Submission to the

Parliamentary Joint Committee on Human Rights inquiry into Freedom of Speech in Australia

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Submitted by
Amnesty International Australia

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About Amnesty International

Amnesty International is the world's largest independent human rights organisation with over seven million supporters in more than 160 countries around the world.

Amnesty International is a worldwide movement to promote and defend all human rights enshrined in the *Universal Declaration of Human Rights* (UDHR) and other international human rights instruments. Amnesty International undertakes research focused on preventing and ending abuses of these rights.

Amnesty International is impartial and independent of any government, political persuasion or religious belief. Amnesty International Australia does not receive funding from governments or political parties.

Background to this submission

Freedom of expression has always been a core part of Amnesty International's work. Indeed Amnesty International was founded to protect freedom of expression. Peter Benenson, the founder of Amnesty, wrote a seminal article in 1960 about the arrest of two Portuguese students after they were overheard uttering remarks critical of the Portuguese government while raising a toast to freedom. They were arrested and imprisoned for treason. Benenson wrote an opinion editorial entitled "Forgotten Prisoners" in the Observer newspaper in in 1961 which called for a one-year campaign of amnesty for political prisoners and greater support for asylum seekers.[1]

Since 1961 Amnesty International has campaigned on behalf of thousands of prisoners of conscience – people who are imprisoned because of their political, religious or other conscientiously held beliefs, ethnic origin, sex, colour, language or sexual orientation. Amnesty recognises that the right to freedom of expression is closely linked to the right to information and the right to freedom of thought, conscience and religion. Amnesty International upholds the right of everyone to freedom of thought, conscience, opinion and expression, as set out in the UDHR, the International Covenant on Civil and Political Rights (ICCPR) and other international human rights treaties.

Amnesty International also campaigns against direct or indirect discrimination on the basis of race, sex, sexual orientation and gender identity, religion or belief, political or other opinion, ethnicity, national or social origin, disability, or other status. Amnesty calls for states to take measures that prohibit discrimination as well as positive measures to address long-standing or systemic disadvantages, and to prevent discrimination by non-state actors. Our work on non-discrimination is grounded in human rights treaties including the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD), the *Convention on the Rights of the Child* (CRC), the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), the *Convention on the Rights of People with Disabilities* (CRPD) and the *Declaration on the Rights of Indigenous Peoples* (the Declaration).

[1] See The Guardian, 'The man who fought for the forgotten', 28 February 2005, available at https://www.theguardian.com/uk/2005/feb/27/humanrights.world1.

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1. Summary

1.1 Amnesty International welcomes the opportunity to provide this submission to the Freedom of Speech in Australia Inquiry referred to the Parliamentary Joint Committee on Human Rights by the Attorney-General on 8 November 2016.

1.2 Freedom of expression is a fundamental human right. It is essential to, and interrelated with, the realisation and exercise of all human rights. Every human being has the right to hold opinions, receive information and express themselves freely. Like all human rights, freedom of speech must protected and balanced alongside other rights. Governments may impose some legitimate restrictions on certain forms of speech, as long as they are demonstrably necessary to ensure respect for the rights of others, such as the right to be free from discrimination, or for the protection of certain specified public interests.[2] Any such restrictions on freedom of expression must be prescribed by law and must conform to the strict tests of necessity and proportionality.[3] Importantly, Governments also have a positive obligation to prohibit advocacy of national, racial or religious hatred.[4]

1.3 Amnesty International notes the focus of this Freedom of Speech inquiry is consideration of the *Racial Discrimination Act 1975 (Cth)* (RDA) and its complaints procedure administered by the Australian Human Rights Commission (AHRC). There are a range of other laws in Australia that create serious freedom of speech concerns that ought to be addressed by this inquiry. Many of these laws were highlighted as areas of concern by the Australian Law Reform Commission (ALRC) in its report on *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws,*[5] cited in this inquiry's Terms of Reference. This submission highlights and makes recommendations regarding a number of these problematic laws, including inadequate whistleblower protections and surveillance and secrecy laws that curtail freedom of the press.

1.4 With regards to the RDA, Amnesty International notes that sections 18C and 18D have now been in place for over twenty years. Case law in that time demonstrates the courts have finely balanced the objects of the Act with the expressly stated intention of the Parliament not to infringe on freedom of expression. Given this, 18C and 18D do not require amendment. This submission also considers and provides recommendations on the important role of the AHRC in handling complaints and facilitating human rights education about the remedies provided by the RDA. This submission also draws the Committee's attention to gaps in the prohibition against racial vilification in Australia, which the Parliament ought to be address.

1.5 The Australian Government and Parliamentarians have a critical role to play in leading by example to promote inclusion and denounce racism and discrimination in all its forms. This leadership is vital to creating an enabling environment in which people can express themselves freely without fear of discrimination victimisation or prejudice. This submission sets out a range of strategies for how this Parliament can balance a genuine commitment to non-discrimination and protection from racial hatred with freedom of expression.

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[2] ICCPR Article 19(3).
[3] United Nations Human Rights Committee, *General Comment 34: Article 19: Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34, 12 September 2011, para. 22.
[4] ICCPR Article 20(2).
[5] *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* [ALRC Report 129 – December 2015], [ALRC Report] available online at: https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_129_final_report_.pdf.

2. Recommendations

2.1 Amnesty International recommends the following reforms and strategies to strengthen freedom of expression in Australia whilst also fulfilling Australia's obligations to protect against racial hatred and promote non-discrimination:

(1) The Australian Government begin a process to legislate a Human Rights Act for Australia, building on the progress and the lessons from past attempts to pursue this reform. The best way for the Parliament to ensure rights to freedom of expression and other fundamental rights are protected and appropriately balanced in Australia is to legislate a Human Rights Act.

(2) The Parliament legislate to improve whistleblower protection and press freedom, including by:

- amending section 35P of the *Australian Security Intelligence Organisation Act 1979 (Cth)* (ASIO Act) to introduce a public interest defence for disclosing information publicly about 'special intelligence operations';
- repealing section 42 of the *Border Force Act 2015 (Cth)*; and
- amending the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* to require law enforcement agencies to obtain a warrant prior to accessing a person's metadata.

(3) The Prime Minister or the Parliamentary Joint Committee on Intelligence and Security refer the following pieces of counter-terrorism and national security legislation to the *Independent National Security Legislation Monitor* to review whether these laws unjustifiably interfere with freedom of expression, consistent with recommendations by the Australian Law Reform Commission (ALRC):

- counter-terrorism offences provided under schedule 1 of the *Criminal Code Act 1995 (Cth) (Criminal Code)* and, in particular, the offence of "advocating terrorism";
- terrorism-related secrecy offences in the *Criminal Code, Crimes Act 1914 (Cth)*; and
- Commonwealth secrecy offences generally, including the general secrecy offences in ss 70 and 79 of the *Crimes Act 1914 (Cth).*

(4) The Australian Government work with state and territory governments to ensure that laws regulating protest activity comply with Australia's international human rights obligations to protect freedom of expression and freedom of association and peaceful assembly.

(5) Given the Federal Courts' interpretation of sections 18C and 18D of the *Racial Discrimination Act,* Amnesty International is of the view that these sections do not require amendment. Any legislative amendment to sections 18C and 18D that is pursued by the Parliament should seek to codify current judicial interpretation of 18C and 18D by the Federal Court, consistent with Australia's obligations under international human rights law, rather than to narrow their current scope of protection.

(6) The Australian Parliament legislates an explicit prohibition of and appropriate remedy for advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, in line with Australia's obligations under Article 20(2) of the ICCPR.

(7) The Australian Human Rights Commission (AHRC) maintains an accessible, fair and effective complaints resolution process for people who experience discrimination on any of the grounds prohibited under international human rights law, including race, colour or national or ethnic origin which is the specific focus of the current submission.

(8) The Australian Government carefully consider any recommendations made to it by the AHRC about ways to improve the effectiveness and efficiency of its complaints procedures.

(9) That the Australian Government not interfere with the independence of the AHRC or other human rights and legal bodies, including the Aboriginal Legal Services, by limiting their ability to conduct human rights education. In particular, the AHRC must be empowered to conduct independent human rights education with groups at risk of or impacted by racism and other forms of racial hatred and discrimination. Advising groups about their rights under Australian law is not "solicitation", it is human rights education.

(10) Political leaders in Australia increase their efforts to condemn racism in all its forms and demonstrate genuine support for multiculturalism. Amnesty International encourages all party leaders to work together to set the standard of respect for culturally and linguistically diverse groups in Australia, and ensure Members of Parliament and public officials do not denigrate groups on the basis of their race, colour, sex, language, religion or any other protected status.[6]

(11) The Australian Government increase funding for public education campaigns to build awareness of the benefits of multiculturalism and negative health and social impacts of racism. For example, Australia should consider increasing funding for the *Racism. It Stops With Me* campaign.

(12) The Australian Government increase its funding and support to diverse media, including Indigenous media, to increase the channels available for culturally and ethnically diverse groups to express their views and access information.

[6] ICCPR, Art. 2(2).

3. International legal frameworks

3.1 The Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) recognise and protect the right of all individuals to freedom of opinion and expression.

3.2 The right to freedom of expression applies to information and ideas of all kinds, including those that others may find offensive,[7] although it may be subject to legitimate restrictions which are demonstrably necessary to ensure respect for the rights of others.[8] The ICCPR also requires states to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[9] Any such restrictions on the exercise of freedom of expression must conform to the strict tests of necessity and proportionality.[10]

3.3 Article 7 of the UDHR and Articles 2.1 and 26 of the ICCPR and numerous other treaties recognise the right to equality and non-discrimination. This places an obligation on states to ensure the protection of the human rights of everyone without discrimination, whether in law or in practice, by public authorities, by the community, or by private persons or bodies.[11]

3.4 This sometimes requires states to take affirmative action to correct conditions which cause or help to perpetuate discrimination. It also requires that laws and policies be designed in ways that take into account inherent or historical disadvantages of specific groups so as to secure their equality in practice.[12] The ICCPR also requires states to ensure that anyone whose right to non-discrimination and equality is violated has an effective remedy.[13]

Freedom of expression

3.5 Australia became a State Party to the ICCPR in 1980. Under the ICCPR Australia is obliged to protect rights to freedom of opinion and expression. Article 19(2) states that:

> *"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."*

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[7] United Nations Human Rights Committee, *General Comment 34: Article 19: Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34, 12 September 2011, para. 11.

[8] ICCPR, Art. 19(3). The right to freedom of opinion differs from the right to freedom of expression in that no restrictions on it are permissible. Article 19(1) of the ICCPR states: "[e]veryone shall have the right to hold opinions *without interference*" and the Human Rights Committee has stressed that it "is a right to which the Covenant permits no exception or restriction": United Nations Human Rights Committee, *General Comment 34: Article 19: Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34, 12 September 2011 (emphasis added).

[9] ICCPR, Art. 20(2).

[10] United Nations Human Rights Committee, *General Comment 34: Article 19: Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34, 12 September 2011, para. 22.

[11] United Nations Human Rights Committee, *General Comment 18: Non-discrimination,* 37th sess, UN Doc HRI/GEN/1/Rev.1, 10 November 1989, para. 9.

[12] United Nations Human Rights Committee, *General Comment 18: Non-discrimination,* 37th sess, UN Doc HRI/GEN/1/Rev.1, 10 November 1989, para. 10.

[13] ICCPR, Art. 2(3).

3.6 Article 19(3) states:

> *"The exercise of the right [to freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
>
> *(a) For respect of the rights or reputations of others;*
>
> *(b) For the protection of national security or of public order (ordre public), or of public health or morals."*

3.7 Any such limitations on freedom of expression must remain an exception. Such restrictions "may not put in jeopardy the right itself" and "must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated."[14]

State obligation to prohibit racial vilification

3.8 In addition to the permissible limitations referred to above, Article 20 of the ICCPR places a positive obligation on Australia:

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

3.9 Prohibitions of such expression are not merely permissible, but obligatory to protect people from the spread of racial hatred.[15] At the same time, any limitation that is justified on the basis of this provision must also comply with the criteria regarding limitations on expression which are set established under article 19(3).[16]

3.10 The United Nations Human Rights Committee interprets the obligation to prohibit advocacy of hatred constituting incitement as "fully compatible with the right of freedom of expression."[17]

3.11 Expression can be criminalised where there is intent to incite violence or other harm identified in Article 20(2); and there is a likelihood that others will commit such violence or other harm; and there is a clear and direct link between the expression and that violence or other harm. Discriminatory expression which falls short of the definitions of advocacy of hatred constituting incitement should not be subject to criminal punishment.

3.12 According to the UN Human Rights Council, States, media and society have a "collective responsibility to ensure that acts of incitement to hatred are spoken out against and acted upon with the appropriate measures, in accordance with international human rights law."[18]

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[14] UNHRC, General Comment No. 34.

[15] UNHRC, General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20) (07/29/1983).

[16] United Nations Human Rights Committee, *General Comment 34: Article 19: Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34, 12 September 2011, para. 50.

[17] United Nations Human Rights Committee, *General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20),* 19th sess, UN Doc HRI/GEN/1/Rev.6, 29 July 1983, para. 2.

[18] Human Rights Council, *Addendum to Annual report of the United Nations High Commissioner for Human Rights: Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred*, UN Doc. A/HRC/22/17/Add.4, para. 35.

State obligation to prevent racial discrimination

3.13 Australia became a State Party to CERD in 1975. Under CERD Australia is obliged to condemn and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law.[19]

3.14 In addition to condemning racial hatred and discrimination in any form, Australia is obliged to undertake positive measures to "eradicate all incitement to, or acts of, such discrimination".[20]

3.15 Australia's obligations to prevent discrimination include the obligation to address intersectional discrimination, since those who face discrimination on the basis of race, colour or national or ethnic origin are often likely also to face discrimination on the basis of other factors such as sex and gender, sexual orientation and gender identity, religion or belief, health, status, age, or other factors. States must recognise such intersecting forms of discrimination and their compounded negative impact on the individuals concerned, such as women, and prohibit them. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences.[21]

3.16 Amnesty International notes that restricting expression, in isolation, is an ineffective means to combat discrimination. Effective protection and social inclusion of marginalised groups requires broader interventions. Any restrictions on freedom of expression in this regard should only take place within a context of broad ranging public policy measures to tackle the root causes of intolerance. The policy measures needed to tackle the root causes of intolerance should include "education on pluralism and diversity, and policies empowering minorities and Indigenous people to exercise their right to freedom of expression."[22]

4. Australian legal framework

4.1 Freedom of speech is a 'common law freedom', according to the High Court of Australia, particularly in relation to the 'expression of concerns about government and political matters. [23] The High Court has recognised that 'political communication' is an implied right in the Australian Constitution, but that the Constitution has not been found to protect free speech more broadly.[24]

4.2 According to the ALRC, the principle of legality provides further protection to freedom speech:

> *"When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of speech, unless this intention was made unambiguously clear".*[25]

[19] Articles 2 and 5 of the ICCPR.
[20] Article 4 ICCPR.
[21] See for eg. CEDAW Committee, *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, para. 18.
[22] Human Rights Council, *Addendum to Annual report of the United Nations High Commissioner for Human Rights: Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred*, UN Doc. A/HRC/22/17/Add.4, para. 37.
[23] Monis v The Queen (2013) 249 CLR 92, [60] (French CJ)) cited in ALRC Report, p.79[4.14].
[24] Australian Capital Television v Commonwealth (1992) 177 CLR 106; Nationwide News v Wills (1992) 177 CLR 1 - 12 Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, 570. cited ALRC Report, p. 80[4.18].
[25] ALRC Report, p.83[4.30]

4.3 Victoria and the Australian Capital Territory also provide specific protections for freedom of expression through their human rights legislation,[26] and Queensland is currently contemplating a Human Rights Act.[27]

4.4 Other countries with comparable legal systems protect freedom of expression and other rights via human rights legislation. For example, New Zealand has a Bill of Rights Act, the United Kingdom has Human Rights Act and Canada has a Charter of Human Rights and Freedoms. The United States protects free speech through the First Amendment to the Constitution.

4.5 Despite a National Human Rights Consultation in 2008 which showed widespread community support for a Human Rights Act,[28] Australia does not have overarching human rights legislation. The best way for the Parliament to ensure rights to freedom of expression and other fundamental rights are protected and appropriately balanced in Australia is to legislate a Human Rights Act.

4.6 Amnesty International recommends the Australian Government begin a process to legislate a Human Rights Act for Australia, building on the progress and the lessons from past attempts to pursue this reform.

5. Pressing threats to freedom of speech in Australia

5.1 The ALRC's *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* identified a number of laws "as being of concern" from a freedom of speech perspective.[29] These include, among other things, various terrorism-related secrecy offences in the *Criminal Code*, *Crimes Act 1914 (Cth)* and *Australian Security Intelligence Organisation Act 1979 (Cth) (ASIO Act)* and, in particular, those relating to 'special intelligence operations' (section 35P).[30]

5.2 Amnesty International agrees with the ALRC's recommended that counter-terrorism and national security laws "should be subject to further review to ensure that the laws do not interfere unjustifiably with freedom of speech, or other rights and freedoms".[31]

Secrecy laws and silencing whistleblowers

5.3 Amnesty International is concerned that a number of Australia's national security laws unduly interfere with freedom of expression. In particular, we have significant concerns about the impact of section 35P of the ASIO Act, introduced by amendment in 2014.[32] Under section 35P journalists and other individuals face significant prison terms for reporting on a special intelligence operation. There are no explicit time periods on the limits to reporting on a

[26] Charter of Human Rights and Responsibilities Act 2006 (Vic); Human Rights Act 2004 (ACT).
[27] Legal Affairs and Community Safety Committee, Inquiry into a possible Human Rights Act for Queensland, Report No. 30, 55th Parliament, Queensland, June 2016, available online at: http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2016/5516T1030.pdf
[28] Out of the 35,014 people who made submissions to the Committee, an overwhelming 29,153 (over 80%) were in favour of a Human Rights Act. See Amnesty International, Feedback on the National Human Rights Action Plan background paper, 18 February 2011, available at: https://www.ag.gov.au/Consultations/Documents/NationalHumanRightsActionPlanBackgroundPaperpublicsubmissions/Amnesty%20International.pdf
[29] ALRC Report, p.79[4.6].
[30] Ibid, p23[1.81].
[31] Ibid, p.92[4.76].
[32] *National Security Legislation Amendment Bill (No. 1) 2014*, Available at http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s969_first-senate/toc_pdf/1417820.pdf;fileType=application%2Fpdf.

special intelligence operation and the legislation contains no public interest defence to a breach of section 35P.[33] A recent inquiry into this law by the Independent National Security Intelligence Monitor found found that it has a negative impact on journalists:

"It creates uncertainty as to what may be published about the activities of ASIO without fear of prosecution. The so-called chilling effect of that uncertainty is exacerbated because it also applies in relation to disclosures made to editors for the purpose of discussion before publication".[34]

5.4 The National Security Intelligence Monitor also noted that:

"Section 35P is arguably invalid on the basis that it infringes the constitutional protection of freedom of political communication. Section 35P is also arguably inconsistent with article 19 of the International Covenant on Civil and Political Rights and so not in accordance with Australia's international obligations".[35]

5.5 Amnesty recommends at a minimum that section 35P is amended to introduce a public interest defence and define time limits for reporting.

5.6 The *Border Force Act 1995,* which came into force on 1 July 2015, gave the government the power to prosecute and imprison doctors, nurses and child welfare professionals who speak out about human rights abuses in immigration detention. The law has been strongly criticised by the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, who said that the Act's provisions were "a real threat" to sources and whistleblowers.[36]

5.7 These concerns were reiterated by Michel Frost, Special Rapporteur on the Situation of Human Rights Defenders, following his visit to Australia in October 2016:

"Australia however has hundreds of secrecy laws that unnecessarily restrict access to government information … The Australian Law Reform Commission recommended in 2010 to reduce the scope of secrecy laws so that disclosures are considered to be unlawful if they harm essential public interests. However, the recommendation has not been implemented by the Government. Instead secrecy provisions have been reinforced, including through the controversial Australian Border Force Act.[37]

5.8 Amnesty International notes the existence of the Act has had a chilling effect on the disclosure of information about Australia's offshore processing arrangements. The Act has resulted in whistleblowers being scared to come forward. Several service-providers working

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[33] Amnesty International, "Submission to the Independent National Security Monitor review of section 35P of the *Australian Security Intelligence Organisation Act 1979*, 20 April 2015. Available at https://www.inslm.gov.au/submissions/section-35p.

[34] Independent National Security Legislation, "Monitor Report on the impact on journalists of section 35P of the ASIO Act", p. 2 available at https://www.dpmc.gov.au/sites/default/files/publications/inslm_report_impact_s35p_journalists.pdf.

[35] Independent National Security Legislation, "Monitor Report on the impact on journalists of section 35P of the ASIO Act", p. 3, https://www.dpmc.gov.au/sites/default/files/publications/inslm_report_impact_s35p_journalists.pdf.

[36] Quoted in Paul Farrell, "Australians' Rights and Freedom to Speak Out Under Threat Warns UN Official," The Guardian, 13 October 2015, available at https://www.theguardian.com/politics/2015/oct/13/australians-rights-and-freedom-to-speak-out-under-threat-warns-un-official.

[37] United Nations Information Centre, "Australian Government must re-build trust of civil society – UN human rights expert" 18 October 2016, available at https://un.org.au/2016/10/18/australian-government-must-re-build-trust-of-civil-society-un-human-rights-expert/.

on Nauru have advised Amnesty International that they are apprehensive to speak with human rights researchers because they are scared doing so would render them liable to criminal prosecution under the Act.[38] On 30 September 2016 the Department of Immigration removed the restrictions under the Act from applying to healthcare professionals, but criminal charges still apply to other non-medical service providers.[39]

5.9 Amnesty International recommends section 42 of the *Border Force Act* is repealed without further delay, to ensure service providers who speak out about human rights abuses in Australia's detention facilities are not silenced.

Impact of mass surveillance on freedom of speech

5.10 Australia's introduction of mass metadata surveillance laws also raises significant concerns with regards to freedom of expression. The passage of the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2014 (Cth),* means that telecommunications companies are now required to store their customers' metadata for two years and provide this data to law enforcement agencies without a warrant.

5.11 The metadata scheme has made it demonstrably easier for Australian law enforcement agencies to trace and prosecute whistleblowers and journalist sources, undermining shield laws.[40] This is a concern, given the abovementioned legislation and evidence the government has sought to uncover the sources of media outlets reporting on asylum seeker policies and other matters politically sensitive to the government.[41]

5.12 When similar metadata surveillance legislation was introduced by the Labor Government the then shadow Communications Minister Malcolm Turnbull called them a "sweeping and intrusive new power" which would have a "chilling effect on free speech".[42] Amnesty International agrees with this assessment.

5.13 Amnesty International calls for the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* to be amended to require law enforcement agencies obtain a warrant prior to accessing a person's metadata.

Anti-protest laws

5.14 Another concerning trend in Australia regarding freedom of expression is the introduction of tougher anti-protest legislation in NSW and Tasmania, as well as legislation before the Parliament in Western Australia.

- NSW passed the *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Bill 2016* on 17 March 2016. Among other things the new

[38] See Amnesty International, "Island of Despair: Australia's "processing" of refugees on Nauru, 17 October 2016, p. 50, https://static.amnesty.org.au/wp-content/uploads/2016/10/ISLAND-OF-DESPAIR-FINAL.pdf?x66249.
[39] See Determination of Immigration and Border Protection Workers - Amendment No 1, 3 September 2016, available at https://www.border.gov.au/AccessandAccountability/Documents/determination-workers-c.pdf.
[40] For more analysis see Human Rights Law Centre, "Safeguarding Democracy", February 2016, p. 29, http://www.bmartin.cc/dissent/documents/rr/HRLC16.pdf
[41] Paul Farrell, "Journalists reporting on asylum seekers referred to Australian police", The Guardian, 22 January 2015, https://www.theguardian.com/australia-news/2015/jan/22/journalists-reporting-on-asylum-seekers-referred-to-australian-police.
[42] See Malcolm Turnbull, "Free at last! Or freedom lost? Liberty in the digital age," Speech delivered at the University of Melbourne, 12 October 2012, available at http://www.malcolmturnbull.com.au/media/free-at-last-or-freedom-lostliberty-in-the-digital-age-2012-alfred-deakin cited in Human Rights Law Centre, "Safeguarding Democracy", February 2016, p. 29, available at http://www.bmartin.cc/dissent/documents/rr/HRLC16.pdf.

legislation limits protest action at mining and coal seam gas sites, which increases penalties for actions like locking-on to mining equipment from $550 to $5,500. The legislation also extends the powers of police and limits the protections peaceful protesters have under the law. Amnesty International is concerned about the potential impact of this legislation on free speech and the right to protest and we are monitoring its application.

- The *Tasmania's Workplaces (Protection from Protesters) Act 2014* came into effect in December 2014. In January 2016 the laws resulted in the arrest and charging under the Act of three people, including former Federal MP Bob Brown, with the cases supposed to be heard in court in March 2016. The Tasmanian court delayed hearing the matter as Bob Brown has commenced a challenge to the Tasmanian laws in the High Court of Australia.[43] Amnesty International is monitoring this case, which will test whether the Tasmanian law contravenes the implied right to political communication under the Australian Constitution.[44]

- The Western Australian Government introduced the *Criminal Code Amendment (Prevention of unlawful activity) Bill 2015* into the Parliament in March 2015, but has since put this legislation on hold until after the 2017 state election. The Bill employs broad and ambiguous wording, establishes excessive penalties for protest activity and reverses the onus of proof by requiring people to *disprove* that their protest activity intended to prevent a lawful activity. Amnesty International recommends the bill not be passed by the WA Parliament given it is not consistent with Australia's ICCPR obligations.

5.15 While these laws are the domain of the states and territories, the Australian Government has a responsibility to ensure these laws do not contravene Australia's obligations under the ICCPR to protect freedom of expression, peaceful assembly and freedom of association.[45]

5.16 **Australia should work with state and territory governments to ensure their laws regulating protest activity comply with Australia's international human rights obligations.**

[43] ABC News, "Bob Brown flags High Court challenge to work Workplace Protest Laws" 11 March 2016, available at http://www.abc.net.au/news/2016-03-10/bob-brown-flags-high-court-challenge-to-workplace-protest-laws/7236124.
[44] Relevant cases: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('Nationwide News'); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('ACTV'); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 ('Theophanous'); *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96, 112; *Coleman v Power* (2004) 209 ALR 182, 232-3 (Kirby J) cited in Leanne Griffiths, "The Implied Freedom of Political Communication: The state of th elaw post Coleman and Mulholland", 12JCULR, p, 93, http://www.austlii.edu.au/au/journals/JCULawRw/2005/5.txt/cgi-bin/download.cgi/download/au/journals/JCULRev/2005/5.pdf.
[45] ICCPR articles 19, 21 and 22 respectively.

6. Racial Discrimination Act

6.1 Australia enacted civil remedies for offensive behaviour based on racial hatred in 1995 with the introduction of Part IIA of the *Racial Discrimination Act 1975* (Cth) (RDA). It is important to recognise that the decision to enact Part IIA followed three national inquiries which found strong links between racism, racial vilification and racially motivated violence.

Royal Commission into Aboriginal Custody (1991)

6.2 The Royal Commission into Aboriginal Deaths in Custody[46] was established in October 1987 "in response to a growing public concern that deaths in custody of Aboriginal people were too common and public explanations were too evasive to discount the possibility that foul play was a factor in many of them".[47] Its findings were handed down on 15 April 1991.

6.3 In relation to racial vilification, the Royal Commission recommended:

> *"That governments which have not already done so legislate to proscribe racial vilification and to provide a conciliation mechanism for dealing with complaints of racial vilification. The penalties for racial vilification should not involve criminal sanctions. In addition to enabling individuals to lodge complaints, the legislation should empower organisations which can demonstrate a special interest in opposing racial vilification to complain on behalf of any individual or group represented by that organisation."*[48]

National Inquiry into Racist Violence (1991)

6.4 The National Inquiry into Racist Violence was announced in 1988 in response to community concern about the incidence of violence which had led to two other major investigations, an inquiry by the Australian Broadcasting Tribunal into Violence in Television[49] and an inquiry by the National Committee on Violence into Violence in Australian Society.[50]

6.5 The Inquiry was a response to community concern that racist attacks, both verbal and physical, were on the increase.[51] These included in particular racist violence and abuse against Aboriginal and Torres Strait Islander people, people of Asian and Middle Eastern descent and people of Muslim and Jewish faith. The types of abuses highlighted by the inquiry as being on the increase included: bomb threats against community organisations; arson attacks on places of religious worship, violent attacks such as bricks being thrown through windows of community centres, racist graffiti targeting community spaces, ethnic community leaders facing death threats and intimidating phone calls, and threatening letters being sent to community leaders.[52]

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[46] *Royal Commission into Aboriginal Deaths in Custody*, 1991, available at http://www.austlii.edu.au/au/other/IndigLRes/rciadic/.
[47] Ibid, volume 1, paragraph 1.1.2.
[48] Ibid, volume 5, Accommodating Difference: Relations Between Aboriginal and Non-Aboriginal People, paragraph 213.
[49] Available at http://www.aic.gov.au/publications/previous%20series/vt/1-9/vt06.html.
[50] Available at http://www.aic.gov.au/publications/previous%20series/vt/1-9/vt01.html.
[51] *Report of the National Inquiry into Racist Violence in Australia*, Human Rights and Equal Opportunity Commission, Australian Government Publishing Service Canberra, 1991, Background to the National Inquiry into Racist Violence, page 6, available at https://www.humanrights.gov.au/sites/default/files/document/publication/NIRV.pdf.
[52] See Appendix 14, National Inquiry into racist violence, p6

6.6 The Inquiry reported in April 1991[53] making a number of recommendations to de escalate racially motivated violence. This included the recommendation that:

> *"the Federal Government accept ultimate responsibility for ensuring, through national leadership and legislative action, that no person in Australia is subject to violence, intimidation or harassment on the basis of race."*[54]

Australian Law Reform Commission Report into Multiculturalism (1992)

6.7 The Australian Law Reform Commission's Report into Multiculturalism was prepared after the federal government asked the ALRC to consider whether Australian laws "are appropriate for a society made up of people from different cultural backgrounds and from ethnically diverse communities."[55]

6.8 The Commission referred to and considered the findings of both reports discussed above and was of the view that incitement to racist hatred and hostility should be unlawful, but not a crime. The Commission recommended that conciliation, backed up by civil remedies when conciliation fails, was the more appropriate way to deal with it and opposed the creation of a criminal offence.[56]

Part IIA of the RDA

6.9 Following these inquiries, in 1994 the Labor Keating government introduced the *Racial Hatred Bill* (1994) (Cth). Taking the same approach as the *Sex Discrimination Act 1984 (Cth)*, the Bill provided civil and rather than criminal remedies.[57]

6.10 In his second reading speech about the Bill the then Attorney-General Lavarch said the laws were intended to "close the gap in legal protection available for the victims of extreme racist behaviour", and that "[n]o Australian should live in fear because of his or her race, colour or national or ethnic origin."[58] The Attorney-General further stressed that:

> *"The bill places no new limits on genuine public debate. Australians must be free to speak their minds, to criticise actions and policies of others and to share a joke. The bill does not prohibit people from expressing ideas or having beliefs, no matter how unpopular the views may be to many other people. The law has no application to private conversations. Nothing which is said or done reasonably and in good faith in the course of any statement, publication, discussion or debate made or held for an academic, artistic or scientific purpose or any other purpose in the public interest will be prohibited by the law".*[59]

6.11 The Bill successfully passed as the *Racial Hatred Act 1995* (Cth), and inserted a new Part IIA into the RDA, titled "Prohibition of offensive behaviour based on racial hatred." The provisions have now been in place for over twenty years. Amnesty International notes that case law in that time demonstrates how the courts have finely balanced the objects of the Act

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[53] Note that it was decided that the Inquiry would not cover matters under consideration by the Royal Commission into Aboriginal Deaths in Custody, as both inquiries were being held at roughly the same time.
[54] Ibid, The Need for Change, page 270.
[55] Multiculturalism and the Law (ALRC Report 57), April 1992, availalble at http://www.alrc.gov.au/report-57.
[56] Recommendation 7.47, http://www.austlii.edu.au/au/other/lawreform/ALRC/1992/57.html#7Heading328
[57] Hansard (No. 198, Tuesday, 15 November 1994), p. 3341 (Mr Lavarch, Racial Hatred Bill 1994).
[58] Ibid.
[59] Hansard (No. 198, Tuesday, 15 November 1994), p. 3337 (Mr Lavarch, Racial Hatred Bill 1994).

with the intention of the Parliament, as expressed in the Attorney-General's second reading, not to infringe on freedom of expression.[60]

Section 18C

6.12 Section 18C makes it unlawful for a person to do a public act – to cause words, sounds, images or writing to be communicated to the public or in a public place – that is reasonably likely to "offend, insult, humiliate or intimidate another person or a group of people" where the act is done because of their "race, colour or national or ethnic origin".[61]

6.13 The protections afforded under section 18C were directly borrowed from the *Sex Discrimination Act 1984,* which makes it unlawful to sexually harass another person "in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be *offended, humiliated or intimidated"* (emphasis added).[62]

6.14 The Federal Court has consistently found violation of section 18C to require "profound and serious effects, not to be likened to mere slights."[63] Contrary to a common misconception, section 18C, as interpreted by the courts, does not protect from "hurt feelings".

6.15 In *Eatock v Bolt*, Justice Bromberg cited and agreed with the conclusions reached in earlier Federal Court judgements,[64] noting that:

> *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.*[65]

6.16 The narrow class of expression prescribed by Part IIA and as interpreted by the courts has helped to protect individuals and groups against offensive expression based on racial hatred that is neither fair nor accurate.[66] It does so in a way that promotes conciliation and imposes no criminal sanctions.

6.17 In 2015, an estimated 15 per cent of people living in Australia experienced racial discrimination, with most reporting experiencing racist verbal abuse.[67] The prevalence of

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[60] Ibid.

[61] A note included under Section 18C of the RDA clarifies that "Section 46P of the Australian Human Rights Commission Act 1986 allows people to make complaints... about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence."

[62] Sex Discrimination Act 1984, section 28A, available from https://www.legislation.gov.au/Details/C2016C00880. See Explanatory Memorandum at 10 and the Second Reading Speech to the RDA at column 3341, cited in *Eatock v Bolt* [2011] FCA 1103, [253].

[63] *Creek v Cairns Post* (2001) 112 FCR 352, 356, Kiefiel J at [16], *Jones v Scully* (2002) 120 FCR 243, 269, [102], *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16, [70].

[64] *Eatock v Bolt* [2011] FCA 1103, [268].

[65] Ibid at 263.

[66] Despite the term not specifically being used in the RDA Part IIA is widely understood and applied by the courts to be directed towards racial vilification. For example, in *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16, [now Chief] Justice French said that "In Part IIA the Commonwealth appeared to have intended to strike the balance between the right to freely express or communicate certain matters and ideas, and the right to live free from vilification," [33].

[67] Andrew Markus, Mapping Social Cohesion: The Scanlon Foundation surveys 2015, p23 and p25. Of the respondents to the survey who said they had been racially discriminated against in the past 12 months, 61% said they had been verbally abused. Available at http://scanlonfoundation.org.au/wp-content/uploads/2015/10/2015-Mapping-Social-Cohesion-Report.pdf.

racism against Aboriginal and Torres Strait Islander people is significant, with studies indicating as many as three in four Indigenous Australians regularly experience racism.[68] Without the protection of section 18C, culturally and linguistically diverse groups and Aboriginal and Torres Strait Islander people may be exposed to more racial discrimination and hatred.

6.18 There are serious consequences for those experiencing racism, including poor physical and mental health.[69] Results of the National Australian Aboriginal and Torres Strait Islander Health Survey show:

- 16 per cent of respondents reported being 'treated badly because they are Aboriginal/ Torres Strait Islander' in the previous 12 months.
- Of this cohort, 8 per cent reported this occurred 2–3 times per week and 5 per cent reported this was a daily occurrence.
- The most common situation of racially discriminatory behaviour or racism was by members of the public (45 per cent).[70]

6.19 Indigenous people who experience discrimination are more likely to be in poor health and engage in risky health behaviours like substance abuse.[71] A BeyondBlue study found that over half of Indigenous people who experience discrimination also experience psychological distress, which increases the more a person is exposed to racism.[72]

6.20 An estimated one in five Australian children experience racial discrimination on a daily basis at school.[73] Exposure to racial discrimination during school years may lead to the development of symptoms of depression in children.[74] For Aboriginal and Torres Strait

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[68] See Yin Paradies, Ricci Harris and Ian Anderson, The Impact of Racism on Indigenous Health in Australia and Aotearoa: Towards a Research Agenda, Cooperative Research Centre for Aboriginal Health, Discussion Paper Series No. 4, p6 citing Forrest, Dunn & Pe-Pua 2007; Gallaher et al. 2007; Paradies & Cunningham, available at http://www.crcah.org.au/sites/default/files/docs/Racism-Report.pdf.

[69] A Ferdinand, Y Paradies & M Kelaher, 'Experiencing racism in health care: the mental health impacts for Victorian Aboriginal communities' (2014) 201(1) Med J Aust 44-47; see also P Dudgeon, H Milroy and R Walker, Working together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice (2014), Australian Government Department of The Prime Minister and Cabinet; Close the Gap Campaign Steering Committee, Progress and Priorities Report 2016 (2016), 22, available at https://www.humanrights.gov.au/sites/default/files/document/publication/Progress_priorities_report_CTG_2016_0.pdf; Productivity Commission, Overcoming Indigenous Disadvantage (2016), 5.23, available at http://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2016/report-documents/oid-2016-overcoming-indigenous-disadvantage-key-indicators-2016-report.pdf#nameddest=842.

[70] Australian Bureau of Statistics, Australian Aboriginal and Torres Strait Islander Health Survey: First Results, Australia, 2012-13 (2013) as cited in Close the Gap Campaign Steering Committee, Progress and Priorities Report 2016 (2016), 22, available at https://www.humanrights.gov.au/sites/default/files/document/publication/Progress_priorities_report_CTG_2016_0.pdf.

[71] Productivity Commission, Overcoming Indigenous Disadvantage (2016), 5.4, available at http://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2016/report-documents/oid-2016-overcoming-indigenous-disadvantage-key-indicators-2016-report.pdf#nameddest=842; AIHW, The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples (2015), 77.

[72] Beyondblue, Stop, Think, Respect: Racial Discrimination and Mental Health (2014), available at https://www.beyondblue.org.au/docs/default-source/default-document-library/bw0249_bl1328_stop_think_respect.pdf?sfvrsn=4; A Ferdinand, Y Paradies & M Kelaher, Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: the Localities Embracing and Accepting Diversity (LEAD) Experiences of Racism Survey, The Lowitja Institute (2013), https://www.lowitja.org.au/sites/default/files/docs/LEAD%20Report-WEB_0.pdf.

[73] See Priest N, Perry R, Ferdinand A, Paradies Y, Kelaher M., "Experiences of racism, racial/ethnic attitudes, motivated fairness and mental health outcomes among primary and secondary school students" in Journal of Youth and Adolescence, October 2014, 43(10):1672-87, https://www.ncbi.nlm.nih.gov/pubmed/24903675#

[74] Australian Government, Aboriginal and Torres Strait Islander Health Performance Framework (2014), 8, available at https://www.dpmc.gov.au/sites/default/files/publications/Aboriginal_and_Torres_Strait_Islander_HPF_2014%20-%20edited%2016%20June2015.pdf.

Islander children these high levels of stress lead to obesity, chronic disease, and, distressingly, self-harm.[75]

6.21 In his 2014 Social Justice and Native Title Report, former Aboriginal and Torres Strait Islander and Social Justice Commissioner Mick Gooda wrote:

> *"The impact of racial discrimination on Aboriginal and Torres Strait Islander people... provides a strong case for maintaining the protections set out in the RDA."*[76]

Section 18D

6.22 Section 18D provides that anything said or done reasonably and in good faith in the performance, exhibition or distribution of an artistic work is exempted under 18D of the RDA and therefore lawful. This is also the case for statements, publications, discussions or debate made or held for a genuine academic, artistic or scientific purpose or other genuine purposes in the public interest. Making or publishing a fair and accurate report of any event or matter of public interest is exempt, so too is 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 it.

6.23 Amnesty International considers that the broad range of existing exemptions under section 18D should be retained as currently drafted. In their current form they ensure that the right to freedom of expression is strongly protected.

6.24 In *Bropho v Human Rights and Equal Opportunity Commission*, Chief Justice French of the High Court of Australia, considered the requirement of good faith in detail and concluded that whereas current section 18C "condemns racial vilification of the defined kind" section 18D "protects freedom of speech and expression." He goes on to say that:

> *"the good faith exercise of that freedom... 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' to offend, insult, humiliate or intimidate people by reason of their race."*[77]

6.25 In the above case Chief Justice French said that reasonableness required a consideration of proportionality which takes in to account the purpose of Part IIA including the recognition of the two competing values of free speech and protection from racial vilification that are protected by those sections."[78]

6.26 Given the Federal Courts' interpretation of sections 18C and 18D of the *Racial Discrimination Act,* Amnesty International is of the view that these sections do not require amendment. Any legislative amendment to sections 18C and 18D that is pursued by the Parliament should seek to codify current judicial interpretation of 18C and 18D by the Federal Court, consistent with Australia's obligations under international human rights law, rather than to narrow their current scope of protection.

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[75] Australian Government, Aboriginal and Torres Strait Islander Health Performance Framework (2014), 15, available at https://www.dpmc.gov.au/sites/default/files/publications/Aboriginal_and_Torres_Strait_Islander_HPF_2014%20-%20edited%2016%20June2015.pdf; N Priest, Y Paradies, W Gunthorpe, S J Cairney & S M Sayers, 'Racism as a determinant of social and emotional wellbeing for Aboriginal Australian youth' (2011) 194(10) Medical Journal of Australia 546-550.
[76] M Gooda, Social Justice and Native Title Report 2014 (2014), 67, available at https://www.humanrights.gov.au/sites/default/files/document/publication/SJNTR%20FINAL.pdf.
[77] *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16, [95].
[78] Ibid at 79.

7. Adequacy of racial vilification laws

7.1 Racial vilification is expression that promotes hatred, hostility, contempt or serious ridicule of a person or group of persons on the ground of colour, race, ethnic or national background.[79] Notwithstanding the important protections under Part AII of the RDA, these do not explicitly prohibit racial vilification or incitement to hatred, in accordance with Australia's obligations under Article 20(2) of the ICCPR.

7.2 Australia currently lacks uniform legislation to explicitly prohibit or provide remedy for racial vilification. The states and territories have different legislative frameworks for racial vilification:

- New South Wales created the first two-tier system for racial vilification in 1989: a complaints system to provide civil remedies; as well as a criminal system, which made it a crime to incite racial hatred, contempt or severe ridicule on the grounds of race by threatening physical harm or inciting others to threaten such harm.[80] No offence has been prosecuted to date under this criminal system, despite 11 potential serious vilification matters being referred to the Department of Public Prosecution by the Anti-Discrimination Board of NSW since 1992.[81] A Parliamentary inquiry into the system found its effectiveness has been hindered by a number of procedural impediments, so NSW is currently overhauling the laws.[82]
- South Australian and the Australian Capital Territory have laws that essentially mirror the NSW laws.[83]
- Queensland,[84] Victoria[85] and Tasmania[86] prohibit both racial *and* religious vilification - Queensland and Victoria under the criminal law, and Tasmania under the civil law.
- Western Australia's *Criminal Code* was amended in 1989 to criminalise the "possession, publication and display" of written or pictorial material that is threatening or abusive with the intention of inciting racial hatred, with penalties of between six months and two years imprisonment.[87] It was amended in 2004[88] with harsher penalties and strict liability offences. The principle of freedom of speech and expression was protected however, by applying only to conduct that does not occur in private, by the insertion of defences to the strict liability offences, and by requiring the consent of the Director of Public

[79] Footnote to report, para 7.42.
[80] *Anti-Discrimination Act 1977* (NSW) s. 20D. Prosecution can only occur with consent of the Attorney General and carries penalties of fines up to $10,000 for individuals and $100,000 for corporations and up to six month imprisonment for individuals.
[81] Legislative Council Standing Committee on Law and Justice, "Racial vilification law in New South Wales", 3 December 2013, p26, available at https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/5807/Racial%20vilification%20law%20in%20New%20South%20Wales%20-%20Final.pdf.
[82] Anthony Klann, "NSW government to overhaul race hate laws after Parramatta shooting", The Australian, 19 October 2015, available at http://www.theaustralian.com.au/national-affairs/state-politics/nsw-government-to-overhaul-race-hate-laws-after-parramatta-shooting/news-story/10d8d7d3dee7b1d4be235c8621846d4b; see also https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/5807/Racial%20vilification%20law%20in%20New%20South%20Wales%20-%20Final.pdf.
[83] *Racial Vilification Act 1996* (SA); *Discrimination Act 1991* (ACT), ss.66 and 67.
[84] *Anti-Discrimination Amendment Act 2001* (Qld), ss.124A 131A.
[85] *Racial and Religious Tolerance Act 2001* (Vic), s.7.
[86] *Anti-Discrimination Act 1998* (Tas) s.19.
[87] *Criminal Code 1913* (WA), ss.76-80.
[88] *Criminal Code Amendment (Racial Vilification)* Bill 2004 (WA).

Prosecutions for any prosecution under sections 77 - 80, which hold maximum penalties of 14 years. Like NSW, there have been no prosecutions to date.

- The Northern Territory has no laws against inciting racial hatred.[89]

7.3 At a Federal level there is no explicit prohibition against inciting racial hatred. Section 85ZE of the *Crimes Act 1914* to use the internet to intentionally disseminate material that results in a person being menaced or harassed, was repealed in 2004 and replaced with section 474.17 of the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act 2004* which makes it an offence to use a carriage service to menace, harass or cause offence. The section can be used for menacing, harassing or offensive content which is racial in its nature, but does not specifically prohibit advocacy of racial hatred.

7.4 In conducting its review of Traditional Rights and Freedoms, the ALRC recommended that any review of the *Racial Discrimination Act* by the Parliament should take place:

> *"... in conjunction with a more general review of anti-vilification laws. This could consider not only existing encroachments on freedom of speech, but also whether existing Commonwealth laws serve their purposes, including in discouraging the urging of violence towards targeted groups distinguished by race, religion, nationality, national or ethnic origin or political opinion. Greater harmonisation between Commonwealth, state and territory laws in this area may also be desirable."*

7.5 Amnesty International agrees with this approach, and we urge the Committee to consider harmonisation of Commonwealth, state and territory laws to close the gaps in racial vilification protections.

7.6 Amnesty International recommends the Australian Parliament takes steps to address inadequate protections against racial vilification by legislating to include an explicit prohibition of and appropriate remedy for advocacy of hatred on the basis of race, colour or national or ethnic origin which amounts to incitement to hostility, discrimination or violence, in line with Australia's obligations under Article 20(2) of the ICCPR.

8. Handling of complaints

8.1 Under Part IIB of the *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act'), the AHRC has a mandate to inquire into and conciliate complaints from individuals about allegedly unlawful discrimination. This inquiry asks for consideration of whether the process of handling complaints made to the AHRC under the AHRC Act should be reformed.

8.2 By definition under the AHRC Act, 'unlawful discrimination' includes any acts, omissions or practices that are unlawful under Part II or IIA of the *Racial Discrimination Act 1975 (Cth).* Section 46PF requires the President of the AHRC to inquire into a complaint made under this part, and attempt to conciliate the complaint. However, under section 46PH, after an inquiry and conciliation is commenced, the President may terminate a complaint where the President is satisfied the complaint was trivial, vexatious, misconceived or lacking in substance. A similar power exists under section 20(2)(c)(ii).

[89] A private member's bill to amend the *Anti-Discrimination Act* to make racial vilification unlawful was introduced in the Northern Territory in 2014 but did not pass. See http://www.austlii.edu.au/au/legis/nt/bill_srs/aab2014294/srs.html.

8.3 This conciliation power is an important function of National Human Rights Institutions (NHRI). NHRIs should have powers to ensure effective non-judicial remedies and to ensure measures of redress and rehabilitation are taken in appropriate cases.

8.4 Under the CERD, Australia is required to provide "effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms".[90] Under international law, remedies must be accessible to be considered 'effective'.[91] This is particularly important for racial discrimination as those affected are likely to be from minority and disadvantaged communities.

8.5 Conciliation, as provided by the AHRC, is an important remedy because it:

(a) is free and therefore accessible; and

(b) allows individuals to attempt to resolve their disputes without going through the courts, which can be costly and re-traumatising.

8.6 Without this service, the law of defamation provides limited recourse for disadvantaged people and groups because of the prohibitive costs involved. State and Territory Legal Aid services, Community Legal Centres and the Aboriginal Legal Services do not generally take on defamation cases.

8.7 Australia is bound by the Principles relating to the Status of National Institutions (the 'Paris Principles'), adopted by the United Nations General Assembly by resolution in 1993.[92] The Paris Principles set out that a NHRI may be authorised to "hear and consider complaints and petitions concerning individual situations."[93] This includes:

(a) seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality; and

(b) informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them.[94]

8.8 Similarly, the Durban Declaration from the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in 2001, recommended that States should, by law, "expressly and specifically prohibit racial discrimination and provide effective judicial and other remedies or redress, including through the designation of national, independent, specialized bodies."[95]

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[90] Article 6 Convention on the Elimination of all forms of Racial Discrimination (CERD).

[91] Human Rights Committee, General Comment 31, para 15.

[92] *Principles relating to the Status of National Institutions* (Paris Principles), General Assembly Resolution 48/134, 20 December 1993, UN Doc A/RES/48/134, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx .

[93] Paris Principles, p. 7.

[94] Ibid.

[95] United Nations, *Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance,* 31 August to 8 September 2001, available at http://www.un.org/WCAR/durban.pdf (Durban Declaration), para. 163. Adopted by consensus, which Australia attended.

8.9 This includes establishing "innovative methods and procedures of conflict resolution, mediation and conciliation between parties involved in conflicts or disputes based on racism, racial discrimination, xenophobia and related intolerance."[96]

8.10 Australia welcomed the Durban Declaration and Program of Action from the World Conference and stated:

> *Australia is unequivocal in its opposition to racism in all its forms. We join with the World Conference in condemning the scourge of racism and supporting strong action at all levels to combat it, both domestically and internationally.*[97]

8.11 Further, the Rabat Plan of Action encourages consideration of civil and administrative sanctions and remedies, including those administered by professional and regulatory bodies.[98]

8.12 The continuation of the AHRC having conciliation powers is consistent with Australia's obligations under these international declarations and treaties.

8.13 Although there should be an assumption in favour of transparency, particularly in reports and the findings of investigations, in such publicity, care should be taken that sensitive details which could lead to complainants, their families, witnesses and human rights defenders being put in danger, or which leads to an invasion of their privacy, should not be released. NHRIs should also publicise their role as an institution independent from the executive part of the government, and its policies regarding confidentiality and security.

8.14 The government must provide NHRIs with adequate funding and resources in order to be able to fully carry out, and without restrictions and limitations, the aims and functions set out within the mandate, and particularly, to address the demands of the caseload that has been brought to its attention.

8.15 The NHRI should have all necessary human and material resources to examine, thoroughly, effectively, speedily and throughout the country, the evidence and other case material concerning specific allegations of violations reported to it.

8.16 The Australian Government should carefully consider any recommendations made to it by the AHRC about ways to improve the effectiveness and efficiency of its complaints procedures.

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[96] Durban Declaration, para. 164(g).

[97] Joint Statement with the Minister for Foreign Affairs, Alexander Downer, and Attorney-General, Daryl Williams, 'Australia Welcomes Conclusion of World Conference Against Racism', 10 September 2001, http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/0RW46/upload_binary/0rw461.pdf;fileType=application%2Fpdf#search=%22media/pressrel/0RW46%22.

[98] Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (Rabat Plan), Conclusions and recommendations emanating from the four regional expert workshops organised by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012, page 7, available at http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf.

9. The importance of human rights education

9.1 The AHRC plays a vital role in educating members of the public about their rights under Australia's anti-discrimination and other human rights laws, and how to access remedies when those rights have been violated. The Australian Government has a responsibility to ensure an enabling environment in which the AHRC can carry out its statutory work in defence of human rights.

9.2 Amnesty International notes that the terms of reference of this inquiry refers to the "practice of soliciting complaints" to the AHRC, and whether this has "had an adverse impact upon freedom of speech" or "should be prohibited or limited".[99] Amnesty International takes issue with the use of the term "solicitation" in this manner. There is a clear distinction between the AHRC's role in providing information to the public about their rights and remedies available to them by law, and the ordinary meaning of "solicitation", which is to request or entreat.

9.3 Often, minorities and other groups vulnerable to racial discrimination, including Indigenous people, are not aware of their rights and the protections and processes available under the RDA and international human rights treaties. NHRIs such as the AHRC, play a critical role in raising awareness about remedies for potential abuses of human rights. In accordance with the Paris Principles, NHRIs shall have responsibility to:

> *"publicise human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs."*[100]

9.4 Further, where an NHRI has a complaint-hearing function, their role may include informing parties of their rights, in particular the remedies available to them, and promoting their access to them.[101]

9.5 The Durban Declaration urged States that:

> *"Existing procedural remedies should be made known in the context of the relevant action, and victims of racial discrimination should be helped to avail themselves of them in accordance with the particular case".*[102]

9.6 Further, in the Rabat Report, the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred recommended that:

> *"due attention should be given to minorities and vulnerable groups by providing legal and other types of assistance for their members."*[103]

9.7 In particular, the AHRC's Race Discrimination Commissioner has a statutory responsibility under the RDA to "develop, conduct and foster research and educational programs" in "combating racial discrimination and prejudices that lead to racial discrimination" and in

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[99] Freedom of Speech in Australia Inquiry Terms of Reference, pt. 3, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia/Terms_of_Reference.

[100] The Durban Declaration, para. 3(g), available at http://www.un.org/WCAR/durban.pdf.

[101] Ibid, p. 3.

[102] Ibid para. 163(b).

[103] Ibid para. 32.

"propagating the purposes and principles of the Convention".[104] This clearly extends to promoting the availability of remedies for racial discrimination and vilification, in accordance with CERD.

9.8 NHRIs should ensure that they have access to the media in order to publicise their work to ensure that the population as a whole is aware of the services that the NHRI can provide and to ensure a forum for discussion of human rights and publicity (therefore transparency) of the NHRI's activities.

9.9 In relation to Indigenous Peoples, the 1991 *Royal Commission into Aboriginal Deaths in Custody* recommended Australian Human Rights and equal Opportunity Commissions at federal, state and territory levels:

> "*should be encouraged to further pursue their programs designed to inform the Aboriginal community regarding anti-discrimination legislation, particularly by way of Aboriginal staff members attending at communities and organisations to ensure the effective dissemination of information as to the legislation and ways and means of taking advantage of it … [and]*
>
> *should be encouraged to consult with appropriate Aboriginal organisations and Aboriginal Legal Services with a view to developing strategies to encourage and enable Aboriginal people to utilise anti-discrimination mechanisms more effectively, particularly in the area of indirect discrimination and representative actions.*[105]

9.10 **Amnesty International recommends the Australian Government not interfere with the independence of the AHRC or other advocacy bodies including the Aboriginal Legal Services by limiting their ability to conduct human rights education. In particular, the AHRC must be empowered to conduct independent human rights education with groups at risk of or impacted by racism and other forms of racial hatred and discrimination. Advising groups about their rights under Australian law is not "solicitation", it is human rights education.**

[104] *Racial Discrimination Act* 1975 (Cth), section 20.
[105] *Royal Commission into Aboriginal Deaths in Custody*, 1991, available at http://www.austlii.edu.au/au/other/IndigLRes/rciadic/.

10. Conclusion

10.1 Amnesty International is committed to promoting all human rights as set out in the Universal Declaration of Human Rights, including freedom of expression and the right to be protected from discrimination and racial hatred. The recommendations outlined in this submission are intended to assist the government and Parliament to balance these important priorities in law and practice.

10.2 There are numerous areas of law where the Australian Government could seek to strengthen freedom of expression. While the government has chosen to focus on particular sections of the RDA, Amnesty International submits that there are much more pressing laws that limit freedom of speech and political communication that Australia should seek to resolve. These include secrecy laws that dampen freedom of the press, laws that provide inadequate protection for whistleblowers, mass surveillance laws and increasingly draconian anti-protest laws at the state and territory level.

10.3 Amnesty International is satisfied that the Federal Courts' interpretation of sections 18C and 18D of the RDA complies with Australia's international human rights obligations. There is no evidence that the application of these laws over the past two decades have undermined Australia's vibrant free media.

10.4 Racism is incompatible with the core values and principles of Amnesty International. Racial discrimination is a negation of the very essence of human rights. True conviction in combating racism requires governments to be there to stand up for what is right and to reject forcefully what is objectionable.[106]

10.5 Amnesty International urges the Committee to ensure a full airing of the concerns of culturally and linguistically diverse communities is facilitated through this inquiry. We also call on the Committee to seriously consider practical measures the Australian Government can take, short of legislative reform, to promote inclusion and denunciation of racism in all its forms.

[106] See for example Amnesty International, "Combating racism calls for conviction and determination" 20 April 2009, available at https://www.amnesty.org/en/documents/ior41/018/2009/en/.