



Parliamentary Joint Committee on Human Rights

Inquiry report

Freedom of speech in Australia

*Inquiry into the operation of Part IIA of the Racial
Discrimination Act 1975 (Cth) and related procedures under
the Australian Human Rights Commission Act 1986 (Cth)*

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Glossary

ABF Act	<i>Australian Border Force Act 2015 (Cth)</i>
ACHRA	Australian Council of Human Rights Authorities
ADB	NSW Anti-Discrimination Board
AHRC Act	<i>Australian Human Rights Commission Act 1986 (Cth)</i>
ALRC	Australian Law Reform Commission
ALS WA	Aboriginal Legal Service of Western Australia
ASIO Act	<i>Australian Security Intelligence Organisation Act 1979 (Cth)</i>
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
AHRC	Australian Human Rights Commission
CRaCR	Cyber Racism and Community Resilience Research Project
DCA	Diversity Council of Australia
DDA	<i>Disability Discrimination Act 1992 (Cth)</i>
EM 1994	Explanatory memorandum to the <i>Racial Hatred Bill 1994 (Cth)</i>
Freedoms Inquiry	Australian Law Reform Commission's <i>Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws</i> [ALRC Report 129 – December 2015]
HREOC	Human Rights and Equal Opportunity Commission (predecessor to the Australian Human Rights Commission)
HRLC	Human Rights Law Centre
ICCPR	International Covenant on Civil and Political Rights
INSLM	Independent National Security Legislation Monitor
ICS	Investigation and Conciliation Service
IPA	Institute of Public Affairs

LIV	Law Institute of Victoria
NATSILS	National Aboriginal and Torres Strait Islander Legal Services
NSW ADB	NSW Anti-Discrimination Board
NSW CCL	NSW Council for Civil Liberties
Part IIA of the RDA	Sets out the framework for protection against anti-vilification at the federal level and comprises sections 18A, 18B, 18C, 18D, 18E and 18F
PJCIS	Parliamentary Joint Committee on Intelligence and Security
President	President of the Australian Human Rights Commission
QUT	Queensland University of Technology
Racial Hatred Bill	<i>Racial Hatred Bill 1994</i> (Cth) (amended the RDA to introduce Part IIA)
RDA	<i>Racial Discrimination Act 1975</i> (Cth)
SDA	<i>Sex Discrimination Act 1984</i> (Cth)
Section 18C	Contains the operative provision making certain conduct on the basis of race unlawful
Section 18D	Provides exemptions or defences to conduct which would otherwise fall within the scope of section 18C
UN	United Nations
UNCERD	United Nations Committee on the Elimination of Racial Discrimination

Recommendations

Recommendation 1

2.137 The committee recommends further supporting, strengthening and developing education programs including those:

- addressing racism in Australian society;
- addressing the scope of conduct caught by Part IIA of the *Racial Discrimination Act 1975* as judicially interpreted; and
- about the meaning and scope of any amendments to Part IIA of the *Racial Discrimination Act 1975*.

Recommendation 2

2.138 Recognising the profound impacts of serious forms of racism, the committee recommends that leaders of the Australian community and politicians exercise their freedom of speech to identify and condemn racially hateful and discriminatory speech where it occurs in public.

Recommendation 3

2.139 The committee received evidence about a number of proposals in relation to Part IIA of the *Racial Discrimination Act 1975*. Given the nature and importance of the matters considered by the committee for this inquiry – primarily the right to freedom of speech, the right to be free from serious forms of racially discriminatory speech, and the importance of the rule of law – views varied among members of the committee as to how to balance these appropriately. The range of proposals that had the support of at least one member of the committee included:

- (a) no change to sections 18C or 18D;
- (b) amending Part IIA of the *Racial Discrimination Act 1975* to address rule of law concerns and to ensure that the effect of Part IIA is clear and accessible on its face, by codifying the judicial interpretation of the section along the lines of the test applied by Kiefel J in *Creek v Cairns Post Pty Ltd* that section 18C refers to 'profound and serious effects not to be likened to mere slights';
- (c) removing the words 'offend', 'insult' and 'humiliate' from section 18C and replacing them with 'harass';
- (d) amending section 18D to also include a 'truth' defence similar to that of defamation law alongside the existing 18D exemptions;
- (e) changing the objective test from 'reasonable member of the relevant group' to 'the reasonable member of the Australian community'; and

- (f) criminal provisions on incitement to racially motivated violence be further investigated on the basis that such laws have proved ineffective at the State and Commonwealth level in bringing successful prosecutions against those seeking to incite violence against a person on the basis of their race.

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.

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.

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.

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.

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'.

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*.

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*.

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.

Recommendation 22

4.42 The committee recommends that the Australian Human Rights Commission should issue guidelines outlining the distinct roles of the President and the relevant Commissioners in relation to complaint handling and public comment and act to ensure that perceptions of complaint soliciting are not able to be drawn from the behaviour of the Commission, its Commissioners or its officers.

Chapter 1

Introduction

Referral and terms of reference

1.1 On 8 November 2016, pursuant to section 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Attorney-General wrote to the Parliamentary Joint Committee on Human Rights (the committee) to refer the following matters for inquiry and report:

1. Whether the operation of Part IIA of the *Racial Discrimination Act 1975* (Cth) [(RDA)] imposes unreasonable restrictions upon freedom of speech, and in particular whether, and if so how, [sections] 18C and 18D should be reformed.
2. Whether the handling of complaints made to the Australian Human Rights Commission [(AHRC)] under the *Australian Human Rights Commission Act 1986* (Cth) should be reformed, in particular, in relation to:
 - a. the appropriate treatment of:
 - i. trivial or vexatious complaints; and
 - ii. complaints which have no reasonable prospect of ultimate success;
 - b. ensuring that persons who are the subject of such complaints are afforded natural justice;
 - c. ensuring that such complaints are dealt with in an open and transparent manner;
 - d. ensuring that such complaints are dealt with without unreasonable delay;
 - 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;
 - f. the relationship between the [AHRC]'s complaint handling processes and applications to the Court arising from the same facts.
3. Whether the practice of soliciting complaints to the [AHRC] (whether by officers of the [AHRC] or by third parties) has had an adverse impact upon freedom of speech or constituted an abuse of the powers and functions of the [AHRC], and whether any such practice should be prohibited or limited.
4. Whether the operation of the [AHRC] should be otherwise reformed in order better to protect freedom of speech and, if so, what those reforms should be.

The committee is asked, in particular, to consider the recommendations of the Australian Law Reform Commission [(ALRC)] in its *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* [(Freedoms Inquiry)] [ALRC Report 129 – December 2015], in particular Chapter 4 – "Freedom of Speech".

In this reference, "freedom of speech" includes, but is not limited to, freedom of public discussion, freedom of conscience, academic freedom, artistic freedom, freedom of religious worship and freedom of the press.

1.2 The Attorney-General also released a press statement further setting out the reasons for his decision to refer the above matters, and requested the committee report by 28 February 2017.

Conduct of the inquiry

1.3 Following referral to the committee by the Attorney-General, the Chair of the committee, Mr Ian Goodenough MP, issued a media release on 11 November 2016 to call for submissions and announce the committee's intention to hold a number of public hearings.

1.4 The committee advertised the inquiry on its website, and wrote to a number of organisations and individuals with expertise in the areas of the terms of reference to invite them to make written submissions. The closing date for submissions was initially set as 9 December 2016; however, the committee extended the closing date for provision of submissions until 23 December 2016 if an extension was required.

1.5 The committee received approximately 11 460 items relating to the inquiry. 418 were accepted as submissions and published on the committee's website. These submissions are listed in Appendix 1.

1.6 For administrative purposes, approximately 10 590 items received were categorised as 'form letters'.¹ In general, these items presented submitters' views on, or support for or against, racial discrimination laws and sections 18C and 18D of the RDA, as well as submitters' views on the AHRC. The majority of items classified as form letters did not contain substantive commentary. One sample of each form letter received has been published on the inquiry webpage, noting the number of each that was received.

1.7 A further approximately 452 items were accepted as correspondence to the inquiry. Items were accepted as correspondence where they expressed views or opinions about the terms of reference, but did not contain substantive commentary.

1.8 The committee held nine public hearings in relation to this inquiry, visiting all state and territory capitals in Australia:

- Canberra, 12 December 2016;
- Hobart, 30 January 2017;
- Melbourne, 31 January 2017;

1 Items were classified as form letters where they contained an easily identifiable template of wording. An item was included as a variation to a particular form letter where the template of the form letter was used either with or without personal additions to that template.

- Sydney, 1 February 2017;
- Adelaide, 2 February 2017;
- Perth, 3 February 2017;
- Brisbane, 10 February 2017;
- Canberra, 17 February 2017; and
- Darwin, 20 February 2017.

1.9 A list of the witnesses who gave evidence at these public hearings is at Appendix 2. The *Hansard* transcripts of each hearing are available on the committee's inquiry webpage.²

Structure of the report

1.10 The report contains five chapters. In addition to this chapter:

- Chapter 2 responds to the inquiry's first term of reference regarding the operation of Part IIA of the RDA;
- Chapter 3 responds to the inquiry's second term of reference regarding complaint handling processes at the AHRC;
- Chapter 4 responds to the inquiry's third term of reference regarding soliciting complaints to the AHRC; and
- Chapter 5 responds to the inquiry's fourth term of reference regarding other potential reforms to the AHRC to better protect freedom of speech, and the term of reference regarding consideration of the recommendations of the ALRC in its Freedoms Inquiry.

Notes on references

1.11 In this report, references to the *Committee Hansard* are to proof transcripts. Page numbers may vary between proof and official transcripts.

Acknowledgements

1.12 The committee thanks all those who contributed to the inquiry, whether by making submissions, providing additional information or in giving evidence at public hearings. The committee is grateful for the breadth and quality of submissions and willingness of individuals and organisations to appear at hearings despite the short timeframe available to do so.

2 See:
http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia.

Chapter 2

Freedom of speech and Part IIA of the *Racial Discrimination Act 1975 (Cth)*

Introduction

2.1 This chapter focuses on the first term of reference of the inquiry:

Whether the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) [(RDA)] imposes unreasonable restrictions upon freedom of speech, and in particular whether, and if so how, ss. 18C and 18D should be reformed.¹

2.2 The committee received extensive and substantial evidence from submitters in relation to this term of reference. The evidence included submissions both for and against amending Part IIA of the RDA. A number of submitters also provided evidence about experiences of racism in contemporary Australia and whether, and to what extent, the RDA provided protection from such racism. The scope afforded to freedom of expression also emerged in evidence as a serious issue. The range of views provided to the committee reflected different underlying concerns about the balance between protection from racial discrimination and freedom of expression as well as legal principles such as the rule of law and constitutionality.

2.3 The views of submitters in favour of repealing or changing Part IIA of the RDA demonstrated a range of concerns. These concerns included the scope afforded to freedom of speech, but also a separate concern that the extent of confusion about the scope and effect of Part IIA could undermine its purposes. In particular, from a rule of law perspective, concerns were expressed that the scope of conduct prohibited under section 18C of the RDA was not clear and accessible on the face of the provision.

2.4 The views of submitters in favour of retaining the existing protections under Part IIA also demonstrated a range of concerns. Many multicultural and community groups considered that Part IIA of the RDA has an important symbolic role and provided protection against forms of racially discriminatory speech. These groups were concerned that repealing or amending Part IIA would send a negative message that racism was acceptable. It was also argued to the committee that in legal terms the application of the law is well settled and concerns were expressed that any changes to the law would give rise to significant uncertainty as to the meaning and scope of any new law.

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

2.5 The first and second parts of this chapter describe the background to the enactment of Part IIA of the RDA, and the scope of conduct caught under Part IIA of the RDA, including how it has been interpreted by the courts.

2.6 The third part of this chapter outlines the wide range of views of submitters in relation to Part IIA of the RDA, including proposals for reform. It canvasses the case for repeal, the case for change, the case for retaining the existing protections and the role that increased education could play.

2.7 The fourth part of this chapter sets out the committee's views on the question of the need for reforming Part IIA of the RDA and recommendations based on evidence received.

Background to, and enactment of, Part IIA of the RDA

2.8 The introduction of legislative protections against certain forms of racially discriminatory speech in the 1990s were informed by recommendations and findings by a number of significant inquiries which had identified gaps in legal protections available to victims of racism:

- The *National Inquiry into Racist Violence in Australia* prepared by the predecessor to the AHRC, the Human Rights and Equal Opportunities Commission;²
- The *National Report* of the Royal Commission into Aboriginal Deaths in Custody;³ and
- The *Multiculturalism and the Law Report* of the Australian Law Reform Council.⁴

2.9 The introduction of such legislative protections was also informed by Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the International Covenant on Civil and Political Rights (ICCPR) which impose specific obligations on states to prohibit certain

2 Hon Michael Lavarch, Attorney-General, *House of Representatives Hansard*, Second reading speech, 15 November 1994, 3336; and Human Rights and Equal Opportunity Commission (HREOC), *Racist Violence: National Inquiry into Racist Violence in Australia*, March 1991.

3 Hon Michael Lavarch, Attorney-General, *House of Representatives Hansard*, Second reading speech, 15 November 1994, 3336; explanatory memorandum to the Racial Hatred Bill 1994, 1 (EM 1994).

4 Hon Michael Lavarch, Attorney-General, *House of Representatives Hansard*, Second reading speech, 15 November 1994, 3336; Australian Law Reform Council, *Multiculturalism and the Law* (1991).

serious forms of racially discriminatory speech.⁵ Australia ratified the CERD and the ICCPR in 1975 and 1980 respectively.⁶

2.10 Protection against forms of discriminatory speech on the basis of race were introduced into Part IIA of the RDA in 1995 through the passage of the *Racial Hatred Bill 1994* (Racial Hatred Bill).

2.11 The Racial Hatred Bill was the subject of extensive parliamentary debate. It was also subject to substantial amendment prior to finally passing both houses of parliament.⁷ Specifically, the bill was amended to remove provisions which would have amended the *Crimes Act 1914* to create three criminal offences prohibiting the making of motivated threats to a person's property because of their race, and intentionally inciting racial hatred.⁸

2.12 The explanatory memorandum to the Racial Hatred Bill 1994 (EM 1994) explained that the Racial Hatred Bill was intended to support social cohesion and close a gap in legal protection for victims of racist speech which had been identified by significant inquiries:

The Bill closes a gap in the legal protection available to the victims of extreme racist behaviour. The Bill is intended to strengthen and support the significant degree of social cohesion demonstrated by the Australian community at large. The Bill is based on the principle that no person in Australia need live in fear because of his or her race, colour, or national or ethnic origin.⁹

2.13 While acknowledging the importance of freedom of speech, the EM 1994 states that 'the right to free speech must be balanced against other rights and interests.'¹⁰

2.14 The EM 1994 further states that the provisions now contained in Part IIA of the RDA were intended to provide a balance between freedom of speech and the protection of individuals and groups from harassment and fear because of their race, colour or national or ethnic origin.¹¹ The 1994 EM noted that the drafting of the

5 International Convention on the Elimination of All Forms of Racial Discrimination (CERD) article 4, International Covenant on Civil and Political Rights (ICCPR) article 20. See, also, Hon Michael Lavarch, Attorney-General, *House of Representatives Hansard*, 16 November 1994, 3341.

6 CERD, opened for signature 7 March 1966, 660 UNTS 195 (entry into force in Australia 30 November 1975); ICCPR, opened for signature 19 December 1966, 999 UNTS 171 (entered into force in Australia 13 November 1980).

7 Centre for Comparative Constitutional Studies, *Submission 137*, 3.

8 Racial Hatred Bill 1994.

9 EM 1994, 1.

10 EM 1994, 1.

11 EM 1994, 1.

Racial Hatred Bill was intended to allow scope for public debate about important issues:

...not intended to limit public debate about issues that are in the public interest. It is not intended to prohibit people from having and expressing ideas. The Bill does not apply to statements made during a private conversation or within the confines of a private home.

The Bill maintains a balance between the right to free speech and the protection of individuals and groups from harassment and fear because of their race, colour or national or ethnic origin. The Bill is intended to prevent people from seriously undermining tolerance within society by inciting racial hatred or threatening violence against individuals or groups because of their race, colour or national or ethnic origin.¹²

2.15 Part IIA of the RDA has not been amended since its enactment through the passage of the Racial Hatred Bill in 1995.

Current anti-vilification laws at the federal level

2.16 At the federal level, Part IIA of the RDA is the source of legislative protection against racial vilification. Part IIA (comprising sections 18A–18E) of the RDA provides the framework for protecting against forms of speech on the basis of race.

2.17 In particular, section 18C of the RDA contains the operative provision making specified conduct unlawful, as a civil wrong. It provides:

- (1) It is unlawful for a person to do an act, otherwise than in private, if:
 - (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
 - (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

2.18 Many submitters to the inquiry noted that the terms in section 18C are subject to judicial interpretation to determine their legal meaning in context.¹³

2.19 The scope of section 18C cannot be understood without consideration of section 18D. Section 18D operates to provide some 'exemptions' or defences from section 18C of the RDA. Section 18D of the RDA provides:

Section 18C does not render unlawful anything said or done reasonably and in good faith:

12 EM 1994, 1.

13 See, for example: Discrimination Law Expert Group, *Submission 118*, 8; Centre for Comparative Constitutional Studies, *Submission 137*, 3; Kate Eastman SC and Trent Glover, *Submission 157*, 1-2.

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- (a) in the performance, exhibition or distribution of an artistic work;
or
 - (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
 - (c) in making or publishing:
 - (i) a fair and accurate report of any event or matter of public interest; or
 - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

Meaning and scope of conduct caught

2.20 The meaning and scope of section 18C of the RDA has been the subject of judicial consideration, which is essential to understanding its application. While this is unremarkable in a legal context, in this instance statutory interpretation plays a particularly important role because in general usage the words 'insult' and 'offend' may be employed in relation to conduct with effects that range from slight to severe. However, the breadth of application for legal purposes is significantly narrower than the senses in which the words 'offend, insult, humiliate or intimidate' are generally understood. This is especially important in the context of section 18C as it is concerned with public conduct engaged in because of the subject's race.

Legal meaning of 'offend, insult, humiliate or intimidate'

2.21 The Federal Court in *Jones v Scully* explicitly set out the dictionary definitions of the terms 'offend, insult, humiliate or intimidate' in an attempt to establish the meaning to be given to each word individually.¹⁴ The ordinary meaning of the words provided in *Jones v Scully* provide some guidance, but must also be consistent with the threshold established by Kiefel J,¹⁵ in *Creek v Cairns Post Pty Ltd*,¹⁶ that section 18C only applies to conduct having 'profound and serious effects, not to be likened to mere slights'. This standard has been affirmed in the case law.¹⁷

2.22 It is worth noting, however, that the Court generally does not consider each term in isolation. Although in *McGlade v Lightfoot* the relevant conduct was found to be reasonably likely to 'offend' and 'insult', the Court made it very clear that it was

14 [2002] FCA 1080.

15 Kiefel J is now the Chief Justice of the High Court.

16 [2001] FCA 1007, [16].

17 *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at 131, [70] (French J) (*Bropho*); *Jones v Scully* (2002) 120 FCR 243, [102]; *Eatoock v Bolt* (2011) 197 FCR 261 at [267]-[268] (Justice Bromberg) (*Eatoock*).

not reasonably likely to humiliate or intimidate.¹⁸ This means that the legal meaning of 'offend, insult, humiliate or intimidate' does not wholly correspond with the ordinary or 'common sense' meaning of the terms. In other words, as interpreted by the courts, conduct that is merely offensive or merely insulting will not be captured by section 18C of the RDA, but only more serious forms of conduct on the basis of race. While some submitters suggested that the words used in section 18C created uncertainty, the committee received evidence from other witnesses that the legal meaning and judicial interpretation of section 18C was well settled as applying only to conduct at the more serious end of the range.¹⁹

Nature of the test

2.23 Under section 18C of the RDA the conduct complained of must be 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate'.²⁰ This has been judicially interpreted as importing an 'objective test' rather than a 'subjective test' in relation to conduct.²¹ This means that the determinative question is not whether subjectively the particular complainant was 'insulted, offended, intimidated or humiliated': the question is whether the act is reasonably likely to have a 'profound and serious effect', in all the circumstances.

2.24 An objective test is often applied with reference to how a reasonable member of the Australian community or reasonable person would respond. However, the form of the 'objective test' that has been applied by the courts in the context of section 18C of the RDA is one in which the 'reasonable person' is the member of a group: the 'objective test' applied in section 18C requires assessing the likely effect of the conduct on a reasonable hypothetical member of a particular racial or ethnic group which is the target of the alleged conduct.²² A number of witnesses suggested this test should be broadened to the reasonable member of the Australian community, which is discussed in [2.80].

Application to public conduct

2.25 Part IIA only applies to conduct 'otherwise than in private'. This means that there is no prohibition on expressing views that 'offend, insult, humiliate or intimidate' on the basis of race, colour or national or ethnic origin in private.

18 *McGlade v Lightfoot* (2002) 124 FCR 106, 120 at [61]-[62].

19 See, for example: Law Institute of Victoria, *Submission 184*, 4; Mr Iain Anderson, Deputy Secretary, Attorney-General's Department, *Committee Hansard*, 17 February 2017, 21-22.

20 *Racial Discrimination Act 1975* (RDA), section 18C.

21 *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2001) 105 FLR 56, [15].

22 *Eatock* (2011) 197 FCR 261, [243], [250].

Defences

2.26 As set out above, section 18D of the RDA contains a number of defences or 'exemptions' to conduct that would otherwise be captured by section 18C of the RDA. These exemptions cover acts done 'reasonably and in good faith.' It includes artistic works, statements made for any genuine academic, artistic or scientific purpose or in the public interest. These 'exemptions' also extend to publishing a fair and accurate report of any event or matter of public interest or a fair comment on any event or matter of public interest if it is a genuine belief held by the person making the comment.²³ The scope of the defences established by section 18D, and its importance for protection of the right to freedom of expression, was the subject of testimony during the inquiry and is explored further below.

Civil-complaint based model

2.27 The model adopted at a federal-level in Australia under the RDA is a civil-complaint based model rather than a criminal model. This means that proceedings are initiated by individual complainants rather than the government. If a respondent is found to have engaged in unlawful conduct under Part IIA they are liable to civil rather than criminal sanctions.

Box 2.1: Case study—*Bropho v HREOC*

The case of *Bropho v HREOC* is a key decision for interpretation of the scope of section 18D exemptions and was important to some areas of evidence given to the committee. The AHRC has described the key elements of the case as follows:

In *Bropho v HREOC*, the Full Court of the Federal Court considered a cartoon published in the West Australian newspaper in 1997. The cartoon dealt with the return from the United Kingdom of the head of an Aboriginal warrior, Yagan, who had been killed by settlers in 1833. There was debate within the Aboriginal community about who had the appropriate cultural claims, by descent, to bring the remains back to Western Australia.

The Nyungar Circle of Elders had lodged a complaint with the Commission about the cartoon. At the time the complaint was lodged, the Commission had the power to conduct hearings and make determinations about whether or not there had been unlawful discrimination. The Commission no longer has the power to make determinations about whether conduct amounts to unlawful discrimination. The complaint was dismissed by the Commission. The complainant sought judicial review of the Commission's decision.

When the case came before the court, Justice French noted that the cartoon:

- reflected upon the mixed ancestry of some of the Aboriginal people involved;

- implied an unseemly desire on the part of some of them to travel to England on public money;
- suggested that their conduct had caused disunity among the Nyungar people of the Perth area;
- showed a frivolous use by an Aboriginal leader of a dreamtime serpent to frighten a child who was sceptical about the trip; and
- showed Yagan's head in a cardboard box expressing a desire to go back to England.

The Commission had found that the cartoon was reasonably likely to be offensive to a Nyungar person or to an Aboriginal person more generally. There was little doubt that at least one of the reasons for the publication of the cartoon was the Aboriginality of the people involved.

However, the Commission found that the cartoon was an artistic work and that the newspaper had published it reasonably and in good faith. As such, it came within the exemption in section 18D(a) of the RDA. The Commission also found that the cartoon came within the exemption in section 18D(b) because it was a publication for a genuine purpose in the public interest, namely the discussion or debate about the return of Yagan's head to Australia. The issue was an issue of importance for the West Australian community. The context in which it was published suggested that the newspaper had taken a balanced approach.

The application for review of the Commission's decision was unsuccessful, in a case which took seven years to resolve. The cartoonist, Dean Alston, has written about the impact of the legal action on his life.²⁴

Source: AHRC, Submission 13, 29.

The case for change – repealing sections 18C and 18D

2.28 Some submitters to this inquiry argued strongly for Part IIA to be repealed in its entirety and not replaced by any other racial vilification laws at a federal level. For example, Mr Simon Breheny, Director of Policy, the Institute of Public Affairs (IPA) argued that Part IIA should be repealed in its entirety on the basis of the restrictions it imposes on free speech:

Section 18C of the Racial Discrimination Act is one of the most significant restrictions on freedom of speech in this country. Along with the rest of the provisions of Part IIA of the Racial Discrimination Act, section 18C ought to be repealed outright. It is an excessive, unnecessary and counterproductive restriction on Australians' liberties. Alternative proposals for reform would not solve the problems with the legislation that have been identified in particular by recent court cases involving

24 Dean Alston, 'Cartoons are risky business', *The West Australian*, 6 November 2016, <https://thewest.com.au/news/wa/cartoons-are-risky-business-dean-alston-ng-ya-122268>.

section 18C. In our analysis, simply removing some of the words from the section—or worse, replacing those words with new words—would be ineffective or redundant, or would create even more uncertainty about the scope of the law.²⁵

2.29 A number of submitters, particularly journalists and lawyers employed to represent them, argued that section 18C had a 'chilling effect' in relation to freedom of speech.²⁶ For example, Dr Augusto Zimmerman identified that, as an academic, he has come across people 'who are intimidated and afraid of expressing their opinions', and further:

...even on radio interviews that I have given I have asked the person conducting the interview if he feels comfortable to say certain things. People are getting really worried these days about making comments.²⁷

2.30 Dr Sev Ozdowski, a former Australian Human Rights Commissioner and also Disability Discrimination Commissioner, stated that:

With any act likely to offend, insult, humiliate or intimidate a person because of race, I believe the bar is high and we need to look at it. In particular, I believe this because I have seen the chilling effects of that legislation on the discussion of any cultural characteristics. Questions about cultural practices are risky to ask. It also builds resentment and distrust. It creates a 'them and us' attitude. In my view, it may put multiculturalism at risk. It also creates enormous repercussions that damage the respondent to a complaint, regardless of whether the allegation is proved or not. Being accused of racism is a similar thing to being accused of sexual violence. It is having a very negative impact on people who are accused of racism.²⁸

2.31 Mr Justin Quill, a lawyer for Nationwide News, stated that section 18C is 'self-censoring':

...there is a hidden cost of the legislation, and I think I have an unusual insight into it. The committee may not have heard of it. Every week, I ...[review] hundreds of articles—newspaper articles, radio editorials and TV reports; it is literally hundreds a week. Every single day, 18C is having an impact. It is not the sort of impact that we read about in the Bill Leak case, the Andrew Bolt case or the [Queensland University of Technology (QUT)] case—the headline-grabbing cases. Those are three big, headline-grabbing cases where everyone can see a real impact. They are very

25 Simon Breheny, Director of Policy, the Institute of Public Affairs, *Committee Hansard*, 31 January 2017, 27.

26 Mr Justin Quill, Nationwide News, *Committee Hansard*, 10 February 2017, 36; Dr Augusto Zimmerman, *Committee Hansard*, 3 February 2017, 26.

27 Dr Augusto Zimmerman, *Committee Hansard*, 3 February 2017, 26.

28 Dr Sev Ozdowski, *Committee Hansard*, 1 February 2017, 21.

serious cases with real impacts and are really important. But there is a hidden thing that happens every day in Australia. It is a result of 18C and the very low bar that 18C has.²⁹

2.32 Mr Bill Leak, an editorial cartoonist at *The Australian* newspaper who was subject to an 18C complaint, shared his concerns about the impact of his case on other cartoonists:

I think that that hypothetical person working for some magazine that might be online - goodness knows - or whatever but does not have the backing of an organisation like News Corp is going to look at what happened to me and say: 'That bloke really got into a lot of trouble for telling the truth. I better not tell it myself.' If that is not a dampener on freedom of expression and freedom of speech, I do not know what is. To me, I think it is extremely sinister.³⁰

2.33 Mr Paul Zanetti, also a cartoonist subject to an 18C complaint, shared this concern:

I am more exposed than Bill because I am an independent syndicator. It is a concern because it is designed to stifle freedom of thought, freedom of speech, freedom of expression. It is a form of thought police, where if you dare to step outside certain boundaries we have this law where anybody is entitled to come after you and drag you in front of a government institution. It could send you broke. You could lose your house—the ramifications of the rest of it where you are held personally liable. There is no protection for anybody who wants to exercise real freedom of speech or expression.³¹

2.34 When asked to respond to how the chilling effect impacts the work of a media organisation, Ms Sarah Waladan, Head of Legal and Regulatory Affairs from Free TV Australia said:

...media organisations are likely to advise against publication of material where 18C is likely to be an issue. The implication of that is obviously a moderation of reporting and a stifling of commentary around the social issues of the day, which can then lead to a distorted view of the issue being portrayed.³²

2.35 In contrast, the committee also received evidence from Professors Katharine Gelber and Luke McNamara who had examined ten years of section 18C complaints from 2000–2010 which questioned whether section 18C had a 'chilling effect' on freedom of expression although neither of them had been subject to a complaint

29 Mr Justin Quill, Nationwide News, *Committee Hansard*, 10 February 2017, 36.

30 Mr Bill Leak, *Committee Hansard*, 10 February 2017, 36.

31 Paul Zanetti, *Committee Hansard*, 10 February 2017, 85.

32 Ms Sarah Waladan, Free TV Australia, *Committee Hansard*, 2 February 2017, 54.

under the RDA.³³ In addition, other submitters argued that they found that forms of racially discriminatory speech themselves had a 'chilling' or silencing effect in relation to their exercise of freedom of expression and in dissuading people affected from pursuing legal remedies (discussed further below at [2.83]).³⁴

2.36 Another basis for arguing that Part IIA should be repealed that was explored before the committee is that criminal and other laws provided sufficient protection in relation to serious forms of threatening or discriminatory speech.³⁵ For example, Mr Graham Young, Executive Director, Australian Institute for Progress argued that words which fall short of a threat of physical injury or violence should not be actionable, and that there is sufficient protection in existing laws, such as defamation law:³⁶

Intimidation in various forms beyond a certain point certainly ought to be illegal, but it is illegal in a lot of cases, like harassment in various places and forms. It should not be in an act like this for the use of a particular number of subgroups. In fact, we would argue it is adequately covered in other legislation. If it is not adequately covered in other legislation then you should look at that other legislation. You do not need to have it in here.³⁷

2.37 However, the committee was given examples that demonstrated that these laws do not address some key forms of racial hatred, do not necessarily provide sufficient remedies, were not well targeted to address discrimination and would not be comprehensive.³⁸ For example, it was noted that while all other states and territories have some form of anti-vilification laws, the Northern Territory (NT) does not and therefore any complaints of racial vilification in the NT must be brought under section 18C of the RDA.³⁹ Additionally, the committee received evidence that

33 Professors Luke McNamara and Katharine Gelber, *Submission 2*, 3.

34 See, for example: Dr Andre Oboler, Victorian Multicultural Faith and Community Coalition, *Committee Hansard*, 31 January 2017, 4; Ms Adrienne Walters, Human Rights Law Centre, *Committee Hansard*, 31 January 2017, 20.

35 See, for example: Institute of Public Affairs, *Submission 58*, 27; Mr Graham Young, Executive Director, Australian Institute for Progress, *Committee Hansard*, 10 February 2017, 15.

36 Mr Graham Young, Executive Director, Australian Institute for Progress, *Committee Hansard*, 10 February 2017, 15.

37 Mr Graham Young, Executive Director, Australian Institute for Progress, *Committee Hansard*, 10 February 2017, 20.

38 See, for example: Aboriginal Legal Service, *Submission 59*, 14; Ms Karly Warner, Executive Officer, National Aboriginal and Torres Strait Islander Legal Services, *Committee Hansard*, 31 January 2017, 12; Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, 1 February 2017, 61; Australian Council of Human Rights Authorities, *Submission 149*, 19.

39 Ms Sally Sievers, Anti-Discrimination Commissioner, Northern Territory Anti-Discrimination Commission, *Committee Hansard*, 20 February 2017, 3.

Federal anti-discrimination laws were needed because state and territory anti-discrimination laws did not cover conduct by the Commonwealth or Commonwealth officers. For example, Ms Robin Banks, Tasmanian Anti-Discrimination Commissioner, explained that a Commonwealth officer engaging in racially discriminatory conduct in Tasmania would not be covered by the Tasmanian legislation:

My act does not cover everything that happens in Tasmania; it covers everything but actions of the Commonwealth. And that can be a staff member of part of the Public Service that exists—a Commonwealth public sector employee in Tasmania. I guess that the most important thing is state and territory laws do not cover Commonwealth entities. If the Commonwealth were to engage, either as an entity or through one of its employees, in conduct that potentially breached the act, I cannot deal with it; I have to reject that on the basis that it is out of my jurisdiction.⁴⁰

2.38 Advocates of repealing section 18C argued that its removal would better support social cohesion and combat racism because it would be out in the open and able to be addressed and responded to, both by victims of racism and their advocates and allies.⁴¹ However, other submitters to the inquiry argued against this proposition on the basis that it assumed an 'equal playing field' and that people who experience racism would not feel marginalised or unsafe in expressing their views and would have equal access to the media.⁴²

2.39 Councillor Jacinta Price indicated to the committee that while she did not agree with the inclusion of the terms 'offend', 'insult' and 'humiliate' in section 18C she still considered that there should be protection against 'hate speech':

I do not think that any racial abuse is acceptable. Regarding the words 'offend', 'humiliate' and 'insult', offence is something that people feel, so, again, it is about who determines that level of offence. I think that, absolutely, there should be no exceptions for hate speech, which can obviously lead to violence. I do not agree with that whatsoever.⁴³

The case for change – amending sections 18C and 18D

2.40 The committee received evidence from many submitters that amendments to Part IIA of the RDA (rather than repeal) would assist to address concerns regarding

40 Ms Robin Banks, Anti-Discrimination Commissioner, Equal Opportunity Tasmania, *Committee Hansard*, 30 January 2017, 3.

41 See, for example: Institute of Public Affairs, *Submission 58*, 27.

42 See, for example: Mr Romlie Mokak, Chief Executive Officer, Lowitja Institute, *Committee Hansard*, 31 January 2017, 19; Mr George Vardas, Secretary, Australian Hellenic Council of NSW, *Committee Hansard*, 17 February 2017 15; Dr Andre Oboler, Victorian Multicultural Faith and Community Coalition, *Committee Hansard*, 31 January 2017, 5.

43 Councillor Jacinta Price, *Committee Hansard*, 20 February 2017, 27.

freedom of expression while continuing to provide protection against serious forms of discriminatory speech.⁴⁴

2.41 While the courts have interpreted section 18C of the RDA as not covering conduct that is merely 'offensive' or 'insulting' but only conduct that has 'profound and serious effects' on the basis of race, the committee received substantial evidence that there was confusion about the meaning and scope of section 18C of the RDA.⁴⁵

2.42 This mirrored some of the arguments raised by the Australian Law Reform Commission (ALRC) in its *Final Report on Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Freedoms Inquiry) referred to in the inquiry's terms of reference.⁴⁶ This report stated 'there are arguments that [section] 18C lacks sufficient precision and clarity, and unjustifiably interferes with freedom of speech by extending to speech that is reasonably likely to "offend"'.⁴⁷ Professor Rosalind Croucher, President of the ALRC, clarified, however, that these comments were restricted to the words of section 18C on the face of the legislation rather than how those words had been interpreted by the courts:

The comments are about the wording of the provision, not as it has been interpreted in the courts. The focus of our analysis is the requirement under the international convention in relation to protection of freedom of speech in the International Covenant on Civil and Political Rights, particularly the provision which accompanies that. But the essence of the right to freedom of expression is in article 19 of that particular convention—to which Australia, of course, is a signatory. But in article 20 of the convention, there is a limitation that is allowed in relation to freedom of expression and so the racial discrimination legislation is a limitation on freedom of expression in the way that it is described in those terms.⁴⁸

2.43 Professor Sarah Joseph, of the Castan Centre for Human Rights Law, argued that the judicial interpretation of section 18C may save it from 'crossing the line' with

44 See, for example: Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance, *Committee Hansard*, 17 February 2017, 6.

45 See, for example: Mr Martyn Iles, Legal Counsel, Australian Christian Lobby, *Committee Hansard*, 40; Mr Justin Quill, Nationwide News, *Committee Hansard*, 10 February 2017, 36, 38; Australian Christian Lobby, *Submission 114*, 5; Mr Brett Savill, Chief Executive Officer, Free TV Australia, *Committee Hansard*, 2 February 2017, 52.

46 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachment by Commonwealth Laws*, Final Report, December 2015.

47 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachment by Commonwealth Laws*, Final Report, December 2015, 119.

48 Professor Rosalind Croucher, President, Australian Law Reform Commission *Committee Hansard*, 2 February 2017, 2.

respect to interference with the right to freedom of expression, but that a layperson is not necessarily going to understand this:

The fact is that the courts have given a narrow interpretation to the relevant words—for me, 'offend' and 'insult'—and that may in fact save the provision from crossing the line, as it were, under international human rights law...

'Offend' and 'insult'—they have not actually been interpreted as 'offend' in the everyday way that we think of 'offend', or 'insult' in the everyday way that we think of 'insult'...But you are not necessarily going to know that as a lay person looking at the law.⁴⁹

2.44 In this context, the committee received evidence that there was a rule of law argument that laws should be clear and accessible on their face.⁵⁰ The significant gap between the judicial interpretation of section 18C of the RDA and the ordinary meaning of the words has given rise to serious misunderstanding about the scope of the law and, for some, worrying uncertainty about its application. Mr Martyn Iles, Legal Counsel, Australian Christian Lobby stated in evidence to the committee that 'It is a rule of law question. It is unknown which issues can be spoken or cannot be spoken.'⁵¹

2.45 Professor Adrienne Stone, Director, Centre for Comparative Constitutional Studies, University of Melbourne also argued in favour of codifying the case law on section 18C of the RDA based on rule of law concerns:

...there is a case to amend section 18C so that its actual terms reflect better what is its current legal effect. I think the fact that the section invites misunderstanding is actually a problem from a rule of law perspective. It is better if our laws more closely resemble on their first reading their actual operation...I think there is at least a significant gap at the moment between the wording of section 18C as it might appear to a lay reader and the actual effect of section 18C that I think this committee should give serious consideration to...codifying the judicial interpretation of section 18C to the section. It might seem unimportant or symbolic, but I do actually think there are very significant rule-of-law values generally when the law is not readily understandable by a person who reads it, and I think there might be particular problems when a law governing speech has that quality, because if you do not understand really what are the limits of your capacity speak there is a risk of self-censorship, and I think that is

49 Professor Sarah Joseph, Director, Castan Centre for Human Rights Law, *Committee Hansard*, 30 January 2017, 13-14.

50 Mr Martyn Iles, Legal Counsel, Australian Christian Lobby, *Committee Hansard*, 30 January 2017, 40.

51 Mr Martyn Iles, Legal Counsel, Australian Christian Lobby, *Committee Hansard*, 30 January 2017, 40.

something that all of us interested in robust debate in a vibrant democracy would want to protect.⁵²

2.46 A number of submitters identified ways to address the difficulties and confusion arising from this situation, including proposals for legislative amendment that seek to retain the effect of the law, while making its scope apparent from a plain reading of the text. For example, the Gilbert + Tobin Centre for Public Law suggests possible amendments to address misconceptions about Part IIA of the RDA which may, in its view, act to undermine the objectives of Part IIA of the RDA and lead to a chilling effect.⁵³ Noting that section 18C had been interpreted as only applying to more serious forms of conduct, the Gilbert + Tobin Centre for Public Law proposed one option for codifying the judicial interpretation:

...section 18C(1)(a)...might be amended to reflect the judicial interpretation of the current language, which would read:

the act is reasonably likely, in all the circumstances, seriously to offend, or insult, or humiliate or intimidate another person or a group of people; and⁵⁴

2.47 The committee received a range of evidence in support of codifying the judicial interpretation of section 18C of the RDA in some form.⁵⁵ However, other submitters were of the view that such an amendment carried with it other risks and uncertainties, such as the potential for unintended consequences and the need for fresh interpretation to understand the precise scope of any new law.⁵⁶ Mr Peter

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

53 Associate Professor Gabrielle Appleby, Professor Rosalind Dixon, Ms Gemma McKinnon, Associate Professor Sean Brennan (Gilbert + Tobin Centre of Public Law at UNSW), *Submission 107*, 2.

54 Associate Professor Gabrielle Appleby, Professor Rosalind Dixon, Ms Gemma McKinnon, Associate Professor Sean Brennan (Gilbert + Tobin Centre of Public Law at UNSW), *Submission 107*, 3. Recommended amendments underlined.

55 See, for example: Dr Yadu Singh, President, Federation of Indian Associations of NSW, *Committee Hansard*, 37; Professor Adrienne Stone, Director, Centre for Comparative Constitutional Studies, University of Melbourne, *Committee Hansard*, 31 January 2017, 46. See, also, Professor George Williams, *Committee Hansard*, 1 February 2017, 75; Professor Anne Twomey, *Committee Hansard*, 1 February 2017, 76; Gilbert + Tobin Centre for Public Law, *Submission 107*, 2.

56 See, for example: Mr Hugh de Kretser, Executive Director, Human Rights Law Centre, *Committee Hansard*, 31 January 2017, 23; Ms Stephanie Cousins, Advocacy and External Affairs Manager, Amnesty International Australia, *Committee Hansard*, 1 February 2017, 32; Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, 1 February 2017, 64; Mr Bill Swannie, Chair, Human Rights/Charter of Rights Committee, Law Institute of Victoria, *Committee Hansard*, 31 January 2017, 61.

Wertheim, Executive Director, Executive Council of Australian Jewry, outlined some of the risks associated with codification:

...codification is usually used when there is an ambiguity or a gap in the law or some conflict in the judicial opinions. That is not the case with regard to [P]art IIA. The judicial decisions are remarkably consistent, so I do not see the need for codification. The other danger I see in proceeding down that path is that what may begin as an intention to codify existing case law does not actually get translated as such by the parliamentary drafts person [sic] and you end up with a de facto amendment with unintended consequences.⁵⁷

2.48 Mr Hugh de Kretser, Executive Director, Human Rights Law Centre similarly noted that codification may lead to unintended consequences:

The cons are that when you amend a piece of legislation you risk changing the interpretation of that legislation, and courts may change their interpretation by raising the threshold higher. They may not do that, but that is a risk. The bigger risk, in my mind, is that the debate around section 18C over the past few years is so highly charged and politicised that any perceived weakening—we may call it a codification, but ethnic communities will see that as a weakening—of the law will also be seen by those who are against 18C as enabling the kind of racial vilification that we try to prohibit through this law. So, on balance, that is why we have come to the conclusion that, while there are arguments in favour of codification and clarifying the meaning as it has been sensibly interpreted by the courts, overall it is better at this stage not to amend 18C.⁵⁸

2.49 The Attorney-General's Department raised further potential considerations in relation to codification:

...on the one hand the committee has had evidence and has formed some views as to whether the existing provisions are well understood by the community, on the other hand they are well understood judicially. We do have very clear jurisprudence on what they mean taken together as a package. As a matter of generality, in my experience any time you change a judicially well understood set of terms, you will create an incentive for people to then relitigate those matters because no matter how well the drafters do their job, there will always be question as to have they managed, in trying to change words or codify or whatever, to actually still

57 Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, 1 February 2017, 64.

58 Mr Hugh de Kretser, Executive Director, Human Rights Law Centre, *Committee Hansard*, 31 January 2017, 23.

capture the right intention? I think you would find more litigation and uncertainty as to what any new terms actually meant.⁵⁹

2.50 Other suggestions for legislative amendment sought both to clarify the face of the legislation and somewhat alter the current scope of the law. For example, some submitters to the committee suggested that the words 'offend' and 'insult' in section 18C be replaced with the word 'vilify'.⁶⁰ The media section of the Media, Entertainment Arts Alliance, an organisation representing journalists, argued that such an amendment would 'elevate the threshold' and strike a balance between protecting freedom of speech while making 'hate speech' unlawful:

The position supported by our media section members, following a period of careful consideration, is to replace the words 'offend' and 'insult' with the word 'vilify'...elevating the threshold for enlivening the provision. ...section 18D we do not believe requires any amendment.

...every day vigorous journalism provokes. At times, it can offend or insult. That is the nature of public debate. But, because vigorous journalism is provocative, or because it can offend or insult at the time, that does not mean it intends to vilify. If such journalism does intend to vilify on the particular basis of race, then it deserves to be condemned, particularly as it is outside what is considered ethical journalism.

...we believe that a balance needs to be struck between making hate speech unlawful, while protecting and preserving freedom of speech.⁶¹

2.51 This approach is consistent with the proposal by the NSW Council for Civil Liberties (NSW CCL):

NSWCCL recommends amending s 18C(1)(a) by repealing the words 'to offend', and possibly to 'insult', and replacing them with conduct of a more demanding standard.

Specifically, 'vilify' could be used as a substitute for 'offend' and/or 'insult'. To vilify is to defame or to traduce, and it incorporates the notion of inciting hatred or contempt. It would also coincide with both the original intention and the public purposes the RDA.⁶²

59 Mr Iain Anderson, Deputy Secretary, Attorney-General's Department, *Committee Hansard*, 17 February 2017, 20-21.

60 Professor Sarah Joseph, Castan Centre for Human Rights Law, *Committee Hansard*, 14; Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance, *Committee Hansard*, 17 February 2016, 6; Dr Murray Wesson, Adjunct Professor Holly Cullen, Ms Fiona McGaughey, *Submission 133*, 6; Caxton Legal Centre and Townsville Community Legal Service, *Submission 23*, 3

61 Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance, *Committee Hansard*, 17 February 2017, 6.

62 NSW Council for Civil Liberties, *Submission 146*, 10.

2.52 It is also supported by the NSW Young Liberal Movement in the following terms:

The NSW Young Liberals support changes to Section 18C and [section] 18D of the Racial Discrimination Act as outlined in the Governments Exposure Draft. Specifically we support the removal of the terms 'offend, insult' and the inclusion of the term 'vilify'.⁶³

2.53 While arguing that sections 18C and 18D of the RDA in its current form is compatible with human rights, Dr Murray Wesson, Adjunct Professor Holly Cullen and Ms Fiona McGaughey also agreed that there is a case for replacing 'offend' and 'insult' with 'vilify' to reflect the judicial interpretation of the law:

There is a case for amending s 18C so that its text is brought in line with its actual operation in the Federal Court e.g. by substituting the word 'vilify' for 'offend and 'insult.' Furthermore, given the controversy surrounding s 18C this would clarify the meaning of the provision in the public mind. It would also be a minor amendment would allow s 18C to continue to perform its important function in limiting hateful acts in Australia's multicultural society.⁶⁴

2.54 This submission also indicated that such an amendment would be compatible with international human rights obligations.⁶⁵

2.55 Similarly, Professor Sarah Joseph gave evidence to the committee that, while she would want to hear evidence from the groups the amendments are most likely to affect, speaking 'purely as a lawyer' she would 'probably replace "offend" and "insult" with another word such as "vilify"' and 'keep "intimidate" and "humiliate"' to strengthen the scope afforded to freedom of expression on the face of the legislation.⁶⁶ Professor Joseph also argued that this would be compatible with human rights obligations.

2.56 As can be seen from the above, the proposal to make such a change generated considerable support, which gives rise to some technical considerations including whether replacing 'offend' and 'insult' with 'vilify' would raise the bar with

63 NSW Young Liberal Movement, *Submission 22*, 3.

64 Dr Murray Wesson, Adjunct Professor Holly Cullen and Ms Fiona McGaughey, *Submission 133*, 16.

65 Dr Murray Wesson, Adjunct Professor Holly Cullen and Ms Fiona McGaughey, *Submission 133*, 16.

66 Professor Sarah Joseph, Castan Centre for Human Rights Law, *Committee Hansard*, 30 January 2017, 14.

respect to conduct caught under section 18C and whether it would actually clarify the terms of the provision.⁶⁷

2.57 For example, The Gilbert + Tobin Centre for Public Law suggested using an alternative to 'vilify' on the basis that it is a technical term and may be less understood by the community, instead it suggested the legislation be amended to say that:

...the act is reasonably likely, in all the circumstances, to ~~offend, insult~~ demean, degrade, humiliate or intimidate another person or group of people, or to promote hatred; and⁶⁸

2.58 The Caxton Legal Centre and Townsville Community Legal Service suggested replacing 'offend' and 'insult' with vilify, but noted that it should have an ordinary rather than technical meaning:

The replacement of offend and insult with vilify is a sensible means of adjusting the threshold of offending conduct to the standard settled at common law, that is, the 'profound and serious' test.

We are concerned, however, that there may be unintended consequences flowing from such an amendment unless it made very clear that *vilify* takes its common meaning and not (or not only) the concept of vilification as is found in other legislation including the *Anti-Discrimination Act 1991* (Qld).⁶⁹

2.59 Mr Gregory McIntyre SC, President, Western Australian Branch, International Commission of Jurists expressed concern with removing the term 'offend' from section 18C on the basis that it may have an impact on cases that, in his view, were properly decided as involving racial vilification:

...to remove the word 'offend' will have an impact on some of the cases which I have just mentioned. In my view, for cases such as the *Clarke v Nationwide News* case, and also a case which I was not involved in but which is mentioned in the report, where terms such as 'nigger', 'black mole' and 'black bastard' were used, do fit within the concept of 'offence'

67 Professor Sarah Joseph, Castan Centre for Human Rights Law, *Committee Hansard*, 30 January 2017, 19; Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance, *Committee Hansard*, 17 February 2017, 6; Dr Murray Wesson, *Committee Hansard*, 3 February 2017, 30.

68 Associate Professor Gabrielle Appleby, Professor Rosalind Dixon, Ms Gemma McKinnon, Associate Professor Sean Brennan (Gilbert + Tobin Centre of Public Law at UNSW), *Submission 107*, 3. Recommended amendments underlined.

69 Caxton Legal Centre and Townsville Community Legal Service, *Submission 23*, 3.

but would not fit within any of the other concepts which are in the present version of the legislation.⁷⁰

2.60 A number of advocates of change, however, noted that there would likely be no meaningful legal effect of replacing the words 'offend' and 'insult' with 'vilify' as these words have interchangeable meaning. They argued that if the purpose of reform is to broaden the scope of free speech, this proposal should not be pursued.⁷¹

2.61 An alternative suggestion was made by Mr Joshua Forrester, Dr Augusto Zimmermann and Ms Lorraine Finlay to replace sections 18C and 18D with a criminal offence of inciting racial enmity. They suggest:

...a more narrowly focused law that makes intent to incite racial enmity a crime. Enmity is defined as hatred or contempt creating an imminent danger of physical harm to persons or property.⁷²

2.62 The proposal is explained in more detail as follows:

The law prohibits incitement to enmity. We have used 'enmity' deliberately, as it connotes the severity of the conduct required to breach the law. Portraying a group as an enemy suggests one wants them destroyed. We have defined enmity to mean hatred creating an imminent danger of violence. This means that hatred and contempt that does not create an imminent danger of violence isn't prohibited. However, given the importance of freedom of expression, and the risk that an overbroad law may be unjustly applied, we have erred on the side of freedom.⁷³

2.63 A further suggestion was submitted by Mr Tim Wilson, the Federal Liberal Member for Goldstein and former Human Rights Commissioner. Mr Wilson suggests that section 18C of the RDA is currently flawed and argues that:

The correct test is not 'offend, insult or humiliate'. The correct test is harassment, which includes high-level, or serious, humiliation and denigration causing intimidation. Harassment does not make challenging ideas unlawful. Harassment stops one person using their freedom to diminish the worth of another alongside their own ability to exercise their freedom.⁷⁴

70 Mr Gregory McIntyre SC, President, Western Australian Branch, International Commission of Jurists, *Committee Hansard*, 3 February 2017, 1.

71 See Mr Simon Breheny, Director of Policy, IPA, *Committee Hansard*, 31 January 2017, 30; Professor James Allan, *Committee Hansard*, 2 February 2017, 41-42; Mr Justin Quill, *Nationwide News*, *Committee Hansard*, 10 February 2017, 40.

72 Mr Joshua Forrester, Dr Augusto Zimmermann and Ms Lorraine Finlay, *Submission 181*, 3.

73 Mr Joshua Forrester, Dr Augusto Zimmermann and Ms Lorraine Finlay, *Submission 181*, 85-86, see also 83-97 generally.

74 Mr Tim Wilson MP, *Submission 203*, 9.

2.64 The committee received limited evidence from other submitters about this specific proposal.⁷⁵ However, the committee notes more generally that the 1991 *Report of the National Inquiry into Racist Violence in Australia* specifically recommended that the RDA be amended to prohibit 'racist harassment'.⁷⁶ It noted that:

It is desirable that there be a clear statement of the unlawfulness of conduct which is so abusive, threatening or intimidatory as to constitute harassment on the ground of race, colour, descent or national or ethnic origin. It is also desirable that individuals who have been the victims of such words or conduct be given a clear civil remedy under the Racial Discrimination Act in the same terms as those subjected to other forms of racial discrimination covered by the Act.⁷⁷

2.65 A submission from the Australian Lawyers for Human Rights cites examples of racial harassment laws from comparable jurisdictions and notes that:

...although Australia has no comparable federal racial harassment law, s.18C of the RDA currently operates so as to capture some of the forms of racial harassment discussed above because it captures acts which 'humiliate' and 'insult'.⁷⁸

2.66 In a similar vein, while stating that it was of 'profound importance that Australia has national laws that provide protection not only against anti-Semitic speech but other forms of hate speech', Justice Ronald Sackville proposed amending section 18C to ensure that the right to freedom of expression is 'not unduly curtailed' by:

...substituting for the current language ("to offend, insult, humiliate or intimidate") a more demanding standard which could be "to degrade, intimidate or incite hatred or contempt".⁷⁹

2.67 This proposal was supported by some other submitters, who argued that it would provide a better balance with freedom of expression.⁸⁰

75 Concerns about the approach were identified by Mr Joshua Forrester, Dr Augusto Zimmermann and Ms Lorraine Finlay, *Submission 181*, 83.

76 HREOC, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, March 1991, 298-99, 301-302.

77 HREOC, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, March 1991, 298-99.

78 Australian Lawyers for Human Rights, *Submission 5*, 13.

79 Justice Ronald Sackville, *Opening statement*, 2 (tabled 1 February 2017).

80 Professor George Williams, *Committee Hansard*, 1 February 2017, 75; Professor Anne Twomey, *Committee Hansard*, 1 February 2017, 76.

2.68 Suggested amendments were also made in relation to other elements of section 18C. Some submitters argued that the current 'objective test' applied in section 18C, which requires an assessment of the likely effect of the conduct on a reasonable hypothetical member of a particular racial or ethnic group or sub-group, in effect introduces subjective elements.⁸¹ As Justice Sackville explained in evidence to the committee:

...the subjective element in 18C introduces the opportunity for evidence from people or groups that have been affected and in practice the evidences to subjective reactions to the hate speech has been of very great importance in determining whether there has been a contravention of 18C and, indeed, whether the exemption in 18D applies.⁸²

2.69 Ms Sarah Waladan, Head of Legal and Regulatory Affairs from Free TV Australia shared their experience with the committee:

It is extremely difficult to provide legal advice on the legislation because of the subjective test, because it is impossible to know whether or not someone will be offended. That in turn means that media organisations are likely to advise against publication of material where 18C is likely to be an issue...⁸³

2.70 Justice Sackville proposed that section 18C 'should incorporate an objective test for determining whether the hate speech is likely to have the prohibited effect, thus requiring the courts to have reference to the standards of a reasonable member of the community at large.'⁸⁴ In evidence to the committee Justice Sackville explained how he thought this proposed test would operate:

I do not think that a test that focuses upon what a reasonable member of the community would think requires you to consider how would that reasonable member of the community react to the particular slight. The test would be: how would a reasonable member of the community view this particular attack on this particular minority group, having regard to the characteristics of that minority group and the nature of the speech or even actions that are directed towards that group? I think that distinction is actually quite important.

I do not think that there is as much difficulty as many people consider in interposing that kind of objective test. What it does is to move away from regarding the subjective impact upon the group as more or less

81 Justice Ronald Sackville AO, *Committee Hansard*, 1 February 2017, 40; Professor George Williams, *Committee Hansard*, 1 February 2017, 75; Professor Anne Twomey, *Committee Hansard*, 1 February 2017, 76.

82 Justice Ronald Sackville AO, *Committee Hansard*, 1 February 2017, 40.

83 Ms Sarah Waladan, Head of Legal and Regulatory Affairs, Free TV Australia, *Committee Hansard*, 2 February 2017, 54.

84 Justice Ronald Sackville, *Opening statement*, 2, (tabled 1 February 2017).

determinative of the outcome at least where the subjective impact can be regarded as serious or some other adjective being satisfied.⁸⁵

2.71 A number of submitters supported this proposal.⁸⁶ However, others considered that the current test is objective, only narrower in scope than a general 'reasonable person' test. Proponents of the current test argued that this was appropriate given the type of harm the provision is aimed at addressing, which 'accrues to people by virtue of their membership of a group'.⁸⁷ It was also argued that a general community standard test could risk importing 'prevailing prejudice' in the general community into the test:

...a general community standard test might inadvertently import prevailing prejudices in the community into the test so that one of the protective functions of 18C would be abrogated. One of those protective functions is to protect vulnerable and, in particular, unpopular minorities. So if there is prevailing prejudice against a minority community which happens at the time to be unpopular—and many of our communities that I mentioned earlier have been, at various stages of Australian history, in that category—then there is a danger that the application of a more general community standard test will undermine the basic protective function of the legislation.⁸⁸

2.72 Some submitters argued that while section 18D is intended to establish a foundation for defences, or 'exemptions' in particular circumstances for action that would otherwise constitute a breach of section 18C, they provide insufficient or unclear protection for freedom of expression. For example, Mr Justin Quill, a lawyer for Nationwide News, explained that the defences under section 18D are only available once the person complained about proves that they apply, such that:

The onus shifts to you, and you have to justify why it is that you should be entitled to say this. That reverse onus of free speech does not sit well in my view of a democratic society, and it ought not to.⁸⁹

2.73 Some submitters to the inquiry noted that while 'fair comment' was a defence to some conduct under section 18C of the RDA, 'truth' was not specifically a

85 Justice Ronald Sackville AO, *Committee Hansard*, 1 February 2017, 41.

86 Professor George Williams, *Committee Hansard*, 1 February 2017, 76; Professor Anne Twomey, *Committee Hansard*, 1 February 2017, 76.

87 Professor Adrienne Stone, Director, Centre for Comparative Constitutional Studies, University of Melbourne, *Committee Hansard*, 31 January 2017, 48.

88 Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, 1 February 2017, 63-64.

89 Mr Justin Quill, Nationwide News, *Committee Hansard*, 10 February 2017, 36.

separate defence.⁹⁰ Mr Joshua Forrester argued in evidence to the committee that 'truth' should be included as an additional defence alongside existing exemptions in section 18D.⁹¹ By contrast, the Attorney-General's Department told the committee that there may be some public policy reasons in the context of anti-vilification laws not to include a truth defence.⁹² Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, cautioned that 'if you make truth a prerequisite for a defence under section 18D, you would be setting the bar impossibly high for the respondent.'⁹³

2.74 While not seeking to alter the current content of the law in this respect, the Gilbert + Tobin Centre for Public Law proposed an amendment that would merge the provisions of sections 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'.⁹⁴

Box 2.2: Studies in relation to public views about section 18C

During the course of the inquiry, the committee was presented with results from two contrasting studies in relation to public support for changes to section 18C of the RDA.

The Institute of Public Affairs commissioned a study by Galaxy Online Omnibus on 11 December 2016, the results of which were tabled at the public hearing in Melbourne on 31 January 2017. As part of the study, a sample of 1,000 Australians aged 18 years and older, distributed throughout Australia, were asked to respond to two questions.

First, participants were asked how important freedom of speech was to them, and were asked to choose one of the following five responses: very important, important, unimportant, very unimportant, and don't know. The results indicated that 95% of Australians surveyed said that freedom of speech is important to them, with 57%

90 Mr Martyn Iles, Legal Counsel, Australian Christian Lobby, *Committee Hansard*, 30 January 2017, 42; Mr Jonathan Holmes, *Committee Hansard*, 1 February 2017, 57; Mr Joshua Forrester, *Committee Hansard*, 3 February 2017, 23; Mr Laurence Maher, *Committee Hansard*, 3 February 2017, 46.

91 Mr Joshua Forrester, *Committee Hansard*, 3 February 2017, 23.

92 Mr Iain Anderson, Deputy Secretary, Attorney-General's Department, *Committee Hansard*, 17 February 2017, 20, 22-23.

93 Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, 1 February 2017, 63.

94 Associate Professor Gabrielle Appleby, Professor Rosalind Dixon, Ms Gemma McKinnon, Associate Professor Sean Brennan (Gilbert + Tobin Centre of Public Law at UNSW), *Submission 107*, 3 (emphasis in original). See also, Federation of Indian Associations, *Submission 112*, 5.

saying it is very important. Of the remaining, 3% said freedom of speech is not important to them, and 2% said they don't know.

Participants were also asked about their attitudes towards a proposal to change the RDA, such that it would no longer be unlawful to 'offend' or 'insult' someone because of their race or ethnicity, noting that the prohibition to 'humiliate' or 'intimidate' someone because of their race or ethnicity would be retained. The results showed that 48% of Australians surveyed approved of the proposal to change the RDA, while 36% disapproved and 16% said they don't know.

This mirrored results of an Essential Research poll conducted in November and September 2016.⁹⁵

In contrast, a study by Essential Research, commissioned by the Cyber Racism and Community Resilience Research Project (CRaCR) during the week of 8 February 2017, found that a high percentage of respondents (over 90%) either strongly disagreed or disagreed with statements relating to whether people should be free to offend, insult, humiliate or intimidate someone on the basis of their race, culture or religion.

The sample varied across the four substantive questions in the study, ranging from 882 to 903 Australians aged 18 years and older, distributed throughout Australia. The statements people were asked were whether they disagreed, agreed, or neither agreed nor disagreed with the following:

- People should be free to offend someone on the basis of their race, culture or religion
- People should be free to insult someone on the basis of their race, culture or religion
- People should be free to humiliate someone on the basis of their race, culture or religion
- People should be free to intimidate someone on the basis of their race, culture or religion

Sources: Document tabled at a public hearing in Melbourne on 31 January 2017 by the Institute of Public Affairs – Galaxy research poll, 8; Document provided as additional information following public hearing in Adelaide on 2 February 2017 by the Cyber Racism and Community Resilience Research Project – Reporting Survey.

95 Essential Media Communications, *Essential Report – Racial Discrimination Act* (November 2016) at <http://www.essentialvision.com.au/racial-discrimination-act-2>; *Essential Report – Racial Discrimination Act* (September 2016) at <http://www.essentialvision.com.au/racial-discrimination-act>.

The case for retaining the existing protections in sections 18C and 18D

2.75 The committee heard evidence from a range of community groups, multicultural and legal organisations and social researchers that Part IIA of the RDA is viewed as being an important protection against forms of racially discriminatory speech and racism in Australia.⁹⁶ For example, Dr Colin Rubenstein, Executive Director, Australia/Israel and Jewish Affairs Council explained in evidence to the committee:

The availability of legal redress against extreme or pervasive racial vilification, we would argue, is essential to maintaining the right of Australians to live their lives free from harassment, from psychological intimidation, from the hurt, anger, anxiety and loss of self-esteem which comes with the reality of bigotry and racism that many Australians still experience. We are probably the most tolerant and multicultural society on earth but, nonetheless, we can do better, and there are those elements that still exist in Australian society. In fact, this also helps to protect the right to freedom of expression for members of vulnerable groups who otherwise can be marginalised in a society even like ours.⁹⁷

2.76 In its submission to the Committee the Executive Council of Australian Jewry outlined the importance of protections in section 18C and cautioned about gaps in the law which would be left without such protections:

To offend or insult a person or group because of their "*race, colour or national or ethnic origin*", necessarily sends a message that such people, by virtue of who they are, and regardless of how they behave or what they believe, are not members of society in good standing. This cannot but vitiate the sense of belonging of members of the group and their sense of assurance and security as citizens. To offend or insult a person or group because of their "*race, colour or national or ethnic origin*" thus constitutes an assault upon their human dignity. In our view, this is the evil which the legislation was enacted to address.

The case law (including the QUT case) therefore contradicts the contention that the use of the word "offend" in s.18C sets the bar too low. Further, the word "offend" or "offensive" appears in a variety of other laws, including the criminal law, yet the effect is not considered to be controversial. Indeed, the words "offend", "humiliate" and "intimidate" in section 18C were copied from the definition of sexual harassment in sub-section 28A(1) of the *Sex Discrimination Act 1984 (Cth)*. The word

96 See, for example: Professor Luke McNamara and Professor Katharine Gelber, *Submission 2*, 2-3; Ms Tasneem Chopra, Australian Muslim Women's Centre for Human Rights, *Committee Hansard*, 31 January 2017, 4; Dr Andre Oboler, Victorian Multicultural Faith and Community Coalition, *Committee Hansard*, 31 January 2017, 7.

97 Dr Colin Rubenstein, Executive Director, Australia/Israel and Jewish Affairs Council, *Committee Hansard*, 31 January 2017, 60.

"offensive" is also used in sections 471.12 and 474.17 of the *Criminal Code 1995 (Cth)*, which make it unlawful to use a postal service or a carriage service to menace, harass or cause "offence". State criminal laws also proscribe certain types of "offensive" behaviour.

The removal of any of the words, "offend" and "insult," would therefore leave severe gaps in the protections provided compared to those provided by the current legislation. For example, in certain cases there would be no remedy, as is available under the current legislation, for victims of gross negative stereotyping and serious instances or repetitions of written or verbal abuse on the basis of race or ethnicity.... This could deny the victims the protection currently offered by the legislation. From a public policy perspective, it would signal to the Australian public that the impact on the victims and the wider community is insufficient to warrant legal protection and that the conduct is now to be tolerated.⁹⁸

2.77 Similarly, Ms Tasneem Chopra, chairperson of the Australian Muslim Women's Centre for Human Rights, argued that:

It is important to recognise that the existing complaint mechanisms provide a recourse for individuals who are experiencing discrimination to feel that they are being heard. This promotes a stronger, more understanding nation, and that is our bottom line here. Retaining 18C as it assists individuals to participate in civic life and contribute confidently.

There is a cost to society, which our organisation has seen, where discrimination leads to stress, isolation, health problems and social and economic downfall. This is a cost, both to the state and to individuals, that is born [sic] when we do not protect our citizens.⁹⁹

2.78 Mr Ramdas Sankaran, President of the Ethnic Communities Council of WA Inc., noted that although members have not exercised their rights under section 18C of the RDA frequently, it was important to community members that such protections were there:

What is more important is the symbolic value that legislation like this has, in terms of tempering racist speech and actions, to the extent it can. We know it would eliminate it and there is plenty of evidence on a daily basis in the media, on the internet and in the parliament itself. We know it is not going to go away but, at least, there is a moral exemplar, in terms of the standards we set as a society.¹⁰⁰

98 Executive Council of Australian Jewery, *Submission 11*, 7.

99 Ms Tasneem Chopra, Chairperson, Australian Muslim Women's Centre for Human Rights *Committee Hansard*, 31 January 2017, 4.

100 Mr Ramdas Sankaran, President, Ethnic Communities Council of WA Inc., *Committee Hansard*, 3 February 2017, 12

2.79 The committee heard extensive evidence from submitters regarding the serious impact of racism, including racially discriminatory speech, on the well-being of individuals.¹⁰¹ For example, the Northern Territory Anti-Discrimination Commissioner, Ms Sally Sievers, explained the serious health and other impacts of racism including discriminatory speech:

I want to briefly go through what the actual impact of this experience of day-to-day racism is on people. We know that it is accepted that... [people] experience impacts on people's mental health and causes psychological distress, but we are also finding now from the health research that it moves into physical symptoms. The sorts of physical symptoms that have come up...are lower birth weights, cardiovascular disease and possible links to obesity and diabetes. Contrary to the old adage that you or I might have been brought up with—'sticks and stones will break your bones, but names will never hurt you'—the medical research is now strongly saying that this day-to-day experience of racism is making the groups it happens to sick. Last week on the phone, when I was taking an inquiry from an Aboriginal person who was telling a story about their experience of racism, that is how the phone call ended: 'This is making us sick.'¹⁰²

2.80 Associate Professor Daphne Habibis, Deputy Director, Institute for the Study of Social Change, University of Tasmania explained the findings of a recent study that examined the impact of racism on Aboriginal people in Darwin:

Almost three-quarters—84 per cent—of survey respondents agreed that the way white people behave makes them sick and tired of everything. One-fifth of respondents said it was always true that the way white people behave makes them sick and tired of everything.

The atmosphere of racism and disregard also affect self-esteem. Forty-three per cent of survey respondents agreed that it was only rarely or never that the way that white people behave makes them feel good about themselves as an Aboriginal person. Only a fifth had a positive view of how the behaviour of white people makes them feel about themselves. It also affects self-efficacy. In the same set of questions we asked how the behaviour of white people affected their capacity to achieve their goals. Over a quarter responded that it made it difficult to achieve their goals.¹⁰³

101 Dr Andre Oboler, Victorian Multicultural Faith and Community Coalition, *Committee Hansard*, 31 January 2017, 7; Ms Karly Warner, Executive Officer, National Aboriginal and Torres Strait Islander Legal Services, *Committee Hansard*, 31 January 2017, 12; Refugee Council of Australia, *Submission 8*, 2.

102 Ms Sally Sievers, Anti-Discrimination Commissioner, Northern Territory Anti-Discrimination Commission, *Committee Hansard*, 20 February 2017, 2.

103 Associate Professor Daphne Habibis, Deputy Director, Institute for the Study of Social Change, University of Tasmania, *Committee Hansard*, 30 January 2017, 20.

2.81 Mr Romlie Mokak, Chief Executive Officer of the Lowitja Institute, explained research the Lowitja institute had conducted in Victoria about rates and experiences of racism for Aboriginal people:

The experiences of racism survey 2010-2011 was undertaken here, surveying 755 Aboriginal Victorians aged 18 years and older living in two rural locations and two metropolitan locations...Ninety-seven per cent of those surveyed had experienced racism in the previous 12 months, and more than 70 per cent of respondents had experienced eight or more racist incidents in that period. The types of racism included: 92 per cent of those surveyed had been called racist names, teased, heard jokes and comments that relied on stereotypes about Aboriginal people; 85 per cent had been ignored, treated with suspicion or treated rudely because of their race; and 84 per cent—over four out of five surveyed—had been sworn at, verbally abused or subjected to offensive gestures because of their race.

The survey presented results that link racism to health. Participants were assessed through a version of the Kessler-6 scale, a well established assessment tool which screens for psychological distress. High psychological distress is an indicator or increased risk of mental illness and, overall, it found that those who had higher incidences of racism were more greatly distressed. It is not a conclusion that anyone would not draw.¹⁰⁴

2.82 Mr George Vellis from the Australian Hellenic Council spoke to the committee of the deep and lasting impact of racism on individuals and older community members in particular:

...you could see with a lot of the elderly that, once I brought up racism, they were pretty much teary eyed, and you could feel the emotion in that room, and it was going back decades.

What I mean by that is that racism is something that sticks with you for decades. It is not something that can heal within two to three weeks. It is not a bruise or a broken arm, for example. It is something, as you know, that makes a person feel inferior.¹⁰⁵

2.83 The committee received evidence that experiences of racially discriminatory speech may have a 'chilling' or silencing effect in respect of the right to freedom of expression of those who experience such discrimination. Dr Andre Oboler, speaking about examples from the work of the Online Hate Prevention Institute, informed the committee that:

104 Mr Romlie Mokak, Chief Executive Officer, Lowitja Institute, *Committee Hansard*, 31 January 2017, 14.

105 Mr George Vellis, Coordinator, Australian Hellenic Council NSW Inc, *Committee Hansard*, 17 February 2017, 15.

The impact at the lowest level is that people do not feel safe having their views, expressing their views or speaking on social media. So we are actually seeing that racism and discrimination is removing people's freedom of speech. It is making some people unable to participate in the civic life of the country...¹⁰⁶

2.84 Ms Penelope Taylor gave evidence to the committee that research by the Larrakia Nation Aboriginal Corporation indicated that changes to section 18C of the RDA was likely to negatively affect the freedom of speech of members of the Larrakia Nation community:

The overwhelming evidence arising out of the recent Larrakia Nation research project indicates that, far from promoting freedom of speech, the removal of parts of section 18C is more likely to negatively affect the freedom of speech of many segments of our community, those very segments which often go unheard and unrepresented in public discourse, resulting in the exclusion of important information and perspectives from public discussion. These groups, including Aboriginal people, are in far greater need of having their freedom of speech supported and protected than those dominant racial groups whose freedom of speech a weakening of section 18C would theoretically benefit.¹⁰⁷

2.85 These views contrast with the views of other submitters who considered that Part IIA of the RDA had a 'chilling effect' on their freedom of speech (discussed further above at [2.29] to [2.35]).¹⁰⁸

2.86 The committee heard that the public debate about section 18C often fails to take into account the role played by section 18D of the RDA:

An unfortunate feature of the public debate surrounding Pt IIA has been the making of the unqualified claim that s 18C makes it unlawful to 'offend or insult' a person on the grounds of their race. Such claims overlook the extensive defences provided by s 18D...the defences may be relied upon by artists, academics, journalists, public commentators — indeed, anyone who can show a 'genuine purpose in the public interest.' They thus qualify the operation of s 18C in contexts critical to public debate. In fact, 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.¹⁰⁹

106 Dr Andre Oboler, Victorian Multicultural Faith and Community Coalition, *Committee Hansard*, 31 January 2017, 5.

107 Ms Penelope Taylor, *Committee Hansard*, 20 February 2017, 35.

108 Mr Justin Quill, *Nationwide News*, *Committee Hansard*, 10 February 2017, 36; Dr Augusto Zimmerman, *Committee Hansard*, 3 February 2017, 26.

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

2.87 Similarly the Gilbert + Tobin Centre for Public Law noted the importance of discussing the law in the context of its judicial interpretation:

It is our view and primary submission that the current statutory protections contained in ss 18C and 18D of the *Racial Discrimination Act 1975* (Cth), when read in the context of their judicial interpretation, provide an appropriately robust protection for vulnerable racial minority groups against hate speech while also providing appropriate exemptions for free and fair speech on race-related topics.... Some will have an *a priori* disagreement with our view on Part IIA because of the extremely high priority they attach to free speech. However, we also believe that in much of the recent public debate on this issue, a singular focus on the term 'offend' and/or 'insult' in s 18C, divorced from the statutory context (including s 18D) and from judicial interpretation, has fed an exaggerated perception amongst many about the impact that s 18C has on free speech.¹¹⁰

2.88 A number of submitters, opposed changes to weaken section 18C of the RDA on the basis that it would send a 'negative signal' that racial discrimination and racist speech was acceptable.¹¹¹ For example Professor Anne Twomey said:

The reform of s 18C of the *Racial Discrimination Act* raises not only legal issues, but also cultural and social ones. In the best of all possible worlds, the abuse of people on the ground of their race, or indeed any other grounds, would be so socially unacceptable that no law on the subject would be necessary. However, because we do have such a law in relation to offensive racial communications, there is a considerable risk that if it is repealed or altered, this will have the effect of sending out a cultural message that such abuse is now acceptable and given legal sanction. The difficulty facing the Committee and the Parliament is essentially that even if s 18C warrants reform, the message sent out by undertaking the reform might itself result in damage that outweighs the benefits of the reform.¹¹²

2.89 A number of submissions were made on this point by multicultural organisations and human rights organisations. For example, Mr Romlie Mokak, expressed serious concerns about any changes to weaken section 18C of the RDA:

The institute is gravely concerned, given high levels of prevalence of racism and its impact on health and wellbeing, that amendments to

110 Associate Professor Gabrielle Appleby, Professor Rosalind Dixon, Ms Gemma McKinnon, Associate Professor Sean Brennan (Gilbert + Tobin Centre of Public Law at UNSW), *Submission 107*, 1-2.

111 See, for example: Dr Andre Oboler, Victorian Multicultural Faith and Community Coalition, *Committee Hansard*, 31 January 2017, 7; Mr Romlie Mokak, Chief Executive Officer, Lowitja Institute, *Committee Hansard*, 31 January 2017, 14; Ms Adrienne Walters, Human Rights Law Centre, *Committee Hansard*, 31 January 2017, 20.

112 Dr Anne Twomey, *Submission 10*, 1.

section 18C of the Racial Discrimination Act would send a very negative signal that it is acceptable to offend, insult, humiliate or intimidate another person or group of people on the basis of race. Many arguments that have been put forward for the change centre on the right to have freedom of speech as if it is an absolute right. We note that section 18C of the RDA is not the only area of Australian law that limits freedom of expression, and the committee would be well aware of that.¹¹³

2.90 Similarly, in evidence to the committee Dr Andre Oboler from the Victorian Multicultural Faith and Community Coalition explained such concerns:

...any change to the act, even changes that could improve it, carr[ies] a risk at this point in time. Any change would create an impression that there is some feedback from the parliament that the sort of hate we are seeing and the sorts of comments that have been saying that this law should be removed, which have been tied largely to those promoting that hate, have traction, and I think that is actually quite dangerous.¹¹⁴

2.91 Ms Adrienne Walters, Director of Legal Advocacy, Human Rights Law Centre stated that moves to weaken section 18C would send a 'dangerous message':

Any move to weaken sections 18C or 18D of the Racial Discrimination Act will send a dangerous message, particularly at a time when we know that more people are reporting experiences of racial discrimination. Experiences of racism...are all too common for Aboriginal and Torres Strait Islander people and those from culturally and linguistically diverse communities. Racism is incredibly harmful. It has negative impacts on mental and physical health and a chilling effect on the freedom of expression and public participation of minority groups.¹¹⁵

2.92 The Very Reverend Dr Keith Joseph, Dean of the Christchurch Anglican Cathedral in Darwin, informed the committee at its public hearing in Darwin that, if section 18C is repealed, 'self-labelled white nationalists and alt-right', with whom he has come into contact through his ministry, 'will be able to say more outrageous things politically because there will be fewer safeguards'.¹¹⁶

113 Mr Romlie Mokak, Chief Executive Officer, Lowitja Institute, *Committee Hansard*, 31 January 2017, 14.

114 Dr Andre Oboler, Victorian Multicultural Faith and Community Coalition, *Committee Hansard*, 31 January 2017, 7; See also Ms Karly Warner, Executive Officer, National Aboriginal and Torres Strait Islander Legal Services, *Committee Hansard*, 31 January 2017, 13.

115 Ms Adrienne Walters, Director of Legal Advocacy, Human Rights Law Centre, *Committee Hansard*, 31 January 2017, 20.

116 The Very Reverend Dr Keith Joseph, Dean, Christchurch Anglican Cathedral, Darwin, *Committee Hansard*, 20 February 2017, 46.

2.93 Some submitters to the inquiry shared stories of their experiences of racism with the committee.¹¹⁷ For example, Mr Burhan Zangana, Refugee Communities Advocacy Network, Refugee Council of Australia explained:

I and many of my fellow community members have experienced racism and hate speech in Australia. We have been subjected to name-calling and racial slurs while we were waiting for the bus, while we were walking in the streets, in workplaces and in many other public places. We were told to go back to where we came from and labelled as terrorists. These incidents can shake you and are hard to forget. After 16 years I very clearly remember the racist behaviour directed at me by two men shortly after the September 11 attacks. I remember clearly another incident that happened a couple of years ago in another workplace where I was told I am black haired and a wog and was laughed at. Knowing that a law exists that supports you can act as a good psychological support. I always choose to let those incidents pass, but it is good for me to know that I am protected by the law, even if I may never consider using it to make a complaint.¹¹⁸

2.94 Mr Justin Mohamed, Chief Executive Officer of Reconciliation Australia explained the lifelong impacts of racial discrimination on many Aboriginal people and his own personal experience:

A lot of Aboriginal people still feel as a fringe-dweller in their own communities in rural and regional Australia and maybe in their suburbs, and feel they do not quite fit because they have been told that they do not.

It has a long-lasting effect and it takes a lot of support and strength from individuals to encourage them. It is an ongoing thing; it has not stopped. As a father of five, I see my children faced with different sorts of racism but racism challenging who they are and what they do through their education right through to university, where a couple of them are now. So it still continues.¹¹⁹

2.95 The committee also received evidence about the prevalence of racism in Australian society including evidence indicating potential increasing rates of racism.¹²⁰ For example, the Refugee Council of Australia pointed to finding by the

117 See, for example: Mr Burhan Zangana, Refugee Communities Advocacy Network, Refugee Council of Australia, *Committee Hansard*, 1 February 2017, 27.

118 Mr Burhan Zangana, Refugee Communities Advocacy Network, Refugee Council of Australia, *Committee Hansard*, 1 February 2017, 27.

119 Mr Justin Mohamed, Chief Executive Officer, Reconciliation Australia, *Committee Hansard*, 2 February 2017, 16.

120 Refugee Council of Australia, *Submission 8*, 1-2; Mr Romlie Mokak, Chief Executive Officer, Lowitja Institute, *Committee Hansard*, 31 January 2017, 14.

Scanlon Foundation, *Mapping Social Cohesion*, released in November 2016, indicating:

- the highest level of reported experience of discrimination (20%) since the surveys began [in 2007];
- with 27% of people from non-English speaking backgrounds reporting an experience of discrimination in the past year;
- 31% of those experiencing discrimination reporting experiencing it about once a month or most weeks in the year; and
- 55% of those experiencing discrimination were verbally abused, 17% were not offered work or were not treated fairly at work; 10% had their property damaged; and 8% were physically attacked, and 22-25% of people consistently report a personal negative opinion of Muslims.¹²¹

2.96 In respect of the most recent annual youth survey conducted by Mission Australia, Ms Jacquelin Plummer, Head of Policy and Advocacy at Mission Australia noted:

We discovered that over one-quarter of young people had experienced some form of unfair treatment or discrimination in the last 12 months. Of those young people, race or cultural background was the reason for discrimination in over 30 percent of these cases. This was the second most common reason after gender. In addition, half of young people surveyed had witnessed someone else being unfairly treated or discriminated against in the last 12 months. The discrimination they witnessed was most commonly on the basis of race or cultural background.

Importantly, for Aboriginal and Torres Strait Islander young people the burden was unevenly distributed. One in five Aboriginal and Torres Strait Islander young people reported experiencing discrimination on the basis of race or culture background—more than three times the proportion of non-Indigenous people.¹²²

2.97 While some submitters argued that continuing levels of racism indicated that section 18C should be repealed or weakened on the basis it was ineffective,¹²³ a

121 Refugee Council of Australia, *Submission 8*, 1-2.

122 Ms Jacquelin Plummer, Head of Policy and Advocacy, Mission Australia, *Committee Hansard*, 30 January 2017, 49.

123 See, for example: Mr Timothy Andrews, Executive Director, Australian Taxpayers' Alliance, *Committee Hansard*, 1 February 2017, 84; Institute of Public Affairs, *Submission 58*, 24.

number of submitters rejected this view.¹²⁴ For example, Professor Katharine Gelber argued that:

My comment on that is it would be a shame to blame section 18C for the ongoing continuation of racism and other types of marginalisation in this country. The reasons for such types of marginalisation are complex.¹²⁵

2.98 Dr Colin Rubenstein, Executive Director of the Australia/Israel and Jewish Affairs Council, also supported the existing provisions:

...we would say that 18C and 18D provide a very important substantive, as well as symbolic, framework of enhancing Australian harmony and cohesion—particularly important at a time of growing populism and xenophobia internationally, and even elements of that within our happy, multicultural Australia. We cannot think of a worse time to dilute these modest legislative protections, which we would suggest are working very well.¹²⁶

2.99 The Race Discrimination Commissioner, Dr Tim Soutphommasane, noted a recent Canadian study which found there had been a 600 percent increase in online hate incidents in the period between November 2015 and November 2016, following the repeal in 2013 of a Canadian law providing civil redress for racial vilification:

Specifically, if we were to view the Canadian situation, I believe it is an illustration of the important message that the law can send to society about what should be acceptable standards when it concerns racial hatred and abuse. The Canadian experience would indicate that there are some dangers when you do weaken legal protections against hate speech, including of a racial kind. It may have the effect of emboldening people to believe that they have greater freedom to inflict racial hatred and bigotry onto others. It is worth noting that, in that research from the CBC [Canadian Broadcasting Corporation], I believe that there was some indication that white supremacist messages, among others, had increased substantially. That should be a consideration for the committee in its deliberations on the signal issue of legislation.¹²⁷

2.100 The committee received evidence from a significant number of submitters, including those who work at the intersection of legal and community representation, who considered that the current law provided an appropriate balance between

124 Professor Katharine Gelber, *Committee Hansard*, 10 February 2017, 5; Dr Tim Soutphommasane, Race Discrimination Commissioner, Australian Human Rights Commission (AHRC), *Committee Hansard*, 17 February 2017, 51.

125 Professor Katharine Gelber, *Committee Hansard*, 10 February 2017, 5.

126 2.972.98 Dr Colin Rubenstein, Executive Director, Australia/Israel and Jewish Affairs Council, *Committee Hansard*, 31 January 2017, 60.

127 Mr Thinethavone (Tim) Soutphommasane, Race Discrimination Commissioner, AHRC, *Committee Hansard*, 17 February 2017, 51.

protecting against serious forms of racially discriminatory speech and freedom of expression.¹²⁸ For example, Professor Simon Rice from the Discrimination Law Experts Group stated in evidence to the committee that:

In essence, we advocate a conservative position. No change needs to be made to 18C... We say that 18C and 18D and the related case law operate together to limit free speech only insofar as is necessary to protect against racially discriminatory speech. At the same time—and this is an important point of policy—this balance protects the right to free speech of people who would otherwise be silenced by offensive language. So it operates notoriously to limit free speech to an extent, but it needs to be kept in mind the work that it does to enable free speech among those who would otherwise be oppressed.¹²⁹

2.101 Ms Stephanie Cousins, Advocacy and External Affairs Manager from Amnesty International Australia also considered that the current provisions strike the correct balance between these rights:

We are satisfied that the balance struck by the RDA is consistent with...Australia's international human rights obligations and we do not see a reasonable justification for amending the legislation. Indeed, to do so could have profound and serious consequences for those in our community who experience racism. To embolden those who would seek to denigrate others on the basis of their race would be a reckless move for this parliament, in our view, and we urge the committee not to go down that road.¹³⁰

2.102 Professor Anna Cody, representing Kingsford Legal Centre and the National Association of Community Legal Centres, stated their position that 'the racial vilification provisions strike the right balance between freedom of speech and freedom from racial vilification.'¹³¹

2.103 Many submitters were concerned by, and acknowledged, that difficulties arose in some difficult high-profile cases that were brought to the AHRC in recent years. While these warrant consideration in terms of reviewing important matters of

128 See, for example: Refugee Council of Australia, *Submission 8*, 1-2; Discrimination Law Expert Group, *Submission 118*, 1; Professor Simon Rice, Member, Discrimination Law Experts Group, *Committee Hansard*, 1 February 2017, 6; Professor Anna Cody, Director, Kingsford Legal Centre; and Member, National Association of Community Legal Centres, *Committee Hansard*, 1 February 2017, 46; Ms Kate Eastman SC and Mr Trent Glover, *Submission 157*, 6.

129 Professor Simon Rice, Member, Discrimination Law Experts Group, *Committee Hansard*, 1 February 2017, 1.

130 Ms Stephanie Cousins, Advocacy and External Affairs Manager, Amnesty International Australia, *Committee Hansard*, 1 February 2017, 26.

131 Professor Anna Cody, Director, Kingsford Legal Centre; and Member, National Association of Community Legal Centres, *Committee Hansard*, 1 February 2017, 46.

process (discussed in more detail in Chapter 3), it was argued to the committee that these were not representative of the vast majority of thousands of matters and that the issue was not with the fact of, or threshold of, protection currently afforded. For example, Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre argued:

If we look at something like what happened to Lindy Chamberlain, that was a gross miscarriage of justice yet our criminal justice system continues—we have not taken murder off the books. We have to recognise that any legal system sometimes gets it wrong—that is why we have appeals.¹³²

2.104 Ms Lisa Annese, Chief Executive Officer of the Diversity Council Australia (DCA), a not-for-profit independent diversity adviser to businesses in Australia, which has approximately 400 members (including ANZ Bank, AMP, Boral, Coles, IBM Australia, Myer, Orica, Rio Tinto and Westpac) gave evidence to the committee regarding the impact of section 18C and section 18D of the RDA on its members. Ms Annese noted that DCA consulted with its membership about changes to sections 18C and 18D of the RDA, and 'have been uniformly supported' in the view that no changes are required and that DCA's members:

...have developed a framework for appropriate behaviour within their workplaces which is based around the current legislation, and this works very well for them. They also acknowledge that cultural diversity and the capacity to operate in a workplace where difference is treated with respect and people are afforded the opportunity to be valued in terms of their diversity—and all of the research and the evidence research demonstrates this—is really good for business.¹³³

2.105 In respect of the QUT case, Professor Simon Rice, from the Discrimination Law Experts Group, stated that 'you so rarely get a QUT case that to hang public policy on it would be, with respect, a huge mistake because it does not represent a problem that needs to be addressed'. Professor Rice commented that the QUT case was 'unremarkable', as it 'represents what happens in cases', and further noted that '[t]he QUT case does not represent the way things might go wrong in the commission processes with all the other complaints. It really does distort an understanding of how the commission exercises its powers.'¹³⁴

2.106 Further, Mr Bill Swannie, Chair of the Human Rights/Charter of Rights Committee at the Law Institute of Victoria, similarly argued that:

132 Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, *Committee Hansard*, 1 February 2017, 29.

133 Ms Lisa Annese, Chief Executive Officer, Diversity Council Australia, *Committee Hansard*, 20 February 2017, 31.

134 Professor Simon Rice, Member, Discrimination Law Experts Group, *Committee Hansard*, 1 February 2017, 6.

There is an old saying that tough cases make bad law and that we should not amend the law because of one case—for example, the [QUT case].¹³⁵

Proposals to strengthen Part IIA of the RDA

2.107 Although the first of the terms of reference has an emphasis on limits on freedom of speech, consideration of the balance between it and protection from racially hateful speech led some submitters to argue for amendments to strengthen Part IIA of the RDA. Kingsford Legal Centre suggested that section 18(1)(b) of the RDA be amended to cover conduct based on both presumed or actual race.¹³⁶ Further, a number of submitters suggested that section 18C should be amended to include religion as a ground for protection.¹³⁷ However, some other submitters argued against such an extension.¹³⁸

2.108 Noting that Part IIA is a civil regime, there were some submitters who argued that a federal criminal offence of racial hatred could be created.¹³⁹ Other submitters argued that the current criminal law did not afford sufficient protection.¹⁴⁰ For example, Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry stated:

The demonstrated ineffectiveness of federal and state criminal provisions which are intended to proscribe the urging of violence on the basis of race further underlines the need for strong and effective civil remedies.¹⁴¹

135 Mr Bill Swannie, Chair, Human Rights/Charter of Rights Committee, Law Institute of Victoria, *Committee Hansard*, 31 January 2017, 41.

136 Kingsford Legal Centre, *Submission 187*, 3.

137 Online Hate Prevention Institute, *Submission 36*, 6; Victorian Multicultural, Faith and Community Organisations, *Submission 125*, 1; Ethnic Communities' Council of Victoria, *Submission 198*, 4; Cyber Racism and Community Resilience (CRaCR) Research group, *Submission 54*, 2.

138 Queensland Council for Civil Liberties, *Submission 76*, 3; Rationalist Society of Australia, *Submission 84*, 3.

139 Equal Opportunity Tasmania, *Submission 167*, 47; Australian Lawyers for Human Rights, *Submission 5*, 18; Dr Murray Wesson, *Committee Hansard*, 3 February 2017, 28; Australian Education Union, *Submission 77*, 4.

140 See, for example, Aboriginal Legal Service, *Submission 59*, 14; Ms Karly Warner, Executive Officer, National Aboriginal and Torres Strait Islander Legal Services, *Committee Hansard*, 31 January 2017, 12; Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, 1 February 2017, 61.

141 Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, 1 February 2017, 61. See also: Ms Anna Talbot, Legal and Policy Adviser, Australian Lawyers Alliance, *Committee Hansard*, 1 February 2017, 34; Ms Roxanne Moore, Indigenous Rights Campaigner, Amnesty International Australia, *Committee Hansard*, 1 February 2017, 32; Victorian Government, *Submission 57*, 2; Legal Aid Commission of New South Wales, *Submission 73*, 11; Refugee Council of Australia, *Submission 8*, 5.

2.109 As these matters were beyond the terms of reference of the inquiry they did not receive much attention from the committee, however, it may be useful for such laws to be re-examined.

The role for education

2.110 The committee received substantial evidence about the critical role that education can play both in tackling racism; properly understanding legal mechanisms and rights; and to reassure people about the limits to what is seen by some as unjustifiable encroachments on freedom of speech.¹⁴² For example, Ms Roxanne Moore, Indigenous Rights Campaigner at Amnesty International Australia stated in evidence to the committee that human rights education 'goes to both making sure that people who have had their rights violated know about the process to begin with and then also that they are able to access it as well.'¹⁴³

2.111 Similarly, in its submission to the inquiry, Legal Aid NSW expressed its support for the Commissioners' consultative and educational activities:

...which protect and promote human rights in the Australian community. When individuals understand their right to lodge a complaint with the Commission, they are more likely to bring genuine and meritorious complaints about acts or practices inconsistent with human rights. Where an individual or client raises circumstances which could give rise to a complaint under the AHRC Act, it is wholly appropriate that they be advised of their right to make a complaint and be assisted to do so.¹⁴⁴

2.112 The Victorian Government noted that 'Racially motivated hatred will not be effectively addressed by legal restrictions alone. Education is also vital to promote a culture of shared responsibility and respect.'¹⁴⁵

2.113 Many submitters were very supportive of education programs to address issues of racism, such as, the 'Racism. It Stops with Me' campaign and similar programs.¹⁴⁶

2.114 Noting common and significant misunderstandings about the meaning and scope of section 18C of the RDA as judicially interpreted, a number of submitters suggested that education programs could be further developed to ensure that the

142 Ms Karly Warner, Executive Officer, National Aboriginal and Torres Strait Islander Legal Services, *Committee Hansard*, 31 January 2017, 15.

143 Ms Roxanne Moore, Indigenous Rights Campaigner, Amnesty International Australia, *Committee Hansard*, 1 February 2017, 32.

144 Legal Aid NSW, *Submission 73*, 11.

145 Victorian Government, *Submission 57*, 2.

146 Mr Joe Caputo, OAM, JP, Board Director, Ethnic Communities' Council of Victoria, *Committee Hansard*, 31 January 2017, 3; National Aboriginal and Torres Strait Islander Women's Alliance, *Submission 53*, 10.

legal interpretation of Part IIA is better understood.¹⁴⁷ For example, Ms Robin Banks, Tasmanian Anti-Discrimination Commissioner stated:

...we can engage in public discourse about matters relating to race, immigration and other things without falling foul of 18C or its equivalents in states and territories. I think there is a difference between the public perception of the law—and this is sometimes heightened by people building it up, feeding the fire—and what the law actually does. That says to me that what we need perhaps is to do more education about what the proper balance is and when speech is entirely okay and when it may, in fact, fall foul of the law. So I think there is an educational role for all of us to play.¹⁴⁸

2.115 Some submitters were of the view that education in itself may be sufficient to address the significant misunderstandings about the scope and effect of section 18C of the RDA.¹⁴⁹ Ms Kate Eastman SC explained the potential role for education in clarifying the way section 18C operates:

I am an expert in the area, but I do agree that the law should be clear and simple, so if clarification to reflect the way the courts are interpreting the law would assist, then I would support that approach. But I am not sure it would need it if there were sufficient education about how these provisions are intended to operate and the impact they have on ordinary people.¹⁵⁰

2.116 Mr Kevin Kadirgamar, President of the Multicultural Council of the Northern Territory, explained that misconceptions about the scope of section 18C have led some people to being fearful about openly discussing matters that are not actually covered by the section 18C and there was an important role for education to play in addressing such issues:

...it is not the legislation that needs fixing, rather it is education and awareness as to what that means to both sides...If those people were properly educated on what 18C really means and on the kinds of

147 See, for example: Professor Gillian Triggs, President, AHRC, *Committee Hansard*, 12 December 2016, 21; Mr Bill Swannie, Chair, Human Rights/Charter of Rights Committee, Law Institute of Victoria, *Committee Hansard*, 31 January 2017, 61; Dr Karen O'Connell, Member, Discrimination Law Experts Group, *Committee Hansard*, 1 February 2017, 4; Associate Professor Gabrielle Appleby, *Committee Hansard*, 1 February 2017, 5; Mr Kevin Kadirgamar, President, Multicultural Council of the Northern Territory, *Committee Hansard*, 20 February 2017, 20.

148 Ms Robin Banks, Anti-Discrimination Commissioner, Equal Opportunity Tasmania, *Committee Hansard*, 30 January 2017, 3.

149 Dr Karen O'Connell, Member, Discrimination Law Experts Group, *Committee Hansard*, 1 February 2017, 4; Associate Professor Gabrielle Appleby, *Committee Hansard*, 1 February 2017, 5.

150 Ms Katherine Eastman SC, *Committee Hansard*, 1 February 2017, 4.

comments that can be made and cannot be made, those concerns would not exist.¹⁵¹

2.117 Northern Territory Anti-Discrimination Commissioner, Ms Sally Sievers, was supportive of an education campaign so that there was better understanding within the wider community about the limits of section 18C:

In any of these spaces, people knowing what their rights are and what their obligations are is what we are all about. It is a jurisdiction which is preventative. So anti-discrimination law is all about the fact that we do not want people complaining to us. If we have done our job really well, if we have gone out and talked to employers and we have told them, 'You need to put these things in place, all this training, all this education for your employees; you need to be on the lookout for this,' then it does not happen. That is the real focus of antidiscrimination.¹⁵²

2.118 The committee also heard evidence that further education is required as many people were not aware of the scope of protections under section 18C of the RDA or the ability to complain to the Commission.¹⁵³ For example, in its submission to the inquiry, the Refugee Council of Australia stated that:

...more could be done to increase community awareness regarding the process for making a complaint to the [Commission]. Most people consulted for this submission were not aware of the process for making a complaint and how such an issue is resolved. More education sessions, community engagement activities and dissemination of fact sheets could help towards increasing community understanding of the conciliation process of the Commission.¹⁵⁴

2.119 Speaking about a recent research project, *Telling It Like It Is: Aboriginal Perspectives on Race and Race Relations in Darwin*, Associate Professor Daphne Habibis, chief investigator for the study, explained that the research findings indicated a lack of knowledge in remote communities about the law:

...we do not think 18C is going to be used very much by everyday Aboriginal people; it is more that it provides an opportunity for Aboriginal leaders, and perhaps other people on their behalf, to take action. There is a degree of a lack of understanding of the law. Some people who live in remote communities but who were visiting Darwin were picked up in the

151 Mr Kevin Kadrigamar, President, Multicultural Council of the Northern Territory, *Committee Hansard*, 20 February 2017, 24.

152 Ms Sally Sievers, Anti-Discrimination Commissioner, Northern Territory Anti-Discrimination Commission, *Committee Hansard*, 20 February 2017, 2.

153 Mr Justin Mohamed, Chief Executive Officer, Reconciliation Australia, *Committee Hansard*, 2 February 2017, 20; Mr Rodney Little, Co-Chair, National Congress of Australia's First Peoples, *Committee Hansard*, 1 February 2017, 53.

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

interviews; their understanding may not be so great. Amongst other urban Aboriginal people, their understanding was good.¹⁵⁵

2.120 Mr Rodney Little, Co-Chair, National Congress of Australia's First Peoples stated in evidence to the committee that:

Certainly we have an obligation to our membership and our communities to inform people; that is why we see more and more of our peoples using the process of 18C and being more informed about the legislation...

I think that we all in our society have an obligation to inform our brothers and sisters and our families. I also think that all Australians have that obligation to inform all Australians of the process that is available to all Australians when they feel as though they have been discriminated against or they have been hurt—and of the views of some that may be called the 'privileged' against others who are different.¹⁵⁶

2.121 Some submitters indicated that the potential risks of sending a 'dangerous message' through an amendment to the RDA could be minimised through a public education campaign.¹⁵⁷ For example, Professor Adrienne Stone stated that:

My own view is that, well handled, I would hope that risk would be minimised, and in a sense I think there would be a very strong message that would come out of the fact that this section has been up for review and possible amendment twice. If what is done is codification, I think it is actually a strong reinforcement of the value of section 18C as an important law in our multicultural democracy. I would hope that that message could be communicated in those circumstances.¹⁵⁸

2.122 Similarly, Professor Sarah Joseph while discussing a possible amendment to replace the words 'offend' and 'insult' in section 18C with 'vilify', and what message such an amendment would send, stated:

I think the government could then maybe accompany [an amendment] with a campaign to even support 'Racism: It Stops With Me'—the Human Rights Commission. So maybe, in that respect, that could be a good idea.¹⁵⁹

155 Associate Professor Daphne Habibis, Deputy Director, Institute for the Study of Social Change, University of Tasmania, *Committee Hansard*, 30 January 2017, 25.

156 Mr Rodney Little, Co-Chair, National Congress of Australia's First Peoples, *Committee Hansard*, 1 February 2017, 53.

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

158 Professor Adrienne Stone, *Committee Hansard*, 31 January 2017, 46. See also Professor Sarah Joseph, Castan Centre for Human Rights Law, *Committee Hansard*, 30 January 2017, 14.

159 Professor Sarah Joseph, Director, Castan Centre for Human Rights Law, *Committee Hansard*, 30 January 2017, 14.

Committee views and recommendations

2.123 The committee thanks the many submitters who have given their time and expertise to provide thoughtful contributions to the inquiry into this important issue.

2.124 There is an important role for what might be termed civility, common human decency, social norms and education in preventing the use of racist language and recognising shared humanity. Providing due consideration and civility to others and engaging in respectful dialogue is an important task with which all members of Australian society can assist.

2.125 Unlike the United States of America, which has a tradition of unrestrained free speech protected by the First Amendment, the Anglo-Australian tradition has been that there can be reasonable fetters on free speech: the question for Parliaments has been to determine where the balance lies.

2.126 The committee acknowledges that Part IIA of the RDA is considered to be an important protection against forms of racially discriminatory speech and racism in Australia by many, including multicultural organisations and Aboriginal and Torres Strait Islander groups. It is also consistent with Australia's international human rights obligations.

2.127 The committee was deeply concerned to hear extensive evidence about the range and extent of daily experiences of racism in Australian society. This is a concern for individuals, for businesses and for society. The evidence illustrated the serious, profound and lasting impacts of racially discriminatory forms of speech, including on the mental and physical health of those affected.

2.128 At the same time, the right to freedom of expression is of fundamental importance. The committee considers there needs to be scope for dialogue on serious and difficult questions, including matters of race. The committee has also received considerable evidence on this issue.

2.129 Part IIA of the RDA cannot be viewed without consideration of the decided cases. In the two decades since the enactment of sections 18C and 18D, the case law has provided a limited but important protection against Holocaust denial and serious racial abuse against Aboriginal and Torres Strait Islander groups and ethnic communities, while allowing, among other things, some artistic expression through cartoons and satire. Similarly the complaints about Part IIA need to be viewed in the context of concerns about the processes of the AHRC and appeals to the Court following a termination by the AHRC (these matters are covered in Chapter 3).

2.130 While the courts have interpreted section 18C of the RDA as not covering conduct that is merely 'offensive' or 'insulting', but only applying to conduct that has 'profound and serious effects' on the basis of race, the committee received substantial evidence that there was confusion regarding the meaning and scope of sections 18C and 18D of the RDA.

2.131 From a rule of law perspective there is a persuasive argument that the meaning of the law should be sufficiently apparent from the words of the legislation. However, the scope of the current formulation of section 18C and the accompanying section 18D 'exemptions' as applied by the courts is not clear and accessible on the face of the provisions.

2.132 This problem has significant implications for understanding what conduct is prohibited by Part IIA and what is protected, particularly as the words 'offend' and 'insult' in section 18C are not applied as generally understood in common usage. The committee considers that there is a significant and substantial case for addressing such confusion.

2.133 In addition, the committee has received evidence that the law unjustifiably limits freedom of speech.

2.134 The committee has received evidence from a wide range of submitters of ways to rectify these problems, including the important role that education could play to raise awareness of the scope of the current law, as well as possible amendments to Part IIA of the RDA.

2.135 One suggested amendment that emerged consistently in evidence was to codify the judicial interpretation of section 18C as meaning 'profound and serious effects'. Another amendment which was suggested was to replace the words 'offend', 'insult' and 'humiliate' with 'harass'. Many of these amendments may assist to both clarify and enhance the weight afforded to freedom of expression in Australia particularly noting the importance of this right. These ideas are relatively new developments in the context of the debate on section 18C and require further consideration. In particular, while there has been a broad debate on removal of the words 'offend' and 'insult' there has been less detailed consideration of removing the word 'humiliate' or its replacement with the word 'harass'. The committee also considers that education has a critical role to play in this respect.

2.136 The committee is cognisant of the evidence presented to it that even changes that could improve understanding of the existing law risk being taken as an indication that racism is acceptable to the Parliament. In canvassing possible amendments to Part IIA, the committee does not intend to signal acceptance of any licence for racism in Australia. The committee considers that should any amendments to Part IIA of the RDA proceed they should be accompanied by education programs to ensure that such amendments are properly understood—both by the Australian community at large and by those communities that are particularly affected—as a strong endorsement of the value of protections for serious forms of racially hateful or discriminatory speech.

Recommendation 1

2.137 The committee recommends further supporting, strengthening and developing education programs including those:

- addressing racism in Australian society;
- addressing the scope of conduct caught by Part IIA of the *Racial Discrimination Act 1975* as judicially interpreted; and
- about the meaning and scope of any amendments to Part IIA of the *Racial Discrimination Act 1975*.

Recommendation 2

2.138 Recognising the profound impacts of serious forms of racism, the committee recommends that leaders of the Australian community and politicians exercise their freedom of speech to identify and condemn racially hateful and discriminatory speech where it occurs in public.

Recommendation 3

2.139 The committee received evidence about a number of proposals in relation to Part IIA of the *Racial Discrimination Act 1975*. Given the nature and importance of the matters considered by the committee for this inquiry – primarily the right to freedom of speech, the right to be free from serious forms of racially discriminatory speech, and the importance of the rule of law – views varied among members of the committee as to how to balance these appropriately. The range of proposals that had the support of at least one member of the committee included:

- (a) no change to sections 18C or 18D;
- (b) amending Part IIA of the *Racial Discrimination Act 1975* to address rule of law concerns and to ensure that the effect of Part IIA is clear and accessible on its face, by codifying the judicial interpretation of the section along the lines of the test applied by Kiefel J in *Creek v Cairns Post Pty Ltd* that section 18C refers to 'profound and serious effects not to be likened to mere slights';
- (c) removing the words 'offend', 'insult' and 'humiliate' from section 18C and replacing them with 'harass';
- (d) amending section 18D to also include a 'truth' defence similar to that of defamation law alongside the existing 18D exemptions;
- (e) changing the objective test from 'reasonable member of the relevant group' to 'the reasonable member of the Australian community'; and
- (f) criminal provisions on incitement to racially motivated violence be further investigated on the basis that such laws have proved ineffective at the State and Commonwealth level in bringing

successful prosecutions against those seeking to incite violence against a person on the basis of their race.

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:

- a) the appropriate treatment of:
 - i. trivial or vexatious complaints; and
 - ii. complaints which have no reasonable prospect of ultimate success;
- b) ensuring that persons who are the subject of such complaints are afforded natural justice;
- c) ensuring that such complaints are dealt with in an open and transparent manner;
- d) ensuring that such complaints are dealt with without unreasonable delay;
- 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;
- 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

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.

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.

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:

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

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 inquiry²¹ 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;

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.

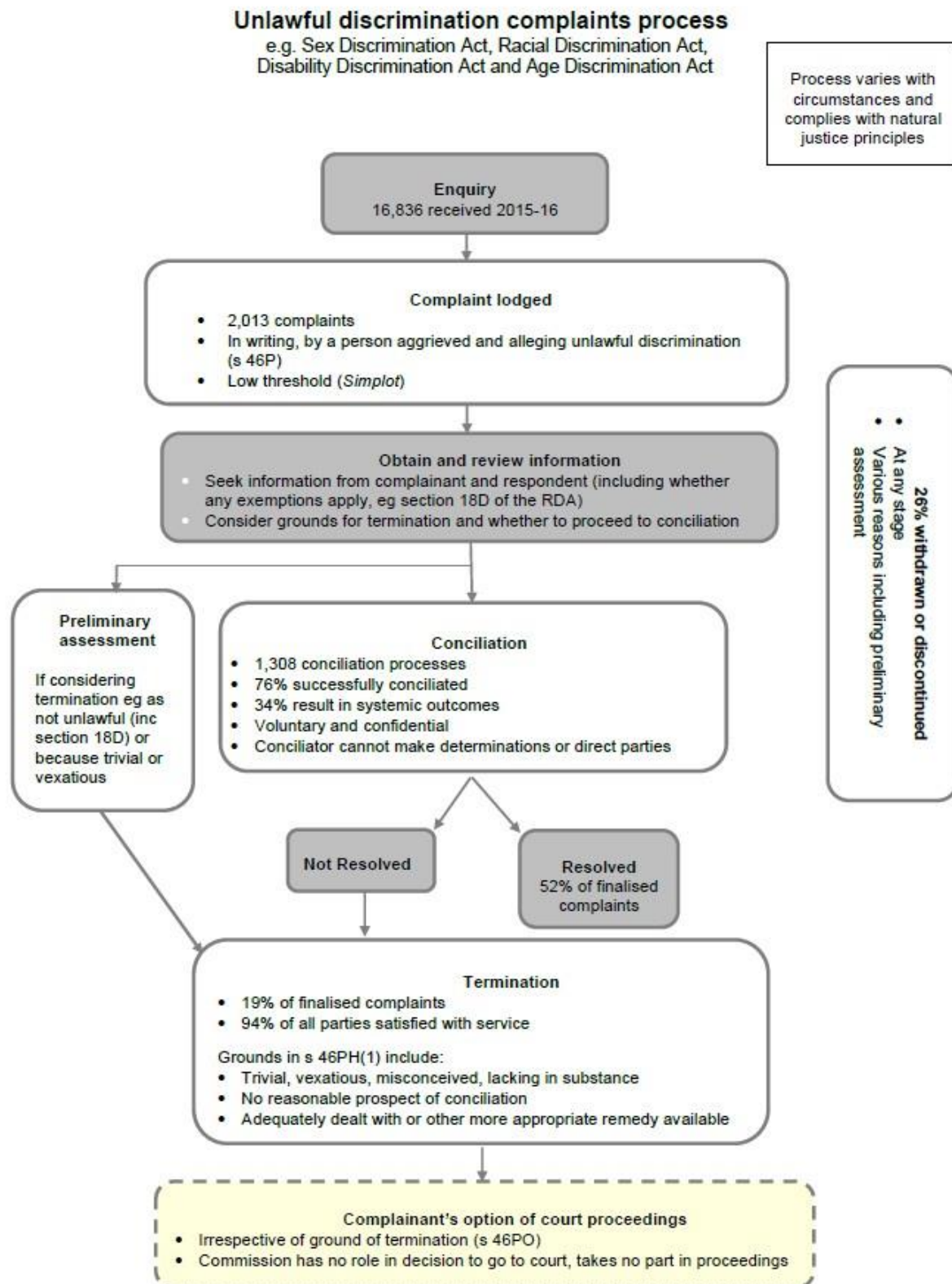
22 AHRC Act, section 46PJ.

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



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.

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?'

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.

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

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

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.

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

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 Adrienne 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 earned.'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.

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 Leaser, *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:

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (c) in making or publishing:
 - (i) a fair and accurate report of any event or matter of public interest; or
 - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.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

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.

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.'...

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

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.

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

91 Mr Julian Leaser 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

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 students¹¹⁰

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

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

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:

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 overhurred 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

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

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

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.

Chapter 4

Soliciting complaints to the Australian Human Rights Commission

Introduction

4.1 This chapter focuses on the third term of reference of the inquiry:

Whether the practice of soliciting complaints to the [Australian Human Rights Commission (AHRC)] (whether by officers of the Commission or by third parties) has had an adverse impact upon freedom of speech or constituted an abuse of the powers and functions of the [AHRC], and whether any such practice should be prohibited or limited.¹

4.2 Some evidence to the committee explored concerns about the AHRC's 'soliciting' of complaints and whether this is consistent with the AHRC's legislative function to provide advice about, and promote awareness of, human rights.

4.3 Some submitters and witnesses expressed concern that the AHRC overstepped its legislated educational function and solicited complaints that otherwise might not have been made. The most prominent instance of this is the complaints made against Mr Bill Leak in relation to a cartoon drawn by him. This case study is useful for illustrating the arguments for and against the AHRC's actions in respect of 'soliciting complaints'.

4.4 Notwithstanding these concerns, submitters and witnesses were supportive of this function of the AHRC and have generally expressed confidence in the AHRC's discharge of its education responsibilities.

4.5 This chapter begins by examining the AHRC's legislative obligation to raise awareness about human rights in Australia. The remainder of the chapter discusses whether the AHRC engaged in behaviour that would be considered complaint soliciting; and whether there is a need for any changes to prevent this type of behaviour from occurring in the future.

Community education and awareness of human rights

4.6 This first section explains the legislated responsibilities that the AHRC must undertake.

4.7 The functions of the AHRC are described in section 11 of the *Australian Human Rights Commission Act 1986* (AHRC Act). One of these functions is to

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

promote awareness of human rights in Australia. Section 11(1)(g) describes this function:

...to promote an understanding and acceptance, and the public discussion, of human rights in Australia...²

4.8 Section 11(1)(h) also describes this function:

...to undertake research and educational programs and other programs, on behalf of the Commonwealth, for the purpose of promoting human rights, and to co-ordinate any such programs undertaken by any other persons or authorities on behalf of the Commonwealth...³

4.9 In its submission to the inquiry, the AHRC explained these functions in more detail:

Commissioners are entitled to advise people of their right to lodge complaints under anti-discrimination law. Indeed, making people aware of their rights under anti-discrimination law is an important part of the role of Commissioners.⁴

4.10 These functions broadly align the following competencies and responsibilities of national human rights institutions outlined in the Paris Principles:

(f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;

(g) To publicize [sic] human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.⁵

4.11 Many submitters were unconditionally supportive of the AHRC's roles to educate and raise awareness, which are seen as essential to the AHRC achieving its

2 *Australian Human Rights Commission Act 1986* (AHRC Act), section 11(1)(g). The functions of each of the individual Commissioners are also described within this Act. All Commissioners have a legislative duty to 'promote understanding' of human rights law.

3 AHRC Act, section 11(1)(h). All Commissioners have a legislative duty to 'undertake educational programs'.

4 Australian Human Rights Commission (AHRC), *Submission 13*, 70.

5 Office of the United Nations High Commissioner for Human Rights, *Principles relating to the Status of National Institutions (The Paris Principles)*, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

legislated goals.⁶ The Law Institute of Victoria (LIV) highlighted that 'one of the explicit functions of the AHRC is to "promote an understanding and acceptance, and the public discussion, of human rights in Australia".⁷ The importance of increasing awareness in the community was also highlighted by Professors Katherine Gelber and Luke McNamara who noted that:

Many of the communities who are targeted by racial vilification did not know about the existence of Part IIA [of the *Racial Discrimination Act 1975* (RDA)] and other anti-vilification laws.⁸

4.12 The Cyber Racism and Community Resilience Research Project relayed the results of a survey on this issue which found that the AHRC should be more proactive in its educative role. Many respondents to the survey:

...believed the laissez faire environment online which requires individuals to initiate and pursue complaints, facilitates racial harassment and the spread of race hatred.⁹

The Bill Leak case

Background

4.13 The most well-known example of the AHRC purportedly 'soliciting complaints' relates to the actions of the Race Discrimination Commissioner, Dr Tim Soutphommasane, in relation to a cartoon drawn by the editorial cartoonist for *The Australian* newspaper, Mr Bill Leak. In August 2016, Mr Leak drew a cartoon which attracted media attention and was subject to a number of complaints under section 18C of the RDA. This case was explored in Chapter 2 with respect to the application of the section 18D 'exemptions' of the RDA relating to artistic expression and public comment.

4.14 In his submission, Mr Leak explained the nature and context of the cartoon:

The cartoon in question was drawn in the context of a raging debate about aboriginal issues that had been triggered by a Four Corners Program about conditions inside a juvenile detention centre in the Northern Territory. My intention was to try to draw attention to the fact that the high level of parental neglect and abuse of children in many Aboriginal communities is one of the underlying reasons why the disproportionately high number of

6 See, for example: Dr Carolyn Tan, *Submission 3*, 2; Australian Lawyers for Human Rights, *Submission 5*, 4; Hunter Asylum Seeker Advocacy, *Submission 18*, 2; Settlement Services International, *Submission 21*, 7; ANTaR, *Submission 48*, 3; Dr Helen Pringle, *Submission 42*, 13–14; Association of Labor Lawyers Qld, *Submission 55*, 6; Aboriginal Legal Service of WA, *Submission 59*, 21–22; Anglican Social Responsibilities Commission, *Submission 61*, 5–6.

7 Law Institute of Victoria (LIV), *Submission 184*, 8.

8 Professor Katherine Gelber and Professor Luke McNamara, *Submission 2*, 6.

9 Cyber Racism and Community Resilience Research Project, *Submission 54*, 7.

97% of the inmates in the detention centre were indigenous. It depicted an Aboriginal police officer, presenting a wayward child to his father, saying, "You'll have to sit down and talk to your son about personal responsibility," to which the father replies, "Yeah righto, what's his name then?"¹⁰

4.15 A number of complaints were lodged with the AHRC in relation to the cartoon. Mr Bill Leak gave evidence to the committee that he understood that lawyers from the Aboriginal Legal Service of WA (ALS WA) had actively sought or 'solicited' complaints about his cartoon:

They took it upon themselves to go to a home where two men lived and show them my cartoon. This is at least three months after it had been published. These blokes had no idea what the cartoon was about. They had never seen it before. They went in there and presented it to two Aboriginal men and said, 'Do you think that's racist?' 'Yeah, I do,' they said. They said, 'Righto, sign here.' They provided them with already made complaints and asked them to sign them. These two poor men were being, in my view, really shabbily treated by these people who claimed to be standing against racism as expressed in my cartoon.¹¹

4.16 Professor Dennis Eggington, Chief Executive Officer, ALS WA was questioned by the committee about how the complaints arose and whether the two complainants had seen the cartoon prior to meeting with lawyers from the ALS WA:

Senator PATERSON: I am interested in following up in a little bit more detail Mr Leaser's questions about how the Leak complaint arose. Obviously there has been some public reporting on this, and I accept that that public reporting may not be accurate, and I want to provide you with an opportunity to point out if and where it might be inaccurate. One of the things that has been raised in the public reporting about the complaint is that the two men had not seen the cartoon until they met with lawyers from your organisation. In your knowledge, is that true?

Prof. Eggington: I do not really know. If people had been shown the cartoon, I do not see anything wrong with that either.

Senator PATERSON: So, if the lawyers were there to see them about an unrelated matter, but while they were there said, 'By the way, have you seen this cartoon? How do you feel about it? Would you like us to make a complaint on your behalf?' in your view, that is a legitimate process?

Prof. Eggington: Absolutely. We do it all the time. Someone comes in with a criminal matter and talking through it you see that there is also a civil matter that needs to be dealt with. It is part and parcel of that outreach program. I am only going on what my understanding was and that we were

10 Mr Bill Leak, *Submission 169*, 2.

11 Mr Bill Leak, *Committee Hansard*, 1 February 2017, 88.

instructed by those guys. Whether they were shown the cartoon or not, I cannot tell you. Had our lawyers actually said, 'Look at this. What do you think of this?' I would say that they were doing their job.

Senator PATERSON: If it did take place in that way, can you see how some people might see that as actively soliciting or seeking a complaint, and why they might not think that is a good use of resources?

Prof. Eggington: We are not ambulance chasers and we do not make any money from any of this sort of work.

Senator PATERSON: I understand.

Prof. Eggington: I will go on the record saying that I personally do not see anything wrong with that. Soliciting work—it happens everywhere; people solicit for work. If you have really astute lawyers whose job is to educate people around discrimination stuff, and here is a cartoon that may or may not offend, and someone says, 'Have a look at it,' I do not see anything wrong with that.¹²

4.17 Dr Soutphommasane made two public comments about the case. The first comment, published in Fairfax Media quoted Dr Soutphommasane:

Our society shouldn't endorse racial stereotyping of Aboriginal Australians or any other racial or ethnic group.

A significant number of people would agree that this cartoon rehearses racial stereotypes about Aboriginal Australians.

If there are Aboriginal Australians who have been racially offended, insulted, humiliated or intimidated, they can lodge a complaint under the Racial Discrimination Act. Section 18D of the Act does protect, however, artistic expression and public comment, provided they were done reasonably and in good faith.¹³

4.18 The second comment was posted in a Facebook message post which reiterated the substance of the first comment.

We shouldn't accept or endorse racial stereotyping of Aboriginal Australians, or of any other racial group. If there are Aboriginal Australians who have been racially offended, insulted, humiliated or intimidated, they can consider lodging a complaint under the Racial Discrimination Act with the Commission. It should be noted that section 18D of the Act does protect artistic expression and public comment, provided they were done reasonably and in good faith.¹⁴

12 *Committee Hansard*, 3 February 2017, 40-42.

13 *AHRC, Submission 13*, 70-71.

14 *AHRC, Submission 13*, 71.

4.19 A further comment was made by Dr Soutphommasane on his Twitter account which expressed an abbreviated version of his earlier comments, accompanied by a link to a media article about the cartoon:

Our society shouldn't endorse racial stereotypes of Aboriginal Australians - or, for that matter, of any other group...¹⁵

4.20 A key procedural point of significance is that the complaints handling process is overseen by the President (or delegate) and that the 'Race Discrimination Commissioner plays no role in handling complaints'.¹⁶

The AHRC's role in the Bill Leak case – the case in favour

4.21 The AHRC acknowledged that it raises awareness about people's rights under human rights laws through the mass media and social media, however it stated that it has 'not called for complaints to be lodged under section 18C of the RDA'.¹⁷ The AHRC further noted:

...at no stage did the Commissioner 'call for' or 'solicit' complaints about the cartoon or say that complaints about the cartoon should be made. At no stage did the Commissioner offer a view on whether any complaint about the cartoon would be successful. Indeed, he drew specific attention to exemptions to protect artistic expression and public comment that would be available in relation to any such claim.¹⁸

4.22 Many submitters were supportive of this position. Reconciliation South Australia highlighted that:

...it is Dr. Soutphommasane's job to educate and inform people of their rights. Where offence is taken, people have the right to complain. Letting people know that such avenues exist falls within the remit of the role of the [AHRC]. Dr. Soutphommasane's role should not be undermined for carrying out his duties where the politically charged language of "soliciting" responses is pointed at him.¹⁹

4.23 The LIV submitted that:

In this case, the Commissioner's conduct is fulfilling the purpose of the [AHRC] by engaging with a popular issue for the legitimate aim of promoting the public discussion of human rights in Australia, and

15 Tim Soutphommasane (@timsout), 'Our society shouldn't endorse racial stereotypes of Aboriginal Australians – or, for that matter, of any other groups', tweet, 3 August 2016, <https://twitter.com/timsout/status/761073783016783874> (accessed 30 January 2016).

16 AHRC, *Submission 13*, 21–22.

17 AHRC, *Submission 13*, 70.

18 AHRC, *Submission 13*, 71.

19 Reconciliation South Australia, *Submission 106*, 2.

informing and educating people on the avenues for redress available to them if they believe they are victims of racial vilification.²⁰

4.24 In light of the terms of reference, some submitters, including the LIV and the National Congress of Australia's First Peoples noted that the AHRC and its Commissioners are obligated to fulfil their functions as described under statute. They disputed how the exercise of these functions impinges on freedom of speech:

It is unclear how the [AHRC], in fulfilling its legislated duties by encouraging victims of discrimination to seek the remedies to which they are entitled at law, would have an adverse impact upon freedom of speech.²¹

4.25 In its submission, the AHRC highlighted that 'although the Race Discrimination Commissioner is not involved in the complaint handling process, he or she also plays an active role in advancing public understanding and debate about racism, race relations and the RDA'. The AHRC emphasised the importance of this role by noting the 'under-reporting of experiences of racial discrimination'.²²

4.26 Many submitters stated that they are not aware of any instances where the AHRC, its officers or third parties have solicited complaints.²³ A group of submitters representing multicultural communities noted that the process of deciding when education and awareness building becomes solicitation is largely subjective:

We believe the definition or interpretation of the word "soliciting" is highly subjective and depends on whether one agrees that the public should be well informed or whether the information should be kept from the public based on an ideological view that people have no rights when it comes to discrimination or abuse on the grounds of race, colour or ethnic origins.²⁴

4.27 Ryan Carlisle Thomas Lawyers submitted that characterising the AHRC's community education function as soliciting complaints not only trivialises the work of the AHRC, but also trivialises the complaints that are being made.²⁵ Furthermore, the

20 LIV, *Submission 184*, 7.

21 LIV, *Submission 184*, 8. See also: National Congress of Australia's First Peoples, *Submission 188*, 14–15.

22 AHRC, *Submission 13*, 24.

23 See, for example: Executive Council of Australian Jewry, *Submission 11*, 26; Townsville Community Legal Service, *Submission 23*, 6; Arts Law, *Submission 27*, 5; Legal Aid Queensland, *Submission 69*, 7; Arab Council Australia, *Submission 113*, 4.

24 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), *Submission 15*, 3.

25 Ryan Carlisle Thomas Lawyers, *Submission 66*, 7.

Australian Lawyers Alliance noted that 'concerns regarding "soliciting complaints" appear to be underpinned by a misunderstanding of the role of the AHRC'.²⁶

4.28 Dr Helen Pringle, a Senior Lecturer at the School of Social Sciences at the University of New South Wales, has stated that the Bill Leak case is the 'sole evidence' of complaint soliciting by the AHRC.²⁷ The LIV agreed noting that 'there is no indication that there is a practice of complaints being solicited to the AHRC'.²⁸

4.29 A different perspective was offered by JobWatch, which argued that even if the AHRC does solicit complaints, it:

...should not be prohibited or limited in anyway as individuals aggrieved by unlawful discrimination should not just be entitled to a legal remedy but should also be entitled to know they are entitled to a legal remedy.²⁹

4.30 A separate point was made by Nationwide News relating to the AHRC's conciliation function:

It could be argued that solicitation by Officers of the AHRC, including Commissioners, does not amount to impartiality by a decision maker because the President of the AHRC ultimately decides whether or not a complaint should be terminated. This argument is misguided because the President should not be expected to eliminate unbiased comments made by Commissioners to members of the public in the process of determining whether a complaint should be terminated.³⁰

The AHRC's role in the Bill Leak case – complaint soliciting?

4.31 Some submitters to this inquiry strongly disagreed and expressed concerns in relation to this case, arguing that Dr Soutphommasane did, in fact, solicit complaints against Mr Leak.³¹ Family Voice contended that Dr Soutphommasane encouraged people to lodge complaints creating the perception that the 'commissioner has prejudged those complaints'.³² Aged Pensioner Power agreed:

The controversy that surrounded the Bill Leak cartoon fiasco erased all confidence and trust that a great deal of Australians held in the "[AHRC]". The idea that Mr. Soutphommasane "touted" for complaints was

26 Australian Lawyers Alliance, *Submission 35*, 13.

27 Dr Helen Pringle, *Submission 42*, 12.

28 LIV, *Submission 184*, 7.

29 JobWatch, *Submission 29*, 12. See also, for example: Darebin City Council, *Submission 98*, 4.

30 Nationwide News, *Submission 117*, 6.

31 See, for example: Institute of Public Affairs, *Submission 58*, 70; Australian Liberty Alliance, *Submission 14*, 2.

32 FamilyVoice Australia, *Submission 49*, 10.

abhorrent to say the least and should at the very minimum be prohibited.³³

4.32 This matter was also of significant concern to Mr Anthony Morris QC, who submitted to the committee that:

...despite Dr Soutphommasane's claim (as quoted in *The Sydney Morning Herald*) that "'a significant number' of people would agree the cartoon was a racial stereotype of Aboriginal Australians"; despite the fact that Dr Soutphommasane had practically guaranteed that such a complaint would be gratefully received at the AHRC; and despite the fact that it costs nothing to lodge such a complaint with the AHRC – despite all of these circumstances, the AHRC was able to find just one solitary individual out of Australia's population of roughly 24¼ million, willing to put her name to such a complaint.³⁴

4.33 Mr Morris went on to note that '[u]ltimately, with assistance from their friends in the Aboriginal Legal Service of Western Australia, the AHRC was able to produce two more complaints.'³⁵

4.34 Dr Sev Ozdowski added to this by making a broad observation in which he noted that 'while Human Rights Commissioner I regularly witnessed discussions about soliciting a particular type of complaint in order to advance regulatory change'.³⁶ Nationwide News agreed and added:

...there have been instances in which Officers of the [AHRC] have identified particular acts as potential breaches of Section 18C and have invited members of the public to submit complaints to the AHRC.³⁷

4.35 While not providing an example of complaint solicitation, the Australian Taxpayers Alliance commented on the broader principle, noting 'that the solicitation of complaints creates an unacceptable conflict of interest' for the officials tasked with advising on the merits of a complaint, and more importantly remaining a neutral conciliator.³⁸ The Federation of Indian Associations of NSW said that the AHRC should not solicit complaints and noted that:

Soliciting complaints is political and AHRC officials should not take part in it. If people feel the need to lodge an 18C complaint, the urge to lodge this complaint should come from them.³⁹

33 Aged Pensioner Power, *Submission 60*, 2.

34 Anthony Morris QC, *Submission 307*, 131.

35 Anthony Morris QC, *Submission 307*, 131-132.

36 Dr Sev Ozdowski, *Submission 101*, 3.

37 Nationwide News, *Submission 117*, 6.

38 Australian Taxpayers Alliance, *Submission 110*, 6.

39 Federation of Indian Associations of NSW, *Submission 112*, 8.

Prohibiting solicitation

Proposals to prohibit solicitation

4.36 Arising from the discussion above, it can be seen that some submitters argued that the AHRC should be prohibited or prevented from soliciting complaints.⁴⁰ However, in terms of assessing this suggestion, it is not clear how to prohibit or limit the solicitation of complaints to the AHRC without unduly impinging on its functions relating to education and raising awareness. In fact, the committee did not receive any detailed proposals as to how prohibition of the solicitation of complaints could occur. As noted earlier, it is difficult to draw a line between what constitutes actions intended to educate as opposed to ones of solicitation. As Dr Helen Pringle explained in her submission:

It is difficult to know what would be the mechanism of and penalty for prohibiting or limiting any soliciting of complaints to the [AHRC]. It is also difficult to ascertain what 'the practice of soliciting complaints to the [AHRC]' actually means. For example, does 'soliciting complaints' include advising a person who expresses unease with certain behaviour that there are legal provisions and a Commission to address such behaviour?⁴¹

4.37 The Public Law and Policy Research Unit at the University of Adelaide agreed that there should not be any restrictions on the AHRC's educative functions. Their submission also added that there should be no barriers to third parties such as legal representatives and community groups 'offering assistance to potential complainants in the formulation and/or lodgement of complaints'.⁴²

Would prohibition restrict free speech?

4.38 In addition to the absence of any concrete proposals to enforce prohibition, questions have been raised as to an unintended consequence of prohibiting the solicitation of complaints. In its submission to the committee, Australian Lawyers for Human Rights highlighted that any prohibition or restriction on the AHRC and its officers with regard to its awareness raising function would, in itself, be a restriction on freedom of speech:

...to suggest that there should be any kind of prohibition or limitation upon any person—in any capacity—who publicly encourages Australians to pursue avenues of redress which are legally open to them. That would

40 See, for example: Aged Pensioner Power, *Submission 60*, 2; FamilyVoice Australia, *Submission 49*, 11; Australian Taxpayers Alliance, *Submission 110*, 6;

41 Dr Helen Pringle, *Submission 42*, 12.

42 Public Law and Policy Research Unit, University of Adelaide, *Submission 88*, 12.

indeed be a restriction on free speech. It would also dangerously undermine the rule of law.⁴³

Committee views and recommendations

4.39 The committee recognises and respects the educative role that the AHRC and its Commissioners are legally obliged to fulfil. The committee is supportive of the AHRC continuing this important work.

4.40 Notwithstanding this, the committee agrees that the comments made by the Race Discrimination Commissioner in relation to the Bill Leak case could have been perceived by some as solicitation. This view notwithstanding, the committee has not received evidence more broadly that complaint solicitation is a practice engaged in by the AHRC.

4.41 However, in light of community perceptions and potential damage to public confidence in the AHRC, it is the committee's view that the AHRC should clarify its role, and the distinct roles of the President and the relevant Commissioners, in relation to complaint handling and public comment and should ensure that perceptions of complaint soliciting are not able to be drawn from the behaviour of the AHRC, its Commissioners or its officers in the future.

Recommendation 22

4.42 The committee recommends that the Australian Human Rights Commission should issue guidelines outlining the distinct roles of the President and the relevant Commissioners in relation to complaint handling and public comment and act to ensure that perceptions of complaint soliciting are not able to be drawn from the behaviour of the Commission, its Commissioners or its officers.

43 Australian Lawyers for Human Rights, *Submission 5*, 5. See also, for example: Federation of Indian Associations of NSW, *Submission 112*, 8.

Chapter 5

Other reforms to better protect freedom of speech

Introduction

5.1 This chapter focuses on the fourth term of reference of the inquiry:

Whether the operation of the [AHRC] should be otherwise reformed in order better to protect freedom of speech and, if so, what those reforms should be.

5.2 Related to this question, the terms of reference also require the committee to:

...consider the recommendations of the Australian Law Reform Commission [(ALRC)] in its *Final Report on Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* [ALRC Report 129 – December 2015], in particular Chapter 4 – "Freedom of Speech".¹

5.3 The committee received relatively little evidence in relation to these aspects of the terms of reference and given their open-ended nature the views expressed varied widely.

AHRC's engagement in freedom of speech issues

5.4 In addressing the question of whether the operation of the AHRC should be otherwise reformed in order to better protect freedom of speech, the AHRC noted that it has undertaken a wide range of activities in relation to freedom of speech or freedom of expression and the freedom to participate in public affairs. These activities include:

- making submissions on proposed legislation which has the potential to impact on the right to freedom of speech;
- in response to complaints from members of the public, conducting inquiries into acts and practices of the Commonwealth that may be inconsistent with or contrary to the right to freedom of speech;
- intervening as amicus curiae in court proceedings that raise freedom of speech issues in order to provide assistance to the court in applying the law in a way that sufficiently takes this right into account; and

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

- convening public forums to discuss freedom of speech issues that arise in a range of areas including media and internet regulation, intellectual property and defamation laws.²

5.5 The AHRC noted that these activities have been carried out in accordance with the AHRC's existing statutory functions. These current functions include:

- to examine enactments and proposed enactments, for the purpose of ascertaining whether they are inconsistent with or contrary to any human right;³
- to inquire into any act or practice by or on behalf of the Commonwealth or under a Commonwealth enactment that may be inconsistent with or contrary to any human right;⁴
- to intervene in court proceedings that involve human rights issues where the AHRC considers it is appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court;⁵
- to promote an understanding and acceptance, and the public discussion, of human rights in Australia;⁶ and
- to undertake research and educational programs for the purpose of promoting human rights.⁷

5.6 The AHRC noted that it will continue to promote an understanding and acceptance, and the public discussion, of all human rights including the right to freedom of speech. The AHRC considers that its existing functions are sufficient for it to carry out this work.⁸

5.7 The Human Rights Law Centre noted the work that the AHRC has undertaken in relation to promoting freedom of speech and concluded that it 'supports the [AHRC], as our national human rights institution, being properly resourced to continue to protect and promote freedom of speech in Australia'.⁹

2 Australian Human Rights Commission (AHRC), *Submission 13*, 73–76.

3 *Australian Human Rights Commission Act 1986* (AHRC Act), paragraph 11(1)(e).

4 AHRC Act, paragraph 11(1)(f).

5 AHRC Act, paragraph 11(1)(o).

6 AHRC Act, paragraph 11(1)(g).

7 AHRC Act, paragraph 11(1)(h).

8 AHRC, *Submission 13*, 76.

9 Human Rights Law Centre, *Submission 136*, 17.

5.8 Similarly, the Australian Council of Human Rights Authorities submitted that there 'is no evidence to suggest that the [AHRC]'s operation should be otherwise reformed to better protect freedom of speech'.¹⁰

5.9 Equal Opportunity Tasmania, in noting that the AHRC is responsible for public education on human rights including international human rights obligations, suggested that:

Preparation and publication of guidelines on forms of public expression that meet obligations under sections 18C and 18D of the [*Racial Discrimination Act 1975* (RDA)] would assist in increasing community understanding of the rights and freedoms recognised in international human rights obligations and how to exercise and enjoy those rights.¹¹

5.10 On the other hand, several submissions were critical of the operation of the AHRC, suggesting that it has not protected freedom of speech.¹² Part of the concern expressed related to the current terms of section 18C. For example, Mr Graham Young, the Executive Director of the Australian Institute for Progress, noted, '[t]his section is not about racism; it is about censorship'.¹³

5.11 For several submitters the view that the AHRC had not protected freedom of speech was also related to their experiences with the AHRC's complaints handling process.¹⁴ Both of these issues are discussed in detail in chapter 3 above.

Committee view

5.12 The committee received relatively little evidence in relation to the question of 'whether the operation of the [AHRC] should be otherwise reformed in order better to protect freedom of speech and, if so, what those reforms should be'.¹⁵

5.13 The AHRC indicated to the committee that it considers that its existing functions are sufficient for it to carry out its work in relation to freedom of speech

10 Australian Council of Human Rights Authorities, *Submission 149*, 27. See also Amnesty International, *Submission 151*, 23–24; Australian Lawyers Alliance, *Submission 35*, 14.

11 Equal Opportunity Tasmania, *Submission 167*, 46.

12 Australian Liberty Alliance, *Submission 14*, 2; Australian Institute for Progress, *Submission 24*, 4; Australian Taxpayers Alliance, *Submission 110*, 6.

13 Mr Graham Young, Executive Director, Australian Institute for Progress, *Committee Hansard*, 10 February 2017, 17.

14 For example, Mr Paul John Zanetti, *Committee Hansard*, 10 February 2017, 83 and Mr Graham Young, Executive Director, Australian Institute for Progress, *Committee Hansard*, 10 February 2017, 17.

15 Parliamentary Joint Committee on Human Rights, *An inquiry into Freedom of Speech*, Terms of Reference, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia/Terms_of_Reference.

issues. Process issues for complaint handling have been the subject of detailed consideration in chapter 3.

5.14 The committee considers that broader questions in relation to the operation of the AHRC would be best addressed in a targeted inquiry focusing on specific future proposals for reform. In this way such proposals could be carefully examined separately from considerations relating to the operation of Part IIA of the RDA, which has been the focus of this inquiry.

The ALRC Freedoms Inquiry and other laws impinging on freedom of speech

5.15 This section relates to the recommendations of the ALRC in its *Final Report on Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Freedoms Inquiry Report) insofar as they relate to freedom of speech and the terms of reference for this inquiry.

5.16 On 11 December 2013, the Attorney-General asked the ALRC to review Commonwealth legislation to identify provisions that unreasonably encroach upon traditional rights, freedoms and privileges.¹⁶ The terms of reference identified what constituted traditional rights or freedoms for the purposes of the inquiry, and included amongst these freedom of speech.

5.17 The ALRC accepted submissions relevant to the terms of reference of the inquiry and held consultations with a number of stakeholders with relevant knowledge or expertise. An interim report was released on 3 August 2015, and the final Freedoms Inquiry Report was tabled by the Attorney-General on 2 March 2016.

Laws which may unjustifiably limit freedom of speech

Commonwealth laws

5.18 The ALRC's final report identified a number of Commonwealth laws which may be said to interfere with the common law rights and freedoms listed in the inquiry's terms of reference. While not making conclusive judgments about these laws, the report provided an extensive survey of the relevant laws and highlighted laws that may unjustifiably limit common law rights and freedoms and may therefore warrant further review. Laws suggested for review to determine whether they unjustifiably limit freedom of speech included:

- Part IIA of the RDA (in conjunction with consideration of anti-vilification laws more generally);

16 Senator the Hon George Brandis QC, Attorney-General, *New Australian law reform inquiry to focus on freedoms*, Media Release, 11 December 2013, <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Fourth%20quarter/11December2013-NewAustralianLawReformInquiryToFocusOnFreedoms.aspx>.

- legislative provisions that protect the processes of tribunals, commissions of inquiry and regulators, for example section 170 of the *Veterans' Entitlements Act 1986*;
- secrecy offences, including the general secrecy offences in sections 70 and 79 of the *Crimes Act 1914*;
- various provisions of the *Criminal Code* including section 80.2C (advocating terrorism), sections 102.1, 102.3, 102.5 and 102.7 (prescribed terrorist organisations), and section 105.41 (preventative detention orders) (the ALRC noted that these provisions are reviewed by the Independent National Security Legislation Monitor (INSLM) and the Parliamentary Joint Committee on Intelligence and Security (PJCIS) as part of their ongoing roles); and
- section 35P of the *Australian Security Intelligence Organisation Act 1979* relating to special intelligence operations (these provisions are also reviewed by the INSLM and the PJCIS).¹⁷

5.19 The ALRC also suggested that the government give further consideration to recommendations that it made in its 2009 report on secrecy laws,¹⁸ and to whether Commonwealth secrecy laws—including the *Australian Border Force Act 2015*—provide for proportionate limitations on freedom of speech.¹⁹

5.20 Few submissions to this inquiry considered whether these laws (other than Part IIA of the RDA) unjustifiably limit freedom of speech.

5.21 The laws identified by the ALRC for review to determine whether they unjustifiably limit freedom of speech are significant and, as the Law Council of Australia noted, a balance must be struck between open government and freedom of speech on the one hand and the protection of sensitive and classified information from disclosure on the other:

Secrecy provisions such as those above are generally in pursuit of a legitimate objective to ensure the limitation of disclosures that would endanger the health or safety of any person or prejudice Australia's interests or criminal prosecutions. The question, however, is whether these provisions are proportionate vis-à-vis that objective and whether they are necessary.²⁰

17 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachment by Commonwealth Laws*, Final Report, December 2015, 126–127.

18 Australian Law Reform Commission (ALRC), *Secrecy Laws and Open Government in Australia*, December 2009.

19 ALRC, *Traditional Rights and Freedoms—Encroachment by Commonwealth Laws*, Final Report, December 2015, 79.

20 Law Council of Australia, *Submission 123*, 7.

5.22 Noting the significant number of laws identified by the ALRC as infringing on freedom of speech,²¹ the Australian Lawyers Alliance suggested that 'a broader inquiry into limits on freedom of speech is warranted without any restriction as to the legislation examined'.²²

5.23 The AHRC suggested that if further inquiry is needed into freedom of speech issues as they arise in other areas of law the AHRC would be well placed to undertake such an inquiry.²³

Committee view

5.24 In its Freedoms Inquiry Report the ALRC identified a number of significant laws that it considers warrant review to determine whether they unjustifiably limit freedom of speech. The committee agrees with the sentiments expressed by the Law Council of Australia that in relation to these laws a balance must be struck between open government and freedom of speech on the one hand and other important objectives.

5.25 Noting the significance of these matters and the significant questions to be examined to determine where the appropriate balance lies in this regard, the committee considers that a further inquiry may be warranted into Commonwealth laws generally to build on the work of the ALRC to identify which laws may unjustifiably impinge on freedom of speech and to make specific recommendations for reform.

Mr Ian Goodenough MP

Chair

21 These laws included criminal laws, secrecy laws, court and tribunal orders, privilege and contempt laws, anti-discrimination laws, the *Racial Discrimination Act 1975*, media, broadcasting and communications laws, information laws, intellectual property laws, and other laws. See ALRC, *Traditional Rights and Freedoms—Encroachment by Commonwealth Laws*, Final Report, December 2015, chapter 4.

22 Australian Lawyers Alliance, *Submission 35*, 7. Other submissions also canvassed further laws which may potentially impact of freedom of speech. See, for example, Professor George Williams, *Submission 6*, 2–3; and Amnesty International, *Submission 151*, 10–13.

23 AHRC, *Submission 13*, 77–78; Professor Gillian Triggs, President, and Mr Ed Santow, Human Rights Commissioner, AHRC, *Committee Hansard*, 17 February 2017, 70–71.

Additional comments by Labor members

1.1 All of history has shown us that racism will regularly raise its ugly head, especially whenever there is a marginalised or repressed minority. Even people who would otherwise lead decent lives, can suddenly be caught up in racist hysteria, saying and doing atrocious things. Society's better angels can be silenced, suddenly, and horror visited on peace, tolerance and security.

1.2 There are many recent examples, such as America in the 1950's during the Civil Rights Movement and Germany in the 1930's where racism became official ideology and law. Whenever racism thrives, skin colour or religion are used to determine how people are treated; even whether some people live or die.

1.3 Australians don't need to look too far afield to find racism. Sadly, there is ample evidence in our own backyard. The Australian Constitution still discriminates against Indigenous Australians. In 1967 our nation's birth certificate was amended to allow Indigenous Australians to be treated equally under Commonwealth laws, but even then, ten per cent of us voted against inclusion. The 'White Australia Policy' was not completely dismantled until 1973.

1.4 The drafters of our Constitution, the designers of the 'White Australia Policy', reflected the racist ideology of their times.

1.5 Laws help set the standard of acceptable community behaviour. Once our Constitution was amended; once the 'White Australia Policy' was dismantled; Australians, on the whole, respected that Indigenous Australians should be treated equally and that immigrants from non-European countries are welcome and accepted. This powerful message has helped to make us the most successful multicultural nation in the world.

1.6 Everyday Australians take their cues from the laws set by their Parliament.

1.7 Labor Members do not consider that any case has been made out to alter Part II of the *Racial Discrimination Act* (RDA).

Twenty years of helping to prevent racial hatred

1.8 Part IIA of the RDA was introduced by the *Racial Hatred Bill* 1995.

1.9 The introduction of the Bill followed the handing down of three landmark reports: Australian Law Reform Council, *Multiculturalism and the Law* (1991), Human Rights and Equal Opportunity Commission, *Racist Violence: National Inquiry into Racist Violence in Australia* (1991), and the Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

1.10 The Bill also reinforced Australia's international obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) and the *International Covenant on Civil and Political Rights* (ICCPR).

1.11 Complaints to the AHRC under Part IIA of the RDA form only a small part of the work of the AHRC, making up only 3.8 per cent of the commission's work. There were only 77 complaints made last year under section 18C and fewer than four complaints a year proceed to court.

1.12 Part IIA has a wider importance than just providing a means of redress for race hate speech. Professor Gillian Triggs, President, AHRC, told the Committee:

The commission believes that sections 18C and 18D, interpreted and applied consistently by federal courts over 20 years, strike an appropriate balance between freedom of speech and freedom from racial abuse. These provisions have served our multicultural democracy well in sending a message that race hate speech is not acceptable in Australia.

Current law is settled

1.13 The overwhelming majority of witnesses with legal expertise and experience, in their evidence to the Committee, agreed that the legal jurisprudence around section 18C was settled.

1.14 Only the most serious offending is captured by the provision.

1.15 The construction put forward by Justice Kiefel, as she then was, in *Creek v Cairns Post Ltd*¹ that only 'profound and serious effects, not to be likened to mere slights' has been approved and adopted by the line of cases that have followed.²

1.16 A plethora of evidence given to the Committee asserted that any change to the wording of sections 18C and 18D of the RDA would definitely cause uncertainty and would be likely to create even more litigation and confusion.

1.17 Mr Iain Anderson, Deputy Secretary of the Attorney-General, Senator George Brandis' own Department said in his evidence to the Committee that:

...while on the one hand the committee has had evidence and has formed some views as to whether the existing provisions are well understood by the community, on the other hand they are well understood judicially. We do have very clear jurisprudence on what they mean taken together as a package. As a matter of generality, in my experience any time you change a judicially well understood set of terms, you will create an incentive for people to then relitigate those matters because no matter how well the drafters do their job, there will always be question as to have they managed, in trying to change words or codify or whatever, to actually still capture the right intention? I think you would find more litigation and uncertainty as to what any new terms actually meant.

1 (2011) 112 FCR 352

2 See submission by Professor Adrienne Stone (sub 137) pages 5 and 6.

1.18 Professor Gillian Triggs, President of the AHRC, agreed with Mr Anderson and went on to say:

That is a significant danger. And when we do have clear law, and it has been applied very carefully and conservatively by the courts, I would think you need a strong case to argue for legislative change.

1.19 Mr Gregory McIntyre SC in his evidence on behalf of the International Commission of Jurists, Western Australia branch, said:

...the courts have developed what these words mean in the legislation and they have done it repeatedly. That is a form of creation of law by judicial decision-making, which has been part of our common law since its inception. So my short answer is no, I do not think codification would assist, and it may in fact cut off possibilities.

1.20 Dr Karen O'Connell from the Discrimination Law Experts Group said in evidence to the Committee in Sydney:

...we would have a concern with changing the language, where that language did not need changing. If it is to address public misunderstanding, it is better to address that misunderstanding through education rather than law reform that may not be warranted.

Changing section 18C would send a dangerous message

1.21 The Castan Centre for Human Rights said in their submission:

The rolling back of a law sends a message, as does the passage of one. It can send a message that it is acceptable to offend and insult another person on the basis of their race.

1.22 This concern was echoed by many of the witnesses appearing before the Inquiry including Mr Benedict Coyne, National President, Australian Lawyers for Human Rights, Ms Sally Sievers, Anti-Discrimination Commissioner, Northern Territory Anti-Discrimination Commission and Ms Penny Taylor, Research Fellow and PhD Candidate at University of Tasmania.

1.23 Mr Hugh de Kretser, Executive Director of the Human Rights Law Centre told the Committee:

...the debate around section 18C over the past few years is so highly charged and politicised that any perceived weakening – we may call it a codification, but ethnic communities will see that as a weakening – of the law will also be seen by those who are against 18C as enabling the kind of racial vilification that we try to prohibit through this law.

1.24 Mr Romlie Mokak, Chief Executive Officer, Lowitja Institute, said in evidence to the Committee in Melbourne:

Rolling it back sends a very clear message not only to Aboriginal and Torres Strait Islander people but to others who have to deal with these issues regularly and persistently.

1.25 Mr Thinethavone Soutphommasane, Race Discrimination Commissioner, AHRC told the Committee:

There is a significant risk indeed of sending a signal, perhaps even unintended, to people if there were to be a change in the Racial Discrimination Act.

1.26 Even witnesses, whose submissions supported some changes to section 18C, expressed some concern about what message a change would send to the community.

1.27 For instance, Professor Anne Twomey said:

I am concerned about that. I think that is a real issue...

1.28 Professor Adrienne Stone, Director, Centre for Comparative Constitutional Studies, University of Melbourne said:

...repealing section 18C and not replacing it would send a message irrespective of what changes it effects in the world. Equally, I think amending the law, even if only to codify what is already found in the judicial decisions, lends the imprimatur of the parliament to it. I take that seriously, and I think the Australian people will take that seriously. So I think that whatever you do – whatever you do – whether you amend it or do not amend it, whether you codify it, whether you completely change it, will send a message.

1.29 There has been a very public debate around section 18C by media commentators calling for its repeal. Any change to the language of the section, including codifying the judicial interpretation, is likely to be seen as a watering down of the section. That message could cause real harm to the community by unwittingly permitting unconstrained racist language.

Racism causes harm

1.30 The Committee has heard witness after witness, from communities spanning the breadth and width of Australia, telling of the harm that racism causes to the individuals who are targeted and to their communities.

1.31 Equal Opportunity Tasmania referred in their submission to a 2013 survey of culturally and linguistically diverse backgrounds conducted by the Victorian Health Promotion Foundation and said about the results obtained:

Importantly, those surveyed exhibited poorer mental health and higher levels of psychological stress compared with those who had not experienced racism; and the levels of distress increased for those who had repeatedly been subjected to racist behaviour... levels of psychological distress were associated with the volume of racist experiences and not necessarily the type... experiences of everyday racism may be just as harmful to mental health as other more severe episodes.

1.32 Associate Professor Clair Andersen, representing the National Indigenous Education Consultative Bodies Network said in relation to the harm that could be caused to Indigenous children by watering down section 18C:

Closing the Gap focuses on education outcomes and health outcomes. If kids are not happy, then they will not do well at school. We already have that going on. If you are not well educated, your health is generally poorer. Those two things are tied up together. If we water it down, it will only make things worse—it will not make things better.

1.33 Mr Peter Wertheim gave evidence on behalf of the Executive Council of Australian Jewry. He said:

The contentions about political theory which are put forward by critics of Part IIA, and of section 18C in particular, do not resonate with the lived experience of most members of communities like ours. From the Jewish people's own long and painful historical experience, we have learned that acts of racially motivated violence invariably begin with racist words.

1.34 Ms Penelope Taylor, former Head Researcher at the Larrakia Nation Aboriginal Corporation said in her evidence, which was based on the results of a three year project which interviewed over 500 Aboriginal people residing in Darwin about their views on race relations:

...the message that the research sent, of people feeling excluded, and that exclusion and marginalisation has health consequences, consequences for employment, consequences for sticking it out in education against the odds, consequences for violence and consequences for alcohol addiction and self-medication, because of this constant humiliation and exclusion from society. So it is not just sticks and stones and, 'Oh, don't say mean things'. It has huge ramifications for this thing which our society says it cares passionately about, which is the equality of Aboriginal people and undoing the terrible disadvantage that we have created. It is not merely symbolic; it has a huge and profound impact on many, many practical outcomes for Aboriginal people.

Economic cost of racism

1.35 The Diversity Council Australia gave evidence to the Committee in Darwin. They represent 400 members including all the major Australian banks and many of the international global banks, major retail groups including Myer and Coles, IBM Australia, Google, Microsoft, Orica, Rio Tinto and many government departments. Their members' employees comprise about ten per cent of the Australian labour market. Their evidence considered the economic cost of racism to their member organisations. The Chief Executive Office, Ms Lisa Annese in her evidence to the Committee said:

...when we create inclusive workplaces, so when workplaces tap into and value the differences between people – and that could be differences based on race and culture but also other areas of diversity such as

disability, LGBTI identity, Indigenous identity or gender... individuals feel more engaged in their workplace. They are more likely to be productive, and they are more likely to be present. There is less absenteeism. And then, if you follow the money on that one, it leads to greater profitability and productivity.

1.36 In relation to proposals to change the existing legislation, Ms Annese said:

...organisations have created their workplace structures, policies and training, and the way they demonstrate their vicarious liability is centred around the existing legislation. For those organisations that are committed to that it appears to be working very well. It would then follow that, if that were watered down, organisations may have to deal with issues in their workplace that they currently do not have to deal with at the moment.

There is no substantive evidence of a 'chilling effect'

1.37 A few witnesses before the Committee claimed that section 18C had a 'chilling effect' on free speech. The Committee did not hear any substantive evidence to back up such a claim.

1.38 Mr Justin Quill appeared before the Committee in his capacity as legal representative for Nationwide News. His evidence was that he approved the content of between 200 and 300 articles a week on behalf of Nationwide News. He said that out of that number there may only be ten where he would need to turn his mind to section 18C.

1.39 Mr Quill said that he had been practising for 20 years exclusively in media law but only six cases in that time, including the Bolt case and the Leak case, had 'gone on to some sort of hearing or conciliation'.

1.40 When pressed by the Committee about what articles Nationwide News had been unable to publish because of section 18C, Mr Quill eventually admitted that only a series of articles written by Mr Bolt had not been published.

1.41 Mr Paul Zanetti, cartoonist, told the Committee that he had published 'hundreds of thousands' of cartoons but had only ever had one claim against him under section 18C.

1.42 Mr Jonathan Holmes, former presenter of ABC TV's *Media Watch*, and practising journalist for more than 40 years, gave evidence to the Committee in relation to his time on *Media Watch*:

Ninety per cent of what I said had to be based on very solid factual evidence that we very carefully researched, and it was then my fair comment on those facts. We never got sued while I was in that chair. But that, you can call it a chilling effect, I do not think was unhealthy. I think it is actually quite a good thing. I do not remember ever being in the least concerned about the Racial Discrimination Act in the work that I was doing... To be honest, Senator, I do not know of any particular instance

that I could point to, with the exception of Andrew Bolt and Bill Leak, where people have been constrained in what they say.

1.43 Free TV Australia was represented at the hearing in Adelaide by their Chief Executive Officer, Mr Brett Savill. When asked if he was able to give some examples of content that their legal teams have stopped them from airing because of concerns about section 18C, he said:

This is one that we have been wrestling with. One of the issues we raised in our submission was that this act and this section do not exist in isolation... When we have gone around it we cannot point to specific single instances where this alone was the issue.

1.44 Even some speech which has been found to be unlawful under section 18C is still available to be viewed. Andrew Bolt's article, the subject of the complaint against him under section 18C, is still available online in the original format with the addition of a notice declaring that his article is unlawful under section 18C.

Removing or watering down section 18C may have an isolating effect on minority communities

1.45 The Committee heard many witnesses tell of the isolating effect that racism has on the targeted individual. Ms Robin Banks, the Anti-Discrimination Commissioner at Equal Opportunity Tasmania, explained the effects of racist speech and behaviour:

...they end up being silenced, which is an anathema to freedom of speech. It causes people to feel that they have to hide from society, shut themselves down, withdraw from active engagement and not speak out because of fear of being further attacked for being different.

1.46 Professor Andrew Jakubowicz, Chief Investigator, Cyber Racism and Community Resilience Research Project commented on the effect of watering down section 18C:

...if you have a community standard that exists, as we do in Australia with 18C, making a decision to remove one of those provisions is actually a very strong signal. Essentially, what that does is open up... opportunities for people to push it further... If you make intercultural communication more stressful and threatening than it has been, then people withdraw. That means that the basis of cohesion in society starts to erode, which I would have thought is exactly the opposite of what government would want to be doing at the moment.

1.47 Ms Penelope Taylor, former Head Researcher at the Larrakia Nation Aboriginal Corporation told the Committee:

...the reality is that groups such as Aboriginal people – and it varies within the Aboriginal population, of course – do not have the same level of freedom of speech as the groups that we seem to be advocating for by talking about amending this provision.

Hard cases make bad law

1.48 The vast majority of media attention around section 18C in recent years has centred on two complaints made under s18C: *Prior v Queensland University of Technology & Ors* (QUT case) and a complaint about cartoonist, Mr Bill Leak.

1.49 The QUT case is currently on appeal from a decision of the Federal Circuit Court to dismiss the complaint.

1.50 One aspect of the public criticism over the QUT case was that not all of the students had been notified before the conciliation conference took place. The AHRC has recommended a change in that regard, that all respondents be notified contemporaneously.

1.51 The complaint against Mr Bill Leak was withdrawn.

1.52 In both of these cases the AHRC has been criticised over its handling of the complaints.

1.53 Neither the QUT case, nor the Bill Leak case, provides any cogent reason for amending section 18C. As Professor Triggs said in her evidence, "hard cases make bad law".

Importance of Access to Justice

1.54 Labor Members of the Committee agree that current procedure adopted by the Australian Human Rights Commission (AHRC), in processing claims under Part IIA RDA, could be amended to ensure the process is as efficient as possible. Indeed, the AHRC have themselves recommended amending their procedures in their own submission to this Inquiry.

1.55 However, Labor Members are concerned that any changes to the current procedures should not restrict access to justice for people seeking to assert their human rights.

1.56 While agreeing to the premise of the recommendations in the report, it is imperative that the implementation of those recommendations continues to uphold access to justice as a fundamental tenet of our legal system.

Resourcing of the AHRC

1.57 Some of the recommendations in the report will impact the workload of the AHRC.

1.58 Labor Members of the Committee are concerned that any recommendations that increase the workload of the AHRC should be coupled with appropriate funding measures to ensure the AHRC is able to fulfil those additional obligations.

1.59 Labor Members also note that Recommendation 1 of the Report requires an increased education program around racism and Part IIA. Labor Members are concerned that if the AHRC is to be responsible for that education campaign, appropriate funding should be provided to the AHRC to carry out that function.

Consideration of law reform requires careful consideration not rushed consultation

1.60 Labor Members were very concerned about the rushed timeframe of this Inquiry.

1.61 Ms Sally Sievers, Anti-Discrimination Commissioner from the Northern Territory Anti-Discrimination Commission commented in her submission to the Inquiry that:

Many people had not heard of the Inquiry or the time frame to comments. To enable full consultation across the breadth of the NT a time frame much longer than two months is required.

1.62 If an issue is considered important enough to be referred to Committee for an Inquiry, and Commonwealth resources are utilised to conduct that Inquiry, it is incumbent on the Government to ensure that all relevant stakeholders and interested members of the public are given the opportunity to contribute their views.

1.63 Labor Members of the Committee consider that a period of 112 days between the date of referral and the reporting date, with 62 of those days being in December and January when most Australians are spending some time with their families, is not enough time for serious community consultation about law reform.

Conclusion

1.64 Politicians and law-makers for civilised society should be wary of making laws in haste that are later regretted at leisure. This is particularly so when those laws are least likely to cause harm to the general population and more likely to cause harm to minority groups in the community.

1.65 There have been many changes since Part IIA was introduced more than 20 years ago. The emergence of online communication, in particular social media, has made it much easier for hate speech to be instantly communicated, even when not truthful or relevant, and then widely distributed. The current political climate has created racial tensions both in Australia and around the world.

1.66 Racists do not care what harm is visited on those they wickedly try to victimise with their vile hate speech. However, condemnation should be poured on those apologists for racists and those who enable their vile work. All sensible members of a tolerant society must remain vigilant and ensure that any rise in racism is always controlled.

1.67 The current well established and well supported provisions strike the appropriate balance between freedom of speech and freedom from racial abuse and should be retained and strongly supported by all Australians.

Mr Graham Perrett MP
Deputy Chair

Senator Carol Brown
Committee member

Ms Madeleine King MP
Committee member

Senator Claire Moore
Committee member

Dissenting Report by Australian Greens

Referral and Terms of Reference

On 8 November 2016, pursuant to section 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Attorney-General wrote to the Parliamentary Joint Committee on Human Rights (the Committee) to refer the following matters for inquiry and report:

1. Whether the operation of Part IIA of the *Racial Discrimination Act 1975* (Cth) imposes unreasonable restrictions upon freedom of speech, and in particular whether, and if so how, ss 18C and 18D should be reformed.
2. Whether the handling of complaints made to the Australian Human Rights Commission (AHRC) under the *Australian Human Rights Commission Act 1986* (Cth) should be reformed, in particular, in relation to:
 - a. The appropriate treatment of:
 - i. Trivial or vexatious complaints: and
 - ii. Complaints which have no reasonable prospect of ultimate success;
 - b. Ensuring that the persons who are the subject of such complaints are afforded natural justice;
 - c. Ensuring that such complaints are dealt with in an open and transparent manner;
 - d. Ensuring that such complaints are dealt with without unreasonable delay;
 - 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;
 - f. The relationship between the Commission's complaint handling processes and applications to the Court arising from the same facts.
3. Whether the practice of soliciting complaints to the Commission (whether by officers of the Commission or by third parties) has had an adverse impact upon freedom of speech or constituted an abuse of the powers and functions of the Commission, and whether any such practice should be prohibited or limited.

4. Whether the operation of the Commission should be otherwise reformed in order better to protect freedom of speech and, if so, what those reforms should be.

The Committee is asked, in particular, to consider the recommendations of the Australian Law Reform Commission in its *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* [ALRC Report 129 – December 2015], in particular Chapter 4 – "Freedom of Speech".

In this reference, "freedom of speech" includes, but is not limited to, freedom of public discussion, freedom of conscience, academic freedom, artistic freedom, freedom of religious worship and freedom of the press.

Recommendations

Recommendation 1:

The Australian Greens recommend the retention of Section 18C of the *Racial Discrimination Act 1975* (Cth) in its current form.

Recommendation 2:

The Australian Greens recommend the suggestions made by the Australian Human Rights Commission (the Commission) regarding changes to the Commission's capacity to terminate complaints that lack merit be adopted.

Executive Summary

The Parliamentary Joint Committee on Human Rights has heard from many multicultural and Aboriginal and Torres Strait Islander groups who have expressed significant concern about potential changes which would weaken protections against racist hate speech contained in the *Racial Discrimination Act 1975* (Cth).

The Committee has heard horrific stories of everyday racism from these groups, some of which expressed concern that even the holding of an inquiry into the *Racial Discrimination Act 1975* (Cth) has increased racism within Australia.

Multicultural and Aboriginal and Torres Strait Islander groups who made submissions and gave evidence to the Committee overwhelmingly concluded that any weakening of s 18C of the *Racial Discrimination Act 1975* (Cth) would send a message of acceptance of racist behaviour and therefore result in an increase in that behaviour.

The Australian Greens share the concern that any weakening of the protections contained in s18C of the *Racial Discrimination Act 1975* (Cth) could be damaging to social cohesion, particularly in our current social and political climate. Many multicultural and Aboriginal and Torres Strait Islander groups provided evidence that racist behaviour is currently increasing.

The Australian Greens agree with submissions made to the Committee reiterating the importance of freedom of speech as a civil right, but maintain that the right is not unfettered.

Section 18D of the *Racial Discrimination Act 1975* (Cth) provides strong and broad defences to prosecution under s 18C and in so doing upholds the right to freedom of speech to an appropriate extent.

The Australian Greens stand strongly in support of s18C in its current form, and against racism and racist hate speech in Australia.

By ratifying the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) Australia voluntarily accepted obligations in relation to right to freedom of expression (or freedom of speech) and the right to be free from racial discrimination including racial "hate speech" or serious forms of racially discriminatory speech.¹

The rights to freedom of opinion and expression are protected by article 19 of the ICCPR.

1 ICCPR, articles 19, 20 and 26; CERD, article 4.

The right to freedom of opinion is the right to hold opinions without interference and cannot be subject to any exception, restriction or limitation.²

However, the right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.³ The right to freedom of expression may be subject to limitations, and in fact is subject to specific parameters.

The United Nations (UN) Human Rights Council has emphasised the importance of the right to freedom of expression:

The exercise of the right to freedom of opinion and expression is one of the essential foundations of a democratic society, is enabled by a democratic environment, which offers, inter alia, guarantees for its protection, is essential to full and effective participation in a free and democratic society, and is instrumental to the development and strengthening of effective democratic systems.⁴

Article 19(3) of the ICCPR provides that the exercise of the right to freedom "carries with it special duties and responsibilities" and the right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order (*ordre public*),⁵ or public health or morals. In order for a limitation to be permissible under international human rights law, limitations must:

- be prescribed by law;
- pursue a legitimate objective;
- be rationally connected to the achievement of that objective; and

2 ICCPR, article 19. Part 11A of the RDA does not limit the right to hold opinions.

3 ICCPR, article 19(2).

4 UN Human Rights Council, *Resolution 12/16, Freedom of opinion and expression*, UN Doc A/HRC/RES/12/16, 12 October 2009, preamble. At: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/RES/12/16 (viewed 8 December 2016).

5 'The expression 'public order (*ordre public*)'...may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (*ordre public*): Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights U.N. Doc. E/CN.4/1985/4, Annex (1985), clause 22.

- be a proportionate means of achieving that objective.⁶

The Australian Greens believe the limitations on freedom of expression currently imposed by s18C of the RDA are appropriate and within the parameters established by the ICCPR.

6 See, generally, Human Rights Committee, *General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, paras 21-36 (2011).

Chapter 1

The scope of s 18C of the *Racial Discrimination Act 1975* (Cth)

1.1 While freedom of speech is an essential right, it is not a right that is unfettered. There are many areas of Australian law which impede upon the right to freedom of speech to a much greater extent than what is accused of the *Racial Discrimination Act 1975* (Cth).

1.2 Examples of laws which limit freedom of speech, yet are not subject to the same level of scrutiny as the *Racial Discrimination Act 1975* (Cth) are defamation laws, and s 42 of the *Border Force Act 2015* (Cth) (which provides that an 'entrusted person' speaking about the occurrences within Australia's offshore and onshore detention centres faces up to two years in prison for doing so).

1.3 Ms Stephanie Cousins, Advocacy and External Affairs Manager, Amnesty International Australia in evidence to the Committee stated:

Several of our submissions note that there are serious threats to freedom of expression in Australia, but they do not come from the much debated sections 18C and 18D of the Racial Discrimination Act. Numerous laws in Australia criminalise speech that ought to be protected in the public interest. The Border Force Act, section 35P of the ASIO Act and several pieces of counterterror legislation curtail free speech in ways that are concerning and were highlighted as such by the Australian Law Reform Commission in its 'Freedom of speech' chapter in its final report of Traditional rights and freedoms, which is noted in the terms of reference. But it seems that these laws are conspicuous in their absence from the terms of reference of the inquiry. We have addressed a number of these laws in our submissions anyway and we welcome discussion of these matters today.⁷

1.4 The Institute of Public Affairs (IPA) is vehemently opposed to s 18C of the *Racial Discrimination Act 1975* (Cth). The IPA maintains that s 18C constitutes a serious and unnecessary impeachment on the right to Freedom of Speech. However, when asked to elaborate on why the IPA had failed to take any meaningful action on other areas of law for the same reason, the only reason that could be provided by Mr Simon Breheny, Director of Policy of the IPA was:

7 COUSINS, Ms Stephanie, Advocacy and External Affairs Manager, Amnesty International Australia, Committee Hansard, 1 February 2017, 26.

We are participating not only in this committee hearing but in the public debate on s 18C to the extent that we have on this issue because it is a live political issue. If defamation becomes a live political issue in the same way that s 18C is, we will be right there with you.⁸

1.5 The Australian Greens have serious concern that s 18C has become a 'live political issue'. Those who argue to water down or weaken s 18C of the *Racial Discrimination Act 1975* (Cth) are effectively arguing that the law should be changed to make it easier to engage in racist hate speech in Australia.

1.6 The concern from proponents of change that the Committee heard regarding the scope of s 18C were often misconceived. They were largely based on the fact that the words "offend" and "insult" in the provision are too broad and encompass behaviour that should not be unlawful by not imposing a high enough threshold of harm.

1.7 Such fears are misconceived in light of the decision of Kiefel J (as she then was) in the case of *Creek v Cairns Post Pty Ltd*⁹. In that case, Kiefel J held that the relevant harm threshold under s 18C of the *Racial Discrimination Act 1975* (Cth) is behaviour that has "profound and serious effects, not to be likened to mere slights."¹⁰ This threshold is, in fact, quite high and its acceptance by the Courts has provided certainty that mere hurt feelings are not enough for successful proceedings under s 18C of the *Racial Discrimination Act 1975* (Cth).

1.8 Professor George Williams in evidence to the Committee stated:

The second thing I would say is that even though I do see an issue with section 18C I think it is a very weak example of a much larger problem—that is, that there are many, many laws on the statute book which seriously infringe freedom of speech in Australia. I think this committee should be looking at those broader examples which, rather than this section, actually impose very significant criminal penalties, including on journalists, in circumstances where they might be gaoled for transmitting information that is clearly in the public interest. My view, having looked at over 350 laws on the statute book, is that there is a very broad problem in

8 BREHENY, Mr Simon, Director of Policy, Institute of Public Affairs, Committee Hansard, 31 January 2017,27.

9 (2001) 112 FCR 352.

10 Ibid, at 365 [16].

Australia about free speech protection, and personally I would like to see action which addresses the larger problem in addition to section 18C.¹¹

1.9 Ms Tasneem Chopra, Chairperson, Australian Muslim Women's Centre for Human Rights submitted that the existing wording of s18C is sufficient and does not warrant further modification:

The Australian Muslim Women's Centre for Human Rights has had a 25-year experience of dealing with racism, discrimination and racist violence in particular. Reports and surveys conducted historically from 2008 up until last year by ourselves, Deakin University, Western Sydney University, the Scanlon Foundation—even the Essential Media poll—have all consistently shown feelings of antipathy and hatred, feelings of supporting a ban against Muslims in this country, and a variety of other ill-willed intent against a minority community in this country. That is all included in our report to you in our submission. The centre here believe the existing wording of 18C is sufficient, together with the exceptions included in section 18D, not to warrant further watering down or modification. These sections allow for recognition of the right to human dignity through respectful communication to continue unabated. Surely we cannot be arguing to enshrine the rights of bigots to hate over the right of dignity of our citizens?¹²

The effects of racism

1.10 The Committee heard numerous submissions on the devastating effect that everyday racism has on multicultural and Aboriginal and Torres Strait Islander groups. Associate Professor Daphne Habibis, Deputy Director of the Institute of Social Change at the University of Tasmania and Professor Maggie Walter, Vice Chancellor at Aboriginal Research and Leadership, the University of Tasmania, conducted research into the effects of racism on Aboriginal people in Darwin, and presented their research to the Committee.

1.11 It is undeniable that being the victim of racism is detrimental to the mental wellbeing of an individual. The Commission heard numerous submissions to this effect. Professor Habibis and Professor Walter also provided evidence that being a victim of racism may have detrimental effects to an individual's physical health as well. Professor Walter submitted:

11 WILLIAMS, Prof. George, Private capacity, Committee Hansard, 1 February 2017, 74.

12 CHOPRA, Ms Tasneem, Chairperson, Australian Muslim Women's Centre for Human Rights, Committee Hansard, 31 January 2017, 4.

...this is not just about sticks and stones, that constant and regular experience of negative racialised interactions – whether that be through the media aimed at your racial group or speaking about that racial group or immediate interpersonal interactions – has huge impacts on health. It has shown to impact on asthma, diabetes, spiritual and mental wellbeing.¹³

1.12 The assertion of Professor Habibis and Professor Walters that the effects of racism can manifest in detriment to a person's physical health is well documented. The OXFAM Australia organisation 'Close the Gap' (which campaigns to achieve indigenous health equality) reported that a factor in the 10-17 year life expectancy difference between Aboriginal and Torres Strait Islanders and other Australians is partly due to the fact "mainstream health services often lack cultural sensitivity and are unwelcoming places for many indigenous people."¹⁴

1.13 The Australian Greens are concerned that even the holding of this inquiry has had have negative effects on multicultural and Aboriginal and Torres Strait Islander groups within Australia. In addition to the wide range of testimony the Committee heard as to the negative effects of racism, the Committee also heard that multicultural and Aboriginal and Torres Strait Islander groups believe that the racism they experience will increase with any weakening of the protections afforded by s 18C of the *Racial Discrimination Act 1975* (Cth).

1.14 Mr Mostafa Rachwani, from the Lebanese Muslim Association, provided examples to the Committee of the type of racist behaviour his organisation and members are subjected to:

We have had cards smeared with bacon and pig's fat sent to the office. We have had calls for massacres and genocide on our Facebook page. We have had emails from people insulting and demeaning us. We have had bomb threats, threats to protest and riot and threats of sexual violence. All of these moments, fleeting as they may be for the perpetrators, have lasting impacts on the staff and stakeholders of the LMA. I cannot count the times I have had to console shaken and traumatised staff who have had to face barrages of racial vilification. We have spent hours upon hours deleting threatening, disgusting comments on pictures of people praying on our Facebook page, having to read each and every single one.

13 WALTER, Professor Maggie, Pro Vice-Chancellor (Aboriginal Research and Leadership) University of Tasmania, Committee Hansard, 30 January 2017, 20.

14 Australian Medical Association, 2007 AMA Indigenous Health Report Card – 'Institutionalised Inequality – Not Just a Matter of Money' May 2007, p. 5.

All of these circumstances, all of these threats and messages, do not emerge out of a political and cultural vacuum.¹⁵

1.15 The National Aboriginal and Torres Strait Islander Legal Service (NATSILS) makes reference to the unequal distribution of power between Indigenous communities and the dominant non-Aboriginal society, and maintains that ss 18C and 18D are essential with regard to this imbalance as they were introduced into the *Racial Discrimination Act 1975* (Cth) in 1995 following the Royal Commission into Aboriginal Deaths in Custody.

1.16 The Lowitja Institute presented evidence from surveys conducted which demonstrate that the higher the levels of racism experienced, the more damage that is suffered by an individual with regards to their mental health. The Lowitja Institute is concerned with the symbolic value of s 18C. To 'water-down' the provision would send that message that such damage to the health of individuals who are victims of racism does not matter.

1.17 The Commission heard from a group of multicultural organisations which included among others the Victorian Multifaith and Multicultural Coalition, the Ethnic Communities Council of Victoria, and the Victorian Multicultural Commission. When asked if they felt racism in Australia would increase as a result of the proposed changes to s 18C of the *Racial Discrimination Act 1975* (Cth) all members of this group vehemently agreed with the statement.

1.18 The Victorian Multicultural Commission (VMC) has reported (based on findings from the National Inquiry into Racist Violence and the Royal Commission into Aboriginal Deaths in Custody as well as the VMC's own findings from community consultations) that racial vilification which may appear to be "low-level behaviour" can lead to an environment which fosters "severe acts of harassment, intimidation, or violence by seeming to condone such acts." It is the contention of VMC that the combined effect of ss 18C and 18D of the *Racial Discrimination Act 1975* (Cth) is the maintenance of "a balance between freedom of speech and freedom from racial vilification."

1.19 VMC states that s 18C provides a "robust safeguard" against racial vilification. VMC further contends that the threshold to be met for conduct to be classified as "offensive behaviour" under s 18C is high, with the courts holding that

15 RACHWANI, Mr Mostafa, President, Project Manager and Media Officer, Lebanese Muslim Association, Committee Hansard, 1 March 2017, 13.

the behaviour in question must have "profound and serious" effects", and not "mere slights."

1.20 The VMC submitted that freedom of speech is adequately protected in the *Racial Discrimination Act 1975* (Cth) by s 18 D and the exemptions it provides to behaviour that would be unlawful under s 18C. The combination of ss 18C and 18D, is therefore "a satisfactory balance between freedom of speech ... and freedom from racial vilification."

1.21 Mr Joe Caputo, the Board Director of the Ethnic Communities Council of Victoria, when asked if racism against the people he represents would increase if s 18C were to be watered down stated:

Yes, I believe that will happen. The current situation has served Australia well. Any changes or any watering down would send a clear message to the community: 'Okay, now we can say whatever we want.' That would send a very nasty message to our community.¹⁶

1.22 It is a serious concern of the Australian Greens that in the current social and political climate it would be especially damaging to social cohesion to amend s 18C of the *Racial Discrimination Act 1975* (Cth). The Committee heard testimony from several multicultural and Aboriginal and Torres Strait Islander groups that racist behaviour has increased in recent years. Ms Helen Kapalos, Chairperson of the Victorian Multicultural Commission, stated the following in regard to racism:

I would argue that we are seeing a more severe, more acute brand of racism as a result of some communities being linked with acts of terrorism around the world. I would say that without [the protections afforded by s 18C of the *Racial Discrimination Act 1975* (Cth)] in place we would face very damaging consequences for our Australian society.¹⁷

Freedom of speech and s 18D of *Racial Discrimination Act 1975* (Cth)

1.23 Section 18D of the *Racial Discrimination Act 1975* (Cth) was widely ignored by proponents of changes to the Act in the submissions heard by the Committee. Section 18D is extremely relevant to the question of whether the *Racial Discrimination Act 1975* (Cth) impedes upon freedom speech, as it provides a broad range of defences for unlawful behaviour under s 18C.

16 CAPUTO, Mr Joe, OAM, JP, Board Director, Ethnic Communities' Council of Victoria, Committee Hansard, 31 January 2017, 1.

17 KAPALOS, Ms Helen, Chairperson, Victorian Multicultural Commission, Committee Hansard, 31 January 2017, 1.

1.24 The lack of discussion regarding s 18D of the *Racial Discrimination Act 1975* (Cth) was addressed during the submissions of Mr Bill Swannie, the Chair of the Human Rights/Charter of Rights Committee of the Law Institute of Victoria:

Our current position is that 18D should be left as it is ... There is an established body of case law interpreting that provision. We say no changes should be made to s 18D.¹⁸

1.25 The Australian Greens agree with the evidence of Ms Robin Banks, the then Tasmanian Anti-Discrimination Commissioner, made to the Committee in Hobart, stating that ss 18C and 18D strike an appropriate balance between the right to freedom of speech and the right to freedom from racial discrimination:

I am of the view that the current provisions, 18C and its following provisions, do appropriately find the balance between freedom of speech as recognised in international law and other international law rights, including the right to equality and the right to be free from discrimination.¹⁹

1.26 Not only would a weakening of s 18C send a message that the right to freedom of speech of certain groups in the community is more important than the right to be free from discrimination of other groups, several multicultural groups provided the Committee with evidence that a watering down of s 18C would in fact be detrimental to freedom of speech.

1.27 Professor Sarah Joseph, Director for Castan Centre for Human Rights Law, is of the opinion that s 18C of the *Racial Discrimination Act 1975* (Cth) is drafted too broadly. She states that although the right to freedom of speech/freedom of expression is not an absolute right, and may be subject to permissible limitations, the right to freedom of expression cannot be displaced by the right to be free from offence or insult. It is Professor Joseph's assertion that the words "offend" and "insult" should not have been included in s 18C of the *Racial Discrimination Act 1975* (Cth). Professor Joseph does acknowledge that prior to any amendments, she would want hear the views of those most affected by changes s 18 and that the judicial

18 SWANNIE, Mr Bill, Chair, Human Rights/Charter of Rights Committee, Law Institute of Victoria, Committee Hansard, 31 January 2017, 39.

19 BANKS, Ms Robin, Anti-Discrimination Commissioner, Equal Opportunity Tasmania, Committee Hansard, 30 January 2017, 1.

interpretation of s 18C may mean that it constitutes a permissible limitation on the right to freedom of expression.²⁰

1.28 Freedom of speech, however, may well be hindered by the amendments to s 18C of the *Racial Discrimination Act 1975* (Cth). It has been documented that racism leads to the silencing of minority groups, and is therefore impedes upon their right to freedom of speech/freedom of expression. As was stated by Ms. Banks, the then Tasmanian Anti-Discrimination Commissioner, with regards to the effect of racially offensive behaviour:

...they end up being silenced, which is an anathema to freedom of speech. It causes people to feel that they have to hide from society, shut themselves down, withdraw from active engagement and not speak out because of fear of being further attacked for being different.²¹

1.29 The fact that s 18C of the *Racial Discrimination Act 1975* (Cth) may be said to protect the right to freedom of speech/freedom of expression aside, that right is further protected by s 18D of the Act, which provides broad exemptions to conduct being deemed unlawful under s 18C.

1.30 The Human Rights Law Centre (HRLC) states that we are currently living in a time where more people are reporting instances of racism, and therefore to weaken s 18C or 18D of the *Racial Discrimination Act 1975* (Cth) would send that message that these instances are tolerable.

1.31 Mr Hugh de Krestler, Executive Director of the HRLC (HRLC), when asked what he thought would be the effect on the ground in Australia today of watering down the protections contained in 18C stated:

I think you would have a rise in racial vilification, a rise in racial discrimination and it would undermine the multicultural success that we have in Australia.²²

1.32 Ms Adrienne Walters, Director of Legal Advocacy, HRLC added:

With that rise would come the well-documented negative effects on people's physical and mental health, their ability to participate

20 Professor Sarah Joseph, Director, Castan Centre for Human Rights Law, *Committee Hansard*, 30 January 2017, 13-14.

21 BANKS, Ms Robin, Anti-Discrimination Commissioner, Equal Opportunity Tasmania, *Committee Hansard*, 30 January 2017, 1.

22 de KRETSER, Mr Hugh, Executive Director, Human Rights Law Centre, *Committee Hansard*, 31 January 2017, 20.

productively in society. We know that it is connected to reduced life expectancy amongst Aboriginal and Torres Strait Islander people ...²³

1.33 Ms Walters went on to raise the example of the recent death in custody of indigenous woman Ms Dhu. Ms Walters stated that the coroner in that instance declared that institutionalised racism had had an impact into Ms Dhu's death.

1.34 Not only do Mr de Kretser and Ms Walters of the HRLC express concerns regarding occurrences such as this if ss 18C and 18D of the *Racial Discrimination Act 1975* (Cth) were to be watered down, but they also express concerns that watering down the relevant sections sends a message of acceptance of such circumstance.

1.35 Dr Colin Rubenstein, Executive Director, Australia/Israel and Jewish Affairs Council was asked if the Jewish community was seeing a rise in anti-Semitism or racism:

We do see the resurgence of anti-Semitism internationally, unquestionably, in many countries—in Europe in particular, and elsewhere. Jeremy is the expert on that in Australia, and I will let him respond to it. I think everybody around this table understands that we are seeing a resurgence of a degree of xenophobia and populism, on the extreme Left as well as the extreme Right, having an impact on mainstream politics in many centres in a very worrying and perturbing way. Many of the actors on the fringes are all for abolishing this legislation for their own reasons, and I do not suggest that these are the reasons for many of the conscientious, serious people who want reform for the best of reasons as they see it. I am not suggesting that everyone wanting reform is in that popular xenophobic camp—far from it, but many of them in that camp are for reform. The most important thing is that these are really very effective tools in containing that racial vilification. Diluting that useful tool at this time when, in Australia and internationally, we do see resurgence of this political extremism would be extraordinarily bad timing and would be very, very unhelpful in trying to contain that extremism.²⁴

1.36 Mr Jeremy Jones, Director of International and Community Affairs, Australia/Israel and Jewish Affairs Council added:

The issue of anti-Semitism and other forms of racism in Australia ebbs and flows. At the moment, what we have globally is a real belief that we are

23 WALTERS, Ms Adrienne, Director of Legal Advocacy, Human Rights Law Centre, *Committee Hansard*, 31 January 2017, 20.

24 RUBENSTEIN, Dr Colin, Executive Director, Australia/Israel and Jewish Affairs Council, *Committee Hansard*, 31 January 2017, 60.

going through dynamic, dramatic changes in all sorts of areas. We look at Europe and North America, and I think it is a time when people are looking for some sort of moral leadership—and moral leadership that says, 'Let's dilute protections against racism,' as against moral leadership that says, 'You as an individual member of our community have recourse against people who are trying to take away your human rights,' is a very important statement to be reaffirming at this time.²⁵

1.37 The Australian Greens are concerned that those most likely to seek assistance under s 18C of the *Racial Discrimination Act 1975* (Cth) are racial minorities who are often disempowered groups within our society. The argument that s 18C impedes upon freedom of speech may be seen as an argument that the right to freedom of speech of these racial minorities (as well as the right to freedom from discrimination) is less important than the right to freedom of speech of groups with whom the power imbalance in Australian society swings in favour of.

25 JONES, Mr Jeremy, Director of International and Community Affairs, Australia/Israel and Jewish Affairs Council, *Committee Hansard*, 31 January 2017, 60.

Chapter 2

The Australian Human Rights Commission

2.1 The Australian Greens accept the recommendations provided by the Australian Human Rights Commission to assist the Commission with dealing with complaints that lack merit.

2.2 Currently, s 46PH (1) of the Australian *Human Rights Commission Act 1986* (Cth) requires the Commission to investigate whenever a complaint is made. The Australian Greens support the Commission's recommendation that the President be given the power to terminate where investigation is not warranted.

2.3 No reliable evidence was submitted to the Committee to suggest that the Commission has solicited complaints.

2.4 The Australian Greens are concerned that the Commission's educative function may be curtailed by allegations of solicitation. The Commission's complaint handling function is dependent on people being able to access it. With regards to s 18C of the Racial Discrimination Act 1975 (Cth) the educative function of the Commission is essential as it is often marginalised groups who will need to seek access under that legislation.

The complaint handling process of the Commission

2.5 The Commission's current complaint process requires only a bare allegation that unlawful discrimination has occurred for a complaint to be valid. The Commission has made two recommendations to raise the threshold for Complaints made to it:

1. The person lodging a complaint must allege an act which, if true, would constitute unlawful discrimination.
2. The details of the alleged unlawful discrimination must be set out in the written complaint, and the details provided must be sufficient to indicate an alleged contravention of the relevant Act.²⁶

2.6 The current grounds the Commission has for terminating a complaint are provided in s 46PH(1) of the *Australian Human Rights Commission Act 1986* (Cth). The Commission has further recommended that these grounds should be expanded to include the following:

The Commission recommends that the grounds for termination is s 46PH(1) of the AHRC Act be expanded to include a power to terminate

26 Australian Human Rights Commission, *Submission 13*, 18.

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.²⁷

2.7 The Commission upholds all human rights, and has committed to maintaining a balance between of all human rights, including the right to freedom of speech and the right to be free from discrimination.²⁸ The Australian Greens agree that the Commission has been effective at doing so.

2.8 The Ethnic Communities Council of Victoria (ECCV) submitted that it has found, on a review of data published by the Commission, that of the complaints received regarding racial discrimination, only a small amount proceeded past the complaints process with only 3% then proceeding past the conciliation process to court.

2.9 It is the contention of ECCV, based on this collected data that s 18C is "being appropriately applied" and that there is therefore no evidence to suggest a high amount of vexatious or trivial complaints are "jamming up" the conciliation or court processes.

2.10 The Human Rights Law Centre also submitted that of all complaints received by the commission in 2015-2016, only 4% "related to s 18C and that 52% of complaints received under s 18C were resolved at conciliation, 12% were withdrawn and only one complaint commenced court proceedings. Further evidence provided by HRLC as to the ability of the Commission to handle to complaints submitted to it are surveys of both complainants and respondents which reported 88% of complainants "reported satisfaction".

Soliciting complaints – the educative function of the Commission

2.11 No reliable evidence was submitted to the Committee to support the assertion that the Commission is guilty of 'soliciting' complaints.

2.12 The Australian Greens have serious concerns regarding accusations of solicitation of complaints by the Commission.

2.13 The Commission has an essential educative function, and that function is not to be confused with solicitation. The Commission must be able to assist people in understanding both their rights and responsibilities in the areas of law which it covers.

27 Australian Human Rights Commission Submission, *Submission 13*, 9.

28 Australian Human Rights Commission, *Submission 13*, 76.

2.14 The educative function of the Commission is particularly relevant with regard to the *Racial Discrimination Act 1975* (Cth). The individuals likely to seek assistance under this legislation may suffer from the following disadvantages:

- Limited English language skills;
- A lack of understanding of Australia's legal system and the avenues of justice that may be open to them;
- Experiences gained in detention and/or migration which may have instilled a mistrust of authority and/or government agencies.

2.15 The above factors were highlighted by Mr Cedric Manen, the Chief Executive Officer of Family Planning Tasmania in his submission to the Committee in Hobart:

A range of the Tasmanian population who are culturally and linguistically diverse have endured significant post-traumatic stress pre-migration which has impacted significantly on their cognitive ability. They have been marginalised in their countries of origin and they do not generally seek systematic type support because of their inherent suspicion of bureaucracy.²⁹

2.16 The Commission would be unable to offer assistance to often marginalised groups such as migrants if its educative function was in any way curtailed.

The QUT Case

2.17 The Australian Greens are concerned that the case of *Prior v Queensland University & Others*³⁰ (the QUT case) is often used to support argument that the Commission is ineffective in handling complaints.

2.18 The Australian Greens agree with the statements that Professor Gillian Triggs, President of the Australian Human Rights Commission made to the Committee:

... hard cases make bad law. The Queensland University of Technology complaint ... [has] attracted public attention, particularly by those advocating for a change to s 18C of the Racial Discrimination Act ... the

29 MANEN, Mr Cedric, Chief Executive Officer, Family Planning Tasmania Inc, *Committee Hansard*, 30 January 2017, 28.

30 [2016] FCCA 2853

commission handles thousands of complaints every year without controversy.³¹

2.19 The Australian Greens are concerned by calls to alter the Commission's complaint handling process in response to the length of the QUT case. This concern is heightened due to evidence from Professor Triggs, of the fact that the complaint handling process of the Commission was not relevant to the length of the QUT case, as the Commission's handling of the case was only slightly above average:

Senator McKim: I wanted to ask my first ever question about the details of the QUT case, because I have always regarded it as an outlier case. But just so that I understand: your evidence today and the time line you have provided to the committee make it clear that the substantive work that the commission did on this case was over a period from May 2015 to August 2015 – is that correct?

Professor Triggs: That is correct.

Senator McKim: ... you are looking at somewhere about a four-month process there. That would be close to your average length of time to resolve matters, would it not?

Professor Triggs: That is true. The average is 3.8, and the amount of time we actually spent in this matter, outside the private negotiations between the parties, was about four months.³²

2.20 The Commission should not be criticised for not dismissing the QUT case at the first instance. As was stated by Professor Triggs:

Our role is to facilitate to bring the parties together to encourage them to find a resolution. That is the role of our accredited conciliation officers.³³

2.21 In evidence to the Committee, Professor Triggs stated:

The argument that the commission should have terminated this matter early also misses the point that there are benefits to both respondents and complainants in participating in the commission's processes, not least of which is the potential for resolution so that cases do not have to proceed to court. Termination by the commission has serious consequences. For the complainant it may mean that the only option is to pursue a complaint by applying to the court.

31 TRIGGS, Professor Gillian, President, Australian Human Rights Commission, *Committee Hansard*, 12 December 2016, 1.

32 TRIGGS, Professor Gillian, President, Australian Human Rights Commission, *Committee Hansard*, 17 February 2017, 62.

33 TRIGGS, Professor Gillian, President, Australian Human Rights Commission, *Committee Hansard*, 17 February 2017, 71.

The case against the students was ultimately struck out by a judge of the Federal Circuit Court as having no reasonable prospects of success. Judge Jarrett was able to reach this view once all the evidence had been filed. However, in a costs judgement published on 9 December last year Judge Jarrett made it clear that at the time the case was filed with the commission it could not be said that the case was hopeless and bound to fail. I should just correct any misunderstanding: at the time the case was filed with the court it could not be said that the case was hopeless and bound to fail.³⁴

2.22 The Commission does not have the function of a court. Even with the addition recommended to s 46PH of the Australian Human Rights Commission Act 1986 (Cth), the QUT case would not have been necessarily terminated at the first instance. Professor Triggs gave evidence to the effect that at the time the complaint was made to the Commission, it seemed likely that the parties to the dispute had a good chance of negotiating to a successful resolution. The Commission's primary role is the facilitation of such arrangements.

2.23 The Australian Greens accept that the active role that the Commission played in this matter was limited to only a few months and was broadly consistent with the average time it takes to resolve such cases.

Senator Nick McKim

Committee member

34 TRIGGS, Professor Gillian, President, Australian Human Rights Commission, *Committee Hansard*, 17 February 2017, 47.

Appendix 1

Submissions received

- 1 Mr Brent Michael
- 2 Professors Luke McNamara and Katharine Gelber
- 3 Dr Carolyn Tan
- 4 Mr Henry Heuzenroeder
- 5 Australian Lawyers for Human Rights
- 6 Professor George Williams AO, UNSW Law
- 7 Australian Christian Churches / Freedom for Faith
- 8 Refugee Council of Australia
- 9 International Commission of Jurists (Western Australian Branch)
 - Supplementary submission
- 10 Dr Anne Twomey, The University of Sydney
- 11 Executive Council of Australian Jewry
- 12 Dr Bede Harris
- 13 Australian Human Rights Commission
 - Supplementary submission
- 14 Australian Liberty Alliance
- 15 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)
- 16 Federation of Ethnic Communities' Councils of Australia, National Aboriginal and Torres Strait Islander Legal Services, Human Rights Law Centre and others
- 17 Oxfam Australia
- 18 Hunter Asylum Seeker Advocacy
- 19 Reconciliation Australia
- 20 Centre for Multicultural Youth
- 21 Settlement Services International
- 22 NSW Young Liberal Movement
- 23 Caxton Legal Centre and Townsville Community Legal Service

- 24 Australian Institute for Progress
- 25 Settlement Council of Australia
- 26 The Ethnic Communities Council of Queensland
- 27 Arts Law Centre of Australia
- 28 National Health Leadership Forum
- 29 Job Watch Inc.
- 30 Australia Council for the Arts
- 31 Victorian Aboriginal Education Association
- 32 National Indigenous Education Consultative Bodies Network
- 33 LibertyWorks
- 34 Australasian Union of Jewish Students
- 35 Australian Lawyers Alliance
- 36 Online Hate Prevention Institute
- 37 Publiq
- 38 National Union of Students
- 39 Access Community Services
- 40 Diversity Council Australia
- 41 All Together Now
- 42 Dr Helen Pringle, University of New South Wales
- 43 Secular Party of Australia
- 44 Islamic Council of Queensland
- 45 Muslim Legal Network (NSW)
- 46 MYAN Australia
- 47 The Multicultural Development Association (MDA)
- 48 ANTaR
- 49 FamilyVoice Australia
- 50 Young Liberal Movement of Australia
- 51 Marrickville Legal Centre
- 52 Mission Australia
- 53 National Aboriginal and Torres Strait Islander Women's Alliance
- 54 Cyber Racism and Community Resilience Research Project (CRaCR)
 - Supplementary submission

- 55 Association of Labor Lawyers QLD
- 56 NSW Aboriginal Land Council
- 57 Victorian Government
- 58 Institute of Public Affairs
- 59 Aboriginal Legal Service of WA
- 60 Aged Pensioner Power
- 61 Anglican Social Responsibilities Commission
- 62 Union for Progressive Judaism
- 63 National Family Violence Prevention Legal Services Forum
- 64 Brotherhood of St Laurence
- 65 Professor James Allan
- 66 Ryan Carlisle Thomas Lawyers
- 67 Goodstart Early Learning
- 68 Uniting Church in Australia Assembly
- 69 Legal Aid Queensland
- 70 Sisters Inside Inc.
- 71 Chinese Australian Forum
- 72 Labor Action for Multiculturalism Policy (LAMP)
- 73 Legal Aid NSW
- 74 National Aboriginal Community Controlled Health Organisation (NACCHO)
- 75 University of Technology Sydney
- 76 Queensland Council for Civil Liberties
- 77 Australian Education Union
- 78 Federation of Australian Buddhist Councils
- 79 Fair Go for Pensioners (FGFP) Coalition Victoria Incorporated
- 80 National Ethnic and Multicultural Broadcasters' Council (NEMBC)
- 81 3ZZZ Melbourne Ethnic Community Radio
- 82 Cambodian Australian Federation
- 83 Central Australian Women's Legal Service (CAWLS)
- 84 Rationalist Society of Australia
- 85 Mr Rene Vandervaere
- 86 Public Affairs Commission, Anglican Church of Australia

- 87 Redfern Legal Centre
- 88 Public Law and Policy Research Unit, The University of Adelaide
- 89 Castan Centre for Human Rights Law
- 90 Aboriginal Legal Service (NSW/ACT) Limited
- 91 Free TV Australia
- 92 Australian Industry Group (Ai Group)
- 93 The Lowitja Institute
- 94 Refugee Advice & Casework Service (Aust) Inc.
- 95 Media, Entertainment & Arts Alliance
- 96 Muslim Women's Welfare of Australia
- 97 Civil Liberties Australia
- 98 Darebin City Council
- 99 Family Planning Tasmania
- 100 The Presbyterian Church of Australia
- 101 Dr Sev Ozdowski AM
- 102 Canberra Multicultural Community Forum (CMFC) Inc.
- 103 Australian Hellenic Council NSW Inc.
- 104 Australia Defence Association
- 105 Australian Quaker Peace and Legislation Committee
- 106 Reconciliation South Australia
- 107 Associate Professor Gabrielle Appleby, Professor Rosalind Dixon, Ms Gemma McKinnon, Associate Professor Sean Brennan (Gilbert + Tobin Centre of Public Law at UNSW)
- 108 Australian Muslim Women's Centre for Human Rights
- 109 Victorian Trades Hall Council
- 110 The Australian Taxpayers' Alliance
- 111 Maribyrnong City Council
- 112 Federation of Indian Associations of NSW
- 113 Arab Council Australia
- 114 Australian Christian Lobby
- 115 Hobart City Branch, Liberal Party of Tasmania
- 116 Cairns Community Legal Centre

- 117 Nationwide News Pty Ltd
- 118 Discrimination Law Experts Group
- 119 Inner City Legal Centre
- 120 Public Interest Advocacy Centre
 - Supplementary submission
- 121 Clubs Australia
- 122 Glen Eira City Council
- 123 Law Council of Australia
- 124 Aboriginal Rights Coalition
- 125 Victorian Multicultural, Faith and Community Organisations
- 126 Mr Paul Zanetti
- 127 Dr Luke Beck
- 128 Mr Tom Reynolds
- 129 Sydney Atheists
- 130 Australian Family Association
- 131 Mr Jacob T Ng
- 132 Mr Laurence W Maher
- 133 Dr Murray Wesson, Adjunct Professor Holly Cullen, Ms Fiona McGaughey
- 134 Ms Margaret Pickup
- 135 Mr John de Meyrick
- 136 Human Rights Law Centre
- 137 Centre for Comparative Constitutional Studies, University of Melbourne
- 138 Liberty Victoria
- 139 National Association of Community Legal Centres
- 140 Grand Mufti of Australia Office
- 141 Lebanese Muslim Association
- 142 Foundation for Aboriginal and Islander Research Action (FAIRA)
- 143 NT Anti-Discrimination Commission
- 144 Revd Dr Elizabeth Smith
- 145 Federation of Ethnic Communities' Councils of Australia (FECCA)
- 146 NSW Council for Civil Liberties
- 147 Australian Association of Social Workers (AASW)

- 148 Australian Council of Social Service (ACOSS)
- 149 Australian Council of Human Rights Authorities
- 150 Victorian Equal Opportunity and Human Rights Commission
- 151 Amnesty International Australia
- 152 Cohealth
- 153 Mr John Cuturilo
- 154 Mr Andrew James Pawley
- 155 Ms Suzanne Brown
- 156 Mr David Allen
- 157 Ms Kate Eastman SC and Mr Trent Glover
- 158 Aboriginal Peak Organisations of the Northern Territory
 - Attachment 1
- 159 Australia/Israel & Jewish Affairs Council
 - Attachment 1
- 160 Dr Ron Spielman
- 161 Dr David Adler
- 162 Ms Tracie Aylmer
- 163 Mr Boris Gurevich
- 164 Mr Jonathan Holmes
- 165 Dr Joshua Roose
- 166 Dr Jereth Kok
- 167 Equal Opportunity Tasmania
- 168 ANU Law Students Research Hub
- 169 Mr Bill Leak
- 170 Mr Andrew Giles MP
- 171 National Aboriginal & Torres Strait Islander Legal Services
- 172 Change the Record Coalition
- 173 Ms Terri Butler MP
- 174 Mr Gary Max
- 175 Bible Believers' Church
 - Supplementary submission
- 176 Ethnic Communities Council of Western Australia

- 177 Atheist Foundation of Australia
- 178 Mr Geoff Allshorn
- 179 Australian Libertarian Society
- 180 Behlau Lawyers
- 181 Mr Joshua Forrester, Dr Augusto Zimmermann and Ms Lorraine Finlay
- 182 Mr Tomas Fitzgerald
- 183 Dr Asmi Wood
- 184 Law Institute of Victoria
 - Attachments 1 and 2
- 185 Daphne Habibis, University of Tasmania
- 186 Victorian Multicultural Commission
- 187 Kingsford Legal Centre
- 188 National Congress of Australia's First Peoples
- 189 Ms Susan Moriarty
- 190 Mr Calum Thwaites
- 191 Ms Jacinta Price
- 192 Australia-Japan Community Network
- 193 Ms Gabrielle Williams MP
- 194 Ms Pam Montgomery
- 195 Mr Jieh-Yung Lo
- 196 Ms Sandra Brewer
- 197 Mr Julian Leeser MP
- 198 Ethnic Communities' Council of Victoria Inc.
- 199 Mr Bernard Gaynor
 - Attachment 1
- 200 Women's Legal Services NSW
- 201 Queensland Chinese Forum
- 202 Ms Elisabeth Wynne
- 203 Mr Tim Wilson MP
- 204 Prodos Marinakis
- 205 Mr Tim Warner
- 206 Ms Alice Pung

- 207 Multicultural Council of the Northern Territory Inc. (MCNT)
- 208 News Corp Australia
 - Attachment 1
- 209 Australian Law Reform Commission
- 210 Blind Citizens NSW
- 211 Jo Paul-Taylor
- 212 Ms Helen Said
- 213 Mr Ian Bowie
- 214 Mr Gerard Shea
- 215 Dr John Coe
- 216 Ms Catherine Guinness
- 217 Mr Neil Cadman
- 218 Ms Melanie Thewlis
- 219 Mr Rudolph Crous
- 220 Mr Tommy Ravlic
- 221 Mr Bill Swannie
- 222 Dr Shelley Bielefeld, and Professor Jon Altman
- 223 Liberal Democrats
- 224 North Australian Aboriginal Justice Agency
- 225 Arab, Middle Eastern and Moslem League Australia
- 226 Clubs NSW
- 227 Mr Patrick Voon
- 228 Reconciliation Victoria
- 229 Queensland African Communities Council Inc.
- 230 Family Planning Association of Western Australia
- 231 Newcastle University Students' Association
- 232 National Council of Jewish Women of Australia
- 233 Western NSW Community Legal Centre Inc.
- 234 Curtin Student Guild
- 235 Launceston Community Legal Centre
- 236 Australian Student Leaders
- 237 MinterEllison

- 238 Mr Nick Gianfrancesco
- 239 Mr Tony O'Brien
- 240 Ms Su Johnson
 - Supplementary submission
- 241 Dr Katie O'Bryan
- 242 Mr Donald Stockton
- 243 Confidential
- 244 Australian Greens
- 245 Ask Me Anything
- 246 Australian Chamber of Commerce and Industry
- 247 Victorian Aboriginal Legal Service
- 248 City of Sydney
 - Attachment 1
- 249 Adelaide University Student Representative Council
- 250 Jewish Community Council of Victoria
- 251 UNSW SRC
- 252 Go To Court Lawyers
- 253 West Australian Stolen Generations Aboriginal Corporation
 - Supplementary submission
- 254 Mr David van Gend
- 255 Ms Julie Le-Fevre
- 256 Ms Leela Shanker
- 257 Mr Martin Vanha
- 258 Mr Russell Darnley OAM
- 259 Name Withheld
- 260 Mrs Glenda Ellis
- 261 Name Withheld
- 262 Prof William Martin
- 263 Mr Godfrey Semini
- 264 Mr Peter Kubler
- 265 Ms Gwynneth Field
- 266 Confidential

267 Mr Terry Young
268 QTribes Pty Ltd
269 Mr George Szykarski
270 Mr George Bindley
271 Name Withheld
272 Mr Ray Maurer
273 Ms Margaret Atkinson
274 Eann Lister
275 Dr Chris Lawrence
276 Ms Kerry Herron
277 Mr John Tinsley
278 Ms Anne Tan
279 Ms Julie Head
280 Mr Jarrod Wright
281 Ms Fiona Mackenzie
282 Mr Geoff Eagar
283 Mr Howard Granger
284 Mr Martin Munz
285 Lex Stewart
286 Mr Danny Kidron
287 Ms Marie Blackman
288 Ms Julie Newham
289 Ms Gabrielle Henry
290 Mr Peter Deakin QC
291 Mr Colin Atkinson
292 Mr David Harrison
293 Confidential
294 Mrs Rowan Shann
295 Dr Luke Beck
296 Mr Steve Khouw
297 Mr Malcolm Pryor
298 Mr Peter Rees

- 299 Mr Rob Brennan
- 300 Mr Robert Bom
- 301 Mr Paul Field
- 302 Mr William Leakey
- 303 Mr Edward Irvine
- 304 Mrs Merle Ross
- 305 Human Rights Working Group of the Federation of Community Legal Centres
- 306 GetUp!
- 307 Mr Anthony Morris QC
 - Attachment 1 and 2
- 308 Dr Hal Colebatch
- 309 Sasha Marin
- 310 Richard and Maria Maguire
- 311 Mr Ventry Gray
- 312 Ms Alison Hart
- 313 Mr Michael Rosenberg
- 314 Ms Margaret Reynolds
- 315 Ms Claire Hansen
- 316 Mr Jeffrey Lee
- 317 Fiji Australia Society of Tasmania Inc.
- 318 Australian Psychological Society
 - Attachment 1
- 319 Mr Michael Kottek
- 320 Ms Nancy Brown
- 321 Robert and Tracey Hicks
- 322 Don and Linda Willis
- 323 Dr Marilyn Ford
- 324 Mr Sam Baker
- 325 Mr John Rutherford
- 326 Rationalist Association of NSW Inc.
- 327 Mr Michael Guinness
- 328 Mr Harry Oppermann

329 Mr Michael Curtotti
330 The Hon Wilson Tuckey
331 Mr Peter Button
332 Name Withheld
333 Mr Mark Fletcher
334 Dr Hector Bellmann
335 Name Withheld
336 Mr David Miller
337 Confidential
338 Mr John Gerber
339 Dr Sumant Badami
340 Mr Martin Wurzinger
341 Mr Lindsay Hackett
342 Mr Andy Semple
343 Ms Bianca Nogrady
344 Mrs Kristina Photios
345 Mr David Stone
346 Mr George Szykarski
347 Name Withheld
348 Mr Chek Ling
349 Name Withheld
350 Name Withheld
351 Mr John Glover
352 Ms Helen Clarke
353 Mr Phillip Tang
354 Dr David Maddison
355 Name Withheld
356 Name Withheld
357 Mr Alastair Lawrie
358 Dr Vidura Jayaratne
359 Name Withheld
360 Ms Rosamund Krivanek

361 Mr Terrence O'Brien
362 Mr Ronald House
363 Name Withheld
364 Name Withheld
365 Dr Sunil Badami
366 Mr Nathan Leivesley
367 Name Withheld
368 Name Withheld
369 Mr Jamie McMahon
370 Mr Geoffrey Stevenson
371 Confidential
372 Mr Michael O'Keeffe
 • Attachment 1
373 Australian Small Business and Family Enterprise Ombudsman
374 Name Withheld
375 Confidential
376 Mr Dilan Thampapillai, Australian National University
377 Mrs Jennifer Kellaway
378 Dr Eliana Freydel Miller
379 Mr Jonathan Gunnell
380 Ms Anne Le-Fevre
381 Mr Douglas Spence
382 Mr Richard Owens
383 Mr Joseph Elias
384 Mr Frank Deutsch
385 Name Withheld
386 Dr Maxine Szramka and Mr Charles Wilson
387 Mr Minh Nguyen
388 Ms Stephanie Guy
389 Mr Simon Patkin
390 Ms Drew Koppe
391 Mr Ray Barbero

- 392 Mr and Mrs Brian and Judith Magree
- 393 Ms Lena Dimopoulos
- 394 Mr David Griffiths, Co-operatives Victoria
- 395 Mr Michael Cane
- 396 Mr Ronald Smart
- 397 Mr Martin Luther
- 398 Mr Michael Sobb
- 399 Name Withheld
- 400 Confidential
- 401 Confidential
- 402 Confidential
- 403 Confidential
- 404 Confidential
- 405 Mr Barry Lowe
- 406 Mr Ronald Cornish
- 407 Dr Michael Cejnar
- 408 Dr Jeremy Sammut, The Centre for Independent Studies
 - Attachment 1
- 409 Ms Anne James
- 410 Mr Gil May
- 411 Confidential
- 412 Confidential
- 413 Mr Russell Goldberg
- 414 Confidential
- 415 Confidential
- 416 Mr Ivan Chan
- 417 Confidential
- 418 Law Society of New South Wales' Young Lawyers Human Rights and Public Law & Government Committees

Form letters received

- 1 Form letter 1 - 472 items received as at 7 pm on Monday, 27 February 2017
- 2 Form letter 2 - 7,780 items received as at 7 pm on Monday, 27 February 2017
- 3 Form letter 3 - 924 items received as at 7 pm on Monday, 27 February 2017
- 4 Form letter 4 - 60 items received as at 7 pm on Monday, 27 February 2017
- 5 Form letter 5 - 1,036 items received as at 7 pm on Monday, 27 February 2017
- 6 Form letter 6 - 12 items received as at 7 pm on Monday, 27 February 2017
- 7 Form letter 7 - 86 items received as at 7 pm on Monday, 27 February 2017
- 8 Form letter 8 - 15 items received as at 7 pm on Monday, 27 February 2017
- 9 Form letter 9 - 13 items received as at 7 pm on Monday, 27 February 2017
- 10 Form letter 10 - 13 items received as at 7 pm on Monday, 27 February 2017
- 11 Form letter 11 - 16 items received as at 7 pm on Monday, 27 February 2017
- 12 Form letter 12 - 15 items received as at 7 pm on Monday, 27 February 2017
- 13 Form letter 13 - 14 items received as at 7 pm on Monday, 27 February 2017
- 14 Form letter 14 - 14 items received as at 7 pm on Monday, 27 February 2017
- 15 Form letter 15 - 11 items received as at 7 pm on Monday, 27 February 2017
- 16 Form letter 16 - 27 items received as at 7 pm on Monday, 27 February 2017
- 17 Form letter 17 - 4 items received as at 7 pm on Monday, 27 February 2017
- 18 Form letter 18 - 78 items received as at 7 pm on Monday, 27 February 2017

Appendix 2

Public hearings

CANBERRA, 12 DECEMBER 2016

EDGERTON, Mr Graeme, Senior Lawyer, Australian Human Rights Commission

O'BRIEN, Ms Julie, Director, Legal, Australian Human Rights Commission

RAMAN, Ms Padma, Executive Director, Australian Human Rights Commission

SANTOW, Mr Edward, Human Rights Commissioner, Australian Human Rights Commission

SOUTPHOMMASANE, Dr Tim, Race Discrimination Commissioner, Australian Human Rights Commission

SWINBOURNE, Ms Emma, Director, Human Rights Unit, Civil Law Unit, Attorney General's Department

TRIGGS, Professor Gillian, President, Australian Human Rights Commission

WALTER, Mr Andrew, Assistant Secretary, Civil Law Unit, Attorney General's Department

HOBART, 30 JANUARY 2017

ANDERSEN, Associate Professor Clair, Member, National Indigenous Education Consultative Bodies Network

BANKS, Ms Robin, Anti-Discrimination Commissioner, Equal Opportunity Tasmania

HABIBIS, Associate Professor Daphne, Deputy Director, Institute for the Study of Social Change, University of Tasmania

ILES, Mr Martyn, Legal Counsel, Australian Christian Lobby

JOSEPH, Professor Sarah, Director, Castan Centre for Human Rights Law

MANEN, Mr Cedric, Chief Executive Officer, Family Planning Tasmania Inc.

McMULLEN, Mrs Barbara, Senior Educator, Family Planning Tasmania Inc.

MEASHAM, Ms Christy, Education, Training and Health Promotion Manager, Family Planning Tasmania Inc.

PLUMMER, Ms Jacquelin, Head of Policy and Advocacy, Mission Australia

SYMONDS, Mrs Lea, Director, Family Planning Tasmania Inc.

WAGNER, Ms Leica, Senior Policy and Projects Officer, Equal Opportunity Tasmania

WALTER, Professor Maggie, Pro Vice-Chancellor (Aboriginal Research and Leadership) University of Tasmania

MELBOURNE, 31 JANUARY 2017

BERG, Dr Chris, Senior Fellow, Institute of Public Affairs

BREHENY, Mr Simon, Director of Policy, Institute of Public Affairs

CAMILLERI, Professor Joseph, Member, Victorian Multifaith and Multicultural Coalition

CAPUTO, Mr Joe, OAM, JP, Board Director, Ethnic Communities' Council of Victoria

CHOPRA, Ms Tasneem, Chairperson, Australian Muslim Women's Centre for Human Rights

de KRETZER, Mr Hugh, Executive Director, Human Rights Law Centre

JONES, Mr Jeremy, Director of International and Community Affairs, Australia/Israel and Jewish Affairs Council

KAPALOS, Ms Helen, Chairperson, Victorian Multicultural Commission

LANDIS, Mr Josh, Executive Manager, Public Affairs, Clubs Australia

MARLOW, Mr David, Coalition Representative, Victorian Multicultural Faith and Community Coalition

MOKAK, Mr Romlie, Chief Executive Officer, Lowitja Institute

OBOLER, Dr Andre, Victorian Multicultural Faith and Community Coalition

RUBENSTEIN, Dr Colin, Executive Director, Australia/Israel and Jewish Affairs Council

SOLIMAN, Mr Yasser, Islamic Council of Victoria Representative, Victorian Multifaith and Multicultural Coalition

STONE, Professor Adrienne, Director, Centre for Comparative Constitutional Studies, University of Melbourne

SWANNIE, Mr Bill, Chair, Human Rights/Charter of Rights Committee, Law Institute of Victoria

TRIMARCHI, Mr Anthony, Manager, Policy and Government, Clubs Australia

WALTERS, Ms Adrienne, Director of Legal Advocacy, Human Rights Law Centre

WARNER, Ms Karly, Executive Officer, National Aboriginal and Torres Strait Islander Legal Services

WARNER, Ms Karly, Member of Administrative Law and Human Rights Section Executive Committee and Reconciliation and Advancement Committee, Law Institute of Victoria

WILSON, Ms Belinda, President, Law Institute of Victoria

ZIFCAK, Professor Spencer, Past President, Victorian Council for Civil Liberties Inc.

SYDNEY, 1 FEBRUARY 2017

ALLEN, Dr Dominique, Member, Discrimination Law Experts Group

ANDREWS, Mr Timothy, Executive Director, Australian Taxpayers' Alliance

APPLEBY, Associate Professor Gabrielle, Private capacity

CHEAH, Mr Kenrick, President, Chinese Australian Forum

CODY, Professor Anna, Director, Kingsford Legal Centre; and Member, National Association of Community Legal Centres

COUSINS, Ms Stephanie, Advocacy and External Affairs Manager, Amnesty International Australia

EASTMAN, Ms Katherine, SC, Private capacity

EDRIES, Mr Zaahir, President, Muslim Legal Network (NSW)

HOLMES, Mr Jonathan, Private capacity

HUGGINS, Dr Jackie, Co-Chair, National Congress of Australia's First Peoples

HUNYOR, Mr Jonathon, Chief Executive Officer, Public Interest Advocacy Centre

LEAK, Mr Bill, Private capacity

LEVIN, Mr Anthony, Senior Solicitor, Human Rights Group, Legal Aid NSW

LITTLE, Mr Rodney, Co-Chair, National Congress of Australia's First Peoples

MARAR, Mr Satyajeet, Research Associate, Australian Taxpayers' Alliance

McKINNON, Ms Gemma, Private capacity

MOORE, Ms Roxanne, Indigenous Rights Campaigner, Amnesty International Australia

NAWAZ, Ms Maria, Law Reform Solicitor, Kingsford Legal Centre

O'CONNELL, Dr Karen, Member, Discrimination Law Experts Group

O'CONNOR, Mr Tim, Acting Chief Executive Officer, Refugee Council of Australia

O'DONNELL, Mr Chesney, Secretary, Chinese Australian Forum

OKHOVAT, Ms Sahar, Policy Officer, Refugee Council of Australia

OZDOWSKI, Dr Sev, Private capacity

PANG, Mr Anthony, Vice President, Chinese Australian Forum

RACHWANI, Mr Mostafa, President, Project Manager and Media Officer, Lebanese Muslim Association

RICE, Professor Simon, Member, Discrimination Law Experts Group

SACKVILLE, Justice Ronald, AO, Private capacity

SAUERMAN, Ms Sophie, Policy Officer, National Congress of Australia's First Peoples

SHELLY, Mrs Lydia, Legal Officer, Lebanese Muslim Association

SINGH, Dr Yadu, President, Federation of Indian Associations of NSW

TALBOT, Ms Anna, Legal and Policy Adviser, Australian Lawyers Alliance

TUCKER, Dr Linda, Solicitor, Redfern Legal Centre; and Chairperson, Community Legal Centres NSW

TWOMEY, Prof. Anne, Private capacity

VOON, Mr Patrick, Immediate Past President, Chinese Australian Forum

WERTHEIM, Mr Peter, Executive Director, Executive Council of Australian Jewry

WILLIAMS, Prof. George, Private capacity

ZANGANA, Mr Burhan, Member, Refugee Communities Advocacy Network, Refugee Council of Australia

ADELAIDE, 2 FEBRUARY 2017

ADLER, Dr David, Private capacity

ALLAN, Prof. James, Private capacity

BLIUC, Doctor Ana-Maria, Lecturer, Social Psychology, Psychology: Human Behaviour, Western Sydney University

CONNOLLY, Ms Helen, Co-Chair, Reconciliation South Australia

DUNLOP, Ms Jacqueline, Policy Officer, Reconciliation Australia

DUNN, Professor Kevin, Dean, School of Social Sciences and Psychology, Western Sydney University

JAKUBOWICZ, Professor Andrew, Chief Investigator, Cyber Racism and Community Resilience Research Project

LIDDY, Ms Nadine, National Coordinator, Multicultural Youth Advocacy Network Australia

MCCARTHY, Ms Justine, Legal Counsel, Seven West Media

McMONNIES, Ms Irene, Corporate Counsel, Nine Network Australia Pty Ltd

MOHAMED, Mr Justin, Chief Executive Officer, Reconciliation Australia

OFFICER, Ms Kiah, Corporate Counsel, Nine Network Australia Pty Ltd

PORTEOUS, Archbishop Julian, Private capacity

POULOS, Reverend Elenie, National Director, UnitingJustice Australia, Uniting Church in Australia Assembly

SAUNDERS, Mr Ashley, National Director, FamilyVoice Australia

SAVILL, Mr Brett, Chief Executive Officer, FreeTV Australia

STUBBS, Professor Matthew, Associate Dean (Learning and Teaching), Adelaide Law School, Public Law and Policy Research Unit, The University of Adelaide

WALADAN, Ms Sarah, Head of Legal and Regulatory Affairs, FreeTV Australia

WATERS, Mr Mark, State Manager, Reconciliation South Australia

ZIRNSAK, Dr Mark, Director, Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia Assembly

PERTH, 3 FEBRUARY 2017

CULLEN, Adjunct Professor Holly, Private capacity

EGGINGTON, Professor Dennis, Chief Executive Officer, Aboriginal Legal Service of Western Australia

FINLAY, Mrs Lorraine, Private capacity

FORRESTER, Mr Joshua, Private capacity

MAHER, Mr Laurence, Private capacity

McGAUGHEY, Ms Fiona, Private capacity

MCINTYRE, Mr Gregory, President, Western Australian Branch, Australian Section, International Commission of Jurists

RAJAN, Mr Suresh, Media Spokesperson, Ethnic Communities Council of WA Inc.

SANKARAN, Mr Ramdas, President, Ethnic Communities Council of WA Inc.

WESSON, Dr Murray, Private capacity

ZIMMERMANN, Dr Augusto, Private capacity

BRISBANE, 10 FEBRUARY 2017

ALEXANDER, Ms Matilda, Senior Lawyer, Human Rights and Anti-Discrimination, Legal Aid Queensland

COLES, Ms Klaire, Senior Lawyer, Caxton Legal Centre

CONNOLLY, Dr Julie, Senior Manager, Impact, Innovation and Advocacy, MDA Ltd

COYNE, Mr Benedict, National President, Australian Lawyers for Human Rights

DOORIS, Ms Marissa, Policy Officer, Sisters Inside Inc.

GAYNOR, Mr Bernard, Private capacity

GELBER, Professor Katharine, Private capacity

KADRI, Mr Shadabhusain (Ali), Vice President, Islamic Council of Queensland

KILROY, Ms Debbie, Chief Executive Officer, Sisters Inside Inc.

MCDOUGALL, Mr Scott, Director, Caxton Legal Centre

MERRITT, Mr Chris, Legal Affairs Editor, The Australian

MORRIS, Mr Tony, QC, Private capacity

PRICE, Mr Andrew Robert (Imran), Volunteer, Islamic Council of Queensland

PRINGLE, Dr Helen, Private capacity

QUILL, Mr Justin, Nationwide News

THWAITES, Mr Calum, Private capacity

WOOD, Mr Alexander, Private capacity

YOUNG, Mr Graham, Executive Director, Australian Institute for Progress

ZANETTI, Mr Paul John, Private capacity

CANBERRA, 17 FEBRUARY 2017

ADAMS, Ms Aurora, Senior Campaigner, Human Rights, GetUp!

ANDERSON, Mr Iain, Deputy Secretary, Attorney-General's Department

BARKLAMB, Mr Scott, Director, Workplace Relations, Australian Chamber of Commerce and Industry

CROUCHER, Emeritus Professor Rosalind, AM, President, Australian Law Reform Commission

EDGERTON, Mr Graeme, Acting Deputy Director, Legal Section, Australian Human Rights Commission

MATHESON, Ms Alana, Deputy Director, Workplace Relations, Australian Chamber of Commerce and Industry

NARAYANASAMY, Ms Chen, Human Rights Director, GetUp!

SANTOW, Mr Edward (Ed), Human Rights Commissioner, Australian Human Rights Commission

SOUTPHOMMASANE, Mr Thinethavone (Tim), Race Discrimination Commissioner, Australian Human Rights Commission

SWINBOURNE, Ms Emma, Director, Human Rights, Attorney-General's Department

TRIGGS, Professor Gillian, President, Australian Human Rights Commission

VACCARO, Mrs Genevieve, Principal Adviser, Workplace Relations Policy, Australian Industry Group

VARDAS, Mr George, Secretary, Australian Hellenic Council NSW Inc.

VELLIS, Mr George, Coordinator, Australian Hellenic Council NSW Inc.

WILLIAMS, Mr Daniel, Partner, MinterEllison

WILLOX, Mr Innes, Chief Executive, Australian Industry Group

DARWIN, 20 FEBRUARY 2017

ANNESE, Ms Lisa, Chief Executive Officer, Diversity Council Australia

FOX, Ms Dorothy, Private capacity

JOSEPH, The Very Reverend Dr Keith, Dean, Christchurch Anglican Cathedral, Darwin

JULIAN-ARMITAGE, Mrs Angela, National President, Migration Institute of Australia

KADIRGAMAR, Mr Kevin, President, Multicultural Council of the Northern Territory

MITCHELL, Mr Ron, Program Manager, Multicultural Council of the Northern Territory

PRICE, Councillor Jacinta Nampijinpa, Private capacity

RAWNSLEY, Mr John, Manager, Law and Justice Section, North Australian Aboriginal Justice Agency; and Aboriginal Peak Organisations Northern Territory

SIEVERS, Ms Sally, Anti-Discrimination Commissioner, Northern Territory Anti-Discrimination Commission

TAYLOR, Ms Penelope, Private capacity

VATSKALIS, Hon. Konstantine, Private capacity

WOODROFFE, Mr David, Principal Legal Officer, North Australian Aboriginal Justice Agency

Appendix 3

Tabled documents and additional information

Tabled documents

- 1 Document tabled at a public hearing in Canberra on 12 December 2016 by the Australian Human Rights Commission – Unlawful discrimination complaints process
- 2 Document tabled at a public hearing in Canberra on 12 December 2016 by the Australian Human Rights Commission – President's opening statement
- 3 Document tabled at a public hearing in Canberra on 12 December 2016 by Senator James Paterson – Transcript of interview
- 4 Document tabled at a public hearing in Canberra on 12 December 2016 by the Australian Human Rights Commission – Proposals for reform made by Mr Leeser MP
- 5 Document tabled at a public hearing in Canberra on 12 December 2016 by the Attorney-General's Department – Explanatory memorandum to the Racial Hatred Bill 1994
- 6 Document tabled at a public hearing in Canberra on 12 December 2016 by Mr Julian Leeser MP – Speech to the Chinese Australian Services Society
- 7 Document tabled at a public hearing in Hobart on 30 January 2017 by Family Planning Tasmania – Case studies (accepted as confidential)
- 8 Document tabled at a public hearing in Melbourne on 31 January 2017 by the Institute of Public Affairs – Galaxy research poll
- 9 Document tabled at a public hearing in Sydney on 1 February 2017 by Justice Ronald Sackville AO SC – Opening statement
- 10 Document tabled at a public hearing in Adelaide on 2 February 2017 by the Cyber Racism and Community Resilience Research Group – Opening statement
- 11 Document tabled at a public hearing in Perth on 3 February 2017 by Mr Laurence Maher – Opening statement
- 12 Document tabled at a public hearing in Brisbane on 10 February 2017 by Multicultural Development Association Queensland – Opening statement
- 13 Document tabled at a public hearing in Brisbane on 10 February 2017 by the Islamic Council of Queensland – Posters

- 14 Document tabled at a public hearing in Canberra on 17 February 2017 by Senator Paterson – AHRC file note
- 15 Document tabled at a public hearing in Canberra on 17 February 2017 by Australian Human Rights Commission – Prior and QUT complaint chronology
- 16 Document tabled at a public hearing in Canberra on 17 February 2017 by the Australian Human Rights Commission – Dinnison and Leak/The Australian complaint chronology
- 17 Document tabled at a public hearing in Canberra on 17 February 2017 by the Australian Human Rights Commission – File note

Answers to questions on notice

- 1 Answers to questions on notice from public hearing held on 12 December 2016 in Canberra, provided by the Australian Human Rights Commission
- 2 Answers to questions on notice from public hearing held on 12 December 2016 in Canberra, provided by the Attorney-General's Department
- 3 Additional answer to questions on notice from public hearing held on 12 December 2016 in Canberra, provided by the Australian Human Rights Commission
- 4 Answers to questions on notice from public hearing held on 31 January 2017 in Melbourne, provided by the Human Rights Law Centre
- 5 Answers to questions on notice from public hearing held on 31 January 2017 in Melbourne, additional document provided by the Human Rights Law Centre
- 6 Answers to questions on notice from public hearing held on 31 January 2017 in Melbourne, provided by the Law Institute of Victoria
- 7 Answers to questions on notice from public hearing held on 31 January 2017 in Melbourne, provided by the Centre for Comparative Constitutional Studies
- 8 Answers to questions on notice from public hearing held on 1 February 2017 in Sydney, provided by Ms Kate Eastman SC
- 9 Answers to questions on notice from public hearing held on 31 January 2017 in Melbourne, provided by the National Aboriginal and Torres Strait Islander Legal Services
- 10 Answers to questions on notice from public hearing held on 1 February 2017 in Sydney, provided by Kingsford Legal Centre
- 11 Answers to questions on notice from public hearing held on 1 February 2017 in Sydney, provided by Legal Aid NSW
- 12 Answers to questions on notice from public hearing held on 1 February 2017 in Sydney, provided by the Chinese Australia Forum

- 13 Answers to questions on notice from public hearing held on 2 February 2017 in Adelaide, provided by FamilyVoice Australia
- 14 Answers to questions on notice from public hearing held on 2 February 2017 in Adelaide, provided by FreeTV Australia
- 15 Answers to questions on notice from public hearing held on 3 February 2017 in Perth, provided by Joshua Forrester, Dr Augusto Zimmermann, and Lorraine Finlay
- 16 Answers to questions on notice from public hearing held on 10 February 2017 in Brisbane, provided by Legal Aid QLD
- 17 Answers to questions on notice from public hearing held on 10 February 2017 in Brisbane, provided by Australian Lawyers for Human Rights
- 18 Answers to questions on notice from public hearing held on 17 February 2017 in Canberra, provided by the Media, Entertainment & Arts Alliance
- 19 Answers to questions on notice from public hearing held on 17 February 2017 in Canberra, provided by GetUp
- 20 Answers to questions on notice from public hearing held on 17 February 2017 in Canberra, provided by the Australian Industry Group
- 21 Answers to questions on notice from public hearing held on 17 February 2017 in Canberra, provided by the Australian Human Rights Commission
- 22 Appendix 1 to answers to questions on notice from public hearing held on 17 February 2017 in Canberra, provided by the Australian Human Rights Commission
- 23 Additional answer to question on notice from public hearing held on 17 February 2017 in Canberra, provided by the Australian Human Rights Commission
- 24 Additional answer to question on notice from public hearing held on 17 February 2017 in Canberra, provided by the Australian Human Rights Commission
- 25 Answer to question on notice from public hearing held on 17 February 2017 in Canberra, provided by the Attorney-General's Department

Additional information

- 1 Document provided as additional information at a public hearing in Hobart on 30 January 2017 by the University of Tasmania – Study on Aboriginal perspectives on race and race relations
- 2 Document provided as additional information at a public hearing in Sydney on 1 February 2017 by Justice Ronald Sackville AO SC – Journal article

- 3 Document provided as additional information at a public hearing in Adelaide on 2 February 2017 by the Cyber Racism and Community Resilience Research Group – Article
- 4 Document provided as additional information at a public hearing in Canberra on 17 February 2017 by the Australian Human Rights Commission – Paragraph 10 complaints procedure
- 5 Document provided as additional information at a public hearing in Hobart on 30 January 2017 by Professor Sarah Joseph – Clarification

Appendix 4

Complaints process prior to 1995

Between 1992 and 1995, the Commission, then known as the Human Rights and Equal Opportunity Commission (HREOC), had statutory functions under the RDA, *Sex Discrimination Act 1984* (SDA) and *Disability Discrimination Act 1992* (DDA) with the following general functions:

- The Race Discrimination Commissioner, Sex Discrimination Commissioner and Disability Discrimination Commissioner investigated and attempted to conciliate complaints of unlawful discrimination under the RDA, SDA and DDA.
- Where the relevant Commissioner determined that the investigation into the complaint would not continue because, for example, the alleged act the subject of the complaint was not unlawful, the complaint was out of time or lacking in substance, the complainant could request an internal review of the Commissioner's decision by the President.
- Where the complaint was not resolved by conciliation and the Commissioner was of the view that it should be referred for a hearing, the hearing was conducted by HREOC and the complaint either dismissed or substantiated.
- Where a complaint was substantiated, HREOC registered its determination with the Federal Court registry. Upon registration, the determination was to have effect as if it were an order of the Federal Court.¹

Process found unconstitutional - Brandy v HREOC

In *Brandy v Human Rights and Equal Opportunity Commission*, 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 HREOC contrary to Chapter III of the Constitution.²

In response to the decision in *Brandy*, the parliament enacted the *Human Rights Legislation Amendment Act 1995*. This Act repealed the registration and enforcement provisions of the RDA, SDA and DDA. Complaints that were lodged under the new regime introduced by the Act were still the subject of hearings before HREOC. Where a complaint was successful, HREOC would make an (unenforceable) determination.³

1 Human Rights and Equal Opportunity Commission (HREOC), *Federal Discrimination Law* (2008), 8.

2 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

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

Amendments to establish the current process

The *Human Rights Legislation Amendment Act (No. 1) 1999* amended the complaints process further:

- the complaint handling provisions were repealed and replaced with a uniform scheme in the [*Human Rights and Equal Opportunity Act 1986*];
- responsibility for the investigation and conciliation of complaints was removed from the Race Discrimination Commissioner, Sex Discrimination Commissioner and Disability Discrimination Commissioner and vested in the President;
- the right to an internal review by the President of matters terminated by reason of, for example, being out of time or lacking in substance, was removed;
- HREOC's hearing function into complaints of unlawful discrimination under the RDA, SDA and DDA was repealed and provision made for complainants to commence proceedings in relation to their complaint before the Federal Court or [(the then) Federal Magistrates Court] in the event that it was not conciliated when before HREOC for investigation; and
- the Race Discrimination Commissioner, Sex Discrimination Commissioner, Disability Discrimination Commissioner Human Rights Commissioner and Aboriginal and Torres Strait Islander Social Justice Commissioner were given an amicus curiae function in relation to proceedings arising out of a complaint before the Federal Court or [(the then) Federal Magistrates Court].⁴

4 HREOC, *Federal Discrimination Law* (2008), 9.