Questions on notice- Freedom of Speech in Australia Inquiry

NATSILS appeared on 31 January 2017 at a public hearing into Freedom and Speech in Australia Inquiry.
The following feedback related to questions taken on notice.

1) *Question from Mr LEESER: The second thing I wanted to ask you is about processes of the commission itself. You may have seen the submission that I put forward to this committee about changes to the processes of the commission to help better restore public confidence in section 18C and 18D and the processes of the commission itself. I wondered if either of you have any comment on that submission and those ideas in relation to the more speedy termination of matters that have no reasonable prospect of success and appeals from them?*

   NATSILS response:

   - At present, only the President of the Commission can deal with complaints brought under Part IIA of the Racial Discrimination Act. Under the Human Rights Commission Act the President "must inquire into the complaints and attempt to conciliate the complaint", and she "may terminate the complaint" if she believes the complaint is, among other things, "trivial, vexatious, misconceived or lacking in substance".
   - What this effectively means is that, under the Human Rights Commission Act, the President's primary focus is conciliation. She has no power to terminate complaints which have little prospect of success.
   - NATSILS shares the view of the Australian Human Rights Commission and does not consider that the AHRC Act should include a specific ground of termination when a complaint has no reasonable prospect of ultimate success.
   - If a complaint cannot be terminated on the basis that it is trivial, vexatious, misconceived or lacking in substance it is undesirable for the Commission to instead terminate the complaint on the basis that the Commission considers that the case is unlikely to ultimately succeed if it goes to court. The function of the Commission is to inquire into, and attempt to conciliate, complaints of unlawful discrimination and complaints lodged under Part IIC (AHRC Act s11). The Commission does not adjudicate or make binding determinations about the substance of unlawful discrimination complaints.
   - In relation to Leeser's proposal we are concerned about restriction to access to justice. Currently, the AHRC can terminate a complaint and complainant can still institute proceedings in the Federal Court. The Leeser proposal suggests that if the AHRC terminates a complaint because it considers that it has limited prospects of success, the complainant would only have the right to review before the Federal Court on the basis of jurisdictional error and by providing security of costs. We don't agree with this because review on the basis of jurisdictional error is extremely limited. Furthermore, ordinary rules re security for costs should be maintained so impoverished people are not denied access to justice (ie, there should be no automatic requirement for a complaint to provide security for costs).
   - If there is to be a tightening of processes for the AHRC the right to institute proceedings in court must remain.
   - A criterion based on a no prospect of success test is very subjective. Current test is an objective test.
   - It puts the Commissioner in an inappropriately judicial role when the purpose of the Commission is to allow for parties to communicate and resolve disputes that are often emotional. Many disputes at the Commission are resolved without any monetary compensation but with satisfaction on both sides. Imposing a "threshold

of success" test misses the point of the Commission, which is to bring people together, rather than make them engage adversarially.
- Terminating more complaints at an earlier stage of the Commission's process will divert many complaints on to the courts.
- It's possible that providing a threshold of merit test will mean lawyers are engaged much earlier in the process, which gets in the way of access to the Commission's conciliation services.

2) Question: *Would your organisations support the creation of an offence of racial vilification in Australia?*

NATSILS response:

- We have taken this question to mean a federal offence for racial vilification on the basis that a number of jurisdictions have state and territory based offences for racial vilification. Although it is the experience of our members that prosecutions under state and territory racial vilification laws occur infrequently.
- Unfortunately we have not had sufficient time to consult with our members to form a position at this time.
- However, we propose that broader community consultation should occur before determining a policy position in relation to any proposed federal offence for racial vilification. NATSILS emphasises that a federal offence for racial vilification should not replace Part IIA of the Racial Discrimination Act, nor any of the civil remedies available and dispute resolution procedures currently conducted by the Australian Human Rights Commission.