Chapter 3

Complaint handling at the Australian Human Rights Commission

Introduction

3.1 This chapter responds to the inquiry's second term of reference:

> Whether the handling of complaints made to the Australian Human Rights Commission [(AHRC)] under the Australian Human Rights Commission Act 1986 (Cth) [(AHRC Act)] should be reformed, in particular, in relation to:
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> a) the appropriate treatment of:
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> i. trivial or vexatious complaints; and
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> ii. complaints which have no reasonable prospect of ultimate success;
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> b) ensuring that persons who are the subject of such complaints are afforded natural justice;
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> c) ensuring that such complaints are dealt with in an open and transparent manner;
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> d) ensuring that such complaints are dealt with without unreasonable delay;
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> e) ensuring that such complaints are dealt with fairly and without unreasonable cost being incurred either by the Commission or by persons who are the subject of such complaints;
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> f) the relationship between the Commission's complaint handling processes and applications to the Court arising from the same facts.[1]

Complaint handling processes

3.2 One of the roles of the AHRC is to 'impartially inquire into and attempt to conciliate' complaints lodged in relation to alleged infringements of Commonwealth discrimination legislation as a means of meeting its international obligations under the International Covenant on Civil and Political Rights (ICCPR).[2] This section examines some of the key elements of the AHRC's complaint handling processes and provides the views of submitters and witnesses on the AHRC's performance with

1 Parliamentary Joint Committee on Human Rights, *Inquiry report: Freedom of speech in Australia*, Terms of Reference, Chapter 1 at paragraph [1.1].

2 Australian Human Rights Commission (AHRC), *Submission 13*, 22. Complaints can be made on the basis of sex, disability, race and age.

regard to each of these elements. Although this section describes functions that apply to a broad range of discrimination, it primarily focuses on complaints made under section 18C of the *Racial Discrimination Act 1975* (Cth) (RDA) (it is noted that many of these processes also apply to complaints made under the *Disability Discrimination Act 1992* (Cth) (DDA), *Sex Discrimination Act 1984* (Cth) (SDA), *Age Discrimination Act 2004* (Cth) (ADA) and RDA more broadly).

3.3 The following discussion of the complaints handling process is structured as follows:

- background—complaints process prior to 1995;
- establishing a complaint and the role of the AHRC;
- terminating complaints;
- effect of terminating a complaint and ability to apply to a court; and
- general issues with the complaint process.

Background—complaints process prior to 1995

3.4 It is useful to broadly understand some key aspects of the previous legislative arrangements both as general background to the development of the current processes, and because they have implications for the some of the proposals for change suggested to the committee in evidence. Between 1992 and 1995, the AHRC, formerly known as the Human Rights and Equal Opportunity Commission (HREOC), had statutory functions under the RDA, DDA and SDA to determine whether a complaint was successful. Where a complaint was substantiated, the HREOC registered its determination with the Federal Court registry, and upon registration the determination was to have effect as if it were an order of the Federal Court.

3.5 In *Brandy v Human Rights and Equal Opportunity Commission*,[3] the High Court held that the provision for registration of the HREOC's decisions was unconstitutional as its effect was to vest judicial power in the HREOC contrary to Chapter III of The Constitution.

3.6 The parliament responded to *Brandy* by enacting the *Human Rights Legislation Amendment Act 1995* (Cth), which repealed the registration and enforcement provisions of the RDA, DDA and SDA. Under this new regime, complaints were still the subject of hearings before HREOC and, where successful, HREOC made a determination. As HREOC's determination was itself unenforceable, where a complainant sought to enforce a determination they had to seek a 'de novo' hearing in the Federal Court. In circumstances where the Federal Court upheld the complaint, the Court would make an enforceable order.[4]

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3 (1995) 183 CLR 245.

4 HREOC, *Federal Discrimination Law* (2008), 8.

3.7 The process was revised again as a result of the *Human Rights Legislation Amendment Act (No. 1) 1999* (Cth). This act amended the complaints process further by completely removing HREOC's hearing and determination function. A more detailed explanation of this process can be found in Appendix 4.

Establishing a complaint

3.8 This section examines AHRC processes relating to complaint handling, including:

- who can make a complaint;
- how a complaint can be lodged;
- threshold for establishing a complaint;
- the role and powers of the AHRC once a complaint is made; and
- the conciliation role of the AHRC.

Who can make a complaint

3.9 Under section 46P of the AHRC Act, a complaint may be lodged with the AHRC alleging unlawful discrimination by a person aggrieved by the alleged unlawful discrimination or on that person's behalf.[5] There must be 'a person aggrieved' before a complaint can be lodged with the AHRC. The AHRC Act does not define 'a person aggrieved', however, the AHRC's submission provided the following explanation:

> Whether a person is a 'person aggrieved' by an act is a mixed question of fact and law. A person does not qualify as a person aggrieved merely because he or she feels an intellectual or emotional concern with the conduct. Rather, the person must be someone who can show a grievance which will be or has been suffered as a result of the act or practice complained of beyond that which he or she has as an ordinary member of the public. However, the term 'person aggrieved' should not be interpreted narrowly. A person need not be directly affected by the conduct. It is at least arguable that derivative or relational interests will support the claim of a person to be 'aggrieved'. The categories of eligible interest to support standing as a person aggrieved are not closed.[6]

5 See: *Australian Human Rights Commission Act 1986* (AHRC Act) section 46P. A complaint may also be made on behalf of more than one person, also aggrieved by the alleged unlawful discrimination.

6 AHRC, *Submission 13*, 42.

How a complaint is lodged

3.10 A complaint is lodged with the AHRC through an application form which enables a layperson to make a written complaint without needing to address technicalities, make legal arguments or prepare evidence.[7]

3.11 At the committee's second Canberra public hearing, the committee and AHRC discussed the limited scope of protections that have been judicially held to apply to section 18C of the RDA and the broad defences under section 18D and how the AHRC currently communicates this to potential complainants.[8] The AHRC indicated that it currently provides information to complainants on the prospects of their complaint; however, this generally occurs after a complaint form is lodged. In response to questioning, the AHRC said it would review the complaint form in light of 'whether there needs to be an amendment to the complaint form to more clearly indicate the elements of the test there'.[9]

Threshold for accepting complaints

3.12 There are three requirements that a complainant must satisfy before the AHRC can determine whether the complaint satisfies the threshold for complaints:

> The first requirement is that the complaint must be in writing.
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> The second requirement is that the complaint must be made by a person or persons aggrieved, either on their own behalf or on behalf of themselves and other persons aggrieved, or by a person or a trade union on behalf of one or more other persons aggrieved.
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> The third requirement is that the complaint must allege unlawful discrimination.[10]

3.13 Some submitters argued that the threshold to make a complaint to the AHRC is too low.[11] For example, the Institute of Public Affairs (IPA) noted that:

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7 AHRC Act, section 46P.

8 Section 18C has been held by the courts to only apply to conduct having 'profound and serious effects, not to be likened to mere slights': Kiefel J in *Creek v Cairns Post Pty Ltd* [2001] FCA 1007, [16].

9 Mr Graeme Edgerton, Acting Deputy Director, Legal Section, AHRC, *Committee Hansard*, 17 February 2017, 51.

10 AHRC, *Submission 13*, 42–43. See: AHRC Act, section 46P. A complaint need not detail the alleged unlawful act, simply that an unlawful act has taken place [*Simplot Australia Pty Ltd v Human Rights and Equal Opportunity Commission* (1996) 69 FCR 90 at 93-94].

11 See for example: Institute of Public Affairs, *Submission 58*, 28; Rationalist Society of Australia Inc. *Submission 84*, 1. Dr Sev Ozdowski AM FAICD, *Submission 101*, 3; Victorian Council for Civil Liberties, *Submission 138*, 16.

> Accepting cases which have no real possibility of conciliation or success in court does nothing more than heighten the chilling effect by fostering public fear and misapprehension of the scope of the law.[12]

3.14 The Uniting Church Assembly made the point that if complaints with little merit were dismissed earlier, the 'resources of the [AHRC] could be directed to complaints that have merit'.[13]

3.15 The AHRC has acknowledged that the threshold for lodging complaints is low, and may not reflect the threshold for a breach of Part IIA of the RDA noting that:

> It is enough to satisfy the threshold for lodging a complaint that there be a bare allegation that unlawful discrimination has occurred. A complaint will be valid even if it does not contain any particulars of the alleged acts or practices being complained about and even if it does not allege anything that if true could constitute unlawful discrimination.[14]

3.16 As set out in Chapter 2, the courts have judicially interpreted the words 'offend, insult, humiliate or intimidate' in section 18C of the RDA collectively to mean 'profound or serious effects, not to be likened to mere slights'.[15]

3.17 However, as it stands now, consideration of the narrower judicial interpretation does not impact on the initial threshold for accepting a complaint so long as the legislation only requires a bare allegation of unlawful discrimination. This means that complaints may be lodged with the AHRC that do not satisfy, or fall far short of, the judicial interpretation of the test of 'offend, insult, humiliate or intimidate' against which the complaint will ultimately be assessed under Part IIA of the RDA.

3.18 The two main consequences of the low legislative threshold as identified by the AHRC that requires only that a complaint 'allege unlawful discrimination' are:

- First, in practice the [AHRC] can spend considerable time and resources dealing with complaints that are unmeritorious or ill-conceived.
- Secondly, if these complaints are not withdrawn and need to be terminated under section 46PH, for example because they are trivial, vexatious or lacking in substance, then the complainant is able to make a complaint to the court in the same terms, which has cost and resource implications for parties and the court.[16]

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12 Institute of Public Affairs, *Submission 58*, 34.

13 Uniting Church Assembly, *Submission 68*, 16.

14 AHRC, *Submission 13*, 43.

15 See, for example: Arts Law, *Submission 27*, 3; Australian Christian Churches and Freedom for Faith, *Submission 7*, 8.

16 AHRC, *Submission 13*, 43–44.

3.19 In its supplementary submission, the AHRC stated that 'around a third of complaints that are made to the [AHRC] do not proceed to conciliation' with five per cent of all complaints being terminated by the AHRC.[17] To strengthen the threshold for complaints, the AHRC has suggested two amendments to section 46P of the AHRC Act. These are that:

- complaints lodged be required to 'allege an act which, if true, could constitute unlawful discrimination'; and
- a written complaint be required 'to set out details of the alleged unlawful discrimination' sufficiently to demonstrate an alleged contravention of the relevant act.[18]

3.20 Reconciliation Australia was supportive of these suggested amendments on the basis that 'raising the threshold for accepting complaints' will help the AHRC to better judge whether a complaint should proceed to conciliation.[19]

The role and powers of the AHRC once a complaint is lodged

3.21 Once a complaint is lodged, the process and powers provided for under the AHRC Act may be summarised as follows:

(a) the President of the AHRC (the President) is required to make inquiries into and attempt to conciliate such complaints;[20]

(b) the President has powers to obtain information relevant to an inquiry[21] and can direct the parties to attend a compulsory conference;[22]

(c) the President may decide not to inquire, or to discontinue an inquiry, if the President is satisfied that the aggrieved person does not want the President to inquire, or to continue to inquire, or if the President is satisfied that the complaint has been resolved;[23]

(d) the President may terminate a complaint on the grounds set out in section 46PH of the AHRC Act, being that:

(i) the President is satisfied that the alleged unlawful discrimination is not unlawful discrimination;

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17 AHRC, *Submission 13.1*, 5–6.

18 AHRC, *Submission 13*, 44.

19 Reconciliation Australia, *Submission 19*, 12.

20 AHRC Act, subsection 8(6) and paragraph 11(aa).

21 AHRC Act, section 46PI.

22 AHRC Act, section 46PJ.

23 AHRC Act, subsection 46PF(5).

(ii) the complaint was lodged more than 12 months after the alleged unlawful discrimination took place;

(iii) the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance;

(iv) in a case where some other remedy has been sought in relation to the subject matter of the complaint, the President is satisfied that the subject matter of the complaint has been adequately dealt with;

(v) the President is satisfied that some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to each affected person;

(vi) in a case where the subject matter of the complaint has already been dealt with by the AHRC or by another statutory authority, the President is satisfied that the subject matter of the complaint has been adequately dealt with;

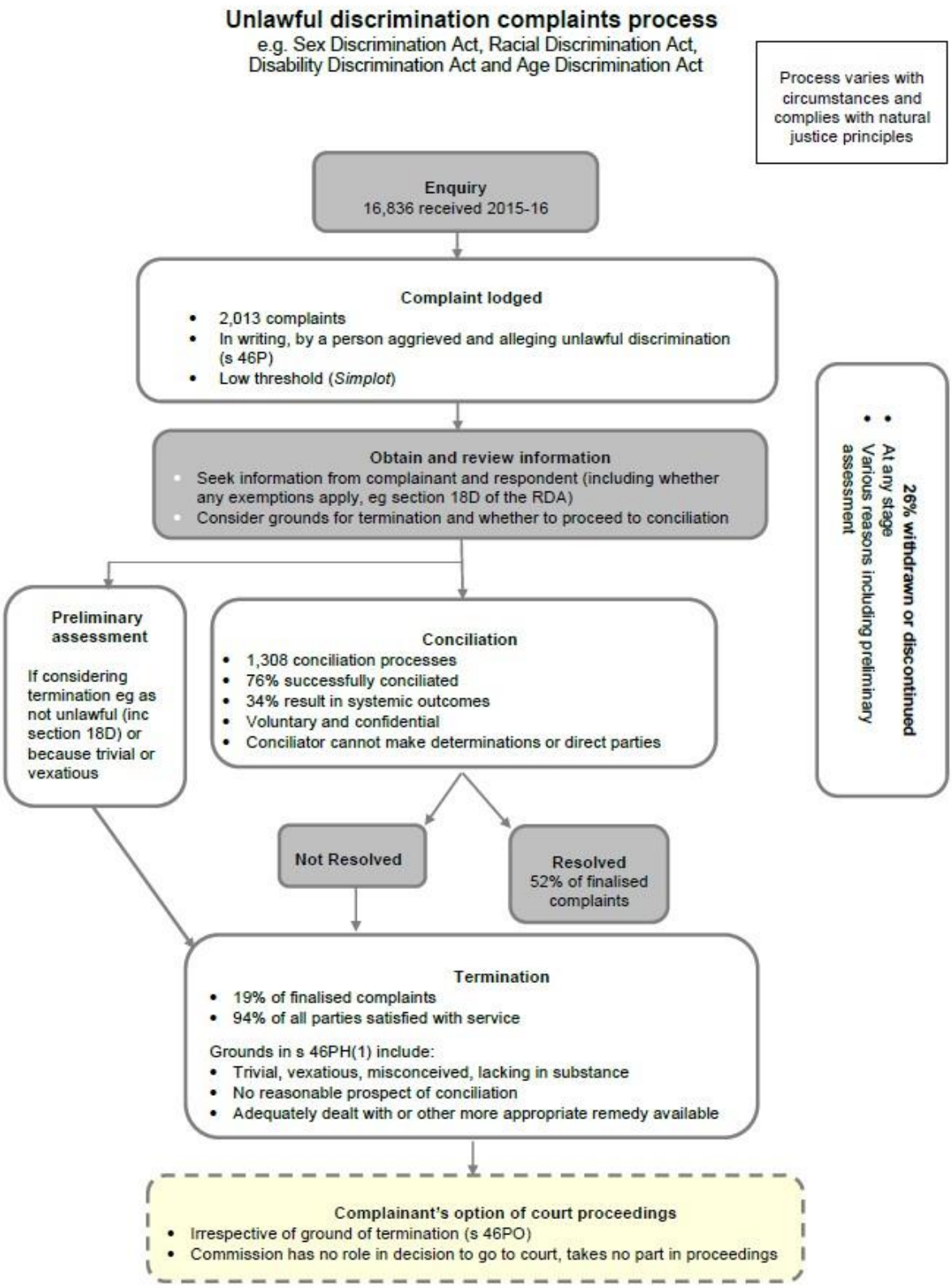
(vii) the President is satisfied that the subject matter of the complaint could be more effectively or conveniently dealt with by another statutory authority;

(viii) the President is satisfied that the subject matter of the complaint involves an issue of public importance that should be considered by the Federal Court or the Federal Circuit Court; or

(ix) the President is satisfied that there is no reasonable prospect of the matter being settled by conciliation.

3.22 The complaint handing processes is also summarised in Figure 3.1 below:

Figure 3.1—Unlawful discrimination complaints process



AHRC, *Submission 13.1*, Annexure A 24.

3.23 The statutory role of the AHRC and the President in respect of the complaint process is therefore to investigate a complaint of unlawful discrimination and attempt to resolve the complaint by conciliating between the parties.[24] The President is empowered to terminate a complaint where a relevant ground for termination exists.[25]

Conciliation

3.24 As noted earlier in this chapter, the role of the AHRC is to 'impartially inquire into and attempt to conciliate the complaint'.[26] The AHRC 'is not a court or tribunal' as it 'does not make determinations about whether or not a breach of the law has occurred'.[27] The objective of conciliation is to provide access to justice which is 'accessible, quick and inexpensive', and avoid a judicial process.[28]

3.25 Also noted earlier in this chapter, lodging a complaint with the AHRC and participating in conciliation does not preclude a complainant from subsequently applying to the Federal Court or Federal Circuit Court if an agreement is not reached and the complaint is terminated. In fact, a complainant is required to go through the AHRC process and have their complaint terminated before they can apply to court alleging unlawful discrimination under the RDA, SDA, ADA or DDA.[29] The AHRC provided evidence to the committee that most conciliation processes that are resolved result in:

- an apology;
- in the case of material published online, an agreement to remove material;
- systemic outcomes such as changes to policies and procedures, training for staff and training for individual respondents; or
- a financial settlement.[30]

3.26 The AHRC noted that it conducts a 'preliminary assessment' of a complaint before a complaint proceeds to conciliation:

> One feature of this process is a 'preliminary assessment' by the [AHRC] where it is considering terminating the complaint before going to conciliation. If the [AHRC] is considering early termination, it will write to

24 See: AHRC Act, paragraph 11(1)(aa).

25 AHRC Act, section 46PH.

26 AHRC, *Submission 13*, 22.

27 AHRC, *Submission 13*, 22

28 AHRC, *Submission 13*, 22–23.

29 AHRC Act, subsection 46PO(1).

30 AHRC, *Submission 13*, 22.

> the complainant and set out why the complaint may be terminated. For example, the [AHRC] may explain that it appears that the free speech exemption in section 18D of the RDA (or some other exemption) may apply so that the conduct complained of is not unlawful, or the [AHRC] may explain that the complaint may be trivial, vexatious, misconceived or lacking in substance.
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> A complainant that receives a preliminary assessment from the [AHRC] may decide to withdraw his or her complaint. In 2015-16, 17% of all finalised complaints were withdrawn.
>
> A complainant that receives a preliminary assessment from the [AHRC] may not provide any response and may disengage from further contact with the [AHRC]. In those cases, the Commission may discontinue the inquiry on the basis that it is satisfied that the person does not want the [AHRC] to continue to inquire into the complaint. In 2015-16, 9% of all finalised complaints were discontinued.[31]

3.27 Ms Katherine Eastman SC further described to the committee how the AHRC's investigation and conciliation process works in practice:

> It will depend on the particular circumstances, but what may happen is that the information that comes in the originating complaint is very thin on the ground, so there needs to be some clarification of that. Lawyers often call it 'asking for further particulars', so when, where and who. The commission might then ask the respondent to respond to those allegations and say: 'What's your side of the story? What do you want to say about that? Is there information that we need to consider?'
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> So the way in which the commission deals with the complaint is to try to get both sides of the story, which starts to look at the merits of the case, identify whether it is a very subjective response to the issues or whether there are some objective factors that should be taken into account. The commission uses that information in the process of conciliation to try to help the parties reach some sort of resolution—in effect, the usual testing that a mediator or said it does, which is to try to help the parties identify their respective strengths and weaknesses.
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> The commission has a firm view that the parties themselves should be resolving their matters, rather than the commission giving some advice along the way. If the matters cannot be conciliated, the process requires the president to take into account the recommendations and all of the work prepared by the conciliators so that the merits can be considered at that point, but the merits are only considered for the president to identify under what grounds she might terminate the complaint.[32]

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31 AHRC, *Submission 13.1*, 6.

32 Ms Katherine Eastman SC, *Committee Hansard*, 1 February 2017, 9.

Terminating unmeritorious complaints

3.28 This section examines the AHRC's powers with regard to terminating complaints and the experience of parties to this process.

Decision to terminate complaints

3.29 As noted above, the AHRC has the prerogative to terminate a complaint for a number of reasons including if a complaint is trivial, vexatious or lacking in substance, the conduct is not unlawful, or if a complaint cannot be resolved through conciliation.[33] Termination of a complaint does not preclude the complainant from lodging an application for allegations to be heard and determined by the Federal Court (or the Federal Circuit Court).[34]

3.30 In evidence to the committee, Professor Anne Twomey agreed with the premise that the AHRC, through the President, currently has extensive powers in relation to terminating complaints, but questioned whether the powers are appropriately exercised:

> I think that the commission has all the powers it needs, but I think the difficulty is getting those powers actually exercised and exercised within a period of time that is sufficiently short to cut out the pain of the process for the people where those sorts of complaints should not be dealt with. So I very much think there should be some kind of obligation on the commission to make an initial assessment, and to make that decision up-front, about whether or not the proceedings need to go ahead, rather than just simply having a discretion that maybe they will or maybe they will not exercise—some kind of obligation to make an initial assessment within a period of time to get rid of the ones that should not be there.[35]

3.31 The next sections will explore the termination of complaints in relation to trivial or vexatious complaints, and complaints subject to 'exemptions' or defences under section 18D of the RDA.

Complaints that are frivolous, vexatious, misconceived or lacking in substance

3.32 Under the AHRC Act, the AHRC may decide not to inquire into a complaint where 'the [AHRC] is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance'.[36] Further, the President may also decide to terminate a claim on the basis it is 'trivial, vexatious, misconceived or lacking in

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33 Pursuant to sections 46PE and 46PH of the AHRC Act.

34 AHRC Act, section 46PO.

35 Professor Anne Twomey, *Committee Hansard*, 1 February 2017, 79. See also: Dr Sev Ozdowski, *Committee Hansard*, 1 February 2017, 24; Clubs Australia, *Submission 121*, 3.

36 *Australian Human Rights Commission Act 1986*, sub-paragraph 20(2)(c)(ii). See also: Australian Lawyers for Human Rights, *Submission 5*, 3.

substance'.[37] The effect of the President making such a determination is that the AHRC complaint process ceases.

3.33 A key concern of submitters and witnesses to this inquiry is the process by which trivial and vexatious complaints made to the AHRC are identified and dismissed or terminated and whether this is being done appropriately.[38]

3.34 Some examples of trivial complaints were provided to the committee. For example, the IPA provided the following information:

> On 23 May 2010, Mr Simpson was granted 'confirmation of aboriginality' certificates for himself and members of his family. Two years later, following personal disagreements between Mr Simpson's family and the local indigenous community, these certificates were rescinded. Ms Taylor (Mr Simpson's daughter), alleged that this was racially discriminatory conduct under section 18C. The case was dismissed as insufficient factual evidence for the alleged discrimination was provided.[39]

3.35 The AHRC did not provide the committee with a detailed breakdown of the number of complaints that were terminated on the grounds of being trivial, vexatious, misconceived or lacking in substance. The AHRC noted that approximately five per cent of all complaints were terminated,[40] with the Refugee Council of Australia noting that only 'a very small percentage of complaints (4 per cent in 2012-13) are terminated because they are trivial, misconceived or lack substance'.[41] Other submitters have described:

> …receiving robust guidance from the [AHRC] about the risks of proceeding with a complaint that is not strong, and are appropriately referred to lawyers for advice on whether there is a better, less risky way to proceed.[42]

3.36 As noted earlier in this chapter, the AHRC has outlined its processes with regard to the preliminary assessments of complaints that it conducts. The AHRC argued that the preliminary assessments currently provide the AHRC with an

37 AHRC Act, paragraph 46PH(1)(c).

38 See, for example: Family Voice, *Submission 49*, 11; Aged Pensioner Power, *Submission 60*, [2]; Victorian Council for Civil Liberties, *Submission 138*, 16–17.

39 IPA, *Submission 121*, 58. *Taylor v Yamanda Aboriginal Association Inc & Anor* [2016] FCCA 1298.

40 AHRC, *Submission 13.1*, 6.

41 Refugee Council of Australia, *Submission 8*, 5.

42 Caxton Legal Centre, *Submission 23*, 6.

opportunity to terminate complaints or for complainants to withdraw complaints that are not arguable after receiving the preliminary assessment.[43]

3.37 Some submitters and witnesses have disagreed and responded by questioning the value of statistics which cite a low proportion of trivial cases. In his submission, Mr Tony Morris QC argued that the majority of complaints are dismissed or terminated late in the process and are often incorrectly categorised. For example, Mr Morris contended that many complaints are dismissed on the basis that 'there is no reasonable prospect of the matter being settled by conciliation' when instead these complaints should be dismissed at any earlier point as 'lacking in substance'.[44]

3.38 In her submission, Dr Helen Pringle raised the difficulty that the AHRC and its officers face in judging early in the process whether a complaint is trivial or not:

> As in many other areas of life and law, it can be difficult to assess in advance—that is, before a formal complaint has been made, or even in the initial stages of a complaint before complete evidence has been taken from both 'sides'—if a particular complaint is 'trivial'. Moreover, in the area of discrimination and harassment, the very *substance* of a complaint may be that the complainant and respondent take different views precisely on this question of whether a certain act is trivial or serious.[45]

3.39 Many submitters were supportive of changes to the complaints process which would result in trivial or vexatious claims being dismissed earlier. A joint submission from Multicultural Communities Council of NSW, National Sikh Council of Australia, Chinese Community Council of Australia, Vietnamese Community in Australia (NSW), and Macedonia Orthodox Church (Rockdale) noted:

> We support the 'filtering' of complaints that can easily be identified as frivolous, vexatious or clearly having no reasonable chance of success through the application of a standard that should be met before proceeding further with the complaint. That such a standard should be a matter for the [AHRC].[46]

3.40 Professor George Williams spoke to the committee about the need for 'giving someone a fast-track capacity to get a commission [AHRC] determination so you are not simply dependent upon whether or not they want to make a decision, and perhaps even a time limit for the making of that as well'.[47] The issue of time limits on complaints is dealt with in more detail later in this chapter.

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43 AHRC, *Submission 13.1*, 6.

44 Mr Anthony Morris QC, *Submission 307*, 24.

45 Dr Helen Pringle, *Submission 42*, 9. See also: National Aboriginal and Torres Strait Islander Women's Alliance, *Submission 53*, 11; Mr John de Meyrick, *Submission 135*, 13.

46 Multicultural Communities Council of Australia et al., *Submission 15*, 2.

47 Professor George Williams, *Committee Hansard*, 1 February 2017, 79.

3.41 Earlier in this chapter, a suggestion from the AHRC was canvassed in relation to raising the threshold for lodging a complaint. Specifically, this suggestion would require a complainant to provide more information in the initial complaint. This process would act as a deterrent to complainants with trivial or vexatious claims from lodging complaints in the first instance. An additional benefit is that by preventing such complaints from entering the AHRC's complaint handling mechanism, this would reduce the number of claims that potentially require termination.

3.42 Although some submitters proposed that the President's current discretionary powers in relation to terminating claims should be amended to become an obligatory power,[48] others questioned whether this amendment would result in any practical changes to the exercise of the termination power.[49] For example, Mr Gregory McIntyre SC from the Western Australian Branch of the International Commission of Jurists noted that 'it would still be a question [for the President or delegate] of when to exercise that, when to do it'.[50]

3.43 The committee also received evidence suggesting that the President be given power to terminate complaints that are trivial or vexatious without having to conduct an inquiry or investigation.[51] The AHRC agreed that the grounds for termination in section 46PH(1) of the AHRC Act should be expanded to include a power to terminate where, having regard to all the circumstances of the case, the President is satisfied that an inquiry, or further inquiry, into the matter is not warranted.[52]

3.44 Some submitters like the Gilbert + Tobin Centre for Public Law at UNSW suggested the creation of a process whereby the respondent to a complaint can

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48 See, for example: Professor Anne Twomey, *Committee Hansard*, 1 February 2017, 79; Australian Taxpayers' Alliance, *Submission 110*, 5; FamilyVoice Australia, *Submission 49*, 11-12; Legal Aid Queensland, *Submission 69*, 6-7.

49 See, for example: Ms Robin Banks, Anti-Discrimination Commissioner, Equal Opportunity Tasmania, *Committee Hansard*, 30 January 2017, 10; Mr Hugh de Krester, Director, Human Rights Law Centre and Ms Adrianne Walters, Director of Legal Advocacy, Human Rights Law Centre, *Committee Hansard*, 31 January 2017, 22; Mr Bill Swannie, Chair, Human Rights/Charter of Rights Committee, Law Institute of Victoria, *Committee Hansard*, 31 January 2017, 40.

50 Mr Gregory McIntyre SC, President, WA Branch, Australian Section, International Commission of Jurists, *Committee Hansard*, 3 February 2017, 4.

51 See, for example: Uniting Church of Australia, *Submission 68*, 16; AHRC, *Submission 13.1*, 4.

52 AHRC, *Submission 13.1*, 4.

apply to the President to have the complaint terminated.[53] Some submitters also suggested that an additional ground for termination be inserted that a complaint has no reasonable prospect of ultimate success.[54]

3.45 Some submitters relatedly flagged a possible way of dismissing claims at an earlier opportunity might be to add an additional criterion for termination as being 'no reasonable prospect of success'. Professor Adrienne Stone acknowledged that 'you could take the existing powers of the commission [AHRC] to dismiss a complaint and extend them to include the additional ground—no reasonable prospects of success that you have earnt.'[55]

3.46 Another area of concern to some submitters is that there seems to be a lack of connection between the result of the AHRC's complaint process for terminated complaints and the capacity for an applicant to file a claim in the Federal Court, particularly if a complaint has been dismissed by the AHRC for being trivial or vexatious. While the complaint handling process with the AHRC must be exhausted prior to a claim for unlawful discrimination under the RDA being able to be lodged in the Federal Court or Federal Circuit Court,[56] the ground upon which a complaint is terminated does not affect whether or not a complainant can seek to apply to the Federal Court to have the merits of their claim assessed. As noted by Professor Triggs in evidence to the committee, there is a need to protect respondents from unmeritorious legal proceedings:

> …as the law currently stands, regardless of the reason for termination, the complainant has the right to make an application to the court.[57]

3.47 This issue will be further examined later in the chapter.

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53 See, for example: Associate Professor Gabrielle Appleby, Professor Rosalind Dixon, Ms Gemma McKinnon, Associate Professor Sean Brennan (Gilbert + Tobin Centre of Public Law at UNSW), *Submission 107*, 8.

54 See, for example: Executive Council of Australian Jewry *Submission 11*, 25; Chinese Australian Forum *Submission 71,* 6*;* Mr Julian Leeser, *Submission 197*, 1; and Professor Adrienne Stone, Director, Centre for Comparative Constitutional Studies, University of Melbourne, *Committee Hansard*, 31 January 2017, 49.

55 Professor Adrienne Stone, Director, Centre for Comparative Constitutional Studies, University of Melbourne, *Committee Hansard*, 31 January 2017, 49.

56 Executive Council of Australian Jewry, *Submission 11*, 25.

57 Professor Gillian Triggs, President, AHRC, *Committee Hansard*, 17 February 2017, 47.

Consideration of section 18D in the complaint handling process

3.48 Section 18D of the RDA provides for 'a number of "exemptions" to the prohibition in section 18C which are designed to protect freedom of expression'.[58] Section 18D provides that:

> Section 18C does not render unlawful anything said or done reasonably and in good faith:
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> (a) in the performance, exhibition or distribution of an artistic work; or
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> (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
>
> (c) in making or publishing:
>
> (i) a fair and accurate report of any event or matter of public interest; or
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> (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.[59]

3.49 The committee received evidence from the Attorney-General's Department about how section 18D would be taken into account during the AHRC's complaint handling process and powers to terminate a complaint in respect of complaints made under section 18C of the RDA:

> …where a complaint is made under section 18C of the RDA, if the President or his or her delegate was satisfied that section 18D of the RDA applied, he or she may terminate the complaint under paragraph 46PH(1)(a) as the conduct would not constitute unlawful discrimination.
>
> As section 18D only applies to specified conduct said or done 'reasonably and in good faith', it is normally necessary for the President or his or her delegate to obtain information from the respondent to be satisfied that the relevant conduct was said or done reasonably and in good faith. Therefore, in practice, it is unlikely that a complaint would be terminated prior to seeking submissions from the respondent to the complaint. Once submissions from the respondent are received, if the President or his or her delegate were satisfied that the exemption in section 18D applied, the President or his or her delegate may terminate the complaint under section 46PH(1)(a).[60]

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58 AHRC, *Submission 13*, 28.

59 RDA, section 18D.

60 Answers to questions on notice from public hearing held on 12 December 2016 in Canberra, provided by the Attorney-General's Department.

3.50 The leading case in relation to the interpretation of section 18D is *Bropho v HREOC*.[61] This case forms the basis of the AHRC's approach to cases that may trigger exemptions under section 18D of the RDA and is described more fully in Chapter 2.[62]

3.51 The committee notes that Justice French in *Bropho* described section 18D as not so much a list of exemptions to section 18C, but rather that section 18D 'defines areas of freedom of speech and expression not subject to the proscription imposed by section 18C'.[63] Or, as Professor Adrienne Stone put it, 'provided a defence is available it *is* entirely possible and lawful to engage in offensive, insulting and even humiliating and intimidating speech on the grounds of race.'[64]

3.52 The AHRC has noted that it adopts the approach set out in *Bropho* when dealing with matters that may trigger section 18D:

> If a similar case were to come to the [AHRC] now, the [AHRC] would contact the publisher of the cartoon to seek a response to the allegations. In particular, the [AHRC] may ask whether the publication was done reasonably and in good faith, in order to make an assessment about whether the exemption in section 18D(a) (or another limb of section 18D) applied. If the [AHRC] was satisfied that section 18D applied, it may decide to terminate the complaint.

3.53 In its submission, the AHRC articulates clearly that when artistic works, public discussion and debate, and fair comment are conducted 'reasonably and in good faith', then the provisions of the RDA should not restrict this type of speech.[65]

3.54 However, the committee received evidence from submitters and witnesses which raised concerns about the scope and application of section 18D,[66] including the AHRC's approach to complaint handling for cases which may be relevant to section 18D.[67]

3.55 A recent prominent case in which section 18D was a key element involved Mr Andrew Bolt, a journalist with the Herald and Weekly Times. Relevant aspects of the ruling in the case are described in Box 3.1 as it provides important background to the discussion of evidence given to the committee about section 18D.

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61 *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105.

62 AHRC, *Submission 13*, 28–30 and Box 2.1 in Chapter 2, above.

63 AHRC, *Submission 13*, 28–30.

64 Professor Adrienne Stone, *Submission 137*, 7 (emphasis in original).

65 AHRC, *Submission 13*, 28–33.

66 For discussion about the scope of section 18D, see, for example; Mr Jonathan Holmes, *Committee Hansard*, 1 February 2017, 57-58.

67 Mr Bill Leak, *Committee Hansard*, 1 February 2017, 89; Media Entertainment and Arts Alliance, *Submission 95*, 8.

Box 3.1: The *Eatock v Bolt* decision

This box outlines the ruling of Justice Bromberg in this case. Responses to it and alternative views as discussed in evidence to the committee for this inquiry are outlined below.

On 15 April 2009, the Herald and Weekly Times Pty Ltd published in the Herald Sun newspaper an article written for publication by Andrew Bolt under the title 'It's so hip to be black'. On or about 15 and 16 April 2009, that article was also published by the Herald and Weekly Times Pty Ltd on its website, under the title 'White is the new black'. On 21 August 2009, the Herald and Weekly Times Pty Ltd published a second article written for publication by Andrew Bolt in the Herald Sun newspaper under the title 'White fellas in the black'. On 21 August 2009, that article was also published by the Herald and Weekly Times Pty Ltd on its website, under the title 'White fellas in the black' (collectively 'the Newspaper Articles'). Ms Pat Eatock applied to the Federal Court on the basis of a contravention of section 18C of the RDA.

The Court found that 'the writing of the Newspaper Articles for publication by Andrew Bolt and the publication of them by the Herald and Weekly Times Pty Ltd contravened s 18C of the Racial Discrimination Act 1975 (Cth) and was unlawful in that:

(a) the articles were reasonably likely to offend, insult, humiliate or intimidate some Aboriginal persons of mixed descent who have a fairer, rather than darker, skin and who by a combination of descent, self-identification and communal recognition are and are recognised as Aboriginal persons, because the articles conveyed imputations to those Aboriginal persons that:

(i) there are fair-skinned people in Australia with essentially European ancestry but with some Aboriginal descent, of which the individuals identified in the articles are examples, who are not genuinely Aboriginal persons but who, motivated by career opportunities available to Aboriginal people or by political activism, have chosen to falsely identify as Aboriginal; and

(ii) fair skin colour indicates a person who is not sufficiently Aboriginal to be genuinely identifying as an Aboriginal person.

(b) the Newspaper Articles were written and published, including because of the race, ethnic origin or colour of those Aboriginal persons described by the articles; and

(c) that conduct was not exempted from being unlawful by s. 18D of the Racial Discrimination Act 1975 (Cth) because the Newspaper Articles were not written or published reasonably and in good faith:

(i) in the making or publishing of a fair comment on any event or matter of public interest; or

(ii) in the course of any statement, publication or discussion, made or held for a genuine purpose in the public interest'.

In noting that the Newspaper Articles were not published 'reasonably and in good faith', the court found that 'many of the facts asserted by the Newspaper Articles were untrue or substantially untrue including the assertion that Ms Eatock and the people dealt with in the Newspaper Articles chose to identify as Aboriginal people.' While the principal reason

Bromberg J determined the matter was that facts in the case were untrue or a substantial distortion of the truth his secondary reasons included a derisive tone and the inclusion of gratuitous asides. Bromberg J held:

"In my view, Mr Bolt's conduct involved a lack of good faith. What Mr Bolt did and what he failed to do, did not evince a conscientious approach to advancing freedom of expression in a way designed to honour the values asserted by the RDA. Insufficient care and diligence was taken to minimise the offence, insult, humiliation and intimidation suffered by the people likely to be affected by the conduct and insufficient care and diligence was applied to guard against the offensive conduct reinforcing, encouraging or emboldening racial prejudice. The lack of care and diligence is demonstrated by the inclusion in the Newspaper Articles of the untruthful facts and the distortion of the truth which I have identified, together with the derisive tone, the provocative and inflammatory language and the inclusion of gratuitous asides. For those reasons I am positively satisfied that Mr Bolt's conduct lacked objective good faith."[68]

Source: Eatock v Bolt (2011) 197 FCR 261 (Bromberg J)

3.56 Some witnesses indicated that the finding in the *Eatock v Bolt* case illustrates that the exclusions in section 18D do not work to protect a journalist's right to freedom of expression. Dr Chris Berg from the IPA described this case as a watershed:

> …what has changed in the section 18C debate is that people thought that section 18C did one thing until 2011 when the Bolt case was, and now it has been discovered that it is actually much more of a burden than people expected it to be.[69]

3.57 Professor Anne Twomey added to this, explaining her view that in the *Bolt* case:

> …the exclusions in section 18D are important but sometimes ineffective and that is because of the interpretation of the word 'reasonably'. If the word 'reasonably' is taken to exclude 'insult' or 'offence' then the exemptions in 18D are ineffective and something needs to be done about that.[70]

3.58 However, relevant to this evidence it is important to note that section 18D of the RDA did not protect Mr Bolt's article in this instance due to factual inaccuracies in the article. Section 18D of the RDA also failed to protect Mr Bolt's article due to the

68 *Eatock v Bolt* (2011) 197 FCR 261 [425] (Bromberg J).

69 Dr Chris Berg, Senior Fellow, Institute of Public Affairs, *Committee Hansard*, 31 January 2017, 34.

70 Professor Anne Twomey, *Committee Hansard*, 1 February 2017, 74.

perceived 'tone', a finding about which a number of witnesses raised concerns.[71] Accordingly, it was held by Justice Bromberg that the comments were not made 'reasonably or in good faith'.

3.59 The consequence of the finding in the Federal Court that Mr Bolt acted unlawfully in relation to section 18C did not directly impose a financial penalty on Mr Bolt. As Professor Stone noted in evidence to the committee:

> No apology was ordered or requested, no money damages were ordered or requested and, indeed, the offending material—the material which was found to have infringed the section—is still available on the internet. It was not required to be removed; it simply appears with a statement on it that it has been found to be in contravention of the Racial Discrimination Act. So the upshot of all of this is to remember that 18C is a section that addresses serious forms of racial abuse that are subject to extensive defence in relation to which the damages may well, but not necessarily, be very light.[72]

3.60 Mr Justin Quill of Nationwide News represented Mr Bolt in this case and disagreed with the decision in this case:

> There is a series of articles that Mr Bolt cannot publish because of 18C. There is a common and, for me— having run the case and been intimately involved in it—very frustrating aspect of the way it was reported and the way it is understood. People often say, in dinnertime conversation when it comes up, 'He lost that case because he made factual errors.' It is a point that I strongly refute. In my view, that decision was made in error, it was an erroneous decision, and it was based on factual errors that include, for example, this factual error that I say is not a fact at all—and this is what it is that Mr Bolt has not been able to publish. I might say that, in my role, I do not take any view. I am always sitting on the fence as to these particular views.[73]

3.61 Mr Quill also noted that despite there being merit in appealing this case, it was not challenged due to the sheer cost of the process:

> Well, I can tell you, just as a little aside—and I spoke to Mr Bolt last night to make sure he was okay with me saying this—that the then CEO of News, Mr Hartigan, said, 'If you want to appeal, we will; we'll back you.'…

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71 See, for example: Mr Jonathan Holmes, *Committee Hansard*, 1 February 2017, 57; Mr Graham Young, Executive Director, Australian Institute for Progress, *Committee Hansard*, 10 February 2017, 15.

72 Professor Adrienne Stone, Director, Centre for Comparative Constitutional Studies, University of Melbourne, *Committee Hansard*, 31 January 2017, 46.

73 Mr Justin Quill, Nationwide News, *Committee Hansard*, Brisbane, 10 February 2017, 39.

> Mr Bolt—concerned about the fact that journalists were being put off while he was about to make a decision that was going to cost the company many, many hundreds of thousands of dollars, while people were losing their jobs—chose not to.[74]

3.62 In another example, Mr Bill Leak told the committee about a number of recent complaints made against him under section 18C of the RDA in relation to a cartoon published in *The Australian* newspaper on 9 August 2016. Mr Leak noted that he was not contacted by the AHRC until over two months after the complaint was lodged and it took a further two months for the complaint to be withdrawn. Mr Leak's primary concern was the AHRC's drawn-out approach and that the AHRC did not follow its own self-described processes in response to *Bropho:*

> My big problem here is with the [AHRC], because right from the word go, if you looked at the provisions of 18D, they meant that any action would not be successful. I think there are five points in 18D, four or five. If you just go through them and say, 'Okay, I tick that one, I tick that one, I tick that one,' I tick the lot.[75]

3.63 In this particular case, the AHRC did not decide whether this complaint should be dismissed or terminated on the basis that it met the 'exemption' criteria in section 18D, instead it was withdrawn by the complainant.

3.64 The AHRC disputed some of the contentions made about its handling of the complaint brought by Ms Dinnison against *The Australian* and Mr Leak in respect of the cartoon published on 9 August 2016. In a chronology of the complaint provided to the committee, the AHRC stated that its inquiry into the complaint lasted for 39 days, of the total period 24 days was spent waiting on responses from the lawyers for *The Australian* and Mr Leak, and 11 days was spent responding to allegations of apprehended bias.[76]

3.65 The committee heard evidence of serious concerns with the AHRC's approach to handling complaints that may be subject to 'exemptions' under section 18D of the RDA. The Gilbert + Tobin Centre for Public Law has proposed an amendment in its submission which would merge the provisions of section 18C and 18D of the RDA into a single provision. This would have the effect of emphasising the 'relationship between the *protections* in s 18C and the *exemptions* in s 18D'.[77]

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74 Mr Justin Quill, Nationwide News, *Committee Hansard*, Brisbane, 10 February 2017, 39.

75 Mr Bill Leak, *Committee Hansard*, 1 February 2017, 89.

76 See: Tabled Document, 'Complaint by Ms Dinnison against *The Australian* and Mr Leak: Chronology', tabled by Professor Gillian Triggs on 17 February 2017. See also: Professor Gillian Triggs, President, AHRC, *Committee Hansard*, 17 February 2017, 45–48.

77 Gilbert + Tobin Centre of Public Law at UNSW, *Submission 107*, 3 (emphasis in original). See also: Federation of Indian Associations, *Submission 112*, 5.

Proposals for change

3.66 Professor Katharine Gelber proposed an amendment to section 46PH of the AHRC Act to clarify that in deciding to terminate a complaint under Part IIA of the RDA on the basis that it is not unlawful, or trivial or vexatious that section 18D should be taken into account.[78] The AHRC suggests that section 18D is being taken into account at an early stage, but perhaps an express requirement to do so will assist to clarify that the AHRC is undertaking this function.

3.67 As noted above, the committee has also received evidence from the Gilbert + Tobin Centre for Public Law at UNSW which would clarify that the President 'must consider the exemptions in s[ection] 18D to the conduct complained of, when determining whether a complaint amounts to unlawful discrimination'.[79] The Federation of Indian Associations of NSW were also supportive of section 18D being read in concert with section 18C to ensure that exemptions are applied where appropriate.[80]

Effect of terminating a complaint and ability to apply to court

3.68 The President is required to notify a complainant in writing of a decision to terminate a complaint and the reasons for that decision.[81] Once a notice of termination has been issued by the President, an 'affected person in relation to the complaint' may make an application to the Federal Court or the Federal Circuit Court alleging unlawful discrimination by one or more respondents to the terminated complaint.[82]

3.69 An application alleging unlawful discrimination may be made regardless of the ground upon which a person's complaint is terminated by the President.[83] This means that even if the President chooses to terminate a complaint on the basis that, for example, it was 'trivial, vexatious, misconceived or lacking in substance' or not unlawful an affected person may still apply to the Federal Court or the Federal Circuit Court alleging unlawful discrimination.

3.70 An application alleging unlawful discrimination must be filed within 60 days of the date of issue of the termination notice by the President (however, the court may allow further time).[84] Courts will not grant remedies for unlawful discrimination

78 Professor Katharine Gelber, *Committee Hansard*, 10 February 2017, 6.

79 Gilbert + Tobin Centre for Public Law at UNSW, *Submission 107*, 8.

80 Federation of Indian Associations, *Submission 112*, 5.

81 AHRC Act, section 46PH.

82 AHRC Act, section 46PO(1).

83 See: AHRC Act, section 46PH and section 46PO(1).

84 See: AHRC Act, section 46PH.

unless the plaintiff/complainant has first made a complaint to the AHRC and that complaint has been terminated.[85]

Orders the Federal Court or Federal Circuit Court can make to summarily dismiss an application at a preliminary stage of proceedings

3.71 On the other hand, the Federal Circuit Court and the Federal Court are empowered to summarily dismiss an application or make an order for summary judgement including on the basis that:

(a) the applicant has no reasonable prospect of successfully prosecuting the proceeding;

(b) the proceeding is frivolous or vexatious; or

(c) the proceeding is an abuse of process.[86]

3.72 These are powers common to discrimination matters and other matters which come before the Federal Circuit Court or Federal Court.

Orders the Federal Court or Federal Circuit Court can make if satisfied of unlawful discrimination

3.73 If the court is satisfied that there has been unlawful discrimination, it has a broad discretion to decide what orders are appropriate. Section 46PO(4) provides for the following orders of the AHRC Act:

(a) an order declaring that the respondent has committed unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination;

(b) an order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant;

(c) an order requiring a respondent to employ or re-employ an applicant;

(d) an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent;

(e) an order requiring a respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by an applicant;

(f) an order declaring that it would be inappropriate for any further action to be taken in the matter.

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85 See: *Re East; Ex parte Nguyen* (1998) 196 CLR 354.

86 *Federal Circuit Court Rules 2001*, rule 13.10; *Federal Court Rules 2011*, rule 26.01; *Federal Court of Australia Act 1976*, section 31A.

Preventing trivial or vexatious complaints from entering the judicial system

3.74 Once the President has terminated a complaint for any of the permissible reasons, complainants are legally entitled to pursue court action. As noted earlier in this chapter, this inquiry has received evidence that expressed concerns that complaints terminated as trivial or vexatious or not unlawful by the President can still enter the judicial system. The AHRC has indicated that 'around three per cent' of cases terminated by the AHRC proceed to the Federal Court.[87]

3.75 Some submitters have expressed support for additional requirements which may screen possible applicants from filing applications that ultimately fail to meet the standard of unlawful conduct under section 18C of the RDA. As noted in the preceding section, the Federal Court and Federal Circuit Court currently has provisions for dismissing such claims, but often this occurs after parties to a complaint have incurred significant legal costs.[88] These processes also unnecessarily impose on the finite time available to the court.

3.76 Mr Jonathon Hunyor from the Public Interest Advocacy Centre signalled support for the introduction of a filtering mechanism suggested by the AHRC in its submission:

> …we think that there is some merit in the idea that having implemented a statutory conciliation process as something of a filtering mechanism prior to having to go to court, then if a complaint is terminated as being, for example, vexatious or lacking in substance, that would be a basis upon which someone would need leave to then take the case to court…
>
> Effectively, where a complaint is vexatious or lacking in substance, we think the better mechanism is for someone to have to seek leave to get access to court. That is a much simpler process.[89]

3.77 Mr Julian Leeser MP, a member of this committee, has suggested that the AHRC Act 'be amended so that on receiving a complaint the [AHRC] must initially determine whether the complaint has no reasonable prospect of success.'[90] Such determinations would be subject to review by the Federal Court but restricted to

87 Professor Gillian Triggs, President, AHRC, *Committee Hansard*, 17 February 2017, 65.

88 See for example: Mr Alexander Wood, *Committee Hansard*, 10 February 2017, 56; Mr Bernard Gaynor, *Committee Hansard*, 10 February 2017, 70.

89 Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, *Committee Hansard*, 1 February 2017, 28. See also: AHRC, *Submission 13*, 7.

90 Mr Julian Leeser MP, *Submission 197*, 7.

review of the jurisdictional issues only.[91] A number of submitters supported the aims of the proposal.[92]

3.78 Clubs Australia highlighted some commonalities between the AHRC's powers to dismiss trivial and vexatious claims and those of the NSW Anti-Discrimination Board (NSW ADB). However, Clubs Australia noted the NSW ADB has an additional mechanism which helps discourage vexatious litigants from continuing the complaint in the tribunal system:

> If a complaint is declined, the complainant can apply to the Administrative and Equal Opportunity Division of the NSW Civil and Administrative Tribunal for leave to appeal the ADB's decision to decline the complaint. However, the ADB usually clearly specifies that it has declined the complaint because it lacks substance and that any further action in relation to the matter is unlikely to succeed. Receiving such a notice of termination often deters complainants from taking unsubstantiated matters further through the judicial system.[93]

3.79 In its submission, the AHRC has made a suggestion which aims to address these concerns in relation to unmeritorious claims. The AHRC has suggested that the AHRC Act be amended so that if the President terminates a complaint on the basis that it is 'frivolous, vexatious, misconceived or lacking in substance' (amongst other reasons) then an application cannot be made to the Federal Court or the Federal Circuit Court unless that court grants leave. This suggestion is supported by other submitters including Ms Katherine Eastman SC who also added that the onus for seeking leave to apply to the court should rest 'on the person wanting to demonstrate that they should be allowed to proceed.'[94]

3.80 Some submitters were supportive of amendments which would require the AHRC to provide a certificate to the Federal Court and Federal Circuit Court detailing its decision on the complaint as part of the process of seeking leave.[95] In his submission, Mr Tony Morris QC went further, suggesting that the Federal Court may require the AHRC to pay costs where the court is satisfied 'that the President has

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91 Mr Julian Leeser MP, *Submission 197*, 7–8. See also: Mr Martin Iles, Legal Counsel, Australian Christian Lobby, *Committee Hansard*, 31 January 2017, 44; Dr Yadu Singh, President, Federation of Indian Associations of NSW, *Committee Hansard*, 1 February 2017, 37.

92 See, for example: Chinese Australia Forum, *Submission 71*, 4; Victorian Multicultural, Faith and Community Organisations, *Submission 125*, 3.

93 Clubs Australia, *Submission 121*, 3.

94 Ms Katherine Eastman SC, *Committee Hansard*, 1 February 2017, 7–8. Any amendment along these lines should not be limited to cases involving the RDA, but all types of discrimination that the Commission deals with including sex, disability or age discrimination.

95 See, for example: Macpherson Kelley, *Submission 117*, 5; Mr Anthony Morris QC, *Submission 307*, 143.

acted recklessly in (i) issuing or purporting to issue a certificate under section (1A); (ii) failing or refusing to issue such a certificate'.[96]

3.81 MinterEllison suggested a further deterrent to vexatious litigants be that

> …an applicant be required to pay a respondent's costs of future proceedings if they are unsuccessful or if the respondent has, at an early point, offered the remedy (e.g. an apology) which is at least equivalent to the remedy which is ultimately ordered.[97]

General concerns with the complaint process

3.82 Submissions and evidence to the inquiry have raised a number of other areas of concern with the AHRC's processes including transparency, natural justice, timeliness and costs.

Transparency and openness

3.83 The AHRC noted that 'conciliation is a private process with no right of access to information raised as part of the conciliation other than the conciliator and parties'.[98] According to the AHRC, this privacy and confidentiality is a critical element in ensuring that all conciliation is undertaken in good faith. It is also currently a legal requirement: the AHRC Act requires that 'a compulsory conference is to be held in private'.[99] Despite the confidentiality of the substance of the conciliation process, the AHRC has insisted that it is committed to transparency and openness of the process to the extent possible.[100] This includes providing publicly available statistics and guidelines on how conciliation works.[101]

3.84 Despite this, the committee has received evidence raising concerns about the confidential nature of this process. An example of a complaint involving Ms Cindy Prior and students of the Queensland University of Technology (QUT) is described below in Box 3.2. Many submitters and witnesses have highlighted this case as an example of when the AHRC's lack of transparency has been criticised as leading to poor outcomes. Although recognising the need for such conciliation to take place in private to protect both the complainant and the respondent, and to ensure that conciliation is undertaken in good faith; it is important that the AHRC comply with its

96 Mr Anthony Morris QC, *Submission 307*, 145. Subsection 1(A) would provide for the issuance of a certificate to the court by the President, as described previously.

97 MinterEllison, *Submission 237*, 2.

98 AHRC, *Submission 13*, 60.

99 AHRC Act, subsection 49PK(2).

100 AHRC, *Submission 13*, 57–62.

101 AHRC, *Submission 13*, 58–61.

legislated obligations to be an unbiased conciliator seeking to protect the interests of both parties:

> The person presiding at the conference must ensure that the conduct of the conference does not disadvantage either the complainant or the respondent.[102]

Box 3.2: *Prior v Queensland University of Technology & Ors*—The Experience of the Students

As one of the respondents in the QUT case, Mr Alexander Woods, related his experiences of the complaint handling processes at the AHRC. Further discussion of, including alternative views to this account, are explored later in this section.

I feel I should explain the simplistic incident and add to it my personal experience. I was 19 and in my second year of uni. I was with two of my engineering mates and we were trying to find a computer so that we could do our uni work. There were two buildings that had been recently built at the university. One of them was full of computers and we exhausted all options there, so we thought we would go to the other building and search for another computer lab. We walked straight in. There was a computer lab that looked like any other. We sat down and about five minutes later a lady came towards us and asked us if we were Indigenous. We said, 'No, we are not,' and she quite brusquely asked us to leave, because they were reserved for Indigenous students, and that we had to go. We promptly left and about 45 minutes later I found another computer where I posted on a Facebook page to a couple of thousand other QUT students. I said:

Just got kicked out of the unsigned Indigenous computer room. QUT stopping segregation with segregation.

I did not follow the post too closely after that, but what ensued was quite a political debate both for and against the merits of the facility. It was not until the next day, when I got a letter from a staff member at QUT, that I was told to take down the post. I promptly jumped on Facebook to take it down but it was already deleted. I sort of put the incident to the back of my mind until about two years later, when I was in my last semester of uni and I was faithfully reading my emails one Friday afternoon. I had an email from the HR department at uni detailing a case that had been with the [AHRC] for over 14 months, with a conciliation scheduled for the Monday, which was just one business day after. I was quite confused because at no point had anyone from the commission ever got in contact with me personally, and, to the best of my knowledge, ever tried. I spoke to the university's lawyers, who told me that conciliation was optional and the uni has been dealing with it for quite some time. I did not appreciate the full gravity of the situation at the time, and I was not legally represented. Around two months later, I was served with a notice to appear at the Federal Circuit Court of Australia, as I was personally being sued for over $250,000. At the same time, I was offered a confidential settlement of $5,000. I was extremely disappointed with my university and the commission, who I felt have effectively hung me out to dry.

102 AHRC Act, subsection 49PK(3).

At that point in my life, it all sort of hit me at once. I was afraid. I felt that uni had been for nothing. I had studied quite hard and had a GPA of 6.3, and I thought that was going to go down the drain. I thought I was going to lose my job and potentially not be able to get a job after uni. I thought my friends would shun me if they thought I was a racist. But, most importantly, I thought that I had incredibly disappointed my mum and my dad. My mum, who is with me here today, and my dad, who passed away in 2006, have always instilled in me strong morals. I have fundamentally formed who I am around these morals. These are to give everyone a fair go; (1) to listen to people and (2) to learn from them; and to treat others fairly and kindly. I held my dad in the highest regard. He was quite a virtuous man, and at that point I thought I had destroyed his legacy. So I think being wrongly accused as a racist under 18C is not just defamation; it allowed for a sanctioned attack on my character, on who I am and on my upbringing.

Suffice it to say I got in contact with some lawyers. It was a family friend who put me in contact with Michael Henry and Bourke Legal. Between that period and the end of the case, I do not think I need to elaborate, because it was quite heavily publicised, but by that point it permeated every facet of my life. I could not escape it at home, I could not escape it with friends, I could not escape it at work, and I was even in a couple of situations when I was out and people were talking about my case and about me, and I did not know who they were and they did not know who I was.

The case was thrown out of court, and all the costs were awarded against Ms Prior. As I had claimed all along and as the judge found, I was effectively rallying against racism. This is how I felt about the statement from day one. It was never targeted at Ms Prior or the Indigenous people as a whole. It was simply an observation upon university policy. I offered numerous times to settle outside of court for no money, even offering to apologise. Each time that happened, I was met with a response of $5,000. I felt as if I were being held to ransom, and I felt that Ms Prior had received poor legal advice.

This case should never have reached the level it did. We attempted to make Ms Moriarty, Ms Prior's lawyer, liable for some of the damages. However, that bid failed, and now I am stuck with a $41,000 bill. I am 22 years old, effectively exonerated in court, dragged through years of legal action, let down by my university and let down by the [AHRC], and now I am stuck with a $41,000 bill. My lawyers, Michael Henry, Damien Bourke and Anthony Collins, have not been paid and may never get paid for their hard work. Where is the justice in this?

Source: Mr Alexander Woods, Committee Hansard, 10 February 2017, 55–56.

3.85 Relatedly, some submitters have raised the issue of confidential financial settlements which will be discussed in a later section on costs.

Natural justice

3.86 The AHRC noted that it:

> …is required to, and does afford, natural justice to both complainants and respondents to the complaint handling process. Any party can seek judicial review of a decision of the [AHRC] if they believe that the [AHRC] has failed

> to accord them natural justice. The [AHRC] also provides its own complaints mechanism under its Charter of Service.[103]

3.87 The committee received evidence which supported the complaints handling work of the AHRC. Ms Maria Nawaz of the Kingsford Legal Centre stated that 'in our experience, the commission does an excellent job of dealing with complaints in an open and transparent manner and affords parties natural justice'.[104] JobWatch agreed, noting that:

> A complaint to the AHRC is a request for conciliation, not an application to a court or tribunal seeking a determination. A conciliation is an opportunity for the parties to resolve their dispute by agreement. The AHRC is not able to make determinations, orders or findings as to fact. Conciliators do not make decisions and they are neutral and impartial. All parties have equal access to the AHRC and they are made aware of arguments and any relevant documents provided by the other side. The conciliations are private and confidential and specific outcomes of conciliations are not published. Respondents have the opportunity reply to complaints made against them and can provide a written response if they wish. Ultimately, there cannot be a negative outcome for a respondent in a conciliation unless that outcome is also agreed to by the respondent.
>
> As a result, in the circumstances of a conciliation, the requirements of natural justice are met by the AHRC conciliation process.[105]

3.88 However, the case study of the QUT Students discussed earlier in this chapter raises some significant and difficult questions about natural justice. Ms Prior lodged a complaint with the AHRC under section 18C of the RDA against QUT, two QUT staff members and seven students in May 2014.[106] The most obvious aspect of this case is the total time—14 months—it took for the student respondents to be notified that a complaint had been lodged against them. The complainant was able to request, with QUT's agreement, that the AHRC delay serving the complaint on the student respondents as the complainant, Ms Prior, was 'in settlement talks with QUT's solicitors'.[107] Mr Calum Thwaites further noted that:

> The AHRC happily kept all seven of the Student Respondents in the dark, placing the complaint to one side and making minimal contact with QUT or

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103 AHRC, *Submission 13*, 40.

104 Ms Maria Nawaz, Law Reform Solicitor, Kingsford Legal Centre, *Committee Hansard*, 1 February 2017, 46.

105 JobWatch, *Submission 29*, 10.

106 Professor Gillian Triggs, President, AHRC, *Committee Hansard*, 17 February 2017, 45.

107 Mr Calum Thwaites, *Submission 190*, 5.

> Ms Prior's solicitors every month or so to "check in" on the settlement talks.[108]

3.89 This case was complicated by a number of factors. The President, Professor Gillian Triggs, gave evidence to the committee that the AHRC, 'both by phone and email, suggested that she [Ms Prior] might appropriately confine her complaint to the university but not proceed against the students.'[109] The President gave further evidence to the committee that it was not until 23 and 24 June 2015 that:

> Ms Prior's solicitors confirmed for the first time that she would, indeed, pursue her complaint against each of the seven students originally named in the complaint. The commission then set a date for conciliation in Brisbane on 3 August 2015, six weeks hence. The commission insisted that, if the conciliation conference was to proceed, the students must be notified. The commission also advised that it did not have the addresses for all the students[110]

3.90 Mr Daniel Williams of MinterEllison, solicitor for QUT, noted that not only the students, but the university itself and individual staff members were accused of unlawful conduct:

> …up to a fairly late point in the proceedings, there was every reason to believe that Ms Prior's grievances were substantially, if not entirely, with the university. Although it is true that she had named and made complaints against particular students, it was, I think, reasonable for the [AHRC] to believe, as the university believed, that as long as the matters could be resolved as between [Ms Prior] and the university, then the other matters would fall away.[111]

3.91 Reflecting on the situation in general, Mr Williams made the following observation:

> In our view the balance could be improved substantially by information, at an early stage in the process, which is of value both to complainants, who may have made a complaint which does not properly fall within the requirements of the legislation, and also to individual respondents, who may gain some comfort from an independent assessment that the complaint made against them is indeed of no merit.[112]

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108 Mr Calum Thwaites, *Submission 190*, 5.

109 Professor Gillian Triggs, President, AHRC, *Committee Hansard*, 17 February 2017, 45.

110 Professor Gillian Triggs, President, AHRC, *Committee Hansard*, 17 February 2017, 46.

111 Mr Daniel Williams, Partner, MinterEllison, *Committee Hansard*, 17 February 2017, 35. See also: Professor Gillian Triggs, President, AHRC, *Committee Hansard*, 17 February 2017, 45. The AHRC understood that 'Ms Prior was primarily concerned at that time [complaint lodgement] about the university's treatment of her, rather than…the students'.

112 Mr Daniel Williams, Partner, MinterEllison, *Committee Hansard*, 17 February 2017, 32.

3.92 The final key element of the case in terms of the committee's inquiry is that not only were the student respondents not notified until 14 months after the complaint was lodged, upon being notified they were only given three business days to prepare for, and attend, a conciliation conference.

3.93 Although more general issues of timeliness will be examined more broadly in the next section, the question of timing in relation to notifying a respondent of a complaint is a critical element of natural justice. It presents difficulties for the respondent to prepare a defence or prepare to engage in conciliation if they are not notified at the earliest possible opportunity.

3.94 The committee is concerned that, as in the QUT case, a complainant and primary respondent can request that other respondents not be notified of an active complaint against them, especially when other third parties are intimately aware of the complaint, and for that request to be acceded to. The President gave evidence to the committee in respect of the QUT case, that in hindsight, the complaint would have been managed differently and that the AHRC has changed its practices relating to notification of respondents:

> If a similar case were to come to the commission today, the commission would handle the aspect of notification differently. If an organisation such as an employer wants to notify individual respondents—most particularly obviously and typically its employees—the commission seeks written confirmation that all the individuals have been notified. In our supplementary submission provided to you this week, we have suggested that a new provision be included in the [AHRC Act] that would formalise this process by requiring all respondents to be notified at the same time as is now our current practice.[113]

3.95 The need for time limits in regard to notifying respondents was raised by several submitters. Concerns were raised about the ad-hoc approach to notifying respondents that a complaint has been lodged against them, noting that there needs to be a statutory requirement to 'directly notify a respondent of a complaint immediately following the complaint being made'.[114] Time limits and their application more broadly to the AHRC's complaints process will be discussed later in the chapter.

3.96 In addition to this issue, in its supplementary submission, the AHRC recommended that the AHRC Act be amended to provide that when there is more than one respondent to a complaint, the AHRC must use its best endeavours to

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113 Professor Gillian Triggs, President, AHRC, *Committee Hansard*, 17 February 2017, 48.

114 Mr Joshua Forrester, Dr Augusto Zimmerman, Ms Lorraine Finlay, *Submission 181*, 3; Discrimination Law Experts Group, *Submission 118*, 3.

notify, or ensure and confirm the notification of, each of the respondents to the complaint at or around the same time.[115]

3.97 As a means to improve natural justice for all parties to a complaint, the AHRC has also recommended that the AHRC Act be amended to provide that the principles applicable to inquiries conducted pursuant to paragraphs 11(1)(aa), 20(1)(b) and 32(1)(b) of the AHRC Act are that:

(a) dispute resolution should be provided as early as possible; and

(b) the type of dispute resolution offered should be appropriate to the nature of the dispute; and

(c) the dispute resolution process is fair to all parties; and

(d) dispute resolution should be consistent with the objectives of the AHRC Act.[116]

Access to legal representation

3.98 Mr Calum Thwaites told the committee about his experience seeking legal aid representation as a respondent to a complaint:

> I attempted to get legal aid through Legal Aid Queensland. I was told, 'Here are a couple community legal groups. Go away.' I was not asked about my means or the merits for merit testing or means testing, like they mentioned earlier today. That is again another point. I went to a community legal service group and they gave me very limited advice on a two-week email basis. The fact was that they were not going to help me at a trial because they were afraid of their funding being cut. That is from the solicitor himself.[117]

3.99 The committee recognises the need for respondents to be considered equally against criteria for access to the same standard of legal advice as complainants.

Timeliness

3.100 In its submission, the AHRC expressed a view that it works 'with all parties to a complaint to ensure a quick and efficient process'.[118] The submission noted that 98 per cent of complaints were finalised within 12 months, with the vast majority resolved in less than 6 months. Further:

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115 AHRC, *Submission 13.1*, 4.

116 AHRC, *Submission 13.1*, 4.

117 Mr Calum Thwaites, *Committee Hansard*, 10 February 2017, 60. See also: Ms Matilda Alexander, Senior Lawyers, Human Rights and Anti-Discrimination, Legal Aid Queensland, *Committee Hansard*, 10 February 2017, 10.

118 AHRC, *Submission 13*, 62.

> In 2015-16 nearly half of all the complaints finalised by the [AHRC] (47%) were finalised within three months of receipt. 82% were finalised within 6 months, 94% within 9 months and 98% within 12 months. The average time from receipt to finalisation of a complaint in the 2015-16 reporting year was 3.8 months.[119]

3.101 Currently, the AHRC is legislatively required to make a decision over whether or not to inquire into the act or practice 'before the expiration of the period of 2 months commencing when a complaint is made to the [AHRC] in respect of an act or practice.'[120]

3.102 The time taken from the lodgement of a complaint to its resolution in most cases is influenced primarily by the willingness of both parties to engage in good faith. Other factors that impact on complaint length include whether a respondent can be contacted and whether parties request additional time to prepare evidence for conciliation.[121] The committee notes the evidence which highlighted the severe difficulties arising from the unusual nature of the QUT case.[122]

3.103 Some submitters have suggested that a time limit be placed on how long a complaint process can take from lodgement to resolution.[123] In her submission, Dr Helen Pringle postured that 'more specific guidance as to "reasonable" timeframes could be added to the [AHRC Act]…although there are also dangers…in overhurried proceedings'.[124] However, Ms Karly Warner of the Law Institute of Victoria indicated a preference for some flexibility in time limits:

> There would essentially be a difference between having aspirational time limits—times which you would like a matter to actually proceed for—

119 AHRC, *Submission 13*, 62. These numbers are generally similar in the preceding two years (2014–15, 2013–14).

120 AHRC Act, subsection 20(3).

121 AHRC, *Submission 13*, 62.

122 Professor Gillian Triggs, President, AHRC, *Committee Hansard*, 17 February 2017, 49.

123 Professor Adrienne Stone, Director, Centre for Comparative Constitutional Studies, University of Melbourne, *Committee Hansard*, 31 January 2017, 49. See also: Professor George Williams, *Committee Hansard*, 1 February 2017, 78–79; Dr Augusto Zimmerman et al., *Submission 181*, 92.

124 Dr Helen Pringle, *Submission 42*, 11.

> versus what are the implications if you have a hard and fast time limit rule and a matter does not actually fall within that agreed time space.[125]

3.104 Nonetheless, Ms Robin Banks, the Tasmanian Anti-Discrimination Commissioner, told the committee that the Tasmanian conciliation process works within strict time limits:

> The first time limit that applies is 42 days to assess the complaint. That is the first one, then there are 10 days to notify from assessment. It is terrible at Christmas; I do not like making decisions just before Christmas, because 10 days is pretty much gone. So it is 10 days to notify. From there it is six months maximum for the investigation to take place. We can make it shorter than that. If there is nothing further to investigate and the parties have not resolved, then I can make a decision earlier than six months, but I cannot go more than that unless the complainant consents, and I am very reluctant to ask complainants for consent, because I think that delay is unhelpful. The only time I would ask is if there have been difficulties for the parties engaging in the process because they are overseas or whatever else. Once the investigation decision is made, if I refer it to the tribunal I have 48 days to finalise the report that goes to the tribunal, and then it is gone.[126]

3.105 The issue of the AHRC's financial and staff resourcing has been raised in the context of its impact on complaint handling timeliness. The AHRC noted that 'as a result of budget constraints the [AHRC]'s Investigation and Conciliation Service (ICS) now has approximately 24% fewer staff than it did three years ago'.[127] The AHRC has indicated that an increase in resourcing would, in turn, increase the AHRC's capacity to process complaints:

> Timeframes for the handling of complaints would be significantly improved if the [AHRC] were appropriately resourced in order to be able to employ sufficient ICS staff to continue to meet the continuing high level of demand for the [AHRC]'s services.[128]

3.106 The committee notes that the AHRC's statistics in relation to processing complaints have not significantly changed despite the AHRC's reduction in staffing

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125 Ms Karly Warner, Member of Administrative Law and Human Rights Section Executive Committee and Reconciliation and Advancement Committee, Law Institute of Victoria, *Committee Hansard*, 31 January 2017, 44. See also: Mr Daniel Williams, Partner, MinterEllison, *Committee Hansard*, 17 February 2017, 35. Mr Williams noted that the Commission adopts a flexible and nuanced approach to inquiry and conciliation which may not align with strict time limits.

126 Ms Robin Banks, Anti-Discrimination Commissioner, Equal Opportunity Tasmania, *Committee Hansard*, 30 January 2017, 8.

127 AHRC, *Submission 13*, 40.

128 AHRC, *Submission 13*, 40.

within the last three years, though the sheer volume of complaints made to the AHRC each year somewhat masks the significance of specific individual cases such as the QUT case.

Financial costs

3.107 The AHRC has noted that the conciliation process it facilitates is provided at no cost to both parties. In some cases, legal costs may be incurred by either a complainant or respondent; however, the AHRC expressed the view that these costs are 'far less' than if the complaints were to proceed to court.[129]

3.108 In 2015–16, the AHRC noted that 76 per cent of complaints were successfully conciliated, the highest rate achieved by the AHRC in a single year.[130] This high success rate means that a lower number of unsuccessfully conciliated complaints are proceeding to court, in turn, resulting in a decrease in potential costs to applicants and respondents.[131]

3.109 Many submitters agreed, including the Ethnic Communities Council of Queensland which noted that last year in relation to section 18C of the RDA 'only one complaint proceeded to court at the initiation of the complainant'. In comparison, over 80 racial discrimination complaints were successfully conciliated in the same period.[132] Further, the committee heard that in the last 20 years only 96 cases brought under section 18C of the RDA have proceeded to court, less than five per cent of the over 2 100 complaints made to the AHRC in that same time period under section 18C of the RDA.[133] In the past five years, the AHRC noted that only '18 [matters relating to section 18C] proceeded to court (3% of finalised complaints).'[134]

3.110 Professor James Allan has argued against the AHRC's statistics, which infer a low migration of complaints from the AHRC to the court's system, and contended that it is difficult for respondents to advance a defence in court due to financial and reputational constraints.[135]

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129 AHRC, *Submission 13*, 66.

130 AHRC, *Submission 13*, 66.

131 AHRC, *Submission 13*, 66.

132 The Ethnic Communities Council of Queensland, *Submission 26*, 2. See also: Caxton Legal Centre, *Submission 23*, 6.

133 Mr Simon Breheny, Director of Policy, Institute of Public Affairs, *Committee Hansard*, 31 January 2017, 37; Institute of Public Affairs, *Submission 58*, Appendix 2, 4.

134 AHRC, *Submission 13*, 24.

135 Professor James Allan, *Committee Hansard*, 2 February 2017, 39–40.

3.111 While there is currently no process in place for the AHRC to prevent an unmeritorious complaint proceeding to court, there are provisions for courts to 'order costs or make vexatious litigation orders against a complainant'.[136]

3.112 The committee has received evidence suggesting that although the AHRC's complaints process itself is free and informal conciliation is encouraged, in reality the process can impose unreasonable costs, including legal costs, on respondents.[137]

3.113 A separate issue relating to the potential costs of a matter relates to the resolution of complaints through financial settlement. The committee heard evidence of concern by some submitters that this can effectively be a form of 'blackmail or extortion', including that these payments were not being made transparently.[138] Some witnesses such as Professor Allan have described this type of settlement as 'go-away' money.[139]

3.114 In its submission, the Young Liberal Movement of Australia described an example where a respondent reached an early settlement with a complainant to avoid further costs. In this case, other respondents who did not settle incurred significant 'crippling' financial costs when the complaint was lodged in the Federal Court.[140] Mr Daniel Williams of MinterEllison disagreed with this assessment of financial settlements noting that it did not reflect his substantial experience of the process, which included representing respondents.[141]

3.115 Earlier in the chapter, the committee discussed a suggestion from the AHRC which would require dispute resolution within the AHRC's processes to aim for early resolution. Ultimately, this would lead to lower costs for all parties to a complaint, particularly if combined with a connection between the basis for termination and access to judicial process.

3.116 The committee has received evidence outlining a range of other suggestions which may assist in mitigating costs associated with conciliation at the AHRC and in some cases, participation in court cases. As noted above, MinterEllison raised the prospect of legislative amendments that require an applicant to pay a respondent's

136 Legal Aid NSW, *Submission 73*, 5.

137 See: Aged Pensioner Power, *Submission 60*, 2; Institute of Public Affairs, *Submission 58*, 33; Dr Augusto Zimmerman et al., *Submission 181*, 47.

138 Mr Anthony Morris QC, *Submission 307*, 25.

139 Professor James Allan, *Committee Hansard*, 2 February 2017, 39–40. See also: Ms Julie Le-Fevre, *Submission 255*, 1.

140 Young Liberal Movement of Australia, *Submission 50*, 3. See also: Mr Josh Landis, Executive Manager, Public Affairs, Clubs Australia, *Committee Hansard*, 31 January 2017, 72.

141 Mr Daniel Williams, Partner, MinterEllison, *Committee Hansard*, 17 February 2017, 42.

costs if the respondent offered a remedy, (for example an apology) which is at least equivalent to what is ultimately ordered.[142] Professor Allan described the effect:

> I suppose if you put in a process where people who lodge complaints and ultimately get taken to court and lose have to pay costs personally, that would be an improvement—which is another difference with defamation, by the way. If you bring a case and you accuse three QUT students of basically nothing and ask for a quarter of a million dollars and lose, you should pay costs out of your own pocket. That is a bit of a deterrent on these ridiculous claims, in my view.[143]

3.117 As noted earlier in this chapter, financial settlements are one option open to the parties to explore to resolve a complaint. Such a settlement can only be reached with the agreement of both the complainant and respondent/s. The AHRC highlighted that 'only 28% under section 18C that were successfully conciliated involved a financial payment by a party'.[144] Further, 'the amounts proposed and agreed to by the parties are broadly similar to the amounts that have been ordered in court proceedings'.[145]

3.118 The Uniting Church in Australia Assembly has suggested that complainants who wish to 'appeal' the dismissal of a complaint by the AHRC in the Federal Court should be required to 'provide security for costs in making such an appeal'.[146] Some witnesses expressed reservations about this suggestion as being too high a barrier to justice.[147] However, the intention of this requirement would be to discourage trivial or frivolous claims from being pursued in the Federal Court or Federal Circuit Court and to ensure that plaintiff/complainants are not exposed to bankruptcy if they cannot afford an award of costs against them. At the same time, this proposed approach ensures that a respondent is not lumbered with an expense without the possibility of being able to access an award of costs.

3.119 Others have discussed whether the requirement to pay a refundable fee when lodging a complaint with the AHRC may assist potential complainants in assessing whether their particular claim warranted inquiry and conciliation.[148]

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142 MinterEllison, *Submission 237*, 2.

143 Professor James Allan, *Committee Hansard*, 2 February 2017, 39–40.

144 AHRC, *Submission 13.1*, 3.

145 AHRC, *Submission 13.1*, 3.

146 Uniting Church in Australia, *Submission 68*, 16.

147 See, for example: Dr Yadu Singh, President, Federation of Indian Associations of NSW, *Committee Hansard,* 1 February 2017, 38; Mr Scott McDougall, Director, Caxton Legal Centre, *Committee* Hansard, 10 February 2017, 11.

148 Mr Daniel Williams, Partner, MinterEllison, *Committee Hansard*, 17 February 2017, 36–37.

3.120 Earlier in this chapter, a suggestion was made which would require an applicant to seek the leave of the court to lodge a case in the Federal Court which had previously been terminated as trivial, vexatious or lacking in substance. An amendment of this type would also lead to lower costs as cases that are trivial or lack substance are less likely to enter the court system based on likely merit without introducing barriers to access to justice.

Committee views and recommendations

3.121 This inquiry has offered the opportunity for a comprehensive inquiry into the complaint handling mechanisms operated by the AHRC.

3.122 Throughout this inquiry, it has been made clear to the committee that some members of the community have developed a number of serious concerns with the complaint handling process at the AHRC. The committee acknowledges that many of these failures have been aptly illustrated in the high profile cases detailed in this chapter. The committee has received evidence on these and other matters which have assisted the committee in identifying a number of areas which require improvement and suggested a range of amendments to legislation and the AHRC's processes that will improve outcomes for all parties involved in these processes. Significantly, a number of these reforms have been proposed by the AHRC itself.

3.123 The committee has considered these concerns and, in response, outlines a suite of recommendations which will comprehensively reform the AHRC's approach to its statutory complaint handling functions. These recommendations should be viewed as working in concert rather than individually, as each recommendation is intended to carefully calibrate with the others to ensure that the community's expectations of the AHRC are met.

3.124 The first step in ensuring that the AHRC's complaint handling work meets with community expectations is for the committee to meet regularly with the AHRC to discuss its complaint handling functions. This will provide the committee with the opportunity to better understand the work of the AHRC. These meetings will also present an opportunity for the committee to provide feedback on the performance of the AHRC as a Commonwealth statutory agency.

Recommendation 4

3.125 **The committee recommends that the Parliamentary Joint Committee on Human Rights become an oversight committee of the Australian Human Rights Commission with bi-annual meetings in public session to discuss the Commission's activities. These sessions will examine the Commission's activities, including complaints handling, over the preceding six month period.**

Natural justice and time limits

3.126 The committee acknowledges that the majority of complaints lodged with the AHRC are finalised within 6 months of lodgement. Notwithstanding this, the

committee is concerned by some of the evidence it has received which details lengthy complaint processes and delays in notifying respondents that a complaint has been lodged with the AHRC.

Recommendation 5

3.127 **The committee recommends that the *Australian Human Rights Commission Act 1986* be amended to provide that when there is more than one respondent to a complaint, the Australian Human Rights Commission must use its best endeavours to notify, or ensure and confirm the notification of, each of the respondents to the complaint at or around the same time.**

Recommendation 6

3.128 **The committee recommends that the *Australian Human Rights Commission Act 1986* be amended to provide that the principles applicable to inquiries conducted pursuant to sections 11(1)(aa), 20(1)(b) and 32(1)(b) of the *Australian Human Rights Commission Act 1986* are that:**

(a) dispute resolution should be provided as early as possible; and

(b) the type of dispute resolution offered should be appropriate to the nature of the dispute; and

(c) the dispute resolution process is fair to all parties; and

(d) **dispute resolution should be consistent with the objectives of the *Australian Human Rights Commission Act 1986*.**

Recommendation 7

3.129 **The committee recommends that the *Australian Human Rights Commission Act 1986* be amended to empower the Australian Human Rights Commission to offer reasonable assistance to respondents consistent with assistance offered to complainants.**

3.130 In addition, the establishment and implementation of time limits on key elements of the complaint handling process will assist the AHRC in remaining focused on its statutory role, and provide certainty to complainants and respondents. The use of time limits is not unusual for similar processes at state level bodies in Australia. There are a number of state-based anti-discrimination bodies such as Equal Opportunity Tasmania that can provide guidance for the AHRC when formulating its own time limits.

Recommendation 8

3.131 **The committee recommends that the Australian Human Rights Commission adopt time limits for processes related to complaint handling activities. These time limits should apply, but not be limited to, the following stages:**

- **initial assessment of complaint (including provision within this timeframe to dismiss unsubstantiated claims);**
- **notification to respondents;**
- **investigation of complaint; and**
- **conciliation of complaint.**

3.132 **It may also be necessary to design some flexibility in relation to the time limits.**

Complaint thresholds

3.133 The committee is concerned about the current low threshold required to lodge a complaint with the AHRC. Many submitters and witnesses, including the AHRC, also share this view. The consequences of maintaining a low threshold include that complaints that are ultimately deemed to be trivial or vexatious not only waste the time of the AHRC and the parties, but also, in some cases, the courts.

3.134 It is the committee view that a higher threshold is required which places the onus onto a complainant to more fully demonstrate that an act of unlawful discrimination might have occurred. A higher threshold would allow the AHRC to more readily make an initial assessment and dismiss complaints that are unmeritorious or ill-conceived at any earlier time. In the event that a complaint was found to warrant conciliation, this process could then commence more quickly as the AHRC would be in possession of the relevant facts earlier in the process.

3.135 The committee is of the view that consideration should be given to requiring complainants to provide a refundable fee to lodge a complaint with the AHRC. The committee considers that such a fee could discourage unmeritorious claims. However, at the same time the committee is cognisant that such a fee should not be set so high so as to be a substantial barrier for meritorious complaints and access to an effective remedy for claims of discrimination.

3.136 The committee is concerned that there are not adequate disincentives, even for legally represented parties, to bring frivolous complaints, especially where there are decided cases with almost identical fact situations. For instance, in the Bill Leak case, which virtually mirrored the facts in *Bropho* where exemptions in section 18D were held to apply.

Recommendation 9

3.137 **The committee recommends that section 46P of the *Australian Human Rights Commission Act 1986* be amended with the following effect:**

- **complaints lodged be required to 'allege an act which, if true, could constitute unlawful discrimination';**

- **a written complaint be required 'to set out details of the alleged unlawful discrimination' sufficiently to demonstrate an alleged contravention of the relevant act; and**
- **a refundable complaint lodgement fee be lodged with the Australian Human Rights Commission prior to consideration of a complaint (with consideration given to waiver arrangements similar to those that are in place for courts).**

Recommendation 10

3.138 **The committee recommends that legal practitioners representing complainants be required to certify that the complaint has reasonable prospects of success.**

Recommendation 11

3.139 **The committee recommends that, where the conduct of the complainant or practitioner has been unreasonable in the circumstances, the Australian Human Rights Commission be empowered to make orders, on a discretionary basis, about reasonable costs against practitioners and complainants in order to prevent frivolous claims.**

Terminating complaints

3.140 The President already has a clear discretionary power to terminate complaints that meet a wide range of criteria as outlined in section 46PH of the AHRC Act. The committee has received a range of evidence on the operation of the AHRC's power to terminate complaints, in particular about the potential reluctance of the President and delegates to use these powers in circumstances where such use may be warranted. It is the committee view that these powers should be clarified and expanded to assist the President when making a decision to terminate and to reduce the number of unmeritorious cases taking up the AHRC's time.

Recommendation 12

3.141 **The committee recommends that the grounds for termination in section 46PH(1) of the *Australian Human Rights Commission Act 1986* be expanded to include a power to terminate where, having regard to all the circumstances of the case, the President is satisfied that an inquiry, or further inquiry, into the matter is not warranted.**

Recommendation 13

3.142 **The committee recommends that the President's discretionary power under section 46PH of the *Australian Human Rights Commission Act 1986* to terminate complaints be amended so that the President has an obligation to terminate a complaint if the President is satisfied that it meets the criteria under section 46PH.**

Recommendation 14

3.143 **The committee recommends that section 46PH(1)(a) of the *Australian Human Rights Commission Act 1986* be amended to clarify that the President must consider the application of the exemptions in section 18D to the conduct complained of when determining whether a complaint amounts to unlawful discrimination.**

Recommendation 15

3.144 **The committee recommends that section 46PH of the *Australian Human Rights Commission Act 1986* be amended to include a complaint termination criterion of 'no reasonable prospects of success'.**

3.145 It is also the committee view that the President's apparent reluctance to use the discretionary termination power is a combined reflection of current complaint handling protocols within the AHRC and the low threshold required of complaints. An earlier recommendation has dealt with the issue of the low threshold by recommending amendments which would raise the threshold to ensure that only complaints that, if true, would constitute discrimination and would move to conciliation in the future. The committee is of the view that an overhaul of complaint handling protocols at the AHRC is also required with an emphasis on streamlining these protocols and allowing for decisive, early complaint termination where appropriate. Empowering respondents to apply to the President to consider termination is one way to address this issue.

Recommendation 16

3.146 **The committee recommends that the *Australian Human Rights Commission Act 1986* be amended to provide for a process whereby a respondent to a complaint can apply to the President for that complaint to be terminated under section 46PH of the *Australian Human Rights Commission Act 1986*.**

3.147 It is also the committee's view that the AHRC's aim of being a quick, cheap forum for resolving complaints is enhanced by providing greater standing to the person who is responsible for resolving those complaints. One way of encouraging parties to see the AHRC as the best forum for dealing with their complaint is to bolster the standing of the AHRC's processes and decision to terminate matters is by appointing a part-time judicial member to perform the President's complaints-handling functions. The appointment of a judge as a part-time member of the AHRC would greatly bolster the standing of the AHRC's decisions, making a complainant less likely to commence proceedings following the termination of their complaint at the AHRC level.

Recommendation 17

3.148 **The committee recommends that the *Australian Human Rights Commission Act 1986* be amended to provide for the appointment of a judge as a part-time**

judicial member of the Australian Human Rights Commission. The judicial member could perform the President's functions in dealing with initial complaints under Part IIA of the *Racial Discrimination Act 1975*.

Ability to apply to a court

3.149 Going through the AHRC's complaint process is a prerequisite for a matter being filed which alleges unlawful discrimination under section 18C of the RDA, in the Federal Court or Federal Circuit Court. As noted earlier, the grounds on which a complaint is terminated by the President does not preclude a complainant from filing an application with the Federal Court or Federal Circuit Court. The committee is cognisant of the importance of the role of the conciliation and the courts, and is supportive of maintaining access to both avenues for individuals who have arguable claims of unlawful discrimination.

3.150 Despite this, the committee notes the lack of connection that currently exists between the processes of the AHRC and the judicial system. Currently, a complainant who has had their complaint dismissed as being 'trivial' by the President may apply to the Federal Court on the same grounds. That court may decide later to dismiss the application, but in the meantime, a potentially unmeritorious application risks wasting the limited resources of the court, and exposes applicants and respondents to legal costs.

3.151 The committee is of the view that an applicant with a related complaint that has been dismissed by the AHRC as being 'trivial' or similar should have to seek leave of the court to make an application. This would provide an initial assessment of the merits of the application, and in some cases, prevent unnecessary legal costs and prolonged uncertainty.

3.152 The committee is also concerned about the costs for respondents in defending an action in court, which has already been terminated by the AHRC, and which may ultimately be unsuccessful. In particular there are significant concerns about the role of some members of the legal profession in advising plaintiffs to commence proceedings which have no reasonable prospects of success. As applications to the Federal Court and Federal Circuit Court make the losing party liable to costs, the committee is concerned that successful respondents to a court action may not be able to recover their costs if the plaintiff/complainant does not have sufficient funds to cover an order for costs. This breaches principles of natural justice, particularly in the situation where a complainant has brought proceedings despite being told by the AHRC that their complaint is trivial, vexatious, lacking in substance or that the alleged act does not constitute unlawful conduct. A respondent who finds themselves in this position should have a guarantee from the outset of proceedings that they will be able to pursue costs.

Recommendation 18

3.153 **The committee recommends that section 46PO of the *Australian Human Rights Commission Act 1986* be amended to require that if the President terminates a complaint on any ground set out in section 46PH(1)(a) to (g), then an application cannot be made to the Federal Court or the Federal Circuit Court unless that court grants leave.**

3.154 **This amendment should include that:**

- **the onus for seeking leave rests with the applicant; and**
- **the Australian Human Rights Commission provide to the Federal Court or Federal Circuit Court a certificate detailing its procedures and reasons for termination of the complaint as part of the process of seeking leave.**

Recommendation 19

3.155 **The committee recommends that the *Australian Human Rights Commission Act 1986* be amended to make explicit that, subject to the court's discretion, an applicant pay a respondent's costs of future proceedings if they are unsuccessful or if the respondent has, at any earlier point, offered a remedy which is at least equivalent to the remedy which is ultimately ordered.**

Recommendation 20

3.156 **The committee recommends that consideration be given to whether a complainant's solicitor should be required to pay a respondent's costs where they represented a complainant in an unlawful discrimination matter before the Federal Circuit Court or Federal Court and the complaint had no reasonable prospects of success.**

Recommendation 21

3.157 **The committee recommends that a plaintiff/complainant, following the termination of a complaint by the Australian Human Rights Commission, who makes an application to the Federal Court or Federal Circuit Court under section 46PO of the *Australian Human Rights Commission Act 1986,* in relation to a complaint that in whole or in part involves Part IIA of the *Racial Discrimination Act 1975*, be required to provide security for costs subject to the court's discretion.**