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EXPRESS POST
Human Rights Policy Branch
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3-5 National Circuit
BARTON ACT 2600

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And by email: s18cconsultation@ag.gov.au

Dear Sir/Madam

Exposure Draft of *Freedom of Speech (Repeal of s.18C) Bill 2014* (the Exposure Draft)

The Executive Council of Australian Jewry (ECAJ) makes the following submission (Submission) in response to the Exposure Draft. We consent to the Submission being made public. The Exposure Draft, released by the Attorney-General on 25 March 2014, proposes that sections 18B, 18C, 18D and 18E in Part IIA of the *Racial Discrimination Act* (the RDA) be repealed and that they be replaced with a single section, comprising four sub-sections, in the terms announced.

The ECAJ is the national peak body of Australian Jewry. It is constituted by its Councillors who are elected by, and accountable to, the representative roof bodies of the Jewish communities in each of the States and the ACT, as well as representatives from other national Jewish organisations in Australia which are affiliated to the ECAJ. A small number of national Jewish organisations which are not affiliated to the ECAJ are granted observer status. This Submission is unanimously endorsed by each of the ECAJ's Constituents and Affiliates.

All complaints that have been brought under Part IIA of the RDA on behalf of the Australian Jewish community, have been lodged and pursued with the Australian Human Rights Commission and its predecessor, the Human Rights and Equal Opportunity Commission, (the Commission) by the ECAJ. Most complaints have been resolved at, or prior to, conciliation. All complaints that have not been resolved, and which have proceeded to litigation, have been pursued on behalf of the Australian Jewish community by the ECAJ.* A list of these cases appears on the ECAJ website.

The ECAJ also publishes the Annual Report entitled "Antisemitism in Australia" and has done so since 1989. These reports continue to provide the most comprehensive available data and analyses of antisemitism in Australia, year on year. Regrettably, no comparable data and analyses have been compiled in relation to other forms of racism in Australia.

**Prior to 2006, the ECAJ was an unincorporated association and its complaints to the Commission and cases in the Federal Court of Australia were brought in the name of the then Executive Vice-President, and later President, of the ECAJ, Jeremy Jones.*

Freedom of expression is fundamental to a democratic society and indispensable for human progress. However, it has never been regarded as absolute and unlimited. In his famous *Essay on Liberty* the English philosopher, John Stuart Mill, drew a distinction between liberty and licence. He recognised that liberty does not mean the licence of individuals to do just as they please, because that would mean the absence of law and of order, and ultimately the destruction of liberty. The limits of freedom are reached when its exercise causes harm to others.

To denigrate people because of the colour of their skin or their national or ethnic origin can be as harmful in its effect on its targets and on society as a whole, as statements which defame individuals, breach copyright, promote obscenity, breach official secrecy, demonstrate contempt of court and parliament, and mislead or deceive consumers, all of which are prohibited, and widely accepted as rightfully prohibited, by law.

The ECAJ submits that Part IIA of the RDA strikes an appropriate balance between freedom of expression and freedom from the harms of racial vilification and that the provisions proposed by the Exposure Draft fail to do so. This Submission, which is divided into 8 sections, is summarised as follows.

SUMMARY

Section 1 – Analysis of Exposure Draft

- No case has been made out for repealing or altering Part IIA of the RDA and the entire Exposure Draft should be abandoned. The following analysis of the Exposure Draft is without prejudice to that over-riding proposition.

- The proposals in the Exposure Draft are fundamentally flawed. The contemplated protections are artificially defined and unreasonably narrow. The contemplated exceptions are unreasonably wide and readily open to abuse.

- The proposal to delete the words **"offend, insult, humiliate"** in section 18C of the RDA, is based on the view that those words set up a "subjective test" based on "hurt feelings", which establishes too low a threshold for the operation of the section and therefore impinges excessively on freedom of expression. That view, is erroneous. If enacted, the Exposure Draft provisions would leave severe gaps in the protections provided compared to those provided by the words "offend, insult, humiliate" in the current legislation.

- The Exposure Draft is wrong to limit the definition of "**vilify**" to the incitement of racial hatred, as opposed to its dictionary meaning. In our view, the primary focus of the definition should be on the harm to the target person or group, whereas the definition in the Exposure Draft is concerned exclusively with the effect of the behaviour on other parties. "**Racial vilification**" should thus be defined according to its ordinary dictionary meaning and common usage, that is, "*to speak evil of, defame or traduce a person or group because of the race, colour or national or ethnic origin of that person or that group*." This Submission adopts that definition.

- The Exposure Draft is wrong to limit the definition of "**intimidate**" - "to cause fear of physical harm". In our view, this definition also is unreasonably narrow and omits the causing of other equally or more compelling types of fear. The dictionary definition of intimidate" is "*to make timid, or inspire with fear; overawe; cow*" or "*to force into or deter from some action by inducing fear*", and covers a wide range of situations in which fear is caused, beyond fear of physical harm. This is the way the word "intimidate" has been interpreted by the courts, and the government has provided no reason as to why the word should not be given its ordinary meaning. The word "intimidate" should therefore retain the meaning attributed to it by the courts.

- Justice requires that the applicable "**community standard**" be defined in a way that does not skew the relevant test in favour of either complainants or respondents. The Exposure Draft formula risks importing into the operation of the section prejudices that might prevail from time to time in the general community, thereby potentially skewing the test in favour of respondents.

- The most objectionable parts of the Exposure Draft are the **exemptions** in subsection (4). Unlike the current Section 18D there is no requirement in the Exposure Draft subsection (4), for the respondent to a complaint to have acted "*reasonably and in good faith*". This would mean that even the very limited protections that would ostensibly be conferred against conduct which incites hatred on the basis of race, or which causes fear of physical harm, would not apply, merely because the conduct of the respondent to the complaint occurred in the course of participating in a public discussion. This would send a message that even certain types of behaviour which are criminal under State law may be acceptable.

- No reason has been given for the proposed deletion of **sections 18B and 18E**, and there has been little public debate about these aspects of the Exposure Draft. The sections should be retained.

- The Submission contains a non-exhaustive list of cases decided under Part IIA of the RDA, (other than *Eatock v Bolt*), in which the complainant was successful, and in which the complaint would have been likely to fail under the provisions proposed in the Exposure Draft. The reason for the likely failure in each case is stated briefly.

Section 2 - <u>The Harms Caused by Racial Vilification</u>

There is extensive research and literature concerning the harms of racial vilification. The harms extend well beyond mere hurt feelings or injured sensibilities and often have profound and serious effects.

Racism deprives its targets of equal treatment and a fair go, disempowering them and excluding them from society, either wholly or in part, often intimidating them into silence, inter alia, by: social exclusion and limitations on personal liberty; internalisation of racist messages; desensitisation of society as a precursor to violence; and silencing of target individuals and groups.

A brief review of the literature is provided.

Section 3 - The Australian Experience

The findings of researchers about the harms of racial vilification have been supported by the findings of national inquiries which were undertaken in Australia in the 1980's and 1990's (the national inquiries), all of which recommended, as a minimum, the introduction of civil prohibitions against racial vilification. They also recommended compulsory conciliation and, as a last resort, civil litigation, as avenues for redress.

Section 4 - The Experience of the Australian Jewish Community

The specific experience of the Jewish community in Australia has, for the most part, been a happy one, with far lower levels of antisemitism than have historically been experienced, and continue to be experienced, by Jewish communities in other parts of the world. Nevertheless, antisemitism persists in Australia. Acts of violence against people or property which are motivated by antisemitism are rare in Australia, but low-level expressions of antisemitism have grown in frequency, especially since the advent of the internet and social media.

Graffiti and vandalism against Jewish communal buildings persist. Synagogues, Jewish schools and other communal Jewish buildings continue to require armed guards and other security facilities as a precaution against antisemitic threats from sources based locally and overseas.

Acts of violence begin with words. Part IIA of the RDA has provided all Australians, including our community, with an avenue of redress and vindication against both local and imported strains of racial vilification. Both redress and public vindication have been important to us as a means of providing people in our community with reassurance about the essential fairness, tolerance and civility of Australian society and thus of preventing or counteracting the harms that public expressions of antisemitism would otherwise cause them.

Section 5 - Australia's International Obligations

The recommendations made by the national inquiries are in accordance with Australia's obligations under international treaties. Implementation of the Exposure Draft proposals would make Australia substantially less compliant with those obligations, and with the commitment given by Australia in the final sentence of its reservation to Article 4a of the *International Convention for the Elimination of all Forms of Racial Discrimination*.

Section 6 - Public Policy Underlying Part IIA of the RDA

The public policy underlying Part IIA of the RDA is in accordance with the recommendations of the national inquiries and Australia's treaty obligations. The processes leading to the enactment of Part IIA were exhaustive and engaged both the Australian people and the Parliament in an open and public debate.

Sections 18C and 18D were carefully drafted to ensure that any limitation upon freedom of expression would be the minimum necessary to protect against the harms of serious occurrences of racial vilification.

Section 7 - Case Law Under Part IIA of the RDA

The courts have interpreted the provisions of Part IIA conservatively and in the manner intended by Parliament. Cases are determined not by the subjective, and possibly capricious, perspectives of complainants about perceived harm, but by the application of an objective test by the court. The protections of section 18C, as interpreted by the courts, extend only to harms having profound and serious effects. Constraints on freedom of expression have been given as limited an ambit as is consistent with those protections. Any concerns in that regard could be readily overcome by the courts' interpretation being codified in the RDA.

In 2003, the Commonwealth - which was then under a Coalition government headed by Prime Minister John Howard – intervened in *Toben v Jones* to defend the validity of Part IIA of the RDA and specifically the use of the words "offend, insult, humiliate and intimidate" in section 18C. The Commonwealth argued "*that acts done in public which are objectively likely to offend, insult, humiliate or intimidate and which are done because of race, colour or national or ethnic origin are likely to incite other persons to racial hatred or discrimination or to constitute acts of racial hatred or discrimination*", and the court accepted that submission. We respectfully urge the current Coalition government to adopt the same approach.

Section 8 - Conclusions and Recommendations

No case has been made out to justify repealing or amending the provisions of Part IIA of the RDA. The Exposure Draft should be abandoned. If the government wishes to undertake a serious review of Part IIA of the RDA, Parliament should conduct an open public inquiry and debate, with expert and community input, that is as comprehensive as the processes that provided the evidentiary basis for the existing legislation. The review should not begin from any *a priori* assumptions about Part IIA of the RDA.

THE SUBMISSION

1. Analysis of Exposure Draft

For the reasons stated later in this Submission, we believe that no case has been made out for repealing or altering Part IIA of the RDA and that the entire Exposure Draft should be abandoned.

Without in any way qualifying that view, and for the sake completeness, we also make the following submissions about the specific terms of the Exposure Draft.

- **Proposed removal of the words "offend", "insult" and "humiliate".**

  The proposal to delete the words "offend, insult, humiliate" in section 18C of the RDA is based on the view that those words set up a "subjective test" based on "hurt feelings", which establishes too low a threshold for the operation of the section and therefore impinges excessively on freedom of expression. That view, as is demonstrated in Section 7 of this Submission, is erroneous.

  Section 18C was not intended to operate in that way when it was enacted (see Section 6 of this submission) and has not been interpreted or given effect to in that way by the courts (see Section 7 of this Submission). In every decided case under section 18C, without exception, the court has made its own assessment by applying an objective test based on a community standard, regardless of the subjective perceptions of the complainant. This is the way the courts have consistently interpreted the words "reasonably likely to", which appear in section 18C immediately prior to the words "offend, insult, humiliate".

  Further, there is no contravention unless the offence, insult, humiliation or intimidation is found to have "*profound and serious effects, not to be likened to mere slights*".[1] Section 18C is thus directed only at conduct which, as objectively assessed by a court, is likely to produce the harms outlined in Section 2 of this Submission.

  It is especially puzzling to us that the government is suggesting that humiliation is exclusively a subjective experience. The plain dictionary definition of that word, which has been adopted by the courts[2], includes "*to cause a painful loss of dignity to*" or "*to make low or humble in position, condition or feeling*".[3] This definition, and common sense and ordinary human experience, suggest that the humiliation of a person is, at least in part, an objective reality which can be readily recognised by an impartial observer, and not merely a subjective perception of the person who is humiliated.

  Finally, section 18C is qualified by the requirement that the offence, insult, humiliation or intimidation must have occurred "*because of the race, colour or national or ethnic origin*" of the complainant, rather than the complainant's (or anyone else's) ideas, opinions or beliefs. (See Section 7 of this submission, second dot point).

  If enacted, the Exposure Draft provisions would leave severe gaps in the protections provided compared to those provided by the current legislation. For example, there would be no remedy, as is available in the current legislation, for victims of gross negative stereotyping, serious instances or repetitions of verbal abuse amounting to harassment, or of humiliation, on the basis of race or ethnicity if these occurrences were found to fall outside the criteria of inciting third parties to hatred or causing fear of physical harm. This proposed diminution in protections sits oddly with statements reportedly made by the Attorney-General in January that he was considering expanding the protections by introducing a new criminal offence of incitement to racial hatred. The Attorney-General was said to have expressed the view that "*section 80.2A of the Commonwealth Criminal*

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1 *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 at [16] *per* Kieffel J
2 See for example *Jones v Scully* [2002] FCA 1080 at [103]
3 *Macquarie Dictionary Online* (viewed 28 April 2014)

Code [which criminalises incitement to racially-motivated violence but not incitement to racial hatred], *is probably too narrowly drawn*".[4]

- **Proposed definition of "vilify"**

  The Exposure Draft includes the following definition of 'vilify':

  "*vilify means to incite hatred against a person or a group of persons*".

  This definition differs significantly from the Macquarie Dictionary definition:

  "*to speak evil of; defame; traduce*"[5]

  Whilst we accept that incitement of third parties to hatred can, but does not necessarily, accompany or result from vilification, the concept of incitement does not capture the nature of vilification. The incitement of third parties to hatred against a person or group can occur contemporaneously with speaking evil of, defaming or traducing the person or group, but is logically preceded by it. Incitement of others to hatred of a person or group is only possible once a basis has been established by speaking evil of, defaming or traducing that person or group.

  For these reasons, we think the Exposure Draft is wrong to limit the definition of "vilify" to the incitement of racial hatred, as opposed to its dictionary meaning. In our view, the primary focus of the definition should be on the harm to the target person or group, whereas the definition in the Exposure Draft is concerned exclusively with the effect of the behaviour on other parties. A complaint would therefore only be capable of being upheld if the complainant could prove that the behaviour would incite, or tend to incite, others to feelings of racial hatred. No uniform test of incitement exists under current state laws, which prohibit "*incitement to hatred, contempt or severe ridicule*" on the basis of race[6], and no test for incitement is specified in the Exposure Draft. The courts would thus be left to formulate such a test, and to do so without regard to the degrading effect of the behaviour on the target person or group. In our view this would be an injustice.

  Accordingly, this submission adopts the Macquarie Dictionary definition of 'vilify' and ascribes a corresponding meaning to the word 'vilification'. The expression 'racial vilification' when used in this Submission means *to speak evil of, defame or traduce a person or group because of the race, colour or national or ethnic origin of that person or that group*.

- **Proposed narrowing of definition of "intimidate"**

  The Exposure Draft defines "intimidate" as "to cause fear of physical harm". In our view, this definition also is unreasonably narrow, and it differs significantly from the Macquarie dictionary definition of "intimidate":

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4 Nicola Berkovic, 'Brandis to Outlaw Inciting Hatred', *The Australian*, 31 January 2014: http://www.theaustralian.com.au/business/legal-affairs/brandis-to-outlaw-inciting-hatred/story-e6frg97x-1226814283793#

5 Macquarie Online Dictionary (viewed 28.4.2014)

6 See for example sections 20C and 20D of the *Anti Discrimination Act* 1977 (NSW)

"*to make timid, or inspire with fear; overawe; cow*" or "*to force into or deter from some action by inducing fear*",[7]

The dictionary definition covers a wide range of situations in which fear is caused, beyond fear of physical harm. This is the way the word "intimidate" has been interpreted by the courts[8] and the government has provided no reason as to why the word should not be given its ordinary meaning.

Section 2 of this Submission makes it clear that the intimidatory effects of racial vilification can extend well beyond a fear of physical harm. Many forms of fear can be just as intimidating in their effects as fear of physical harm, if not more intimidating – fear of social stigmatisation and loss of social standing and acceptance, fear of loss of friendship and support networks, fear of exclusion from employment opportunities and fear for the well-being of loved ones, to give only a few examples. The word "intimidate" should therefore retain the meaning attributed to it by the courts.

- **Proposed change to the "community standard"**

Subsection (3) of the the Exposure Draft proposes the introduction of a test of reasonable likelihood that requires the relevant assessment to be made from the standpoint of an "*ordinary reasonable member of the Australian community, and not by the standards of any particular group within the Australian community*". In our view, justice requires that the applicable standard be defined in a way that does not skew the relevant test in favour of either complainants or respondents. That appears to be the intention behind subsection (3).

The difficulty we have with the formulation in subsection (3) is that it could potentially set up a test which is skewed in favour of respondents. A reasonable member of the Australian community in certain times and contexts might be a person who harbours racial prejudice against a complainant or that complainant's racial group. For example, during WWII a reasonable member of the Australian community might plausibly have been described as someone who was racially prejudiced against the Japanese and Germans. More recent overseas conflicts involving Australia's armed forces have arguably given rise domestically to feelings of antipathy towards Australians of the same racial or ethnic background as those against whom Australian forces are fighting. Such feelings during times of armed conflict towards the racial or ethnic groups of one's nation's enemies is a near universal phenomenon, and certainly not unique to Australia. Other circumstances can also give rise to a prevalence of forms of racial prejudice.

The formulation in subsection (3) of the Exposure Draft, especially the addition of the words "*and not by the standards of any particular group within the Australian community*", therefore creates the risk that racial prejudices in the general community that may prevail from time to time will be imported into the operation of the law. We doubt that this outcome is intended by the government, but the risk cannot be ignored. The problem could be overcome by adding to subsection (3) a proviso specifying that a reasonable

[7] Macquarie Online Dictionary (viewed 28.4.2014)
[8] See for example *Jones v Scully* [2002] FCA 1080 at [103]

member of the Australian community is someone whose judgment is not affected by bias or prejudice either in favour of, or against, any group in the community.

- **Proposed exemptions**

In our view, the most objectionable part of the Exposure Draft is subsection (4) which would exempt "*any words, sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter*". The expression "*public discussion*" is not defined, but given the width of the kinds of communication to which it would apply, (namely, "*any words, sounds, images or writing spoken, broadcast, published or otherwise communicated*"), public discussion would likely include publications in the print and electronic media, on websites and on social media.

If the intention of subsection (4) is to confer wholesale special exemptions or privileges upon the media as compared to other Australian citizens, we submit that there is no basis for doing so. By way of analogy, the exemptions granted to information providers with regard to the prohibition of misleading and deceptive conduct in trade or commerce are strictly limited. The exemptions do not apply insofar as an information provider is supplying goods or services or publishing advertising in the ordinary course of its business.[9] The central mischief which is prohibited is misleading or deceptive conduct in the sale of goods or services in the course of a business operator's business. The legislation extends this prohibition to information providers in the same way as it does to any other type of business operator.

Unlike the current Section 18D, there is no requirement in draft subsection (4) for the respondent to a complaint to have acted "*reasonably and in good faith*". This would mean that even the very limited protections that would ostensibly be conferred against conduct which incites hatred on the basis of race or which causes fear of physical harm would not apply if – and merely because - the conduct of the respondent to the complaint occurred in the course of participating in a public discussion. The wide scope for this exception to be abused is obvious. It could apply even to conduct amounting to a threat of violence on the basis of race – a criminal offence with aggravating circumstances under State law[10] - if the threat is made in the course of a public discussion.

Whilst some judges have dealt with the words "reasonableness" and "good faith" as a composite concept most judges have treated them as overlapping but different.

For an act to have been done "reasonably" under section 18D it must bear a rational relationship to the purpose which it is claimed renders it exempt from liability, and not be disproportionate to what is necessary to carry it out. If offence, insult, humiliation or intimidation is caused on the basis of race, it must not be out of proportion to the fulfilment of that purpose.[11]

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9 See Australian Consumer Law, section 19

10 See, for example, section 21A(2)(h) of the *Crimes (Sentencing Procedure) Act*, *1999* (NSW), which provides that one factor that can be taken into account in sentencing is whether: "*the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability)*".

11 *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at [79]-[82] *per* French J

"Good faith" requires a respondent to have acted with sufficient honesty, care and diligence, to minimise the offence, insult, humiliation and intimidation suffered by the people likely to be affected by the respondent's conduct, and to avoid, for example, gratuitously inflammatory and provocative language, or contriving to smear a person or group.[12]

In our view, both of these requirements are moderate and necessary to prevent abuse of the exception, and their proposed removal in accordance with subsection (4) of the Exposure Draft would result in a provision that would not only be open to abuse but would also be repugnant to the basic purpose of the RDA, which is to eliminate racial discrimination. The current section 18D requirements of reasonableness and good faith should therefore both be retained.

- **Proposed deletion of sections 18B and 18E**

No reason has been given for the proposed deletion of these sections, and there has been little public debate about this aspect of the Exposure Draft. Under section 18B, where an act in question has been done for two or more reasons it is adequate for the purposes of Part IIA if one of those reasons is the ground of race. That is to say, race does not need to be the dominant or substantial reason for doing the act, but simply a factor in the doing of the act.[13] It is uncertain what the deletion of Section 18B would mean. It could mean that a complainant would be obliged to prove that race is the dominant or true or substantial reason for the act in question. The precise consequences would be a matter for judicial interpretation.

The same would apply to the proposed deletion of section 18E, the vicarious liability provision, which presently applies to employers and principals of agents. No explanation has been given for the deletion of this provision either. It might have the unintended consequence of making it more difficult to hold to account internet service providers and social media platform providers for hosting racist content that has been posted by their clients and of which they have been made aware. This could add an additional layer of difficulty for victims seeking redress against the burgeoning problem of cyber-racism.

- **Practical effects**

The following is a list of cases under Part IIA of the RDA, other than *Eatock v Bolt*, in which the complainant was successful and in which, in our view, the complaint would fail under the provisions proposed by the Exposure Draft.

In none of these cases was the outcome a significant matter of public controversy.

The list does not purport to be exhaustive.

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12 *Toben v Jones* [2003] FCAFC 137 (27 June 2003) at [45] *per* Carr J

13 *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 at [28] *per* Kieffel J

Name of case and citation	Reason complaint would fail under Exposure Draft provisions
Jones v Toben (includes explanatory memorandum) [2002] FCA 1150 (17 September 2002)	In the course of a public discussion
Jones v Scully [2002] FCA 1080 (2 September 2002)	In the course of a public discussion
McGlade v Lightfoot [2002] FCA 1457 (26 November 2002)	In the course of a public discussion
Kanapathy v In De Braekt (No.4) [2013] FCCA 1368 (25 September 2013)	No incitement or causing fear of physical harm
Clarke v Nationwide News Pty Ltd trading as The Sunday Times [2012] FCA 307	In the course of a public discussion

2. The Harms Caused by Racial Vilification

There is extensive literature by researchers concerning the harms of racial vilification, whether it consists of words or conduct or both. As was noted in the Commission's report following its *National Inquiry into Racist Violence in Australia* in 1991, these harms go well beyond hurt feelings or injured sensibilities and consist instead of "*adverse effects on the quality of life and well-being of individuals or groups who have been targeted because of their race*".[14] Racism deprives its targets of equal treatment and a fair go, disempowering them and excluding them from society, either wholly or in part, often intimidating them into silence. A brief summary of the adverse effects of racial vilification follows.

(a) Social exclusion and limitations on personal liberty

To be the target of expressions of racism is to be portrayed negatively because of one's skin colour, ethnicity or national origin, which are factors which one cannot change. This can impact negatively on one's relationships with neighbours, work-mates, friends, acquaintances and others with whom one needs to interact.

Belonging to a racial or ethnic group which is the target of public expressions of racism can undermine and ultimately destroy the sense of safety and security with which members of the group go about their daily lives. Such targeting can thus deny its victims personal security and the liberty to pursue their daily lives because of the fear, even in the absence of provable threats of physical harm, that violent acts of racial hatred are more

[14] Human Rights and Equal Opportunity Commission, *Report of National Inquiry into Racist Violence in Australia* (1991) p 299. At http://www.humanrights.gov.au/publications/racist-violence-1991 (viewed 28 April 2014).

likely to occur in a social climate in which speech-acts of racism are free to proliferate.[15] As three national inquiries in Australia have concluded, such a fear is well-founded (see Section 3 below).

The desire to avoid being continually confronted with speech of this nature, or by actual or potential perpetrators, places limits on the target's freedom to maintain broad support networks, limiting social harmony and circumscribing possibilities to form and maintain personal relationships. Left unchecked, this may lead the target to resign from a job, leave an educational institution, move house and avoid public places.[16] There may also be knock-on effects upon sympathetic non-target group members, whose liberties to associate with those who are targeted by racial vilification are also constricted by a desire to avoid becoming targets themselves.[17]

(b) Internalisation of racist messages

Despite conscious attempts to resist the messages of racist speech, the public repetition of racist themes and stereotyping results in individual victims, the perpetrators, and society as a whole subconsciously learning, internalising and institutionalising the messages conveyed.[18] Left unchecked, speech which communicates inferiority and negative characteristics based on race tends to produce in its victim the very characteristics of 'inferiority' that the speaker intends to ascribe to the victim, as the victim internalises and comes to believe, and then perform, the dehumanising characterisations attributed to him or her.[19]

Shaming and degrading a group of people by labelling them inferior ('stigmatising') can inflict psychological injury by assaulting self-respect and dignity. Because self-esteem and the respect of others are important for participation in society, racist stigmatising corrodes the self-respect of targeted individuals and groups and thus becomes self-perpetuating; it tends to reproduce in its target group those qualities attributed to the group by the stigmatisers.[20] One researcher has described this process as 'spirit-murder', and has argued that it is as 'devastating', 'costly' and 'psychically obliterating' in its effects as assault.[21]

(c) Desensitisation of society as a precursor to violence

Historically, in other countries and to a limited degree in Australia, particularly in relation to the Indigenous population, public expressions of racism have had the effect, often

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15 Mari Matsuda, 1993. "Public Response to Racist Speech: Considering the Victim's Story". In *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, M. Matsuda, C. Lawrence, R. Delgado and K. Crenshaw (eds.), pp. 17-52. Colorado: Westview Press, at pp.17 and 22.

16 *Ibid,* at 24-25.

17 *Ibid,* at 25.

18 Richard Delgado, 1993. "Words that Wound: A Tort Action for Racial Insults, Epithets and Name Calling". In *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, M. Matsuda, C. Lawrence, R. Delgado and K. Crenshaw (eds.), pp. 89-110. Colorado: Westview Press, at pp. 90-94.

19 *Ibid*, at pp. 94-95.

20 Charles R. Lawrence III, 1987. 'The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism', *Stanford Law Review*, Vol. 39, pp. 317-388 at p. 351; Cass Sunstein, 1993. "Words, Conduct, Caste", *The University of Chicago Law Review*, Vol.60, Nos. 3 and 4, pp. 795-844 at pp. p.802.

21 Patricia Williams. 1987. 'Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism', *University of Miami Review*, Vol. 42, pp. 127-157 at p.129.

intended, of desensitising the general population to the humanity, dignity and human rights of members of the targeted group. This has been a precursor to discrimination, persecution, violence and, ultimately, genocide and other crimes against humanity.[22]

For this reason targeted group members are typically subject to fears of racially motivated violence, experience fear of ongoing subordination and are made aware of a denial on the part of hate speakers of the premise of political equality.[23]

It is of particular importance that Part IIA has had the effect of setting the tone of civil discourse in Australia, acting as a powerful prophylactic against the tendency to racial violence that might otherwise arise in the absence of Part IIA.

(d) Silencing of target individuals and groups

Speaking back against expressions of racism is often not possible for its targets, or even appropriate. A verbal attack based on the target's skin colour or ethnic background, which are immutable factors, is a denial of the target's humanity. Such an attack should not be dignified with a response in circumstances where a response would imply that the target's humanity is a legitimate matter for 'debate'.

Speaking back will rarely change a racist's basic attitudes. Although racism is said to spring from a belief that human races have distinctive characteristics which determine the moral and other qualities of their individual members, the belief has no scientific basis and is rarely the product of any kind of purely cognitive process, whether evidence-based or otherwise. People who propound racist beliefs are almost always motivated by emotional or psychological factors or by a supervening interest and will therefore persist in such beliefs even when there is overwhelming evidence to the contrary. The "reasons" proffered for racist attitudes are rationalisations, usually *ex post facto*.[24]

The targets of expressions of racism tend to curtail their own speech as a protective measure for a range of reasons.

- The target fears that a response may provoke further abuse.[25]

- In many cases the speaker is in a position of authority over the target, which further restricts the target's belief in his or her ability to respond in a meaning-

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22 Alexander Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements* (New York: New York University Press, 2002).

23 Cass Sunstein, "Words, Conduct, Caste", (1993),*The University of Chicago Law Review*, Vol.60, Nos. 3 and 4, pp. 795-844 at p.814.

24 See, for example, Polycarp Ikuenobe, 'Conceptualizing Racism and Its Subtle Forms', *Journal for the Theory of Social Behaviour*', Volume 41, Issue 2, June 2011, pp 161–181.

25 Richard Delgado, "Words that Wound: A Tort Action for Racial Insults, Epithets and Name Calling" (1993) in M. Matsuda, C. Lawrence, R. Delgado and K. Crenshaw (eds.), *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Colorado: Westview Press, 1993) pp. 89-110 at p. 95; and also Mari Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1993) in M. Matsuda, C. Lawrence, R. Delgado and K. Crenshaw (eds.), *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Colorado: Westview Press, 1993) pp. 17-52 at pp. 24-25.

ful way, as the target may fear victimisation, or lack the confidence to challenge a person in a position of authority over the target.[26]

- Ongoing public, negative, stereotypical portrayals of a target group have been described as 'incessant and cumulative assaults' on the self-esteem of members of the group. The 'micro-aggression' enacted via racism also produces 'deference' in the victim persona, that is to say, conformity to the expectations is placed on the victim group,[27] and a conviction, usually well-founded, that counter-speech will not be given a fair hearing and taken seriously.[28]

- Members of the majority or dominant group in society 'get a lot more speech than others'. Members of relatively less powerful groups within the community do not operate from a level playing field.[29]

(e) Damage to health of targets

There is a growing body of research that highlights the serious health effects racism can have on individuals, similar to other stress-induced disorders. Repeated exposure to it contributes to conditions such as hypertension, nightmares, post-traumatic stress disorder, even psychosis and suicide.[30]

3. The Australian Experience

The conclusions of researchers concerning the harms of racism were borne out in Australia by the findings and recommendations of three national inquiries in the early 1990's, immediately preceding the enactment of Part IIA of the RDA, and a lesser known inquiry in the early 1980's.

(a) The ***National Inquiry into Racist Violence*** conducted by the Commission in1991, concluded that "the evidence presented to the Inquiry also supports the observation that there is a connection between inflammatory words and violent action".[31] The Commission's Report recommended the introduction of new Federal criminal offences to proscribe behaviour involving racist violence or intimidation and also incitement to racist violence and to racial hatred likely to lead to violence.[32]

The Report also recommended the introduction of civil remedies for racial harassment and for incitement of racial hostility. With regard to the former it concluded:

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26 *Ibid*.
27 Peggy Davis, "Law as Microaggression" (1989) *Yale Law Journal*, Vol. 98, pp. 1559-1577, at pp. 1585, 1567.
28 Rae Langton, "Speech Acts and Unspeakable Acts" (1993) *Philosophy and Public Affairs*, Vol. 22, No. 4, pp. 293-330, at pp. 314-316.
29 Catharine A. MacKinnon, *Only Words* (Cambridge, Massachusetts: Harvard University Press,1993).
30 Mari Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989) *Michigan Law Review* 87(8), pp. 2320-2381 at p. 2336; and see also Cosima Marriner, *Weaker laws may legitimise racist behaviour*, *The Age*, April 27, 2014: http://m.theage.com.au/federal-politics/political-news/weaker-laws-may-legitimise-racist-behaviour-20140426-37avs.html (viewed 28 April 2014).
31 Human Rights and Equal Opportunity Commission, *Report of National Inquiry into Racist Violence in Australia* (1991), p. 144: http://www.humanrights.gov.au/publications/racist-violence-1991 (viewed 28 April 2014).
32 *Ibid*, pp. 297-298.

"*It is desirable that there be a clear statement of the unlawfulness of conduct which is so* ***abusive,*** *threatening or intimidatory as to constitute harassment on the ground of race, colour, descent or national or ethnic origin. It is also desirable that individuals who have been the victims of such* ***words or conduct*** *be given a clear civil remedy under the Racial Discrimination Act in the same terms as those subjected to other forms of racial discrimination covered by the Act.*"[33] (Emphases added).

The Report noted the need for the proposed civil remedies "*to set an appropriate threshold on prohibited conduct in order to avoid trivialisation*"[34], stating that: "*No prohibition or penalty is recommended for the simple holding of racist opinions without* ***public expression or promotion*** *of them or in the absence of conduct motivated by them*."[35] (Emphases added). Further, the civil remedies should not extend to mere "*hurt feelings or injured sensibilities*", but only to public "*conduct with adverse effects on the quality of life and well-being of individuals or groups who have been targeted because of their race*".[36]

(b) The ***Royal Commission into Aboriginal Deaths in Custody*** (1991) also concluded that there is a clear nexus between racist language and violence. The Royal Commission's Report concluded that expressions of racism are both a 'form of violence' and a promoter of subsequent violence against Aboriginal people.[37] The Report noted that even in the United States, where a guarantee of free speech is enshrined in the First Amendment to the American Constitution, an exception applies with respect to:

"insulting or fighting words, which by their very utterance inflict injury or tend to incite to immediate breach of the peace, these utterances have no essential value as a step to the truth. Any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free ordered life in a metropolitan polyglot community."[38]

The Royal Commission's Report recommended that governments that had not already done so should legislate to provide civil remedies to victims of racial vilification and provide a conciliation mechanism for complaints, with exclusions for "*demonstrations against the behaviour of particular countries, publication or performance of works of art and the serious and non-inflammatory discussion of issues of public policy*".[39] It noted that legislation alone could not change people's attitudes and emphasised the important role of education, but also observed that education and legislation are not mutually ex-

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33 *Ibid*, pp. 298-299.
34 *Ibid*, p.296
35 *Ibid*, p.297
36 *Ibid*, p. 299
37 Royal Commission into Aboriginal Deaths in Custody, National Report Volume 4 (1991), at 28.3.34: http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol4/26.html (viewed 28 April 2014).
38 Unanimous decision of the US Supreme Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), *per* Justice Frank Murphy.
39 Royal Commission into Aboriginal Deaths in Custody, National Report Volume 4 (1991), at 28.3.49: http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol4/26.html (viewed 28 April 2014)

clusive. It emphasised that anti-racism legislation has an important educative role to play by dissuading people from performing racist acts and changing attitudes over time.[40]

(c) The Australian Law Reform Commission, in its ***Multiculturalism and the Law*** report (1992) concluded (with one dissenter) that prohibition of "racist abuse" is consistent with existing limits on freedom of expression, and that public expressions of racism are damaging to the whole community, not only minority groups, undermining the tolerance required for Australia to survive as a multicultural society.

> "*In a tolerant society people are entitled to be protected against serious attempts to undermine tolerance by stirring up hatred between groups. Laws prohibiting incitement of racist hatred and hostility protect the inherent dignity of the human person. In a multicultural society, values such as equality of status, tolerance of a wide variety of beliefs, respect for cultural and group identity and equal opportunity for everyone to participate in social processes must be respected and protected by the law. Laws prohibiting incitement to racist hatred and hostility indicate a commitment to tolerance, help prevent the harm caused by the spread of racism and foster harmonious social relations. Australia is a multicultural society. Its survival as a multicultural society demands that the communities that make up the Australian community can live in peace and harmony. Inciting hatred and hostility against sections of the community is an offence against the whole community and the whole community has an interest in ensuring that it does not happen.*"[41]

All but one of the eight members of the Law Reform Commission thus recommended that the Federal government introduce civil remedies against incitement of racist hatred and hostility for targeted individuals and groups.[42] Six members concurred with the view expressed in the Report of the Royal Commission into Aboriginal Deaths in Custody, that "*conciliation, backed up by civil remedies when conciliation fails, is the more appropriate way to deal with it and opposes the creation of a criminal offence.*"[43]

However, a minority of two of the members also favoured the introduction of a new criminal offence of incitement to racial hatred and hostility, reasoning that:

> "*In many cases there may be only a fine line between stirring up hatred and hostility on the one hand and incitement to violence on the other. Where proof of intention to cause violence falls short, the existence of intent to cause hatred may be quite clear. To offer no more than conciliation in such cases would add to the trauma of the victim.*"[44]

Drawing on the provisions of Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination, to which Australia has been a State party since 1975, the precise offence which the two members recommended be introduced was:

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40 *Ibid*, at 28.3.46 and 28.3.47

41 Australian Law Reform Commission, *Multiculturalism and the Law, Report No 57* (1992), para 7.44: http://www.austlii.edu.au/au/other/alrc/publications/reports/57/ (viewed 28 April 2014).

42 *Ibid*, para 7.45

43 *Ibid*, para 7.47

44 *Ibid*, para 7.48

"*A person must not publish, by any means, anything that is based on ideas or theories of superiority of any race or group of persons of one colour or ethnic origin over another, or promotes hatred or hostility between such races or groups, if the person intends that the publication will incite hatred or hostility towards an identifiable group and is likely to have that effect.*"[45]

(d) In 1983, the Human Rights Commission (as it was then known), conducted an Inquiry chaired by Dame Roma Mitchell, into the possible need for amendments to the RDA to cover **incitement to racial hatred** and **racial defamation**. The Inquiry was prompted by the fact that: "*Even though it is widely known that racist statements are not covered by the existing legislation, fully one-quarter of all complaints* [received by the Commission under the RDA] *concern racist statements*".[46] Whilst some of the complaints were minor, others involved "*gross racist propaganda and powerful attacks on the equal opportunities of minority groups. In two cases where there had been prior complaints to the Commissioner, tension resulted in violence and the death of one of the protagonists*".[47]

Prior to the commencement of the Inquiry into possible remedies for racist statements/propaganda and racial defamation and the call for submissions, the Commission had publicly circulated four papers:

(a) *Incitement to Racial Hatred: Issues and Analysis* (Occasional Paper No. 1) October 1982

(b) *Incitement to Racial Hatred: The International Experience* (Occasional Paper No 2) October 1982

(c) *Words that Wound: Proceedings of the Conference on Freedom of Expression and Racist Propaganda* (Occasional Paper No. 3) February 1983

(d) *Proposed Amendments to the Racial Discrimination Act concerning Racial Defamation* (Discussion Paper No. 3) September 1983

The Report drew a distinction between recalcitrant racists and "*a much larger group of persons whose racism was unthinking or less deeply entrenched*", and concluded that complaints against the latter group were more appropriately dealt with by conciliation and, as a last resort, civil remedies.[48] This conclusion was in keeping with the Report's emphasis on the educative role of the law.

"*The simple fact that an act is known to be unlawful will dissuade most citizens from performing that act unless they have a strong economic or personal interest in so doing. Laws can also change attitudes over time and it is not necessarily the case that an overall attitudinal change has to precede a change in the law. Indeed often when the major proportion of the population accepts that a particular behaviour … is not acceptable, a law restraining the practice will then be highly*

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45 *Ibid*

46 Human Rights Commission. Report No. 7. *Proposal For Amendments To The Racial Discrimination Act To Cover Incitement To Racial Hatred And Racial Defamation* (1983) p. 7: https://www.humanrights.gov.au/sites/default/files/HRC_report7.doc

47 *Ibid*

48 *Ibid*, pp.12-13

effective in convincing the remainder of the population to conform to the new social standard."[49]

Uniquely, the Inquiry's report explored the concept of **group defamation** based on race. It noted that in 1952, the US Supreme Court dismissed a challenge under the First Amendment to a State statute which made it unlawful '*to make or sell a publication exposing the citizens of any race, colour, creed or religion to contempt, derision, or obloquy, or which is productive of a breach of the peace or riots*', because of its defamation of the group. The Supreme Court dismissed the challenge on a five to four vote, with the majority concluding that the First Amendment does not protect group libel any more than individual libel.[50]

Accordingly, in addition to recommending that the RDA be amended to include a civil prohibition against incitement to racial hatred, the Report recommended that a further civil prohibition be introduced "*to make it unlawful publicly to threaten, insult or abuse an individual or group, or hold that individual or group up to contempt or slander, by reason of race, colour, descent or national or ethnic origin*."[51] The scope of this further prohibition was outlined as follows:

"*The second provision is intended to cover racial defamation: i.e. forms of racist statement which in effect defame a person by virtue of his or her membership of a racial group or defame the group itself. Statements which detract from the humanity of people, often by means of unfavourable stereotypes, are as damaging when they slander groups as when the reputations of individuals are attacked. Examples would include 'no X has ever done an honest day's work'; or. 'Ys in this town are a mob of alcoholics with prison records'.*

It should be noted that the unlawfulness of the actions covered by the provisions would depend upon the likely impact of the actions and not upon the intentions of the perpetrators. In this way, the Commission's proposals would fit within the civil concept of unlawfulness on which the Racial Discrimination Act is based rather than within the criminal law tradition."[52]

4. The Experience of the Australian Jewish Community

The specific experience of the Jewish community in Australia has for the most part been a happy one, with far lower levels of antisemitism than have historically been experienced, and continue to be experienced, by Jewish communities in other parts of the world. Nevertheless, antisemitism persists in Australia. Acts of violence against people which are motivated by antisemitism are relatively rare in Australia but, as the ECAJ's Annual Antisemitism Reports have demonstrated, low-level expressions of antisemitism, especially online including via email and social media, have grown in frequency. Graffiti and vandalism against Jewish communal buildings persist.

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49 *Ibid*, p. 13

50 *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

51 Human Rights Commission. Report No. 7. *Proposal For Amendments To The Racial Discrimination Act To Cover Incitement To Racial Hatred And Racial Defamation* (1983) p. 14:

52 *Ibid*, p.15

Both the 1983 Human Rights Commission Inquiry into the possible need for amendments to the RDA to cover incitement to racial hatred and racial defamation and the 1991 National Inquiry into Racist Violence, contained sections analysing the data then available on the incidence of antisemitism in Australia. The most serious outbreaks of antisemitic violence occurred in 1982, when bombs detonated in the Hakoah Club and the Israeli Consulate in Sydney and during the 1991 Gulf War, when there were arson attacks against Jewish kindergartens in Sydney and Melbourne and against three synagogues in Sydney. Fortunately there were no injuries. However, no-one has been prosecuted for these crimes.

Since the early 1990's, three major changes have somewhat altered the pattern of antisemtic behavior in Australia, viz:

(i) the advent of the internet including social media;
(ii) the growing convergence between the extremes of the political left and right in embracing antisemitic tropes and themes[53] and
(iii) the introduction of Part IIA of the RDA.

The first two changes have produced a burgeoning of public expressions of antisemitism and other forms of racism online[54] and the third has provided the Jewish community with a valuable counter-measure.

Synagogues, Jewish schools and other communal Jewish buildings continue to require armed guards and other security facilities as a precaution against antisemitic threats of widely varying severity from sources based locally and overseas.

Acts of violence begin with words. Part IIA of the RDA has provided all Australians, including our community, with an avenue of redress and vindication against both local and imported strains of racial vilification. For our community, this has mostly been by way of direct negotiations with publishers of antisemitic content. The fact that publishers are aware that there is "a law against racial vilification" and that most publishers do not identify, or wish to be identified, as racists is sufficient in most cases to resolve a potential complaint. Only if negotiations fail is the incident escalated into a formal complaint with the Commission. It has been even rarer for our organisation to proceed to litigation under Part IIA of the RDA, but when we have done so we have usually been successful.

We have successfully resolved many more cases at conciliation or by direct negotiations with publishers. A complaint under Part IIA of the RDA which was brought to the Commission by our organisation against Facebook in 2012, went to compulsory conciliation. The complaint was made only after online complaints from Facebook users had not been responded to. Facebook ultimately removed or made inaccessible hundreds of crudely antisemitic racist images and comments that had appeared on 51 Facebook pages. In the US, efforts by Jewish organisations to have Facebook take similar action failed.[55]

Both redress and public vindication have been important to us as a means of providing people in our community with reassurance about the essential fairness, tolerance and civility of Australian society and thus of preventing or counteracting the harms that public expressions of

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53 Julie Nathan, *We're not racist, we just hate Jews*, 4 July 2012: http://www.jpost.com/Opinion/Op-EdContributors/Article.aspx?id=276273; and *Antisemitism in left-wing online media*, 3 October 2012: http://www.jpost.com/Opinion/Columnists/Article.aspx?id=286494 (both accessed 28 April 2014)

54 Peter Wertheim, *We can tame the cyber racism beast*, 18 November 2010: http://www.smh.com.au/federal-politics/political-opinion/we-can-tame-the-cyber-racism-beast-20101118-17yxu.html (accessed 28 April 2014)

55 See http://www.israelhayom.com/site/newsletter_opinion.php?id=7823 (accessed 28 April 2014)

antisemitism would otherwise cause them. Also, by informing those who may have been influenced by racist content that has been removed, a successful outcome to a complaint can help to negate the dissemination of racial prejudice. Nevertheless, we treat the option of making a complaint under Part IIA as a last resort. We also recognise that the principle means of counteracting racism in the long term is through public and school education. We consider legal and educative tools to be mutually complementary, not mutually exclusive.

5. Australia's International Obligations

The recommendations made by the national inquiries are in accordance with Australia's obligations under international treaties. Implementation of the Exposure Draft proposals would make Australia substantially less compliant with those obligations, and with the commitment given by Australia in the final sentence of its reservation to Article 4a of the International Convention for the Elimination of all Forms of Racial Discrimination (CERD).[56]
CERD was the instrument by which an internationally agreed legal framework for redressing racial discrimination, including the promotion of racial hatred, was first created. On 13 October 1966 Australia became one of the first countries to sign CERD, but it was not until 30 September 1975 that Australia ratified CERD and became legally bound by its provisions. At present, 177 of the world's 193 States are parties to CERD. The RDA was enacted in 1975 in pursuance of Australia's obligations under CERD and the whole of CERD is a schedule to the RDA.

A key provision of CERD is Article 4, paragraph (a) of which requires States parties to make "*all dissemination of ideas based on racial superiority or hatred*" a criminal offence:

> "*States Parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the universal declaration of human rights…*
>
> *a) Shall declare an offense punishable by law all dissemination of ideas based on racial superiority or hatred…"*

The CERD, in common with other aspects of international human rights law and humanitarian law, draws its lessons from the cataclysmic events of the 1930's and 1940's and is aimed at eliminating anything resembling a recrudescence of Nazi ideology or practice. Nevertheless, the treaty is in generic terms. It is aimed at eliminating ***all*** forms of racial discrimination ***and racial prejudice***, and seeks to prohibit the dissemination of ***any*** "ideas based on racial superiority ***or hatred***". (Emphases added).

The rationale for the conclusion of CERD in the 1960's is admirably summarised in the following passage:

> "*By this time in the twentieth century, the nations of the world had experienced a century stained by, amongst other catastrophes, racial slaughter, pogroms, forced removal and relocations of whole peoples, religious and ethnic genocide, and were undergoing the*

[56] 660 United Nations Treaty Series 195 (entered into force Jan. 4, 1969)

trauma involved in the break-up and disintegration of colonial empires and national and regional political structures based on racial characteristics. The unexpected recrudescence, in the winter of 1959-60, of some of the most recent and horrific manifestations of racist behaviour enlivened the world community to act swiftly and (with an inevitable degree of variation in political perspective) unanimously, to take steps towards the elimination of the perceived evil. The perceived evil was all forms of racial discrimination and racial prejudice, the manifestation of which had been, in recent generations, at times horrifically violent and strident, at times overt, and at times less overt and less brutal, but nevertheless insidiously pervasive. In any form, it was recognised, by all nations in the international community, to strike at the dignity and equality of all human beings."[57]

At the time of ratifying the convention in 1975, Australia reserved its position in relation to Article 4(a), stating that "*Australia is not at present in a position specifically to treat as offences all the matters covered by Article 4(a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian government, at the first suitable moment, to seek from parliament legislation specifically implementing the terms of Article 4(a).*"[58]

Australia has never enacted a Federal criminal offence or offences in terms of Article 4(a) and the reservation remains in place. The UN's Committee on the Elimination of Racial Discrimination does not consider the enactment of the civil prohibitions in Part IIA of the RDA, to constitute compliance with Article 4(a) (and the commitment given in the final sentence of the reservation) and has called on Australia to withdraw its reservation.[59]

The other relevant international instrument bearing on Australia's obligations to combat racism, is the International Covenant on Civil and Political Rights (ICCPR),[60] which entered into force for Australia on 13 November 1980. The ICCPR highlights the interaction between freedom of expression and freedom from expressions of racism. Article 19 affirms that "*[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds.*" Article 19 also recognizes that freedom of expression is not absolute: it "*carries with it special duties and responsibilities*" and "*may therefore be subject to certain restrictions*" as are provided by law and are necessary for "*respect of the rights or reputations of others*" or "*the protection of national security or of public order*". One of the exceptions is enshrined in Article 20, which states that, "*[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law*".

6. Public Policy Underlying Part IIA of the RDA

The conclusions of the three national inquiries, referred to in Section 3(a), (b) and (c) of this Submission, as to the existence of a causal nexus between racial vilification and racist

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57 *Toben v Jones* [2003] FCAFC 137 (27 June 2003) at [98] *per* Allsop J

58 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en (viewed 28 April 2014)

59 CERD/C/AUS/CO/15-17, 27 August 2010, para [17]

60 999 *United Nations Treaty Series* 171 (entered into force Mar. 23, 1976)

violence, and Australia's international obligations under CERD, were invoked in the second reading speech introducing the Racial Hatred Bill 1994 (Cth), the civil remedy provisions of which were ultimately enacted in 1995 as Part IIA of the RDA.

In addition to the civil remedy provisions, the Racial Hatred Bill included provisions to introduce new criminal offences of incitement to racial hatred, which were rejected in the Senate and not proceeded with. The Bill also reflected the input of public comment on an earlier draft in 1992.

In speaking to the civil prohibitions in the course of the Second Reading speech, the then Attorney-General stated that their basic purpose was to fill the gaps in protections against the harms of racial vilification identified in the three national inquiries.[61] Referring to the nexus that these inquiries had found to exist between racial vilification and racially-motivated violence, the Attorney-General compared the harms of racial vilification to those dealt with by other areas of the law:

> "*Laws dealing with defamation, copyright, obscenity, incitement, official secrecy, contempt of court and parliament, censorship and consumer protection all qualify what can be expressed. These laws recognise the need to legislate where words can cause serious economic damage, prejudice a fair trial or unfairly damage a person's reputation. In this bill, free speech has been balanced against the rights of Australians to live free of fear and racial harassment.* ***Surely the promotion of racial hatred and its inevitable link to violence is as damaging to our community as issuing a misleading prospectus, or breaching the Trade Practices Act.*** [62] (Emphasis added).

The Bill was intended to provide a safety net for racial harmony in Australia and send a clear warning to those who might attack the principle of tolerance.

The Attorney-General was at pains to emphasise that the Bill's provisions, and those of the RDA as a whole, "*do not seek to eliminate racist attitudes, for a law cannot change what people think"*. The target is behaviour and the harms caused by that behaviour.[63]

As to the role of education and legislation as tools for countering racism, the Attorney-General said:

> "*Racism should be responded to by education and by confronting the expression of racist ideas. But legislation is not mutually exclusive of these responses. It is not a choice between legislation or education. Rather, it is, in the government's view, a case of using both.*
>
> *There is no doubt that the Racial Discrimination Act has been a powerful influence on the rejection of racist attitudes over the past two decades. It has forced many people to confront racist views and have them debunked*."[64]

Rejecting the proposition that the legislation would limit free expression, the Attorney-General argued:

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61 Commonwealth of Australia, Parliamentary Debates, House of Representatives, Tuesday 15 November 1994, pp 3336-3337, (The Hon Michael Lavarch MP, Attorney-General): http://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/1994-11-15/toc_pdf/H%201994-11-15.pdf;fileType=application%2Fpdf#search=%221990s%201994%22 (viewed 28 April 2014)

62 *Ibid*, 3337

63 *Ibid*, 3336.

64 *Ibid*, 3337

"*The bill places no new limits on genuine public debate. Australians must be free to speak their minds, to criticise actions and policies of others and to share a joke. The bill does not prohibit people from expressing ideas or having beliefs, no matter how unpopular the views may be to many other people. The law has no application to private conversations. Nothing which is said or done reasonably and in good faith in the course of any statement, publication, discussion or debate made or held for an academic, artistic or scientific purpose or any other purpose in the public interest will be prohibited by the law.*"[65]

It was noted that the specific terms of the civil prohibition – "*reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate a person or group because of their race*" – differ from the equivalent provisions in State jurisdictions, which require proof of "incitement" of others to hatred on the grounds of race. The Bill's approach was preferred over the State models because it:

- was said to represent "*the sum of experiences in these jurisdictions*"[66] which had revealed deficiencies in the State legislation; and
- "*is the same as that used to establish sexual harassment in the Sex Discrimination Act. The commission is familiar with the scope of such language and has applied it in a way that deals with serious incidents only*"[67].

Nevertheless, the Attorney-General emphasised that the Part IIA of the RDA:

- "*requires an objective test to be applied … so that community standards to behaviour rather than the subjective views of the complainant are taken into account.*"[68]

7. Case Law Under Part IIA of the RDA

The case law has borne out the claims that were made in the Second Reading speech about the way Part IIA would operate, and have demonstrated that criticisms of its provisions were, and continue to be, based on a mischaracterisation of their legal effect. In particular:

- Section 18C does not enforce the subjective, and possibly capricious, perspectives of complainants about perceived harm. Not a single judgment has interpreted the section in that way. To the contrary, the courts have consistently held that the question of whether a publication is "reasonably likely" in all the circumstances to offend, insult, humiliate or intimidate because of race is to be decided by the court according to an objective test, and not according to the subjective perceptions of the complainant or witnesses. It is not necessary for a complainant to adduce evidence that anyone has in fact been offended, insulted, humiliated or intimidated. Such evidence, if led, is admissible but not determinative. The Court must make an objective assessment of the position itself, so that community standards of behaviour rather than the subjective views of the complainant are the decisive consideration.[69]

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65 *Ibid*.
66 *Ibid*, 3341
67 *Ibid.*
68 *Ibid.*
69 *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 at [15]; *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 at [12]*; Jones v Scully* [2002] FCA 1080 at [98]-[101].

- Claims that the words "offend" and "insult" are excessively broad and vague and prohibit too wide a range of expressions[70], have not been borne out by the case law. Section 18C(1)(b) itself provides that the alleged contravention must have occurred "*because of the race, colour or national or ethnic origin*" of the complainant. The section does not apply if the alleged offence, insult, humiliation or intimidation arises because of the opinions or beliefs, rather than the race, of the complainant. Accordingly, no topic, or side of the argument on any topic, is placed "off-limits" for discussion in any context. No case under Part IIA has been decided against a respondent simply because of the subject matter dealt with, or solely because the thesis presented has reflected negatively on a group of people because of their race.[71]

  Although the judgment of Bromberg J in *Eatock v Bolt* [2011] FCA 1103, has been the focus of much of the government's criticisms of Part IIA of the RDA, and seems to have given rise to the Exposure Draft now under consideration, it too confirmed expressly that the contravention of section 18C that was found to have occurred was not due to the subject matter of the respondents' publications:

  > "*nothing in the orders I make should suggest that it is unlawful for a publication to deal with racial identification, **including by challenging the genuineness of the identification of a group of people**. I have not found Mr Bolt and the Herald & Weekly Times to have contravened section 18C, simply because the newspaper articles dealt with subject matter of that kind. I have found a contravention of the Racial Discrimination Act because of the **manner** in which that subject matter was dealt with.*"[72] (Emphases added).

  The "manner" to which the court referred included the finding that the publications in question "*contained errors of fact, distortions of the truth and inflammatory and provocative language*".[73] The findings of the court concerning the publications' "*deficiencies in truth*" precluded the respondents from establishing that the 'fair comment' exception in section 18D(c)(ii) applied,[74] but did not necessarily rule out the application of other exceptions in section 18D.

  What was ultimately decisive was the finding against the respondents of a lack of good faith, good faith being a threshold requirement for any of the exceptions in section 18D to apply.[75] The finding of a lack of good faith was in turn based on a combination of findings as to "*the lack of care and diligence*" involved in the "*untruthful facts and the distortion of the truth*" which the court found had occurred, and as to "*the derisive tone, the provocative and inflammatory language and the inclusion of gratuitous asides*".[76]

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70 See, for example, Commonwealth of Australia, Parliamentary Debates, House of Representatives, Tuesday 15 November 1994, p 3347 (The Hon Philip Ruddock)

71 See, for example, *Walsh v Hanson* (2000) HREOCA 8 (2 March 2000) concerning a complaint against Australian politician, Pauline Hanson, who co-wrote a book contending that Aboriginal people were getting welfare payments undeservedly for which other Australians were not eligible. Regardless of factual and methodological flaws in the book, Ms Hanson was found to have a complete defence under section 18D and the complaint was dismissed.

72 *Eatock v Bolt* [2011] FCA 1103, Summary of Judgment, para [30].

73 *Ibid*, para [23].

74 *Ibid*, Reasons for Judgment, paras [384]-[386]

75 *Ibid*, para [425].

76 *Ibid*.

To offend or insult a person or group merely by confronting them with ideas or opinions which they perhaps find incompatible with their own belief systems, might hurt their sensibilities, but does not in any way impugn their human dignity. In a free society, ideas of any kind - religious, political, ideological or philosophical - are and should be capable of being debated and defended. Robust critiques of ideas of any kind, no matter how passionately adhered to, do not constitute a form of social exclusion of those who adhere to them.

In contrast, to offend or insult a person or group because of their "*race, colour or national or ethnic origin*", necessarily sends a message that such people, by virtue of who they are, and regardless of how they behave or what they believe, are not members of society in good standing. This cannot but vitiate the sense of belonging of members of the group and their sense of assurance and security as citizens. To offend or insult a person or group because of their "*race, colour or national or ethnic origin*" thus constitutes an assault upon their human dignity. In our view, this is the evil which the legislation was enacted to address.

- The case law has also demonstrated the falsity of claims that the words "offend" and "insult" provide a remedy for mere hurt feelings and trivial slights. The prohibition in s.18C has been found by the courts to be limited to those circumstances in which the offence, insult, humiliation or intimidation has "*profound and serious effects, not to be likened to mere slights*".[77] This means that section 18C of the RDA has been interpreted by the courts as applying only to authentic harms as outlined in Section 2 of this submission. Any concerns in that regard could be readily overcome by the courts' interpretation being codified in the RDA.

- Fears that Part IIA of the RDA would produce a plethora of trivial or vexatious complaints have likewise proved groundless. Complaints are lodged with the President of the Commission[78] who is obliged to inquire into and attempt to resolve the complaint by direct conciliation between the parties.[79] No complaint can come before a court until this process has been exhausted and the President has issued a certificate that the complaint before him or her has been terminated.[80] The President may terminate a complaint "*if the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance*."[81]

  A complainant who proceeds to litigation in the Federal Court of Australia or the Federal Circuit Court and is unsuccessful, is virtually always ordered to pay the Respondent's costs. This is a powerful disincentive against bringing complaints which are manifestly unmeritorious.

- Legal challenges to the validity of the provisions of Part IIA of the RDA as an exercise of the external affairs power conferred by s 51(xxix) of the Constitution have been unsuccessful. The fact that Part IIA provides for civil remedies only, rather than the criminal sanctions called for by the treaty on which it is based (Article 4(a) of CERD),

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77 *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 at [16] *per* Kieffel, J.
78 *Australian Human Rights Commission Act, 1986* (Cth), Section 46P
79 *Ibid*, Subsection 46PF(1)
80 *Ibid*, Section 46PO
81 *Ibid*, Subsection 46PH(1)(c)

and does not deal with "racial hatred" in express terms as referred to in CERD, has been found not to render Part IIA deficient in implementing that treaty. In *Toben v Jones* in 2003, the Full Court of the Federal Court held that "*it is clearly consistent with the provisions of CERD and the ICCPR that a State Party should legislate to "nip in the bud" the doing of offensive, insulting, humiliating or intimidating public acts which are done because of race, colour or national or ethnic origin before such acts can grow into incitement or promotion of racial hatred or discrimination*".[82] The law need not be a full and complete implementation of the treaty, nor does the need to implement obligations under the treaty, provide the outer limit of Parliament's legislative power.[83]

It is notable that the Commonwealth - which was then under a Coalition government headed by Prime Minister John Howard – intervened in *Toben v Jones* to defend the validity of Part IIA of the RDA and specifically the use of the words "offend, insult, humiliate and intimidate" in section 18C. The Commonwealth argued "*that acts done in public which are objectively likely to offend, insult, humiliate or intimidate and which are done because of race, colour or national or ethnic origin are likely to incite other persons to racial hatred or discrimination or to constitute acts of racial hatred or discrimination*", and the court accepted that submission.[84] We respectfully urge the current Coalition government to adopt the same approach.

- Part IIA has also been found to be consistent with the implied constitutional freedom of communication about government and political matters, having regard to the exceptions from unlawful conduct contained in Section 18D of anything that is said or done 'reasonably and in good faith' which falls within the criteria set out in subsections (a)-(c). The Federal Court has found that "*those exemptions provide an appropriate balance between the legitimate end of eliminating racial discrimination and the requirement of freedom of communication about government and political matters required by the Constitution*."[85]

- The courts have interpreted Part IIA in accordance with the public policy purposes outlined in the Second Reading speech which introduced it.[86]

8. Conclusions and Recommendations

Given the foregoing, no case has been made for repealing or revising the provisions of Part IIA of the RDA. The government has asserted, but not demonstrated, that those provisions constitute an unjustified limitation on freedom of expression. It has made this assertion in the face of: voluminous evidence to the contrary in the form of research in Australia and overseas as to the harms of racial vilification (as defined in this Submission); the conclusions of three national inquiries as to the nexus between racial vilification and racially-motivated violence and other forms of social dysfunction; and the significant body of jurisprudence that has given effect

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82 *Toben v Jones* [2003] FCAFC 137 (27 June 2003) at [19]-[20] *per* Carr J

83 *Ibid*, at [141]-[142] *per* Allsop J

84 *Ibid*, at [19]

85 *Jones v Scully* [2002] FCA 1080 at [239]-[240], *per* Hely, J. Justice Hely's reasoning has been followed in all subsequent cases where the issue of the constitutionality of section 18C of the RDA has been raised. That reasoning remains binding and authoritative, and most persuasive. It was cited with approval by the Full Court of the Federal Court in *Toben v Jones* [2003] FCAFC 137.

86 The case law is conveniently summarised in the Reasons for Judgment of Bromberg J in *Eatock v Bolt* [2011] FCA 1103, paras [207]-[210]

to Part IIA. Two recent surveys indicate that, despite the government's assertions that have been critical of the operation of Part IIA and the outcome of *Eatock v Bolt*, the existing sections 18C and 18D also enjoy wide support in the Australian community.[87]

The protections contemplated by the Exposure Draft are artificially defined and unreasonably narrow. The contemplated exceptions are unreasonably wide and readily open to abuse. We acknowledge and appreciate the fact that prior to publishing the Exposure Draft, the Attorney-General consulted privately and informally with our organisation and representatives of other communities, although the Exposure Draft bears no resemblance to what we and other community representatives understood were the upshot of those discussions. In our view, those discussions are no substitute for a formal process of consultation with the Australian people or for the kind of systematic, evidence-based approach that was adopted in the formulation and enactment of the existing legislation.

The government appears to have proceeded from the fixed assumption that the outcome of *Eatock v Bolt* was an injustice necessitating a change in the legislation. That assumption is far from universally accepted by the Australian people, as the two recent surveys have indicated. If the government wishes to undertake a serious review of Part IIA of the RDA, it should eschew the reactive, and largely emotive, thinking behind that assumption and instead have Parliament conduct an open public inquiry and debate, with expert and community input, that is as comprehensive as the processes that provided the evidentiary basis for the existing legislation. The review should not begin from any *a priori* assumptions about Part IIA of the RDA, and for that reason we submit that the entire Exposure Draft should be abandoned.

Yours sincerely

Robert M Goot AM SC
President

Peter Wertheim AM
Executive Director

[87] See (i) the Challenging Racism Research Project, University of Western Sydney: http://www.uws.edu.au/newscentre/news_centre/feature_story/australias_largest_study_on_racism_shows_public_supports_existing_racial_discrimination_act (viewed on 28 April 2014) and (ii) a Nielsen poll published on 14 April 2014 which found that 88 per cent of respondents believe it should be unlawful to offend, insult or humiliate based on race: http://www.smh.com.au/federal-politics/political-news/race-hate-voters-tell-brandis-to-back-off-20140413-zqubv.html (viewed on 28 April 2014)