant stakeholders and interested members of the public are given the opportunity to contribute their views.

1.63 Labor Members of the Committee consider that a period of 112 days between the date of referral and the reporting date, with 62 of those days being in December and January when most Australians are spending some time with their families, is not enough time for serious community consultation about law reform.

Conclusion

1.64 Politicians and law-makers for civilised society should be wary of making laws in haste that are later regretted at leisure. This is particularly so when those laws are least likely to cause harm to the general population and more likely to cause harm to minority groups in the community.

1.65 There have been many changes since Part IIA was introduced more than 20 years ago. The emergence of online communication, in particular social media, has made it much easier for hate speech to be instantly communicated, even when not truthful or relevant, and then widely distributed. The current political climate has created racial tensions both in Australia and around the world.

1.66 Racists do not care what harm is visited on those they wickedly try to victimise with their vile hate speech. However, condemnation should be poured on those apologists for racists and those who enable their vile work. All sensible members of a tolerant society must remain vigilant and ensure that any rise in racism is always controlled.

1.67 The current well established and well supported provisions strike the appropriate balance between freedom of speech and freedom from racial abuse and should be retained and strongly supported by all Australians.

Mr Graham Perrett MP
Deputy Chair

Senator Carol Brown
Committee member

Ms Madeleine King MP
Committee member

Senator Claire Moore
Committee member