



12 December 2016

Freedom of Speech Inquiry
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
Canberra ACT 2600

By email: 18Cinquiry@aph.gov.au

Dear Madam/Sir,

Submission to Inquiry on Freedom of Speech in Australia

Kingsford Legal Centre (KLC) welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Human Rights Inquiry on Freedom of Speech in Australia.

This submission is endorsed by the following organisations:

- Community Legal Centres NSW
- Community Legal Centres Queensland
- Kooloora Community Centre
- National Association of Community Legal Centres
- South East Community Connect
- Sydney Multicultural Community Services

Our submission draws on the experiences of our clients and solicitors in advising and representing clients at the Australian Human Rights Commission ('**the Commission**') who have experienced racial abuse. All case studies have been de-identified to protect our clients' confidentiality.

We believe that the 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.

Australia is a proud multicultural nation. Australians believe that racism is wrong. Any reforming of section 18C to reduce protections against vilification will privilege freedom of speech over freedom from racial vilification. We disagree with this Government priority and believe any amendments that dilute the protections in section 18C are 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 ensure it is clear that this behaviour is not acceptable in modern Australian society, and that victims of racial vilification have access to civil remedies.

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. Section 18C(1)(b) of the RDA be amended to make it unlawful to vilify or intimidate a person or a group of people on the basis of their presumed or actual race, colour or national or ethnic origin;
2. Protections against religious vilification be introduced;
3. The current wording of 'offend and insult' in section 18C(1) remain. If 'offend and insult' is replaced with 'vilify', 'vilify' should be given its ordinary meaning, to include conduct that is degrading;
4. The existing powers of the Commission to dismiss trivial or vexatious complaints be maintained;
5. Any decision on whether a claim has no reasonable prospects of ultimate success be made by the Federal Circuit Court or Federal Court;
6. The Government provide increased funding to the Commission to allow it to fulfil its functions;
7. The Commissioners retain the power to educate the public about human rights and the Commission's complaint process; and
8. 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.

1. Whether the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) imposes unreasonable restrictions upon freedom of speech, and in particular whether, and if so how, ss. 18C and 18D should be reformed.

KLC submits that Part IIA of the RDA does not impose unreasonable restrictions upon freedom of speech, and should not be reformed to reduce protections against racial vilification. KLC recommends that protections against vilification on the basis of presumed race, and protections against religious vilification be introduced.

How the 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.

It is worth noting that in the Andrew Bolt case which led to the campaign to repeal section 18C, the Court found that the conduct engaged in by Mr Bolt was unlawful and didn’t fall within the section 18D exemption, as his articles contained material errors of fact and distortions of the truth, and as such he had not acted reasonably and in good faith. For example:

“Mr Bolt said of Wayne and Graham Atkinson that they were “Aboriginal because their Indian great-grandfather married a part-Aboriginal woman” (1A-33). In the second article Mr Bolt wrote of Graham Atkinson that “his right to call himself Aboriginal rests on little more than the fact that his Indian great-grandfather married a part-Aboriginal woman” (A2-28). The facts given by Mr Bolt and the comment made upon them are grossly incorrect. The Atkinsons’ parents are both Aboriginal as are all four of their grandparents and all of their great grandparents other than one who is the Indian great grandfather that Mr Bolt referred to in the article.”¹

Had Mr Bolt’s articles not contained these errors and distortions, it is likely the Court would have found that the section 18D exemption applied. In effect, the exemptions in section 18D place stringent limits on what conduct constitutes racial vilification.

Contravening section 18C is not a criminal offence - the RDA provides for civil rather than criminal law remedies. As such, if a person is found to have breached section 18C, they are not subject to a fine or imprisonment. The Court can order civil remedies, including:

¹ *Eatoock v Bolt* (2011) 197 FCR 261, [406].

- a declaration that the person has engaged in unlawful conduct and directing the respondent not to repeat or continue the conduct²;
- an order requiring the respondent to perform any reasonable act to redress the complainant for any loss or damage³;
- requiring the respondent to employ or reinstate the employment of the applicant (in a complaint arising from an employment relationship)⁴;
- payment of compensation⁵; or
- an order requiring the respondent to vary the termination of a contract or agreement to redress loss or damage suffered by the applicant⁶.

At the Commission, parties can settle the matter confidentially at a conciliation conference.

Section 18C is rarely used

The use of section 18C is extremely limited, and there is no evidence that section 18C, as it currently stands, operates 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 year⁷. The majority of complaints settle at the conciliation stage.

In KLC's experience operating a specialist discrimination law practice that undertakes significant work in the area of racial discrimination, section 18C is rarely used by people who have experienced racial vilification. This is because section 18C already sets a high threshold, placing significant limits on the type of speech that is actionable.

Presumed race, colour or national or ethnic origin is not protected

² *Australian Human Rights Commission Act 1986* (Cth), s 46PO(4)(a) ('AHRC Act').

³ AHRC Act, s 46PO(4)(b).

⁴ AHRC Act, s 46PO(4)(c).

⁵ AHRC Act, s 46PO(4)(d).

⁶ AHRC Act, s 46PO(4)(e).

⁷ Australian Human Rights Commission, Annual Report 2014-15, <<https://www.humanrights.gov.au/our-work/commission-general/publications/annual-report-2014-2015>>

Case study - Sally

Sally was on a bus on her way home from work one evening. When she got on the bus, a passenger yelled at her, saying "get off the bus, or I'll make you go back to Japan, you fucking Jap". Sally is Chinese, not Japanese.

The RDA currently prohibits offensive behaviour, if the offending behaviour is done because of the person's race. A vilification complaint cannot be made if the offender incorrectly assumes the race or national or ethnic origin of the person. If the Government decides to amend the RDA, they should amend section 18C(1)(b) making it unlawful to vilify or intimidate a person or a group of people on the basis of their presumed or actual race, colour or national or ethnic origin. This would ensure that people subject to racial vilification, have a remedy available to them, regardless of whether the person vilifying correctly identified their race, national or ethnic origin. It would also reflect similar provisions in other anti-discrimination legislation⁸.

Recommendation 1

We recommend that section 18C(1)(b) of the RDA be amended to make it unlawful to vilify or intimidate a person or a group of people on the basis of their presumed or actual race, colour or national or ethnic origin.

Vilification that occurs in private is not protected

Case study- Ian

Ian is Aboriginal. Ian worked in retail as a sales assistant. A new manager, Brian, started, and seemed to take an instant dislike to Ian. One day in the back storeroom, Brian pushed Ian against the wall, called him a "black cunt" and said he "should be on welfare or in prison like the rest of his kind". Nobody else witnessed this conversation. We advised Brian that as the act had not occurred in public, he was unable to bring a complaint under section 18C.

⁸ For protections against vilification on the basis of presumed status, see for example *Anti-Discrimination Act 1977 (NSW)* section 49ZXB, which provides that it is unlawful to vilify a person on the grounds they are HIV/AIDS infected or thought to be, whether or not they actually are HIV/AIDS infected.

Section 18C of the RDA only protects against acts done in a public place. Often, our clients are subject to racial hatred, but because it occurs in private, they cannot complain of racial vilification.

Religious vilification is not unlawful

Case Study -Zeinab

Zeinab is Muslim and wears the hijab. One day, while waiting in line at a café, a fellow customer starting yelling at her. The customer said “go back to your country terrorist”. When Zeinab went back to the café the following week, the same customer was there and yelled at her again, saying “If you love Islam...I’ll fucking show you”, calling Zeinab a “fucking murderer”, saying “maybe you have a knife to kill me because Muslims kill people”, and telling Zeinab to “fuck off”. Zeinab was very intimidated and shaken by this incident and reported it to the police. We advised Zeinab that she was unable to take action under section 18C, as it doesn’t protect Muslims against religious vilification.

Section 18C protects against vilification done because of race, colour or national or ethnic origin. As such, only religious groups that are found by the court to be a recognised ‘racial’ group are covered. Members of ethnoreligious groups, such as persons of the Jewish faith, can use section 18C to complain about anti-Semitic comments or conduct. However, persons of other faiths that are not ethnoreligious groups, such as Christians, Muslims and Hindus, are not afforded any protection against vilification by national anti-discrimination laws.

Recommendation 2

We recommend that protections against religious vilification be introduced.

The impact of racial vilification

Arguments that racial vilification laws need to be amended or repealed 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.⁹ The project also found that 40% of race hate speech occurred in a public place, such as on public transport.¹⁰

In 2011 the Lowitja Institute surveyed 755 Aboriginal and Torres Strait Islander people across four communities in Victoria about racism and found that:

- Almost everyone who was surveyed had experienced racism in the previous 12 months;
- More than 70% of those surveyed had experienced eight or more incidents of racism in a year; and
- Racism was most commonly experienced in shops (67%) and public spaces (59%).¹¹

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.¹² Racial vilification is often a precursor to racially motivated violence and exclusion, and racial vilification laws act as a deterrent to such conduct. As Justice Bromberg stated in *Eatock v Bolt*:

“The essence of racial vilification is that it encourages disrespect of others because of their association with the racial group to whom they belong. That kind of stigmatisation and its insidious potential to spread and grow from prejudice to discrimination, from prejudice to violence, or from prejudice to social exclusion, is at the fundamental core of racial vilification.”¹³

⁹ University of Western Sydney, *The Challenging Racism Project Study*, <https://www.westernsydney.edu.au/challengingracism/challenging_racism_project>
¹⁰ *Ibid.*

¹¹ Angeline Ferdinand & Margaret Kelaher, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: The Localities Embracing and Accepting Diversity (LEAD) Experiences of Racism Survey*, Lowitja Institute (January 2013) 1 <http://www.lowitja.org.au/sites/default/files/docs/LEAD%20Report-WEB_0.pdf>

¹² 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.

¹³ *Eatock v Bolt* (2011) 197 FCR 261, [225].

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 (ICCPR)* and the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* to ensure that no one is subjected to racial hatred.¹⁴

Article 20(2) of the ICCPR provides:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 4(a) of ICERD requires that states parties:

*Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin...*¹⁵

As provided in Article 19 of the ICCPR, freedom of expression carries with it special duties and responsibilities¹⁶. Freedom of expression is not an absolute right and may be restricted where necessary to respect others' rights.¹⁷ Article 19(3) of the ICCPR requires any restrictions on freedom of expression to be provided by law, be necessary, and to pursue a legitimate aim (for the protection of national security or public order, or public health or morals).¹⁸ As

¹⁴ *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.

¹⁵ ICERD, art 4(a).

¹⁶ ICCPR, art 19(3).

¹⁷ *Ibid.*

¹⁸ *Ibid.*

such, restrictions on freedom of expression are permissible if 'they are necessary in order for the State to fulfil an obligation to prohibit expressions on the grounds that they cause serious injury to the human rights of others'.¹⁹ The UN Human Rights Committee has found that laws offering protection against racial vilification meet these criteria²⁰.

Additionally, being subject to race hate speech can cause great social harm by having a silencing effect on victims. The freedom of speech of both parties has to be taken into account. As noted by the UN Committee on the Elimination of Racial Discrimination:

*"The protection of persons from racist hate speech is not simply one of opposition between the right to freedom of expression and its restriction for the benefit of protected groups: the persons and groups entitled to the protection of the Convention also enjoy the right to freedom of expression and freedom from racial discrimination in the exercise of that right. Racist hate speech potentially silences the free speech of its victims."*²¹

Section 18C strikes an appropriate balance between the competing rights of freedom of speech and freedom from discrimination and racial vilification. The objective test required by section 18C, combined with the availability of broad exemptions in section 18D, provide adequate safeguards for freedom of speech, and an appropriate balancing of the right to be free from racial vilification.

Amending or repealing section 18C will not guarantee freedom of speech

Amending or repealing the racial vilification provisions will not guarantee the right to freedom of speech in Australia, given we only have an implied freedom of political communication in the Australian Constitution. Any amendments to the RDA will likely only serve to reduce or remove protections against racial vilification.

¹⁹ F. La Rue, *2010 Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, UN Doc: A/HRC/14/23 (20 April 2010), [79(h)].

²⁰ 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*').

²¹ UN Committee on the Elimination of Racial Discrimination, *General Comment 35 – Combating racist hate speech*, UN Doc: CERD/C/GC/35 (26 September 2013) [28].

We note that the Courts have found that the racial vilification provisions do not impinge upon the implied right to freedom of political communication. In *Jones v Scully*, Justice Hely found that Part IIA of the RDA was constitutionally valid, as the section 18D exemptions provide an appropriate balance between the legitimate end of eliminating racial discrimination and the implied freedom of political communication.²²

We believe that freedom of speech would be best protected if enshrined in the Australian constitution or a national human rights act. South Africa and Canada have these protections.

South Africa protects and limits freedom of speech in section 16 of their Bill of Rights, which is chapter 2 of their Constitution:

*“(1) Everyone has the right to freedom of expression...
(2) The right in subsection (1) does not extend to-...
(b) incitement of imminent violence; or
(c) advocacy of hatred that is based on race, ethnicity, gender or religion,
and that constitutes incitement to cause harm.”*

The *Canadian Charter of Rights and Freedoms* protects freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.²³

The court stage

If a matter does not settle at a conference at the Commission, the applicant may pursue it in the Federal Circuit Court or Federal Court. The court process, the costs of running a matter, and the risk of an adverse costs order act as a disincentive to pursuing vexatious or frivolous claims. Additionally, should an applicant wish to obtain representation from Legal Aid or community legal centres at the court stage, the matter is subject to a rigorous merits assessment.

²² *Jones v Scully* (2002) 120 FCR 243, 306 [240].

²³ *Australian Human Rights Commission Act 1986* (Cth), s 1, 2(b).

At the court stage, the onus of proof is on the applicant to show that the conduct did occur. 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”.²⁴ The conduct complained of is objectively assessed from the perspective of an ordinary, reasonable person from the targeted racial group.²⁵ In *Eatock v Bolt*, Justice Bromberg stated:

“Section [18C(1)] is at least primarily directed to serve public and not private purposes... That suggests that the section is concerned with consequences it regards as more serious than mere personal hurt, harm or fear. It seems to me that s 18C is concerned with mischief that extends to the public dimension. A 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...”²⁶

Replacing ‘offend and insult’ with ‘vilify’

KLC notes that there has been much public debate about removing the words ‘offend and insult’ from section 18C(1) and replacing these with ‘vilify’. We submit that if ‘vilify’ is narrowly defined as inciting hatred (as it was in the exposure draft of proposed amendments to the RDA in 2014), this threshold would be too high.

KLC has extensive experience advising clients on the racial vilification protections under the *Anti-Discrimination Act 1977* (NSW). Section 20C of the *Anti-Discrimination Act 1977* (NSW) makes it unlawful to incite hatred towards, serious contempt for or severe ridicule of a person or groups of persons on the ground of race. Section 20C shifts the focus from the person who experiences the vilification, to whether the conduct has incited a third party. Effectively, this means the complainant’s response to the alleged conduct is irrelevant. This sets a high threshold in comparison to the ‘reasonably likely’ conduct test in section

²⁴ *Creek v Cairns Post* (2001) (2001) 112 FCR 352, [16]

²⁵ *Eatock v Bolt* (2011) 197 FCR 261, [249] - [253].

²⁶ *Eatock v Bolt* (2011) 197 FCR 261, [263].

18C. The Administrative Decisions Tribunal of NSW (now the New South Wales Civil and Administrative Tribunal) has held that to meet the test in section 20C, it is not sufficient if words merely convey hatred or express serious contempt or severe ridicule²⁷, rather, the conduct must be seen as capable of inciting hatred, serious contempt or severe ridicule of a third party targeted at the victim²⁸, based on their race²⁹. This test sets a very high onus of proof for the applicant, which is difficult to discharge.

Additionally, we believe that replacing 'offend and insult' with vilify would add little to the protections contained in criminal law, and fails to recognise the importance of protecting vulnerable groups from racial abuse and vilification. If the Government does amend the legislation, vilify should be given its ordinary meaning, to include degrading conduct.

We note that in *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, the then Justice French found that the terms 'offend' and 'insult' in section 18C were supported by ICERD.

Most people who experience racial vilification are not in a privileged position and do not have the same platform as those in the media or parliament that often complain about the existing provisions. Section 18C provides an avenue for members of minority groups to address their experience of racial vilification. It needs to be recognised that words are extremely powerful and can have lasting impacts on disadvantaged groups, causing them to feel unsafe and withdraw from society.

Recommendation 3

We recommend that the current wording of 'offend and insult' in section 18C(1) remain.

If 'offend and insult' is replaced with 'vilify', 'vilify' should be given its ordinary meaning, to include conduct that is degrading.

²⁷ *Veloskey v Karagiannakis* [2002] NSWADTAP, 18, [21] citing *Wagga Wagga Aboriginal Action Group v Eldridge* (1995) EOC; *Malco & Ors v Massaris & Ors* [1998] NSWEO (12/2/98); *Kazak v John Fairfax Publications Ltd* [2000] NSWADT 77; *Western Aboriginal Legal Service Ltd v Jones* [2000] NSWADT 102.

²⁸ *Veloskey v Karagiannakis* [2002] NSWADTAP, 18, [26] – [29].

²⁹ *Veloskey v Karagiannakis* [2002] NSWADTAP, 18, [30].

Broad public support for racial vilification laws

There is broad public support for racial vilification laws, with 88% of respondents to a Fairfax- Nielsen poll conducted in April 2014 saying it should be unlawful to offend, insult or humiliate someone because of their race³⁰.

In a survey conducted by the CyberRacism and Community Resilience Research Group, there was broad support for retaining racial vilification protections as currently drafted, with only 10% or less of those surveyed opposed to the legislation. Respondents to the survey were asked if it should be unlawful to offend, insult, humiliate or intimidate someone on the basis of their race:

- **Offend** - 66% of participants agreed or strongly agreed it should be unlawful, 10% of participants disagreed or strongly disagreed it should be unlawful, and 25% were undecided;
- **Insult** - 72% of participants agreed or strongly agreed it should be unlawful, only 7% of participants disagreed or strongly disagreed it should be unlawful and 20% were undecided;
- **Humiliate** - 74% of participants agreed or strongly agreed it should be unlawful, only 6% of participants disagreed or strongly disagreed it should be unlawful and 20% were undecided; and
- **Intimidate** - 79% of participants agreed or strongly agreed it should be unlawful, only 5% of participants disagreed or strongly disagreed it should be unlawful and 15% were undecided.³¹

Additionally, we note that Government attempts to amend section 18C in 2014 were met with widespread community protest against such changes. Section 18C reflects widely held community perceptions that racial vilification is unacceptable behaviour in modern Australian society. Victims of racial vilification often have a limited voice in public debate, and section 18C provides an avenue to allow them to hold respondents to account for their unlawful actions.

³⁰ ABC News, *Race law changes receive little support in new poll* (14 April 2014) <<http://www.abc.net.au/news/2014-04-14/race-law-changes-receive-little-support-in-new-poll/5387452>>

³¹ The CyberRacism and Community Resilience (CRaCR) Research Group, *Submission on Freedom of Speech (Repeal of s 18C Bill) 2014* (28 April 2014) <https://www.westernsydney.edu.au/__data/assets/pdf_file/0004/645772/RDA_submission_28_April_2014.pdf>

Section 18C of the RDA (and related provisions) only limit freedom of speech to the extent necessary to protect communities and individuals from the detrimental impact of racial vilification and therefore does not need to be amended. Section 18C strikes the appropriate balance between Australia's international human rights obligations to protect freedom of speech and freedom from racial hatred.

2. ***Whether the handling of complaints made to the Australian Human Rights Commission ("the Commission") under the Australian Human Rights Commission Act 1986 (Cth) should be reformed, in particular, in relation to:***
 - a. ***the appropriate treatment of:***
 - i. ***trivial or vexatious complaints;***

The *Australian Human Rights Commission Act 1986 (Cth)* ('**AHRC Act**') regulates the complaints handling functions of the Commission. The AHRC Act requires the Commission to inquire into, and attempt to conciliate complaints of unlawful discrimination.³²

We note that the Commission's power to conciliate complaints applies consistently across the federal discrimination acts – the *Age Discrimination Act 2004 (Cth)*, the *Disability Discrimination Act 1992 (Cth)*, the *Racial Discrimination Act 1975 (Cth)* and the *Sex Discrimination Act 1986 (Cth)*. In our view, it is important to maintain consistency in complaints handling and conciliation processes for all discrimination complaints made under these Acts, to ensure all complainants are afforded the same access to conciliation processes, regardless of the subject matter of their complaint.

The benefits of conciliation in discrimination complaints is that it provides an informal, accessible and free process for parties to have a chance to resolve complaints before proceeding to litigation. Additionally, given applicants in discrimination complaints are generally from vulnerable and marginalised groups, providing access to alternative dispute resolution ensures greater access to justice. In 2015-16, 76% of complaints (989 complaints) made to the

³² AHRC Act, s 1(aa).

Commission were successfully conciliated³³, reflecting the benefits of the Commission's existing complaints handling procedures.

The AHRC Act allows the Commission to terminate complaints if the President is satisfied that:

- the conduct alleged is not unlawful discrimination;³⁴
- the complaint was lodged outside the 12 month time limit;³⁵
- the complaint was trivial, vexatious, misconceived or lacking in substance.³⁶

In KLC's view, the current powers to terminate a complaint strike the correct balance. The Commission clearly has the power to strike out complaints that are trivial, vexatious, misconceived or lacking in substance.

Recommendation 4

We recommend that the existing powers of the Commission to dismiss trivial or vexatious complaints be maintained.

- a. the appropriate treatment of:***
- ii. complaints which have no reasonable prospect of ultimate success;***

Assessing whether a complaint has no reasonable prospect of ultimate success requires a detailed legal assessment of each claim and the potential exemptions that may apply. The Commission's complaint system is designed to be informal, free and accessible, and does not require applicants and respondents to be legally represented, or a standard of proof. As such, the written complaints and responses received by the Commission would often not adequately set out the facts and legal arguments of each case. To assess reasonable prospects of ultimate success of a complaint would necessarily include an assessment of whether the conduct complained of occurred on the balance of probabilities, whether such conduct meets the tests in 18C, and whether the exemptions in

³³ Australian Human Rights Commission, *Annual Report 2015-16* <
<http://www.humanrights.gov.au/our-work/commission-general/publications/annual-report-2015-2016>>

³⁴ AHRC Act, s 46PH(1)(a).

³⁵ AHRC Act, s 46PH(1)(b).

³⁶ AHRC Act, s 46PH(1)(c).

18D would apply. Where the courts have engaged in such analysis, it has often been lengthy and complex, involving assessment of errors of fact and issues of law. In our view, as the Commission is not a judicial body, such assessment goes beyond its remit.³⁷

KLC notes that the function of assessing whether racial vilification complaints have no ultimate prospect of success is appropriately vested in the Federal Circuit Court and Federal Court.

Section 31A(3) of the *Federal Court Act 1976* (Cth), which details the Court's powers to make summary judgment, provides:

For the purposes of this section a defence or a proceeding or part of a proceeding need not be:

- (a) hopeless;
- (b) or (b) bound to fail;

for it to have no reasonable prospect of success³⁸.

In *Spencer v Commonwealth of Australia*, Chief Justice French and Justice Gummow highlighted the complexity of summarily dismissing a matter, stating:

"Section 31A(2) of the Federal Court of Australia Act requires a practical judgment by the Federal Court as to whether the applicant has more than a "fanciful" prospect of success. That may be a judgment of law or of fact, or of mixed law and fact. Where there are factual issues capable of being disputed and in dispute, summary dismissal should not be awarded to the respondent simply because the Court has formed the view that the applicant is unlikely to succeed on the factual issue. Where the success of a proceeding depends upon propositions of law apparently precluded by existing authority, that may not always be the end of the matter. Existing authority may be overruled, qualified or further explained. Summary processes must not be used to stultify the development of the law."³⁹

³⁷ See *Brandy v HREOC* (1995) 183 CLR 205, which found that the Commission, as a non-judicial body, did not have the constitutional power to finally determine disputes.

³⁸ *Federal Court Act 1976* (Cth), s 31A(3). Note section 17A(3) of the *Federal Circuit Court of Australia Act 1999* (Cth) provides the same.

³⁹ *Spencer v Commonwealth* (2010) 241 CLR 118, 131-132, [24]–[25].

The beneficial nature of human rights legislation, the public interest and the impact of a breach of discrimination law on the applicant must also be considered by the court in deciding whether a claim has no reasonable prospects of success. In *Oorloff v Lee*, then Federal Magistrate Walters stated:

“In the context of discrimination legislation, both the Federal Magistrates Court and Federal Court have emphasised that the power to summarily dismiss a matter must be exercised with ‘exceptional caution’ and be ‘sparingly invoked’. In particular, the power should be used with great care when the litigant is unrepresented.”⁴⁰

Additionally, any decision to allow the Commission to assess complaints on the papers for reasonable prospects of ultimate success would necessarily disadvantage vulnerable unrepresented applicants who may not be able to frame their complaint in terms of the law, creating an access to justice issue. We have detailed our reasons below:

1) *People do not get legal advice before lodging claims*

Discrimination law is complex, and applicants often have little or no understanding of how to best frame their discrimination claims. The limited availability of free legal assistance in discrimination law often means that applicants are unable to get legal advice before lodging a discrimination claim, or are unaware that free legal services exist. This means that although applicants may have a strong case, they may be unable to frame their claim persuasively under the law.

In our view, any process at the Commission which determines whether applications ‘on the papers’ have reasonable prospects of success will disadvantage vulnerable and marginalised applicants who face the largest barriers when lodging a complaint. Many applicants who have suffered from racial vilification will be migrants, people with limited English proficiency, people who cannot read or write or have very low literacy and people with a disability, who find it difficult to complete the forms and will often be unable to best frame their application with reference to the law. Any decision by the Commission that a claim has no reasonable prospects of success would likely impose significant disadvantages on these vulnerable persons, and would

⁴⁰ *Oorloff v Lee* [2004] FMCA 893, [17].

effectively restrict their right to bring a racial vilification claim and access remedies. This would result in the discrimination complaints system operating only as a remedy for people who are able to navigate the system, rather than as a way of protecting vulnerable applicants from unlawful racial vilification.

2) Conciliation conferences facilitate resolutions

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 normally dependent on the willingness of the parties to negotiate and settle. In our experience, whether a racial vilification claim has merit is a key factor in the existing Commission conciliation processes. Commission conciliators will provide information on what racial vilification is under the law, and the availability of exemptions, allowing parties to self-assess the merits of their case. Additionally, in conciliation, parties may discuss what their views are on the merits of the matter. The merit of the matter informs any offers and counter-offers made by the parties, and whether any settlement is reached at conciliation. If a respondent party does not believe that a racial vilification claim has merit, they may discuss this at the conciliation.

Any additional change to conciliation processes is likely to decrease the efficiency of the process, and subject the parties to additional legal costs and delay.

Recommendation 5

We recommend that any decision on whether a claim has no reasonable prospects of ultimate success be made by the Federal Circuit Court or Federal Court.

Summary dismissal does not indicate reform is required

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.

b. ensuring that persons who are the subject of such complaints are afforded natural justice;

KLC recognises that it is imperative that both applicants and respondents in racial vilification complaints are afforded natural justice. We are confident that the Commission's existing processes allow this to occur.

We note that once a complaint is lodged, the Commission will contact the applicant and inform them that a copy of the complaint will be provided to the respondent. The respondent is then given the complaint and the opportunity to provide a written response to the complaint. The Commission considers both parties' positions and assesses whether a conciliation conference is suitable. If a conciliation conference is scheduled, the Commission provides the same information to both parties on the applicable law and how the conciliation process works. Conciliation conferences are confidential. Both parties are required to seek leave to be legally represented at any conciliation conference.

c. ensuring that such complaints are dealt with in an open and transparent manner;

KLC has significant experience dealing with the Commission while representing applicants in discrimination matters. In our experience, the Commission does an excellent job of dealing with complaints in an open and transparent manner in the following ways:

- referring complainants and respondents for legal advice where appropriate;
- contacting complainants and respondents about the content of complaints and discussing how the law applies to each complaint and the possible merits or weaknesses of each case;
- encouraging both parties to attend a conciliation conference where appropriate;
- liaising with both parties to set a suitable date for a conciliation conference;
- explaining the conciliation conference process to both parties in detail before any such conference takes place;
- remaining neutral and impartial throughout the process, and facilitating discussion between the parties; and

- proactively seeking feedback on applicants' and respondents' experience of the process at the Commission by sending out surveys following each conciliation conference.

In 2014-15, 92% of those who responded to the Commission's Service Satisfaction Survey said they were satisfied with the service provided and 73% rated the service as 'very good' or 'excellent'⁴¹, indicating that parties are very satisfied with the Commission's complaint handling procedures.

d. ensuring that such complaints are dealt with without unreasonable delay;

KLC's experience is that the Commission deals with complaints efficiently and effectively, subject to their resource constraints. In 2014-2015, the average length of time between a complaint being lodged and a complaint being finalised is 3.7 months. This is a relatively quick resolution in civil jurisdictions, where complaints at the court stage can drag out for years before being finalised.

If the Government is concerned about delays in dealing with complaints, we recommend that the Government provide increased funding to the Commission to allow it to fulfil its functions.

Recommendation 6

We recommend that the Government provide increased funding to the Commission to allow it to fulfil its functions.

e. ensuring that such complaints are dealt with fairly and without unreasonable cost being incurred either by the Commission or by persons who are the subject of such complaints;

As discussed above, the complaints process at the Commission is designed to be accessible and parties are not required to engage legal representatives in order to engage with the process. It is free to make a complaint. As the Commission

⁴¹ Australian Human Rights Commission, *Annual Report 2014-15*, <<https://www.humanrights.gov.au/our-work/commission-general/publications/annual-report-2014-2015>>

only facilitates conciliation conferences and does not have the power to make decisions, it is appropriately a no cost jurisdiction. We note that the Federal Circuit Court and Federal Court are costs jurisdictions in this area.

Given that a respondent does not have to engage legal representatives, in our view there is no need for any unreasonable costs to be incurred.

f. the relationship between the Commission's complaint handling processes and applications to the Court arising from the same facts.

The Commission does not have any power to initiate or bring complaints to the Federal Circuit Court or Federal Court under racial vilification laws. It is up to an individual applicant whether they choose to bring an application at the court stage. We note the number of complaints proceeding to the court stage is extremely low. If a matter does settle at conciliation at the Commission, it is standard for both parties to sign a deed of release, which prevents the applicant from pursuing further legal action. Where a complaint is terminated by the Commission, it is still open to the applicant to proceed to court.

3. Whether the practice of soliciting complaints to the Commission (whether by officers of the Commission or by third parties) has had an adverse impact upon freedom of speech or constituted an abuse of the powers and functions of the Commission, and whether any such practice should be prohibited or limited.

We note that the role of Commissioners at the Australian Human Rights Commission, including the Race Discrimination Commissioner includes an educative function, requiring the Commissioners to raise awareness of human rights issues and the legislation they operate under among the public.

Specifically, the AHRC Act requires the Commission to:

- promote an understanding and acceptance, and the public discussion, of human rights in Australia⁴²;
- to undertake research and educational programs and other programs, on behalf of the Commonwealth, for the purpose of promoting human rights⁴³; and

⁴² AHRC Act, s 11(1)(g).

⁴³ AHRC Act, s 11(1)(h).

- to do anything incidental or conducive to the performance of any of the preceding functions⁴⁴.

Given this is an inquiry into freedom of speech in Australia, it is surprising that this question contemplates restricting Commissioners' abilities to educate the public about the types of complaint that can be lodged at the Commission and the complaints process. With substantial inaccurate media reporting of how the Commission and court process works, including comments from Government senators and the Prime Minister incorrectly characterising the Commission for "bringing complaints" to the courts under section 18C, it is all the more imperative that Commissioners are able to educate the public about the Commission's functions and complaint system.

KLC is strongly against any limitations being placed on the conduct and role of Commissioners in this manner.

Recommendation 7

We recommend that the Commissioners retain the power to educate the public about human rights and the Commission's complaint process.

4. Whether the operation of the Commission should be otherwise reformed in order better to protect freedom of speech and, if so, what those reforms should be.

KLC submits that the operation of the Commission does not need to be reformed in the area of freedom of speech. The Commission, as an independent statutory agency and National Human Rights Institution should be allowed to do its work without unwarranted and sustained criticism from Government.

Should the Government decide to enshrine freedom of speech in the Australian Constitution or a national human rights act, the Commission would have a greater role in this area.

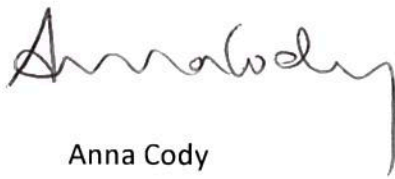
Recommendation 8

⁴⁴ AHRC Act, s 11(1)(p).

We recommend that 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.

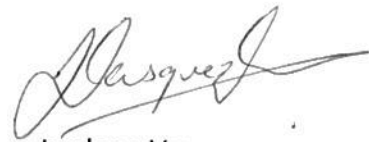
Yours faithfully,
KINGSFORD LEGAL CENTRE



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