AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

PO Box A147
Sydney South
NSW 1235
DX 585 Sydney
alhr@alhr.org.au
www.alhr.org.au

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Committee Secretary
Parliamentary Joint Committee on Human Rights
PO Box 6100,
Parliament House
Canberra ACT 2600

By email: 18Cinquiry@aph.gov.au

Dear Committee Secretary,

Inquiry into Freedom of Speech in Australia – Questions on Notice and Further Information

Further to our appearance before the PJCHR on Friday 10 February 2017 in the Undumbi Room of Queensland Parliament, and our Submission #5 to the Inquiry, Australian Lawyers for Human Rights (ALHR) is pleased to provide further information as requested.

We refer you to Hansard for a copy of our opening statement.

We think it of the utmost importance that the Committee consider:

(1) the Explanatory Memorandum[1] and

(2) the Second Reading Speech[2]

in relation to Part IIA of the *Racial Discrimination Act 1975* (Cth) (**RDA**) as contained in the *Racial Hatred Bill* (Cwlth), as these two documents appear to contain comprehensive responses to many of the Committee's questions and concerns that we witnessed at the Brisbane hearing.

We provide **extracts** of those documents below and hyperlinks in the footnotes.

However, before turning to those documents and related issues, we would first like to respond to the questions posed about the situation in Canada since the repeal in 2013 of Section 13 of the *Canadian Human Rights Act 1977*.

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[1] Michael Lavarch, Attorney General of Australia, Explanatory Memorandum – Racial Hatred Bill 1994, House of Representatives, Parliament of Australia. Available at: <http://www.austlii.edu.au/au/legis/cth/bill_em/rhb1994119/memo_0.html>, accessed 12 February 2017.

[2] Michael Lavarch, Attorney General of Australia, Second Reading Speech *Racial Hatred Bill 1994,* Hansard, Tuesday 15 November 1994 at 6:14pm. Available at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;page=1;query=AuthorSpeakerReporterId%3ALG4;rec=6>, accessed 12 February 2017.

1. Is ALHR aware of any adverse effects that have occurred in Canada since the repeal of section 13 of the Human Rights Act in June 2013, for example in terms of increases in racial vilification and racism?

1.1 Terms of s 13

Section 13 of the *Canadian Human Rights Act 1977* (**CHRA**) was repealed in June 2013 following a highly politicised media campaign to do so. Section 13(1) provided as follows:

> **Hate messages**
>
> **13 (1)** It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

1.2 Campaign for repeal

Strong parallels can be drawn between the media campaign to repeal section 13 CHRA in Canada and the media campaign to repeal section 18C in Australia, including, but not limited to the following:

- Repeal of s13 of the CHRA was **not** supported by numerous human rights groups, civil society groups or legal experts;
- As is currently the case in Australia, the campaign to repeal section 13 was **highly politicised and media driven;**
- Section 13 of the CHRA existed without controversy until a conservative commentator, Mark Steyn, was implicated.

1.3 Role of Criminal penalties

It is important to emphasise that with regards to racial vilification in Canada, the State still criminalises and intervenes to prevent and penalise hate speech messages or communications via sections 318 and 319 of the *Canadian Criminal Code 1985* which make it a criminal offence to advocate genocide, publicly incite hatred, or willfully promote hatred against an “identifiable group. Section 430 relating to committing ‘mischief’ is also relevant. It deals with damage to property, including computer data, and subsection 4.1 provides that:

> Every one who commits mischief in relation to property that is a building, structure or part thereof that is primarily used for religious worship, including a church, mosque, synagogue or temple, or an object associated with religious worship located in or on the grounds of such a building or structure, or a cemetery, if the commission of the mischief is motivated by bias, prejudice or hate based on religion, race, colour or national or ethnic origin,
>
> (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
>
> (b) Is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Section 13 was a provision that looked towards civil redress rather than criminal penalties.

Like many very well respected organisations in Canada, including the Canadian Bar Association, ALHR does not think the *Criminal Code* on its own offers sufficient protection against racial vilification. During the campaign and inquiry regarding the proposed repeal of Section 13, the Canadian Bar Association’s submission (**enclosed**) stated as follows:

> Over the years, the enforcement of human rights protections against hate speech, [through] section 13 of the CHRA, has been the subject of controversy and debate in the media. Many media outlets have advocated the abolition of section 13 with no acknowledgement of the valuable role it plays in promoting tolerance and

respect in Canadian society. Consequently, the public debate that results from these media reports has not been balanced.

By repealing section 13 of the CHRA, Canada's ability to prevent the proliferation of hate speech in society will be severely hampered. For the state to intervene, hate speech, messages or communications will have to meet the threshold of a *Criminal Code* offence. Under subsection 319(1) of the *Criminal Code*, for example, the Crown must prove "beyond a reasonable doubt" that public statements by the accused incite hatred against an identifiable group to such an extent that they will likely lead to a breach of the peace. This imposes a very high burden of proof compared with the lower standard of proof that must be met under section 13 of the CHRA, i.e., the civil standard of "on a balance of probabilities." In the absence of section 13, individuals will be free to engage in hate speech without fear of state intervention as long as the speech does not rise to the level of a *Criminal Code* offence.

While the CBA Section and Committee strongly support Canadians' right to freedom of expression (enshrined in section 2(b) of the *Canadian Charter of Rights and Freedoms*),[5] that right, as [with] all *Charter* rights, is not absolute and may be limited by valid government action, such as laws against discrimination and slander. A carefully balanced civil remedy, such as section 13 of the CHRA, is a reasonable government limit on the right to freedom of expression and can be demonstrably justified in a free and democratic society.[6]

1.4 Adverse effects in Canada

Since our appearance at the public hearing last Friday 10 February 2017, ALHR has contacted the Canadian Race Relations Foundation, the Executive Director of which has provided the following information in relation to the question of whether the repeal of section13 has had any adverse effects.[3]

(1) Statistics on this exact point are not readily available, in part because as a result of the removal of section 13, victims of racial vilification no longer have any reason to report occurrences of racial vilification to the Canadian Human Rights Commission.

(2) There are statistics kept throughout Canada on hate crimes but not on hate 'incidents' (including instances of racist insults and racial vilification). There are also significant methodological problems with changing definitions and different definitions between different provinces.

(3) Anecdotal evidence is however that there has been an enormous increase in racial vilification, particularly on line, since the repeal of s 13. According to Executive Director Anita Bromberg, there is a **"growing recognition within Canada that the repeal of section 13 has had a range of negative effects in Canada, particularly with regard to any ability to control online hate related activities**." [4]

(4) As a result, a bill is about to be put forward by Canadian MP and Professor Irwin Cotler to reinstate section 13 or introduce an equivalent.

(5) Also noteworthy is that this week the Canadian House of Commons will be debating a motion which calls on the government to "condemn Islamophobia and all forms of systemic racism and religious discrimination." The text of the motion also asks the government to:

- Recognize the need to quell the "**increasing public climate of hate and fear**" (emphasis added);
- Request the Heritage Committee study how the government could develop a

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3 Personal conversation between Executive Director Anita Bromberg and ALHR Vice President Kerry Weste, 14 February 2017.

4 Saada Branker, "Minority groups are seeing one of their greatest fears come true — they're becoming targets at home", CBC News online, 21 December 2016, available at <http://www.cbc.ca/news/opinion/minority-targets-in-canada-1.3905882>, accessed 14 February 2017.

government-wide approach to reducing or eliminating systemic racism and religious discrimination, including Islamophobia;

- Collect data to contextualize hate crime reports, conduct needs assessments for impacted communities and present findings within 240 calendar days.[5]

(5) A recent study conducted by Canada's national broadcaster, CBC[6], found that there has been a 600% increase in online hate incidents just in the last 12 months. "The study suggests," says Bromberg, "a 600 per cent jump in the past year in how often Canadians use language online that's racist, Islamophobic, sexist or otherwise intolerant. [The study] found that terms related to white supremacy jumped 300 per cent, while terms related to Islamophobia increased 200 per cent."

(6) The level of unfettered hate speech in comments under news articles posted by CBC relating to Canada's indigenous peoples has become so severe that for the last 12 months the national broadcaster has taken the unprecedented step of suspending online comments on its news stories relating to Indigenous affairs.[7]

(7) Other studies found that (1) in the past 3 years (since the repeal of section 13 in 2013) there has been a 50% increase in online anti-Semitism in Canada[8]; and (2) hate crimes against Muslims doubled in three years from 2012 to 2014.[9]

(8) Anita Bromberg noted that due to the extremely high bar set by the Canadian *Criminal Code* provisions for hate crimes, police across Canada very rarely pursue prosecutions under the *Criminal Code*, even where her organisation believes that they should do so. She said that "criminal prosecutions for *Criminal Code* hate crimes are few and far between and yet Canada has seen a huge proliferation of hate speech on line since the repeal of section 13. There has been an increase in the number of hate based online radio stations. The media is reporting that the recent mosque shooter was a regular listener to one of the hate based online radio stations. The repeal of section 13 has left people in Canada with no remedy short of [police bringing a criminal prosecution for] a hate crime and this has left a hole in society's ability to address online hate."

(9) Ms Bromberg noted that the gaps in legislation and information-gathering resulting from the repeal of s 13 and the prosecution problems with the *Criminal Code* hate crime provisions have been recognised in the Province of Alberta, whose government has just set up a website Stop Hate (https://stophateab.ca) asking people to report occurrences of hate incidents in order to obtain information about incidents not being captured by hate crimes prosecutions, or which should be captured but are not being enforced.[10] Ms Bromberg said

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5 Kathleen Harris, "Liberal MP's anti-Islamophobia motion set for debate on Wednesday", CBC News online, 9 February 2017, available at <http://www.cbc.ca/news/politics/m103-islamophobia-khalid-motion-1.3972194> accessed 14 February 2017.

6 See "Canadians appear to be more hateful online. Here's what you can do about it" http://www.cbc.ca/news/canada/marketplace-racism-online-tips-1.3943351

7 Office of the GM and Editor in Chief, "Uncivil dialogue: Commenting and stories about indigenous people", CBC News Online, 30 November 2015, available at <http://www.cbc.ca/newsblogs/community/editorsblog/2015/11/uncivil-dialogue-commenting-and-stories-about-indigenous-people.html>, accessed 14 February 2017

8 Bromberg, op cit.

9 Anna Mehler Paperny, "Hate crimes against Muslim-Canadians more than doubled in 3 years", 13 April 2016, Global News Online, available at: <http://globalnews.ca/news/2634032/hate-crimes-against-muslim-canadians-more-than-doubled-in-3-years/>, accessed 14 February 2017

10 See "Website to keep tabs on incidents involving hate in Alberta", CBC News Online, 13 February 2017, available at <http://www.cbc.ca/news/canada/edmonton/alberta-hate-crime-committee-website-1.3980522>, accessed 14 February 2017. This initiative follows that of organisations such as B'nai Brith, Canada, and the Canadian Anti-Defamation League, which already ask victims to report antisemitic incidents: see <http://www.bnaibrith.ca/report> accessed 14 February 2017 and

that her organisation appreciates this step but does not see the initiative as ideal because of definitional issues (many in Canada do not understand what a hate crime is) and because hate incidents are notoriously underreported by victims. Her organisation would prefer that, in the absence of section 13, victims report incidents of hate to police even where this may not lead to a *Criminal Code* hate crime prosecution.

(10) The Canadian Race Relations Foundation will this week be making a significant written submission to the Canadian Government on the need to return powers to the Canadian Human Rights Commission so as to enable it to deal with, and perform an important educational role in relation to hate incidents in Canada. We are happy to forward a copy to the Inquiry when the submission has been published.

1.5 ALHR Comments[11]

The increases in racist speech and behaviour reported by Ms Bromberg since the repeal of section 13 are to be expected. Legislation provides authority for compliance with desired social norms both through the deterrent effect of penalising those who breach the legislation and through the symbolic and educative effect provided by its statement of norms.[12]

By legislating against racist threats a government is giving the message that racist speech will not be tolerated. There is a "public declaration" that there are "moral and ethical values which society wishes, or needs, to sustain."[13]

When Britain brought in its racial vilification bill:

> there were the same arguments that … we would create martyrs, that you cannot educate people to change their attitudes. Of course, you cannot, but you can at least make them know what the consequences will be if they engage in this sort of behaviour. Anything that will make people stop and think about what they are going to do is useful.[14]

The process of defining something legally as unacceptable indicates that the behaviour is both unjust and *alterable*, and encourages people not to engage in – or put up with - that behaviour. While legal rights themselves may be hard to enforce, the process of establishing that one has a right *not* to be treated in a certain way has, for example in the context of sexual discrimination, changed many people's view of the conduct from "It's only natural" to "that's unacceptable."[15]

To promote appropriate legislation against racism is not to abrogate responsibility to our politicians, but for us as a community to take responsibility — because we elect the politicians and because our system enables a fuller democratic participation in society.

With responsibility come risks, but they have always been our risks, and no doctrine of free speech has ever insulated us from them. They are the risks of permitting speech that does obvious and very real harm and of shutting off speech in ways that might deny us the benefit of valuable expressions. Nothing can insulate us from these risks and it is impossible to formulate

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https://secure2.convio.net/adl/site/SPageNavigator/Report/Incident.html accessed 14 February 2017. B'nai Brith reported a 28% increase in antisemitic incidents in Canada between 2013 and 2014.

[11] The following is drawn from Dr Tamsin Clarke, *Racism, Pluralism and Democracy in Australia,* PhD thesis, UNSW, Chapter 8, accessed 12 February 2017, available at: <http://www.unsworks.unsw.edu.au/primo_library/libweb/action/dlDisplay.do?dscnt=1&dstmp=1321253783332&docId=unsworks_631&vid=UNSWORKS&fromLogin=true>

[12] Human Rights Commission, *Proposal for Amendments to the Racial Discrimination Act to cover Incitement to Racial Hatred and Racial Defamation*, *Report No. 7,* AGPS, Canberra, 1983, noted at 13 that law can change attitude over time, and it is not necessarily the case that an overall attitudinal change has to precede a change in the law.

[13] Colin Tatz, *Reflections on the Politics of Remembering and Forgetting*, Centre for Comparative Genocide Studies, Macquarie University, 1995, 31-32.

[14] *Hansard*, House of Representatives, 15 November 1994, 3378.

[15] Robert W. Gordon, "New Developments in Legal Theory" in David Kairys (ed) *The Politics of Law: A Progressive Critique*, Pantheon Books, New York, 1990 (first edition 1982) 413 at 423.

rules that will prevent us making the wrong decisions in the future.[16] But that doesn't relieve us from our responsibilities to protect vulnerable members of our community from the very real psychological and physical effects of being subjected to racial vilification.

And if we frame regulations that are protective; that recognise the harms of racist speech and take steps to remedy those harms, we are more likely to set a desirable precedent than if we refuse to redress obvious present harms. The fact that some cases may be difficult to decide does not mean that we should give up our responsibilities and refuse to draw the line.[17] As Campbell says,

> if the populace does not retain an idea of and commitment to fundamental rights, courts are in no position to sustain the vitality and force of this essential element of democracy. Democracy was not achieved by judicial activism and is unlikely to be sustained by it. If the people and their representatives do not have a lively sense of human rights, and a strong sense of responsibility towards the values they represent, then fundamental constitutional rights, implied or otherwise, will be ineffective. And so, while it is true that democratic decision-making presupposes democratic process and majority sensitivity to the rights of minorities, it is mistaken to look to the maintenance of democratic culture and process outside of majoritarian electoral process.[18]

Conversely, where the government – by repealing protective legislation – gives the message that racism is acceptable, it is unfortunately likely that racist behaviour will escalate.

2 Evidence as to Motivations for the introduction of Part IIA

We refer to Senator Patterson's assertions that the findings of the *1991 National Inquiry into Racist Violence* and the *1987-1991 Royal Commission into Aboriginal Deaths in Custody*, had no relation to, and did not motivate, the introduction into Parliament of the *Racial Hatred Act 1995 (Cth)* and its passage through the Parliament crystallising in the adoption of the present wording of Part IIA of the *Racial Discrimination Act 1975* (Cth).

This contention must be rejected on the basis of (1) the content of the reports of the Human Rights and Equal Opportunity Commission's National Inquiry into Racist Violence (1991), the Royal Commission into Aboriginal Deaths in Custody (1991), and the Australian Law Reform Commission's report on Multiculturalism and the Law (1992) (see further below), as acknowledged in (2) the Explanatory Memorandum for the *Racial Hatred Bill 1994* authored by then Attorney General Michael Lavarch MP and the second reading speech in relation to the Bill given by him at 6:14pm on 15 November 1994 which reads as follows (emphasis added):[19]

> This Bill makes provision in relation to racial hatred by amending the Crimes Act 1914 to provide for three criminal offences and the Racial Discrimination Act 1975 to provide for a civil prohibition. **The Bill addresses concerns highlighted by the findings of the National Inquiry into Racist Violence and the Royal Commission into Aboriginal Deaths in Custody**. In doing so, the Bill closes a gap in the legal protection available to the victims of extreme racist behaviour.
>
> The Bill is intended to strengthen and support the significant degree of social cohesion demonstrated by the Australian community at large. The Bill is based on the principle that no person in Australia need live in fear because of his or her race, colour, or national or ethnic origin.
>
> The High Court has recently established an implied guarantee of free speech inherent in the democratic process enshrined in our Constitution. But the High Court has also made it clear that there are limits to this

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[16] 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, 115.

[17] Simon Lee, *The Cost of Free Speech,* Faber & Faber, London, 1990, 56.

[18] Tom D. Campbell, "Democracy, Human Rights, and Positive Law" (1994) 16 *Sydney Law Review* 195, 205.

[19] Michael Lavarch, above n 1.

guarantee. There is no unrestricted right to say or publish anything regardless of the harm that can be caused. A whole range of laws protect people's rights by prohibiting some

forms of publication or comment, such as child pornography and censorship laws, criminal laws about counselling others to commit a crime, and Trade Practices prohibitions on misleading and false advertising or representations.

While it is highly valued, the right to free speech must therefore be balanced against other rights and interests.

The Bill is not intended to limit public debate about issues that are in the public interest. It is not intended to prohibit people from having and expressing ideas. The Bill does not apply to statements made during a private conversation or within the confines of a private home.

The Bill maintains a balance between the right to free speech and the protection of individuals and groups from harassment and fear because of their race, colour or national or ethnic origin. The Bill is intended to prevent people from seriously undermining tolerance within society by inciting racial hatred or threatening violence against individuals or groups because of their race, colour or national or ethnic origin.

We note that former Attorney General Lavarch elaborated on the motivations behind the legislation further in the Second Reading Speech as follows (emphasis added):[20]

Next year will mark the 20th anniversary of the passage of the Racial Discrimination Act. The act was the first specific Commonwealth law on human rights. It was based on the fundamental belief that all Australians irrespective of race, colour or national or ethnic origin are entitled to fair treatment. In this country, we take pride in the community's consensus that everyone should be able to advance through life on their own efforts and abilities; that it is wrong to judge anyone on the colour of their skin or the sound of their accent.

Be it under a law, or in employment, or the provision of services, or access to facilities and accommodation, discrimination based on racial prejudice and intolerance is addressed by the Racial Discrimination Act. The law provides a remedy to those who have experienced discrimination. **It exists because, even with general community tolerance, we know racism exists. And racism leads to discrimination**.

The Racial Discrimination Act does not eliminate racist attitudes. It does not try to, for a law cannot change what people think. But it does target behaviour—behaviour that causes an individual to suffer discrimination. The parliament is now being asked to pass a new law dealing with racism in Australia. It too targets behaviour—behaviour which affects not only the individual but the community as a whole.

The Racial Hatred Bill is about the protection of groups and individuals from threats of violence and the incitement of racial hatred, which leads inevitably to violence. It enables the Human Rights and Equal Opportunity Commission to conciliate complaints of racial abuse. This bill is controversial. It has generated much comment and raises difficult issues for the parliament to consider. **It calls for a careful decision on principle.**

I wish to address the issues most consistently raised in the public debate and then examine the provisions of the bill in detail. The bill is intended to close a gap in the legal protection available to the victims of extreme racist behaviour. No Australian should live in fear because of his or her race, colour or national or ethnic origin. The legislation will provide a safety net for racial harmony in Australia, as both a warning to those who might attack the principle of tolerance and an assurance to their potential victims.

Three major inquiries have found gaps in the protection provided by the Racial Discrimination Act. The National Inquiry into Racist Violence, the Australian Law Reform Commission Report into Multiculturalism and the Law, and the Royal Commission into Aboriginal Deaths in Custody all argued in favour of an extension of Australia's human rights regime to explicitly protect the victims of extreme racism.

The 1992 report of the national inquiry into racist violence found that while state and territory criminal law punishes the perpetrators of violence, it largely is inadequate to deal with conduct that is a pre-condition of

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[20] Lavarch, above n 2.

racial violence. The report documented 60 such incidents. The Law Reform Commission report and the royal commission also dealt extensively with examples of extreme racist behaviour.

Since then there has been an upsurge in the activities of extremist racist groups which have resulted in harassment and intimidation of individuals. As well, public gatherings of ethnic communities have been disrupted, sometimes violently. In Sydney, police are investigating seven arson attacks on synagogues in less than four years. In Melbourne, there have been reports of teenage gangs targeting Australians of Asian background. While these incidents are not everyday occurrences, they tear at the fabric of our society and cause immense concern to many of our citizens.

Racism is often a by-product of ignorance, and education is an essential part of any response. The Human Rights and Equal Opportunity Commission has a number of programs which target racism in schools, reinforced by a variety of programs run by educational authorities. The commission also provides resources to help employers deal with racism in the workplace. The commission will also be conducting a public education program to promote this legislation upon its passage.

Racism should be responded to by education and by confronting the expression of racist ideas. But legislation is not mutually exclusive of these responses. It is not a choice between legislation or education. Rather, it is, in the government's view, a case of using both. There is no doubt that the Racial Discrimination Act has been a powerful influence on the rejection of racist attitudes over the past two decades. It has forced many people to confront racist views and have them debunked. It can be compared to the contribution of the Sex Discrimination Act over the past 10 years to improving the way women are treated in our society.

This bill has been mainly criticised on the grounds that it limits free expression and that to enact such legislation undermines one of the most fundamental principles of our democratic society. **Yet few of these critics would argue that free expression should be absolute and unfettered. Throughout Australia, at all levels of government, free expression has had some limits placed on it when there is a countervailing public interest.**

Laws dealing with defamation, copyright, obscenity, incitement, official secrecy, contempt of court and parliament, censorship and consumer protection all qualify what can be expressed. These laws recognise the need to legislate where words can cause serious economic damage, prejudice a fair trial or unfairly damage a person's reputation. In this bill, free speech has been balanced against the rights of Australians to live free of fear and racial harassment. Surely the promotion of racial hatred and its inevitable link to violence is as damaging to our community as issuing a misleading prospectus, or breaching the Trade Practices Act.

The bill places no new limits on genuine public debate. Australians must be free to speak their minds, to criticise actions and policies of others and to share a joke. **The bill does not prohibit people from expressing ideas or having beliefs, no matter how unpopular the views may be to many other people. The law has no application to private conversations.** Nothing which is said or done reasonably and in good faith in the course of any statement, publication, discussion or debate made or held for an academic, artistic or scientific purpose or any other purpose in the public interest will be prohibited by the law.

In relation to the reports of the bodies mentioned above, and the history of the legislation, the following paragraphs summarise the situation:[21]

Reports from the Human Rights and Equal Opportunity Commission's *National Inquiry into Racist Violence* (1991),[22] the Royal Commission into *Aboriginal Deaths in Custody* (1991),[23] and the Australian Law Reform

21 Clarke, *op cit.*

22 Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, AGPS, Canberra, Chapter 11, 273 ff (HREOC 1991).

23 Elliott Johnston QC, *Royal Commission into Aboriginal Deaths in Custody, National Report: Overview and Recommendations*, AGPS, Canberra, 1991, 78 (recommendation 213) (Royal Commission 1991).

Commission's report on *Multiculturalism and the Law* (1992)[24] identified the existence of racist abuse and violence against Australian migrant groups and the indigenous Aboriginal population, and called for legislation specifically targeting racist activities and racist speech.

Each of the reports identified racial vilification as a sufficiently serious problem in Australia to warrant the making of such conduct unlawful. Racist vilification and violence was no longer seen as an individual problem but as a social problem which should be on the political agenda.[25] The *National Inquiry into Racist Violence* (1991)[26] found that "Racist violence is an endemic problem for Aboriginal and Torres Strait Islander people in all Australian States and Territories."[27] It also found that "Racist violence on the basis of ethnic identity in Australia is nowhere near the level that it is in many other countries. Nonetheless it exists at a level that causes concern and it could increase in intensity and extent unless addressed."[28] In the *National Report of the Royal Commission into Aboriginal Deaths in Custody* (1991),[29] Commissioner Johnston noted that verbal abuse constituting racial vilification was a persistent feature of the systemic discrimination suffered by Aboriginal people in the criminal justice system, particularly at the point of contact with police.[30]

The Federal Labor Government's initial legislative response to these reports was the Racial Discrimination Amendment Bill 1992 (Cth) which was introduced into the House of Representatives in December 1992. The Bill proposed amendments to both the *Racial Discrimination Act 1975* (Cth) and the *Crimes Act 1914* (Cth), reflecting a preference for the combined criminal law/conciliation approach advocated by the National Inquiry into Racist Violence.

The 1992 Bill proposed that the *Racial Discrimination Act 1975* (Cth) be amended to make racial vilification unlawful and a basis for complaint to the Human Rights and Equal Opportunity Commission. Racial vilification was defined as knowingly or recklessly doing a public act which was likely to stir up hatred, serious contempt or severe ridicule against a person or a group of persons on the ground of race, colour or national or ethnic origin. The Bill also proposed the addition of two racial incitement offences to the *Crimes Act 1914* (Cth): intentionally stirring up hatred on the ground of race, colour or national or ethnic origin; and, inspiring fear that violence may be used against persons because of their race, colour or national or ethnic origin.

The Bill was circulated for public discussion and comment but when a federal election was called for March 1993, the Bill lapsed. In November 1994 a revised Bill—the Racial Hatred Bill 1994 (Cth) —was introduced into the House of Representatives. Many of its provisions, including the imposition of criminal penalties, were opposed by the then Liberal opposition and ultimately blocked by the Democrats in the Senate. The Commonwealth *Racial Hatred Act* which was finally passed in 1995[31] was much more limited in scope.

3 Tim Wilson MP's Submission

Furthermore, we note the submission #203 of Mr Tim Wilson MP, the former AHRC Human Rights Commissioner, contains numerous inaccuracies and misrepresentations with regard to established standards of international human rights law and with regard to the settled domestic jurisprudence in relation to Part IIA of the *Racial Discrimination Act 1975*. **We note that while Mr Wilson was the former Australian Human Rights Commissioner, he has no formal legal**

24 Australian Law Reform Commission, *Multiculturalism and the Law, Report No. 57*, Alken Press Pty Ltd, Smithfield, 1992, Appendix A (proposed Sections 85 ZKD and 85 ZKE).

25 See generally Rob Witte, "Racist Violence: An Issue on the Political Agenda?" in Tore Björgo and Rob Witte (eds), *Racist Violence in Europe*, St Martin's Press, New York, 1993, 139.

26 HREOC (1991) Chapter 11, 273 ff.

27 HREOC (1991) 387.

28 HREOC (1991).

29 Royal Commission (1991) 78 (recommendation 213).

30 Royal Commission (1991) 71.

31 *Racial Hatred Act 1995* (Cth), amending the *Racial Discrimination Act 1975* (Cth) by incorporating section 18C.

training in Australian law or international human rights law. Unfortunately, it appears the case that much of what Mr Wilson is proposing runs contrary to very well established standards of international human rights law.

On the basis of our submission to the Inquiry and opening statement and evidence on the record at the public hearing, ALHR reiterates its position and makes the following brief comments about Mr Wilson's submission:

- It is an incorrect to allege that "[I]n its current form the law [Part IIA] is inconsistent with human rights, operates [sic] anathema to liberal democratic society, and is utterly inconsistent with a free society."[32].
- The idea to introduce a so-called "objective test" in the form proposed by Mr Wilson based on the test of whether "a reasonable member of the Australian community objectively concludes that…" is entirely misconceived on the following bases:
  - The existing law already includes both a subjective and an objective test;[33]
  - Mr Wilson's proposal misunderstands the inherent and indispensable reason for invoking a victim-test where the standard is implemented as that of the reasonable member of the target group or sub-group as comprehensively explained by Justice Bromberg in *Eatock v Bolt* [2011] FCA 1103 at [243] – [252] and [278] – [302]. See also ALHR Submission #5 at [10.8] – [10.3]. Failing to maintain the current test of reasonableness, and (for example) implementing Mr Wilson's proposal, would completely frustrate the objects and purposes of Part IIA and the RDA as a whole.

4 Nationwide News comment that compliance is too expensive – compare with defamation laws

We also note the question from Senator Claire Moore to representatives of Sisters Inside and the Multicultural Development Association of Queensland regarding:

(1) the alleged "uncertainty" of knowing what might offend some people, and

(2) the purported exorbitant costs involved for media publications in pre-emptively assessing publications to comply with Part IIA of the RDA.

To take the second point first: the simple response to this is that Part IIA requires no higher degree of assessment than do defamation laws. Large media organisations in Australia have (or should have) teams of lawyers on retainer who assess the defamatory liabilities of the publications day in day out. No doubt it comes as a significant cost, but so does proper corporate conduct in adhering with most laws and regulations enacted by the parliaments of Australia to protect the public good. We reiterate that no-one is calling into question the existence of defamation laws on the basis of compliance cost, so it seems absurd to be doing the same with regards to Part IIA RDA on the basis of a spurious "economic cost" argument.

On the point of alleged "uncertainty": the Australian judicial system is in good working order. The precedents of statutory interpretation have been well settled such that the Courts have interpreted the words "reasonably likely to 'offend, insult, humiliate or intimidate' them "**as referring only to 'profound and serious effects, not to be likened to mere slights**."[34] Judicial interpretation has clarified the scope of the legislation, such that there is no uncertainty.

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32 Wilson, Tim MP, Submission #203, PJCHR Inquiry into Section 18C & Freedom of Speech in Australia.

33 See ALHR Submission #5.

34 *Creek v Cairns Post* (2001) 112 FCR 352 at 356 [16] (Kiefel J); *Bropho* at [70] (French J); *Scully* at [102] (Hely J); *Eatock v Bolt* [2011] FCA 1103 at [268] (Bromberg J); or, as Branson J put it in *Jones* at [92] "real offence".

We thank the Committee for its consideration of our additional submissions and we would be happy to assist including by answering any further questions that the Committee might have.

ALHR

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.

Yours faithfully,

Benedict Coyne
President
Australian Lawyers for Human Rights

E: president@alhr.org.au.
M: 0434 915 713

Encl: Submission of Canadian Bar Association in relation to s 13