8 December 2016

Committee Secretary

Parliamentary Joint Committee on Human Rights

PO Box 6100,

Parliament House

Canberra ACT 2600

Dear Parliamentary Join Committee on Human Rights,

RE: ARTS LAW CENTRE OF AUSTRALIA SUBMISSION TO 'FREEDOM OF SPEECH IN AUSTRALIA' INQUIRY

The Arts Law Centre of Australia (**Arts Law**) is an independent organisation which gives legal advice to copyright users, copyright owners and creators across Australia as well as engaging in education and advocacy. For this reason, Arts Law is a strong advocate of freedom of expression, and in particular, freedom of artistic expression. However, Arts Law is also conscious of the fact that artists, in line with Australia's diverse society, come from a wide range of ethnic, cultural, racial and religious backgrounds. Furthermore, we are an organisation with a proud commitment to Indigenous artists and communities, who currently comprise around 35% of our legal work. Therefore, Arts Law is sensitive to the potential for harm caused by racial discrimination and vilification and the need to protect vulnerable communities and individuals from hate speech. It is from this unique perspective that we have considered the current operation of sections 18C and 18D of the *Racial Discrimination Act 1975* (Cth) (**RD 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.

Due to the nature of Arts Law's work and its field of expertise, we endorse a comprehensive and robust establishment of freedom of speech and expression in Australia. However, Arts Law

acknowledges that the right to freedom of speech in Australia should not be absolute in all circumstances. For example, the implied constitutional right of freedom of political communication may be infringed by legislation if it is reasonably appropriate and adapted to serve a legitimate end[1] and proportionate to its purposes.[2] Arts Law recognises that freedom of speech, although crucial in a free and open democratic society, is not paramount and must be balanced with other common law rights, freedoms and privileges or human rights set out in international covenants, declarations and conventions to which Australia is a party. We consider that 'rights' cannot be isolated from the 'duties' or 'responsibilities' of the rights holder or the 'legitimate interests' of others that may be in conflict with the exercise of those rights.[3] This 'consequences-based' approach acknowledges the balance needed between certain rights and the impact that the exercise of those rights may have on vulnerable communities and individuals.

Arts Law supports the implementation of Australia's international obligations. Section 18C of the RD Act is consistent with Articles 19(3) of the *International Covenant on Civil and Political Rights* (**ICCPR**) which limits the right to free speech by noting that it "carries with it special duties and responsibilities" and accordingly be restricted to protect other rights, reputations, national security, public order, public health or morals. It is also consistent with section 20(2) of the ICCPR which provides that *"racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law"*. In addition, section 18C implements Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (1969), which requires member states to condemn and to adopt measures to eradicate racial discrimination, racial vilification and the dissemination of ideas based on racial superiority.

Arts Law acknowledges the common criticism that the use in section 18C of the words *"offend, insult, humiliate or intimidate"* as the parameters for racially discriminatory expression appear to set a relatively low threshold. A tension may exist for a robust artistic culture in which community sensitivities and morals may be challenged and sensitive issues broached. However, Australian case law demonstrates that the courts have construed the test as having a high threshold for harm caused.

[1] *Wotton v Queensland* [2012] HCA 2, per French CJ, Gummow, Hayne, Crennan and Bell JJ at [25].
[2] *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 per French CJ at [44] & per Crennan and Kiefel JJ at [2010].
[3] Julie Debeljak, *Balancing Rights in a Democracy: The problems with limitation and overrides of rights under the Victorian Charter of Human Rights and Responsibilities Act 2006* [2008] MULR 422-469 at 422.

Examples of complaints upheld under the RD Act include:

- An online newspaper article and subsequent reader comments about four young Aboriginal boys killed in a car accident. The subsequent comments including referring to the boys as 'criminal trash' and the comment 'I would use these scum as landfill';[4]

- The publication of a website containing Holocaust denial assertions and other anti-Semitic content;[5] and

- Verbal abuse towards the respondent's Aboriginal neighbour and her family in a manner that could be heard in public, including calling them 'niggers', 'coons', 'black mole', 'black bastards' and 'lying black mole cunt'.[6]

The test itself has been interpreted as an objective consideration, based on whether the act in question could in the circumstances be regarded as reasonably likely to offend, insult, humiliate or intimidate a person in the complainant's position (i.e. a member of the racial, ethnic, and/or national origin group to which the conduct relates).[7] In addition, the words *"offend, insult, humiliate or intimidate"* have been interpreted to convey that the conduct must have "profound and serious effects, not to be likened to mere slights."[8] Arts Law is satisfied that section 18C operates in an appropriate way and focuses only on serious examples of racial vilification.

Replacing 'offend and insult'

The current public debate on this issue has focused on removing from the provision the words, 'offend' and 'insult,' which are considered to be of a lesser degree of seriousness. As discussed above, the case law appears settled in demanding a high threshold of harm. In addition, the case law does not appear to apply the words to an alleged offence as separate elements, but rather as a collective concept. For example, in *Eatock v Bolt,* Justice Bromberg, in his interpretation of the scope of the words, observed in obiter dicta that:

> *"[t]he word 'offend' is potentially wider, but given the context, 'offend' should be interpreted conformably with the words chosen as its partners."*[9]

[4] *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389.
[5] *Jones v Scully* (2002) 120 FCR 243.
[6] *Campbell v Kirstenfeldt* [2008] FMCA 1356. Examples taken from Katharine Gelber and Luke McNamara, 'Anti-vilification laws and public racism in Australia: mapping the gaps between the harms occasioned and the remedied provided' (2016) 39(2) *UNSW Law Journal* 488, 499.
[7] *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, [12].
[8] Ibid [16].
[9] *Eatock v Bolt* (2011) 197 FCR 261, 318 [241].

Accordingly, it is not in fact clear, based on the current system and jurisprudence, that the removal of 'offend' and 'insult' would change the operation of the section in any significant way. In that context, Arts Law does not propose any amendment being made to section 18C.

Section 18D Exemption

In addition to the high threshold for the standard of racial discrimination required by the courts, section 18C is balanced by section 18D which contains broad 'free speech' exemptions. This provision protects any artistic, academic or scientific work or 'fair comment' made in the course of public debate, provided it is done reasonably and in good faith. Arts Law notes that this is one of the few provisions in Australian legislation which explicitly protects the interests of free speech. We consider that this section is a vital lynchpin of the regime, maintaining the vigorous and at times 'politically incorrect' nature of public discourse in Australia. It provides artists with confidence in any good faith artistic expressions which may explore sensitive racial themes. This appears to be confirmed by case law which has demonstrated the significant protection offered to, artists, comedians and other performers. In particular, the cases of *Bropho v Human Rights & Equal Opportunity Commission*[10] and *Kelly-Country v Beers*[11] demonstrate the extent of protection offered by section 18D to artists.

In *Bropho*, a cartoon was published which satirised attempts by Aboriginal elders to repatriate remains of a historical Indigenous leader from the United Kingdom and the subsequent disputes which arose within the group. Although the cartoon was found to have contravened section 18C, it was considered to be an 'artistic work', published reasonably and in good faith and consequently within the ambit of the section 18D exemption.

Kelly-Country involved a non-Indigenous comedian whose act involved him donning blackface to play an Indigenous character, 'King Billy Cokebottle', and implying stereotypical negative attributes to Indigenous people. The character was performed in live stand-up routines, on radio programs and was recorded on audio and video tapes. The court found that although the acts were "impolite and offensive", the performance was undertaken with comedic intention and did not amount to unlawful racial discrimination. In addition, the comedy act was found to be 'artistic work' done reasonably and in good faith and therefore would have attracted the protection of section 18D in any case.

The case of *Eatock v Bolt* is often raised as an example of overreach of section 18C and the inefficacy of section 18D by those calling for the removal or reform of these provisions. In this case, Mr Bolt published newspaper articles and blog posts claiming that 'fair-skinned' Indigenous people took

[10](2004) 135 FCR 105.
[11] (2004) 207 ALR 421.

advantage of their indigeneity to claim welfare benefits or advance their careers. The court found that not only had Mr Bolt breached section 18C, but that he could not avail himself to the 'fair comment' exemption in section 18D as the comments were not made reasonably and good faith. Although Justice Bromberg acknowledged that it was in the public interest to discuss how awards and opportunities are allocated to Indigenous people, he found the articles were not made in good faith due to a combination of errors in fact, distortions of the truth and inflammatory and provocative language.[12]

In the opinion of Arts Law, these cases demonstrate that section 18C is a reasonably appropriate statutory provision which serves a legitimate end and is proportionate for the purposes of protecting vulnerable communities and society at large from the damaging effects of racial vilification and public racism. The way in which section 18D has been deployed provides Arts Law with sufficient confidence that artistic freedom of expression has a robust defence in relation to section 18C. Concerns about the section have not been raised frequently by our clients and we see no evidence that the provisions have dampened freedom of expression in the Australian artistic community. We consider that the operation of Part IIA of the RD Act imposes reasonable restrictions upon freedom of speech and does not currently require reform.

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.

Although Arts Law rarely deals with the Australian Human Rights Commission (**Commission**), we understand that it takes a neutral role in relation to the enforcement of section 18C, by facilitating confidential conciliation between the parties to resolve complaints. Arts Law understands there is also a broad power of the President of the Commission to terminate a complaint for being trivial, vexatious, misconceived or lacking in substance.[13] This approach appears to have been successful at minimising litigation, with 53% of complaints being resolved at conciliation and only 3% proceeding to court for the years 2012-13.[14] Arts Law has no experience with the Commission 'soliciting' complaints from any parties.

[12] (2011) 197 FCR 261, 506.
[13] *Australian Human Rights Commission Act 1986* (Cth), section 46PH.
[14] *At a glance: Racial vilification under section 18C and 18D of the Racial Discrimination Act 1975 (Cth)* (12 December 2013) Australian Human Rights Commission <http://www.humanrights.gov.au/our-work/race-discrimination/projects/glance-racial-vilification-under-sections-18c-and-18d-racial>

Arts Law also considers the existence of these laws and the Commission to play a pivotal and symbolic role in Australian society. A recent study by Gelber & McNamara found that the majority of people interviewed claimed that although they would never lodge a complaint under section 18C or pursue litigation, the Commission's existence nonetheless felt like a powerful symbol of protection in the community.[15] Arts Law considers that the Commission plays an important role in giving individuals and communities a forum in which to challenge perceived racial vilification which can avoid court intervention. Arts Law cannot, at this stage, identify any practice by the Commission that should be prohibited or limited.

If you require further information about this submission please contact Robyn Ayres CEO, Arts Law at rayres@artslaw.com.au or 02 9356 2566.

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[15] Gelber and McNamara, above n6, 508.