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Submission to an Inquiry into Freedom of Speech in Australia

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1. Introduction

The *Racial Discrimination Act 1975* (Cth) was introduced to give effect to Australia's international legal obligations under the International Convention on the Elimination of Racial Discrimination. It is clear from the second reading speech that the Act was intended not only to provide legal remedies, but also to have an educative function - promoting awareness of the undesirable nature of racism and its hurtful consequences for those affected by it.¹ The Act remains important in making racial discrimination unlawful, especially in the absence of a federal Bill of Rights or regional human rights protection. The minor amendments proposed in this submission are intended to align with the existing application of the law in the Federal Court and to clarify the meaning of the provision in the public mind.

The terms of reference for the current Inquiry include the question of:

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

The terms of reference also include matters pertaining to the functions of the Australian Human Rights Commission. This submission primarily addresses the question of whether the *Racial Discrimination Act 1975* (Cth) imposes unreasonable restrictions upon freedom of speech and whether and how ss. 18C and 18D should be reformed.²

This submission begins with an analysis of Australia's relevant international legal obligations in **Section two**. In particular it addresses the right to freedom of expression in the International Covenant on Civil and Political Rights (ICCPR) and protections from racism and racial discrimination in the International Convention on the Elimination of Racial Discrimination (ICERD). It concludes that ss 18 C and D are compatible with Australia's obligations but that Australia has not criminalised incitement to racial hatred as required by the treaties.³

Section three provides a comprehensive analysis of comparative law from Canada, Germany, South Africa, the United Kingdom, and the United States, as well as decisions of

¹ Enderby, 'Second reading speech: Racial Discrimination Bill 1975', 1.

² The inquiry is also to consider the recommendations from Australian Law Reform Commission, *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, ALRC Report 129, (2016). Of particular relevance is Chapter 4 – *Freedom of Speech*. As such, this submission makes reference to the Australian Law Reform Commission ('ALRC') report where relevant.

³ Noting also though that Australia has reservations to Article 20 on the ICCPR and Article 4 of ICERD on this matter.

the European Court of Human Rights. It concludes that s18C is broader in scope than legislation from comparable jurisdictions,⁴ particularly with reference to the ordinary meaning of the words ‘offend’ and ‘insult’. However, the apparently broad scope of s 18C is mitigated by its operation through the civil law as opposed to the criminal law, and the Federal Court’s restrictive interpretation of the provision. Nevertheless, there is a case for amending s 18C so that its text is brought in line with the Federal Court’s interpretation, e.g. by substituting the word ‘vilify’ for ‘offend’ and ‘insult.’

This proposed minor amendment that would allow s 18C to continue to perform its important function in limiting hate speech in Australia’s multicultural society is included in the conclusions and recommendations in **Section 4**. A recommendation for review of Australia’s reservations to the ICCPR and ICERD and for consideration to be given to laws criminalising racial hatred is also proposed.

⁴ With the exception of the South African *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*.

2. Australia's obligations under international law

Chapter four on freedom of speech in the ALRC's *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* report does briefly address the question of Australia's international legal obligations. However, there is an undue focus on the rights to freedom of expression under Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and inadequate acknowledgement of the protections afforded by the International Convention on the Elimination of Racial Discrimination (ICERD). In relation to the role of international law, the ALRC report is correct in stating that international instruments cannot override Australian national law but that courts will favour a construction that accords with Australia's international obligations.⁵ However, this ignores the fact that the international human rights treaties, which Australia has voluntarily signed and ratified, are legally binding.⁶

A) International Covenant on Civil and Political Rights (ICCPR)

Article 19(1) of the ICCPR provides for the right of everyone to hold opinions without interference - freedom of opinion. Article 19(2) provides for freedom of expression:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Whilst freedom of opinion is not subject to restrictions, freedom of expression is under Article 19(3):

The exercise of the rights provided for in paragraph 2 of this article 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.*

S 18C of the *Racial Discrimination Act 1975* (Cth) therefore is compatible with Article 19(3) of the ICCPR – a restriction provided for by law and necessary for the respect of the rights of

⁵ ALRC, above n 2, 85, citing *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J). 42 and *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

⁶ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). Article 26: *Pacta Sunt Servanda*: Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

others. The Human Rights Committee has stated that such restrictions must conform to the strict tests of necessity and proportionality.⁷ Proportionality must consider the form of expression and the means of its dissemination; for example, unrestricted expression is particularly important in public debate on people in the public and political domain.⁸ The exemptions in s 18D protect this type of debate. S 18D provides, *inter alia*, that s 18C does not render unlawful anything said or done reasonably and in good faith in the course of any statement, publication, discussion or debate made for any genuine purpose in the public interest. It also provides an exemption for fair and accurate reports 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. These exemptions provide a balance to the restrictions in s 18C and address the proportionality and necessity test.

The Committee has also clarified that the word ‘others’ in Article 19(3)(a) can relate to individuals or communities and may refer to members of a community defined by its religious faith or ethnicity.⁹ Again, the restrictions imposed by s 18C seem to be compatible with what was envisaged in the ICCPR.

Article 20 of the ICCPR provides that:

1. *Any propaganda for war shall be prohibited by law.*
2. *Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

Article 20 balances the differing views of UN member states concerning the degree to which prohibitions of hate speech can be compatible with freedom of expression, and the text as adopted is narrower than proposals advocated by many states.¹⁰ This provision is distinct from the *option* to have restrictions under Article 19(3) as it is a *requirement* to prohibit incitement to discrimination, hostility or violence under Article 20(2). Australia does not have legislation prohibiting incitement to racial or religious discrimination, hostility or violence. In that regard, our current laws fall short of what is required by the ICCPR. Australia has a reservation to Article 20,¹¹ and the Human Rights Committee has

⁷ United Nations Human Rights Committee, Communication No. 1022/2001, *Velichkin v. Belarus*, Views adopted on 20 October 2005.

⁸ United Nations Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression*, UN Doc: CCPR/C/GC/34 (12 September 2011), para 34.

⁹ *Ibid* para 28.

¹⁰ See discussion in Inger Osterdahl, *Freedom of Information in Question* (Uppsala: Iustus Forlag, 1992), 86-98.

¹¹ "Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interest of public order (ordre public), the right is reserved not to introduce any further legislative provision on these matters."

recommended that Australia consider withdrawing same.¹² The Committee has also called for legislation as envisaged by Article 20 to be put in place in light of increased discrimination against Muslims in Australia.¹³

B) International Convention on the Elimination of Racial Discrimination (ICERD)

ICERD contains provisions that are equally as important to consider with reference to the current Inquiry, particularly since the *Racial Discrimination Act 1975* (Cth) was introduced to give effect to Australia's obligations under ICERD.¹⁴ The Committee on the Elimination of Racial Discrimination (CERD) has considered the question of whether protection of minorities imposes unreasonable restrictions upon freedom of speech, as questioned in the terms of reference of this Inquiry. Specifically focusing on racist hate speech, the Committee concluded:

*The relationship between proscription of racist hate speech and the flourishing of freedom of expression should be seen as complementary and not the expression of a zero sum game where the priority given to one necessitates the diminution of the other. The rights to equality and freedom from discrimination, and the right to freedom of expression, should be fully reflected in law, policy and practice as mutually supportive human rights.*¹⁵

Article 4 of ICERD provides for, *inter alia*, a criminal offence of dissemination of ideas based on racial superiority or hatred, and incitement to racial discrimination. Again, Australia has a reservation to Article 4(a) regarding criminalisation of racial hatred.¹⁶

In relation to States' obligations, the CERD Committee has confirmed that States should address all manifestations of racist hate speech, whether emanating from individuals or

Department of Foreign Affairs and Trade, *International Covenant on Civil and Political Rights*, (New York, 16 December 1966) Australian Treaty Series 1980 No. 23.

¹² United Nations Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia*, UN Doc: CCPR/C/AUS/CO/5, 2 April 2009, para 9.

¹³ *Ibid* para 26.

¹⁴ Greg Marks, 'Avoiding the International Spotlight: Australia, Indigenous Rights and the United Nations Treaty Bodies', *Human Rights Law Review* (2002) 2 (1) 19, 27.

¹⁵ United Nations Committee on the Elimination of Racial Discrimination, *General Comment No.35: Combating racist hate speech*, UN Doc: CERD/C/GC/35, para 45.

¹⁶ "The Government of Australia ... declares that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4 (a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4 (a)." United Nations Treaty Collection, *Status of Treaties, International Convention on the Elimination of Racial Discrimination*.

groups, whether orally or in print, or disseminated through electronic media or by displaying racist symbols, images and behaviour at public gatherings, including sporting events.¹⁷ This interpretation of States' obligations by the CERD Committee is compatible with s 18C and includes examples of the types of cases brought under s 18C such as sporting events, social networking sites and the media. The Committee goes on to state that:

*As a minimum requirement, and without prejudice to further measures, comprehensive legislation against racial discrimination, including civil and administrative law as well as criminal law, is indispensable to combating racist hate speech effectively.*¹⁸

C) Conclusion on international legal obligations

Ss 18C and 18D are compatible with Australia's international legal obligations under the ICCPR and ICERD. Freedom of expression is protected under Article 19(2) of the ICCPR but is subject to restrictions provided by law and necessary for the respect of the rights or reputations of others (Article 19(3)), which aligns with the objectives of s 18C. There are strict necessity and proportionality requirements for restrictions under Article 19(3) and it is argued that this is reflected in the broad exemptions provided for in s 18D. The ICERD requires that States parties implement protections from racial discrimination and the CERD Committee has specifically recognised the requirement to address all manifestations of racist hate speech. It argues that "the relationship between proscription of racist hate speech and the flourishing of freedom of expression should be seen as complementary". Finally, both the ICCPR and ICERD contain provisions for the criminalisation of incitement to racial hatred, to which Australia has reservations and so these provisions are not currently reflected in Australian law.

¹⁷ United Nations Committee on the Elimination of Racial Discrimination, above n 15.

¹⁸ Ibid para 9.

3. Comparative law

This section considers ss 18C and 18D of the *Racial Discrimination Act 1975* (Cth) in light of comparative law from Canada, Germany, South Africa, the United Kingdom, and the United States, as well as decisions of the European Court of Human Rights applying the European Convention on Human Rights. The analysis reveals that outside the United States hate speech legislation is an established feature of liberal democracies and is regarded as important in safeguarding the dignity of minority groups and their members, and maintaining a successful multicultural society. However, s 18C is unusual in the extent to which it limits free expression. Most hate speech provisions do not limit ‘offensive’ expression and few limit ‘insulting’ expression. Such provisions also typically require intention on the part of the speaker to engage in hateful speech. But s 18C is also unusual in establishing a civil wrong as opposed to a criminal offence. As well as this, the apparently broad nature of s 18C should be considered in light of the exemptions contained in s 18D and the fact that the Federal Court has interpreted the words of s 18C restrictively so that it covers only ‘profound and serious effects, not to be likened to mere slights.’¹⁹ There is a case for a minor amendment to s 18C that brings the text of the provision in line with its actual operation in the Federal Court but care should be taken not to undermine the efficacy of s 18C in the process.

A) The United States

In the United States very broad protection is accorded to free speech. The First Amendment of the United States Constitution provides that ‘Congress shall make no law ... abridging the freedom of speech.’ The Supreme Court has held that content-based restrictions upon speech will be subject to strict scrutiny, that is, they must be narrowly tailored to serve a compelling state interest. This allows for laws that proscribe ‘fighting words’ or words ‘directed to inciting or producing imminent lawless action and ... likely to incite or produce such action.’²⁰ However, such legislation cannot impose ‘viewpoint’ discrimination. By way of illustration, in *R.A.V. v City of St Paul, Minnesota*²¹ a criminal ordinance prohibited the display of symbols such as burning crosses where one knew or had reasonable grounds to know that this would arouse ‘anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender...’ The Supreme Court held that this amounted to impermissible viewpoint discrimination since the ordinance applied only to ‘specified disfavoured topics.’²² The result is that legislation can prohibit ‘fighting words’ but cannot expressly protect particular groups against hateful expression. The legislature cannot, in other words, determine that some ideas and not others are permitted in public debate – even if such ideas amount to hate speech.

¹⁹ *Eatoock v Bolt* [2011] FCA 1103 at [268].

²⁰ *Brandenburg v Ohio*, 395 US 444, 447; 89 S. Ct. 1827 (1969).

²¹ 505 US 377; 112 S. Ct. 2538 (1992).

²² *Ibid* 391.

However, the United States is exceptional in this regard. Most other jurisdictions recognise that the state can engage in viewpoint discrimination for the purpose of protecting the dignity of minority groups and maintaining a successful multicultural society.

B) Canada

In Canada the right to freedom of expression in s 2(b) of the Canadian Charter of Rights and Freedoms is not absolute and is subject to ‘reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’ The *Criminal Code*²³ prohibits public statements that incite hatred towards identifiable groups where such incitement is likely to lead to a breach of the peace,²⁴ and public statements that wilfully promote hatred towards identifiable groups.²⁵ In *R v Keegstra*²⁶ a school teacher had been convicted of wilfully promoting hatred against Jews in his classes. The Supreme Court upheld the legislation, reasoning that the harms caused by hate speech ‘run directly counter to the values central to a free and democratic society, and in restricting the promotion of hatred Parliament is therefore seeking to bolster the notion of mutual respect necessary in a nation which venerates the equality of all persons.’²⁷

C) The United Kingdom

Likewise, in the United Kingdom the right to freedom of expression in Article 10(1) of the *Human Rights Act 1998* is subject to limits set out in Article 10(2). Hate speech is regarded as a public order issue. Section 18(1) of the *Public Order Act 1986* provides that: ‘A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if (a) he intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.’ Section 18(5) provides that a ‘person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting.’ Thus while the British legislation refers to ‘insulting’ words these must also be intended to, or likely to, stir up racial hatred – thereby exceeding the scope of s 18C. This offence has been extended to cover ‘religious hatred’²⁸ and ‘hatred on the grounds of sexual orientation.’²⁹

²³ RSC, 1985, c. C-46.

²⁴ Section 319(1).

²⁵ Section 319(2).

²⁶ [1990] 3 S.C.R. 697.

²⁷ Ibid 756.

²⁸ Sections 29A and 29B.

²⁹ Sections 29AB and 29B.

D) Germany

More extensive hate speech provisions can be found in Germany, reflecting the importance attached to human dignity in German constitutional law and the history of the Third Reich's persecution of Jews. Sections 185 to 200 of the German Federal Penal Code contain provisions punishing individual and collective defamation or insult. The object of these provisions is to protect 'the right to one's social worth (i.e. one's reputation or external honour) and also the right to respected as a human being (i.e. for one's internal worth or integrity).'³⁰ In addition, s 130 provides 'Whosoever, in a manner liable to disturb public peace, (1) incites hatred against parts of the population or invites violence or arbitrary acts against them, or (2) attacks the human dignity of others by insulting, maliciously degrading or defaming parts of the population shall be punished with imprisonment of no less than three months and not exceeding five years.' Where criminal law provisions against insult and defamation apply, civil liability can be established under s 823(2) of the German Civil Code in combination with s 185 of the Penal Code. In other words, the same threshold applies for civil and criminal liability. The Penal Code also contains more specific provisions forbidding the dissemination and use of propaganda by unconstitutional and National Socialist organisations (ss 86 and 86a). These proscribe, for example, displaying National Socialist 'flags, badges, uniform parts, passwords and salutes' (s 86(a)(2)).

E) South Africa

In South Africa, a country that likewise has a history of racist repression, free expression is governed by s 16 of the Constitution which provides that the right does not extend to 'incitement of imminent violence' (s 16(2)(b)) and 'advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm' (s 16(2)(c)). The Constitutional Court has commented that 'certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely upon the dignity of others and cause harm. Our Constitution is founded on the principles of dignity, equal worth and freedom, and these objectives should be given effect to.'³¹ The *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* provides in s 10(1) that 'no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to (a) be hurtful; (b) be harmful or to incite harm; (c) promote or propagate hatred.' Like s 18C, s 10(1) gives rise to a civil wrong. However, doubts have been expressed about the constitutionality of ss 10(1)(a) and (b) given the more constrained definition of hate speech contained in s 16(2)(c) of the Constitution.³² The draft *Prevention and Combating of Hate Crimes and Hate Speech Bill* provides that: 'Any person who intentionally ...

³⁰ Winfried Brugger, 'The Treatment of Hate Speech in German Constitutional Law (Part I)' (2003) 4(1) *Germany Law Journal* 1, 15.

³¹ *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) para 10.

³² Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (Juta, 5th edn, 2009) 379.

communicates to one or more persons in a manner that (i) advocates hatred towards any other person or group of persons; or (ii) is threatening, abusive or insulting towards any other person or group of persons, and which demonstrates a clear intention, having regard to all the circumstances, to (aa) incite others to harm any person or group of persons, whether or not such person or group of persons is harmed; or (bb) stir up violence against, or bring into contempt or ridicule, any person or group of persons ... is guilty of the offence of hate speech.’

F) European Regional Law

European regional instruments will be considered as aspects of comparative law. Each member state of the European Union and the Council of Europe³³ has its own legislation on racial hatred and sometimes on denial of historical crimes such as genocide. This legislation exists, however, in a framework of European Union law, which its members are obliged to implement, and the European Convention on Human Rights. The European Court of Human Rights receives applications from individuals in Council of Europe member states concerning alleged violations of the Convention. Its judgments are considered binding in international law. The European Union Framework Decision on racism and xenophobia calls on member states to establish criminal offences in relation to racial hatred, but permits states to restrict these to public order offences, and provides explicit protection for freedom of expression.³⁴ The Framework Decision, reflecting only the European Union competence on cooperation in criminal justice matters, does not provide useful guidance for reviewing s 18C and 18D, which are civil law measures. The European Union also addresses the dissemination of racial hatred in the Audiovisual Media Services Directive,³⁵ which is likely to be replaced with a new measure soon.³⁶ These measures focus on media providers rather than authors.

³³ There are 27 member states of the European Union, all of which are also members of the Council of Europe, which has 47 member states including Russia and Turkey.

³⁴ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms of racism and xenophobia by means of criminal law, [2008] OJ L 328. Mark Bell, *Racism and Equality in the European Union* (Oxford: OUP, 2008) 166, criticises the Framework Decision for failure to require criminalisation of incitement to discrimination, and for the permitted restriction of the offences to public order matters.

³⁵ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, [2010] OJ L 95/1: Article 6 – ‘Member States shall ensure by appropriate means that audio-visual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.’

³⁶ The proposed new measure was published in May 2016: Proposal for a Directive of the European Parliament and of the Council, amending Directive 2010/13 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COM(2016) 287 final, 25.5.2016, Article 28a.

More interesting insights can be drawn from the **European Convention on Human Rights**, and the decisions of the European Court of Human Rights. The Convention was adopted before CERD or the ICCPR were finalised, but drew on early drafts of the ICCPR. It contains no equivalent to either Article 4 CERD or to Article 20 ICCPR. However, the case law under Article 10 (freedom of expression) has consistently permitted states to implement some measures, mostly criminal law measures, to combat racial hatred.

In recent case law, the European Court of Human Rights has identified the interest which is protected by anti-racial hatred measures to be **human dignity**, linked to the right to respect for private life which is protected by Article 8 of the Convention. A key decision is the Grand Chamber judgment in *Aksu v Turkey* in 2012.³⁷ In this case, the applicants complained of negative stereotypes of Roma people included in two publications funded or issued by the Turkish Ministry of Culture. Although the applicants were ultimately unsuccessful, the Court did recognise that such negative stereotyping was an interference with their right to respect for private life. Specifically, the Court said:

*any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group.*³⁸

This case is useful as an example of a civil case where the Court explicitly balances the rights of the targets of the statements and the author of the expression. In *Aksu*, the Court found that the interference with the right to respect for private life was justified by the need to protect the rights of others, specifically freedom of expression rights under Article 10, because the way the material was presented indicated that it was 'metaphorical' rather than intended to be taken as a literal description of Roma people. The majority of the Court did, however, indicate that a stronger indication that the material was pejorative or an unjustified stereotype (rather than merely 'metaphorical') would have been preferable. This is similar to the contextual analysis which the Federal Court has undertaken in s 18C cases.

The other key recent case, this time directly on the justification for prohibiting racist hate speech as an exception to the right to freedom of expression is *Perinçek v Turkey*, decided by the Grand Chamber in October 2015.³⁹ In this case, unlike *Aksu*, the applicant was convicted of genocide denial and claimed his Article 10 rights were denied. The Grand Chamber in *Perinçek* followed *Aksu* in saying that the interference could be justified as interference with

³⁷ Applications Nos. 4149/04 and 41029/04, Decision of 15 March 2012. A Grand Chamber decision is an appeal from a Chamber decision of the European Court of Human Rights, which will be a panel of around seven judges. A Grand Chamber appeal is heard before seventeen judges.

³⁸ Paragraph 58.

³⁹ Application No. 27510/08, Decision of 15 October 2015.

the rights of others, rather than on the basis of protection of public order, specifically the right to respect for private life in Article 8. The Grand Chamber added that this was a matter of protecting the dignity of the members of the group, including the descendants of victims of the Armenian genocide.⁴⁰ Switzerland, like Germany, protects the right to dignity in its constitution. The Grand Chamber ultimately found that the interference with the applicant's rights was disproportionate, but did find that the interference had a legitimate aim of protecting the dignity of descendants of victims of genocide.

These recent cases articulating the dignity interests of groups, and in particular vulnerable minority groups, must be contrasted with the older decision in *Otto-Preminger-Institut v Austria*.⁴¹ In that case, the Court found no violation of Article 10 in banning a film which was deemed to be offensive to the Roman Catholic majority in the local community where the film was to be shown. The *Otto-Preminger-Institut* decision was strongly criticised,⁴² and has not been referred to by the Court in many years.

Most of the cases directly on Article 10 in relation to racial hatred involve criminal penalties,⁴³ and unsurprisingly the Court has set a high threshold for states to establish that their laws are proportionate restrictions on freedom of expression. Nonetheless, there are several decisions concerning criminal penalties for racist hate speech resulting in a finding of no violation of Article 10 (or where the applications were declared inadmissible as manifestly ill-founded):

- *Glimmerveen and Hagenbeek v Netherlands* – distribution of leaflets calling for deportation of immigrants on the basis of 'race';⁴⁴
- *Le Pen v France* – statements made in newspaper interviews that were deemed incitement to hatred or intolerance towards Muslims;⁴⁵
- *X v Germany* – Holocaust denial conviction upheld.⁴⁶

Several decisions have, however, upheld the Article 10 rights of the applicants:

⁴⁰ Paragraphs 155-57, 200-03. Dignity as the basis for the prohibition of racist hate expression is accepted by freedom of expression scholars such as Eric Barendt, *Freedom of Speech*, 2nd ed. (Oxford: OUP, 2005) 32-34.

⁴¹ Application No. 13470/08, Decision of 20 September 1994.

⁴² See for example, David Harris, Michael O'Boyle and Colin Warbrick, *The European Convention on Human Rights* (London: Butterworth's, 1996) 370.

⁴³ One exception is *Cox v Turkey*, Application No. 2933/03, Decision of 20 May 2010, where the applicant was deported and prohibited from re-entering the country. In *Perinçek*, the action was a mixed criminal and civil action, but the Court did not address the civil elements of the proceedings separately. While *Aksu* was a civil proceeding, it was an Article 8 claim by the target of the speech rather than an Article 10 claim by its author, and therefore does not directly address the question of proportionality of civil remedies.

⁴⁴ Application Nos. 8348/78, 8406/78, Decision of 11 October 1979.

⁴⁵ Application No. 18788/09, Decision of 20 April 2010.

⁴⁶ Application No. 9235/81, Decision of 16 July 1982.

- *Orban and Others v. France* – the statements were not incitement, but were a first-person statement of witnessing events in the Algerian war;⁴⁷
- *Dink v. Turkey* – conviction for denigrating ‘Turkishness’ was unjustified interference with freedom of expression where the applicant was writing journalistic commentary criticising Turkish treatment of Kurds (there are several similar cases from Turkey on related issues).⁴⁸

In addition, the recent decision in *Perinçek*, found that the conviction for genocide denial was a disproportionate interference with Article 10 rights, with the majority of the Court of the view that a law prohibiting denial of all genocides was overbroad. However, eight of the seventeen judges in the Grand Chamber were not convinced by the majority’s effort to distinguish Holocaust denial from denial of other genocides.

Article 17 of the Convention was used in early cases of racist hate speech to justify government restrictions on expression (ex. *Glimmerveen*) but is deployed much less in recent cases (ex. *Perinçek*). Article 17 states that:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

The Court has taken great care to ensure that the justification for criminalising racial hatred as a reasonable limitation to Article 10 rights does not interfere with journalistic enquiry. One of the major cases on racist hate speech, *Jersild v Denmark*,⁴⁹ found no violation of Article 10 because the prosecution was taken against a journalist producing a programme on an extremist group in Denmark. Although the statements made by the interviewees in the programme would likely have led to a successful prosecution of the interviewees themselves (see, for example, *Le Pen*), the fact that the applicant presented the interviews in a way that did not associate himself with their statements tilted the balance towards protection of his freedom of expression.

G) Lessons from Comparative Law

Section 18C of the *Racial Discrimination Act 1975* (Cth) is broader in scope than the legislation surveyed above, with the exception of the South African *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*. However, s 18C is also unusual given

⁴⁷ Application No. 20985/05, Decision of 15 January 2009.

⁴⁸ Applications No. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, Decision of 14 September 2010.

⁴⁹ Application No. 15890/89, Decision of 23 September 1994.

the exceptions in s 18D and the fact that it establishes a civil wrong as opposed to a criminal offence. Whether the civil nature of the provision justifies its more extensive scope raises difficult questions that have not been clearly addressed in other jurisdictions. However, the fact that Federal Court has interpreted s 18C so that it covers only ‘profound and serious effects, not to be likened to mere slights’⁵⁰ appears to recognise that the ordinary meaning of the words ‘offend’ and ‘insult’ is overbroad. There is a case for amending s 18C so that its text is brought in line with its actual operation in the Federal Court e.g. by substituting the word ‘vilify’ for ‘offend’ and ‘insult.’ Furthermore, given the controversy surrounding s 18C this would clarify the meaning of the provision in the public mind. It would also be a minor amendment would allow s 18C to continue to perform its important function in limiting hateful acts in Australia’s multicultural society.

⁵⁰ *Eatock v Bolt* [2011] FCA 1103 at [268].

4. Conclusion

The *Racial Discrimination Act 1975* (Cth) was introduced to give effect to Australia's international legal obligations under the International Convention on the Elimination of Racial Discrimination. It continues to play an important role in providing legal remedies and in promoting awareness of the deleterious effects of racial discrimination. Minor amendments are proposed to align s 18C with the existing application of the law by the Federal Court and to clarify the meaning of the provision in the public mind. It is anticipated that this would encourage support for the Act and not weaken protections against racial discrimination.

In conclusion, s 18C of the *Racial Discrimination Act 1975* (Cth) is broader in scope than legislation from most other comparative jurisdictions. It is also unusual given the exceptions in s 18D and the fact that it establishes a civil wrong as opposed to a criminal offence. Sections 18C and D are compatible with Australia's international human rights obligations relating to freedom of expression in the ICCPR and protection from racist speech in ICERD. What is lacking is domestic legislation criminalising racial hatred.

Recommendations

- There is a case for amending s 18C so that it is brought in line with its actual operation in the Federal Court e.g. by substituting the word 'vilify' for 'offend' and 'insult.' Furthermore, given the controversy surrounding s 18C this would clarify the meaning of the provision in the public mind. It would also be a minor amendment that would allow s 18C to continue to perform its important function in limiting hate speech in Australia's multicultural society.
- Consideration should be given to introducing laws criminalising racial hatred as required under Australia's international obligations in the ICCPR Article 20(2) and ICERD Article 4(a). Australia's reservations to these articles should also be reconsidered as recommended by the Human Rights Committee, CERD Committee and the Human Rights Council.⁵¹

⁵¹ United Nations Human Rights Council, Report of the Working Group on the Universal Periodic Review. Twenty-third session Geneva, 2-13 November 2015. UN Doc: A/HRC/WG.6/23/L.11

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