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Human rights lawyers urge caution on racial discrimination changes

Australian Lawyers for Human Rights (**ALHR**) raised concerns with the Government's exposure draft of proposed amendments to racial discrimination laws.

John Southalan, ALHR's President, said "This proposed change to the law removes important protections against racial discrimination. We reject the Government's suggestion that racial vilification or intimidation is acceptable if done 'in the course of...public discussion of any political [or] social matter'. The Government's proposal is contrary to international standards, the law of various Australian States and Territories,¹ and common sense of what racial discrimination is".

ALHR will make submissions on the exposure draft, as invited by the Attorney General.

Southalan also questioned the vagaries the proposed law may be introducing: "The reference to 'the standards of an ordinary reasonable member of the Australian community' is introducing a new phrase which is legally unknown. Others laws use notions such as 'vilify a segment of the Australian community' (Migration Act), 'ordinary, reasonable members of the relevant section of the community' (misleading conduct), or 'the point of view of ordinary reasonable decent members of the community' (defamation). The proposal here seems destined to produce confusion."

The exposure draft proposes a change by outlawing 'vilification' in place of 'offend, insult and humiliate'. The likely operation and interpretation of that change will be examined by ALHR in forthcoming submissions. ALHR will also address the proposal that racial intimidation only be illegal where it causes fear of 'physical harm'. "There are ways in which racism exists other than just through physical harm", said Southalan, "racist intimidation causing psychological or economic harm should also be prohibited".

The guidance for ALHR's analysis is the international standards on racial discrimination, which Australia has long championed. International law sets basic minimum standards, and one of the earliest and most fundamental human rights is the prohibition of racial discrimination. Australia's

¹ eg. *Discrimination Act 1991* (ACT), s66; *Anti-Discrimination Act 1977* (NSW), s20c; *Criminal Code 1913* (WA), s78.

High Court has recognised this prohibition is part of customary international law,² and it is expressly stated in the 1945 *UN Charter*, the 1948 *Universal Declaration of Human Rights*, the 1963 *Declaration on the Elimination of all Forms of Racial Discrimination* and more recent treaties. In the 1963 Declaration, a unanimous General Assembly of the United Nations stated that 'Everyone shall have the right to...protection against any discrimination he may suffer on the grounds of race...with respect to his fundamental rights and freedoms through independent national tribunals competent to deal with such matters'.³ These standards have been repeatedly emphasised, including the need for countries to 'deter racism and racial discrimination as well as activities aimed at their promotion or incitement'.⁴

"It is these standards, and more recent treaties on civil/political rights and on eliminating racial discrimination, which show how different rights and actions are balanced", said Southalan. The tension between free speech and racial discrimination is not new. In 1963, the Australian Government's statement to the United Nations acknowledged people's right 'to express their views', but explicitly said this was 'subject to the normal limitations on the manner of expression; namely, that social or political opinions ought not to be expressed in such a way as to arouse hatred, hostility or violence. Indeed, this is the law in most countries'.⁵ Nearly half a decade later, in 2011, Australia reaffirmed this position, reporting to the UN that 'The Australian Government will continue to administer a strong framework for the prevention of hate speech and incitement to violence'.⁶

ALHR's submissions will examine the consistency, or otherwise, of these proposed legal changes with Australia's international commitments.

Media Contact: John Southalan, President
M: 0417 932 143
E: president@alhr.asn.au

ALHR (Australian Lawyers for Human Rights) is a network of Australian lawyers active in practising and promoting awareness of international human rights standards in Australia. ALHR has a national membership of over 3000 lawyers and law students, with active National, State and Territory committees.

² *Koowarta v Bjelke-Petersen* [1982] HCA 27; 153 CLR 168, 205-206 per Gibbs CJ, 220 per Stephen J, 248 per Wilson J.

³ *Declaration on Elimination of Racial Discrimination* (UN General Assembly, 20 Nov 1963, UN doc A/RES/1904(XVIII)), art 7(2)

⁴ *General Recommendation 7: Measures to eradicate incitement to or acts of discrimination* (Committee on the Elimination of Racial Discrimination, 23 Aug 1985, UN doc A/40/18 at 120), preamble.

⁵ *Official Records* (UN General Assembly, 18th session, 1261st plenary meeting, 20 Nov 1963), [152].

⁶ Australia Government formal response to the UPR recommendations (UN Human Rights Council, 8 June 2011), recommendation 98.