27 March 2017

Senate Legal and Constitutional Affairs Committee
Inquiry into Human Rights Legislation Amendment Bill 2017
Parliament House
Canberra ACT 2600

Dear Madam/Sir,

Submission to Inquiry into Human Rights Legislation Amendment Bill 2017

Kingsford Legal Centre (**KLC**) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into Human Rights Legislation Amendment Bill 2017 (**the Bill**). However, we note we are only able to provide limited comments on the Bill due to the extremely short consultation period. We are disappointed that the Bill will not be subject to extensive scrutiny through community consultation, with the Committee only being given 5 days to report on the Bill.

We believe that the current racial vilification provisions in the *Racial Discrimination Act 1975* (Cth) ('**RDA**') strike an appropriate balance between the right to freedom of speech and right to freedom from racial vilification and should not be weakened. If the Government wants to better protect freedom of speech, we recommend enshrining the right to freedom of speech in the Australian Constitution or a national human rights act. KLC does not support the substantive changes proposed to Part IIA of the RDA in the Bill.

Australia is a proud multicultural nation. Australians believe that racism is wrong. The Bill will reduce protections against vilification and will privilege freedom of speech over freedom from racial vilification. We disagree with this Government priority and believe the Bill is out of step with current community values. Our clients, who come from disadvantaged backgrounds, experience significant harm from racist speech and to weaken these provisions would disadvantage our clients further. KLC believes that it is imperative to retain effective legal

protections against racial vilification, to make it clear that this behaviour is not acceptable in modern Australian society. Our view is that the Bill weakens racial vilification protections, in the absence of a clear case to amend the legislation being made.

About Kingsford Legal Centre

KLC is a community legal centre which has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas since 1981. KLC provides general advice on a wide range of legal issues, including discrimination and racial vilification.

KLC has a specialist discrimination law service (NSW wide), a specialist employment law service, and an Aboriginal Access Program. In addition to this work, KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

In 2015 KLC provided 215 advices in the area of discrimination, which was over 13% of all advice provided. Of this advice, 17% of the advice provided was in area of race discrimination (43 advices).

Our recommendations:

KLC recommends that:

1. The current wording of 'offend, insult and humiliate' in section 18C(1) remain;
2. The current test of an ordinary, reasonable person from the targeted racial or ethnic group remain;
3. The current time limit of 12 months to make a complaint remain;
4. Applicants not be required to seek leave to apply to the Court when their complaint is terminated by the Commission;
5. The Court not have the power to have regard to an offer to settle in deciding whether to award costs.
6. If the Government wishes to provide greater protections for freedom of speech, this should be enshrined in the Australian Constitution or a national human rights act.

How the current racial vilification provisions work

Section 18C of the RDA provides that it is unlawful to do an act 'otherwise than in private' if:

(a) The act is reasonably likely to offend, insult, humiliate or intimidate another person or group of people; and
(b) The act is done because of the race, colour or national or ethnic origin of the other person or of some or all the people in the group.

The section 18C threshold therefore requires that the act be done in public, be subject to an objective ("reasonably likely") test in relation to the harm caused, and be done because of the race of the other person. Section 18D of the RDA contains broad free speech exemptions to section 18C. It provides that conduct that is offensive, insulting, humiliating or intimidating on the basis of race will not be unlawful if it is done 'reasonably and in good faith' for a genuine academic, artistic, scientific or public interest purpose. Any fair and accurate reporting or commenting on an act or statement done for one of these purposes is also exempt.

Item 3 of the Bill -replacing 'offend, insult, humiliate' with 'harass'

KLC opposes the substantive amendments proposed to Part IIA of the *Racial Discrimination Act 1975* (Cth) in the Bill. We note that the Parliamentary Joint Committee on Human Rights did not make a consensus recommendation that the wording of section 18C be amended. KLC considers these amendments are inconsistent with the object and purpose of the RDA.

Over the 20-year period since the racial vilification protections were enacted, they have not been heavily litigated, with fewer than 100 cases going to court over this period. The Courts have consistently interpreted the protections in section 18C from a public interest perspective, in line with the objects of the RDA. The courts have held that to amount to racial vilification, the conduct complained of must have 'profound and serious effects, not to be likened to mere slights'.[1] While arguments have been advanced that the Bill aims to codify this interpretation, we submit that the Bill fails to do this. Replacing 'offend, insult and intimidate' with 'harass', does not codify the court's jurisprudence in

[1] *Creek v Cairns Post* (2001) 112 FCR 352, [16].

this matter. Rather, it creates uncertainty as how the law applies, which will not be resolved until an amended section is subject to judicial interpretation.
We note that the term 'harass' has been interpreted differently in civil and criminal proceedings, and it has not been clearly defined in the Bill. The term 'harass' is currently used in the the *Sex Discrimination Act 1986* (Cth) and the *Disability Discrimination Act 1992* (Cth).[2] In particular, the objective test for sexual harassment in the SDA requires a reasonable person, having regard to all the circumstances, to anticipate the *possibility that the person harassed would be offended, humiliated or intimidated*. It is unclear why this language is being replaced in the RDA.

KLC's view is that it is likely that replacing 'offend, insult, humiliate' with 'harass' will have the effect of imposing a higher threshold for racial vilification complaints, leaving vulnerable applicants who have experienced racial vilification with no civil remedy.

KLC is very concerned that this weakening of racial vilification protections will send a message to the Australian community that racial tolerance is not valued in Australian society, and give license to people who wish to offend, insult and humiliate persons based on their race.

Recommendation:
1. The current wording of 'offend, insult and humiliate' in section 18C(1) remain.

Item 4 of the Bill – 'standards of a reasonable member of the Australian community'

Currently, under section 18C, the conduct complained of is objectively assessed from the perspective of an ordinary, reasonable person from the targeted racial or ethnic group, with the court considering the standards, values and circumstances of that group. Item 4 of the Bill proposes replacing this test with the "standards of a reasonable member of the Australian community". KLC does not support this amendment. The current test ensures that the lived experience of people that are victims of racism and racial vilification are considered in assessing the conduct complained of. The proposed standard of a reasonable

[2] Section 28A *Sex Discrimination Act 1986* (Cth); Sections 35-39 *Disability Discrimination Act 1992* (Cth).

member of the Australian community is extremely risky as it is unlikely a member of the Australian community, as opposed to a member of the targeted racial group, will have the necessary understanding of the impact of such conduct or the lived experience of minority groups. Additionally, imposing this test further disadvantages racial groups that are regularly subject to higher rates of racial vilification, such as Aboriginal and Torres Strait Islanders and the Jewish community.

Recommendation:

2. The current test of an ordinary, reasonable person from the targeted racial group remain.

Item 39 of the Bill- limitation period of 6 months

KLC is deeply concerned about Item 39 of the Bill, which proposes changing the current time limit of 12 months to 6 months for all complaints of discrimination to the Australian Human Rights Commission. Changing the time limit to 6 months will further disadvantage vulnerable applicants who have experienced discrimination, and will create a grave access to justice issue.

KLC regularly advises complainants in discrimination matters. In our experience, complainants often have difficulty meeting the current 12-month time limit to bring a claim. Complainants who have suffered discrimination are often traumatised by the conduct and may not be in a position to seek advice or lodge a complaint within 6 months of the discrimination occurring. Additionally, client groups who experience discrimination, including Aboriginal and Torres Strait Islanders, culturally and linguistically diverse groups, and people with a disability may already be experiencing multiple barriers to accessing justice. Complainants who suffer from discrimination in employment may not be comfortable making a complaint for fear of dismissal. Complainants who have been sexually harassed are often traumatised and unable to seek help within the current time limit. We also note that there is limited availability of free legal advice in the area of discrimination law due to resource constraints, and that upcoming funding cuts to community legal centres will only exacerbate this problem.

Reducing the time limit to 6 months will act as a further barrier to prevent complainants from pursuing a discrimination claim. KLC notes that the Parliamentary Joint Committee on Human Rights did not recommend any change to the time limit. KLC cannot see any rationale for reducing the time

limit, given the structural barriers that already exist for minority groups in exercising their rights.

Recommendation:
3. The current time limit of 12 months remain.

Item 53 of the Bill- Applying for leave to the court to make an application

Currently, a complainant may make an application directly to the Federal Circuit Court or Federal Court if their complaint is terminated by the Australian Human Rights Commission. Item 53 of the Bill proposes requiring applicants to seek leave from the Court to make an application. KLC is concerned this poses significant access to justice issues for complainants.

Applying to court is a stressful, intimidating, long and expensive process for most complainants. In KLC's experience, many complainants who have meritorious claims that don't settle at conciliation will not pursue the matter to court due to these barriers. Introducing an additional requirement on complainants to seek leave to make an application to the Court will act as a further disincentive to complainants from pursuing meritorious complaints of discrimination.

There are many reasons why a complaint may not settle at a conciliation conference, often including the reluctance of Respondents to fully engage in the conciliation process as they are aware many complainants will not pursue the matter to court due to the barriers discussed above. It is likely that requiring applicants to seek leave to apply to the Court will only exacerbate this power imbalance.

Recommendation:
4. That applicants not be required to seek leave to apply to the Court when their complaint is terminated by the Commission.

Item 57 of the Bill – court may have regard to an offer to settle

Item 57 of the Bill proposes allowing the court to have regard to an offer to settle a matter in deciding whether to award costs in the proceedings. KLC is concerned that this amendment will have an impact on the effectiveness of conciliation processes at the Australian Human Rights Commission. Currently, all offers made in conciliation are subject to confidentiality. This confidentiality allows parties to openly discuss their concerns and work together to reach creative settlement solutions. KLC's understanding of this proposed

amendment is that it would allow settlement offers made in conciliation to be considered by the court. KLC submits that this approach fails to recognise the benefits of conciliation, and serves to undermine the AHRC's conciliation processes.

Conciliation is a form of alternative dispute resolution, aimed at encouraging discussion between the parties in order to reach an agreement. The success of any conciliation is usually dependent on the willingness of the parties to engage in the process. The effectiveness of AHRC's conciliation model is reflected in AHRC's Service Satisfaction Survey, with 92% of survey respondents being satisfied with the service provided, and the fact that the majority of matters settle at conciliation.

KLC is concerned that this proposed amendment will lead to parties being reluctant to engage in conciliation or explore settlement options during conciliation, for fear that offers may be considered in the awarding of costs at the court stage. Additionally, parties may be willing to accept clearly inadequate settlement offers for fear of offers being considered at the court stage, further exacerbating the power imbalance between applicants and respondents in discrimination claims.

Recommendation:

5. That the Court not have the power to have regard to an offer to settle in deciding whether to award costs.

ADDITIONAL COMMENTS

There is no clear rationale for amending section 18C

The use of section 18C is extremely limited, and there is no evidence that section 18C, as it currently stands, operates as an unreasonable limit of free speech. The number of racial vilification complaints being made to the Commission is relatively low. In 2014-2015, the Commission received 116 complaints of racial vilification, representing only 4.8% of the total number of discrimination complaints lodged with the Commission that year.[3] The majority

[3] Australian Human Rights Commission, Annual Report 2014-15, <https://www.humanrights.gov.au/our-work/commission-general/publications/annual-report-2014-2015>

of complaints settle at the conciliation stage. On average, only 4 cases go to court each year.

We note that it is common in civil jurisdictions where complaints initially go through alternative dispute resolution before reaching the court or tribunal stage, for complaints to only be crystallised once the court stage is reached. It is also common in civil jurisdictions for complaints to be summarily dismissed at the court stage, without inferences being drawn that the law under which the complaint was made thus needs to be reformed. The QUT, Bolt and Bill Leak cases do not demonstrate a need for section 18C to be amended.

Due to the limited use of the provisions, and the fact that the Parliamentary Joint Committee on Human Rights did not reach a consensus view on recommendations to change the current wording of 18C in their Freedom of Speech Inquiry Report (in fact, one proposal was for no change to be made), we believe that there is no clear rationale for amending the existing racial vilification provisions.

The impact of racial vilification

Arguments that racial vilification laws need to be amended fail to recognise the prevalence of racial vilification and racism in Australia, and the impact of this abuse on minority groups. The Challenging Racism Project found that over 1 in 5 Australians surveyed had experienced race hate speech, and 1 in 20 had been attacked because of their race.[4] The project also found that 40% of race hate speech occurred in a public place, such as on public transport.[5]

Being subject to racial vilification can cause great psychological and social harm to individuals and minority groups, and threatens a cohesive multicultural society. Empirical research suggests that those who have been subject to racial vilification, and more broadly, racial abuse, can experience fear, intimidation, paranoia, diminished self-esteem and alienation.[6] Racial vilification is often a precursor to racially motivated violence and exclusion, and racial vilification

[4] University of Western Sydney, *The Challenging Racism Project Study*, <https://www.westernsydney.edu.au/challengingracism/challenging_racism_project>
[5] Ibid.
[6] Katherine Gelber and Luke McNamara, 'Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps Between the Harms Occasioned and the Remedies Provided' (2016) 39(2) *UNSW Law Journal* 488, 505.

laws act as a deterrent to such conduct. KLC is concerned that if the Bill becomes law, people may offend, insult and humiliate others based on their race with impunity, causing harm to minority groups.

Balancing freedom of speech and right to be free from racial vilification

Recent political comments on section 18C frame it as an attack on free speech. However, this argument ignores the tendency of the law to curtail free speech in other areas, such as defamation, sexual harassment, copyright, official secrecy, contempt of court and limits on offensive language.

Australia is obliged under the *International Covenant on Civil and Political Rights* and the *International Convention on the Elimination of All Forms of Racial Discrimination* to ensure that no one is subjected to racial hatred.[7]

Freedom of expression is not an absolute right and may be restricted where necessary to respect others' rights.[8] The UN Human Rights Committee has found that laws offering protection against racial vilification meet these criteria[9]. KLC's view is that section 18C as currently drafted strikes the appropriate balance between freedom of speech and freedom from racial vilification. KLC is concerned that this Bill privileges the right to freedom of speech over the right to be free from racial discrimination and vilification.

Recommendation:
If the Government wishes to provide greater protections for freedom of speech, this should be enshrined in the Australian Constitution or a national human rights act.

Please contact us on (02) 9385 9566 if you would like to discuss our submission further.

[7] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 19 & 20; *International Convention on the Elimination of All Forms of Racial Discrimination,* opened for signatures 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) arts 1 & 4.
[8] Ibid.
[9] See for example, UN Human Rights Committee, Communication No. 104/1981, U.N. Doc. CCPR/C/OP/2 (6 April 1983) ('*JRT and WG Party v Canada*').

Yours faithfully,
KINGSFORD LEGAL CENTRE

Anna Cody
Director

Maria Nawaz
Law Reform Solicitor