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Submission to the Commonwealth Attorney-General on the Proposed Amendments to the Racial Discrimination Act 1975 (Cth)

Aboriginal and Torres Strait Islander peoples are advised that this publication contains images of deceased persons

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23 April 2014

The author and OHPI request that this submission be published by the Australian Government and grants the permission to do so accordingly.

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30 April 2014

The Online Hate Prevention Institute (OHPI) is Australia's only Harm Prevention Charity dedicated to the issue of online hate. A large part of our work relates to identifying and combating cyber-racism against various parts of the community, we welcome the opportunity to participate in this consultation. This submission focuses on the impact we believe the proposed changes would have on the growing problem of online racism.

In the online sphere the proposed changes would significantly impact Australia's ability to regulate harmful and dangerous content and behavior. The change would be far more radical than the government likely expects. In particular we are concerned about a loss of sovereignty which will result if the proposed changes were adopted.

Section 18C of the *Racial Discrimination Act 1975* (Cth) plays a critical role by allowing Australian attitudes on multiculturalism, and Australian expectations regarding public discourse to shape what Australians see (or don't see) on major social media platforms. This occurs because platform providers supplement their own global "community standards" with provisions for also complying with local laws – for example the prohibition on Holocaust denial in Germany and other countries. This compliance is achieved by blocking certain content for visitors who access the site from those countries.[1]

It is not enough that the content offends local norms in Australia; to override the default policies of social media companies there must be a clear legislative provision making the content unlawful. Section 18C provides this hook when it makes the content unlawful. While we support the observation made by the Human Rights Commissioner that "Not all of societies' ills can be solved through law",[2] in this situation a law is required. Without a law we give up our sovereign right to determine what social media content may be visible in Australia. We will instead be subject to global standards which have been repeatedly shown to conflict with Australian expectations. Losing our local law provisions would mean moving from a situation where the Australian standards for acceptable content can ultimately be set by the courts, to a situation where the Australian public is at the whim of vested private interests. Worse still, these private interests often operate as monopolies in a failed market place.

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[1] These blocks, which occur at the point of origin of the data, are far more effective than Internet filtering

[2] Tim Wilson, "Freedom of Speech (repeal of s.18C) Bill 2014 - response by Human Rights Commissioner, Tim Wilson", 28 April 2014 <https://www.humanrights.gov.au/submissions/freedom-speech-repeal-s18c-bill-2014-response-human-rights-commissioner-tim-wilson>

There is no substitute for Facebook, YouTube, Twitter or LinkedIn as each occupies its own niche. In such an environment, where market forces are largely non-existent, the Australian people have a right to expect regulation by Government. The situation is particularly serious for Aboriginal and Torres Strait Islanders as racism against these communities may not be recognized or understood outside of Australia.[3]

OHPI is also concerned that the removal of S 18C, or of the 'offend' provision, would elevate some forms of cyber-racism from matters for reconciliation between the perpetrator and victim into criminal matters before the courts under S 474.17 of the *Criminal Code Act 1995* (Cth). Similar conduct occurring offline would, however, leave a victim with no recourse. We are concerned about the way this violates the principle of 'online-offline consistency'.

We believe that the proposed changes to S 18C would significantly hinder Australia's ability to block harmful content and could see previously blocked content 'unblocked', resulting in a virtual tsunami of hate. More fundamentally, we are alarmed at point 4 of the exposure draft which we believe would provide a blanket exemption for all forms of racist hate speech in social media, again forcing complaints into the criminal justice system under telecommunications provisions. We appreciate that this is not the Government's intent, but as social media is premised on the idea of public communication, we believe this would be the result if point 4 were to become law.

The Online Hate Prevention Institute believes the combination of S 18C and S 18D, as they currently stand, provides the best balance between protection from racism and the protection of freedom of speech. We additionally recommend against the removal of the terms "offends" or "insults" from S 18C as we believe these terms capture certain classes of racist content, which we regularly see online, and which ought to remain unlawful. Antisemitic conspiracy theories about Jewish power are one example of content which is offensive and has a 'profound and serious impact' as this sort of hateful content has led to multiple massacres throughout history. At the same time, conspiracy theories about Jewish power are portrayals of strength and as such it could be hard to prove that they "insult", "humiliate" or "intimidate".

The existing law strikes a balance that makes racist content unlawful, allowing its online forms to be blocked in Australia, whilst avoiding the engagement of the criminal law and minimizing the use of the courts. The international norm is to make such conduct criminal, as can be seen in the Additional Protocol – the only treaty to address this problem in the online context.[4]

The Online Hate Prevention Institute believes further research into the issue of Cyber-Racism is needed before changes to the law should be considered. The problem of cyber-racism, and the impact it is having in Australia, is growing rapidly. Tackling this growing problem requires greater Government attention and resourcing. Care should be taken to avoid legislative changes which might negatively impact on Australia's ability to tackle this problem.

Dr Andre Oboler

CEO, Online Hate Prevention Institute

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[3] This was demonstrated in: Andre Oboler, *Aboriginal Memes and Online Hate* (2012) <http://ohpi.org.au/aboriginal-memes-and-online-hate/>

[4] *Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems*, opened for signature 28 January 2003 (entered into force 1 March 2006) ('*Additional Protocol*')

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About OHPI

Formed in January 2012, the OHPI's vision is to change online culture so hate in all its forms becomes as socially unacceptable online as it is "in real life". This hate ranges from cyberbullying of individuals to attacks on minorities and other segments of society. We have addressed hate based on race, religion, sexuality, gender, military service and targeting police, fire fighters and politicians. At the individual level we have provided assistances in cases of cyberbully, cyberstalking and trolling.

OHPI's mission is to be a world leader in combating online hate, and a critical partner who works with key stakeholders to improve the prevention, mitigation and response to such forms of online hate. The Government, its departments and its agencies are of course critical partners we wish to work with in the pursuit of this mission. We thank you for this public consultation and the opportunity to share our thoughts on this important topic.

Regulating Cyber-Racism

The Rising Problem of Cyber-Racism

We are deeply concerned with rising cyber-racism. The Online Hate Prevention Institute has been monitoring and documenting this increase over the last two years.[5] The trend is also reflected in data from the Australian Human Rights Commission which shows a 59% increase in racial hatred complaints in 2012-2013, largely due to cyber-racism which accounted for 41% of such complaints (compared to 17% of racial hatred complaints the previous year).[6]

The rise in cyber-racism can be understood through the *routine activity approach* to crime opportunity. This approach holds that crime, or in this case racism, requires a convergence of three elements: motivated offenders, suitable targets, and the absence of capable guardians.[7] Social media provides an environment where such racism can flourish. Online, the lack of suitable guardians is exacerbated as those promoting racism can use fake accounts or anonymous forms of communication. The media interest in trolling and online hate feeds the motivation for some promoting racism online.

One way to reduce the hostile environment minority communities encounter online is to have hate speech taken down as quickly as possible. This cleans up the online environment and sends a message to those posting hate that there are capable guardians. It also sends a message to minority communities that they are welcome in the community and that society rejects the efforts to exclude them. To be effective, it is important that action against online hate is highly visible. Section 18C plays an important, but unexpected, role in having such hate removed.

The removal of S 18C, or the reduction in scope of protections against racism, as indicated in the exposure draft, would negate the role S 18C currently plays. It would also serves as a green light to racists, both for content that would then become lawful, and (through fake and anonymous accounts) for the promotion of content that remained unlawful.

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[5] See generally http://www.ohpi.org.au

[6] Kate Emery, "Social Media Driving Racism", *The West Australian*, 27 January 2014 <https://au.news.yahoo.com/thewest/latest/a/21068988/social-media-driving-racism/>.

[7] Clough, above n 2, 5; L. Cohen and M. Felson, 'Social change and crime rate trends: A routine activity approach' (1979) 44 *American Sociological Review* 588, 589; Marcus Felson and Ronald V. Clarke, 'Opportunity Makes the Thief: Practical theory for crime prevention' (Police Research Series Paper 98, Home Office, 1998) 4.

The unexpected impact of S 18C on Cyber-Racism

The mere existence of S18C of the *Racial Discrimination Act* has a practical impact in protecting the Australian community from cyber-racism. It allows Australian standards to replace the yard-stick which US law would otherwise leave to be determined arbitrarily by large social media companies.

In the United States racial discrimination is lawful as the First Amendment prevents Congress passing legislation prohibiting it. Major social media companies are not under a legal obligation from the United States Government to remove racist hate speech. At the same time, the First Amendment prevents congress from passing a law forcing the large social media companies to allow cyber-racism. The result is that most social media companies have policies that prohibit hate speech, including cyber-racism, but these policies are often poorly enforced. As there is no state requirement in the United States, there is no penalty for failing to properly uphold the policy and there is no oversight when failures occur.

We have numerous examples of social media companies getting it wrong; Facebook's refusal to recognize Holocaust denial as hate speech is the best known.[8] Their refusal to recognize cyber-racism against Indigenous Australians is another.[9] Fortunately S 18C isolates Australians from these problems.

Large social media companies, such as Facebook, are able to block content based on a person's location. This capacity was introduced to allow Holocaust denial to be blocked in those countries where it is a criminal offence. The capability is now used far more widely to enable compliance with local laws.

In Australia "country-blocks" have been applied to both antisemitic content and anti-Indigenous content which would likely be unlawful as a result of S 18C. Making racism unlawful, and allowing Australian courts to determine when a breach occurs, protects Australia's ability to control the sort of content that can go viral in this country.

Section 18C provides an important tool that serves the public interest. It is of practical use to the Australian people. It is also of particularly use to the Online Hate Prevention Institute in our work to protect Australians from serious harm including suicide, self-harm, and substance abuse, which can result from cyber-racism.

Holocaust Denial on Facebook

The Attorney-General has stated that "racial vilification would always capture the concept of Holocaust denial".[10] Facebook, however, has rejected this idea and allowed Holocaust denial in countries which don't have laws prohibiting it.

In a letter to the *Global Forum to Combat Antisemitism* Facebook justify their position by claiming they "recognize people's right to be factually wrong about historical events" and that this was different to "direct statements of hate and clear threats of violence against specific people or groups of people".[11] In Australia Holocaust denial was deemed unlawful in the *Jones v Toben* case based on a beach of S 18C.[12] Were S 18C to be removed or altered, the position in Australia would become doubtful and it

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[8] Andre Oboler, "Facebook, Holocaust Denial, and Anti-Semitism 2.0", Post-Holocaust and Anti-Semitism Series No 86, Jerusalem Center for Public Affairs, 27 August 2009 <http://jcpa.org/article/facebook-holocaust-denial-and-anti-semitism-2-0/>

[9] Andre Oboler, *Aboriginal Memes and Online Hate* (2012) <http://ohpi.org.au/aboriginal-memes-and-online-hate/>

[10] Matthew Knott, "Changes to racial discrimination laws would 'open door for Holocaust deniers'", The Sydney Morning Herald, March 26 2014

<http://www.smh.com.au/federal-politics/political-news/changes-to-racial-discrimination-laws-would-open-door-for-holocaust-deniers-20140326-35igj.html>.

[11] Facebook's letter on Holocaust Denial, http://ohpi.org.au/wp-content/uploads/2014/04/2-Facebook_to_GFCA.pdf

[12] [2002] FCA 1150. See http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/federal_ct/2002/1150.html

The practical use of S 18C to combat Cyber-Racism

Section 18C of the Racial Discrimination Act provides a basis for Australians to ask large scale social media companies to remove racist content. These requests are often made directly to the platform provider through online tools. They do not appear in any complaint statistics. Once social media companies understand content is likely to be unlawful, the content is often "country blocked" even if the platform is unwilling to remove it entirely. For example, the pages "Abo Memes" and "Aboriginal Memes" are currently blocked in Australia but still available to people accessing Facebook from outside Australia.[13]

Where content is not removed, S 18C provides a mechanism under which the Australian Human Rights Commission can provide reconciliation between victims and social media companies. As members of the public have no easy way to speak to a "real person" at large scale social media companies, the complaint mechanism provides a valuable opportunity for the complainant to explain what is wrong with the content they have complained about. As complaint forms often use closed questions, and are usually only seen by low level staff, this may be the first time more senior people becomes aware of a problem. This may involve explaining language or imagery whose meaning is lost outside of the Australian context.

The Online Hate Prevention Institute has not brought complaints to the Australian Human Rights Commission ourselves, but we have participated in reconciliation in an advisory role to affected parties. Complaints have also been based on our reports. We see our role as improving the social media companies' understanding of online hate, and particularly of online hate in the Australian context. We produce reports which examine incidents in depth and explain the imputations of the content we consider hate speech. We try and share these with the companies through contacts we maintain with them, and we usually allow them the chance to take remedial action before we publish the reports. It is only when all of this fails that our reports can become the basis for peak community bodies lodging complaints against a major social media company through the Australian Human Rights Commission.

The complaints we have been involved in are often a result of cultural difference where content that is unacceptable in Australia would be defended as acceptable in the United States. Ultimately reconciliation under S 18C means that social media companies, with the ability to block content in Australia, must accept that the standard applied for Australian users is different to their general standard.

The loss of S 18C of the Racial Discrimination Act will mean there is no legal basis for Facebook, YouTube or other social media companies to impose Australian specific blocks on racist content. The exposure draft provides such wide exemptions that it appears any use of social media would qualify for an exemption under point 4. We need the law to provide a hook on which the standards of the Australian community can be hung. Without this we lose the ability to define what is acceptable in Australia.

The requirements for an effective legislative hook are that:

1. It declares hate speech, or at least racism, to be unlawful
2. It makes making such speech available, for example through a website, unlawful
3. It empowers a Commission to try to reconcile complaints
4. If reconciliation fails there is a way for the content to be assessed and deemed unlawful (e.g. through private action in the courts) and for some sort of penalty to be applied

We believe S 18C in its current form provides this. We believe the proposed changes will not provide this.

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[13] If accessed from outside Australia, the pages can be seen at: https://www.facebook.com/pages/Abo-Memes/458371290860677 and https://www.facebook.com/pages/Aboriginal-Memes/409171432542820

A philosophical Approach to Regulating Cyber-Racism

OHPI believes that the problem of cyber-racism should be primarily dealt with as a racism issue, and not as a telecommunications issue. This means that, where possible, laws aimed at racism in general should also apply to online hate. Special laws for cyber-racism should only be used when general approaches would fail to provide an adequate response.

Practically, this means OHPI would prefer that cyber-racism be dealt with under S 18C of the *Racial Discrimination Act 1975* (Cth), or under new criminal provisions for racial or religious vilification, rather than under telecommunications provisions such as S 474.17 of the *Criminal Code Act 1995* (Cth). Notably, both sections cover content that is offensive; S 18C makes it unlawful to "offend, insult, humiliate or intimidate" another person on the basis of their race, while S 474.17 makes "using a carriage service to menace, harass or cause offence" (on any basis at all) an offence. While S 18C makes all racism (including cyber-racism) "unlawful" and is most likely to be resolved through reconciliation by the Australian Human Rights Commission, S 474.17 involves police investigation and can lead to 3 years imprisonment.

The removal of S 18C, or of the "offend" provision of S 18C, would mean some forms of racist conduct which occur offline would be without remedy. The same conduct occurring online would become a criminal matter as the reconciliation path currently available through the Australian Human Rights Commission would no longer be available. OHPI believes that Australia would be worse off under such a system. If criminal provisions are to apply, and OHPI would support the addition of new criminal provisions for incitement to racial hatred, we believe such provisions should apply consistently, regardless of whether the conduct involves telecommunications technology.

The above position is based on OHPI's support of the idea of 'online / offline consistency' which holds that the regulation of conduct should generally be equivalent whether the conduct occurs online or offline,[14] and of the three principles this involves: *generality*, *inclusion* and *appropriate adaptation*. Under *generality* existing laws which are not specific to the online environment should be relied upon whenever possible.[15] Under *inclusion* online conduct should not escape illegality if similar offline conduct would be unlawful.[16] Under *appropriate adaptation,* conduct which is lawful offline should only be regulated online if the changes in environment have 'an impact on the nature of the conduct or its prevalence' which necessitates such regulation.[17] As we outlined in our submission on online safety,[18] we would support additional regulation of large social media companies themselves as an appropriate exception.

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[14] President's Working Group on Unlawful Conduct on the Internet, *The Electronic Frontier: The challenge of unlawful conduct involving the use of the Internet* (2000) 11.

[15] Jonathan Clough, Principles of Cybercrime (Cambridge University Press, 2010) 15.

[16] Neal Kumar Katyal, 'Criminal law in cyberspace' (2001) 149 *University of Pennsylvania Law Review* 1003, 1005-7.

[17] Jonathan Clough, Principles of Cybercrime (Cambridge University Press, 2010) 16.

[18] OHPI Online Safety Submission, Submission to the Department of Communications, 7 March 2014 <http://www.communications.gov.au/__data/assets/pdf_file/0019/220168/Online_Hate_Prevention_Institute.pdf>

Further Improvements to assist with Online Hate

In addition to retaining S 18C, we would ideally like to see three further aspects included in relation to online hate speech:

1. A civil case against the platform provider or host should be able to be brought by the state, reducing the burden on private individuals to defend what is a public good. This could be similar to the role the State plays when ASIC takes action in relation to breaches of director duties.
2. If content is assessed and found to be unlawful there should be a small fine as well as an order to remove the content. This is to encourage the avoidance of formal determinations.
3. Any fine should be able to increase the longer the content remains accessible in Australia. For example, failure to comply with a removal order within a specified amount of time could mean any effort at paying the fine is refused, and interest is applied to the fine at a penalty rate.

The aim should be to encourage the removal of content by platform providers in reasonable time in cases where the content is likely to be unlawful. At the same time, the fine should be small enough that those hosting content, such as social media sites or website owners, are willing to risk the fine in order to test legal boundaries. Finally, the fine needs to be able to increase in order to ensure it cannot be ignored even by very large companies.

We believe that these three additional aspects should not be addressed in the Racial Discrimination Act but in separate legislation which can allow the provisions to also apply to other forms of hate speech which are already unlawful. We believe this would work well with the Governments proposals in relation to Online Safety for Children, but would allow the systems to be used more widely.

The Online Hate Prevention Institute has also noted a significant volume of hate directed against the Muslim community. A recent report we have published highlights 191 different examples of anti-Muslim hate on Facebook, all visible in Australia.[19] This community, while partially overlapping with for example the Arab community, is not itself a race or ethnicity and is therefore not covered by the Racial Discrimination Act. We would recommend a "Religious Discrimination Act" be created which holds that everything in the racial Discrimination Act will also apply to any public acts done on the basis of a person's religion or religious practice.

Potential for Executive Government use of S 18C

The ability for Australian community standards, rather than the arbitrary will of non-Australian companies, to determine what is acceptable in social media in Australia is important. Equally important is the ability for the Government to take action against a company that refuses to remove content which the Australian public finds grossly offensive. Aboriginal Memes are one example of such content.

The overseas experience has shown that the most effective way to get social media companies to take action against cyber-racism is for the government to threaten prosecution. Social media companies recognize that even if they win such a case, it will likely lead to revision of legislation and ultimately to more regulation of their business. As a result, many incidents are then settled to avoid them becoming a trigger for change and increased regulation.

As long as S 18C remains in place, the Attorney-General has the option of providing material support for a public interest test case to establish the accountability of social media companies for the spread of cyber-

[19] Andre Oboler, *Islamophobia on the Internet: The Growth of Online Hate Targeting Muslims* (2013) <http://ohpi.org.au/islamophobia-on-the-internet-the-growth-of-online-hate-targeting-muslims/>

racism (presumably such a case would involve a social media company that is aware of a breach and refuses to act on it after an attempt at mediation through the Australian Human Rights Commission). With the judicial interpretation of the S 18C indicating that it defends a public and not a private right, further legal development by the courts may open the way for a relator action by the Attorney-General in this area.

Countering Cyber-Racism under S 18D

OHPI believe the protection provided by S 18D is well balanced and ensure S 18C the reach of S 18C is appropriately limited. This is particularly important for both individuals and organisations countering cyber-racism. Those combating cyber-racism need to be able to expose it and educate about it, and this is most effectively done through examples which, but for S 18D, would be a breach of S 18C. This submission, for example, includes such examples and we believe they substantially contribute to the submission and provide an example of the use of racist material in a manner that is reasonable and in good faith.

The Online Hate Prevention Institute regularly produces online "briefing papers" which archive examples of the racist content of a particular page and provide instructions uses can follow to report the page to the relevant platform provider.[20] On social media platform themselves, OHPI has had success in convincing major platform providers to allow the posting of links to hateful content when the links are provided as part of a campaign to encourage people to report the content.[21]

We believe the freedom to publish hate speech in certain appropriate contexts is both appropriate and indeed necessary. The requirement that such publication only occur when it is being done reasonably and in good faith is, we believe, a vital limitation on this exception. In the content of social media and grassroots campaigns against online racism, it is appropriate that the exception provided by S 18D is available to anyone pursuing a "genuine purpose in the public interest" and is not limited to journalists, artists or researchers. This is the current scope of S 18D and no additional changes are needed.

Comments on the Exposure Draft

From whose perspective is racism judged?

The approach adopted by point 3 of the exposure draft adopts what is known as the "colourblind" approach. This approach suggests that "the best way to end discrimination is by treating individuals as equally as possible, without regard to race, culture, or ethnicity".[22] Though initially sounding egalitarian, the approach is described as "a half-measure that in the end operates as a form of racism" and runs counter to ideas of multiculturalism.[23] Research has linked the colourblind approach to greater racial bias and negative view of minorities and to greater stress in ethnic minorities.[24] The strong response of

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[20] http://ohpi.org.au/centrelink-memes-and-anti-aboriginal-racism/; http://ohpi.org.au/proud-holocaust-deniers/; http://ohpi.org.au/the-merchant-antisemitic-facebook-page/; http://ohpi.org.au/briefing-aboriginal-memes-2014/; http://ohpi.org.au/holocaust-denial-on-facebook-an-untold-story/

[21] http://ohpi.org.au/using-facebook-to-fight-hate/

[22] Monica Williams, "Colorblind Ideology is a Form of Racism", Psychology Today: Culturally Speaking, 27 December 2011 <http://www.psychologytoday.com/blog/colorblind/201112/colorblind-ideology-is-form-racism>.

[23] Ibid.

[24] Holoien, D. S., and Shelton, J. N. "You deplete me: The cognitive costs of colorblindness on ethnic minorities", *Journal of Experimental Social Psychology* (October 2011).

Australia's ethnic communities against the exposure draft can be understood as a response to the stress caused by the colourblind approach adopted in much of the discussion surrounding the exposure draft.

As mentioned, the colourblind approach can be a form of racism, more specifically a form of racial microaggressions known as "microinvalidation". The term was coined by psychologist Dr Derald Wing Sue in an article in *American Psychologist (Vol. 2, No. 4),* the official journal of the American Psychological Association.[25] It refers to "communications that subtly exclude, negate or nullify the thoughts, feelings or experiential reality" of an effected minority.[26]

Point 3 of the exposure draft invalidates the experiential reality of affected groups in a manner that is both colourblind and meets the definition of microinvalidation. Legislation which adopts this approach could therefore be seen as institutionally racist. This raises a legal difficulty as the Racial Discrimination Act relies on the External Affairs power under S 51(xxix) of the Australian Constitution to enact the *Convention on the elimination of all forms of racial discrimination*.[27] Article 2(1)(a) of the convention states that "Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation". Point 3 of the proposed amendment may therefore be ultra vires.

Beyond the psychological and legal analysis, we also believe the current balance is correct and is preferable to either the proposed approach or the subjective approach which has been under discussion as a result of misconceptions about S 18C.

A Subjective or Objective test (S18C or "Hurt Feelings")

The existing approach developed by the courts, that of using the objective standard of a reasonable member of the impacted group is far preferable to the "hurt feelings" test which many in the media have been commenting on. A hurt feelings test would be a subjective test and it is not the approach taken under S 18C as it currently stands. The existing standard takes into account the experience of the affected part of the community, but does so in an objective manner rather than relying on the specific impact on the individual concerned. This gives a greater, and appropriate, level of protection to freedom of speech. As it stands Section 18C is "concerned with consequences it regards as more serious than mere personal hurt, harm or fear… [it is concerned with] mischief that is not merely injurious to the individual, but is injurious to the public interest and relevantly, the public's interest in a socially cohesive society".[28]

The Targeted Group or the Ordinary Australian (S 18C or point 3 of the exposure draft)?

The existing approach is also far preferable to the approach adopted in point 3 of the proposed changes. The ordinary Australian will be unaffected by racism not targeted at them, but more significantly, they will be unfamiliar with the language and symbolism of such racism and in many cases will not be able to recognize it.

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[25] Tori DeAngelis, "Unmasking 'racial micro aggressions'", Monitor on Psychology (2009) 40(2) <http://www.apa.org/monitor/2009/02/microaggression.aspx>.

[26] Ibid.

[27] Tony Blackshield and George Williams, *Australian Constitutional Law and* Theory (Federation Press, 5th ed, 2010) 359.

[28] Eatock v Bolt [2011] FCA 1103 (28 September 2011) [263] <http://www.austlii.edu.au/au/cases/cth/FCA/2011/1103.html>

At OHPI we have seen significant problems in the online sphere where complaint handlers at social media companies have been unable to recognize the nature of certain complaints. One of our roles has been producing research reports that explain the imputations which are being made. In one case, related to Aboriginal Memes, there was a direct clash between what an ordinary member of the Australian public would immediately recognize as racist and what an ordinary non-Australian staff member of a social media company would recognize as racist.[29] The same would apply within Australia to all but the most common or well advertised forms of racism.

The proposed approach would turn a blind eye to most forms of racism in Australia. Logically it also ignores the probable impact of the harmful behavior as that impact will be felt by the targeted group, not by the average Australian.

The Green Light problem

The Online Hate Prevention Institute believes any amendment to the Racial Discrimination Act which reduced existing areas of coverage would give a green light to racism. We believe this would lead to a rise in cyber-racism, and in particular to cyber-bullying which can lead to substance abuse, self harm and suicide. We believe this rise in cyber-racism based bullying would occur despite the fact that cyberbully itself, whether in the guise of cyber-racism or not, would remain unlawful under S 474.17 of the Commonwealth Crimes Act and other State and Commonwealth legislation.

Instantiating the discussion: Cyber-Racism Examples

Section 18C makes it unlawful to offend, insult, humiliate or intimidate on the basis of race. While these terms are generally read collectively, much of the public discussion has centered on their individual meanings. Despite this, evidence has shown that there is clear public support for retaining all four terms.

A survey by the University of Western Sydney has shown that 66% support the idea that offending someone on the basis of race should be unlawful, 72% believe insulting on the basis of race should be unlawful, 74% believe humiliating someone on the basis of race should be unlawful and 79% believe intimidating someone on the basis of race should be unlawful.[30]

As discussed above, there is an overlapping criminal provision against the misuse of telecommunications equipment to offend people. In the case of cyber-racism, a removal of 'offend' from S 18C would in fact increase the penalties for 'offend' as the matter would then need to be dealt with under S 474.17 of the *Criminal Code Act 1995* (Cth). As discussed, this provision covers all forms of offence, not just racially based offence, and unlike S 18C, it is a criminal provision with a penalty of 3 years imprisonment.

In the case of 'insult', the removal of this provision would make a certain class of racist content unlawful. This is the result the definition of the words themselves.

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[29] Andre Oboler, *Aboriginal Memes and Online Hate* (2012) <http://ohpi.org.au/aboriginal-memes-and-online-hate/>

[30] Racism survey shows public supports existing Racial Discrimination Act, University of Western Sydney, 26 March 2014 <http://www.uws.edu.au/newscentre/news_centre/feature_story/australias_largest_study_on_racism_shows_public_supports_existing_racial_discrimination_act>

The following definitions are from the MacQuarie Dictionary (6th ed, 2013):

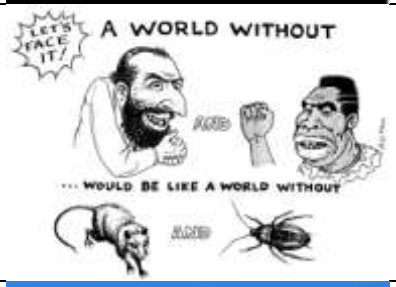
- Humiliate - "to lower the pride or self-respect of; cause a painful loss of dignity to; mortify"
- Offend - "to irritate in mind or feelings; cause resentful displeasure in"
- Insult - "(1) to treat insolently or with contemptuous rudeness; affront. (2) an insolent or contemptuously rude action or speech; affront"
- Intimidate - "(1) frighten or overawe (someone), especially in order to make them do what one wants. (2) to force into or deter from some action by inducing fear"

According to these definitions, humiliate, offend, and intimidate are all judged based on the impact on the victim. Legally, the test developed for S 18C is an objective one and is based on the impact on an ordinary member of the class of people affected (not the actual impact on the complainant). Insult, by contrast, is about the perpetrator's action and does not rely on an impact on a victim (a real victim of a theoretical member of the same class). In light of this it is possible to "insult" in circumstances where it would be impossible to humiliate, offend or intimidate – for example when the victim being insulted (i.e. treated with contempt) is deceased. Some of the worse cases of cyber-racism we have seen, with the most profound impact on communities and on society as a whole, have involved attacks on the recently deceased. Some of these attacks were racist in nature.

The following images have either been blocked in Australia on the basis that they are unlawful under S 18C, or they have been globally removed for breaching a platform's own community standards:

#	Image	Imputation	S18C / Proposed Changes
1		That Asian people eat dogs. This is a form of negative stereotyping.[31]	This image is likely to **offend** Asian Australians. It is debateable whether it insults Asian-Australians generally. It does not humiliate, intimidate or vilify.
2		That it is funny Jews were killed in extermination camps by the Nazis.	This image **insults**. It is also likely to **offend** Jewish people in general and Holocaust survivors in particular as Anne Frank is seen as a public symbol of those who died. The image may be considered offensive by the general community for the way it makes light of Nazi extermination camps. It does not humiliate, intimidate or Vilify.

[31] Benjamin Law, "The New Lows: Representing Asian-Australians on Television (Screenplay & Exegesis)", QUT PhD Thesis, Pg 41 <http://eprints.qut.edu.au/29272/2/Benjamin_Law_Thesis.pdf>; Mark Pinner, "Racial stereotypes as comedic mechanism: Luscombe Searelle and Walter Parke", Grainger Studies: An Interdisciplinary Journal, no. 1 (2011) pg 48 <http://www.msp.unimelb.edu.au/index.php/graingerstudies/article/download/307/325>.

3		That Aboriginal people are substance abusers, particular of petrol.	This image humiliates, offends and insults Indigenous Australians. Aboriginal memes such as this may also vilify Indigenous Australians. It does not intimidate.
4		Incites violence against the target	Muslims are a religious group, not a race or ethnicity, so this content is **not covered** by S 18C or the proposed changes. Had the cartoon been aimed at a race, such as Arabs, it would **intimidate**.
5		Dehumanisation – denigrates the targets.	This item (originally from the United States) **humiliates** both Jewish people and African Americans. It also **offends** and **insults**. It does not intimidate.
6		Conspiracy theory promotion – that the Jews run the media / Hollywood	This item reuses the antisemitic caricature from the above image. It also **offends** by promoting what a member of the group would recognise as an antisemitic conspiracy theory.
7		Mocking the tragic death of a 9 year old Aboriginal child (William John Bligh).	This item **insults**. As the victim is dead, they cannot be offended, humiliated or intimidated.
		Mocking the death of Jewish people during the Holocaust	This image **insults**. It is also likely to **offend** Jewish people in general and Holocaust survivors in particular. It does not humiliate, intimidate or Vilify.

Alternative Changes

The Online Hate Prevention Institute believes that the *Racial Discrimination Act 1975* (Cth), and S 18C—D in particular, are working well. They are not only resolving issues through reconciliation, as intended, but are also playing a critical role in combating the more recent phenomena of cyber-racism.

We don't believe a case for change has been made, and we are deeply concerned that even minor changes to S 18C may significantly impact on Australia's ability to apply our own standards to prevent the viral spread of online racist content. In social media, the rapid and widely distributed sharing of racist content can easily lead to a profound and serious impact. It can cause serious harm to individuals and serious and widespread breaches of public order.

OHPI is concerned that the impact of changes to the *Racial Discrimination Act 1975* (Cth) on the problem of cyber-racism may not be fully understood at this point in time. If alternative changes to the exposure draft are to be considered, we believe this should only occur after an open public inquiry.

Cyber-racism intersects both the legal and technology spheres and as such OHPI wishes to highlight the need for engaging with technology experts as well as with the legal profession so the implications of changes can be more fully considered. There is a need for the technology experts consulted to be free of vested interests and to be able to approach the problem from an Australian perspective. The Online Hate Prevention Institute would welcome the opportunity to participate in any inquiry into this matter.

For the reasons outlined in this submission we urge the Government not to proceed with the changes outlined in the exposure draft. We also urge the government not to make alternative changes at this time as doing so may have a profound and unintentional impact on the growing problem of cyber-racism.