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Senator The Honourable George Brandis QC
Attorney General
Minister for the Arts

Sent via email: s18cconsultation@ag.gov.au

Dear Senator,

Australian Lawyers for Human Rights (ALHR) is pleased to provide this submission in relation to the proposed amendments to the *Racial Discrimination Act 1975* (Cth) (RDA) as set out in the *Freedom of Speech (Repeal of s. 18C) Bill 2014* (Exposure Draft Bill).

Recommendations

ALHR recommends that the Exposure Draft Bill not be enacted; and

either:

- no change should be made to Part IIA of the RDA; or
- the changes described in Section 4 of these submissions should be made. Briefly, this would involve incorporating the following principles:

  A. Freedom of expression is not an absolute right and the objective of legislation which seeks to prevent the harm caused by racist speech is of sufficient importance to warrant appropriate restrictions on freedom of speech;

  B. Vilification not only includes the 'incitement of hatred', and 'intimidation' but also 'abuse', 'harassment' 'humiliation', 'serious contempt' and 'severe ridicule';

  C. Intimidation on the basis of race is not limited to a fear of physical harm to the person, group of persons or property and also involves psychological intimidation;

  D. A requirement for exemptions and defences to include elements of reasonableness, truth, fairness and good faith;

  E. The standard of reasonableness should be determined from the perspective of a hypothetical reasonable representative of the victim group.

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

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

Introduction

The Exposure Draft Bill substantially diminishes the protection offered by the RDA. It does not 'strengthen the RDA's protections against racism'[2]. It only proscribes the most excessive and violent racist speech which does not occur in the course of a public discussion. Because of its narrow ambit, the Draft Exposure Bill will not protect vulnerable Australians from racial harassment, nor give the desired message that racist speech is unacceptable.

ALHR submits that the need for the Exposure Draft Bill is not clear. Arguments in favour of a change to the current provisions[3] have included the need to reduce the role of the State in limiting free speech[4] and increasing the role of the general public in limiting free speech without the assistance of the law.[5] ALHR submits that these arguments are not persuasive (see Section 5) and that international law places a clear obligation on the State to limit racial vilification (see Section 2).

1. Background: What is racism and how does it work?[6]

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

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

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

b) silencing of those persons, reducing their free speech rights;[9]

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

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

a) denigrating human dignity;

b) encouraging others to mistreat the targeted group;

c) disseminating misinformation and false stereotypes;

d) promoting inequality and unequal treatment;

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

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

2 Media Release accompanying the Exposure Draft of the *Freedom of Speech (Repeal of s. 18C) Bill 2014* (Exposure Draft Bill), Office of the Attorney General Senator The Hon George Brandis QC, 25 March 2014.

3 being Part IIA of the RDA.

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

5 ibid.

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

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

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

9 Soutphommasane, op.cit (2014).

f) discouraging fundamental participatory aspects of democracy.

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

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

The evidence is that encouraging, accepting and tolerating racism causes it to increase and causes the forms that racism takes to become more harmful and more violent.[10] Regulation is essential in order to protect both targeted groups and the wider society.

It is generally accepted both in international law and in other countries (see Section 3) that it is possible to achieve an appropriate regulatory balance between free speech, an individual's right to be free from racist vilification and have their human dignity respected, and a society's right to protect itself from false statements and acts which undermine its democratic system.

2. International law

Australia is a party to the *International Covenant on Civil and Political Rights* ('ICCPR'). Article 19 protects freedom of expression. Article 19(3) contemplates limits to freedom of expression in the following terms:

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

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

Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* ('CERD') also requires State Parties to criminalise all dissemination of ideas based on racial superiority or hatred and incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any racial or ethnic groups. The Article is preventative in nature "to deter racism and racial discrimination as well as activities aimed at their promotion or incitement".[11]

Australia continues to have in place a reservation regarding Article 4 of CERD. Part IIA of the RDA is the closest that Commonwealth legislation has come to giving domestic legislative effect to he binding obligations to the international community mandated by CERD. ALHR submits than the RDA should be strengthened, not weakened (which would be the effect of enacting the Exposure Draft Bill), including through further and more substantively including the concept of 'human dignity' as a care legal principle of the RDA.

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

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

Human dignity has been described as the "foundational concept" of international human rights law.[12] The ICCPR proclaims that the rights in the Covenant derive from the "inherent dignity of the human person".[13] The preamble to CERD recalls that the Charter of the UN is based on the principles of the dignity and equality in all human beings and the UDHR[14] proclaims that all human beings are born free and equal in dignity and rights.[15]

The *Oxford Dictionary* defines 'dignity' as "the state or quality of being worthy of honour or respect". Human rights law recognises that everyone is inherently worthy of respect because they are human. A person has a fundamental right not to be "unjustly debased".[16] Part IIA of the RDA protects a person from vilification by virtue of their race, colour or national or ethnic origin, qualities which are immutable and inherent to them as human beings. ALHR submits that the current provisions properly protect a person's human dignity while the Exposure Draft Bill provides inadequate protection.

ALHR submits that the reference to acts 'reasonably likely to offend, insult or humiliate' should neither be removed nor amended. To 'humiliate' is to injure a person's dignity and self-worth.[17] UNESCO has described humiliation as an offence against human dignity.[18] The UN Committee which monitors the implementation of CERD has commented that states should protect people from abusive and insulting speech and dehumanising discourse on the basis of race, colour or national or ethnic origin.[19] The Exposure Draft Bill fails to do this with its narrow focus on incitement of hatred and fear of physical violence.

To 'offend' is to cause (a person or group) to feel hurt, angry, or upset by something said or done. Offence on the grounds of race might seem an innocuous and irrelevant concept to those who do not experience and have never experienced racism but for vulnerable minorities who have histories of targeted racial abuse, in a civilized democracy they should be protected from such unjust conduct. Freedom of speech and the marketplace of ideas are not optimised when they are oppressing people. Freedom of Speech and the marketplace of ideas are best optimised when properly regulated to facilitate the realisation and respect of fundamental human dignity. The protection as afforded by s 18C of the RDA as it currently stands is precisely what vulnerable minority groups in Australia need to protect their dignity and cultural and social worth such that they can safely and meaningfully engage with Australian democracy.

It is also likely that racial insults and humiliation violate Article 17(1) of the ICCPR - the right to protection from attacks on honour and reputation.[20] Article 19(3) of the ICCPR places a clear limitation on the freedom of expression in relation to the respect for the reputation of others. The CERD Committee has commented that: "the degree to which acts of racial discrimination and racial insults damage the injured party's perception of his/her own worth and reputation is often underestimated" and in accordance with Art 6 of CERD "authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate."[21]

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

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

14 *Universal Declaration of Human Rights*.

15 Preamble to UDHR.

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

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

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

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

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

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

ALHR submits that international law:

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

To properly comply with international law, the Exposure Draft Bill definitions of vilification and intimidation should be considerably more broadly defined; protection from actions that offend, insult and humiliate should be retained; and the scope of subclause (4) should be considerably narrowed (see further Section 4.4). ALHR submits that the proposed subclause (4) is so broad that it would almost entirely defeat the proposed offence and would place Australia in breach of its obligations under the ICCPR, the CERD and the UNDRIP[22].

3. Laws in comparable jurisdictions

This section examines contemporary racial vilification legislation in other comparable jurisdictions, focusing primarily on restrictions through civil and criminal legislation[23]. ALHR submits that these culturally diverse modern democracies, with their similar legal systems, present a series of alternative models against which the Exposure Draft Bill may be compared.

ALHR submits that the Australian Government should be concerned that the Exposure Draft Bill does not leave Australians with lesser legal protections against racial vilification than those required by Australia's international law obligations and those currently granted to citizens in most other culturally diverse modern democracies. ALHR is concerned that the Exposure Draft Bill as proposed would provide significantly less protection than that enjoyed by citizens of comparable jurisdictions. ALHR submits that the passage of a law in the form of the Exposure Draft Bill is likely to not only restrict the right of Australians to live a life free from intimidation and harassment on the grounds of race, but would also significantly reduce Australia's international standing.

3.1 Civil and Criminal Legislative Measures

The United Kingdom, Canada, New Zealand, Ireland, Germany, the Netherlands, the Council of Europe and most other modern states prohibit racial vilification and racist hate speech[24] in terms similar to, or broader than, the existing Part IIA.

(a) New Zealand

New Zealand prohibits hate speech under the *Human Rights Act 1993*. Section 61 (Racial Disharmony) makes it unlawful to publish or distribute "*threatening, abusive, or insulting...matter or words likely to excite hostility against or bring into contempt any group of persons...on the ground of the colour, race, or ethnic or national or ethnic origins of that group of persons*." Inciting Racial Disharmony also creates liability.[25]

(b) Canada

Under the Canadian Criminal Code it is an offense to advocate or promote genocide against a particular race and to publicly incite hatred against any identifiable group by communicating statements in public which are likely to lead to a breach of the peace.[26] The communication of statements, other than in private, which wilfully promote hatred against an identifiable group is also prohibited.[27] These are indictable offences with maximum prison terms of two to fourteen

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22 United Nations *Declaration on the Rights of Indigenous Peoples.*

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

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

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

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

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

years[28]. It is not necessary to prove that the communication actually caused the hatred of a third party.

(c) United Kingdom

In the United Kingdom several statutes criminalise hate speech.[29] Any communication which is threatening, abusive, and intended to harass, alarm, or distress is forbidden. The penalties for hate speech include fines, imprisonment, or both. Pursuant to the *Public Order Act 1986 (UK)* it is an offence to use, display, publish, show or distribute any words, images or behaviour (including a public broadcast or a play) which are "threatening or abusive" and which are either intended or likely to stir up racial hatred.[30]

(d) Europe

On 28 November 2008 the Council of Europe adopted *Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law*. This requires member states take action to criminalise conduct intentionally and publicly inciting violence or hatred directed against a group of persons defined by reference to race, colour, religion, descent or national or ethnic origin.[31]

States are similarly obliged to criminalise conduct publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes when the conduct is carried out in a manner likely to incite violence or hatred.[32] Article 2 of the Framework Decision requires member states to also make punishable instigating, aiding or abetting the conduct referred to in Article 1.[33]

Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.[34]

3.2 Racial Harassment Legislation

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

> "*unwanted conduct related to racial or ethnic origin (which) takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.*[35]

In the United Kingdom the *Crime and Disorders Act 1998 (UK)*[36] and the *Race Relations Act*[37] prohibit racial harassment. In Canada, harassment is a 'discriminatory practice' subject to the same civil penalties as racial discrimination.[38]

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

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

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

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

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

32 IBID Article 1(1)(c) and (d).

33 IBID Article 2.

34 IBID Article 1(2).

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

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

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

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

3.3 Balancing Freedom of Speech and Racial Vilification

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

Article 10 of the European Convention on Human Rights guarantees the right to freedom of expression and to freely *"hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers"*[39]. The convention also provides that the exercise of these freedoms carries with it duties and responsibilities, and acknowledges restrictions to this right, including for "*the protection of the reputation or rights of others*"[40].

The European Court of Human Rights (ECtHR) has held that remarks directed against the Convention's underlying values do not enjoy protection[41] as "*there can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention*".[42]

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

> "*the law had a rational connection to its objective, it was not overly limiting, and the seriousness of the violation was not severe, as the content of the hateful expression has little value to protect…[P]arliament's objective of preventing the harm caused by hate propaganda is of sufficient importance to warrant overriding a constitutional freedom.*"[43]

Many countries recognise that specific legal prohibition of hate speech may however be necessary in order to meet their international and regional treaty obligations. Furthermore they have recognised its value to modern legal systems, not only for the protection it affords to individuals and groups, but for the message that it sends. The ECHR recognises that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society[44] and that it may be necessary in '*democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance*'.[45]

Legislators in the above-mentioned jurisdictions may specifically balance the right to be free from racial vilification and the right to legitimate free expression through defences and exclusions[46].

For example, under section 319 of the *Canadian Criminal Code*, an accused is not guilty if the statements communicated were (1) true, (2) a good faith religious argument, (3) relevant to any subject of public interest the discussion of which was for the public benefit, and on reasonable grounds were believed to be true, or (4) a good faith identification of matters tending to produce hatred for the purpose of their removal.[47] The United Kingdom legislation contains one narrow exemption, which applies only to 'fair and accurate reports' of parliamentary or judicial proceedings.[48]

ALHR submits that the exemption in subclause (4) of the Draft Exposure Bill is too broad. There is a strong international consensus that appropriate exclusions require elements of truth,

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[39] *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights, as amended) (ECHR) Article 10.
[40] Council of Europe *Fact Sheet on Hate Speech*, Council of Europe, November 2008.
[41] Judgments of 4.12.2003 (*Gündüz v. Turkey)* and of 24.6.2003 (*Garaudy v. France)*.
[42] *Gündüz v Turkey* (2003) Eur Court HR 35071/97 at para 41.
[43] *R. v. Keegstra*, [1990] 3 S.C.R. 697.
[44] ibid, 8.
[45] ECtHR judgments of 23.9.1994 (*Jersild v. Denmark*) and 6.7.2006 (*Erbakan v. Turkey*). See also the Judgment of 9.7.2013 (*Vona v Hungary*), specifically on freedom of assembly and association.
[46] Australian Human Rights Commission (2008), op.cit, Chapter 6 at 6.5.
[47] http://en.wikipedia.org/wiki/Hate_speech_laws_in_Canada and http://laws-lois.justice.gc.ca/eng/acts/c-46/page-156.html#docCont, accessed on 28 April 2014.
[48] *Public Order Act 1986* (UK) c 64 s 26 and Australian Human Rights Commission (2008) op.cit, Chapter 6 at 6.5.

reasonableness and good faith. Australia has no reason to fall below this accepted and basic international standard on the extent of freedom of expression and freedom of speech.

4. Specific drafting problems with the Exposure Draft Bill

The Exposure Draft Bill does not appropriately address racial vilification because:

- 'Vilify' and 'intimidate' are defined too narrowly;
- The connector 'because of' is not appropriate;
- The definition of 'reasonable standard' is too narrow;
- Indirect harm including Holocaust denial is not covered;
- Subclause (4) is too wide.

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

This restriction is not appropriate. Extremist speech is not necessarily the most harmful, because its very extremism makes it less socially acceptable. The most harmful racist speech is that expressed by public figures,[49] because people have a tendency to conform to the social mores they express. Similarly, the width of subclause (4) is inappropriate to the nature of the harm. Racial vilification in 'public' discussions, media stereotyping and racist reporting still causes harm.

4.1 'Vilify' and 'intimidate' are defined too narrowly

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

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

We also submit that vilification should include the matters covered in the European Union Framework Decision for Combating Racism and Xenophobia (2007)[50] and acts that encourage racial discrimination.[51]

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

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

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

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

4.2 The connector 'because of' is not appropriate

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

ALHR submits that 'Racist grounds' should be defined to mean '*the supposed, alleged or perceived race, colour, national, ethno-religious, ethnic or cultural background of the targeted person or their family or dependants, and categorisations which use religion as a pretext or cover for targeting on a racist ground*' and that the connection should be that the act is 'by reference to' the racist grounds,[52] not 'because of' the racist grounds.

4.3 The definition of 'reasonable standard' is too narrow

The explanation in subclause (3) of the Exposure Draft Bill of 'whether an act is reasonably likely to have the effect specified' considerably weakens the operation of that test because it prevents consideration of the standards of the target group. The courts acknowledge that applying section 18C calls for an assessment of the reasonably likely reaction of the person or people within the group concerned.[53] The courts have compared the test to that applied in misleading and deceptive conduct cases. A hypothetical individual is adopted as a representative member of the class.[54] This standard is vital to the proper functioning of the RDA. The importance of the victim's perspective in determining the reasonableness of the speech has been highlighted in Australian[55] and international law, and psychology and social theory literature.

ALHR agrees with Justice Bromberg's statement in *Bolt v Eatock*[56] that importing 'general community standards into the test of the reasonable likelihood of offence runs a risk of reinforcing the prevailing level of prejudice.' The Federal Court and the Australian Human Rights Commission (and its predecessor, HREOC) have made the same comments.[57]

The proposed change reflects the unsuccessful argument by Andrew Bolt in *Bolt v Eatock* that 'the objective nature of the assessment required by s 18C(1)(a) imported an objective assessment of community standards and that the same standard applied irrespective of whether group offence or personal offence was alleged.'[58]

Bromberg J noted that 'acceptance of that contention would see a reasonable person test substitute the reasonable representative test' and that to change the wording in this way 'would be antithetical to the promotional purposes of Part IIA of the RDA'.[59] To change the standard of

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52 As used in the European Union *Framework Decision for Combating Racism and Xenophobia* (2007).
53 *Bolt v Eatock* [2011] FCA 1103, at 241.
54 Ibid, at 244.
55 See *Nyungar Circle of Elders v West Australian Newspapers Ltd* [2001] HREOCA 1 (12 April 2001). HREOC Commissioner Graham Innes noted the wide differences in viewpoints as to the offensiveness of the publication by a West Australian newspaper of a cartoon relating to the return of bones of a deceased Aboriginal ancestor. Notably, in that case, general community standards in the application of the reasonableness test in section 18D of the RDA enabled a finding that the publication was not unlawful.
56 Ibid, 1.
57 *Nyungar Circle of Elders v West Australian Newspapers Ltd* [2001] HREOCA 1 (12 April 2001) and *Wanjurri v Southern Cross Broadcasting (Aus) Ltd* [2001] HREOCA 2.
58 Ibid, 1, at 253.
59 Ibid.

reasonableness to that of an ordinary reasonable person, rather than a hypothetical reasonable representative of the target group, would make nonsense of the legislation and lead to a perpetuation of dominant values and understanding. As HREOC Commissioner Graham Innes said, 'the ordinary reasonable man on the Clapham omnibus (who is not likely to be an Australian Aborigine from Western Australia of the Nyungar group) is not reasonably likely to be offended by something which is said concerning the culture, deceased ancestor or mixed ancestry of an Australian Aborigine living in Western Australia of the Nyungar group.'[60]

The importance of the viewpoint of the victim of racial vilification can readily be seen when comparison is made with the law's application to victims of sexual harassment. As Justice Beezer said in the US case of *Ellison v Brady,*[61] 'conduct that many men consider unobjectionable may offend many women'.[62] He stated that 'if we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.' As he noted: 'a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.'

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

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

4.4 Subclause (4) is too broad

No deficiency in the operation of s 18D has been identified which would justify its repeal. Sections 18C and 18D already interact to provide appropriate protection from racial vilification in a way that is consistent with the right to freedom of speech set out in Article 19 of the ICCPR and Australia's international obligations under Articles 19 and 20. The threshold elements of reasonableness and good faith have both objective and subjective elements,[63] and involve the concept of proportionality.[64] These elements together strike an appropriate balance between regulation and freedom of speech.[65] Case law[66] demonstrates that s 18C does not protect statements that are a "mere slight or insult."[67]

The only requirement of this proposed defence is for the speech to be in the course of public discussion. There are no safeguards such as requirements of truthfulness, reasonableness, fairness, accuracy or good faith. This means that the racially vilifying or intimidating speech could be entirely gratuitous, and does not need to be relevant, let alone proportionate. Reporting or commentary could be carried out in a racially vilifying or intimidating way.

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

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60 *Nyungar Circle of Elders v West Australian Newspapers Ltd* [2001] HREOCA 1 (12 April 2001).
61 924 F.2d 872.
62 Ibid.
63 Bromberg J sets out the elements of reasonableness and good faith at [341] in *Eatock v Bolt* [2011] FCA 1103.
64 (2004) 135 FCR 105, 128 [79].
65 See Australian Human Rights Commission, "At a glance: Racial vilification under sections 18C and 18D of the Racial Discrimination Act 1975 (Cth)," https://www.humanrights.gov.au/glance-racial-vilification-under-sections-18c-and-18d-racial-discrimination-act-1975-cth , accessed 15 April 2014.
66 See for example *Kelly-Country v Beers & Anor* [2004] FMCA 336 where a non-Aboriginal comedian portrayed Aboriginal people as stupid, rude, dirty, crude, and always either drunk or drinking. The Federal Magistrates Court found that the performances were artistic works under s 18D(a) and although were 'impolite and offensive' to many groups within Australia, were not unlawful. See also *Jones v Scully* (2002) 120 FCR 243.
67 *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356-57 [16]; *Eatock v Bolt* [2011] FCA 1103 at [268].

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

> requires a recognition that the law condemns racial vilification of the defined kind but protects freedom of speech and expression in the areas defined in pars (a), (b) and (c) of the section. The good faith exercise of that freedom will, so far as practicable, seek to be faithful to the norms implicit in its protection and to the negative obligations implied by s 18C. It will honestly and conscientiously endeavour to have regard to and minimise the harm it will, by definition, inflict. It will not use those freedoms as a 'cover' to offend, insult, humiliate or intimidate people by reason of their race or colour or ethnic or national origin.[68]

Professor Sarah Joseph, Director of the Castan Centre for Human Rights, has noted that under the Exposure Draft Bill effectively only racist speech which has a limited audience is likely to be caught. The more public and widely disseminated the speech, the more likely it is that subclause (4) will apply.[69] This anomalous result is inconsistent with defamation law, ignores the greater harms of widely publicised racist speech and indicates a troubling policy direction (see Section 5).

Some of the worst violence historically has been incited via mass broadcast. The Rwandan genocide was preceded by radio broadcasts by a radio station set up in 1993 and "financed by Hutu extremists to prepare the people of Rwanda for genocide by demonising the Tutsi and encouraging hate and violence."[70] The disc jockeys spoke in code. For example, when the radio station told people to "go to work," it was understood to mean that people should take their machetes to kill Tutsi peoples.[71]

4.5 Indirect harm should be captured, including Holocaust Denial

The Exposure Draft Bill effectively limits the scope of the proscribed speech to where the victim perceives a 'clear and present danger' - a concept more appropriate to public 'village hall' discussions of previous centuries than to the effect of receiving media communications in our own homes and on our own screens. The definitions fail to address the way in which racist speech is communicated through modern media and can cause harm indirectly.

We submit that the definitions should be broadened as discussed above and so that indirect harm is also captured, including Holocaust Denial.[72] While Holocaust Denial is clearly antisemitic, it ingeniously pretends to be a reasoned debate about history and it is doubtful whether it could be said to 'incite hatred' against Jewish people. That does not lessen its hurtfulness to Jews, nor the dangers of the messages it communicates.

5. Free Speech

The Exposure Draft Bill has been promoted on the basis of the supposed desirability of (1) reducing the role of the State in limiting free speech, and (2) increasing the role of the general public in limiting free speech without the assistance of the law – presumably following the First Amendment proposition that 'free speech' is an absolute value that must not be regulated.

As explained in Sections 2 and 3, that is not a proposition shared by international law or by many other nations, which recognise that it is not possible to have real freedom without equality and – to return the quotation at the beginning of this submission - human dignity.

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

69 Gay Alcorn, "Locked in a war of words to define free speech", *Sydney Morning Herald,* 29 March 2014,www.smh.com.au/national/locked-in-a-war-of-words-to-define-free-speech-20140328-35oi1.html , accessed 8 April 2014

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

71 Ibid.

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

5.1 More speech?

> *… the marketplace of ideas can be distorted; it is not an arena of perfect competition, as economists might put it. We cannot realistically expect that the speech of the strong can be countered by the speech of the weak.*[73]

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

The mass media presents complex situations in terms of stereotypes[74] and appeals to prejudices rather than reason. It has acquired an enormous potential for harm[75] which has not been taken into account in philosophically-based arguments for free speech. Proponents of free speech such as John Stuart Mill assumed that the speech to be protected would be rational debate amongst a relatively small, educated elite. They did not envisage how speech, music and imagery would be transmitted across continents in a "systematic avalanche of falsehoods"[76] to manipulate the emotions and opinions of millions.[77]

Modern analysis of communication understands that racist speech can still have an effect even if its message is rejected. At some level racism is planted in our minds as an idea that may hold some truth.[78]. Racism works "by socializing, by establishing the expected and the permissible."[79]

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

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

5.2 The role of the State as legislator

ALHR notes comments made by the Attorney-General in an interview on ABC's *Lateline* program that people should have a general "freedom to spread untruths."[80] This suggests that the Government is seeking to allow a society that permits public attacks on human dignity based on

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[73] Soutphommasane (2014), op.cit.

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

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

[76] Reisman (1942a).

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

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

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

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

race, regardless of the facts, of reasonableness and of good faith. This would leave people, who may already be experiencing marginalisation, in a position where even the truth cannot provide a basis for remedy. ALHR can see no public benefit to be derived from allowing racial vilification based on factual inaccuracies and distortions of the truth. Further, this position is fundamentally incompatible with the aims of the CERD (to eliminate all forms of racial discrimination), the relevant provisions of the UNDRIP and the ICCPR, and Australia's related obligations.

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

While it has been argued that the law itself is not the "solution to all of society's ills,"[81] to quote Bhikhu Parekh:

> Because the law throws the society's collective moral and legal weight behind a particular set of norms of good behavior, it does have some influence on attitudes; its role is limited but nonetheless important. [82]

In ALHR's view, the Exposure Draft Bill changes the legislation in a way that is likely to have a negative influence on public attitudes. ALHR submits that the social conditions in Australia have not changed so much since 1995 that we no longer need protection from racial vilification. The Exposure Draft Bill sends a strong signal that bigotry is not only acceptable, but that people have a right to publicly engage in it. In ALHR's view the 'right' to bigotry, coupled with the 'freedom' to spread untruths, are not proper policy goals for any modern society.

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

ALHR submits that the Exposure Draft Bill amounts to a proposal to allow public racially vilifying speech that is factually incorrect and inflammatory.[83] ALHR submits that this is a deeply concerning prospect that fails to recognise that social cohesion is a necessary public interest that must be actively pursued in a multicultural society like Australia and that government has a crucial role in this process.

ALHR notes also that the silencing effect of racial hate speech and racial vilification upon victim communities would defeat the purpose of the Exposure Draft Bill, which is to promote the freedom of speech.

Racism develops and reproduces itself within society through racist speech and ideas. While some people may see that as something that law cannot and should not change, international law and legislation in comparable countries demonstrates that State regulation of racist speech is accepted across the world – with no obvious ill-effects upon the democratic structures of those countries. Speech is not so fragile as First Amendment jurisprudence might suggest.

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

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

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

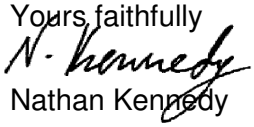
[83] See *Eatock v Bolt* [2011] FCA 1103 at [381] , Camb.

A change of focus is required to achieve recognition that categories of rights and obligations which are traditional in the common law do not meet the needs of the victims of racist activities. The focus should shift to Australia's obligations under international human rights law and the RDA should be strengthened in order to comply with that law. The Exposure Draft Bill fails to do that.

6. About ALHR

ALHR, established in 1993, has extensive experience and expertise in the principles and practice of international law and human rights law in Australia. ALHR is a network of over 3,000 Australian lawyers, barristers, judicial officers and law students active in practising and promoting awareness of international human rights. ALHR has active National, State and Territory committees through which it conducts training, information dissemination, submissions and networking related to human rights both within, and external to, the legal profession.

Yours faithfully



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