



New South Wales  
Council for Civil Liberties

## **NSWCCL SUBMISSION**

**Submission to the Parliamentary  
Joint Committee on Human  
Rights**

**Inquiry into Freedom of Speech  
in Australia**

23 December 2016

### **About NSW Council for Civil Liberties**

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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## INTRODUCTION

The New South Wales Council for Civil Liberties (NSWCCL) welcomes the opportunity to comment on Part IIA of the *Racial Discrimination Act 1975* (Cth) (the 'RDA') and the handling of complaints by the Australian Human Rights Commission ('the Commission').

The Human Rights Committee is asked to determine:

1. *Whether the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) imposes unreasonable restrictions upon freedom of speech [taking into account the meaning given to that phrase below in the Terms of Reference], and, in particular whether, and if so how, ss 18C and 18D should be reformed.*
2. *Whether the handling of complaints made to the Australian Human Rights Commission under the Australian Human Rights Commission Act 1986 (Cth) (the "HRC Act") should be reformed, in particular, in relation to:*
  - a. *the appropriate treatment of:*
    - i. *trivial or vexatious complaints; and*
    - ii. *complaints which have no reasonable prospect of ultimate success,*
  - b. *ensuring that persons who are the subject of such complaints are afforded natural justice;*
  - c. *ensuring that such complaints are dealt with in an open and transparent manner;*
  - d. *ensuring that such complaints are dealt with without unreasonable delay;*
  - 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;*
  - f. *the relationship between the Commission's complaint handling processes and applications to the Court arising from the same facts.*
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.*
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.*

*The Committee is asked, in particular, to consider the recommendations of the Australian Law Reform Commission (the 'ALRC') in its Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws [ALRC Report 129 – December 2015], in particular Chapter 4 – "Freedom of Speech" [in this submission, 'the Report'].*

*"Freedom of speech" is stated to include, but not be limited to, freedom of public discussion, freedom of conscience, academic freedom, artistic freedom, freedom of religious worship and freedom of the press.*

### 1. NSWCCCL'S PERSPECTIVE

- 1.1 NSWCCCL has been a vigorous defender of freedom of speech as a core civil liberty for 53 years and, in recent times, has been increasingly concerned with the number of new laws which **unwarrantedly** restrict freedom of speech. In 2015 it joined with other civil liberties

organizations across Australia to express our deep concerns about the disturbing trend of unwarranted statutory restrictions on traditional freedoms- including freedom of speech<sup>1</sup>.

**1.2** NSWCCCL recognizes that freedom of speech is not an absolute right but it is consistently vigilant in assessing the rationale for any restrictions on freedom of speech to ensure that they are both necessary and reasonable.

1.1. It is from this perspective that NSWCCCL has consistently argued the importance for Australia of an appropriately balanced RDA. As one of the most racially and ethnically diverse nations in the world an effective statutory protection against race hatred is an essential safeguard for national harmony.

1.2. It has been our view that the current RDA is appropriately balanced and demonstrably effective. We are not aware of any contexts in which the Act has led to an unwarranted restriction of freedom of speech. While trivial and vexatious complaints have been brought before the Commission the available data over 20 plus years suggests that the overwhelming majority of these are dismissed or resolved by conciliation.

1.3. Most recently the NSWCCCL strongly opposed the amendments proposed in the Racial Discrimination Act 1975 (*Freedom of Speech Repeal of S.18C*) Bill 2014 on two main grounds:

- the amendments would have dramatically narrowed the definition of unlawful racist speech/conduct and the list of exempt contexts was so expansive that the overall effect would have been a dangerous weakening of the Act and its protections against racist abuse in Australia;
- the overall context in which the amendments had been introduced by the Government came with undesirable symbolical implications<sup>2</sup> which would have sent a clear message to many that racist abuse is once again 'acceptable' in Australia. This created a political and community context in which reasoned discussion of the extremely complex, sensitive and vitally important issue of the proper and desirable balance between freedom of expression and freedom from racist abuse and vilification would have been hard to achieve.<sup>3</sup>

1.4. Given this context, NSWCCCL argued against any changes to the Act at that time. It did however flag that if the Government was determined to amend the RDA this should be restricted to 'a minor clarification of unlawful behaviours which does not weaken existing, necessary protections against racial vilification in Australia'. Specifically this should encompass the repeal of '*to offend* and possibly *to insult*' and their replacement by '*to vilify*'. We argued against any amendment to s18D.<sup>4</sup>

1.5. The current political context and a significant element of media coverage have similar disturbing aspects. The aggressive attacks on the Australian Human Rights Commissioner in

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<sup>1</sup> Combined CCLS Submission to the Inquiry on Traditional Rights and Freedoms: Encroachments by Commonwealth Laws 18<sup>th</sup> October 2015

<sup>2</sup> Submission of NSWCCCL on The Exposure Draft Racial Discrimination Act 1975 (Freedom Of Speech Repeal Of S.18c) Bill 2014, 1 May 2014,

<sup>3</sup> Submission of NSWCCCL on The Exposure Draft Racial Discrimination Act 1975 (Freedom Of Speech Repeal Of S.18c) Bill 2014, 1 May 2014, P1 (NSWCCCL submission May 2014)

<sup>4</sup> Recommendation 7.5 (NSWCCCL submission May 2014)

relation to the implementation of the RDA by some members of parliament –notably in Committee contexts- have been unhelpful for an informed and reasoned debate about the appropriateness and effectiveness of the RDA. Similarly some media coverage –including internet social media- of two recent and high profile complaints has generated considerable public misinformation about the Act and the powers and responsibilities of the Commission and its processes.<sup>5</sup>

1.6. Although not explicitly within the terms of reference of this inquiry, NSWCCCL urges the Committee to reaffirm the independence of important safeguard agencies such as the AHRC. If their senior officers are guilty of misconduct or poor management there are proper processes to deal with such failings. These agencies are an important check in our democratic system. We regard any attempt to undermine them as dangerous.

## **2. SUMMARY OF NSWCCCL POSITION**

2.1. NSWCCCL’s position remains consistent with its submission on the 2014 RDA Amendment Bill.

2.2. NSWCCCL replies ‘no’ to all of the questions in the terms of reference, with the exception of a clarifying amendment to s 18C.

2.3. NSWCCCL believes the main issue with s 18C centres on the lack of clarity of its terms. NSWCCCL recommends **only** those amendments necessary to bring the section in line with its interpretation in case law and/or Australia’s international human rights obligations.

2.4. NSWCCCL is a strong advocate of the Commission’s complaint handling processes, emphasizing its broad effectiveness and the legal and social value of its educative function and conciliation-based remedies.

2.5. NSWCCCL considers nothing in Chapter 4 ‘Freedom of Speech’ of the Report, including its recommendations, to be inconsistent with its views.

## **DETAILED COMMENT**

### **The Racial Discrimination Act and Freedom of Speech**

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

## **3. Freedom of Speech in International Human Rights Law**

3.1. Any discussion of freedom of speech should acknowledge from the outset that international human rights law does not guarantee an absolute right to freedom of speech. Article 19 of the *International Covenant on Civil and Political Rights* (‘ICCPR’) holds that freedom of speech is not an absolute right and may be protected where necessary, including ‘for the

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<sup>5</sup> In this context, NSWCCCL was particularly concerned that a public statement by the PM was inaccurate in assigning a critical role to the Commission which was not within its powers. See further comment below p.11.

respect of the rights or reputations of others’, and the protection of ‘public health or morals.’<sup>6</sup>

3.2. These limitations on permissible speech are evident in a variety of areas in Australian law outside of Part IIA. Those areas include defamation,<sup>7</sup> criminal law (including sexual harassment,<sup>8</sup> threats to kill or seriously injure,<sup>9</sup> and hate speech<sup>10</sup>), limitations on the implied constitutional right to freedom of political communication,<sup>11</sup> offensive language,<sup>12</sup> and contempt.<sup>13</sup>

3.3. The particular limitations imposed by Part IIA, especially s 18C, exist for a laudable, specific public purpose. They provide a special form of protection against racist speech that is especially heinous and threatening to Australia’s multicultural social fabric, with very real and harmful effects on vulnerable social groups. This rationale, directed towards social cohesion and mutual respect, clearly fits within the permissible limitations under Article 19 of the ICCPR. Australia has expressed a reservation to Article 20(2) of the ICCPR, which imports a higher threshold of prohibition on hate speech through the express requirement that such advocacy constitute ‘incitement to discrimination, hostility or violence’.<sup>14</sup> The reservation is justified on the grounds that the rights provided for by Article 19 (as well as Articles 21 and 22) are consistent with Article 20;

‘accordingly, the Commonwealth and constituent States, having legislated with respect to the subject matter of the Article in matters of practical concern in the interests of public order (*ordre public*), the right is reserved not to introduce any further legislative provision on these matters.’<sup>15</sup>

This justification suggests that by framing itself within the exceptions to freedom of speech under Article 19, existing legislation like the RDA can be seen to sufficiently safeguard against the harm contemplated by Article 20: namely, racial hatred.

3.4. NSWCCL wholeheartedly agrees with the Attorney-General in his comments that, ‘[i]t is important that Australia strikes the right balance between the laws which protect social harmony and mutual respect, and the fundamental democratic value of freedom of speech.’<sup>16</sup>

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<sup>6</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(3) (‘ICCPR’).

<sup>7</sup> See e.g. *Sutherland Shire Council v Folkles* [2015] FCA 1288 [49]: ‘Over centuries, the common law of defamation evolved to maintain a fragile and often controversial balance between the freedoms of speech and opinion and the individual’s right to his or her reputation.’

<sup>8</sup> See e.g. *Sex Discrimination Act 1984* (Cth) s 28A(2).

<sup>9</sup> See e.g. *Crimes Act 1958* (Vic) ss 20, 21.

<sup>10</sup> See e.g. *Anti-Discrimination Act 1977* (NSW) s 20D; *Racial and Religious Tolerance Act 2001* (Vic) s 42; *Anti-Discrimination Act 1991* (Qld) s 131A; *Racial Vilification Act 1996* (SA) s 4; *Criminal Code*(WA) ss 77-80D; *Discrimination Act 1991* (ACT) ss 66, 67.

<sup>11</sup> See e.g. *McCloy v NSW* (2015) 89 ALJR 857 [2]-[5].

<sup>12</sup> See e.g. *Summary Offences Act 1988* (NSW) s 4A.

<sup>13</sup> See e.g. *Administrative Appeals Tribunal Act 1975* (Cth) s 63; *Royal Commissions Act 1902* (Cth) s 60; *Evidence Act 1995* (NSW) s 195.

<sup>14</sup> ICCPR Art 20(2).

<sup>15</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, [1980] ATS 23 (entered into force 23 March 1976).

<sup>16</sup> Senator the Hon. George Brandis QC, ‘Parliamentary Inquiry into Freedom of Speech’ (Media Release, 8 November 2016) <<https://www.attorneygeneral.gov.au/Mediareleases/Documents/Media-release-freedom-of-speech.pdf>>

3.5. NSWCCCL is of the view that Part IIA broadly strikes the right balance and should not be weakened. Specifically s 18C does not, in its operation, impose an unreasonable restriction on freedom of speech. Importantly, its practical effect is guided by its interpretation in case law, where the balance is most effectively struck. NSWCCCL agrees with other commentators –including the Commission - that there is a gap between its statutory terms and its interpretation by the courts. For the sake of clarity this gap should be removed.

#### 4. Interpretation of s 18C

4.1. NSWCCCL urges the Committee to note the difference between the way in which the RDA is interpreted in practice by the courts, and misconceptions perpetuated by the media and some politicians about the effect of s 18C. Some of these misconceptions include that there is no threshold for offensive conduct in s 18C, that it creates a criminal offence, and/or that its operation is based on the subjective feelings of the complainant alone.

4.2. In cases that have considered s 18C, the courts have provided important contours helping to clarify the section’s terminology. Two important areas that have been clarified are the threshold of harm incurred by unlawful conduct under s 18C (including ‘to offend’ or ‘insult’), and the standpoint from which this is to be assessed.

4.3. s 18C has long been interpreted as importing a higher standard than ‘mere slights’ alone.<sup>17</sup> The courts have applied an objective test,<sup>18</sup> referring to a ‘real (not fanciful or remote) chance’ of the offence, insult, humiliation or intimidation occurring, ‘in light of the particular factual circumstances in which the act complained of was done’.<sup>19</sup> This approach centres on the perspective of the hypothetical person, and/or a reasonable member of the hypothetical group.<sup>20</sup> While the subjective responses of the complainant may be taken into consideration, they will not be determinative.<sup>21</sup> In fact, actual offence, insult, intimidation or humiliation need not actually be proven.<sup>22</sup> Further, while the words ‘offend, insult, humiliate or intimidate’ should be given their ordinary English meanings,<sup>23</sup> s 18C has been held to target conduct inflicting ‘profound and serious effects’ on the reasonable victim.<sup>24</sup>

4.4. NSWCCCL submits that this approach to s 18C appropriately expresses the balance intended by s 18C between freedom of speech and protection from racist abuse. Far from rendering merely trivial comments unlawful, s 18C in practice is directed to serious instances of

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<sup>17</sup> *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, [16].

<sup>18</sup> *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615, [15]; *Jones v Scully* [2002] FCA 1080, [98]-[99]; *Jones v Toben* [2002] FCA 1150, [83].

<sup>19</sup> *Eatock v Bolt* [2011] FCA 1103, [258]-[261], *Clarke v Nationwide News Pty Ltd* [2012] FCA 307, [48]-[49].

<sup>20</sup> *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, [13]; *McGlade v Lightfoot* (2002) 124 FCR 106, [52]; *Eatock v Bolt* (2011) 197 FCR 261, [244]; *Clarke v Nationwide News Pty Ltd* [2012] FCA 307, [48]-[49].

<sup>21</sup> *Jones v Scully* [2002] FCA 1080, [98]-[99]; *Jones v Toben* [2002] FCA 1150, [83].

<sup>22</sup> *Silberberg v Builders Collective of Australia Inc* (2007) 164 FCR 475, [21]; *Jones v Scully* (2002) 120 FCR 243, [99].

<sup>23</sup> *Jones v Scully* (2002) 120 FCR 243, [102]-[109]; *Clarke v Nationwide News Pty Ltd* [2012] FCA 307, [65]-[71].

<sup>24</sup> *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, [16]; *Eatock v Bolt* (2011) 197 FCR 261, [268]; *Clarke v Nationwide News Pty Ltd* [2012] FCA 307, [65]-[71].

conduct and does not rely on subjective reactions, especially those which are ‘extreme or atypical’,<sup>25</sup> as determinative of unlawfulness.

4.5. The application of a restrictive, objective lens to the nature and degree of harm under s 18C in practice also goes some way to ensuring the section does not operate in a broader sense than contemplated by international human rights law. As stated by Justice French in *Bropho v Australian Human Rights and Equal Opportunity Commission*, the ‘lower registers’ of definitions for unlawful conduct under s 18C, ‘in particular those of “offend” and “insult”’, ‘seem a long way removed from the mischief to which Art 4 of the [International Convention on the Elimination of All Forms of Racial Discrimination (‘CERD’)] is directed’ (emphases added).<sup>26</sup>

## 5. Role and Operation of the s 18D Exemptions

5.1. It would be highly erroneous to consider any of the limitations on freedom of speech in s 18C, without reading them together with the broad exemptions listed in s 18D. It is unfortunate that much commentary on s18C does ignore these important exemptions.

5.2. s 18D of the *Racial Discrimination Act 1975* provides a crucial limitation on the operation of Part IIA. It provides an exemption to s 18C for acts done ‘**reasonably and in good faith**’, for any ‘**genuine** academic, artistic or scientific purpose or any other **genuine purpose** in the **public interest**’, as well as making ‘**fair and accurate** report’ or ‘comment’ on matters of public interest (emphases added).<sup>27</sup>

5.3. NSWCCCL submits that s 18D provides an important and reasonable safeguard for free speech by permitting fair comment and reasonable acts with genuine purposes in the public interest. ss. 18C and 18D, when read together, place reasonable limits on freedom of speech to provide the necessary protection permitted under human rights law for the rights of minority groups against racist abuse.<sup>28</sup>

5.4. To expand the operation of s 18D beyond its already broad criteria (that is, to permit speech made not in good faith, not reasonably nor fairly, or without any genuine purpose in the public interest) would risk permitting speech that would seriously and unreasonably compromise the public interest in protecting fundamental values – particularly those of tolerance and respect for the equal worth and dignity of every individual – that are absolutely essential for a unified and cohesive multicultural society.

## 6. Incitement of Racial Hatred or Hostility

6.1. By international standards, s 18C does contain a comparatively broader proscription on racial vilification than similar provisions in other jurisdictions. Legislation in New Zealand

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<sup>25</sup> Ronald Sackville AO QC, ‘Anti-Semitism, Hate Speech and Pt IIA of the Racial Discrimination Act’ (2016) 90 *Alternative Law Journal* 631, 641.

<sup>26</sup> *Bropho v Australian Human Rights and Equal Opportunity Commission* [2004] FCAFC 16, [67]-[68]; see also similar comments on the word ‘insulting’ in Queensland legislation in *Coleman v Power* (2004) 220 CLR 1, [242].

<sup>27</sup> *Racial Discrimination Act 1975* (Cth) s 18D(c).

<sup>28</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(3) (‘ICCPR’).



and the United Kingdom uses the more limiting language of ‘threatening, abusive or insulting’, *and* likely to (or intended to, in the UK) incite racial hatred or hostility.<sup>29</sup> Article 20(2) of the ICCPR and Article 4 of the CERD also refer specifically to conduct which constitutes incitement to discrimination. Unlike the New Zealand and United Kingdom legislation, this element is absent in s 18C’s terms. However, NSWCCCL submits this does not compromise Australia’s ability to uphold its human rights obligations for the reasons that follow.

6.2. The Australian Government has made a reservation to Article 20(2) of the ICCPR and declaration on Article 4 of the CERD. As discussed in [3.2], Part IIA of the RDA can be seen to conform with the rationale behind the Australian Government’s reservation to Article 20. The Government has declared in relation to Article 4 of the CERD that,

*‘...Australia is not at present in a position specifically to treat as offences all the matters covered by Article 4(a) of the Convention. **Acts of the kind there mentioned are punishable only to the extent provided by the existing law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts.** It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of Article 4(a).’<sup>30</sup> (emphases added)*

6.3. Six Australian states and territories (NSW, Victoria, Queensland, South Australia, Western Australia and Australian Capital Territory) criminalise serious racial vilification inciting hatred,<sup>31</sup> more closely following the provisions of Article 4(a). Per s 18F of the RDA, Part IIA does **not** affect the operation of those laws. That is, s 18C would not preclude prosecution under state legislation on the basis of incitement of racial hatred or hostility specifically. Furthermore, the court’s interpretation of s 18C (reflected especially in Justice French’s comments in *Bropho*; see [4.5]) have ensured that the RDA still operates in accordance with Article 4(a) and the ‘mischief’ it intends to prohibit.

6.4. NSWCCCL submits this complementary framework fits well within and strengthens Australia’s enforcement of its human rights obligations in a way that, in so doing, does not unreasonably nor inappropriately infringe on freedom of speech.

## 7. Part IIA of the RDA

7.1. NSWCCCL proposes the following recommendations for reform of Part IIA of the RDA. The recommendations are **not** designed to weaken necessary protections against racial vilification in Australia, **nor** to protect those who engage in hate speech. Instead, they are designed to clarify the terms of s 18C in accordance with its interpretation and application by the courts with reference to international human rights law. This includes the nature, gravity and impact of unlawful conduct under s 18C, and the approach that should be adopted in its application.

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<sup>29</sup> *Human Rights Act 1993* (NZ) s 61; *Public Order Act 1986* (UK) s 18(1).

<sup>30</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 1975 ATS 40 (entered into force 4 January 1969).

<sup>31</sup> See e.g. *Anti-Discrimination Act 1977* (NSW) ss. 20C, 20D; *Racial and Religious Tolerance Act 2001* (Vic) s 24; *Anti-Discrimination Act 1991* (Qld) s 131A; *Racial Vilification Act 1996* (SA) s 4; *Criminal Code* (WA) ss 77-80D; *Discrimination Act 1991* (ACT) s 67A.

- 7.2. Firstly, NSWCCCL recommends amending s 18C(1)(a) by repealing the words ‘to offend’, and possibly to ‘insult’, and replacing them with conduct of a more demanding standard. Specifically, ‘vilify’ could be used as a substitute for ‘offend’ and/or ‘insult’. To vilify is to defame or to traduce, and it incorporates the notion of inciting hatred or contempt. It would also coincide with both the original intention and the public purposes the RDA.<sup>32</sup> Professor Gillian Triggs, President of the Australian Human Rights Commission, has recently referred to the prospect of replacement with ‘vilify’ as a ‘very useful thing to do’, as ‘there’s always ambiguity about what you mean by offending and insulting.’<sup>33</sup>
- 7.3. NSWCCCL recommends retention of a contextual, objective test, as currently adopted for s 18C, if vilification is introduced into its statutory terms. This might allow the court to take account of, for example, the social standing that the vilified group occupies, any history of racial vilification of that group, and the group’s relationships to the community. It may also avoid too excessive a focus on third party responses to the conduct, which as state-based legislation has demonstrated,<sup>34</sup> may be difficult for a complainant to prove.
- 7.4. NSWCCCL recommends the retention of s 18D with no further amendments.
- 7.5. NSWCCCL more broadly recommends that the Government provides greater support for increased social and educational initiatives to prevent racial vilification from occurring in the first place. More widely disseminated community legal education about Part IIA would help send a stronger message about impermissible conduct that may also relieve the Commission in its complaints-handling process. It would also help redress the current misperceptions amongst politicians, community and media about the operation of ss. 18C and 18D which have at times misguided public debate about Part IIA’s nature and effect.

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<sup>32</sup> See e.g. Bromberg J in *Eatock v Bolt* [2011] FCA 1103, [263]: ‘s 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...’

<sup>33</sup> Jane Norman, *s 18C: Malcolm Turnbull Announces Inquiry into Racial Discrimination Act* (8 November 2016) ABC News <<http://www.abc.net.au/news/2016-11-08/malcolm-turnbull-announces-racial-discrimination-act-inquiry/8004640>>

<sup>34</sup> See e.g. Nicholas Cowdery AM QC ‘Review of Law of Vilification: Criminal Aspects’ paper given to Roundtable on *Hate Crime and Vilification Law: Developments and directions* Law School, University of Sydney 28 August 2009, Chesterman Freedom of Speech in Australian Law pp 204ff; Ronald Sackville AO QC, ‘Anti-Semitism, Hate Speech and Pt IIA of the Racial Discrimination Act’ (2016) 90 *Alternative Law Journal* 631, 636.

## 8. Complaints-handling by the Australian Human Rights Commission

*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;*

*(ii) complaints which have no reasonable prospect of ultimate success....*

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

8.1. NSWCCCL does not have recent direct experience with all operational aspects of the Commission's processes for complaints handling and has no inside knowledge of the handling of the two recent high profile cases. It does have a long engagement with the area of race discrimination at the state and federal level, is a close observer of the Commission's work in this and other human rights areas and has strong relationships with numbers of relevant professional and community bodies with direct experience. NSWCCCL will therefore confine its comments to areas in which we have confidence that we have sufficient relevant knowledge.

8.2. Overall NSWCCCL is not aware of any operational failings that would necessitate significant changes to the Commission's complaint handling procedures. Based on our perceptions of its operations and outcomes we have long advocated the Commission's processes as an exemplar for other relevant areas of law. We would of course support any constructive and robustly evidence-based proposals which would strengthen the Commission's procedures and/or resources to improve its effectiveness in achieving the Act's objectives.

8.3. NSWCCCL strongly supports the Commission's conciliation role and the availability of conciliation based remedies as an appropriate and effective complaints handling process under the RDA. The procedure has the benefit of reducing racial vilification through education, mutual understanding and mediation, in a way that alleviates cost and inconvenience to all parties by avoiding litigation in court. Conciliation may involve assisting the perpetrator to understand how their words or conduct cause harm not just directly to the direct victim/s, but more broadly by undermining public support for the principles of tolerance, respect and equality our multicultural society prides itself on.

8.4. Most importantly available information over the life of the Commission appears to validate the high level of success of its complaint-handling processes:

*'Of complaints where conciliation was attempted, **76% were successfully resolved in 2015-16.***

***Only 3% of complaints finalised by the Commission were lodged in court.** For example, of the over 80 complaints finalised under the racial hatred provisions of the Racial Discrimination Act last year, only one proceeded to court at the initiation of the complainant.*

*In the 2015-16 reporting year the average time it took the Commission to finalise a complaint was 3.8 months. In that same reporting year, **94% of surveyed parties were satisfied with the Commission's service.***<sup>35</sup> (emphases added)

- 8.5. The additional option for the complainant to bring an unresolved matter before the Court is an essential avenue in the interests of the rule of law and the right of every individual to a fair hearing before a Court.
- 8.6. Importantly, the Commission's complaint-handling processes are distinct from applications to the Court arising from the same facts. Conciliation deals with unlawful conduct specifically through education and mediation between the parties. This does **not** mean the Commission's role is to facilitate or bring 'successful' proceedings for complainants before a Court.
- 8.7. NSWCCCL emphasises this point because this misperception has featured in public responses to the case of *Prior v Queensland University of Technology & Ors (No. 2)* [2016] FCCA 2853 ('*Prior*'). For example, Prime Minister Malcolm Turnbull suggested in relation to *Prior* that the Commission had 'harm[ed] its credibility by bringing the case against the QUT students',<sup>36</sup> when the proceedings were not initiated by the Commission in the first place.
- 8.8. In terms of the relationship between (2)(a)(ii) and (2)(f) of the terms of reference, NSWCCCL submits that the Commission powers when dealing with trivial or vexatious complaints are appropriate. The treatment of such complaints (as well as those that are 'misconceived or lacking in substance') are covered in ss. 20(2)(c)(ii) and 46PH(1)(c) of the HRC Act. These sections respectively allow the Commission to decide not to inquire into a complaint, or the President to terminate a complaint.
- 8.9. It is difficult to envisage a situation where the Commission (as opposed to a complainant or their legal practitioner) could reasonably be at fault for an application by a party to the court based on a claim under s 18C that has no reasonable prospects of success, if that same complaint was earlier dismissed or terminated by the Commission in the proper exercise of its powers. The *Prior* case illustrates this point. The Commission can hardly be blamed for the ultimate finding that *Prior's* claim lacked reasonable prospects of success, especially given no reference was made to the Commission's complaint-handling process in the reasons for the judgment; the Commission's earlier termination of *Prior's* complaint;<sup>37</sup> and, again, the fact that the proceedings were not brought by the Commission, but by *Prior* herself (with legal representation).
- 8.10. NSWCCCL submits that the avenues available to the Commission for the treatment of trivial or vexatious complaints, or complaints lacking in substance, constitute appropriate

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<sup>35</sup> Australian Human Rights Commission, *Racial Discrimination Complaints* (7 November 2016) <<https://www.humanrights.gov.au/news/stories/racial-discrimination-complaints>>

<sup>36</sup> Fergus Hunter, *Malcolm Turnbull says Human Rights Commission has Damaged its Reputation over s 18C and Must Reform* (7 November 2016) Sydney Morning Herald <<http://www.smh.com.au/federal-politics/political-news/malcolm-turnbull-says-human-rights-commission-has-damaged-its-reputation-over-18c-and-must-reform-20161106-gsjc2i.html>>

<sup>37</sup> Australian Human Rights Commission, 'Racial Discrimination Complaints' (Media Release, 7 November 2016) <<https://www.humanrights.gov.au/news/media-releases/racial-discrimination-complaints>>

treatment of such complaints, and are not in need of reform. Reform to s 18C along the lines that we propose by providing clearer criteria, is likely to assist the Commission in dealing effectively and appropriately with trivial and vexatious complaints at an earlier stage.

- 8.11. As for the remaining points in the second term of reference, NSWCCCL submits that the current legislative framework should sufficiently ensure that:
- (a) persons who are the subject of complaints are afforded natural justice;
  - (b) complaints are dealt with in an open and transparent manner;
  - (c) complaints are dealt with without unreasonable delay; and
  - (d) 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.

## 9. 'Soliciting' Complaints

*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.*

- 9.1. The loaded wording of this term of reference appears to be based on dubious presumptions. One example is the Submission of NSWCCCL on The Exposure Draft Racial Discrimination Act 1975 (Freedom Of Speech Repeal Of S.18c) Bill 2014, 1 May 2014, - as though it is an established, routine occurrence by the Commission, or in society more broadly. It also appears to implicitly presume that freedom of speech is a superior right to protection from racist hate speech with which we would not agree. It is appropriate for commissioners and others to refer persons who have feel they have experienced race vilification - or others who are concerned about instances of race vilification – to the Commission to seek a remedy.
- 9.2. Insofar as the Commission's function is to promote human rights in public discourse and coordinate educational initiatives to this end, encouraging those who believe their human rights have been infringed to apply for conciliation is entirely within the Commission's powers and functions. This can hardly be seen as conducive to limiting or adversely affecting anyone else's right to free speech. An individual's decision to then lodge a complaint cannot be seen as anything other than something they are lawfully entitled to do under s 18C.
- 9.3. It is also troubling that this term of reference extends beyond the Commission and its officers, but also to third parties. This appears to extend to any member of the general public. To restrict individuals' ability to encourage and facilitate complaints (however broadly the phrase is construed) not only seems unnecessary, but would have a highly adverse impact on their freedom of speech in a way that cannot reasonably be justified in a human rights framework. Of particular concern is the way any potential limitations would detrimentally impinge on lawyers' duty to their client. The inclusion of this extension is therefore perplexing and concerning for the protection of freedom of speech in Australia.

## 10. SUMMARY OF NSWCCCL RECOMMENDATIONS

**Rec 1:** NSWCCCL considers the current Racial Discrimination Act 1975 is appropriately balanced and demonstrably effective. We are not aware of any contexts in which the

operation of the Act, including s18C, has led to an unreasonable restriction on freedom of speech.

**Rec 2:** NSWCCCL considers there are no grounds justifying a weakening of the Part 11A of the RDA.

**Re 3:** NSWCCCL supports an amendment to clarify the meaning of s18C consistent with its interpretation in case law. Specifically, NSWCCCL recommends the repeal of 'to offend' and 'to insult' and their replacement with 'to vilify' as normally defined.

**Rec 4:** NSWCCCL considers s18D provides important and reasonable safeguard for free speech and does not support any amendment to the existing exemptions.

**Rec 5:** NSWCCCL considers that ss18C and 18D together, place reasonable limits on freedom of speech to provide the necessary protection permitted under human rights law for the rights of minority groups against racist abuse.

**Rec 6:** NSWCCCL is not aware of any operational failings that would necessitate significant changes to the Commission's complaint handling procedures. NSWCCCL strongly supports the Commission's conciliation role and considers its procedures to be an exemplar for other relevant areas of complaint resolution.

**Rec 7:** NSWCCCL, on the basis of available data, considers the Commission to be highly successful in the appropriate management of trivial or vexatious complaints and is not aware of any reason for reform of this process.

**Rec 8:** NSWCCCL does not accept the apparent presumption underlying TOR 3 which implies that 'soliciting' of complaints is an established, routine occurrence by the Commission, or in society more broadly. NSWCCCL considers encouraging those who believe their human rights have been infringed to apply for remedy by conciliation is appropriately within the Commission's powers and functions.

**Rec 9:** NSWCCCL considers nothing in Chapter 4 'Freedom of Speech' of the Report, including its recommendations, to be inconsistent with its recommendations in this submission.

**Rec 10:** NSWCCCL more broadly recommends that the Government provides greater support for increased social and educational initiatives to prevent racial vilification from occurring in the first place.

## 11. Conclusion

The submission was largely written by Chiara Angeloni a law intern with the NSWCCCL with assistance from Dr Martin Bibby NSWCCCL Committee member and Dr Lesley Lynch V-P NSWCCCL. NSWCCCL hopes this submission is of assistance to the Committee in its consideration of this extremely

important and sensitive matter. We are available for further discussion on any aspect of this submission.

Yours sincerely

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