THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Submission to the Parliamentary Joint Committee on Human Rights

27 February 2017

Inquiry into Freedom of Speech in Australia

Committee Secretary
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600
18Cinquiry@aph.gov.au

Contact: **Emily Ryan**
President, NSW Young Lawyers

Nicole D'Souza (Coordinator of this Submission)
Chair, NSW Young Lawyers Human Rights Committee

Suzanne Martinez
Chair, NSW Young Lawyers Public Law and Government Committee

Contributors: Maeve Curry, Samudhya Javasekera, Kamani Krishnan, Aleesha Nathan, Quyen Nguyen, Jaskiran Rekhraj and Kah-Mun Wong

THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

The NSW Young Lawyers Human Rights and Public Law and Government Committees (**Committees**) make the following submission in response to the Parliamentary Joint Committee on Human Rights' Inquiry into Freedom of Speech in Australia (**Inquiry**).

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Human Rights Committee

The Human Rights Committee (**HRC**) is comprised of a group of over 1,200 members interested in human rights law, drawn from lawyers working in academia, for government, private and the NGO sectors and other areas of practice that intersect with human rights law, as well as barristers and law students. The objectives of the HRC are to raise awareness about human rights issues and provide education to the legal profession and wider community about human rights. Members of the HRC share a commitment to effectively promoting and protecting human rights. The HRC takes a keen interest in providing comment and feedback on legal and policy issues that relate to human rights law and the development and support of it.

The Public Law and Government Committee

The Public Law and Government Committee (**PLGC**) is comprised of a group of over 850 members, which includes a diverse range of practising lawyers from the public and private sectors, barristers and students. The PLGC aims to foster a social and educational environment for those who wish to keep abreast of developments, develop their skills, and gain awareness of potential career paths in these areas. The PLGC's areas of focus include, but are not limited to, administrative law, constitutional law and the work of government lawyers.

Summary of Recommendations

The Committees make the following recommendations:

1. That no changes be made to sections 18C or 18D of the *Racial Discrimination Act 1977* (Cth) (**RDA**), but should changes be made, that these be in line with the interpretation of these provisions by the Courts.
2. That consideration be given to establishing timeframes for the Australian Human Rights Commission (**Commission**) to notify participants of the steps in the complaints process.

3. That prior to the imposition of any timeframes, a proper assessment of the impact on the Commission's resources and funding requirements be conducted.
4. That the Commission's informal conciliation processes be maintained.
5. That particular regard should be had to the recommendations for reform submitted by the Commission itself in its detailed submission to this inquiry.
6. That the Commission should not be tasked with the function of determining with finality that a matter has no ultimate prospects of success.
7. That the confidentiality of the Commission's conciliation processes be maintained.
8. That the vital education and advocacy functions that the Commission plays with respect to the promotion and protection of human rights standards in Australia be recognised and maintained.
9. That no limitations be placed on the Commission's ability to communicate freely with the Australian public about applicable human rights standards and the complaints mechanisms available to them where those standards may have been breached.
10. That a human rights instrument, which includes provisions concerning the freedom of expression in line with Article 19 of the *International Covenant on Civil and Political Rights*[1] (**ICCPR**), be introduced into Commonwealth legislation.

Consideration of the Recommendations of the Australian Law Reform Commission's Report on Traditional Rights and Freedoms

The Australian Law Reform Commission made a number of recommendations in its final report, Traditional Rights and Freedoms - Encroachments by Commonwealth Laws,[2] which give rise to a number of issues. However, given the deadline for making submissions to the Inquiry, the Committees have focused on those issues that are relevant to the terms of reference, notably sections 18C and 18D of the RDA. For ease of reference, a copy of the previous NSW Young Lawyers submission to the Australian Law Reform Commission inquiry is annexed to this submission. The position of the Committees on the matters before this Inquiry remain the same as in the previous submission to the Australian Law Reform Commission.

[1] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html [accessed 30 December 2016].
[2] Australian Law Reform Commission Report 129.

The Operation of Part IIA of the *Racial Discrimination Act 1975*

In respect of term of reference 1, the Committees submit as follows:

1. Both freedom of expression and the right to be free from racial discrimination are important human rights that Australia is obliged to protect under international law. These rights are currently restricted by existing laws. Insofar as they are competing rights, they should be appropriately balanced.

2. Whilst the ordinary meaning of the words 'offend' and 'insult' in s 18C of the RDA might indicate a lower threshold, Australian courts have interpreted these words, and s 18C more generally, in a way that requires that the relevant words or conduct to be of a serious nature. Further, the courts have found that s 18C applies only to 'profound and serious effects not to be likened to mere slights'[3] and that the words or conduct must be 'injurious to the public's interest in a socially cohesive society', not a mere personal hurt.[4] Coupled with the exemptions provided in s 18D, this approach strikes an appropriate balance between the two competing rights, consistent with article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (**ICERD**)[5] and article 19(3) of the ICCPR, and does not warrant reform.

3. The ongoing political debate and attempts to curtail the protection provided by s 18C of the RDA appear to have had a destabilising effect on the fabric of Australia's multicultural society.

4. In light of the above, and noting the significant role that the law plays in human rights education and standard-setting, the Committees are of the view that any change to ss 18C or 18D that can be perceived to curtail the existing protection against racial discrimination could have a real and negative impact on the understanding of what is acceptable conduct in Australian society.

Freedom of Speech in Australia

The right to freedom of speech is not absolute. There is no express protection of freedom of speech in a Commonwealth bill of rights or human rights charter.[6] Australian courts have recognised a limited right of political communication implied from the Constitution. Subject to the implied freedom, the common law of Australia can restrict free speech; for example, the criminal offences of incitement, conspiracy, obscenity and

[3] *Eatock v Bolt* (2011) 283 ALR 505 [263].
[4] Ibid.
[5] UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: http://www.refworld.org/docid/3ae6b3940.html [accessed 30 December 2016].
[6] Australia is the only common law jurisdiction in the world that does not have an entrenched human rights instrument, such as a constitutional bill of rights or enacted human rights legislation.

sedition restrict certain types of harmful speech. Modern offences that restrict speech or expression include urging violence and advocating terrorism as contained in the *Criminal Code Act 1995* (Cth).[7]

The Constitution does not entrench a personal right to freedom of speech. The High Court, however, has recognised that freedom of political communication is implied in the Constitution. Political communication includes 'expressive conduct' capable of communicating a political or government message to those who witness it.[8] The Court originally found that an implied freedom was derived from the notion of representative democracy.[9] However in *Lange v Australian Broadcasting Corporation*,[10] the Court stated that the text and structure of the *Constitution* provided a basis for the implied freedom. The Court held that ss 1, 7, 8, 13, 24, 25, 28, and 30 of the Constitution established systems of representative and responsible government by enabling the people to exercise a free and informed choice as electors.[11] In particular, the High Court found that the implied freedom did not confer personal rights on individuals; rather it precluded the curtailment of freedom of speech by the exercise of legislative or executive power by the Commonwealth.[12]

Subsequently, Commonwealth and State legislative constraints on speech have been challenged under the implied freedom of political communication. These have included criminal laws,[13] restrictions on public canvassing,[14] and electoral funding laws.[15]

Part IIA of the *Racial Discrimination Act 1975*

Part IIA of the RDA prohibits 'offensive behaviour based on racial hatred'.

Section 18C of the *Racial Discrimination Act 1975*

Section 18C(1) prescribes that:

> It is unlawful for a person to do an act, otherwise than in private, if:
>
> (a) the act is reasonably likely, in all the circumstances, 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 of all of the people in the group

---

[7] *Criminal Code Act 1995* (Cth), Schedule: The Criminal Code, ss 80.1AA; 80.2; 80.2A; 80.2B; and 80.2C.
[8] *Levy v Victoria* (1997) 189 CLR 579.
[9] *Nationwide News v Wills* (1992) 177 CLR 1, 72-3 (Deane and Toohey JJ); *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 168 (Deane and Toohey JJ); *Theophanous* (1994) 182 CLR 104, 123 (Mason CJ, Toohey and Gaudron JJ).
[10] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (**Lange**).
[11] *Lange* (1997) 189 CLR 520, 557, 570. See also *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 139 (Mason CJ); *Nationwide News v Wills* (1992) 177 CLR 1, 74 (Brennan J).
[12] **Lange**, 560.
[13] *Criminal Code 1995 (Cth)* s 471.12*; Monis v The Queen* (2013) 249 CLR 92.
[14] *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1.
[15] *Election Funding, Expenditure and Disclosures Act 1981 (NSW)* pt 6 div 4A*; McCloy v New South Wales* [2015] HCA 34.

Section 18C(2) stipulates that:

> an act is taken not to be done in private if it:
>
> (a) causes words, sounds, images or writing to be communicated to the public; or
>
> (b) is done in a public place; or
>
> (c) is done in the sight or hearing of people who are in a public place.

A 'public place':

> includes any place to which the public have access as of right or be invitation, whether express of implied and whether or not a charge is made for admission to the place.[16]

The Committees stand by the comments previously made on behalf of NSW Young Lawyers to the Australian Law Reform Commission's inquiry,[17] that:

> Section 18C of the RDA, as it currently stands, finely balances fair and accurate reporting and fair comment with discrimination protections. The "reasonably likely" test provided for in section 18C allows for an objective assessment to be made, and ensures that the threshold for racial vilification is appropriate. Section 18D of the RDA provides adequate safeguards to protect freedom of speech by imposing a list of exemptions for 'anything said or done reasonably and in good faith'. The Australian Courts have historically interpreted [ss] 18C and 18D in a fair and reasonable manner, and with the public interest in mind. For example, 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 s18C 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 … Conformably with what I regard as the intent of Part IIA, a consequence which threatens the protection of the public interest sought to be protected by Part IIA, is a necessary element of the conduct s18C is directed against. For the reasons that I have sought to explain, conduct which invades or harms the dignity of an individual or group, involves a public mischief in the context of an Act which seeks to promote social cohesion."

Justification for Section 18C

These provisions contained in Part IIA manifest an intention consistent with Australia's international obligations as a signatory to the ICERD. Part IIA of the RDA purports to eliminate *all* forms of racial discrimination, by targeting behaviour 'which affects not only the individual but the community as a whole'.[18] The Explanatory Memorandum to the *Racial Hatred Bill 1994* (Cth) (**Explanatory Memorandum**), which introduced s 18C, expressly references articles of the ICERD (articles 1, 2, 6 and 4).[19]

---

[16] *Racial Discrimination Act 1975*, s. 18C(3).
[17] The Law Society of New South Wales Young Lawyers: Human Rights Committee and Environment and Planning Law Committee, Submission to Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, 13 March 2015, 3; quoting Justice Bromberg in Eatock v Bolt [2011] FCA 1103.
[18] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 15 November 1994, 3336 – 3342 (Attorney General Lavarch); quoted *Toben v Jones* [2003] FCAFC 137, [131] (Carr J).
[19] Explanatory Memorandum, Racial Hatred Bill 1994 (Cth); quoted *Toben v Jones* [2003] FCAFC 137, [129] (Carr J).

Interpretation and Application of Section 18C

Section 18C of the RDA provides that it is unlawful to commit a public act that is reasonably likely to 'offend, insult, humiliate or intimidate' a person on account of their race. In *Creek v Cairns Post Pty Ltd*[20] at [16], Kiefel J, having considered the legislative history of Part IIA of the RDA, stated 'to "offend, insult, humiliate or intimidate" are profound and serious effects, not to be likened to mere slights.' Similarly, in *Bropho v Human Rights & Equal Opportunity Commission*[21] at [68], French J considered that the 'lower registers' of these words, particularly 'offend' and 'insult', seemed 'a long way removed from the mischief to which Article 4 of the [ICERD, and consequently, Part IIA of the RDA] was directed.' His Honour concluded, echoing Kiefel J, that s 18C was intended to deal with 'serious incidents only.'

It is possible to argue that 'offend' is a problematically low threshold. However, Australian courts have extensively considered the term 'offend, insult, humiliate and intimidate' and have concluded that they 'do not constitute a compendious phrase and should be separately considered and given their ordinary English meanings.'[22] Further, as will be outlined below, judicial consideration of the objects and purposes of the RDA have led to a fairly high threshold being incorporated within the test.

In *Jones v Scully*[23] at [106], Hely J, citing the Explanatory Memorandum (which stated that the Racial Hatred Bill was 'not intended to prohibit people from having and expressing ideas'), found that:

> the expression or dissemination of views contrary to those held by a section of the community or even by a majority of the community will not necessarily be offensive… even if the expression of those views is hurtful to those who hold a different opinion.

As noted above, the fairly consistent interpretation courts have afforded s 18C suggests that 'offending' or 'insulting' require more than subjectively hurting a person's feelings.

In considering the appropriate balance to be struck between one person's right to freedom of expression and another person's right to be free from racial discrimination, Professor Katherine Gelber and Professor Luke McNamara have commented that the Commonwealth model is sensitive to the perspective of victims who have experienced such harms. The 'reasonable' test in s 18C(1)(a) acknowledges that targeted victims are in a special position to:

> attest to the lived harms of their experiences: No member of the Australian racial majority – politicians, policymakers, opinion writers – can understand what it is to have one's life defined by one's difference … It is not for us to say that someone who actually – and, in their circumstances, reasonably – feels offence that they should not, or that it is to be borne with resignation. For almost

[20] (2001) 112 FCR 352.
[21] (2004) 135 FCR 105.
[22] Barker J in *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389 at [65]-[71]; referring to *McGlade v Lightfoot* (2002) 124 FCR 106 at [51]; *Jones v Scully* (2002) 120 FCR 243 at [102]; *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105 at [67].
[23] (2002) 120 FCR 243.

> 20 years, federal racial vilification law has been admirably respectful of the lived reality of racial difference.[24]

The Committees submit that rather than placing unreasonable restrictions upon freedom of speech, ss 18C and 18D reflect current attitudes of Australian society as to the levels of tolerable behaviour. Further, the Committees submit that these sections provide necessary mechanisms for protecting vulnerable members of the community from racism and racial vilification.

Proposed Amendments to Section 18C

It has been suggested that s 18C be reformed by removing the words 'offend' and 'insult' and replacing them with 'vilify', in support of a more 'defensible balance' between the freedom of speech and freedom from racial vilification.

The Committees consider that the proposed legislative amendment does not appear to markedly alter the threshold of unlawful conduct under s 18C. For instance, the Oxford English Dictionary defines 'insult' as 'to assail with offensively dishonouring or contemptuous speech or action; to treat with scornful abuse or offensive disrespect; to offer indignity to; to affront, outrage.' It defines 'vilify' as to 'speak or write about in an abusively disparaging manner.' On their ordinary meanings, it is not clear how vilify would differ from insult in this regard.

In 2014, when s 18C of the RDA was under public and political scrutiny, a poll conducted by the Sydney Morning Herald found that 88% of respondents considered it should be unlawful to 'offend, insult or humiliate someone based on their race or ethnicity'".[25] The Challenging Racism Project (a national research program on racism and anti-racism in Australia) found that 85.6% of respondents believed that something should be done to minimise or fight racism in Australia.[26]

Further, the available evidence suggests that Australians are being offended, insulted, humiliated and intimidated on the basis of their race. The Challenging Racism Project found that 84.4% of respondents agreed that there is racial prejudice in Australia,[27] and 27% had experienced being called names, or being similarly insulted because of their ethnic origin.[28] In 2016, the Scanlon Foundation's annual survey found that 20% of respondents had experienced discrimination in the previous 12 months because of their skin colour, ethnicity or religion (the highest level recorded by the Scanlon Foundation since it began annual

---

[24] 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) 38 *UNSW Law Journal* 488, 507.
[25] Chief Political Correspondent Mark Kenny, *Race Hate: Voters Tell Brandis To Back Off* (2016) The Sydney Morning Herald <http://www.smh.com.au/federal-politics/political-news/race-hate-voters-tell-brandis-to-back-off-20140413-zqubv.html>.
[26] Challenging Racism Project, *Challenging Racism: The Anti-Racism Project, National Level Findings,* Western Sydney University <https://www.westernsydney.edu.au/__data/assets/pdf_file/0007/173635/NationalLevelFindingsV1.pdf> at 4.
[27] Ibid at 2.
[28] Ibid at 3.

surveys in 2007).[29] Submissions made by community legal centres during 2014 consultations regarding amendments to s 18C provided distinct examples of clients who had been subject to racism that were seeking legal redress.[30]

The Committees further note that the RDA is being used by those who experience racism as a mechanism to seek redress. In the 2015-2016 year, the Australian Human Rights Commission received 743 complaints under the RDA. Of those complaints, 77 concerned racial hatred.[31]

Finally, the Committees express concern about the message that any action to curtail the protections under s 18C would send to the community about acceptable standards of behaviour towards fellow Australians. Altering the level of protection afforded to Australians from different ethnic or racial backgrounds could suggest that discrimination against them is tolerable. It could dismiss and devalue the experiences of the many Australians who are subjected to offensive behaviour because of their race, colour, or ethnic origin.

Section 18D of the *Racial Discrimination Act*

It is significant to recognise that s 18C is subject to the exemptions provided in s 18D. Section 18D provides:

> Section 18C does not render unlawful anything said or done reasonably and in good faith:
>
> (a) in the performance, exhibition or distribution of an artistic work; or
>
> (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
>
> (c) in making or publishing:
>
> (i) a fair and accurate report of any event or matter of public interest; or
>
> (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

Section 18D of the RDA reflects the values of the freedoms to make fair comment on, or fair reports of, an event or matter of public interest, and to make publications of a potentially wide nature. However, it does so in a qualified manner. The critical qualification to the exceptions created by s 18D is that any act that would otherwise be rendered unlawful by s 18C must be said or done reasonably and in good faith.

---

[29] Professor Andrew Markus, *Mapping Social Cohesion – The Scanlon Foundation Surveys 2016* <http://scanlonfoundation.org.au/research/surveys/> at 25.
[30] Redfern Legal Centre, Submission to the Attorney-General's Department, *Amendments to the Racial Discrimination Act 1975,* April 2014; Kingsford Legal Centre, Submission to the Attorney-General's Department, *Amendments to the Racial Discrimination Act 1975,* 30 April 2014.
[31] Australian Human Rights Commission, *2015-2016 Compliant Statistics,* <https://www.humanrights.gov.au/sites/default/files/AHRC%202015%20-%202016%20Complaint%20Statistics.pdf> at 10.

In *Jones v Scully*, Jones sought to enforce the determination of Commissioner Cavanough [32] The respondent argued that Part IIA of the RDA was constitutionally invalid because it infringed the implied freedom of political communication. Justice Hely held that Part IIA was constitutionally valid, finding that Part IIA of the RDA was reasonably appropriate and adapted to serve the legitimate end of eliminating racial discrimination. Significantly, his Honour found that the exemptions available under s 18D provide an appropriate balance between the legitimate end of eliminating racial discrimination and the protection of freedom of communication about government and political matters required by the *Constitution*.[33]

In *Bropho v Human Rights & Equal Opportunity Commission*, the Full Court of the Federal Court considered whether the exemptions to racial hatred as contained in s 18D should be broadly or narrowly construed. In that matter, the Nyungah Circle of Elders claimed that a cartoon published in a Western Australian newspaper breached s 18C as it was offensive to Aboriginal people. At first instance, Commissioner Innes found that the cartoon fell within the exemption for artistic works in s 18D(a).[34] This decision was upheld on review by Nicholson J,[35] who held that s 18D should be broadly interpreted.[36]On appeal, French J agreed with the broad approach to the exemptions provided by s 18D. His Honour reasoned that s 18C was, in fact, an exception to the general principle that people should enjoy freedom of speech and expression. Section 18D was therefore 'exemption upon exception'.[37] French J stated:

> Against that background s 18D may be seen as defining the limits of the proscription in s 18C and not as a free speech exception to it. It is appropriate therefore that s 18D be construed broadly rather than narrowly.[38]

French J cited with approval the statement of Kiefel J in *Creek v Cairns Post Pty Ltd* (quoted above) that conduct must have 'profound and serious effects not to be likened to mere slights' to be caught by the prohibition in s 18C. French J said in relation to the proper construction of s 18C(1)(a):

> The criteria for determining the outer limits of the conduct caught by Pt IIA and the words 'offend, insult, humiliate or intimidate' must be judged according to their ordinary meaning, in their context, acknowledging their somewhat elastic content and having regard to the objectives of the legislation which are to be derived from its terms and from extraneous material including the second reading speech and the explanatory memorandum. As a general principle freedom of expression is not limited to speech or expression which is polite or inoffensive. The European Court of Human Rights observed in the *Handyside* case that Art 19 of the ICCPR applies not only to information or ideas that are favourably received or regarded as inoffensive but, also subject to para 2:

---

[32] See *Hobart Hebrew Congregation v Scully* [2000] HREOCA 38.
[33] Ibid, 306 [240].
[34] *Corunna v West Australian Newspapers Ltd* [2001] HREOCA 1.
[35] *Bropho v Human Rights & Equal Opportunity Commission* [2002] FCA 1510.
[36] Ibid, [31]. See also the discussion of this issue in *Bryl v Nowra* [1999] HREOCA 11.
[37] (2004) 135 FCR 105, 125 [72].
[38] Ibid, 125 [73]. The other members of the court, Lee and Carr JJ, did not express any view on this issue.

> "... those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broad mindedness without which there is no 'democratic society".[39]

French J also stated, in obiter:

> The act must be "reasonably likely" to have the prohibited effect. Judicial decisions on s 18C(1) do not appear to have determined whether the relevant likelihood is a greater than even probability or a finite probability in the sense of a 'real chance'. It might be thought that the threshold of unlawfulness should be defined by reference to the balance of probabilities rather than a lesser likelihood having regard to [the] character of s 18C as an encroachment upon freedom of speech and expression.[40]

Courts have approached 'reasonableness' and 'good faith' as separate elements of the exemption in s 18D. The question of whether an act is done 'reasonably' will be answered by reference to the objective circumstances of the act, whereas 'good faith' requires a consideration of the intention of the respondent. Both French and Lee JJ held that the expression 'reasonably and in good faith' required a subjective and objective test.[41] Carr J expressed his agreement.[42] On the objective test of 'reasonableness', French J noted the relevance of proportionality:

> There are elements of rationality and proportionality in the relevant definitions of reasonably. A thing is done 'reasonably' in one of the protected activities in par (a), (b) and (c) of s 18D if it bears a rational relationship to that activity and is not disproportionate to what is necessary to carry it out. It imports an objective judgment. In this context that means a judgment independent of that which the actor thinks is reasonable. It does allow the possibility that there may be more than one way of doing things 'reasonably'. The judgment required in applying the section, is whether the thing done was done 'reasonably' not whether it could have been done more reasonably or in a different way more acceptable to the court. The judgment will necessarily be informed by the normative elements of ss 18C and 18D and a recognition of the two competing values that are protected by those sections.[43]

On the question of 'good faith', French J held that s 18D:

> requires a recognition that the law condemns racial vilification of the defined kind but protects freedom of speech and expression in the areas defined in pars (a), (b) and (c) of the section. The good faith exercise of that freedom will, so far as practicable, seek to be faithful to the norms implicit in its protection and to the negative obligations implied by s 18C. It will honestly and conscientiously endeavour to have regard to and minimise the harm it will, by definition, inflict. It will not use those freedoms as a 'cover'

---

[39] At [69], citing *Handyside Case* European Court of Human Rights (1976 Ser A No 24) [1976] ECHR 5.
[40] Ibid, 124 [65].
[41] Ibid, 132-133 [96]-[102] (French J), 142 [141] (Lee J).
[42] Ibid, 149 [178]. Special leave to appeal against the decision of the Full Court of the Federal Court was refused by the High Court: *Bropho v Human Rights & Equal Opportunity Commission* [2005] HCATrans 9.
[43] Ibid, 128 [79].

> to offend, insult, humiliate or intimidate people by reason of their race or colour or ethnic or national origin.[44]

Response to term of reference 1

The Committees recognise the importance of balancing freedom of speech and the protections against racial hatred, both of which are guaranteed by international law. The Committees consider that ss 18C and 18D do not impose unreasonable restrictions upon freedom of speech in Australia.

As noted above, the Federal Government has not expressly legislated to protect freedom of speech. The limited protection of freedom of speech in Australia is largely provided by the implied freedom of political communication.[45] The Commonwealth, however, has sought to implement article 20, namely that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law' in ss 18C and 18D. Australian courts have found that the RDA fulfils Australia's international obligations and does not come at the expense of freedom of communication.

The Australian Human Rights Commission's Procedures for Handling Complaints

Term of Reference 2

In respect of term of reference 2, the Committees submit as follows:

1. Established timeframes for the notification of steps in the complaints process can contribute to transparency and accountability and contribute to the perception of the provision of natural justice.
2. Timeframes should not be imposed without a proper assessment of the impact on the Commission's resources and funding requirements.
3. The Commission's conciliation processes are informal, cost-effective and have been very successful in providing a mechanism for the address and redress of complaints concerning discrimination within the Commission's purview.
4. Particular regard should be had to the recommendations for reform submitted by the Commission itself in its detailed submission to this inquiry.
5. The confidentiality of conciliation processes is a fundamental aspect of successful alternative dispute resolution and mediation processes and should not be eroded.

---

[44] Ibid, 131-132 [95]-[96] (French J).
[45] *Lange v Australian Broadcasting Corporation* [1997] HCA 25, *Nationwide News Pty Ltd v Wills* [1992] HCA 46, *Australian Capital Television Pty Ltd v the Commonwealth* [1992] HCA 45.

6. As recommended by the Commission, a broader review into racial vilification laws so as to seek to achieve greater harmonisation between such law as well as racial discrimination laws across the Commonwealth, States and Territories' laws ought to be conducted.

Response to Term of Reference 2

The Committees note that the Senate Standing Committees on Legal and Constitutional Affairs have recently released a complaints process flowchart entitled 'Unlawful discrimination complaints process' tabled by Professor Gillian Triggs, President of the Australian Human Rights Commission.

Responses to be provided by members of the Australian Human Rights Commission to questions asked during the 2016-2017 Supplementary Budget Estimates hearing on 18 October 2016 are yet to be released.[46] The questions to officers of the Commission included:

1. How many complaints, under s 18C, are resolved or terminated during initial investigation; and
2. How many complaints, under s 18C, are dismissed by the Commission.

The Committees submit that the answers to those questions are relevant to the consideration of the issues raised by this term of reference.

The Committees consider that in assessing the success or otherwise of the current complaints-handling procedures and framework of the Commission under the RDA, it would be useful to consider the processes adopted under comparable state legislation, such as the *Anti-Discrimination Act 1977* (NSW) (**ADA**).

NSW legislation on race discrimination: a brief comparative analysis

The ADA renders unlawful racial discrimination in certain circumstances and promotes equality of opportunity between all persons. The ADA defines two separate forms of racial discrimination – direct race discrimination, the most commonly litigated form, which prohibits less favourable treatment of people because of their race; and indirect discrimination, which prohibits unreasonable conditions or requirements that have a unfairly or disproportionate negative effect upon those of a particular racial group. The ADA provides civil and criminal provisions that require racial vilification be a "public act" which is defined as broadly including communications to the public, any conduct observable by the public or any dissemination of any matter to the public knowing that matter expresses racial vilification. Civil provisions within the ADA relating to racial vilification provide no defence or exemptions to partially, or wholly, exonerate a respondent accused of racial vilification. Importantly, under the civil provisions it is also not necessary to prove intent or a threat of harm to person, property or an incitement to another to cause harm to person or property in order to

[46] See: Senate Standing Committees on Legal and Constitutional Affairs, 'Index of Questions on Notice' <http://www.aph.gov.au/~/media/Committees/legcon_ctte/estimates/sup_1617/AGD/AGD_Index_SBE_2016_17.pdf> (30 January 2017).

successfully prosecute a respondent under the ADA. Unlike the RDA, the ADA contains criminal provisions providing safeguards against the act of inciting hatred, contempt or severe ridicule towards a person or group of persons on the grounds of race if such incitement is done by threatening physical harm towards people or their property, or inciting others to threaten such harm. Nevertheless, there is yet to be a criminal prosecution to date, under the ADA, on the grounds of racial vilification.

Complaints Handling Procedures: NSW Anti-Discrimination Board

The ADA establishes the Anti-Discrimination Board (**ADB**) as the statutory body with the mandate to handle discrimination complaints. Individuals or representative bodies may lodge a complaint of racial vilification with the President of the ADB. The President of the ADB does not have the power to investigate an incident of racial vilification unless a formal complaint is lodged. This is similar to the powers of the Commission under s 46P of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**).

As a first 'point of contact', the ADB provides an enquiry service to assist people who believe they have been discriminated against or harassed (the **Enquiry Officers**). The Enquiry Officers will advise the complainant whether the problem appears to be covered by the ADA. If the events outlined in the complaint are clearly not covered by the ADA, the complaint may be declined at the point of enquiry. This may also happen where the events are raised with the ADB outside the 12-month statutory limitation period on initiating proceedings.

If the complaint is found to be within the jurisdiction of the ADA, it can be formally lodged. The ADB handles all complaints impartially, confidentially and free of charge, without the need for the complainant to incur the expense of legal services. A complaint can be made on behalf of an individual, a group, or in certain circumstances, through a representative, guardian or agent.

Complaints that are accepted are then investigated more thoroughly to see if they may involve a breach of anti-discrimination law. Some complaints are resolved during this process of initial investigation. If the available evidence indicates a contravention of the racial vilification provisions, the President must investigate the complaint. Of the complaints that are within the ADBs jurisdiction, a significant number of complaints are declined as lacking substance.

If appropriate, the President is required to attempt to conciliate the complaint. If resolution cannot be reached, the President of the ADB may refer the matter to the Administrative and Equal Opportunity Division of NSW Civil and Administrative Tribunal (**NCAT**).

Complaints of racial vilification lodged for investigation under the ADA, that may enliven the criminal provisions, are filtered through the following ADB complaint-handling process:

- Lodgement of complaint with the ADB; then
- A 28 day time period for the President to determine whether to refer the complaint to the Attorney General; then

- If the complaint is referred to the Attorney General, then the decision is made whether to refer the complaint to the Director of Public Prosecutions.

Comparison of complaints handling process

A snapshot comparison of the complaint handling process of both the Commission and the ADB indicates that both authorities handle discrimination complaints in a similar way. Discrimination jurisdictions in Australia emphasise informal dispute resolution and their complaint-handling procedures focus on the processing of complaints through confidential mechanisms of 'investigation' and 'conciliation' rather than adjudication at the start of the process.

However, the Commission and the ADB diverge where conciliation is unsuccessful. The differences between the Commission and ADB complaints-handling system include the following:

- Complaints that are made to the ADB but are not resolved can be referred to NCAT whereas complaints made to, and terminated by, the Commission have to be commenced in the Federal Court or Federal Circuit Court.
- Federal courts can make different orders to those of NCAT; for example, the maximum amount of compensation NCAT can award a complainant is $100,000; there are no maximum amounts at the federal level.
- If the complainant is successful in the federal courts, the respondent will likely be required to pay the complainant's legal costs. It is unusual for costs to be awarded in NCAT, as the it must be satisfied there are 'special circumstances' warranting costs.[47]

Soliciting Complaints to the Australian Human Rights Commission

Term of Reference 3

In respect of term of reference 3, the Committees submit:

1. Are not aware of any solicitation of complaints by the Commission.
2. Recognise the important education and advocacy functions that the Commission plays with respect to the promotion and protection of human rights standards in Australia.
3. Recognise the power imbalances that can exist in society which can lead to under-reporting of matters such as racial discrimination.

[47] The Tribunal must be satisfied there are special circumstances warranting the award of costs: s 60, *Civil and Administrative Tribunal Act 2013*.

4. Recommend against limiting the Commission's ability to communicate reasonably with the Australian public about applicable human rights standards and the complaints mechanisms available to them where certain standards may have been breached.

Response to Term of Reference 3

The Committees are not aware of any solicitation of complaints by the Commission and cannot comment on this aspect of this term of reference.

The Committees note, however, that the Commission has an important advocacy function under s 11(g) of the AHRC Act 'to promote an understanding and acceptance, and the public discussion, of human rights in Australia.'[48] The Commission also has specific functions under the RDA, the *Age Discrimination Act 2004* and the *Sex Discrimination Act 1984* 'to promote an understanding and acceptance of, and compliance with' the relevant Acts.[49]

The Commission is also guided by a specific duty in s 10A of the AHRC Act to perform its functions 'with regard for the indivisibility and universality of human rights, and the principle that every person is free and equal in dignity and rights'. Under the same section, the Commission is required to perform its functions 'efficiently and with the greatest possible benefit to the people of Australia'.

It should be noted that there are existing legislative duties and limits to how members of the Commission may exercise their powers and functions.[50]

The Committees consider that the existing legislation provides the Commission with enough flexibility to fulfil its statutory responsibilities, while ensuring that its powers and functions are exercised for their intended purpose.

In practice, the Commission's functions encompass raising awareness of specific human rights issues, and educating the public about the available mechanisms for resolving disputes or complaints. Raising awareness is critical to making the Commission accessible to those who are most likely to benefit from what it can offer.[51] Depending on how it is defined, the Committees submit that a prohibition on 'soliciting' complaints could unduly restrain the Commission from fulfilling this function.

Accordingly, the Committees recommend that:

---

[48] *Australian Human Rights Commission* Act 1986 (Cth).
[49] *Racial Discrimination Act 1975* (Cth) s 20(b); *Age Discrimination Act 2004* (Cth) s 53(1)(b); *Sex Discrimination Act 1984* s 48(1)(d).
[50] For instance, a safeguard against abuse of power is the offence of "abuse of public office" under s142.2 of the *Criminal Code Act 1995* (Cth) Sch 1.
[51] UN High Commissioner for Human Rights, *National Human Rights Institutions. A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, UN doc HR/P/PT4, (1995), [160]-[163].

1. The vital education and advocacy functions that the Commission plays with respect to the promotion and protection of human rights standards in Australia be recognised and maintained; and that

2. No limitations be placed on the Commission's ability to communicate freely with the Australian public about applicable human rights standards and the complaints mechanisms available to them where certain standards may have been breached.

Should the Australian Human Rights Commission's Operation be Reformed to Better Protect Freedom of Speech

Term of Reference 4

In respect of term of reference 4, the Committees submit that the enactment of a human rights instrument, which includes provisions concerning the freedom of expression in line with article 19 of the ICCPR, would be the most effective means of protecting freedom of speech in Australia.

Response to Term of Reference 4

The functions of the Commission relate to human rights under international instruments as they apply in Australia.[52] Some of these instruments are scheduled to the AHRC Act, including the ICCPR, the *Convention on the Rights of the Child*,[53] and the *Convention concerning Discrimination in respect of Employment and Occupation.*[54]

Freedom of expression is articulated in article 19 of the ICCPR and is thus within the ambit of the AHRC Act. However, the ICCPR, and article 19 in particular, are not consistently reflected by Australian.

There is only a limited protection of freedom of expression afforded by the constitutional implied freedom of political communication, as discussed above. Importantly, the implied freedom is not enforceable as a personal right. Consequently, complainants have not been able to enforce the implied freedom generally against the conduct of public or private persons.[55]

The Committees consider that without an express, legislated right to freedom of speech, the Commission does not have a comprehensive mandate or framework to receive, investigate, and conciliate complaints of

[52] *Australian Human Rights Act 1986* (Cth) s 3(4).
[53] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, 3, available at: http://www.refworld.org/docid/3ae6b38f0.html [accessed 30 December 2016].
[54] International Labour Organization (ILO), *Discrimination (Employment and Occupation) Convention, C111*, 25 June 1958, C111, available at: http://www.refworld.org/docid/3ddb680f4.html [accessed 30 December 2016].
[55] See for example, *Banerji v Bowles* [2013] FCCA 1052, per Neville J [65]-[89].

this kind, except under their general jurisdiction to make inquiries into human rights matters under s 11(f) of the AHRC Act.[56]

[56] Section 11(f) of the *Australian Human Rights Commission Act 1986* (Cth) gives the Commission power to inquire into any act or practice that may be inconsistent with or contrary to any human right, where "act or practice" is defined in s 3 to be acts by or on behalf of the Commonwealth, under an enactment or within a Territory.

THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Concluding Comments

NSW Young Lawyers and the Committees thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

Contact:

Emily Ryan

President

NSW Young Lawyers

Email: president@younglawyers.com.au

Alternate Contact:

Nicole D'Souza

Chair

NSW Young Lawyers Human Rights Committee

Email: hrc.chair@younglawyers.com.au

Alternate Contact:

Suzanne Martinez

Chair

NSW Young Lawyers Public Law & Government Committee

Email: publiclaw.chair@younglawyers.com.au