



Amendments to the Racial Discrimination Act 1975

Submission to the Attorney-General's Department

April 2014

1. UNICEF Australia

- 1.1** UNICEF is a multilateral organisation that works in over 190 countries to promote and protect the rights of children. UNICEF supports child health and nutrition, clean water and sanitation, quality basic education for all boys and girls, and the protection of children from violence, exploitation and HIV.
- 1.2** UNICEF has the global reach to influence decision-makers, and the variety of partners at grassroots level to turn the most innovative ideas into reality. UNICEF is unique among world organisations and unique in our rights based and participatory approach to working with children and young people.
- 1.3** UNICEF Australia is the national committee for UNICEF in Australia and has a dual mandate of raising funds to advance the rights of all children and advocating for the rights of all children by improving public and government support for child rights and international development.

2. Introduction

- 2.1** UNICEF Australia welcomes the opportunity to provide input into the proposed amendments to the *Freedom of Speech (repeal of s. 18C) Bill 2014*. However, we strongly emphasise that this public submission process and the limited timeframe in which it has occurred, is not an adequate substitute for a quality public consultation process.
- 2.2** UNICEF Australia opposes the proposed amendments to the *Racial Discrimination Act 1975 (Cth) (RDA)*. While the proposed amendments specifically define vilification, removing the terms ‘insult’, ‘offend’ and ‘humiliate’, has the prospect of lowering community standards and values, in relation to racial vilification and hatred. Such a change risks further marginalising already vulnerable groups by weakening protections for people from Aboriginal and Torres Strait Islander backgrounds, people from culturally and linguistically diverse backgrounds and ethnic minority groups. Young people in Australia are particularly susceptible to a weakening of these protections due to their specific vulnerabilities.
- 2.3** UNICEF Australia notes that there has been no public call for a change to the RDA. The individuals and communities most impacted by racial vilification have not made a request for any amendments to the existing legislation. An urgent move towards

making such amendments as the exposure draft proposes, risks further unforeseen implications without a thorough quality community consultation process.

2.4 UNICEF Australia is concerned the proposed amendments risk the provision of adequate protections for children and young people who experience racial abuse and racially motivated violence in a variety of contexts, including education settings and in online forums. Racial vilification and other forms of intersectional discrimination have serious and negative social, emotional and health impacts when directed at children and young people. It is our view that the proposed changes to the RDA would not adequately safeguard children and young people or create an environment that promotes safety, inclusion and cross-cultural understanding.

2.5 UNICEF Australia would like to express that, from our perspective; there is no inherent conflict between freedom of speech and freedom from racial vilification. Like all rights, we must consider how we can best strike a prudent balance between 'competing rights' and, where necessary, limit rights reasonably.

2.6 UNICEF Australia opposes weakening protections for people from Aboriginal and Torres Strait Islander backgrounds, culturally and linguistically diverse backgrounds and ethnic minority groups. The proposed amendments to the RDA are not in line with the legal protections required in a contemporary multicultural, democratic society. The RDA is a necessary and positive legislative expression of multiculturalism and diversity in the Australian context.

2.7 UNICEF's global position is that every child should live a life free from racial discrimination and racial hatred. UNICEF Australia supports the principles of non-discrimination, and participation as set out in Article 12 of the *Convention on the Rights of the Child 1989* (CRC). This article affirms that children are full persons and recognises their right to participate as citizens and as agents of change. UNICEF Australia's chief concern regarding proposed changes to the RDA is that racism and racial vilification impedes children's ability to meaningfully participate in social, cultural and public life.

3. Submission parameters

3.1 This submission has an explicit child rights focus and considers the negative impacts of racism and racial vilification on children and young people. It also sets out

UNICEF Australia's specific objections to each amendment proposed in the exposure draft: *Freedom of Speech (Repeal of s. 18C) Bill 2014*.

4. Key recommendations

UNICEF Australia strongly recommends that:

Recommendation 1: the Australian Government does not proceed with the amendments set out in the exposure draft. Noting that in the RDA's current form, section 18D essentially acts as an exemption.

Recommendation 2: the Australian Government makes all submissions to this process publicly available on the Department of the Attorney General's website.

If the Australian Government does proceed with amendments UNICEF suggests the following:

Recommendation 3: The words 'offend, insult or humiliate' should not be removed from section 18 of the RDA. If the Attorney General is concerned with establishing a clear threshold, the word 'severely' could be added to ensure only conduct that *severely* offends, insults or humiliates is covered by the section. This amendment would reflect the way the law is currently applied by the courts.

Recommendation 4: The term 'vilify' should include *expressing* racial hatred towards a person as well as inciting racial hatred. It should include conduct that amounts to racial abuse.

Recommendation 5: Intimidation should be left undefined and not limited to causing fear of physical harm. It should also include causing psychological and emotional harm.

Recommendation 5: Section 3 should not be added. The courts' current approach to assessing the standard to determine whether an act is likely to have an effect is adequate and should not be amended. If this standard must be defined, it should be defined as a reasonable member of the Australian community with the racial, ethnic or relevant attributes of that person or group affected.

Recommendation 6: Section 4 should not be added and should not replace section 18D. If it is added, the words 'political, social, cultural and religious' should be removed. The requirement that the act is done reasonably and in good faith must be retained.

Recommendation 7: Section 18E should not be repealed and employers should be accountable in adequately addressing discriminatory behaviours in work settings.

5. A Child's Rights Based Approach to racial equality

5.1 UNICEF Australia's mission is to advocate for the protection of children's rights as set out in the CRC. UNICEF Australia identifies the following child rights as instrumental to the addressing and preventing of racial discrimination and vilification:

- the right to non-discrimination (Article 2)
- the right to healthy development (Article 6)
- the right to be free from emotional and physical violence (Article 19)
- the right of the child to the enjoyment of the highest attainable standard of health (Article 24)
- the right to participate in education in a safe environment (Article 28)
- the right to safe leisure and play (Article 31)

5.2 UNICEF Australia believes that children experience racism and racial vilification in ways that can potentially impact negatively throughout each of their life stages. That is, affecting their participation in education and social settings, and as a key determinant of emotional well-being, labour market participation and physical health.

5.3 The *International Convention of the Elimination of All Forms of Racial Discrimination* (ICERD) to which the Australian government is a signatory, requires State Parties to pursue by *all* appropriate means a policy of eliminating racial discrimination in all its forms and promoting understanding among all races (Article 2). It further requires State Parties to adopt positive measures designed to eradicate all incitement to, and acts of, racial hatred and discrimination in any form (Article 4).

6. Racism and racial vilification in the Australian context

6.1 While Australia has had a history of relative progressive policy and egalitarianism in relation to cultural diversity, research indicates that there is growing prevalence of racism in the Australian context. Weakening protections for racial vilification may exacerbate the problem and will lead to a decrease in tolerance in Australian communities. This comes at a time when multiculturalism continues to increase. In 2012, the population increased by almost 400,000 persons, 40% from natural increases and 60% from net overseas migration.¹

6.2 In 2013 the Scanlon Foundation's Survey, *Mapping Social Cohesion 2013*, found the level of discrimination experienced by respondents was the highest level recorded across the last 6 surveys (19%), an increase of 7% since 2012.²

6.3 Kevin Dunn's report, *Racism in Australia: findings of a survey on racist attitudes and experiences of racism* (2003) found that there is a substantive degree of racism in Australia.³ He found that anti-Muslim sentiment is very strong and there is persistent intolerance against Asian, Indigenous and Jewish Australians.⁴ About one-quarter of Australians report the experience of 'everyday racisms'.⁵ As noted above, over 80% of school students from various non-Anglo-Australian backgrounds reported being subjected to some form of racism.⁶ UNICEF Australia notes that racism, racist bullying and associated behaviour has a serious, negative impact on children's ability to participate meaningfully in their education and to achieve to their full potential.

6.4 In a 2009 report, based on a survey of 12,500 people Dunn found that one in five respondents in Sydney, Melbourne and Perth had experienced forms of race hate talk. This included verbal abuse, name-calling, racist slurs or ridicule based on a person's cultural background.⁷ He also found that race hate talk is more frequent within the public realms and spaces of the city. He found that racisms are 'everyday' in the sense of their informality, and the ways in which they can insidiously become seen as expected or normalised.⁸ He warned against 'circumstances where such talk

¹ The Scanlon Foundation, Professor Andrew Marcus, *Mapping Social Cohesion* (2013), p 1 http://www.scanlonfoundation.org.au/docs/2013_SocC_report_final.pdf.

² Ibid p 2.

³ Kevin M Dunn, *Racism in Australia: findings of a survey on racist attitudes and experiences of racism*, p 2 (February 2003) https://digitalcollections.anu.edu.au/bitstream/1885/41761/4/dunn_paper.pdf.

⁴ Ibid.

⁵ Ibid.

⁶ Foundation of Young Australians Report, Above n4, p 47.

⁷ Dunn et al, *Cities of race hatred? The spheres of racism and anti-racism in contemporary Australian cities*, p 5 (2009).

⁸ Ibid p 8.

becomes common, the uneven dispensation of citizenship and belonging becomes normalised, unquestioned and harder to challenge.⁹

6.5 CERD Committee General Comment 35 clearly sets out the dangers of race hate speech, including how it can contribute to increased community tensions and racialized violence.¹⁰

6.6 Dunn found that one in eight Australians hold views that constitute racial supremacy and 13% of respondents supported racial separatism. Dunn's work also found that everyday racisms experienced by Indigenous respondents were significantly higher than non-Indigenous participants. Forty-three percent of Indigenous respondents identified that they had experienced racial slurs, racist abuse or public expressions of disrespect based on their indigeneity.

6.7 This research suggests that there is a continued need to ensure strong protections against race hate talk and racial vilification in Australian society. The survey revealed that the overwhelming majority of respondents (86.4%) supported the need for anti-racism policy.¹¹ Similarly, a consultation process undertaken by the Australian Human Rights Commission revealed a strong message from the public: taking action against racism in all its forms is critically important if we are committed to building a fair and inclusive community.¹²

6.8 The Foundation of Young Australians' report, *The Impact of Racism upon the Health and Wellbeing of Young Australians*, interviewed Australian high school students and found that the events of 9/11 and the Cronulla riots resulted in a new range of racist abuse that affects anyone of 'Middle Eastern appearance' or with dark skin.¹³ Similarly, the Scanlon Foundation's survey shows that the highest level of negative feeling, at close to 25%, is towards immigrants from the Middle East.¹⁴

6.9 The report also found a current climate of racism toward refugees and migrants in light of the 'war on terror.' They found that there was resentment towards the newest wave of migrants because they are perceived to be the beneficiaries of special treatment in relation to housing and welfare 'hand-outs'. The report also commented

⁹ Ibid p 3.

¹⁰ CERD Committee. 2014 General Comment 35 Combatting Racist Hate Speech. Viewed at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2FC%2fGC%2f35&Lang=en

¹¹ Ibid p 11.

¹² AHRC, above n3 at p 6.

¹³ Foundation of Young Australians Report, Above n4 p 56.

¹⁴ Scanlon foundation, above n11, p 3.

that research shows this resentment can be fuelled by the politicians and media 'shock-jocks'.¹⁵ These findings indicate that the proposed amendments to the RDA could have a direct flow on effect to levels of racial vilification of Australian children in school yards. The report also noted findings that discriminatory attitudes can be addressed through altering and encouraging the media and popular culture to represent and promote diversity and build positive social norms.¹⁶

6.10 With the current indicative prevalence of racism in Australia, it is difficult to understand why amendments would be made to weaken protections against racial vilification. The Australian Human Rights Commission has commented, 'Effective laws are critical tools for addressing racism and discrimination. They also send a strong message about shared community values in relation to diversity and cross cultural understanding.'¹⁷

7. The impacts of racism and racial vilification on children and young people

7.1 UNICEF Australia is concerned about the increasing prevalence of racism and racist behaviour and subsequent impacts on children's participation, well-being, health and development.

7.2 A recent study conducted by Dr Priest surveyed children's experience of racism in five primary schools and four high schools across Victoria. The survey found the following:

- Four out of five children born in non-English speaking countries have experienced racism in school on a regular basis
- The most common form of direct racism experienced in schools was being told that 'you don't belong in Australia' (20% of respondents heard this on average once a month)
- 14% of students were spat on, pushed or hit based on their race
- One in ten students thought that their teachers had low expectations of their performance based on their cultural background
- 70% of high school students surveyed had witnessed or experienced racism at school

¹⁵ Ibid p 59 referencing Adams, P & Burton L (eds), 1997, *Talkback: Emperors of Air*, Sydney, Allen & Unwin.

¹⁶ Ibid p 111 referencing Paradies et al, 2009, *Building on our strengths: a framework to reduce race-based discrimination and support diversity in Victoria*. Full report, Victorian Health Promotion Foundation, Melbourne.

¹⁷ AHRC, above n3, p 6.

- Less than half of the students reported positive attitudes towards people from other cultures

7.3 Dr Priest identified that children and young people are particularly vulnerable to the harmful effects of racism because they are still developing.¹⁸

7.4 The Foundation of Young Australians' report, *The Impact of Racism upon the Health and Wellbeing of Young Australians* (2009) (the Impact of Racism Report 2009) surveyed Australian high school students and found that the most frequently recorded impacts from the experience of racist behaviour were 'feeling angry and frustrated' and feelings of 'not belonging to community'.¹⁹ The report also found that witnessing or being involved in racism is significantly related to decreased health and wellbeing of children.²⁰ Over 80% of participants surveyed from culturally and linguistically diverse backgrounds reported being subjected to some form of racism.²¹

7.5 Worryingly, girls are particularly at risk with the report showing that female students experience higher levels of racism and their well-being appears to be most affected by racism.²²

7.6 Indigenous Australians and people who speak a language other than English experience a much higher rate of racism.²³ The Impact of Racism Report 2009 found that 80% of school students from various non-Anglo-Australian backgrounds reported being subjected to some form of racism which is significantly higher than the percentage of racism reported by Anglo-Australians (54.6%).²⁴ The report further found that the overwhelming trend that emerged through their analysis was that those participants with a migrant background were far more likely to experience racism.²⁵ The Foundation for Young Australians conducted interviews with young people from Aboriginal and Torres Strait Islander backgrounds which revealed a depth of racist experiences indicating that they may in fact suffer more debilitating forms of racism than Australian youth.²⁶

¹⁸ Priest N, Perry R, Ferdinand A, Paradies Y, Kelaher M Experiences of racism, racial/ethnic attitudes, motivated fairness and mental health outcomes among primary and secondary school students. *Journal of Youth and Adolescence*, under review.

¹⁹ Foundation of Young Australians, *The Impact of Racism upon the Health and Wellbeing of Young Australians* (2009) p 4.
²⁰ *Ibid* p 49.

²¹ *Ibid* p 47.

²² *Ibid* p 7-8.

²³ Kevin M Dunn, *Racism in Australia: findings of a survey on racist attitudes and experiences of racism*, p9 (February 2003).

²⁴ Foundation of Young Australians, above n4, p 47.

²⁵ *Ibid* p 5.

²⁶ Foundation of Young Australians, above n4, p 6.

7.7 Serious impacts upon the health and wellbeing of young people articulated by participants included:

- Ongoing feelings of sadness, anger, depression and exclusion
- A constant fear of being attacked verbally and physically
- Not wanting to attend school
- Long-term negative impact on school work
- Social withdrawal and isolation
- Having little or not trust in anybody apart from immediate family members
- Flashbacks to distressing events which had occurred in the country of the affected young person's birth²⁷

7.8 The Impact of Racism Report 2009 further highlighted research that found that racism has a negative impact upon the settlement and transition of migrants, affecting self-esteem, self-confidence and belonging to the broader community.²⁸ This research found that racism threatens personal and cultural identity and is often linked to psychological distress, specifically anxiety, depression, low self-esteem and anger. The research warned that marginalisation can result in withdrawal from active participation in mainstream life and can lead to anti-social attitudes and behaviour.

7.9 The *Racism No Way* website similarly reports that the lower participation rates, behavioural problems and feelings of alienation that result from the presence of racism in schools impact on educational outcomes. Racism disrupts the child's ability to participate effectively in the classroom and educational outcomes are limited as a result.²⁹

²⁷ Ibid p 79.

²⁸ Foundation of Young Australians report, Above n4 at p18 referencing Francis S & Cornfoot S 2007, *Multicultural Youth in Australia: Settlement and Transition*, For the Australian Research Alliance for Children and Youth, Melbourne, Centre for Multicultural Youth Issues, October pp1-41; Mansouri, f & Wood SP 2008, *Identity, education and belonging: Arab and Muslim Youth in Contemporary Australia*, Melbourne University Press.

²⁹ Website Racism No way, *Understanding racism, The extent of racism in Australian schools*
<http://www.racismnoway.com.au/about-racism/understanding/schools.html>

7.10 In 2012, the Committee on the Rights of the Child expressed its concern at the serious and widespread discrimination faced by Aboriginal and Torres Strait Islander children.³⁰

8. Racial vilification complaints 2012-2013

8.1 Section 18C is not an overused section of the RDA. In 2012-2013 there were only 192 racial hatred complaints made to the Australian Human Rights Commission.³¹ Fifty-three percent of racial vilification complaints in 2012-13 were resolved at conciliation and less than three per cent proceeded to court.³² The impact of this section on freedom of speech is low with very few cases reaching the courts.

9. Reasonable limitations on freedom of speech

9.1 The right to freedom of speech is important for all people living in Australia. However, this right is not absolute and must be balanced reasonably against the rights of others to be protected from discriminatory or unfair treatment. People living in Australia have the right to live in a society free from racial discrimination and abuse.

9.2 Article 19 of the *International Convention on Civil and Political Rights 1966* (ICCPR), to which Australia is a signatory, provides that everyone shall have the right to freedom of expression. However, the ICCPR goes on to say in paragraph 3 of article 19 that this right carries with it special duties and responsibilities. It may therefore be subject to certain restrictions that are necessary either for:

- respect of the rights or reputations of others; or
- the protection of national security, public order or public health or morals

9.3 Article 20, paragraph 2 further provides that any advocacy of racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

³⁰ Committee on the Rights of the Child, *Concluding Observations: Australia*, Sixtieth Session (29 May - 15 June 2012)

³¹ Australian Human Rights Commissioner, *Annual Report 2012-13*, p133

http://www.humanrights.gov.au/sites/default/files/document/publication/ahrc_annual_report_2012-13.pdf

³² Australian Human Rights Commission, *At a glance: Racial vilification under sections 18C and 18D of the Racial Discrimination Act 1975 (Cth)*, 13 December 2012 <http://www.humanrights.gov.au/glance-racial-vilification-under-sections-18c-and-18d-racial-discrimination-act-1975-cth>

9.4 UNICEF Australia's position is that the right to freedom of speech must be reasonably restricted when it is being used to insult, offend, humiliate and intimidate another person based on their race, colour, ethnicity, or country of origin.

9.5 The current section 18D of the RDA provides exemptions for reasonable and honest artistic work, debate in the public interest and fair and accurate reporting to ensure that freedom of speech is only restricted when necessary. The courts have interpreted section 18C of the RDA in light of the right to freedom of speech and consistently held that for conduct to be covered by section 18C, the conduct must involve 'profound and serious' effects, not 'mere slights'.³³

9.6 The principle of participation, the freedom of speech and an entitlement to be heard are also embedded in the CRC. UNICEF Australia stresses that racist abuse and racial vilification directed at children and young people can frequently have the effect of silencing them. This point should be considered as part of a holistic and human rights based discussion of freedom of speech.

10. UNICEF Australia's objections to the Exposure Draft: *Freedom of Speech (Repeal of s. 18C) Bill 2014*

10.1 UNICEF Australia does not support a repeal of section 18B. Section 18B provides that if an act is done for various reasons and one of those reasons is the race, colour or national or ethnic origin of a person, then the act is taken to be done because of that reason. Section 18B clarifies that race does not have to be the *dominant* or *substantial* reason for doing the act.

10.2 This section is required to avoid alleged perpetrators relying on other reasons for doing the act. It allows the court to look at every motivation of a defendant and see if that included an element of racism. This section is a standard legislative provision with similar provisions being employed across different federal and state laws to ensure that people are protected from discrimination.³⁴

10.3 This section also provides clarity to how racial vilification law should be interpreted. If this section is removed, the law will be uncertain. In particular, it will be unclear whether the racism or racial abuse must be *dominant* or *substantial* to constitute

³³ *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356-357 [16] (Keifel J).

³⁴ See, for example, s 5 of the *Equal Opportunity Act 1984* (WA) and s 360 of the *Fair Work Act* (Cth).

racial vilification. This would significantly reduce protection against racial vilification and will allow defendants to easily point to other reasons for their conduct to avoid liability.

Removals of the words 'offend, insult or humiliate'

10.4 This amendments makes it lawful for a person to do an act in public that is reasonably likely to offend, insult or humiliate a person or group of people where the act is done on the grounds of race (as long as the act does not incite racial hatred).

10.5 Protections against racial vilification must include prohibiting racially offensive, insulting and humiliating behaviour as well as behaviour that incites racial hatred. This protection is important to ensure Australia has a peaceful, harmonious community that celebrates diversity and prohibits racism. The *National Inquiry into Racist Violence* found that racial hatred and vilification can cause emotional and psychological harm to victims and can reinforce discrimination and exclusion.³⁵ Allowing racist behaviour generates a threatening environment.³⁶ It is a form of psychological violence and harassment that has severe negative health consequence for victims. It is not reasonable to remove this protection. Considering almost one in four Australian residents were born outside of Australia this evidence suggests a large percentage of the Australian population are susceptible to being negatively impacted by the proposed changes and thereby have significant negative implications for the Australian social fabric³⁷.

10.6 It has been argued that these words should be removed to ensure that only very serious behaviour is prohibited in order to protect freedom of speech. However, as noted above, the section does not protect hurt feelings. The courts have held that for conduct to be covered by section 18C, the conduct must involve “profound and serious” effects, not “mere slights.”³⁸

Limited definition of 'vilify'

10. 7 The proposed amendments make it unlawful to do an act that is reasonably likely to racially vilify another person or a group of persons. UNICEF Australia does not

³⁵ Human Rights and Equal Opportunity Commission, *National Inquiry into Racist Violence*, 1991

³⁶ Ibid.

³⁷ Website Australian Government, Our people: ; <http://australia.gov.au/about-australia/our-country/our-people>

³⁸ *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356-357 [16] (Keifel J).

object to this inclusion on the face of it but advocates for a wider definition of the term 'vilify.' UNICEF Australia also does not support the inclusion of the term 'vilify' at the expense of losing protection against insulting, offensive and humiliating conduct on the basis of race. 'Vilify', for the purposes of the section, means to incite hatred against a person or group of persons. This is a departure from the ordinary meaning of 'vilify' which means to abuse or disparage.

10.8 Conduct will only be caught by this definition if it has the potential to affect the actions of third parties. This definition ignores the victim's pain and suffering caused by the racial hatred focussing only on whether the conduct incites racial hatred in others. The Race Discrimination Commissioner Dr Tim Soutphommasane has commented:

“Even in cases of overt racist abuse, it would be necessary to demonstrate that the conduct could incite a third person to feel racial hatred. Such an incitement test has proven extremely difficult to satisfy in existing state racial vilification laws.

Take the scenario of a spectator racially abusing a person at a football match. Under what is proposed, the only thing that will matter is whether third parties were incited. The effects of the abuse in degrading the target would be irrelevant, no matter how serious or severe the vilification.”³⁹

10.9 In *Campbell v Kirstenfeldt*, Lucev FM held that incidents where a man called his neighbours (including an 11 year old boy) names such as ‘niggers’, ‘coons’, ‘black mole’, ‘black bastards’ and ‘lying black mole c#\$t’ breached s 18C.⁴⁰ Under the limited definition of 'vilify,' this conduct would only constitute racial vilification if it was heard by others and be reasonably likely to incite racial hatred in the people who heard the comments. If the victims could not prove this, they would have no redress despite being subjected to severe and relentless racial vilification and abuse by their neighbour.

10.10 The requirement that conduct must cause others to hate on the basis of race to constitute racial vilification is an unreasonably high threshold for complainants to meet and to subsequently establish. This limited definition removes protection from

³⁹ Australian Human Rights Commission, *Are we to favour bigotry over the right to live unaffected by it?* (29 March 2014) <http://www.humanrights.gov.au/news/stories/are-we-favour-bigotry-over-right-live-unaffected-it>

⁴⁰ [2008] FMCA 1356.

most complainants and legalises racial hatred in the public domain provided that it does not incite others.

Limitation of intimidation to fear of physical harm

10.11 While the exposure draft retains the term 'intimidate', it narrowly defines intimidation to conduct that causes fear of physical harm to a person, property or members of a group. This is a high hurdle for complainants to overcome. They may be subjected to conduct that intimidates them but they must evidence that the conduct was likely to cause fear of physical harm to seek redress. This is a difficult burden of proof to establish and it ignores the mental health and psychological harm caused by race hate and associated behaviours.

10.12 The Race Discrimination Commissioner Dr Tim Soutphommasane has commented:

“As for intimidation, consider the scenario of someone being deterred from participating in public debate, out of fear of being subjected to verbal racial harassment. The proposed laws mean that this is unlikely to be considered intimidation.”⁴¹

10.13 Dr Yin Paradies has found that the strongest and most consistent findings from experiences of racism are for negative mental health outcomes.⁴² This research shows the importance of affording protection to people suffering mental harm from racial intimidation. All people in Australia should have the right to live with dignity free from racial abuse, intimidation and discrimination.

Addition of the 'Reasonable Member of the Australian Community' Standard

10.14 Under the current legislation, whether an act is 'reasonably likely' to offend, insult, humiliate or intimidate does not include a standard to which reasonable likelihood is to be tested. The Courts had held that reasonableness is to be informed by community standards and the context in which the communication is made. Brown FM commented in *Kelly-Country v Beers*:

“...it is obviously necessary to apply a yardstick of reasonableness to the act complained of. This yardstick should not be a particularly susceptible person to be aroused or incited,

⁴¹ Australian Human Rights Commission, *Are we to favour bigotry over the right to live unaffected by it?* (29 March 2014) <http://www.humanrights.gov.au/news/stories/are-we-favour-bigotry-over-right-live-unaffected-it>

⁴² Paradies Y. *A systematic review of empirical research on self-reported racism and health*, Int J Epidemiol 2006, 35:888–901.

*but rather a reasonable and ordinary person and in addition should be a reasonable person with the racial, ethnic or relevant attributes of the complainant in the matter.*⁴³

10.15 The courts have held that where conduct is directed at a class of people, rather than at identified individuals, it is necessary to identify a hypothetical representative member of that class whose reactions are being assessed.⁴⁴

10.16 The proposed amendments require whether an act is reasonably likely to vilify or intimidate to be determined by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community. For example, a specific racial or ethnic group.

10.17 Under the proposed changes, an 'ordinary' 'reasonable' member of the Australian community may be a person who has experienced racism, discrimination or vilification. This standard' raises the question of what race or cultural identity would be attributed to the 'ordinary' member of the Australian community? UNICEF notes that race and cultural identity cannot necessarily be a neutral consideration. The 'community standard' should not be conceptualised in a way that causes people who belong to racial and ethnic minority groups to be disadvantaged by or excluded from deliberations.

10.18 The views of people who have suffered lifelong experiences of discrimination are relevant to whether conduct constitutes racial vilification. People who have a lived experience of racial discrimination are best positioned to determine what can reasonably offend, insult, humiliate or intimidate a person based on race, colour, ethnicity or country of origin. The fact that a group is particularly disadvantaged and marginalised from society is of relevance to whether the act is likely to constitute racial vilification. Brown FM commented in *Kelly-Country v Beers*:

*I also accept that Aboriginal people are a distinct minority within Australian society and so objectively more susceptible to be offended, insulted, humiliated and intimidated because of their disadvantaged status within Australian society.*⁴⁵

10.19 Where there conduct is directed against an individual from an Aboriginal or Torres Strait Islander background, the question should be how a reasonable person from *that*

⁴³ (2004) 207 ALR 421, 442 [90]-[92].

⁴⁴ 2011] FCA 1103, [244], [250].

⁴⁵ (2004) 207 ALR 421, 446 [111]-[112].

group would feel about the conduct, not how a hypothetical 'ordinary Australian' would feel about it. Disregarding the standards of a particular minorities group, such as Aboriginal and Torres Strait Islander peoples, suggests that members of these minority groups are not viewed as 'ordinary Australians.' This legislative implication is likely to lead to further feelings of exclusion for already marginalised Australians.

10.20 One difficulty with this proposed amendment is what some academics have named the 'normalcy' of racism.⁴⁶ Kevin Dunn has commented, 'where... [racist talk] becomes common, the uneven dispensation of citizenship and belonging becomes normalised, unquestioned and harder to challenge.'⁴⁷ About one-quarter of Australians report the experience of 'everyday racism.'⁴⁸ Research has shown there is a substantive degree of racism in Australia.⁴⁹ Over one in ten Australians self-identify as racist.⁵⁰ When community standards reflect a level of racism, looking to the views of the 'ordinary reasonable member of the Australian community' may perpetuate existing inequalities and remove protections for vulnerable minorities. The standard to which perpetrators are held to account will be significantly lowered by the proposed amendment.

Public Discussion Exemption

10.21 The exposure draft repeals s 18D and adds section 4 which provides that protection against racial vilification and intimidation does not apply to 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.

10.22 This exemption is too broad and will allow most defendants to avoid liability under the section. This significantly weakens protection for vulnerable people and effectively removes the right to be free from racial vilification.

10.23 HRLC Executive Director Hugh de Kretser has commented, 'Anyone with a blog, megaphone or a twitter account will seemingly be given a licence to racially vilify.'⁵¹

⁴⁶ Kobayashi, A. & Peake, L. (2000) *Racism out of place: thoughts on Whiteness and an antiracist geography in the new millennium*, *Annals of the Association of American Geographers* 90(2), 392-403.

⁴⁷ Dunn et al, *Cities of race hatred? The spheres of racism and anti-racism in contemporary Australian cities*, p 3 (2009).

⁴⁸ Kevin M Dunn, *Racism in Australia: findings of a survey on racist attitudes and experiences of racism*, p2 (February 2003).

⁴⁹ *Ibid.*

⁵⁰ *Ibid* p 8.

⁵¹ Australian Human Rights Law Centre, Proposed exemptions licence the promotion of racial discrimination and hatred, 25 March 2014 <http://www.hrlc.org.au/proposed-exemptions-licence-the-promotion-of-racial-discrimination-and-hatred>

Cyber-bullying is a big issue affecting Australian children and it is extremely important that children are protected from racial vilification posted online. Exposure to cyber-bullying and harmful online content damages children's health and development. It can also lead to youth suicide in extreme cases.

10.24 The Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in 2001 expressed deep concern about the use of new information technologies, such as the Internet, for purposes contrary to respect for human values, equality, non-discrimination, respect for others and tolerance, including to propagate racism, racial hatred, xenophobia, racial discrimination and related intolerance, and that, in particular, children and youth having access to this material could be negatively influenced or affected by it.⁵² The Declaration urged States to implement legal sanctions in respect of incitement to racial hatred through these technologies.⁵³

10.25 While the Internet and emerging technologies offer genuine benefits for children, including access to information and culture, new ways to participate in multiple areas of public life and to be heard, it also presents significant risks. This includes the risk of being exposed to racially offensive images and content and racist bullying and harassment.

10.26 UNICEF Australia recently drafted a submission to the Department of Communications, Australian Government for the Enhancing Online Safety for Children review. UNICEF Australia would like to point to the considerable gap in policy coherence, particularly for children and young children between promoting cyber safety on the one hand, and reducing racial vilification protection on the other. The exposure draft repeals section 18D of the legislation and adds section four which exempts nearly all forms of public discussion. This means that racially offensive material and racist bullying on the internet and via other forms of social media is likely to be exempt under the proposed amendments.

10.27 The current section 18D only allows exemptions if the act was done reasonably and in good faith in relation to any of the following:

- artistic work

⁵² World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (2001) at para 91 <http://www.un.org/WCAR/durban.pdf>.

⁵³ *Ibid* at para 145.

- debate for genuine academic, artistic, scientific or genuine public interest purpose
- making fair and accurate report of any event or matter of public interest
- making a fair comment on any event or matter of public interest if it is an expression of the person's genuine belief

10.28 Section 18D was already a broad exemption to racial vilifications. It has been interpreted broadly by the courts in order to protect free speech.⁵⁴

10.29 Extending the exemption to public discussion of any political, social, cultural and religious matter effectively excludes any public discussion from constituting racial vilification. HRLC Executive Director Hugh de Kretser has commented, 'It's hard to imagine any racial topic that would be outside the realms of this extraordinarily broad exemption.'⁵⁵ Similarly, the Race Discrimination Commissioner Dr Tim Soutphommasane has commented:

"I believe that, if enacted, ...[the amendments] would severely weaken existing legal protections against racial vilification. They would give legal sanction to the most serious forms of racial vilification, if expressed in the course of participating in a public discussion. They would, I fear, embolden a minority with bigoted views to amplify their prejudice. This broad exemption undermines the protections against racial vilification and intimidation under the Act."⁵⁶

10.30 The amendments also remove the requirement for the act to be done reasonably and in good faith. This requirement protects acts that are done honestly with legitimate purposes⁵⁷ while protecting people from acts that are undertaken to deliberately cause harm and racially vilify. The Race Discrimination Commissioner Dr Tim Soutphommasane has commented:

"The effects would likely be profound. You may threaten physical harm, incite others to racial hatred, or racially abuse someone in any other way. You may do so dishonestly, unreasonably or in bad faith. With the proposed law, you may do all these things but nevertheless invoke the protection of free speech."

⁵⁴ *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105, 125 [73].

⁵⁵ Australian Human Rights Law Centre, Proposed exemptions licence the promotion of racial discrimination and hatred, 25 March 2014 <http://www.hrlc.org.au/proposed-exemptions-licence-the-promotion-of-racial-discrimination-and-hatred>

⁵⁶ Australian Human Rights Commission, *Let's not take racial tolerance for granted: Commissioner*, 1 April 2014

<http://www.humanrights.gov.au/news/stories/let-s-not-take-racial-tolerance-granted-commissioner>

⁵⁷ *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105, 131-132 [95]-[96] (French J).

In other words, the dividing line between free speech and hate speech would be removed. There would be no distinction between venting racial hostility and conducting legitimate public debate about ideas".⁵⁸

10.31 In *Kelly-Country v Beer*, Brown FM warned against having a very broad exemption to s 18D commenting, 'those who would incite racial hatred or intolerance within Australia should not be given protection to express their abhorrent views...'⁵⁹

10.32 Many past incidents of clear racial vilifications would no longer be covered by the RDA. For example, in 2005, in the lead up to the Cronulla riots, Allan Jones was found to have to have broadcast material on his breakfast radio program that was likely to encourage violence or brutality and to vilify people of Lebanese and Middle-Eastern backgrounds on the basis of ethnicity.⁶⁰ The New South Wales Administrative Decisions Tribunal upheld a complaint of racial vilification against Jones and the radio station 2GB finding that:

His comments about "Lebanese males in their vast numbers" hating Australia and raping, pillaging and plundering the country, about a "national security" crisis, and about the undermining of Australian culture by "vermin" were reckless hyperbole calculated to agitate and excite his audience without providing them with much in the way of solid information.⁶¹

10.33 If a similar claim was brought under the proposed new section of the RDA it would be likely to fail as the racial vilification would be likely to be found to be exempt as a 'public discussion of any political, social, cultural and religious matter.' As stated above, the conduct of radio 'shock jocks' can have a direct and significant impact on the climate of race relations in the Australian community. This influence includes behaviour in schoolyards, sporting and recreation settings and other public spaces routinely accessed by children and young people in Australia.⁶²

10.34 In *Toben v Jones*, a website publication doubting the holocaust and suggesting that Jewish people exaggerated the number of Jewish people killed in World War II was found not to be an act done reasonably and in good faith for genuine academic

⁵⁸ Australian Human Rights Commission, *Are we to favour bigotry over the right to live unaffected by it?* (1 April 2014) <http://www.humanrights.gov.au/news/stories/are-we-favour-bigotry-over-right-live-unaffected-it>

⁵⁹ (2004) 207 ALR 421, 447 [116].

⁶⁰ ACMA, Investigation Report No 1485 http://www.acma.gov.au/webwr/_assets/main/lib101068/2gb%20-%20report%201485.pdf

⁶¹ *Trad v Jones & anor* (No. 3) [2009] NSWADT 318 at para 223 (21 December 2009).

⁶² See above: Paragraph 7. Current Racism in Australia.

or public interest debate.⁶³ Under the amendments, a court would be likely to find that this situation would fall under the broad public discussion exemption and the court would not be required to consider whether the act was undertaken reasonably or in good faith or whether the discussion is in the public interest.

Repeal of vicarious liability for racial vilification

10.35 The proposed amendments repeal s 18E which gives employers a duty to take all reasonable steps to prevent their employees and agents racial vilifying other people. If reasonable steps are not taken, employers can be held vicariously liable for the acts of racial vilification of their staff and agents.

10.36 This is an important protection that encourages employers to ensure a corporate culture that celebrates diversity and social inclusion and that does not tolerate racism. It protects the right to work in a safe environment free from racial hatred. There is no justification for removing this protection considering the high levels of racism experienced in the workplace. Kevin Dunn has found:

*Sixteen per cent of respondents reported having experienced racism within their workplace.... The rates of racism experienced by Indigenous Australians were much higher (Workplace 29%...) and also for those respondents who speak a language other than English (Workplace 36%...).*⁶⁴

11. Contact

11.1 For more information please contact: Amy Lamoin, Advocacy Manager, UNICEF Australia at alamoin@unicef.org.au or by telephone on 02 8917 3220.

⁶³ (2003) 129 FCR 515.

⁶⁴ Kevin M Dunn, *Racism in Australia: findings of a survey on racist attitudes and experiences of racism*, p9 (February 2003)