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12 May 2017

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Dear Mr McInally

***Submission as to Ways of protecting and strengthening Australia's multiculturalism and social inclusion***

Australian Lawyers for Human Rights (ALHR) refers to your letter of 7 April 2017. We are grateful for the opportunity to make a submission to the Senate Select Committee in relation to its Inquiry.

Our submission will focus on the following issues in the Terms of Reference:

1. the impact of discrimination, vilification and other forms of exclusion and bigotry on the basis of 'race', colour, national or ethnic origin, culture or religious belief;
2. the impact of political leadership and media representation on the prevalence of vilification and other forms of exclusion and bigotry on the basis of 'race', colour, national or ethnic origin, culture or religious belief;
3. how to improve the expected standards of public discourse about matters of 'race', colour, national or ethnic origin, culture or religious belief;
4. how to better recognise and value the contribution that diverse communities bring to Australian social and community life; and
5. the potential benefits and disadvantages of enshrining principles of multiculturalism in legislation.

**ALHR**

ALHR was established in 1993 and is a national association 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.

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*Commitment to a country ... is often a tentative and incremental process.  
Like a transplanted seedling, it needs time  
and tender loving care to take roots and grow.  
Acceptance and encouragement strengthen it,  
Rejection and rebuttal make it wither.<sup>1</sup>*

## Summary

*Discrimination, vilification and other forms of exclusion and bigotry on the basis of 'race', colour, national or ethnic origin, culture or religious belief are referred to in this submission as 'exclusionary activities.'*

1. **The impact of exclusionary activities:** Exclusionary activities cause numerous inter-related harms even when those activities are directed against a group in general terms and not against identifiable individuals. Such activities can cause both psychological and physical harm to members of the targeted group. As a consequence of exclusionary activities, group members can feel excluded from mainstream society and may be afraid to be involved in public activities. They can feel disempowered. Their words are given less credibility and are less likely to be publicly heard. They are discouraged from contributing to the society in which they live and effectively encouraged to remain separated from the rest of society. 'Multiculturalism' is undermined and Australian democracy and social cohesion is diminished.
2. **The impact of political leadership and media representation:** Exclusionary activities increase where they are supported by public figures such as politicians and/or by the media. Social and political tendencies towards scapegoating and the lack of an Australian human rights framework contribute to this problem.
3. **How to improve expected standards of public discourse:** Neither law nor education can achieve improvement alone, it is necessary to use both of these tools (bearing in mind that law also has an educative role), and the adoption of human rights principles can provide an effective structure for such improvements.

From a legislative point of view, the adoption of a federal Human Rights Act would be an effective measure. Strengthening of media standards would also assist.

Public education needs to be carried out at a variety of levels. Human rights education including anti-racism and pro-multicultural education should be part of the Australian curriculum from primary school onwards. Government media (radio, television and internet) should be used as an educative tool to counter exclusionary activities, including by re-invigorating the multicultural nature of SBS and strict adherence to its Charter.

4. **How to better recognise and value the contribution that diverse communities bring to Australian life:** This can be improved through government leadership and public education generally, including through SBS, as described above.
5. **The potential benefits and disadvantages of enshrining principles of multiculturalism in legislation:** Given that there is no generally agreed definition of 'principles of multiculturalism,' and that different cultures can have inconsistent beliefs or principles, we submit that the better course would be to enshrine principles of human rights in legislation.

If human rights are enshrined, through the balancing and 'reasonable accommodation' processes of a human rights framework, the best aspects of multiculturalism will be encouraged and the worst aspects (such as religious intolerance) discouraged.

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<sup>1</sup> Dr Nguyen Trieu Dan, *Quadrant*, November 1994 quoted by Marjorie Henzell, *Hansard*, House of Representatives, 16 November 1994, 3419.

## 1. What is multiculturalism?

- 1.1 Despite the existence of State, Territory and Federal legislation and policy about multiculturalism (see section 8), there is no general agreement as to the content of Australian principles of multiculturalism. As Elsa Koleth noted in 2010:

*Multiculturalism has been a contested policy and concept since its introduction in Australia in the 1970s. While maintaining some core principles, in the three decades since its introduction, federal multicultural policy statements have evolved in response to changing government priorities and responses to the challenges facing Australian society.*<sup>2</sup>

- 1.2 She adds:

*Over time the term 'multiculturalism' has come to refer to the demographic reality of cultural diversity, a set of policies and policy orientations, as well as a concept which articulates a normative ideal or ideals about society. Multiculturalism has served a variety of goals over the years, including, the pursuit of social justice, the recognition of identities and appreciation of diversity, the integration of migrants, nation-building, and attempts to achieve and maintain social cohesion.*

- 1.3 In so far as multiculturalism is a policy for *managing the consequences of cultural diversity*,<sup>3</sup> it has been validly criticised as 'white monomorality',<sup>4</sup> a conservative perspective "aimed at the Anglo-Australian ruling class, reassuring them that cultural minorities will not be allowed to threaten their material superordination."<sup>5</sup> Multiculturalism does not overcome the concept that 'white' is normal or neutral and the ethnic is the 'other'. Multiculturalism can be criticised as maintaining the notion of artificial boundaries between groups and hence as an inadequate principle to deal with the reality of 'cultural hybridity'.<sup>6</sup> Issues of power differentials are obscured. All cultures are viewed as equal and as internally homogeneous, class and gender structures being ignored.<sup>7</sup>
- 1.4 In this submission, we do not examine these issues. We assume, rather, that references to enshrining "multicultural principles" can be taken as a general description of the aims of achieving and maintaining social cohesion and equal treatment for all Australian residents irrespective of cultural or ethnic background, and of fostering an accepting culture which encourages indigenous people, new arrivals and Australian-born descendants of immigrants to feel themselves to be genuine and valued members of Australian society (the 'positive aims'). These positive aims cannot be met where any section of people within Australian society feels that they do not receive social and legal justice, that they are systemically discriminated against, or systemically vilified. These positive aims cannot be met if any section of Australian society is regularly vilified and denigrated publicly by the media or by political leaders. We argue below that these positive aims will best be realised in Australia by enshrining a human rights framework in our federal legislation.

<sup>2</sup> Elsa Koleth, "Multiculturalism: a review of Australian policy statements and recent debates in Australia and overseas" Social Policy Section, Federal Parliamentary Library, *Research Paper No. 6 2010–11*, [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1011/11rp06 - Toc275248147](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1011/11rp06 - Toc275248147), accessed 3 May 2017, Executive Summary.

<sup>3</sup> Department of Prime Minister and Cabinet, Office of Multicultural Affairs, *National Agenda for a Multicultural Australia: Sharing our Future*, AGPS, Canberra, July 1989, vii.

<sup>4</sup> Jon Stratton, "Multiculturalism and the Whitening Machine, or how Australians became white" in Ghassan Hage and Rowanne Couch, *The Future of Australian Multiculturalism*, Research Institute for Humanities and Social Sciences, University of Sydney, 1998, 163.

<sup>5</sup> Andrew Jakubowicz, discussing the 1982 Ethnic Affairs Policy Task Force booklet, *Multiculturalism for all Australians*, in "Ethnicity, multiculturalism and neo-conservatism," in Gill Bottomley and Marie de Lepervanche (eds), *Ethnicity, Class and Gender in Australia*, George Allen & Unwin, Sydney, 1984, 28 at 43. See Curthoys (2000) 30.

<sup>6</sup> Homi K. Bhabha, "Signs Taken for Wonders" in Bill Ashcroft, Gareth Griffiths, and Helen Tiffin, *The post-colonial Studies Reader*, Routledge, London and New York, 1995, 29 at 34, David Hollinsworth, *Race and Racism in Australia* (2<sup>nd</sup> ed), Social Science Press, Katoomba, 1998, 247.

<sup>7</sup> Peta Stephenson, "'Race,' 'Whiteness' and the Australian Context" (1997) 1 (2) *Mots Pluriels* 297, available at: <http://www.com.refer.org/motspluriels/MP297ps.html> at footnote 15, citing de Lepervanche.

## 2. The desirability of establishing a human rights framework

- 2.1 ALHR's strongly believes that Australian legislation and judicial decisions should adhere to international human rights law and standards.
- 2.2 We endorse the views of the Parliamentary Joint Committee on Human Rights (PJCHR) expressed in Guidance Note 1 of December 2014<sup>8</sup> as to the nature of Australia's human, civil and political rights obligations, and agree that the inclusion of human rights 'safeguards' in Commonwealth legislation is directly relevant to Australia's compliance with those obligations.
- 2.3 Human rights entail both rights and obligations. In so far as we are ourselves entitled to the protection of human rights, we must also respect the human rights of others.<sup>9</sup> Generally, where legislative protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others. Conversely, where legislation penalises behaviour it is relevant to what extent the offender's behaviour impacts upon the human rights of others.
- 2.4 In general terms, there is no hierarchy of human rights – all are equally valuable (the principle of indivisibility) and all should be protected together (the principle of interdependence). Some rights are expressed as absolutes: the right to be free from slavery, torture, cruel or inhuman or degrading punishment or treatment, or arbitrary deprivation of life, and the right to recognition as a person in law. The protection of one's internal beliefs is also expressed to be an absolute right as an aspect of both freedom of speech and freedom of religion.
- 2.5 Subject to those absolutes, all rights must be **balanced** where they conflict and provide **reasonable accommodation** to other rights.<sup>10</sup> This is commonly understood in international law and in jurisdictions where human rights are enshrined in national constitutions, such as Canada and all European countries. **In Australia, being alone amongst first world countries in not having constitutionally protected human rights, there is not a common understanding of this well-established point.**
- 2.6 We argue below that a human rights framework will best implement the benefits of multiculturalism and manage the tensions and conflicts that can arise from cultural diversity through the balancing and reasonable accommodation processes.

## 3. General acceptance of social inclusion and multiculturalism in Australia

- 3.1 Some recent research findings provide a useful context to any discussion about multiculturalism, social inclusion and discrimination. The Scanlon Foundation surveys have found consistent high level of agreement with the proposition that 'multiculturalism has been good for Australia': in the range 83%-86% in the 2013-2016 surveys.<sup>11</sup> The majority of 1,500 respondents to a 2016 Scanlon Foundation survey felt that multiculturalism involves a two-way process of change, involving adaptation by Australia-born and those born in other countries. 66% agreed with the proposition that 'we should do more to learn about the customs and heritage of different ethnic and cultural groups in this country,' while 60% agreed that 'people who come to Australia should change their behaviour to be more like Australians.'<sup>12</sup>
- 3.2 80% of 6,001 respondents to a 2015-2016 national survey entitled 'Face Up to Racism' were of the view that it is good for society to be culturally diverse. There was, however, quite strong support for the proposition that cultural diversity is a threat to nationhood in Australia. Almost 1-in-2 respondents (49 per cent) believed that people from racial, ethnic, cultural and religious

<sup>8</sup> Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting Statements of Compatibility*, December 2014, available at <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources)> accessed 16 January 2015, see also previous *Practice Note 1* which was replaced by the Guidance Note, available at <<https://www.humanrights.gov.au/parliamentary-joint-committee-human-rights>>, accessed 16 January 2015.

<sup>9</sup> See generally, United Nations Human Rights Office of the High Commissioner, "What are Human Rights?" available at <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>>, accessed 9 February 2017.

<sup>10</sup> Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief* (2015) A/HRC/31/18 pursuant to the UN Human Rights Council Resolution 22/20 (cited as Bielefeldt (2015)) par 19ff.

<sup>11</sup> Professor Andrew Markus, 'Mapping Social Cohesion: The Scanlon Foundation surveys 2016,' Scanlon Foundation, Australian Multicultural Foundation and Monash University, p.2 (Markus (2016)).

<sup>12</sup> *ibid.*

minority groups should behave more like 'mainstream Australians', showing support for assimilation.<sup>13</sup>

- 3.3 The 2016 Scanlon Foundation found relatively high levels of negativity towards Muslims and an increase in the proportion of people experiencing discrimination on the basis of skin colour, ethnicity or religion from 15% in 2015 to 20% in 2016.<sup>14</sup>
- 3.4 The 'Face Up to Racism' survey found that 63 per cent of respondents expressed some degree (ranging from slightly-extremely) of intolerance/discomfort with Muslim Australians, 51.4 per cent expressed anti-Middle Eastern sentiment, and 43.9 per cent of respondents expressed anti-African sentiment. Experiences of racism amongst the respondents were quite high: 34.8 per cent of participants had experienced racism on public transport or in the street, 32.8 per cent of participants had experienced racism in the work place, and 32.8 per cent of participants had experienced within an educational institution.<sup>15</sup>
- 3.5 Nine out of ten respondents to a consultation survey led by the Australian Human Rights Commission in 2012 said that racism was either an extremely important or very important issue facing Australians. Two-thirds of respondents identified having experienced racism personally.<sup>16</sup>
- 3.6 Between 2011 and 2014, concern over defence, national security and the threat of terrorism in Scanlon Foundation surveys ranked low, noted by less than 1% of respondents. In 2015, however, it increased to 10%, making it the second highest ranked issue of that year. In 2016, defence, national security and the threat of terrorism was the third ranked issue at 9%.<sup>17</sup>
- 3.7 The following research findings provide some context to the specific situation of refugees and migrants:
  - The 2016 Scanlon Foundation survey found continuing low level of concern over issues of immigration. Just 34% considered that the immigration intake was 'too high', the lowest recorded in the Scanlon Foundation surveys, and consistent with the findings of recent ANU, Lowy Institute and Roy Morgan polls.<sup>18</sup>
  - When asked concerning the entry as permanent or long term residents of 'those who have close family living in Australia' and 'skilled workers', 84%-85% of respondents to the 2016 Scanlon Foundation survey were 'very positive' or 'somewhat positive', higher than the proportions obtained in the 2010-2012 Scanlon Foundation surveys.<sup>19</sup>
  - Almost one-quarter (23%) of all respondents to the 2015-2016 'Challenging Racism Project' survey stated that some migrant groups do not belong in, or should not be welcomed to, Australia (see Table 7).<sup>20</sup>
  - 80% of respondents to the Scanlon Foundation survey were positive about the humanitarian program. Respondents in 2016 were also asked for their view on the size of the Humanitarian program, whether the 'current refugee intake is adequate, too few or too many.' Almost a quarter (23%) indicated too few, a further 39% 'adequate,' a total of 62%. A minority, close to one-third (30%), responded too many. Almost the same result was obtained in response to a question on the 'government's plan to bring refugees from the Syrian conflict to Australia'; 58% indicated support, 34% opposition.<sup>21</sup>
  - The Scanlon Foundation survey asked participants: 'Do you approve of asylum seekers who try to reach Australia by boat?'. 14% indicated 'strong approval', 18% 'approval', a

<sup>13</sup> See Blair K., Dunn K. M., Kamp, A., and Alam, O. (2017) 'Challenging Racism Project 2015-16 National Survey Report', Western Sydney University (Blair (2017)), <http://researchdirect.westernsydney.edu.au/islandora/object/uws:39004> p.6.

<sup>14</sup> Markus (2016) p.4.

<sup>15</sup> Blair (2017).

<sup>16</sup> Australian Human Rights Commission, 'Report of the National Anti-Racism Strategy consultation process,' June 2012, pp. 4-5, <https://itstopswithme.humanrights.gov.au/why-racism>.

<sup>17</sup> Markus (2016) p.21.

<sup>18</sup> Markus (2016) p.2.

<sup>19</sup> Markus (2016) p.2.

<sup>20</sup> Blair (2017) p.7.

<sup>21</sup> Markus (2016), p.2.

total 32%, while 42% indicated 'strong disapproval', a further 20% 'disapproval', a total of 61%.<sup>22</sup>

#### 4. The impact of exclusionary activities<sup>23</sup>

##### Background

- 4.1 The ideology underpinning exclusionary activities is kept alive through both public and private communication of racist viewpoints and the use of racist scapegoating. Racism justifies discriminatory treatment on the basis of the targeted person's purported 'race' or similar characteristics (cultural, biological, historical etc) - which are often inaccurate descriptions of the target group.<sup>24</sup>

##### Summary

- 4.2 Exclusionary activities cause direct and indirect harm to the people targeted and their communities<sup>25</sup> including:
- (a) psychological trauma - reducing the victims' desire and ability to express themselves freely, and to participate fully in education, work and public or political life;
  - (b) direct violence as well as indirect physical harm - including, in the case of children, higher risk of anxiety and depression, behaviour difficulties, suicide and self-harm, sleep difficulties, systemic inflammation, risk factors for cardiovascular disease and increased cellular aging,<sup>26</sup>
  - (c) silencing of those persons, reducing their free speech rights and their public participation,<sup>27</sup>
  - (d) discrimination against those persons, limiting their social and economic resources and participation in democratic society.
- 4.3 Exclusionary activities also fundamentally harm our democratic processes and encourage Australians to reject the notion of an inclusive democracy, multiculturalism and assimilation, by:
- (a) encouraging others to mistreat the targeted group;
  - (b) disseminating misinformation and false stereotypes;
  - (c) promoting inequality and unequal treatment;
  - (d) denigrating human dignity;

<sup>22</sup> Markus (2016), p.2.

<sup>23</sup> 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/primos\\_library/libweb/action/dIDisplay.do?dscnt=1&fromLogin=true&dsmtp=1321253783332&docId=unsworks\\_631&vid=UNSWORKS](http://www.unsworks.unsw.edu.au/primos_library/libweb/action/dIDisplay.do?dscnt=1&fromLogin=true&dsmtp=1321253783332&docId=unsworks_631&vid=UNSWORKS), accessed 7 May 2017.

<sup>24</sup> Peter Jackson, *Race and Racism: Lessons in Social Geography*, Allen and Unwin, London, 1987, 12 - 13.

<sup>25</sup> 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 (Soutphommasane (2014)), <https://www.humanrights.gov.au/news/speeches/two-freedoms-freedom-expression-and-freedom-racial-vilification>.

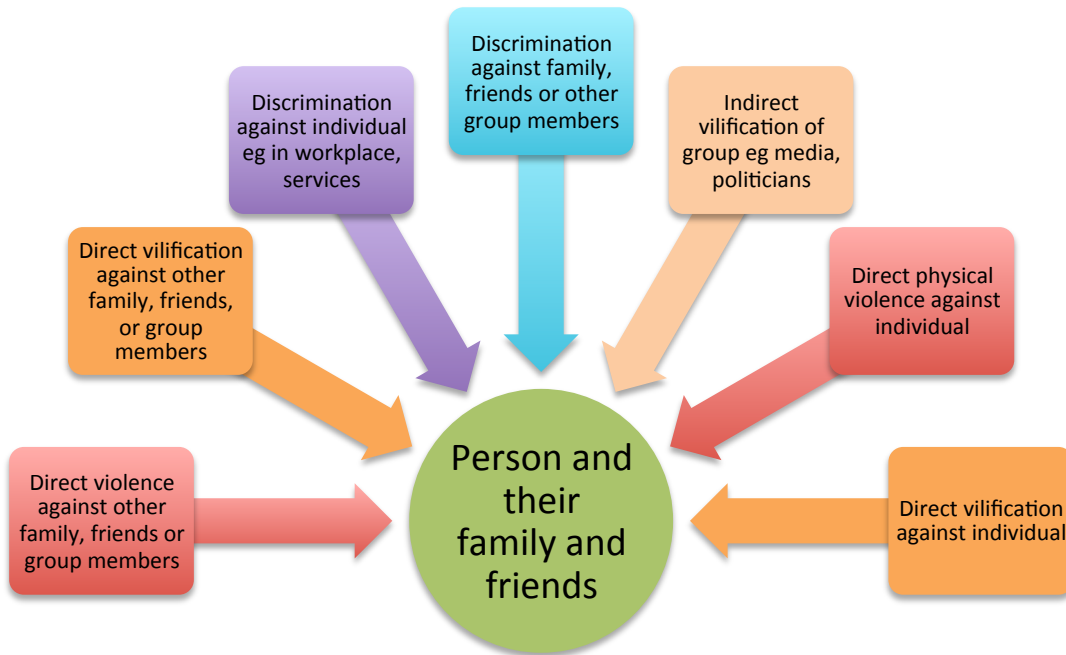
<sup>26</sup> Dr Naomi Priest, "Research reveals what racism can do to a child's body", Unicef Australia website, accessed 25 November 2016 at: [http://www.unicef.org.au/blog/november-2016/research-reveals-what-racism-can-do-to-a-childs-body?utm\\_source=facebook&utm\\_campaign=racism&utm\\_medium=page-post&utm\\_content=research-reveals-blog-post-1](http://www.unicef.org.au/blog/november-2016/research-reveals-what-racism-can-do-to-a-childs-body?utm_source=facebook&utm_campaign=racism&utm_medium=page-post&utm_content=research-reveals-blog-post-1), American Psychological Association, "Physiological & Psychological Impact of Racism and Discrimination for African-Americans", <http://www.apa.org/pi/oema/resources/ethnicity-health/racism-stress.aspx>, accessed 7 May 2017, "Racism, a threat to the health and well-being of the nation", Robert Wood Johnson Foundation, <http://www.rwjf.org/en/library/articles-and-news/2012/04/racism-a-threat-to-the-health-and-well-being-of-the-nation.html>, accessed 7 May 2017, "Living with Discrimination can take a toll on health", <http://www.rwjf.org/en/library/articles-and-news/2013/11/living-with-discrimination-can-take-a-toll-on-health.html>, accessed 7 May 2017.

<sup>27</sup> Soutphommasane (2014).

- (e) discouraging or ‘chilling’ general opposition to racist groups; and
- (f) discouraging fundamental participatory aspects of democracy.

Exclusionary activities promote ideas opposed to democratic values and undermine a stable and plural Australian society.

- 4.4 Justification for limiting exclusionary activities by law is founded on the realities of the harms caused.
- 4.5 The evidence is that encouraging, accepting and tolerating exclusionary activities causes them to increase and causes the forms they take to become more harmful and more violent. Regulation is essential in order to protect both targeted groups and the wider society.



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### Harms overlap

- 4.6 The types of harm caused by exclusionary activities such as racist abuse and behaviour are not separate but merge into a complex overlapping pattern, repeated time after time. The harms are cumulative and mutually reinforcing, creating a culture of harm that is greater than the sum of the individual exclusionary activities. Thus it is not correct to claim that the only ‘harms’ which are ever caused by racial vilification are offence or hurt of those who suffer direct ‘face to face’ abuse. Harms caused to family members, friends or others of the same group all have an impact not just on those people but on everyone within their group. Indirect racist abuse is no less harmful than direct abuse, although its effects are experienced in different ways. The various different types of event, and the number of such events over time, must be viewed as a whole.<sup>28</sup>
- 4.7 People from marginalised groups are subjected to exclusionary activities to a much higher degree than others. They more likely than the rest of the community to experience a wide range of intimidatory and violent behaviours; to be violently attacked, vilified and mistreated. They are more likely than the rest of the community not just to experience isolated incidents of violence or abuse, but to experience continuous mistreatment for the whole of their lives. This continuous pattern of maltreatment has severe psychological, social and economic effects, and impacts on following generations.
- 4.8 Exclusionary activities can respond to different aspects of the victim’s identity or perceived characteristics. Thus women may suffer discrimination of a different kind or to a different degree than men from the same ethnic background, and people with disabilities may suffer more or less adverse treatment depending upon their perceived ethnicity or colour.

<sup>28</sup> Tore Björger, and Rob Witte (eds), *Racist Violence in Europe*, St Martin’s Press, New York, 1993, 4.



- 4.9 Exclusionary activities also compound other difficulties faced by individuals. For example, refugees have fled war, persecution and/or serious human rights violations and may already be suffering from mental health issues. Exclusionary activities are likely to exacerbate these problems further.
- 4.10 Most of the 'free speech' arguments against regulation of racist speech and behaviour focus upon only the personal psychological pain felt by victims of isolated incidents of direct racist hate speech. This is to deny the context of the experience of multiple and overlapping harms and their serious consequences.<sup>29</sup>

### *Psychological harms and their physical effects*

- 4.11 Suffering is more subtly manifested in the psychosocial realm.<sup>30</sup> Racist discrimination or abuse attacks the victim for being part of the group of which their family and social circle are also a part. It thus attacks at the same time the victim's own identity, their family and their social group,<sup>31</sup> leaving them nowhere to turn.
- 4.12 The former Commissioner of the Royal Commission into Black Deaths in Custody, Elliott Johnson, was horrified to discover "the degree of pin-pricking domination, abuse of personal power, utter paternalism, open contempt and total indifference" with which so many Aboriginal people are treated in Australia on a day to day basis.<sup>32</sup> Even minor and subtle forms of racism such as people averting their gaze, not sitting next to them on a bus, or ignoring their presence, have a debilitating effect on individuals, found the Human Rights and Equal Opportunity Commission's *National Consultations*,<sup>33</sup> "denying a person's humanity and thereby attacking the basis of their identity."
- 4.13 While traditionally threats of harm are only recognised as hurting only the individual directly threatened,<sup>34</sup> in the case of exclusionary activities the whole group with which the victim has been associated pays the price, says Colin Rubinstein, in fear, insecurity, and genuine psychological harm,<sup>35</sup> damaging each person's self-image and confidence and affecting relations with friends, family and society.<sup>36</sup>
- 4.14 Psychological harm is reinforced by the fact that direct response by victims is usually not a practical option. Victims choose not to challenge behaviour which perpetuates their subordination out of fear and out of knowledge that they will not receive social support if they respond to the perpetrator's attacks.
- 4.15 American research has indicated that the emotional stress constantly experienced by Afro-Americans because of the general level of ill-feeling against them from the predominantly white society, coupled with Afro-Americans' generally lower socio-economic status,<sup>37</sup> has resulted in higher levels of sickness and stress-related disorders,<sup>38</sup> lower life expectancy and learning difficulties, including at college level.<sup>39</sup> Such stress severely hampers a child's

<sup>29</sup> Catharine A. MacKinnon, *Only Words*, Harvard University Press, Cambridge, Massachusetts, 59, 60.

See too Luke McNamara, "Confronting the Reality of Hate Speech" (1995) 20 (5) *Alt L J* 231 at 233-4.

<sup>30</sup> Thomas W. Simon, "A Theory of Social Injustice" in David S. Caudill and Steven Jay Gold, (eds) *Radical Philosophy of Law*, Humanities Press, New Jersey, 1995, 54 at 62. See also *Page v. Smith* [1995] 2 WLR 664 at 668-9 (judicial recognition of psychiatric effects).

<sup>31</sup> Peter Rosenthal, "The Criminality of Racial Harassment" (1989 - 90) *Canadian Human Rights Yearbook Annual* 113 at 118.

<sup>32</sup> quoted by Garrie Gibson, *Hansard*, House of Representatives, 15 November 1994, 3349 to 3350.

<sup>33</sup> [http://www.humanrights.gov.au/racial\\_discrimination/consultations/consultations.html](http://www.humanrights.gov.au/racial_discrimination/consultations/consultations.html)

<sup>34</sup> Former Attorney-General Michael Lavarch, *Hansard*, House of Representatives, 15 November 1994, 3339.

<sup>35</sup> *Australian*, 1 June 1994, quoted by Martin Ferguson, *Hansard*, House of Representatives, 16 November 1995, 3427.

<sup>36</sup> See Howard J. Ehrlich, Barbara E.K. Larcom and Robert D. Purvis, "The Traumatic Impact of Ethnoviolence," in L. Lederer, and R. Delgado (eds) *The Price We Pay: the case against racist speech, hate propaganda and pornography*, Faura, Strauss and Giroux, New York, 1995, 62.

<sup>37</sup> See A. Gordon, "Black Education in South Africa: Psychological and Sociological Correlates of Achievement" in L.H. Ekstrand (ed), *Ethnic Minorities and Immigrants in a Cross-Cultural Perspective*, Swets North America Inc, Berwyn, 1986, 245 at 251.

<sup>38</sup> See also references in footnote 28 above.

<sup>39</sup> Reginald A. Gougis, "How a Prejudice-Based Stressor Disrupts the Emotional State and Academic Achievement of Black-American Students" in Ekstrand (1986) 260.

learning process.<sup>40</sup> Even where there is no obvious physical damage, the stress and fear caused by racist behaviour can result in nausea, headaches, high blood pressure, stomach pains, heart attacks, suicide.<sup>41</sup> The individual might be scared to leave the house, reluctant to socialise, or to allow their children to do so, and constantly sensitive to the possibility of abuse or attacks. Repeated racist intimidation from neighbours or workmates can ruin an adult's life. Harassment and abuse at school can terrorise a child, particularly if their teachers fail to protect them or join in the abuse.

- 4.16 Jane Elliott described the pain that some children in her primary school class felt when they were treated in an exclusionary manner for a single day. She divided the children into two groups according to eye colour — blue or brown — and used this as an excuse for treating one group badly: giving them fewer privileges, and acting towards them as if they were less interesting and less intelligent.

*By the lunch-hour, there was no need to think before identifying a child as blue or brown-eyed. I could tell simply by looking at them. The brown-eyed children were happy, alert, having the time of their lives. And they were doing far better work than they had ever done before. The blue-eyed children were miserable. Their posture, their expressions, their entire attitudes were those of defeat. Their classroom work regressed sharply from that of the day before. Inside of an hour or so, they looked and acted as though they were, in fact, inferior. It was shocking.*<sup>42</sup>

- 4.17 The targeted children described how they felt: I was sick; I felt dirty. I didn't want to work. I didn't feel like I was very big. I felt like crying. I felt like quitting school. They were 'mad', they were angry, and they wanted to 'tie up' or slap the other students who were hurting them and "blow the teacher sky high."<sup>43</sup> Their pictures of themselves when they were part of the 'superior' group were large, bright and beautiful – dramatically different from the dark and miserable pictures they drew of themselves as tiny insignificant figures, when they were in the 'inferior' group.<sup>44</sup>
- 4.18 In 1993, 630 Higher School Certificate Melbourne students were interviewed by researchers at the Melbourne University Department of Psychiatry. Of one hundred Vietnamese refugee students in that group, 69 percent said they experienced racism at school, 59 percent experienced it in the streets and 14 percent said racism involved physical threat or injury. As a result of such experiences, some of the students suffered from loss of sleep, others felt "nervous and shaky inside," some said they panicked in crowds and some even thought of killing themselves. The constant fear and vulnerability caused by racist violence, intimidation and hate speech is a real injury.

<sup>40</sup> Gordon (1986) 251 quoting Mana Slabbert, *Repetitive Cycles*, University of Cape Town, Institute of Criminology, Cape Town, 1980, 9.

<sup>41</sup> See Mari J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 *Michigan Law Review* 2320, reprinted in 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, 24.

<sup>42</sup> W. Peters, *A Class Divided, Then and Now*, Yale University Press, New Haven, 1987, 24 and 25.

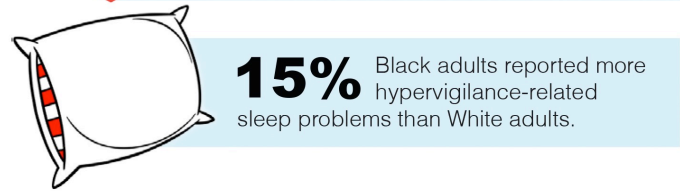
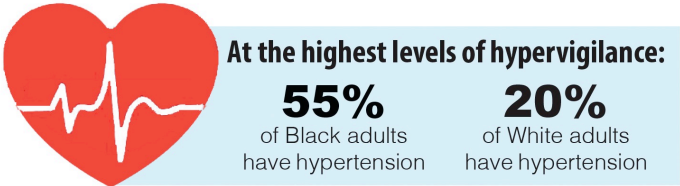
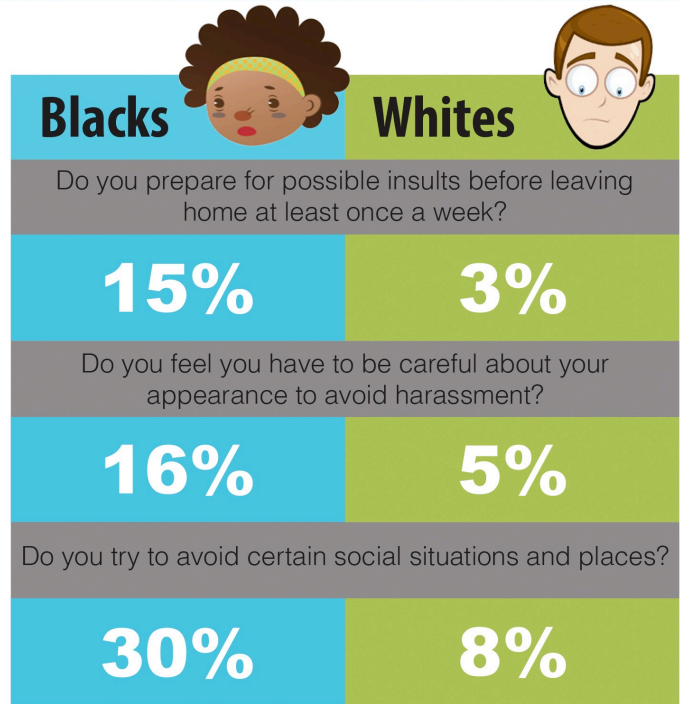
<sup>43</sup> Peters (1987) 32 to 34.

<sup>44</sup> Peters (1987) 88 to 90. For other descriptions of the immediacy and intensity of the harm wrought by the encouragement of prejudice, see the descriptions of experiments of American college students in Philip G. Zimbardo, *Psychology and Life*, Scott, Foresman and Company, Glenview, Illinois, 1979 and also Richard Delgado, "Words that Wound" (1982) 17 *Harv. Civ. Rts-Civ. Lib. L. Rev.* 133, 136 to 149.

# DISCRIMINATION CAN MAKE YOU SICK

Staying on guard (hypervigilance) about encountering discrimination is terrible for your health. A new study is the first to show that hypervigilance about racism—a major source of stress—is linked to hypertension (high blood pressure) and may keep people up at night,\*\* reports *RWJF Health & Society Scholars* program alumna Margaret Hicken, PhD.

The effects are particularly acute for Black Americans, the group most likely to have hypertension and most likely to be hypervigilant about discrimination. Hypertension and insomnia both contribute to heart disease risk.



"Racial/Ethnic Disparities in Hypertension Prevalence: Reconsidering the Role of Chronic Stress," *American Journal of Public Health, November/December 2013.*

\*\*\*"Every Shut Eye, Ain't Sleep: The Role of Racism-Related Vigilance in Racial/Ethnic Disparities in Sleep Difficulty," *Journal of Race and Social Problem, June 2013.*

Robert Wood Johnson Foundation

## Direct Physical harm

4.19 Physical attacks that have racist motivation are characterised by their ferocity<sup>45</sup> and the callousness shown as to whether or not the victims survive – because, after all, the victims

<sup>45</sup> Jack Levin and Jack McDevitt, *Hate Crimes: The Rising Tide of Bigotry and Bloodshed*, Plenum Press, New York and London, 1993, 8 -11. They suggest that this stems partly from the group nature of most

are less than human and dispensable. Racist attacks are often perpetrated at random on total strangers, which makes such attacks particularly terrifying. There is nothing the victim can do, except never leaving their house, which can protect them from attack – and sometimes even that is not enough.<sup>46</sup>

- 4.20 Physical damage to community property of social and emotional significance (schools, cemeteries and places of worship<sup>47</sup>) is a form of racist behaviour directed against the whole group, intended to hurt and to intimidate all the individuals in that group, just as a racially-motivated physical assault upon a group member can terrorise others in the group. The firebombing of a Jewish kindergarten must make every Jewish family fearful.
- 4.21 The National Inquiry into Racist Violence reported 1,447 violent or intimidatory racist acts during the late 1980s (likely to be an underreporting).<sup>48</sup> Victims included Aboriginal, Asian, Middle Eastern, Jewish and non-English-speaking people, as well as supporters of anti-racist policies. In addition to activities which involved abuse and verbal harassment, actions reported against Aborigines<sup>49</sup> included manslaughter, attempted murder, shooting a pregnant woman (killing her baby), poisoning the contents of flagons of alcohol (killing five), frequent death threats, intimidation, property damage including to sacred sites, police brutality and intimidation, assault and rape.<sup>50</sup>

### **Economic, Social and Political harm**

- 4.22 Social acceptance of racism restricts social, economic and political opportunities for members of disadvantaged or targeted groups, leading to disempowerment and 'negative community'.<sup>51</sup> Minority groups get the worst jobs, have the highest rates of unemployment, are likely to have worse access to state services, and worse treatment when they get there.<sup>52</sup>
- 4.23 Educational opportunities for minority groups are generally more limited, and the curricula aimed at enforcing the dominant culture, leading to lower educational achievement rates. Many participants in HREOC's 2001 *National Consultation*<sup>53</sup> identified these factors as leaving many indigenous people in a disadvantaged position.
- 4.24 Restriction of opportunities in one generation limits the next, born into conditions of suffering with negative stereotypes already attached to them, creating an 'interconnectedness of disadvantaged conditions'. The cycle is self-perpetuating, affecting academic achievement, occupational status, income, and overall quality of life.<sup>54</sup>
- 4.25 When the powerlessness of a group becomes deeply entrenched, when group powerlessness cuts across generations and becomes an inescapable and effectively defining feature of the group, then that is not only a democratic cause for concern, but "should receive top priority on the democratic agenda." At that point, powerlessness can no longer be fairly characterised, he says, as part of the give and take of politics. Democracy needs to address political causes

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racist violence, whereby no individual feels direct personal responsibility, and peer pressure encourages members of the group to outdo each other in their atrocities: 18-19.

<sup>46</sup> Levin & McDevitt (1993) 12 -14.

<sup>47</sup> Specifically prohibited in Colombia, Article 296 of the Constitution: Centre for Human Rights, Geneva, *Second Decade to Combat Racism & Racial Discrimination*, United Nations, New York, 1991, 57.

<sup>48</sup> Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, AGPS, Canberra, 1991, 7.

<sup>49</sup> HREOC (1991) Appendix 14, 478 to 505.

<sup>50</sup> In relation to police violence against Aborigines see Chris Cunneen, *A study of Aboriginal Juveniles and Police Violence*, Sydney, 1990 and *Aboriginal - Police Relations in Redfern*, Sydney, 1990, Royal Commission into Aboriginal Deaths in Custody (1991), HREOC (1991) 79ff and Chris Cunneen, "Enforcing genocide? Aboriginal young people and the police" in R. White and C. Alder (eds), *The police and young people in Australia*, Cambridge University Press, Melbourne, 1994, 128. As to police violence against other minorities see Janet Chan, 'Policing Youth in 'Ethnic' Communities: is community policing the answer?' in White and Alder (1994) 175, HREOC (1991) 163ff.

<sup>51</sup> See generally Thomas Sowell, *Markets and Minorities*, Blackwell for the International Centre for Economic Policy Studies, Oxford, 1981.

<sup>52</sup> Again confirmed by Human Rights and Equal Opportunity Commission, *Moving Forward: Achieving reparations for the Stolen Generations*, Conference Papers, 15/16 August 2001, HREOC, Sydney, 2001.

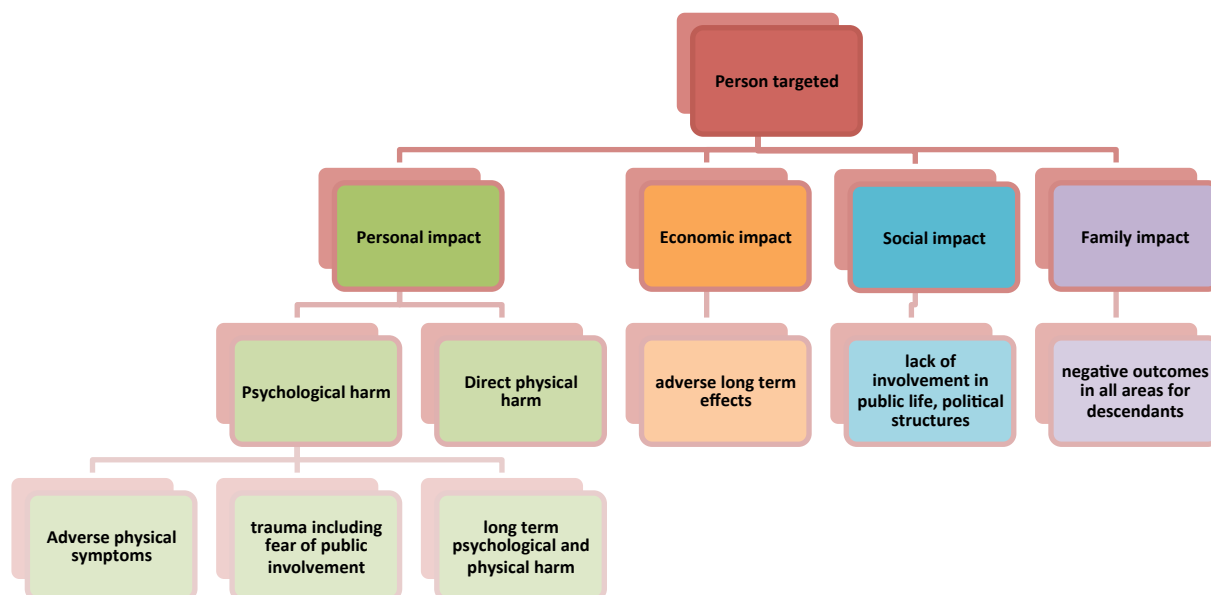
<sup>53</sup> HREOC (2001).

<sup>54</sup> Gougis (1986) 267.

of social suffering that result in entrenched group powerlessness; to confront the problems of social injustice.<sup>55</sup>

### Cumulative effects of exclusionary activities

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### Undermining Democratic Values of the whole community

*In a racist society all our social structures become polluted, privileging dominant groups at the expense of all others. Therein lies its rationale.*<sup>56</sup>

- 4.26 Racist speech acts indirectly upon the rest of society to encourage action by others against victim groups. It desensitises society to discrimination, effectively establishing social protection and permission for racist behaviour. It corrupts the proper working of the political system through scapegoating, intimidation, deception, defamation and denigration. The ultimate aim of racism is for targeted groups to be substantively disempowered and excluded from full participation in the body politic.<sup>57</sup> Such groups are discouraged from contributing to the society in which they live and encouraged to remain separated from the rest of society. 'Multiculturalism' is undermined and Australian democracy and social cohesion is diminished.
- 4.27 If the democratic ideal is not simply concerned with maintaining the *status quo*, but involves changing society for the better and promoting human rights, substantive equality, and the status and well-being of minority groups, then a racist society will not achieve that democratic ideal. **Where racism is given free rein it necessarily affects the level of democracy that is practised in any society, because racism is inherently undemocratic and inequalitarian in its ideals. It prevents the development of a just and egalitarian culture.**
- 4.28 "Would race matter in a truly democratic society?" it has been asked. The answer must be that it would not matter.

<sup>55</sup> Simon (1995) 71.

<sup>56</sup> Dinyar Godrej, "Race: Unlocking Prejudice," *New Internationalist*, October 1994, 4 at 7. Similarly see Ghassan Hage (ed), *Arab Australians today: citizenship and belonging*, Melbourne University Press, Carlton, 2002.

<sup>57</sup> Charles R. Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus" (1990) *Duke L. J.* 431, reprinted in Matsuda et al (1993) 53, 79.

## 5. The impact of political leadership and media representation on the prevalence of exclusionary activities

### *Leadership seen as crucial by marginalised groups*

- 5.1 The cruellest aspect of racism, it is said, lies not so much in the direct abuse, but in the tolerance of that racism shown by society's elite.<sup>58</sup> Target-group members must either identify with a community that promotes racist speech, or admit that the community does not include them – that the democratic structures established to protect other citizens from abuse, attack or discrimination are of little assistance to the victim group.<sup>59</sup> Their personal experience of wrongs is reclassified as a misfortune for which there is effectively no legal redress. This failure on the part of society to provide recourse is an effective second injury.<sup>60</sup> Governments act to stop spitting in the street, to criminalise breaches of the *Australian Consumer Law*, or the issuing of a misleading product disclosure statement.<sup>61</sup> But the harms of racism are denied or belittled.
- 5.2 If the police or military are directly involved in racist behaviour<sup>62</sup> — or fail to prosecute it — the victim's security is completely undermined. There is no one in authority upon whom the victim can rely for protection.<sup>63</sup> Successful multiculturalism in such a context is impossible.
- 5.3 The social experience for victim groups is therefore inevitably one of loss of faith in, and alienation from, the democratic structures of government and from any feeling of loyalty to, or connection with Australia. Thus many second and third-generation refugees and immigrants voiced the rejection they felt at Immigration Minister Peter Dutton's diatribes against "illiterate and innumerate" refugees (May 2016) and against Lebanese immigrants from the 1970s (November 2016). They were born here, worked to establish successful law-abiding lives, but were still slurred as part of an ethnic group. "What does it take to be accepted?" they asked.
- 5.4 The debate surrounding proposed amendments to Section 18C of the *Racial Discrimination Act* similarly raised questions about what politicians wanted to be able to say – or authorise others to say – that is not currently permitted under the law. Many Australians felt the proposed changes were racist, and that the very fact that the changes were supported by a number of politicians had the potential to pave the way for hate speech and other forms of racism to proliferate. In 2014, the Refugee Council of Australia engaged in consultations with people of refugee background with respect to proposed changes to the *Racial Discrimination Act*. The CEO, Paul Power, explained that the changes themselves were not the only source of concern: 'many refugee community members noted that the negative and inflammatory rhetoric perpetuated by some politicians and public figures has had a negative impact on people settling in Australia as well as fuelling a misunderstanding in the Australian population about who refugees are and why they come to Australia'.<sup>64</sup>

### *Exclusionary Activities result from lack of leadership*

- 5.5 Exclusionary activities such as racism are not inevitable: many people are not racist, and some racist attitudes can be overcome. An exclusionary ideology is reiterated and encouraged through a multitude of cultural signals, by race politics, and by extremist hate propaganda. It is a learned response, the result of cultural conditioning,<sup>65</sup> rather than an

<sup>58</sup> Colin Tatz, *Reflections on the Politics of Remembering and Forgetting*, Centre for Comparative Genocide Studies, Macquarie University, 1995, 19 at 27, quoting Matthew Parris, *The Times* 11 April 1994.

<sup>59</sup> Matsuda (1993) 25. See also Björge and Witte (1993) 11 and generally Chapters 9 to 16.

<sup>60</sup> Matsuda (1993) 49.

<sup>61</sup> See comments by Michael Lavarch, *Hansard*, House of Representatives, 15 November 1994, 3337.

<sup>62</sup> See Levin & McDevitt (1993) 159- 164.

<sup>63</sup> For the effect on Australian Aborigines, see Hollinsworth (1998), 11.

<sup>64</sup> Refugee Council of Australia, 'Former refugees fear racism, abuse if Racial Discrimination Act is weakened,' 1 May 2014, [http://www.refugeecouncil.org.au/n/mr/140501\\_RDA.pdf](http://www.refugeecouncil.org.au/n/mr/140501_RDA.pdf).

<sup>65</sup> M.C. Hartwig, "Aborigines and Racism: an Historical Perspective" in F.S. Stevens (ed), *Racism: The Australian Experience Vol 2*, Sydney, ANZ Book Co. 1972, 9 at 12. Laurence Rees notes in the documentary *Horror in the East: Turning against the West*, that Japanese troops in WWI were instructed to behave respectfully towards POWs, who were generally well treated. However by WWII the army culture had significantly changed. The army was part of a superior race, headed by a God-like Emperor. Chinese were treated as subhuman and white POWs harshly treated with little guilt or remorse on the part of the Japanese; approximately one in four dying in captivity: written and produced by Laurence Rees, BBC/ History Channel, 2000 shown on ABC 10 February 2004.

inherent human 'need'.<sup>66</sup> Even if exclusionary ideologies such as racism were a 'natural' response,<sup>67</sup> that response can be discouraged. Whether or not such ideologies are 'human nature', says Shklar, are we not creatures who can choose to act otherwise?<sup>68</sup>

- 5.6 The evidence is that encouraging, accepting and tolerating exclusionary activities and ideologies such as racism causes them to increase and for the forms taken to become more harmful and more violent.
- 5.7 If politicians, respectable businessmen and talk-show hosts express or condone a racist outlook, if newspapers consider xenophobic insults fit for publication<sup>69</sup> and report and comment on events in simplistic and racist ways, the person in the street receives the message that it is acceptable, even admirable, for him to be racist too.<sup>70</sup> When reputable politicians make inflammatory statements, said a source at Scotland Yard, racist attacks increase.<sup>71</sup>
- 5.8 Like any other mythology, racism must be constantly communicated to survive. But exclusionary activities such as hate speech can still have an effect even if their message is rejected. At some level racial inferiority is planted in our minds as an idea that may hold some truth.<sup>72</sup> Racism works "by socializing, by establishing the expected and the permissible."<sup>73</sup> Its effects are subtle, and it relies upon indoctrination over time.<sup>74</sup> Society is changed for the worse. The racist signals which we receive from our culture create what we regard as normality. Racism arises from the 'normal' or 'ordinary' assumptions we have learned to make about the world, ourselves, and others and from the basic patterns of our social activities,<sup>75</sup> and through the mutually reinforcing messages from society's most entrenched and powerful institutions, organisations and the mass media, which inevitably support the *status quo*.<sup>76</sup>
- 5.9 Learning to hate is almost as inescapable as breathing. "I know how to teach racism" says Jean Elliott, "all you have to do is use most of the textbooks available today."<sup>77</sup> Racism is perpetuated across generations by laws and treaties, group norms and customs, newspapers and textbooks. It is taught through "half-truths and ethnic prejudices passed from one generation to the next, through religion, political demagoguery, inflammatory tracts, the practice of medicine, and even through abuse of folk song and tales." Stereotypes are powerful, widely accepted, and enduring. We are taught to define and distinguish the 'Other', to see variations in appearance as relevant differences, from the earliest Sesame Street game of "One of these

<sup>66</sup> The theory that the mere existence of separate groups is in itself a necessary and sufficient cause for the emergence of negative intergroup attitudes and behaviour might only describe a learned social response: surely it is through social constructs that one learns to differentiate human beings as the 'Other'?

<sup>67</sup> Against the argument that racism is a natural human response there is evidence that more beneficial responses are inherent not just in humans but in other primates. A desire for justice is apparently not just a natural human need but one experienced also by monkeys: Deborah Smith, "Grapes of wrath at feeding time," *Sydney Morning Herald*, 18 September 2003, 1, reporting on research by Dr Sarah Brosnan reported in *Nature*.

<sup>68</sup> See Seyla Benhabib, "Judith Shklar's Dystopic Liberalism," 55 at 56 in Bernard Yack (ed) *Liberalism without Illusions*, University of Chicago Press, Chicago & London, 1996.

<sup>69</sup> See John Hooper, "Blind British Prejudice", *Guardian Weekly*, 6-12 September, 2001.

<sup>70</sup> Wilhelm Heitmeyer, "Hostility and Violence towards Foreigners in Germany" in Björge and Witte (1993) 17 at 27, Hollinsworth (1998) 198, Teun A. van Dijk, *Communicating Racism*, Sage Publications, Newbury Park, 1987, 362. Participants in HREOC's *National Consultation* (2001) expressed concern at "the attempts by some in positions of influence and power in Australian society to promote models of national identity that are based on stereotypical images and masculine and euro-centric views of history which implicitly exclude or marginalise diverse communities and women."

<sup>71</sup> *Guardian Weekly* Editorial, "What was all that about?" 2-9 May 2001, 11.

<sup>72</sup> Matsuda (1993) 25.

<sup>73</sup> See Kathleen E. Mahoney, "R v. Keegstra: A rationale for regulating pornography?" (1992) 37 *Mc Gill Law Journal* 242 at 251, discussing the socialisation of pornography.

<sup>74</sup> Mahoney (1994) 14.

<sup>75</sup> Charles R. Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism" (1987) 39 *Stanford Law Rev* 317, 330, Lull (1995) 18.

<sup>76</sup> James Lull, *Media, communication, culture: A Global Approach*, Polity Press, Cambridge and Oxford, 1995, 33.

<sup>77</sup> in the documentary by Bertram Verhaag about her anti-racism work, *Blue Eyes*, 1996.

things is not like the others ... .”<sup>78</sup> We learn to see others as inferior through the ethnocentric teaching of history from the victor’s point of view, fairy stories, scientific mnemonics,<sup>79</sup> and racist jokes which subtly reinforce racist ideas and stereotypes. Their values ‘aren’t the same’ as ours; ours are better. Even the labelling of crayons contributes to a biased perception of reality: ‘skin colour’ has traditionally been ... pink. Black is bad, white is good: a black mark, a black day, blackballed, black words, black looks, black magic ....

- 5.10 The media has a dominant role in encouraging conformity, manipulating public opinion, and hence in supporting racism. It creates cultural reality through the constant portrayal of dominant cultural stereotypes – images which shape our national vision and our sense of identity. What is shown in newspapers, magazines, film and television is not neutral. Mainstream media presents complex situations in terms of stereotypes that simplify and distort, and appeals to emotions and prejudices, rather than reason. In these ways, the media has acquired an enormous potential for harm 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”<sup>80</sup> to manipulate the emotions and opinions of millions.<sup>81</sup>
- 5.11 The media and the government are both involved in this communication with the public because public presentation of issues in the media is actively shaped by the government.<sup>82</sup> A number of politicians, talk back hosts and columnists promote racism through simplistic scapegoating even as they deny that racism exists in Australia.<sup>83</sup> They are adept at coded messages which reinforce racist messages indirectly – and not so indirectly.
- 5.12 The problem with dealing with media commentary, says the Anti-Discrimination Board, is that while the media is very influential in communicating racist messages, especially because of its ability “to represent events or issues in the context of pre-existing fears or prejudices,” racism in the media “does not just manifest in overtly racist statements” but “permeates everyday media practices of news gathering and the narrative structures of news reportage.”<sup>84</sup> Racism has become coded through revised notions of culture.<sup>85</sup> Discussions of public drunkenness in Bourke are understood by readers to refer to Aboriginal drunkenness, because whites would not be written about in the same way.<sup>86</sup> The balance is never redressed in the other direction: where the Anglo-Australian husband of a woman of Asian appearance murders their three children, this is not portrayed as a racist murder.<sup>87</sup>
- 5.13 The Anti-Discrimination Board of NSW says that it “has seen the damage done by news that uses race as its angle,”

<sup>78</sup> “... one of these things just doesn’t belong....” continues the song. Martha Minow tells how this song disturbed her too, as an encouragement to children to categorise and differentiate, and notes that the game has more recently been amended to demonstrate that objects can be categorised in different ways depending upon which characteristics are isolated: “differences are not intrinsic but relative to chosen ends”: Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law*, Cornell University Press, Ithaca and London, 1990, 1, 390.

<sup>79</sup> In Australian scientific and army circles in times past the mnemonic for the colour coding of electronic resistors goes as follows: Black Bastards Rape Our Young Girls: Bloody Virginity Gone West: information from Australian scientist the late Richard Peir.

<sup>80</sup> David Reisman, “Democracy and Defamation: Control of Group Libel” (1942) 42 *Colum L. Rev* 727.

<sup>81</sup> 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.

<sup>82</sup> Anti-Discrimination Board of NSW (principal author, Ruth McCausland), *Race for the Headlines*, 2003, 11.

<sup>83</sup> Phillip Adams and Lee Burton, *Talkback: Emperors of Air*, Allen and Unwin, Sydney, 1997, 46 ff.

<sup>84</sup> Anti-Discrimination Board (2003) 10.

<sup>85</sup> Anti-Discrimination Board (2003) 33 and Chapter 3. In this way, Australian Nationalist publications can describe their focus as ‘anti-Asianisation’ and present racial vilification legislation as persecution of those opposed to Asian immigration.

<sup>86</sup> Hollinsworth (1998) 34, Gillian Cowlshaw, “Where is racism?” in G. Cowlshaw and B. Morris (eds), *Race Matters*, Aboriginal Studies Press, Canberra, 1997, 177ff.

<sup>87</sup> Indeed, the front page photographs showing only the mother and children implied to me and others at first sight that this was an ‘ethnic’ attack: Murray Trembath, “Alone in a cell,” *Leader*, 17 February 2004, 1 and 4.



*From media commentators who make blatantly racist comments, to a news story that links the causes of crime or conflict to a particular racial or ethnic minority community, the media portrays powerful and permeating messages about who is 'one of us' and who is not ... debates about asylum seekers, terrorism and local crime become linked in media representations, and lead to a damaging environment of anti-Arabic and anti-Muslim sentiment.<sup>88</sup>*

- 5.14 Ten years ago, inflammatory opinion pieces argued that police were soft on 'Middle Eastern' crime, that 'Middle Eastern males' regularly assault and rape 'Australians' and that racial vilification legislation does not protect victims who are attacked "simply because they are Australian."<sup>89</sup> Nowadays every 'national security' issue is a coded or even outright attack on Australians originating from the Middle East.
- 5.15 Björge notes that the manner of media reporting is particularly important in raising the level of fear.<sup>90</sup> Violence is likely to be encouraged where reports on racist incidents go on to suggest that further racist violence is anticipated.<sup>91</sup>
- 5.16 The lack of appropriate telecommunications standards, with media basically self-regulating, does not assist the situation. When leaders play on racist fears to provide easy answers and produce scapegoats, reporting of their activities and words needs to question what is happening, not blindly reproduce it. The lack of an Australian human rights framework compounds the problem. Having no understanding of the balancing of human rights that is appropriate in a civilised democracy, our institutions and our media fail to apply appropriate ethical standards based in human rights, and our population does not know how to hold them to account.

## **6. How to improve the expected standards of public discourse about matters of 'race', colour, national or ethnic origin, culture or religious belief**

Neither law nor education can achieve improvement alone, it is necessary to use both of these tools (bearing in mind that law also has an educative role), and the adoption of human rights principles can provide an effective structure for such improvements.

### **Media and internet regulation through legislation**

- 6.1 Australian broadcasting standards are generally contained in piecemeal codes of conduct which have little deterrent effect.<sup>92</sup> Proper standards which prohibit both direct and indirect racial vilification through the media should be enshrined in legislation, penalising those who breach the legislation and providing a symbolic and educative effect.<sup>93</sup> Such regulation would be strengthened by a human rights framework.
- 6.2 Abuse and vilification online is a growing problem which is taken insufficiently seriously by police. It can be psychologically harmful, even leading to suicide. Abuse can be for any reason including race, colour, national or ethnic origin, culture or religious belief. Peoples' employment and personal reputations can be destroyed. Exclusionary activities include online harassment. Again, Australian legislation in this area is insufficiently strong and insufficiently policed.

### **Regulation of public speech through legislation**

- 6.3 We have written elsewhere about the importance of maintaining section 18C of the *Racial Discrimination Act* in its present form, or even strengthening it. We would be happy to provide further information on this point. As explained, exclusionary ideologies such as racism are

<sup>88</sup> Anti-Discrimination Board (2003) 10.

<sup>89</sup> Tim Priest, "Don't turn a blind eye to terror in our midst," *Australian*, 12 January 2004, 9, leading to increases in abuse and harassment of 'Middle Eastern' Australians; Anti-Discrimination Board (2003) 10, referring to the situation in Australia from mid 2001 to 2003.

<sup>90</sup> Tore Björge, "Role of the Media in Racist Violence" in Björge and Witte (1993) 96 at 105ff (1993a).

<sup>91</sup> Björge (1993a) 103ff.

<sup>92</sup> See generally Australian Communications and Media Authority, "Broadcasting rules & complaints" at <http://www.acma.gov.au/theACMA/ACMAi/Complaints/Broadcast-complaints/faqs-broadcasting-rules-and-complaints-acma-1>, accessed 7 May 2017

<sup>93</sup> 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.

perpetuated through speech. Only legislation can remove a perception in the community that people have the right to behave a particular way.<sup>94</sup> Legislation provides moral support to those people whose natural instincts are against racism.<sup>95</sup> The process of defining something legally as unacceptable indicates that the behaviour is both unjust and *alterable*, and encourages people not to 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."<sup>96</sup>

### *Regulation of public speech and behaviour through human rights legislation*

6.4 We discuss in the following section the need for human rights legislation to combat exclusionary activities. Such legislation would also underpin and strengthen the regulations discussed in the paragraphs above.

### *Good leadership*

6.5 ALHR believes that strong leadership against exclusionary activities and in raising standards of public discourse is crucial – and costs nothing. Senior politicians need to promote what is good about multiculturalism, rather than giving Australians tacit approval to engage in acts of racism. The Prime Minister and Minister for Immigration and Border Protection should have special responsibilities in this respect. As the research studies mentioned above evidence, Australians generally support multiculturalism and social inclusion. Politicians, the media and other influential leaders need to de-politicise these issues, highlight the ways in which they make Australia stronger and speak out about exclusionary activities. As stated by Chris Sidoti in 2002 with respect to asylum seekers and refugees, 'When governments deliver negative messages, people respond. So when senior political leaders misrepresent, vilify and demonise refugees and asylum seekers, popular attitudes reflect those views. And where positive leadership is offered, people respond positively.'<sup>97</sup>

6.6 The following are brief suggestions as to how this could be achieved by politicians and the media:

- Focus on the positives. Australia has one of the highest percentages of people born in another country (28% as at the 2011 census) and politicians need to embrace this and highlight the widespread benefits that multiculturalism has brought to Australia;
- Highlight and build upon the welcoming nature of Australia, rather than what divides us. Emphasise to the public that we are not a racist nation. As noted above, one study found that 80.4% of respondents believe it is a good thing for a society to be made up of different cultures<sup>98</sup> and another found that 83%-86% of respondents in 2013-2016 surveys agree with the proposition that 'multiculturalism has been good for Australia'.<sup>99</sup> Australia's Race Discrimination Commissioner explained that:

*In contrast to many European countries, the majority of Australians support current levels of immigration. Our diversity is an indivisible part of our national identity. This is the perspective we should bring to the rise of anti-Islam protest movements. The voices of far-right nationalists aren't the voices of mainstream Australia.*<sup>100</sup>

<sup>94</sup> See Marjorie Henzell, *Hansard*, House of Representatives, 16 November 1994, 3420, speaking about legislation which imposes criminal sanctions in the context of the Racial Hatred Bill 1994 (Cth).

<sup>95</sup> Human Rights Commission (1983).

<sup>96</sup> Robert W. Gordon, "New Developments in Legal Theory" in David Kairys (ed) *The Politics of Law: A Progressive Critique*, Pantheon Books, New York, 1990, 413 at 423.

<sup>97</sup> Chris Sidoti, National Spokesperson, Human Rights Council of Australia, 'Without prejudice: discrimination and refugees,' presented at the NSW State Conference Local Government Community Services Association, 14 November 2002, <http://www.hrca.org.au/discrim%20and%20refugees.htm>, accessed 9 May 2017.

<sup>98</sup> See Blair (2017).

<sup>99</sup> Markus (2016) 2.

<sup>100</sup> Tim Soutphommasane, Race Discrimination Commissioner, 'There are echoes of the Cronulla riots on our streets today,' 14 December 2015, <https://www.humanrights.gov.au/news/opinions/there-are-echoes-cronulla-riots-our-streets-today-0>, accessed 9 May 2017.

- Present accurate information when reporting on sensitive issues, providing sufficient context to enable fact-based analysis: ‘Political debate must avoid jumping to conclusions based on single opinion polls – especially when polls need to be interpreted with care,’<sup>101</sup>
- Refrain from making statements in the media before the facts have been verified;
- De-politicise the asylum seeker and refugee issue, decreasing media attention and focusing instead on Australia’s legal and humanitarian obligations, the benefits that these people bring to Australia, and how to work with other countries in the region on improving protection outcomes;
- Engage in and promote anti-racism campaigns (this could include politicians). In one recent study, a large proportion of respondents (77%) appreciated the need to challenge racism and for there to be anti-racism initiatives. Seventy-six per cent of respondents also expressed a commitment to personal action.<sup>102</sup> This would be much more constructive and beneficial to Australia as a whole than engaging in debates about watering down protections against discrimination;
- Speak out against discriminatory comments made by politicians. When the UN Special Rapporteur on Racism, Mutama Ruteere, visited Australia in 2016, he highlighted concerns over discriminatory comments made by politicians with respect to certain groups of migrants.

*‘I call upon political leaders to denounce and censure this kind of divisive and racist rhetoric particularly when made by members of their own political parties,’ he said. ‘The elimination of racism, xenophobia and discrimination will not happen unless it is led by the most senior political leadership. If political leaders don’t speak out they lend silent legitimacy to this racist element.’<sup>103</sup>*

- Speak out about developments overseas that violate human rights, including non-discrimination. Recent examples include the travel ban imposed in the United States of America of people from a list of Muslim countries, as well as the large-scale deportation of migrants. Australian politicians speaking out on the global stage against exclusionary activities would also serve to educate Australians and promote non-discrimination in our own country.

### **Public education through government media**

6.6 Public education of all Australians through government media is essential. There is evidence that strong media condemnation of racist violence has an educative effect, discouraging violence and shaming the perpetrators (who were otherwise generally law-abiding).<sup>104</sup> A particularly biting newspaper report on racist violence in a small Norwegian town led to the formation of anti-racist groups and policies both in that town and in others.<sup>105</sup> Investigative journalism into the real functions of racist groups is also valuable, demonstrating the reality of the groups’ practices.<sup>106</sup> Objective and sensitive journalism which presents refugees, for example, as individuals rather than as ‘queue jumpers’ can educate and minimise unfounded fears.<sup>107</sup> While it is often argued that media reporting of racial vilification prosecutions will

<sup>101</sup> Tim Soutphommasane, Race Discrimination Commissioner, ‘There isn’t a silent majority of racists in Australia,’ 28 November 2016, <https://www.humanrights.gov.au/news/opinions/there-isnt-silent-majority-racists-australia>, accessed 9 May 2017.

<sup>102</sup> See Blair (2017).

<sup>103</sup> Marija Jovanovic, ‘UN rapporteur concerned by ‘racist rhetoric’ in Australian politics,’ 6 December 2016, <http://www.sbs.com.au/news/article/2016/12/05/un-rapporteur-concerned-racist-rhetoric-australian-politics>, accessed 9 May 2017.

<sup>104</sup> Björger (1993) 106ff. Björger notes that it is perhaps less likely that this effect would be achieved where the perpetrators had a record of criminal behaviour and were more socially marginalised.

<sup>105</sup> Björger (1993) 108ff.

<sup>106</sup> Björger (1993) 107-8.

<sup>107</sup> Björger (1993) 110. In the Australian context, *Australians against Racism* have used film and billboard advertising with this aim. Marr and Wilkinson argued in 2003 that the Federal Liberal government took great care to exclude journalists from contact with Tampa refugees and other boat people to prevent any telling of ‘the human story,’ and that exclusion has continued to this day: David Marr and Marian Wilkinson, *Dark Victory*, Allen and Unwin, Crows Nest, 2003, 214-215.

itself encourage racism, studies in Canada suggest this is not what occurs, and that the media can play a positive role in such a context, increasing public sympathy for the victims.<sup>108</sup>

- 6.7 Promotion of role models from marginalised groups is essential in order to counter negative stereotypes, but the manner of their portrayal is also crucial, because multiple and sometimes contradictory messages can be conveyed and received. Media portrayals of blacks in the United States have traditionally been negative, with blacks given comic and subordinate roles and black sportsmen used in advertising only where they are “attention-getting, bad boy[s].” Black shows are forced to include white characters, but not vice versa. In Australia, thirteen years ago any principal television characters who happened to be Aboriginal were virtually non-existent.<sup>109</sup> The situation is only marginally better today. While the NI (National Indigenous) TV television channel has been established, at the same time SBS and NITV need considerably increased funding.
- 6.8 Partly as a result of the internet but perhaps also because of the increased anglicisation of SBS, many new arrivals to Australia are not, it is argued, receiving their news through the prism of an Australian perspective. “They are transnational citizens still engaged with their home countries via information disseminated from countries where they no longer reside. That does not bode well for Australian integration and our multicultural foundation” says Helen Vatsikopoulos.<sup>110</sup>

### School Education

- 6.9 Björge and Witte note that lower levels of education seem to be more closely connected with racist behaviour than other factors such as unemployment.<sup>111</sup> One Australian study drew a direct correlation between people stating that some migrant groups do not belong in, or should not be welcomed to, Australia, and not having tertiary education levels. Higher education was similarly linked to the possession of less exclusionary attitudes.<sup>112</sup> However history shows that a high level of education is of itself no guarantee against racism; indeed the elitism involved in access to higher education may foster notions of superiority and thereby encourage racism.
- 6.10 In order to counter the ways in which conformity encourages the development of racism, it is therefore necessary to teach the ability to feel emotion and to empathise with others, to feel a sense of responsibility for others, to teach how to react against conformity, how to maintain personal morality and social values, how to question authority and how to act against structural discrimination and inequality in one’s own culture.<sup>113</sup>

*I am a survivor of a concentration camp. My eyes saw what no person should witness. Gas chambers built by learned engineers. Children poisoned by educated physicians. Infants killed by trained nurses. Women and babies shot and killed by high school and college graduates. So, I'm suspicious of education. My request is: help your students to be human. Your efforts must not produce learned monsters, skilled psychopaths, or educated Eichmanns. Reading and writing and spelling and history and arithmetic are only important if they serve to make our students human.*<sup>114</sup>

- 6.11 Education can also assist in developing the pride and self-image of victims of prejudice so as to shield them against the crippling psychological effects of prejudice, and thus help to develop their real potential.<sup>115</sup>
- 6.12 Education and legislation should be used together to establish behavioural limits and social sanctions against racism, to change social expectations and perceptions over time and to develop public values. “Legislation by itself will be less effective unless it is also accompanied

<sup>108</sup> Gabriel Weimann and Conrad Winn, *Hate on Trial: The Zundel Affair, the Media, and Public Opinion in Canada*, Mosaic Press, Oakville, 1986, 163ff, reporting the results of a national survey.

<sup>109</sup> Ernie Dingo starred in the 1994 ABC TV series *Heartland*, not repeated until 2002, and Deborah Mailman, Aborigine of the Year for 2003, starred in *The Secret Life of Us* (2002). Mailman commented in 2003: “It’s appalling ... It’s still only Ernie Dingo and I. Two actors.” Andrew Darby, “Mailman’s message: it’s still a secret life for us,” *Sydney Morning Herald*, 12-13 July, 2003, News, 7.

<sup>110</sup> Helen Vatsikopoulos, “Whitewash? That’s not the colour of the SBS charter”, *The Conversation*, 29 April 2015, accessed 9 May 2017 at <https://theconversation.com/whitewash-thats-not-the-colour-of-the-sbs-charter-40837>.

<sup>111</sup> Björge and Witte (1993) 8.

<sup>112</sup> See Blair (2017) 7.

<sup>113</sup> See Amos Oz, “When Evil comes Wrapped in a Flag”, 18 October 1992, *Guardian Weekly*, 23.

<sup>114</sup> Letter to *The International Worker*, quoted in “Unkept Promises and New Opportunities: Social Studies Education and the New World Order,” C. Frederick Risinger, *Social Education*, February 1991, 138.

<sup>115</sup> Zimbardo (1979) 641.

by a serious, substantial, well-funded education strategy. The two go together. It is important to have both of them.”<sup>116</sup>

## 7. How to better recognise and value the contribution that diverse communities bring to Australian social and community life

- 7.1 There are many ways in which the Government (including through its own media outlets) and the media generally can better recognise the contributions of diverse communities in Australia, including the following:
- Draw attention to the wide array of benefits of multiculturalism on Australian society, including with respect to the economy, population growth, innovation, the arts, culture, cuisine etc;
  - Bring a historical perspective to discussions, and highlight the achievements of early migrants to Australia. Some Australians forget the importance of migration to Australia’s past;
  - Speak out about the negative repercussions of discrimination, racism and other acts of intolerance;
  - Celebrate Australia’s diversity by promoting positive stories of individual people or communities, including through SBS;
  - Use more humanising language when discussing refugees and asylum seekers. Refrain from referring to those who arrived (or sought to arrive) in Australia by boat as ‘boat people’, ‘illegal’ or ‘queue jumpers.’
- 7.2 It is submitted that the use of legislation and education to promote principles of multiculturalism and human rights, as discussed in the previous section, will assist refugees and immigrants in feeling valued and protected in Australia, rather than excluded and marginalised.

## 8. The potential benefits and disadvantages of enshrining principles of multiculturalism in legislation

Given that there is no generally agreed definition of ‘principles of multiculturalism,’ and that different cultures can have inconsistent beliefs or principles, we submit that the better course would be to enshrine principles of human rights in legislation. If human rights are enshrined, the best aspects of multiculturalism will be encouraged, and the worst aspects (such as religious intolerance) discouraged.

### *What are “principles of multiculturalism”?*

- 8.1. Legislation and other instruments enshrining various principles of multiculturalism have been adopted at the State and Territory level across Australia. These include the *Charter of Multiculturalism* (WA, 2004), the *Multicultural New South Wales Act* (2000), *Multicultural Recognition Act* (Qld, 2016), the *Multicultural Victoria Act* (2011), the *Victorian Values Statement* (2017), the *Tasmanian Multicultural Policy* (2014), *Building on the Territory’s Diversity: A Multicultural Policy for Migrant and Ethnic Territorians* (2005), and the *ACT Multicultural Framework* (2015-2020).
- 8.2 There is not a general agreement as to what constitute Australian principles of multiculturalism, as evidenced by amendments made from time to time to the above legislation.

### *Potential benefits and disadvantages of enshrining principles of multiculturalism in legislation*

- 8.3 Enshrining those principles which recognise and promote the importance and benefits of multiculturalism and which encourage respect for people from all cultural backgrounds in legislation would give a positive message that all Australians are valued and respected and serve as a solid basis for policy and programs in this area.
- 8.4 Enshrining principles that serve other objectives and/or present multiculturalism in a negative light – focusing on challenges, for example – must be avoided as this could create divisions and give rise to discriminatory attitudes and assumptions about people from diverse cultural backgrounds. The Australian Government recently released Australia’s Multicultural Statement

<sup>116</sup> Lindsay Tanner, *Hansard*, House of Representatives, 15 November 1994, 3358.

in March 2017.<sup>117</sup> This is a disappointing statement that is even weaker than the multicultural policy released by the Australian Government in 2011 – *The People of Australia*.<sup>118</sup> It focuses particularly on individuals' responsibilities and mutual obligations; expectations of new citizens of Australia, including allegiance and loyalty to Australia; and, national unity, national interest and security. It does not adopt the positive, celebratory, inclusive tone that would be expected of such a statement. The last paragraph of the conclusion gives a clear insight into the negative, protective nature of the statement:

*Successive Australian Governments have established a firm commitment to a multicultural Australia. It is timely to renew and reaffirm the Government's commitment with this new statement: a clear message on the values and responsibilities that underpin our society, support our national interest and guide how we respond to challenges. It presents a vision for our future as a strong and successful multicultural nation, united by our allegiance to Australia and committed to freedom and prosperity.*<sup>119</sup>

- 8.5 If "principles of multiculturalism" are enshrined in legislation at federal level, it is imperative that these do not reflect the negative, risk- and challenge-focused language and messages contained in Australia's 2017 Multicultural Statement. Such principles must strengthen – rather than detract from – the promotion of multiculturalism as a positive feature of Australia's past, present and future.

### **Factors to take into account if legislation incorporating "principles of multiculturalism" is enacted**

- 8.6 If principles of multiculturalism are enshrined in federal legislation, ALHR believes that the following factors should be taken into account:
- Specific reference to respecting, protecting and promoting international human rights must be included in the principles. Though some human rights principles are indirectly included in the instruments that have been adopted at State and Territory level (such as non-discrimination, respect for human dignity, individual freedoms), none contain principles that specifically refer to human rights.
  - The principles of multiculturalism must be consistent with Australia's international human rights obligations.
  - The focus of the principles should be on equality, respect for diversity, equal opportunity, and the participation and inclusion of all people living in Australia, rather than on ensuring that individuals from diverse backgrounds demonstrate their commitment to Australia and Australian values. Achieving a supportive climate of respect, equality and belonging is a much more effective way to build stronger communities and ensure that people respect and adhere to Australian values.
  - This is not the place for principles related to national security.
  - The principles should focus on the benefits of multiculturalism for Australia and the contributions that people from diverse backgrounds continue to make to Australia's economic, cultural, political and social life.
  - The principles should recognise Aboriginal peoples and Torres Strait Islander peoples as the first Australians.
  - The principles should make a clear statement that discrimination is never acceptable.<sup>120</sup>
  - The principles should include fair and equitable access to government services and programs by all Australians, regardless of their background, in addition to targeted services and programs for people with specific needs.

<sup>117</sup> Available at <https://www.dss.gov.au/settlement-and-multicultural-affairs/australian-governments-multicultural-statement/australian-governments-multicultural-statement>.

<sup>118</sup> Available at [https://www.dss.gov.au/sites/default/files/documents/12\\_2013/people-of-australia-multicultural-policy-booklet.pdf](https://www.dss.gov.au/sites/default/files/documents/12_2013/people-of-australia-multicultural-policy-booklet.pdf).

<sup>119</sup> Australia's Multicultural Statement (March 2017) p.15, <https://www.dss.gov.au/settlement-and-multicultural-affairs/australian-governments-multicultural-statement/australian-governments-multicultural-statement>.

<sup>120</sup> See, for example, the Victorian Values Statement: 'Everyone has a responsibility to promote inclusion and participation and to reject racism and all forms of violence.'

- 8.7 In addition to enshrining principles of multiculturalism in legislation – provided the above considerations are taken into account – ALHR submits that multiculturalism would be strengthened through the incorporation of human rights principles in federal legislation.

## 9. Preferred path: incorporation of human rights principles

- 9.1 Despite Australia having been a founding member of the United Nations and one of only eight nations involved in drafting of the *1948 Universal Declaration on Human Rights*, today Australia is alone amongst first world democratic nations in not itself having any nation-wide Human Rights Act or Bill of Rights. Australia's Constitution does not specifically protect human rights and has been held to protect only a limited right to free political speech.
- 9.2 Australia has signed and ratified both the *1966 International Covenant on Civil and Political Rights* and the *1966 International Covenant on Economic, Social and Cultural Rights* over four decades ago, and has since ratified all seven core international human rights law treaties and some of the Optional Protocols. However, Australia has not enacted enabling legislation which enshrines all the basic universally recognised human rights and freedoms in local law. At the Federal level, the Australian government has passed a number of laws prohibiting specific types of discrimination, such as the *Sexual Discrimination Act* and the *Racial Discrimination Act*. But such legislation provides only a piecemeal approach to human rights law, and Australian law generally lacks the concept of the fundamental right of all persons to human dignity.
- 9.3 Many Australians have the mistaken belief that just because Australia is an affluent developed country, its citizens' human rights are properly and fairly protected. They are not. The common law does not fill the gap. The common law has been significantly diminished and weakened by the development of the Doctrine of Parliamentary Supremacy and the Commonwealth Parliament's ability and desire to override human rights standards for policy purposes. Australia's abysmal record in relation to refugee rights and its cruel treatment of boat-arriving asylum seekers provides a case in point. Furthermore, the common law has historically been concerned with protection of property rights, not personal human rights, and generally offers a very inadequate protection for Australians' personal human rights.
- 9.4 In 2008, then Chief Justice Spigelman identified a number of common law principles of statutory interpretation or 'rebuttable common law presumptions' which could loosely be regarded as constituting a "common law bill of rights."<sup>121</sup> However generally those principles and presumptions can be overridden by parliament through statute. A carefully crafted Bill, Charter or Act could provide appropriate safeguards against statutory incursions upon beneficial freedoms, particularly if it were to be constitutionally entrenched (there are various models which could be adopted and we would be happy to discuss this with you further if desired). But without such legislation, we are reliant upon the federal government of the day to protect our freedoms as it thinks fit, and have little redress where it fails to act or infringes our freedoms. Adopting human rights principles would enshrine those principles "beyond the reach of political expediency."<sup>122</sup>
- 9.5 The adoption of Human Rights Acts in Victoria and the Australian Capital Territory is generally understood to have been successful, not to have opened the 'floodgates' to litigation, and to have resulted in modest improvements in legislation and policy.<sup>123</sup>
- 9.6 Part of the problem with the 'lack of respect' for human rights in Australia is that the discourse about human rights is very much influenced by the mainstream media in the United States – largely no doubt as a result of our common language. The United States, despite having a Bill of Rights, does not practice the 'balancing' of human rights (which is an essential part of European human rights jurisprudence) and views equality as a formal rather than a contextual matter.
- 9.7 In Australia, we take a contextual approach to concepts of equality<sup>124</sup> but are only just starting to work towards a more European approach to human rights, in which human dignity is central

<sup>121</sup> The Honourable J J Spigelman AC Chief Justice Of New South Wales, "The Common Law Bill of Rights," First Lecture in The 2008 McPherson Lectures: Statutory Interpretation & Human Rights, University Of Queensland, Brisbane 10 March 2008, accessed 9 May 2017, <http://www.aph.gov.au/DocumentStore.ashx?id=c190ac6b-aa39-4bab-97a4-c2aab8b899f9>

<sup>122</sup> Lucia Osborne-Crowley, "A bill of rights to rein in the rogues", *The Saturday Paper*, 24 October 2015.

<sup>123</sup> See for example the case studies at: <http://www.humanrights.vic.gov.au>

and in which racial vilification is understood to be a form of discrimination and an attack on other human rights of the victims: upon their human dignity, their own rights to free speech, free assembly, self expression and democratic participation.

- 9.8 What we are learning in this process is that human rights should not be seen as an end in themselves but as a process for testing the desirability of structures or theories. As there is no hierarchy of human rights, the extent to which claims for the protection of one human right impinge upon other rights is a good test of whether that claimed protection is proportionate and reasonable. We are learning that human rights make good law and that the human dignity that human rights protect and promote simultaneously provides for stability and security.

## 10. Conclusion

The protection, promotion and strengthening of Australia's multiculturalism and policies of social inclusion are integral to Australia's progress and its stable democratic nature. All marginalised groups, whether indigenous, refugee or immigrant, need to be respected and supported in order to feel part of Australian society. Their manifold contributions to Australia need to be recognised and celebrated. Loyalty develops through an inclusive culture and is undermined by exclusionary activities. This document provides a brief outline as to how the Australian federal government can lead the way.

If you would like to discuss any aspect of this submission, please email me at: [president@alhr.org.au](mailto:president@alhr.org.au).

Yours faithfully



Benedict Coyne  
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<sup>124</sup> See for example Brennan J in *Gerhardy v. Brown* (1985) 57 ALR 472 at 516, where he said that formal equality before the law is "an engine of oppression destructive of human dignity if the law entrenches inequalities 'in the political, economic, social, cultural or any other field of public life.'