SECTION 18C OF THE RACIAL DISCRIMINATION ACT – NEED FOR REFORM?
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On 28 February 2017, the Parliamentary Joint Committee on Human Rights delivered its recommendations after inquiry into the Racial Discrimination Act 1975 (Cth) (RDA") to determine whether the law should be changed. On 31 March 2017, Parliament amended the Australian Human Rights Commission Act 1986 (Cth) ("AHRCA"), leaving the RDA intact (if only for the moment) but otherwise significantly increasing the President's powers to put an end to complaints of any kind of discrimination (i.e. not just those brought under the RDA). This paper addresses some of the issues arising and arguments for and against the proposed reform in the context of the legislation, case law and history of the federal discrimination law.

INTRODUCTION

1. On 30 July 2017, Emeritus Professor Rosalind Croucher AM becomes the new President of the Australian Human Rights Commission, beginning a seven-year term, the primary focus of which will be managing recent changes to the AHRCA. Those changes were the result of an unsuccessful attempt to amend s 18C of the RDA and will result in immediate changes to the ways in which all complaints to the Australian Human Rights Commission will be handled and provide significant new powers to the President to bring an end to a complaint (subject to leave of a relevant Court). This paper considers the arguments for and against changes to the RDA as well as the significant changes to the process for dealing with complaints occasioned by the amendments to the AHRC Act, which will have retrospective effect.

BACKGROUND

2. The Federal Government's recently proposed amendments to Part IIA of the *Racial Discrimination Act 1975 (Cth)* ("RDA") and the *AHRCA* included:

    a. replacing the words "*offend, insult, humiliate or intimidate*" with the words, "*harass and intimidate*"[1];

    b. changing the existing test as to whether an act is reasonably likely, in all the circumstances, to have the effect mentioned in paragraph 18C(1)(a) "*to be determined by the standards of a reasonable member of the Australian community*[2]" ("New Standards Test");

    c. creating a new regime of investigating and mediating complaints that would place greater power in the hands of the President to bring complaints to an end (subject to leave of the Court) by:

        i. requiring the President to terminate the complaints if:

[1] Section 3 *First Reading Human Rights Legislation Amendment Bill 2017 (Cth)* ("RDA Amendment Bill").
[2] Section 4 inserting new 46PH(1C); *RDA Amendment Bill.*

1. "*satisfied that there would be no reasonable prospect that the Federal Court or the Federal Circuit Court would be satisfied that the alleged acts, omissions or practices are unlawful discrimination*" [3] and if

2. "*the complaint is trivial, vexatious, misconceived or lacking in substance*[4]" and

ii. Prescribing that complaints may only commence by leave of the Court unless a complaint was terminated under s 46PH(1)(h) of the AHRCA, being that the President was 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[5];

d. creating arguably more onerous costs consequences including allowing offers made by Respondents only during the complaints process before the Australian Human Rights Commission ("AHRC") to be used to argue for costs against Applicants (but not the reverse)[6].

3. These changes were said to be justified by the report provided by *Parliamentary Joint Committee on Human Rights* ("Report") and arose from a long history of debate occurring since at least 2011.

4. Importantly, the amendments to the AHRCA sought and ultimately made by the RDA Amendment Bill will have the effect of changing not just access to remedies via the AHRCA for those bringing claims under the RDA, but for each of the other federal discrimination acts[7] including:

a. the *Age Discrimination Act 2004 (Cth)* ("ADA");

b. the Sex Discrimination Act 1984 (Cth) ("SDA"); and

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[3] Section 43 inserting new 18C(2A); *RDA Amendment Bill.*
[4] *RDA Amendment Bill*; s 43 inserting new (1B)(a).
[5] *RDA Amendment Bill*; s 53, inserting new 46PO(3A). Noting this was broadened in the *Third Reading Human Rights Legislation Amendment Bill 2017 (Cth)* ("AHRCA Amendment Bill"), which left out any change to the RDA and also allowed a complaint to proceed under subsection 46PH(1)(i) (which is where the President "is satisfied that there is no reasonable prospect of the matter being settled by conciliation")
[6] *Amendment Bill*; s 44 inserting new 46PH(2A); s 54 inserting notes to s 46PO(4) and s 57 adding s 46PSA(a) to (c).
[7] *Report*; 75, [3.79]. This recommendation appears to have come from Kate Eastman SC's comment that such changes ought not be made just for the purpose of dealing with complaints under the RDA, but ought to be extended to all types of discrimination[7]. Ms Eastman SC is also noted as supporting the changes requiring leave of the Court to proceed if the President terminates the complaint on the ground it is "frivolous, vexatious, misconceived or lacking in substance". This would effectively adopt the NSW model in force under the *Anti-Discrimination Act 1977 (NSW)* ("NSW ADA").

c. the Disability Discrimination Act 1992 (Cth) ("DDA").

In fact, the public debate used to justify these changes has focussed only on the RDA and specifically s 18C of the RDA, whereas there has been little to no public debate on the proposed changes to the AHRCA, being the only legislation ultimately amended and to arguably far greater effect that any proposed changes to section 18C of the RDA. The Joint Committee was never asked to address itself to any need for the assessment of such access in relation to the other legislation. That is, the recommendations were made without regard to the particular contexts within which the above legislation operates and so there was no consideration of the appropriateness of the changes more generally. In addition, while the key multicultural and ethnic groups were given the opportunity for consultation, none of the other key groups were likewise asked to contribute (such as any of the peak disability groups such as Vision Australia, or groups specifically focused on sexual equality, such as the women's electoral lobby). The changes to the AHRCA are significant and problematic given the narrow parameters of this inquiry.

5. The amendments were said to address the following matters.

a. Ineffectiveness of the legislation, as expressed in the below extracts.

> *"the words 'offend, insult, humiliate' **do not protect people from racial vilification**. Rather, they target the expression of ideas and opinions, particularly those which may be controversial or challenging. Section 18C must be amended to address the disconnect between the ordinary meaning of the words 'offend, insult, humiliate' and the way they have been judicially interpreted*[8]*."*
>
> "…[T]he words 'offend, insult, humiliate' do not protect people from racial vilification. Rather, **they target the expression of ideas and opinions, particularly those that may be controversial or challenging**. Section 18C must be amended to address the disconnect between the ordinary meaning of the words 'offend, insult, humiliate' and the way they have been judicially interpreted[9]."
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> "The formulation 'harass or intimidate' more accurately describes the core vice of racial vilification than the existing formulation, without subjecting frank and open discussion and debate, however challenging to legal sanctions and therefore prejudicing freedom of speech[10]."
>
> *[Emphasis added.]*

[8] *Explanatory Memorandum to the Amendment Bill* circulated by authority of the Attorney-General, Senator the Honourable George Brandis QC ("Explanatory Memorandum"); [3].
[9] *Explanatory Memorandum*; [5].
[10] *Explanatory Memorandum*; [24].

b. Inconsistency "Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[11]".

c. Inconsistency *"with the right to freedom of speech*[12]*"* noting:

i. the present legislation went too far, protecting against "mere slights" and as such had a 'chilling' effect on freedom of speech[13] and

ii. (by implication) there was a fear of unreasonable legal sanctions being imposed[14].

d. The processes of the AHRC are at present (by implication) not fair to all the parties[15] requiring amendment:

i. to treat respondents fairly[16];

ii. to prevent unmeritorious complaints proceeding to court[17]; and

iii. to ensure "all parties" are given "procedural fairness"[18].

e. Problems raised by complaints against Andrew Bolt, the late cartoonist Bill Leak, and students at the Queensland University of Technology[19].

6. What is missing from the Report and the Explanatory Memorandum is:

a. an acknowledgement or understanding of the difficulties and costs (both personal and financial) of bringing a complaint;

b. an analysis of the prevalence of racial abuse alongside actual complaints made; and

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[11] *Explanatory Memorandum*; [4] and [7]. Noting the High Court found no inconsistency of this kind in *Toben v Jones* (2003) 129 FCR 515 ("*Toben v Jones*").
[12] *Explanatory Memorandum*; [4].
[13] *Explanatory Memorandum*; [6].
[14] *Explanatory Memorandum*; [6].
[15] *Explanatory Memorandum*; [8].
[16] *Explanatory Memorandum*; [10].
[17] *Explanatory Memorandum*; [8] and [10].
[18] *Explanatory Memorandum*; [14].
[19] *Explanatory Memorandum*; [16] referring to *Eatock v Bolt* (2011) 197 FCR 261 ("*Bolt*"); a complaint against Bill Leak that was withdrawn and never proceeded to hearing; and *Prior v Queensland University of Technology & Ors (No.2)* [2016] FCCA 2853 (4 November 2016) ("*QUT*") which resulted in the summary dismissal of complaints as against the Fourth, Sixth and Seventh Respondent, leaving the claim on foot against the university, the Second Third and Ninth Respondents.

c. an assessment of the case law (and practical examples of racial vilification) that show the law is not about preventing an expression of ideas per se, but expression of ideas in a form that causes significant harm to the targeted population.

This was perhaps not assisted by an apparent erroneous understanding of the process by the public in general (disclosed in the Report), including a view individuals are not required to pay legal costs if they lose[20]. In fact, that is one of the very real risks of this litigation, preventing many from taking claims with reasonable prospects further.

7. The Attorney General also stated that amendments to the AHRCA would result in a restoration of public confidence in the AHRC[21], indicating it had been somehow undermined. This would appear to owe more to a schism between the (still) President of the Australian Human Rights Commission, Professor Gilliam Triggs and the present government dating back to at least 2015 when the then Prime Minister Tony Abbott declared he had lost confidence in Professor Triggs as President[22] rather than anything arising from the Report. Indeed, the Parliamentary Joint Committee noted that notwithstanding,

> "[s]*ome submitters and witnesses expressed concern that the AHRC overstepped its legislated educational function and solicited complaints that otherwise might not have been made*"…. *[However] 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****.[23]"*

Importantly, the lack of confidence as disclosed in the Report appeared based on a fundamental misunderstanding, that Commissioners handle complaints (and therefore are in a position to prejudge them[24]) when that is not the case.

8. When one looks at each of the above matters in turn, in the context of the case law and other evidence, it is clear that there is certainly an argument that section 18C could be more effective in protecting against racial

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[20] *Report*; 87 [3.116].
[21] *Explanatory Memorandum*; [14].
[22] Borrello, E. & Glenday, J; "Gillian Triggs: Tony Abbott says Government has lost confidence in Human Rights Commission president"; ABC News; 24 February 2015 < http://www.abc.net.au/news/2015-02-24/gillian-triggs-says-brandis-wants-her-to-quit-rights-commission/6247520 > and Bennett, J.; "Gillian Triggs says she will not resign in face of 'highly personalised' Government pressure"; ABC News; 12 June 2015; http://www.abc.net.au/news/2015-06-12/gillian-triggs-says-she-has-not-considered-resigning/6540862
Kozoil, M.' : "Gillian Triggs slams Malcolm Turnbull's 'highly unsatisfactory' 18C race law changes"; Sydney Morning Herald; 24 March 2017; http://www.smh.com.au/federal-politics/political-news/gillian-triggs-slams-malcolm-turnbulls-highly-unsatisfactory-18c-race-law-changes-20170323-gv5gf2.html.
[23] Report; 95, [4.3] & [4.4].
[24] Report; 102, [4.31] as per "aged pensioner Power".

discrimination. However, many of the other matters are difficult to maintain on any fair analysis of fact and law. In particular, this debate is not (as it has been characterised to date), a debate about freedom of speech. PartIIA does not prevent anyone from speaking about any subject matter they wish. What it does prevent is speaking about it in a way that is harmful to others.

9. What is also Important to acknowledge is that Australia has no express protection of any right to freedom of speech. The only guarantee of freedom of speech under Australian law is the freedom of political communication, which has been implied to the Constitution in accordance with cases such as *Lange*[25]. While a case has yet to be brought contesting the Constitutional validity of section 18C of the RDA, it is certainly arguably that it ought to be held valid. That is because s 18C protects minorities from the types of strategies used to silence and prevent participation. That is, racial vilification, is about creating a hegemonic power differential in favour of the majority that undermines individuals' capacities to participate in democracy and as such it is entirely consistent with the implied freedom the Constitution.

10. In this context, the necessity for racial vilification laws is best understood by reference to data showing the effect of racism.

PREVALENCE OF EFFECT OF RACISM

11. A recent survey of young people aged 15-19 by Mission Australia stated,

> *The Youth Survey 2016 showed that for the record number of 21,846 15 to 19 year olds who took part, alcohol and drugs and equity and discrimination were the top two issues facing Australia today, with mental health entering the top three for the first time in its 15 year history. Concerns about mental health have doubled since 2011.*
> *…*
> *… the report shows one in seven females reported experiencing gender discrimination and one in five Aboriginal and Torres Strait Islander young people reported experiencing discrimination on the basis of race or cultural background.*
>
> *Of those who reported experiencing discrimination, the main reasons cited were gender (39%) and race/cultural background (31%). Half the young people surveyed had witnessed someone else being unfairly treated or discriminated against in the last twelve months. The discrimination they witnessed was most commonly on the basis of race/cultural background (58%) and sexuality (41%).*[26]

12. In this context, there is now significant research showing the detrimental impacts of discrimination (generally) on health[27].

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[25] *Lang v Australian Broadcasting Corporation* (1997) 189 CLR 520 ("*Lange*").
[26] <https://www.missionaustralia.com.au/what-we-do/research-evaluation/youth-survey>.
[27] See for example: Saffron Karlsen, MSc, and James Y. Nazroo, PhD; "Relation Between Racial Discrimination, Social Class, and Health Among Ethnic Minority

13. While much has been written from a legal or sociological perspective about laws aimed at protecting against racism, there has been little engagement with empirical data assessing the impact of racism and/or the laws protecting against racism in Australia[28].

14. In relation to the harm occasioned by racism, Gelber and McNamara note,

> *"…the work of Langton, … [argues] that 'speech can subordinate in virtue of unfairly ranking women as inferior', and [likewise] Hornsby and McGowan … have separately shown how hate speech can silence its targets (cited in Maitra & McGowan, 2012b, pp. 7-8). Matsuda has written persuasively of individual harms including psychological distress and risk of destruction to one's self-esteem, and social harms such as restrictions on freedom of movement and association (1993). This is consistent with findings from psychology that individuals subjected to non-physical discrimination suffer harms to their physical and mental health (Meyer, 2003; Vijleveld et. Al., 2012; Anderson, 2013; Paradies et. Al., 2013; Gee, 2002; Harris et. Al., 2006; Victorian Health Promotion Foundation, 2012). Indirect effects include harms to dignity, 'disregard for others whose lives qualitatively depend on our regard' (Williams, 1991, p. 73), and the maintenance of power imbalances within social hierarchies of race (Allbrook, 2001; Bloch & Dreher, 2009; Dunn & Nelson, 2011)."* [29]

15. Professor Rice made the same point to the Joint Committee,

> *"We say that 18C and 18D and the related case law operate together to limit free speech only insomuch 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.* [30]*"*

16. Gelber and McNamara conclude that the results of racism include:

Groups" (2002) Vol. 92 American Journal of Public Health 624-631. Stephanie Wallace, James Nazroo, Laia Bécares; "Cumulative Effect of Racial Discrimination on the Mental Health of Ethnic Minorities in the United Kingdom" (2016) 106 *American Journal of Public Health* 1294-1300. Karin L. Brewster, Kathryn Harker Tillman; "Sexual Orientation and Substance Use Among Adolescents and Young Adults" (2012) 102 *American Journal of Public Health* 1168-1176. Michael S. Spencer, Juan Chen, Gilbert C. Gee, Cathryn G. Fabian, David T. Takeuchi; "Discrimination and Mental Health–Related Service Use in a National Study of Asian Americans" (2010) 100 *American Journal of Public Health* 2410-2417.

[28] Gelber, K. & McNamara, L.; "Evidencing the Harms of Hate Speech" (2016) 22 *Social Identities* 324; 324.

[29] Ibid; 325.

[30] Report; 40, [2.100].

a. Disempowering people to take action against hate speech;

b. Disengagement/withdrawal from the situation which translates to lack of participation in all areas of public engagement;

c. Effective exclusion (i.e. "go back to where you belong" is a clear message your voice is not wanted here);

d. Feeling dehumanised/violated;

e. anger and frustration;

f. isolation (i.e. de-identification as a strategy to try and avoid racism); and

g. Fear.

I note by way of aside that each of these matters would cause a risk to the psychiatric health and therefore safety of people the subject of such action, if they occurred in a workplace. As such, this would also satisfy part of the definition of bullying under the FWA[31]. That is, racial vilification is also potentially a form of bullying. In that regard, the provisions of the FWA might have provided some guidance to the Joint Committee, but there was no reference to that legislation, despite its clear application[32]. No doubt this was because of the narrow focus of the inquiry, but the legislation now passed is the poorer for this omission.

17. Gelber and McNamara also assert that racism is prevalent (albeit not all racism necessarily meets the definition in s 18C) and as such, one would expect much higher incidence of complaint. However, their research shows that there is a great lack of familiarity with the laws. Further, where people are aware of those laws, they do not think they can rely upon them, or doubt they have the skills or resources to access them[33]. In this context, they make the point that making individuals liable for enforcing public wrongs is problematic[34] when the public wrong seeks to redress a power imbalance and the person required to right the public wrong is the person with the least power and resources in the relevant interaction[35].

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[31] Being Part 6-4B of the *Fair Work Act 2009 (Cth).*

[32] There is not even a mention of the word "bullying". While such reports are often only as good as the applications made thereto, the ability to provide assistance by way of application requires an effective consultation process whereby the possible recommendations are clearly articulated and comment sought.

[33] Gelber, K. & McNamara, L.; "Anti-vilification and Public Racism in Australia – Mapping the Gaps Between the Harm Occasioned and the Remedies Provided" (2016) 39 UNSWLJ 488; 507.

[34] Gelber and McNamara, "Private Litigation To Avoid a Public Wrong g: A Study of Australia's Regulatory Response to 'Hate Speech'" (2014) 33 *Civil Justice Quarterly* 307; 332.

[35] Gelber and McNamara, "Private Litigation To Avoid a Public Wrong g: A Study of Australia's Regulatory Response to 'Hate Speech'" (2014) 33 *Civil Justice Quarterly* 307; 332.

18. Certainly, it is my experience and observation of such claims that the personal cost of pursuing such litigation is significant. It is emotionally, financially and psychologically fraught. This is particularly so where the outcome of the treatment has resulted in a psychiatric injury, the proper management of which, is unlikely to recommend litigation.

HISTORY OF THE 18C DEBATE

19. It is important to properly site the changes (both proposed and made) within the historical framework of legislation aimed at preventing racism.

20. As noted by the former Human Rights Commissioner Mr Tim Wilson[36] the inclusion of Pat IIA of the RDA came after three significant independent inquiries[37]. Those inquiries made a range of different recommendations with regard to tackling racism in Australia including both civil and criminal penalties as set out below.

    a. The Royal Commission into Aboriginal Deaths in Custody[38];

    b. the Australian Human Rights Commission's National Inquiry into Racist Violence in 1991 [39]; and

    c. The Australian Law Reform Commission's inquiry, Multiculturalism and the Law[40].

    The findings from these inquiries were clear: racism was a problem in Australia. It undercuts and undermines people's ability to participate in a functional way in society.

21. In 1995, after nearly a year of Parliamentary debate[41], federal Parliament adopted the *Racial Hatred Act 1995* (Cth), thus inserting Part IIA[42] into the

[36] Who has been the who has been liberal Member for Goldstein in the Australian House of Representatives since he ceased being the Human Rights Commissioner in about 2016.
[37] Wilson T.; "Another 'aberration' shows 18C is a problem and must be changed"; The Australian; 6 February 2016; accessed at < http://www.theaustralian.com.au/opinion/another-aberration-shows-18c-is-problem-and-must-be-changed/news-story/378d02cca93b0eec3d934e3f12a7fb72> on 13 April 2016. In relation to the QUT litigation, ultimately dismissed see: Prior v *Queensland University of Technology & Ors (No.2)* [2016] FCCA 2853 (4 November 2016) ("*Prior v QUT*") as per Jarrett J.
[38] Commissioner Johnston, E. QC; Royal Commission into Aboriginal Deaths in Custody; AGS (Canberra); 15 April 1991.
[39]Federal Race Discrimination Commissioner Moss, I. and Commissioner Castan, R. QC; Racist Violence – Report of the National Inquiry into Racist Violence in Australia; AGS (Canberra);27 March 1991.
[40]ALRC Report 57 –Multiculturalism and the Law; 1992; < http://www.austlii.edu.au/au/other/lawreform/ALRC/1992/57.html > accessed on 29 March 2017.

Racial Discrimination Act 1975 (Cth) ("RDA"). The then Attorney General, Michael Lavarch MP, spoke for the amendments to the *RDA* inserting Part IIA stating,

> *"This bill is an appropriate and measured response to closing the identified gap in the legal protection of all Australians from extreme racist behaviour.* ***It strikes a balance between the right of free speech and other rights and interests of Australia and Australians****. It provides a safety net for racial harmony in Australia and sends a clear warning to those who might attack the principle of tolerance. And importantly this bill provides Australians who are the victims of racial hatred or violence with protection[43]."*

22. The assertion of "balance" described above, lasted at least until the end of 2011, with the decision of Justice Bromberg in *Bolt*[44]. The ensuing media furore[45] made it clear that many (or at least many with media access) believed that section 18C did not sufficiently balance "the right to free speech" against sanction under the RDA. It remained an issue during the 2013 federal election campaign and the then Liberal Party in Opposition made promises to amend it if they came to power. The Liberal party was successful in that election, but in August 2014, the then Prime Minister Tony Abbott made a "leadership call", deciding not to pursue amendment of section 18C[46]. However, the debate did not abate. Indeed, in September 2016 a Private Members Bill was unsuccessfully introduced to repeal Part IIA of the RDA in its entirety[47].

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[41] Amendments to Pat IIA, Racial Discrimination Act Australian Human Rights Commission submission to the Attorney General's Department; (Australian Human Rights Commission) Sydney; 28 April 2014; 13; [50].
[42] Comprising sections 18B-18E.
[43] The Hon Michael Lavarch MP, House of Representatives – Hansard, 15 November 1994, p 3336.
[44] Eatock v Bolt (2011) 197 FCR 261 ("*Bolt*").
[45] See for example, Miranda Devine, 'Bolt Case Has Ominous Echo', Herald Sun (Melbourne), 30 September 2011, 40 and Jonathan Holmes, 'Bolt, Bromberg and a Profoundly Disturbing Judgment', ABC News (online), 30 September 2011 <http://www.abc.net.au/news/2011-09-29/holmes-bolt-bromberg-and-a-profoundly-disturbing-judgment/3038156> cited in Stone, A.; "Liberty Privacy, the Media and the Press Council, The Ironic Aftermath of Eatock v Bolt" (2015) 38 MULR 926; 927.
[46] Aston, H.; "Tony Abbott dumps controversial changes to 18C racial discrimination laws"; The Sydney Morning Herald; 5 August 2014; at <http://www.smh.com.au/federal-politics/political-news/tony-abbott-dumps-controversial-changes-to-18c-racial-discrimination-laws-20140805-3d65l.html> accessed 27 March 2017.
[47] *Racial Discrimination Law Amendment (Free Speech) Bill 2016 (Cth)* ("Private Members Bill") introduced by Senators Leyonhjelm, Burston, Culleton, Day, Hanson, Hinch and Roberts.

23. Finally, on 8 November 2016 (under Prime Minister Turnbull) and only four days after the *QUT*[48] decision was handed down, the current Attorney General George Brandis referred an inquiry to the *Parliamentary Joint Committee on Human Rights* ("Joint Committee") under Terms of Reference requiring it to consider two matters.

> *"The first is whether the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) (including ss. 18C and 18D) impose [sic] unreasonable restrictions on freedom of speech. The second,[sic] related,[sic] matter, is whether the complaints-handling procedures of the Australian Human Rights Commission should be reformed. The reference has been made under s. 7(c) of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)[49].*

24. During the hearings, the Attorney General George Brandis QC told the Parliamentary Joint Committee on Human Rights,

> *"If we don't believe in freedom of expression for people we despise we don't believe in it at all," Senator Brandis said. "Those are not my words, those are the world of Noam Chomsky, not somebody I am often given to quoting.*[50]*"*

25. While such words are a *cri de coeur* for freedom of speech, they disguise the practical effect to which such neutrally worded legislation (of which s18C is a kind) may operate. As Zanghellini states,

> *A problem with this neutral approach is that the relevant law may be applied in a way that reinforces current social hierarchies. Thus, in the British context the relevant (neutrally worded) racial anti-vilification law 'was used, at least in its first decade of operation, more effectively against Black Power leaders than against white racists.'*[51]

Joint Committee Findings

26. The Joint Committee delivered their report on 28 February 2017 ("Report") (discussed further below). The recommendation in relation to s 18C was framed so as to simply list a range of proposals, which had the support of "at least one member of the committee" as set out below.

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[48] *Prior v Queensland University of Technology & Ors (No.2)* [2016] FCCA 2853 (4 November 2016) ("*QUT*"). Striking out some of the claim again three respondents.
[49] Press Release of the Attorney General George Brandis QC on 8 November 2016. Terms of Reference attached to the Press Release are provided at Attachment A of this paper.
[50] "18C: Triggs blasts government's proposed changes in the Senate Hearing"; The Australian; 24 March 2017; at <http://www.theaustralian.com.au/national-affairs/18c-triggs-blasts-governments-proposed-changes-in-senate-hearing/news-story/d92b594be7aef971c0d4ed2679e79b48> accessed on 24 March 2017.
[51] Zanghellini, Aleardo --- "Jurisprudential Foundations for Anti-Vilification Laws: The Relevance of Speech Act and Foucauldian Theory" [2003] MelbULawRw 17; (2003) 27(2) Melbourne University Law Review 458; 459.

"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." [52]

27. That is, not only was there no consensus as to what, if anything ought be done to change the RDA, but the above list shows those on the Committee could not agree with whether s 18C went too far or not far enough. In relation to the suggestion that criminal provisions "be ….investigated" it was the lack of support for this kind of provision in 1995 that lead to the present civil version. Interestingly, most states have criminal provisions (discussed below) and so it is questionable whether further legislation at the federal level is required in this regard[53].

28. In so far as the Explanatory Memorandum relied upon the Report in order to recommend the changes to ensure "procedural fairness[54]", it is clear that nowhere in the report was there any reference to a lack of procedural fairness in the handling of complaints before the AHRC.

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[52] 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) ("Report"); (Commonwealth of Australia) Canberra; 2017; pp ix-x.

[53] Although damages under federal legislation are uncapped compared to, for example, the *Anti-Discrimination Act 1977 (NSW)* ("ADA").

[54] *Explanatory Memorandum*; [14].

Other recommendations

29. The Report made a number of other recommendations many of which were not expressly included in the RDA Amendment Bill including:

    a. that there be more education programs to address racism including the meaning to be given PartIIA of the Racial Discrimination Act 1975 (Cth) ("RDA") [55];

    b. ensuring that respondents were notified of complaints around the same time[56] (made subject to exceptions in the RDA Amendment Bill where the President is satisfied that notification would be likely to prejudice the safety of a person[57];

    c. the Parliamentary Joint Committee become an oversight committee of the AHRC[58];

    d. requiring the AHRC to provide assistance to respondents consistent with the assistance provided to complainants[59];

    e. adopting some time limits (with flexibility as appropriate) for the handling of cases[60];

    f. requiring legal practitioner involved in complaints to certify complaints have reasonable prospects of success[61];

    g. empowering the AHRC to make costs orders against practitioners and complainants to prevent frivolous claims[62];

    h. changing the grounds on which a complaint may be terminated (under s 46PH of the Australian Human Rights Commission Act 1986 (Cth) ("AHRCA") including termination where there is 'no reasonable prospect of success' and a requirement to consider the exemptions in s 18D of the AHRCA;

    i. amending s 46PO of the AHRCA to have the effect that a termination for relevant grounds in 46PH(1) (as amended and including a finding

[55] Paragraph 2.137 Recommendation 1; Report; ix.
[56] Paragraph 3.127 Recommendation 5; Report; 89.
[57] Section 36 inserting ss (6) to (10) at the end of s 46PF; *RDA Amendment Bill*.
[58] Paragraph 3.125 Recommendation 4; Report; x.
[59] Paragraph 3.129 Recommendation 4; Report; x.
[60] Paragraph 3.131 Recommendation 4; Report; xi. Noting the RDA Amendment Bill provided sections requiring AHRC to act expeditiously: s 10 inserting (9)-(12) at the end of section 320 AHRCA and s 15 inserting (4)-(7) at the end of s 32 AHRCA, requiring AHRC "*must use the Commission's best endeavours to finish dealing with the complaint within 12 months after the complaint was made*" but noting that duty is not enforceable in Court.
[61] Paragraph 3.138 Recommendation 10; Report; xi.
[62] Paragraph 3.139 Recommendation 10; Report; xi.

that there were 'no reasonable prospects of success') would preclude application to the Courts unless the Court grants leave;

j. appointing a judge as a part-time member of the AHRC to perform the President's functions in dealing with initial complaints under Part IIA of the RDA;

k. the AHRCA to be amended to make explicit the costs consequences for unsuccessful applicants (and their lawyers if action is commenced that did not have reasonable prospects); and

l. applicants making application to Courts for determination of claims under Part IIA of the RDA be required to provide security of costs.

30. Of course, *Brandy*[63], made it clear that the AHRC could not exercise the powers of a Court and so there could be no amendment allowing AHRC to make costs orders in relation to the bringing of complaints. Likewise, the submissions from the AHRC as to the extent of their resources[64] put paid to those recommendations that they ought to be doing more.

31. The focus of the review was (apparently) squarely on discouraging unworthy complaints under Part IIA of the RDA and ensuring such claims do not find their way into court. However, many of the recommendations would have had the effect of discouraging complaints that have reasonable prospects of success. In particular, the idea of imposing a standard requirement that an applicant provide security for costs in circumstances other than those already available under existing legislation would effectively put this kind of litigation outside the reach of most people, let alone those for whom these laws were made to protect, who are often those with the least resources.

32. The legislation now enacted[65] certainly:

a. imposes greater hurdles to applicants, including the requirement for the Court to take into account any offers made during conciliation of a complaint (entirely confidential previously – as per s 46PSA of the Amending Act) and

b. grants greater powers to the President of the Australian Human Rights Commission, effectively allowing them to bring complaints to an end with limited review by the Courts[66].

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[63] *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.
[64] *Report;* 84, [3.105], in which the AHRC noted as a result of "budget restraints" its investigation and conciliation service (ICS) now had approximately 24% fewer staff than it did three years ago.
[65] *Human Rights Legislation Amendment Bill* 2017 (Cth) ("Amending Act"). A short comparison table found at the end of this paper.
[66] Which are allowed to grant leave for terminated complaints to continue (as per s 46PO(3A) of the Amending Act), the basis upon which such leave shall be granted being a matter difficult to determine in the absence of case law.

33. In relation to the latter matter, it was the case that each of the matters listed under s 46PH prior to the Amending Act, provided a basis for the President to terminate and the termination provided jurisdiction to the Court. Now, termination means an end to the complaint (without leave being granted by the Court) unless the termination is on one of two grounds, being:

    a. where the President terminates the complaint under s 46PH(1)(h) (i.e. where 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

    b. s 46PH(1B)(b) (i.e. where the President is satisfied that ""there is no reasonable prospect of the matter being settled by conciliation".

    In addition, there is no guidance provided as to how that discretion ought to be exercised. In that regard, it could be that the example of other similar legislation is to be followed, such as that found in NSW under the ADA, which has a similar regime in which the NSW Civil and Administrative Tribunal determines the matter anew (rather than as a review of the President's decision).

34. The matters set out in the two paragraphs immediately above, mark a fundamental shift in the work done and approach taken by the AHRC to date and are likely to greatly reduce the number of matters being the subject of application before a relevant Court. This, despite the fact that the current framework already provides plenty of discouragement for complainants. Further, the new 6 month (discretionary) limitation is arguably inconsistent with the indirect discrimination provisions found in the *Disability Discrimination Act 1992 (Cth)* ("DDA"), which prevent discrimination on criteria that applies equally to everyone, but has a disproportionate effect on individuals with a disability. In this context, it is my experience that those who have a psychiatric injury because of the discrimination are less likely to commence within the 6 month period, which is often crucial to recovering from the treatment in order to be able to cope with litigation. Further, the full extent of the injury is not always apparent before 2 years have elapsed, thus the Amending Act, making changes without consultation with disability advocates is likely to significantly disadvantage those with a disability arising from the discrimination.

35. It is the case that discrimination law in Australia has become one of the most complex jurisdictions, one that is almost impossible to navigate without legal assistance. In that context, applicants wishing to pursue such claims must therefore bear the burden of paying legal costs associated with doing so, along with the substantial risk that they may also be liable for legal costs associated with losing a claim.

36. It is no secret that respondents often spend much more on defending these claims than applicants have available to litigate these claims. Indeed, the former Disability Discrimination Commissioner, having successfully sued Railcorp in 2013 over their failure to make station announcements[67], applied under freedom of information laws to get access information regarding the

[67] *Innes v Rail Corporation (NSW) (No 2)* (2013) 273 FLR 6.

level of funds used to defend his claim (heard over only 5 days by the then Federal Magistrates Court) and they amounted to a very substantial amount (i.e. more than $400,000[68]). That was an amount for which he may have been liable if he had lost. That risk of being liable for a respondent's legal costs is a very significant disincentive to all applicants in these types of claims - particularly where the outcome is often not about damages, but social change in a particular context.

Failure of the RDA Amendment Bill to Pass the Senate (31 March 2017)

37. When it became clear that the amendments referred to in the above would not be passed with the relevant amendments to section 18C of the RDA, it was amended once again to seek only changes to the *Australian Human Rights Commission Act 1986 (Cth)* ("AHRCA") and other consequential amendments[69]. As noted above, only the legislation amending the AHRCA was passed.

THE NAMED CASES – BOLT, LEAK AND QUT

38. In order to understand how section 18C has been called into question, it is necessary to understand the history and cases said to justify the changes.

Bolt

39. The Herald and Weekly Times Pty Ltd published an article by Mr Andrew Bolt in the *Herald Sun* on several occasions in April 2009. The title of the original article was: "It's so hip to be black". It was also published by the Herald and Weekly Times Pty Ltd on its website, under the title "White is the new black" on or about 15 and 16 April 2009. A second article written by Mr Bolt was also published in the *Herald Sun* under the title "White fellas in the black" on 21 August 2009. It was also published on the website, under the title "White fellas in the black" ("Articles").

40. The Applicant in that case argued that the Articles contravened s 18C because they were offensive in their assertion that fair-skinned Aboriginal people:

    a. were not genuinely Aboriginal and/or

    b. falsely identified as Aboriginal to access benefits associated with Aboriginality.

41. The Respondent, Mr Bolt gave evidence that he wrote the articles to describe a "trend" of persons of mixed genealogy choosing to identify as Aboriginal, and that it was that act (of self-identifying) that lead to the undesirable consequence of emphasising racial differences, rather than common humanity. It was otherwise argued in his defence that:

[68] < http://www.smh.com.au/nsw/disability-case-costs-railcorp-420000-20130328-2gxn5.html>.
[69] Amending Act.

a. Pt IIA of the Act (which included s 18C) was restricted in its application by reason of its heading: "Prohibition of offensive behaviour based on racial hatred";

b. the elements of s 18C of the Act were not satisfied; and

c. his conduct should in any event have been excused pursuant to s 18D of the Act.

42. The Court made the following findings.

a. A person of mixed heritage including some Aboriginal descent, who identifies as an Aboriginal person and has communal recognition as such, is an "Aboriginal Australian" as conventionally understood. Such persons are entitled to expect that other Australians would recognise and respect their identification as an Aboriginal Australian[70].

b. The heading in Part IIA of the RDA did not restricted s 18C only to extreme racist behaviour based upon racial hatred or behaviour calculated to induce racial violence[71].

c. Whether conduct is reasonably likely to offend a group of people within the meaning of s 18C(1)(a) of the Act, is to be analysed from the point of view of a hypothetical representative of that group with characteristics to be expected of a member of a free and tolerant society[72].

d. (Following well settled case law), the phrase "offend, insult, humiliate or intimidate" in s 18C(1)(a) of the Act are interpreted to involve a public mischief, beyond personal hurt, and refers to conduct that has profound and serious effects, *not to be likened to mere slights*[73].

e. Australia Aborigines have a long-shared history and culture and are a race with a common ethnic origin[74].

f. Whether an act is done "reasonably and in good faith" within s 18D of the Act involves a consideration of the subjective and the objective elements[75].

g. The imputations in the articles were also not "fair comments" able to be excused by s 18D(c)(ii) of the Act. Some of the facts on which the comments relied, which focused on named individuals' "choice" of

[70] *Bolt*; [188]-[189].
[71] *Bolt*; [206]-[209].
[72] *Bolt*; [250]-[255] following *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352; *Jones v Scully* (2002) 120 FCR 243, followed. *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, applied.
[73] *Bolt*; [267]-[268].
[74] *Bolt*; [314]. Following *Mandla v Dowell Lee* [1983] 2 AC 548.
[75] *Bolt*; [347]-[350]. With discussion of *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105.

identity, motivation for such choice and a biological rather than cultural examination, were untrue and/or deficient[76].

h. The articles were not written "reasonably and in good faith" as required by s 18D of the Act because untruthful facts were included, as was inflammatory and provocative language. There was also the failure to minimise the possible degree of harm caused by the conduct. Thus, the articles did not advance freedom of expression in a way designed to honour the values asserted by the Act, including the promotion of racial tolerance[77].

43. In obiter Bromberg J stated that section 18D(b), which involves the pursuit of a genuine purpose "in" the public interest as opposed to a matter "of" public interest, requires the pursuit of a public benefit beyond freedom of expression[78].

44. In this context, the Court held that the writing of the Newspaper Articles for publication by Mr Bolt and the publication of them by the Herald and Weekly Times Pty Ltd contravened s 18C of the RDA because,

(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

[76] *Bolt*; [384], [397]-[399]. *Peterson v Advertiser Newspapers Ltd* (1995) 64 SASR 152, considered.
[77] *Bolt*; [412]-[415], [425], [439]-[440].
[78] *Bolt*; [433]-[434].

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.

45. The Court also made orders including requiring the Herald Sun to publish a statement to the effect they had breached the RDA in the newspaper in print and on line.

LEAK

46. This matter never proceeded to a hearing as the complainants withdrew it. It concerned a cartoon in which an Aboriginal man holding a beer can is asked by an Aboriginal police officer to speak to his child about personal responsibility. The father responds by asking his child's name (i.e. as if he does not know his own child's name).

47. The real allegation in this context was that the AHRC had solicited complaints. An allegation not definitively determined by the Report[79]. There were two complainants and the matter never proceeded to litigation before any Court.

48. The Report cites Leak as stating,

> *"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…[80]"*

49. Mr Paul Zanetti (another cartoonist), also gave evidence before the Committee stating,

> *"I am more exposed than Bill [Leak] 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.[81]"*

[79] Report; 105.
[80] Report; 14, [2.32].
[81] Report; 14, [2.33].

50. Mr Zanetti himself was subjected to a complaint under s 18C for a cartoon he drew about "abuse of Aboriginal children in remote communities"[82]. That cartoon was published on 4 July 2009, in the *Kalgoorlie Miner* (under the editorship of John Horner at the time). The Australian has reported that the then editor remains unrepentant and the settlement that was offered was made because of the likely exposure to legal costs if the matter proceeded[83].

51. While Mr Zanetti said he was concerned about the ramifications of s 18C on his freedom of expression and the exposure to legal costs. He has since made a complaint (along with former Australian Liberty Alliance senate candidate Mr Bernard Gaynor) against indigenous MP Linda Burney's comment following the announcement of the Committee's inquiry that,

> *"It astounds me that the people that are advocating for the removal of 18C are basically white men of a certain age that have never experienced racial discrimination in their life.*[84]"

52. That is, while he thinks the laws are contrary to freedom of speech he is happy to used them when they suit his purpose. This would tend to support Zanghellini's observation that neutrally worded laws are often successfully used against minorities.

QUT[85]

53. The QUT litigation sprang from a case where three non-indigenous students sought to use the indigenous dedicated computers located in the Oodgeroo Unit at the Gardens Point campus of QUT. One of the respondents, Alex Woods, was about to log on to a computer in the lab when a Ms Prior approached them and asked them if they were indigenous. They told her they were not. In response, she said words to the effect: "*Ah ... this is the Oodgeroo Unit, it's an indigenous space for indigenous students at QUT. There are other computer labs in the University you can use. There are computers in "P" block or the library that you can access*". The men left the computer lab.

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[82] Zanetti, P.; "Australian Human Rights Commission's Discrimination - And My Reply"; Zanetti'sview.com; 4 April 2017; <http://zanettisview.com/story/australian-human-rights-commissions-discrimination-and-my-reply/3799>.
[83] Merrit, C.; "18C debate: Media needs freedom to cover all indigenous affairs"; The Australian; 22 October 2016 http://www.theaustralian.com.au/news/inquirer/18c-debate-media-needs-freedom-to-cover-all-indigenous-affairs/news-story/1fc37d822563fa2a66bdff6eaa655c24 accessed 4 April 2017.
[84] As reported in SBS News "White men file complaint claiming Indigenous MP Linda Burney has been racist to them"; 11 November 2016; <http://www.sbs.com.au/news/article/2016/11/11/white-men-file-complaint-claiming-indigenous-mp-linda-burney-has-been-racist-them> accessed 4 April 2017.
[85] *Prior v Queensland University of Technology & Ors (No.2)* [2016] FCCA 2853 (4 November 2016) ("*QUT*").

54. Mr Wood found another available computer in another part of the Gardens Point campus. He logged onto his Facebook account and accessed a "Facebook page" called "QUT Stalker Space". He posted a comment as follows:

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

55. Thereafter followed a number of posts by various people who were able to post comments to that Facebook page, including:

    a. A post by the sixth respondent, Jackson Powell: "*I wonder where the white supremacist computer lab is";*

    b. A later post by Mr Powell in response to another unidentified post: "*...it's white supremacist, get it right. We don't like to be affiliated with those hill-billies";* and

    c. a final post by Mr Powell responding to the ninth respondent, Chris Lee, "*Chris Lee today's your lucky day, join the white supremacist group and we'll take care of your every need!"*

56. Ms Prior also argued that the seventh respondent Callum Thwaites, posted an entry to the "QUT Stalker Space" Facebook page to the effect of "*ITT niggers"* and that Mr Wood, Mr Jackson and Mr Thwaite's is that each of the messages posted to the "QUT Stalker Space" Facebook page.

57. Jarrett J dismissed the Applicant as against three of the Respondents (Powell, Thwaites and Lee) but left the remainder of the application in place to be determined at a later hearing for the reasons summarised below.

    a. Mr Wood was responsible for two comments. The first ("got kicked out") was a statement of fact and unable to offence s 18C. In relation to the second ("*QUT stopping segregation with segregation...?"* [86]*)* Jarrett J stated that it could not proceed because the Applicant would be unable to make out the act was done because of Ms Prior's race and also because it was[87],

> *"not reasonably likely that a hypothetical person in the position of the applicant, or a hypothetical member of the groups identified by Ms Prior who is a reasonable and ordinary member of either of the groups who exhibits characteristics consistent with what might be expected of a member of a free and tolerant society and who is not at the margins of those groups would feel offended, insulted, humiliated or intimidated by Mr Woods words. This is so because:*

[86] QUT; [44].
[87] QUT; [49].

- *Mr Wood's words were directed to QUT and its actions; and*

- *Mr Wood's word*s were rallying against racial discrimination."

b. The same reason as set out in the quote (immediately above) was given about Mr Powell, noting *"in my view that Mr Powell's posts are a poor attempt at humour… s.18C(1)(a) is not concerned with tasteless jokes, or "smart Alec" remarks, unless there is a likelihood that it will in all the circumstances either offend, insult, humiliate or intimidate the members of the relevant group*[88]*".* Further it was held Ms Prior could not prove a connection between her race and the acts.

c. It was held that Mr Thwaites was not liable because he denied posting the relevant messages and the Court held that as the Applicant could not prove he was the author of the quotes, the fact his name was used did not make out a prima facie case[89].

ARE THERE A GREAT MANY COMPLAINTS?

58. As the below analysis of the Annual Reports of the Anti-Discrimination Board of NSW, the AHRC and the Federal Circuit Court and the Federal Court show, there is not a great deal of litigation concerning s 18C. A fact noted by others writing in relation to s 18C of the RDA[90].

59. In New South Wales, the Anti-Discrimination Board of NSW received 1058 complaints under the Anti-Discrimination Act 1977 (NSW) ("NSW ADA") in the financial year ending 30 June 2015 [91], only 28 of which (2.6% overall) concerned racial vilification. In that same year there were no decisions[92] concerning racial vilification[93]. Likewise there were none in 2016. There has been one decision in 2017 in which the Tribunal held against the Applicant, stating in conclusion,

> *"The Tribunal finds that the display of the sign [*[94]*] on the dividing fence caused deep distress to Mr Droga. He was intimidated by it. There is a poignancy to the composition of the sign. The message,*

[88] QUT; [65]-[67].
[89] QUT; [75].
[90] Thampapillai, D.; "Inconsistent at Best?: An analysis of Australia's Federal Racial Vilification Laws" (2010) Canberra Law Review 1; 2.
[91] Anti-Discrimination Board of NSW Annual Report 2014-2015; NSW Government (Sydney); 2015; 4.
[92] "Decisions" being defined as final determination at first instance of a complaint referred by the President and not requiring leave to proceed under s 96 of the ADA NSW.
[93] Review by author of Austlii data bases on 27 March 2017.
[94] The sign had a swastika, a drawing of a person hanging from a gallows, the words "You should never have picked on my family. Now you pay" all hand drawn/written on the sign.

communicated by a combination of a swastika and the gallows, in the context of Mr Droga's Jewish ethnicity was deeply disturbing to Mr Droga.

The provisions against racial vilification are however, directed at public acts. In these circumstances the Tribunal is not satisfied that there has been a "public act" as required by section 20B of the Anti-Discrimination Act, 1977.

For this reason, the complaint of racial vilification is dismissed."[95]

60. The Australian Human Rights Commission's ("AHRC") statistics show that it receives between 2100 to 2600 complaints of discrimination (pertaining to all grounds), each year for the past five years[96]. Of those about a quarter to a half are termination, around half are conciliated and the remainder are withdrawn, discontinued or referred for reporting. While the AHRC does not break down the complaints to provide statistics for each type of discrimination, it is clear that racial discrimination (of which racial vilification makes up around a quarter (cir. 24%) of complaints[97]. Around 67% of complaints under the RDA are resolved at conciliation, leaving around 33% unresolved[98], which either are not pursued or become the subject of proceedings before the Federal Circuit Court of Australia ("FCCA") or the Federal Court of Australia ("FCA") [99].

61. In relation to the time it takes to finalise complaints, just under half of all complaints were finalised within 3 months (47%), 82% were finalised within 6 months, 95% within 9 months and 99% within 12 months. From receipt to finalisation of a complaint was, on average, approximately 3.7 months[100]. In this context, the allegations that the AHRC was somehow recalcitrant in dealing with complaints as a matter of course is not substantiated and any changes proposed based on dealing with complaints in a timely fashion was not properly made.

62. Once matters proceed to the FCCA there is, as a matter of general policy, a further mediation, usually after the pleadings and before evidence is filed and served. In that context, the data discloses the following outcomes noting there is no break down for each type of discrimination.

63. In relation to human rights claims before the FCCA in the year ending 30 June 2015:

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[95] *Droga v Birch* [2017] NSWCATAD 22 (13 January 2017) ("*Droga*").
[96] Australian Human Rights Commission Annual Report 2014-2015; 2015 (Sydney); Appendix 1; 139.
[97] Ibid; 144.
[98] Ibid; 144.
[99] The statistics are similar if not the same for complaints mediated in relation to the other ground of discrimination under federal legislation. Ibid; 144.
[100] Ibid; 137.

a. Human rights claims made up just 1% of the claims before the FCCA, noting there were around 89 claims[101];

b. Of the claims before the FCCA, only around 49% had been referred for mediation[102];

c. Around those that had been mediated slightly more than half (around 54%) were successfully resolved at mediation than not; and

d. In that same year only nine claims human rights claims were heard, which tends to indicate that only around 1 in ten proceed to full hearing, and of those three were unrepresented[103]; and

e. There is no hard data on the time it takes to finalise a matter filed in this jurisdiction.

64. In relation to human rights claims before the Federal Court of Australia ("FCA"):

a. It is not possible to tell how many human rights claims come before the court because they are reported in concert with Administrative Law and Constitutional claims[104];

b. In 2015, only 16 claims that had been referred to mediation had been resolved, 12 successfully and 4 without resolution[105].

65. Reviewing the decisions in both the FCCA and the FCA contained in Austlii discloses a that there were around six[106] decisions concerning section 18C, of which only two were determined in favour of the Applicant[107].

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[101] Federal Circuit Court of Australia 2014-2015 Annual Report; Commonwealth of Australia (Canberra); 2015; 59 and 71.

[102] Ibid; 71. Noting that not all matters mediated in the reporting period will have been filed or even referred to mediation in the reporting period. Matters that are referred to mediation at the end of the reporting period may be mediated in the following reporting period.

[103] See Attachment A to this paper.

[104] Federal Court of Australia 2014-2015 Annual Report; Commonwealth of Australia (Canberra); 2015; 157.

[105] Ibid; 163.

[106] *Folkes* [2015] FCA 1288 (11 December 2015) ("Folkes") decision of Rares J for interlocutory injunction preventing further publications on a "Cronulla Riots Memorial Page"; *Murugesu v Australian Postal Corporation & Anor* [2015] FCCA 2852 (12 November 2015) ("*Murugesu*") a decision of Burchardt J holding that there was racial discrimination under section 9 but not vilification under s 18C; *Ejueyitsi v Commissioner of Police (Western Australia) (No.2)* [2015] FCCA 494 (9 March 2015) ("*Ejueyitsi*") a decision of Lucev J dismissing the application inclusive of a claim under s 18C; *Edwards v State of New South Wales* [2015] FCCA 124 (17 February 2015) ("*Edwards"*); decision of Driver J dismissing the application inclusive of a claim under s 18C; *Haider v Hawaiian Punch Pty Ltd* [2015] FCA 37 (6 February 2015) ("*Haider*") decision of Mansfield J upholding a claim awarding $9,000.00 plus costs (in which the Applicant was told to "go back to his own

66. What these figures show is that human rights proceedings are a very small proportion of the overall work of the FCCA and the FCA. A big difference between these two jurisdictions are the applicable costs provisions[108]. Having regard to these figures, it is difficult to maintain that excessive litigation is a feature of claims under federal or state discrimination laws.

CURRENT LEGISLATION AND CASE LAW

Federal Legislation and Case Law

67. At the outset, it is important to note that regardless of what occurs in relation to Commonwealth discrimination laws, there are still similar laws in each of the states[109]. Having said that the federal law clearly adopts a lower threshold of harm. The formulation was not entirely untested and was based on the sexual harassment provisions contained in the *Sex Discrimination Act 1984* (Cth)[110]. Indeed, they could form a basis for amending Part IIA[111].

68. The current wording of s 18C and s 18D of the RDA is set out in Attachment B to this paper. There are three limbs to the test for unlawful conduct contained in section 18C:

    a. The act must be done in public;

    b. It must be reasonably likely to offend, insult, humiliate or intimidate the people against whom it is directed; and

    c. It must be done because of the race, colour or national or ethnic origin of the group against whom it is directed.

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country", "Australia is a white peoples' country", and that "you not white"; abused and asked to produce his visa before being pushed in the chest causing him to stumble backwards a few steps without falling).

[107] *Folkes* and *Haider*.

[108] See section 79 of the *Federal Circuit Court of Australia Act 1999* (Cth) and Schedule 1 of the *Federal Circuit Court Rules 2001 (Cth)* ("FCCR") or section 43 of the *Federal Court of Australia Act 1976* (Cth) and Part 40 Costs of the *Federal Court Rules 2011 (Cth) ("FCR").*

[109] See for example: Part 2 Division 3A of the *Anti-Discrimination Act 1977 (NSW)* ("ADA NSW"); s 124A *Anti-Discrimination Act 1991 (Qld)* ("ADA Qld"); s 73 of the *Civil Liability Act 1936 (SA)* ("CLA SA") and the Racial Vilification Act 1996 (SA).

[110] As noted by Gelber, K. & McNamara, L.; "Anti-vilification Laws and Public Racism in Australia – Mapping the Gaps Between the Harm Occasioned and the Remedies Provided" (2016) 39 UNSWLJ 488; 498.

[111] E.g.: "*For the purposes of this Division, a person racially harasses another person (the person harassed) if the person engages in unwelcome conduct of a racial nature in relation to the person harassed in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated."*

"in public"

69. Section 18C regulates only public speech. That is, where it is capable of being heard by the public[112].

Reasonably likely to offend, insult, humiliate or intimidate

70. The courts have consistently held that the standard to be met in relation to this test is conduct that has "profound and serious effects, not to be likened to mere slights"[113]. As noted by Bromberg J in *Bolt*[114],

> *"The definitions of 'insult' and 'humiliate' are closely connected to a loss of or lowering of dignity. The word 'intimidate' is apt to describe the silencing consequences of the dignity denying impact of racial prejudice as well as the use of threats of violence. The word 'offend' is potentially wider, but given the context, 'offend' should be interpreted conformably with the words chosen as its partners."*

71. The heading (i.e. "Prohibition of offensive behaviour based on racial hatred") does not operate to require more serious consequences and ought to be interpreted to "narrow the field of operation" of the section, Bromberg J holding,

> *"Those words and the legislative history do not support Mr Bolt's contention that the operation of Pt IIA is restricted to extreme racist behaviour based upon racial hatred or behaviour calculated to induce racial violence. The following legislative history and judicial consideration of it confirms that conclusion.*[115]*"*

72. As noted by Bromberg J in *Bolt*,

> *"The act which s 18C(1)(a) makes unlawful is not dependent upon a state of emotion which has either motivated the act or which is sought to be incited in others. The "intensity of feeling of the person whose act it is, is not necessary to be considered": Creek v Cairns Post Pty Ltd (2001) 112 FCR 352 at [18] (Kiefel J). The emotions upon which s 18C(1)(a) turns are those of a victim and not of an aggressor. The emotions of hurt or offence or fear need to be demonstrated, not hate or incitement to hatred. An act that hurts or offends a victim may be driven by hatred or may incite hatred of the victim by others, but hurt or offence may be the product of a benevolent intent and may incite negative attitudes to the victim which fall short of enmity. The section refers to the reason for the act*

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[112] *Campbell v Kirstenfeldt* [2008] FMCA 1356, [42] (Lucev FM); *McLeod v Power* (2003) 173 FLR 31, 47 [73] (Brown FM); *APS Group (Placements) Pty Ltd v O'Loughlin* (2011) 209 IR 351; 359 [17]–[18] (Lawler V-P and Commissioner Roberts).
[113] *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356 [16] (Kiefel J). Following in Bolt; 325.
[114] *Bolt*; 324, [265].
[115] *Bolt*; 307; [196].

being done as simply "race, colour or national or ethnic origin". The act need not be based on racial hatred: Creek at [17]-[18] (Kiefel J). As Allsop J said in Toben at [136]:

> *Many acts comprehended by ss 18B, 18C and 18D will involve an expression of racial hatred, though other acts may not.*

….The use of the word "hatred" in the heading to Pt IIA is not to be "seen as a control upon otherwise clear words that were deliberately chosen, as a departure from previous models" (Toben at [137] (Allsop J)) or as creating a separate test confined to racial hatred (Creek at [18] (Kiefel J)). No member of the Full Court in Toben was of the view that s 18C was to be read down as applying only to cases of racial hatred. [116]"

73. Further, 18C does not extend to personal hurt unaccompanied by some public consequence' or 'public mischief' being the object of the legislation[117].

The act is done because of the race, colour or national or ethnic origin of the group

74. The conduct must be racially-based in order for it to be covered by the legislation. There might be several reasons for an offensive communication and, in such cases, it is only necessary that one of these reasons be race, colour or national or ethnic origin.

Exemptions – 18D

75. The onus is on the respondent to prove any exemptions[118], which require proof that an act is done "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

[116] *Bolt*; 310; [206] and [208].
[117] *Bolt*; 325, [267].

[118] *Eatock v Bolt* (2011) 197 FCR 261; 339, [339] (Bromberg J); *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389; 413, [116] (Barker J).

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.

"Good Faith"

76. The correct test in relation to the concept of 'good faith' is that of French J in *Bropho*[119] French J held:

> *"..[G]ood faith may be tested both subjectively and objectively. Want of subjective good faith, i.e. seeking consciously to further an ulterior purpose of racial vilification may be sufficient to forfeit the protection of s 18D. But good faith requires more than subjective honesty and legitimate purposes. It requires, under the aegis of fidelity or loyalty to the relevant principles in the Act, a conscientious approach to the task of honouring the values asserted by the Act. This may be assessed objectively.*[120]**"**
>
> *"Generally speaking, the absence of subjective good faith, e.g. dishonesty or the knowing pursuit of an improper purpose, should be sufficient to establish want of good faith for most purposes. But it may not be necessary where objective good faith, in the sense of a conscientious approach to the relevant obligation, is required. In my opinion, having regard to the public mischief to which s 18C is directed, both subjective and objective good faith is required by s 18D in the doing of the free speech and expression activities protected by that section."*
>
> *"A person acting in the exercise of a protected freedom of speech or expression under s 18D will act in good faith if he or she is subjectively honest, and objectively viewed, has taken a conscientious approach to advancing the exercising of that freedom in a way that is designed to minimise the offence or insult, humiliation or intimidation suffered by people affected by it. That is one way, not necessarily the only way, of acting in good faith for the purpose of s 18D. On the other hand, a person who exercises the freedom carelessly disregarding or wilfully blind to its effect upon people who will be hurt by it or in such a way as to enhance that hurt may be found not to have been acting in good faith."*
>
> *"It may be that there will be an overlap between the assessment of reasonableness and of good faith. This does not necessarily mean that they overlap conceptually. It just means that there may be common factual elements underpinning them in a particular case.*[121]**"**

77. Carr J stated, in relation to 'good faith' and 'reasonableness':

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[119] *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105 ("*Bropho*").
[120] *Bropho*; 132, [96] as per French J.
[121] *Bropho;* [101]-[103]

> *"In my view, the Commission applied an entirely appropriate test. It took an objective approach, but without excluding evidence of Mr Murray's actual state of mind. I respectfully agree with the primary judge when he expressed the view, at [33] of his reasons, that the focus of the inquiry is an objective consideration of all the evidence, but that the evidence of a person's state of mind may also be relevant.*[122]*"*

78. Lee J (in the minority, but not on this point) stated:

> *"The requirement that an act to which s 18D applies must be shown to have been done in good faith as well as reasonably, will not be met by the publisher asserting that there is an absence of evidence that it acted in bad faith, fraudulently, or with malice. The question whether publication was an act done in good faith must be assessed, in part, by having regard to the subjective purpose of the publisher but overall it is an objective determination as to whether the act may be said to have been done in good faith, having due regard to the degree of harm likely to be caused and to the extent to which the act may be destructive of the object of the Act. (See: Cannane v J Cannane Pty Ltd (In liq) (1998) 192 CLR 557 per Kirby J at 596-597.)*[123]*"*
>
> *"The words 'in good faith' as used in s 18D import a requirement that the person doing the act exercise prudence, caution and diligence, which, in the context of the Act, would mean due care to avoid or minimise the consequences identified in s 18C.*[124]*"*

79. The approach of Lee J has been quoted with approval in later cases including *Clarke*[125], in which Barker J stated,

> *"His Honour* [Lee J], *like French J, considered that whether the publication was an act done in good faith must be assessed, in part, by having regard to the subjective purpose of the publisher, but overall it is an objective determination as to whether the act may be said to have been done in good faith having regard to the degree of harm likely to be caused and to the extent to which the act may be destructive of the object of the RD Act.*[126]*"*

RIGHT TO FREEDOM OF SPEECH IN AUSTRALIA

80. There is no denying that the concept of freedom of speech overlaps with the right to be protected from racial vilification under s 18C. As noted by

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[122] *Bropho;* 149, [178] (Carr J).
[123] *Bropho;* , 142, [141] (Lee J).
[124] p *Bropho;* , 143, [144] (Lee J).
[125] *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389 ("*Clarke*").
[126] *Clarke*; 415, [131].

Bromberg in Bolt[127],*"… for the fundamental common law right of freedom of expression to be eroded, clear words are required: Coleman at [185], [188] (Gummow and Hayne JJ) and [313] (Heydon J).*

81. However, as has been noted numerous times, including by the former Chief Justice of the High Court, Justice French[128], Australia has no express guarantee of freedom of speech. There is an implied freedom of communication on political matters. As Justice French noted (as he was then)[129],

> *Debate about the desirability of both constitutional and statutory Bills of Rights has been going on in Australia for at least 35 years. Attempts to introduce statutory Bills of Rights as Commonwealth law were made in 1973 and 1985. The 1973 Bill which included protection for "freedom of expression" was strongly opposed and was not enacted. It lapsed in 1974 when parliament was prorogued. The 1985 Bill was passed by the Lower House but did not find a majority in the Senate*.
>
> *In 1985 the Attorney-General, Lionel Bowen, established a Constitutional Commission. That Commission recommended the inclusion in the Constitution of a new Chapter VIA guaranteeing specified rights and freedoms against legislative executive or judicial action. A proposed new section 124E specified a number of rights including "(c) freedom of expression". [28]* ***The Commission observed that the Australian Constitution does not place any direct limitation on parliamentary powers to make laws which limit freedom of expression. Laws restricting freedom of expression cover a wide range of subjects. They include defamation, sedition, blasphemy, obscenity, indecency and offensive behaviour, contempt of court and of parliaments, legislation restricting reporting of certain court proceedings, laws regulating advertising, laws governing the importation of books, films, videos and so forth, laws regulating the exhibition of films and the sale of certain types of publications, laws regulating broadcasting and use of postal services and official secrets legislation****."* [Emphasis added.]

82. Indeed, the list of laws are greater today and would include, s 42 of the Australian Border Force Act 2015 (Cth) (causing significant concerns to Australian Health Workers in areas of off shore detention[130]) and s 35 Of the *Australian Security Intelligence Organisation Act 1979 (Cth)*.

83. The key decisions in Australia (delivered at the same time and in 1992) are:

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[127] *Eatock v Bolt* (2011) 197 FCR 261 ("*Bolt*"); 306-307; [192].
[128] French J*.; "*Dialogue Across Difference – Freedom of Speech and the Media in India and Australia, Some Constitutional Comparison*"* (2007*) FedJSchol 16*; [39].
[129] French J,; *ibid;* [43]-[44].
[130] Bradley, M. ; 'Border Force Act: why do we need these laws?"; ABC News; 16 July 2015; http://www.abc.net.au/news/2015-07-16/bradley-border-force-act:-why-do-we-need-these-laws/6623376 accessed 4 April 2017.

a. *Nationwide News*[131] and

b. *ACT v Commonwealth*[132].

84. The date on which these cases were handed down is significant, being three years before the introduction of Part IIA of the RDA. In which case it must be assumed the impact of those decisions were taken into account.

Nationwide News

85. *Nationwide News* arose in circumstances where "The Australian" newspaper published criticism of the Australian Industrial Relations Commission. Amongst other things, the article stated,

> *"The right to work has been taken away from ordinary Australian workers. Their work is regulated by a mass of official controls, imposed by a vast bureaucracy in the Ministry of Labour and enforced by a corrupt and compliant "judiciary" in the official Soviet-style Arbitration Commission*[133]."

86. Section 299 of the then *Industrial Relations Act 1988 (Cth)* provided that[134]:

> *"(1) A person shall not:*
> *…*
> *(d) by writing or speech use words calculated:*
>
> *(ii) to bring a member of the [Industrial Relations] Commission or the Commission into disrepute.*

87. By majority, the High Court held the section invalid, but were divided in their reasons. Mason CJ, and McHugh JJ held that the protection afforded the Commission was so disproportionate that it stood outside the incidental scope of the power in s 51(xxxv)[135]. Mason CJ also held that even if the purpose of a law is to achieve an end within power, it will not fall within scope of what is incidental unless it is reasonably and appropriately adapted to the pursuit of the end within power. In that context, determining whether "reasonable proportionality" exists he held it was material to consider adverse consequences including infringement of fundamental values protected by the common law[136]. In that context, Mason CJ declined to rule on the existence of an implied guarantee of freedom of communication[137]. Dawson J rejected the test of "reasonable

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131 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ("*Nationwide News*").
132 *Australian Capital Television Pty Limited v The Commonwealth [No 2]* (1992) 177 CLR 106 ("*ACT v Commonwealth*").
133 *Nationwide News*; 96.
134 *Nationwide News*; 35.
135 *Nationwide News*; Mason CJ at 34 and McHugh at 101.
136 *Nationwide News*; 34.
137 *Nationwide News*; 34.

proportionality" (except for purposive powers[138]) and held that the issue was whether the prohibition was within power and he held it was not because there was not a sufficient connection between it and the subject matter of the head of power[139].

88. The majority held that s 299(1)(d)(ii) was invalid because it infringed an implied freedom of political discussion[140]. Brennan J noting,

> ***"To sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential (53): it would be a parody of democracy to confer on the people a power to choose their Parliament but to deny the freedom of public discussion from which the people derive their political judgments***[141]*.*
>
> *…*
>
> *Freedom of public discussion of government (including the institutions and agencies of government) is not merely a desirable political privilege; it is inherent in the idea of a representative democracy*.[142]
>
> *…*
>
> *…[T]he Constitution prohibits any legislative or executive infringement of the freedom to discuss governments and governmental institutions and political matters except to the extent necessary to protect other legitimate interests and, in any event, not to an extent which substantially impairs the capacity of, or opportunity for, the Australian people to form the political judgments required for the exercise of their constitutional functions. Although s. 51(xxxv) empowers the Parliament to enact a law protecting the Commission's capacity to perform its functions, that power does not extend so far as to authorize a law prohibiting justifiable and fair and reasonable criticism of the Commission as an important instrument of government*[143]*."*

Thus the finding that there was an implied freedom arose from the terms of the Constitution, Brennan J noting there is no right to free discussion of government under the common law (thus Westminster could abolish freedom of speech as it was not Constitutionally entrenched)[144].

89. Similarly, Gaudron J held,

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[138] *Nationwide News*; 88-89.
[139] *Nationwide News*; 91.
[140] *Nationwide News*; Brennan J at 51, Deane and Toohey JJ at 72 and Gaudron J at 94.
[141] *Nationwide News*; 47.
[142] *Nationwide News*; 48.
[143] *Nationwide News*; 50-51.
[144] *Nationwide News*; 48.

> *"[T]he powers conferred by s. 51 of the Constitution, because they are conferred "subject to [the] Constitution", do not authorize laws which are inconsistent with a Commonwealth which is a free society governed in accordance with the principles of representative parliamentary democracy and, thus, do not authorize laws which impair or curtail freedom of political discourse, albeit that that freedom is not absolute[145]."*

90. In a joint judgment, Deane and Toohey JJ held that the implication arose from the provisions of the Constitution proscribing a system of representative government, saying,

> *"The people of the Commonwealth would be unable responsibly to discharge and exercise the powers of governmental control which the Constitution reserves to them if each person was an island, unable to communicate with any other person. The actual discharge of the very function of voting in an election or referendum involves communication.* ***An ability to vote intelligently can exist only if the identity of the candidates for election or the content of a proposed law submitted for the decision of the people at a referendum can be communicated to the voter. The ability to cast a fully informed vote in an election of members of the Parliament depends upon the ability to acquire information about the background, qualifications and policies of the candidates for election and about the countless number of other circumstances and considerations, both factual and theoretical, which are relevant to a consideration of what is in the interests of the nation as a whole or of particular localities, communities or individuals within it***[146]*."*
> [Emphasis added.]

ACT v Commonwealth[147]

91. In *ACT v Commonwealth*, the High Court struck down federal legislation[148] that prohibited broadcasting during an election except on "exempt matters". There were two main arguments:

    a. That the legislation was inconsistent with the Constitution as it was inconsistent with the implied freedom of political speech and

    b. That it infringed s 92 of the Constitution in that it also sought to regulate State and local government elections and its "free time" provisions involve the acquisition of property other than on just terms.

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[145] *Nationwide News*; 94.
[146] *Nationwide News*; 72.
[147] *Australian Capital Television Pty. Ltd. v. The Commonwealth [No. 2]* (1992) 177 CLR 106 ("ACT)
[148] Being Part IIID of the *Broadcasting Act 1942 (Cth) ("BA"),* introduced by the *Political Broadcasts and Political Disclosures Act 1991 (Cth)* inserting sections 95-95u into the BA.

92. By majority, Mason CJ, Deane, Toohey and Gaudron JJ held that Part IIID was wholly invalid as it infringed the right to freedom of communication on matters relevant to political discussion[149]. That right was implied by the system of representative government contained in the Constitution. Brennan J also held PartIIID was invalid[150]. McHugh J held that PartIIID was invalid under both arguments (except in relation to the territories)[151]. While Dawson J held that the section was wholly valid[152].

Lange v ABC[153]

93. *Lange* was decided five years after *ACT v Commonwealth* and *Nationwide News* and two years after the introduction of Part IIA of the RDA. It clarified how legislation may be limited by the freedom of political communication implied by the Constitution. That litigation concerned a defamation claim made by the former Prime Minister of New Zealand, Mr David Lange, who argued that the ABC broadcast statements on 4Corners were defamatory. Specifically, they contained imputations that he was guilty of abuse of public office. The ABC unsuccessfully sought to rely on the implied freedom of political communication to invalidate defamation laws arguing[154]:

> *(a) pursuant to a freedom guaranteed by the Commonwealth Constitution to publish material:*
>
> *(i) in the course of discussion of government and political matters;*
> *(ii) of and concerning members of the parliament and government of New Zealand which relates to the performance by such members of their duties as members of the parliament and government of New Zealand;*
> *(iii) in relation to the suitability of persons for office as members of the parliament and government of New Zealand;*
>
> *(b)*
>
> *(i) in the course of discussion of government and political matters;*
> *(ii) of and concerning the plaintiff as a member of the parliament of New Zealand and as Prime Minister of New Zealand;*
> *(iii) in respect of the plaintiff's suitability for office as a member of the parliament of New Zealand and as Prime Minister of New Zealand;*

[149] *ACT v Commonwealth;* Mason CJ at 146, Deane and Toohey JJ at 176 and Gaudron J at 219 and 224.
[150] *ACT v Commonwealth;* Brennan J at 164.
[151] *ACT v Commonwealth;* McHugh J at 241.
[152] *ACT v Commonwealth;* Dawson J, 202-203.
[153] *Lang v Australian Broadcasting Corporation* (1997) 189 CLR 520 ("*Lange*").
[154] *Lang;*521-522.

(iv) in respect of the plaintiff's performance, conduct and fitness for office as a member of the parliament of New Zealand and as Prime Minister of New Zealand;

(c) in circumstances such that:

(i) if the matter was false (which is not admitted) the defendant was unaware of its falsity;
(ii) the defendant did not publish the matter recklessly, that is, not caring whether the material was true or false;
(iii) the publication was reasonable; and, by reason of each of the matters aforesaid, the matter complained of is not actionable."

As noted in the head notes, "the Corporation later abandoned sub-pars (a)(ii), (iii), (b)(ii), (iii) and (iv)".

94. The unanimous judgment of the High Court was that the freedom (being a freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors) cannot invalidate a law whose object is compatible with:

a. the maintenance of the constitutionally prescribed system of representative and responsible government or

b. the procedure for submitting a proposed constitutional amendment to the people, so long as the law is reasonably appropriate and adapted to achieving that legitimate object.

95. The validity of legislation said to restrict the freedom, being in this case the law of defamation, was determined by the following test enunciated in *Lange*.

> "*First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Secondly, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 [of the Constitution] for submitting a proposed amendment of the Constitution to the informed decision of the people ... If the first question is answered 'yes' and the second is answered 'no', the law is invalid.*[155]*"* [Footnotes omitted.]

96. In this context, it is important to noted that,

[155] *Lange*; 567–8.

> *"The freedom of communication is negative, in the sense that it is an immunity from government action (including legislative and executive actions and the common law). It is not positive in the sense of a right enforceable directly against people or institutions which burden the freedom. The remedy for any infringement of the freedom is a challenge to the validity of legislation, executive action, or a challenge to the interpretation of the common law. The freedom is not absolute, as it does not protect all forms of communication at all times and in all circumstances.* [156]*"*

Coleman[157]

97. Mr Coleman was involved in protests in Queensland. He distributed pamphlets in Townsville Mall alleging corruption of certain police officers in the following terms.

> *"Ah ha! Constable Brendan Power and his mates, this one was a beauty - sitting outside the mall police beat in protest at an unlawful arrest - with simple placards saying TOWNSVILLE COPS - A GOOD ARGUMENT FOR A BILL OF RIGHTS - AND DEAR MAYOR - BITE ME - AND TOWNSVILLE CITY COUNCIL THE ENEMY OF FREE SPEECH - the person was saying nothing just sitting there talking to an old lady then BAMMM arrested dragged inside and detained. Of course not happy with the kill, the cops - in eloquent prose having sung in unison in their statements that the person was running through the mall like a madman belting people over the head with a flag pole before the dirty hippie bastard assaulted and [sic] old lady and tried to trip her up with the flag while ... while ... he was having a conversation with her before the cops scared her off ... boys boys boys, I got witnesses so KISS MY ARSE YOU SLIMY LYING BASTARDS.*[158]*"*

98. Two police officers moved to arrest Coleman, including Constable Power, at which time Mr Coleman said, *"[t]his is Constable Brendan Power a corrupt police officer*[159]*"*, violence then ensued giving rise to additional charges. Thus Coleman was charged with offences including:

    a. distributing material with insulting words (s 7A(1)(c) *Vagrants, Gaming and Other Offences Act 1931 (Qld)* ("*VA"*));

    b. using insulting words in public (s 7(1)(d) *Vagrants Act*);

    c. obstructing police;

    d. serious assault against police; and

    e. wilful damage.

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[156] Arcioni, E.; "Free Speech Law in Coleman and Mulholland" (2005) 33 FLR 1; 3.
[157] *Coleman v Power* (2004) 209 ALR 182 ('*Coleman*').
[158] Reproduced by McHugh J in *Coleman*; 195, [42].
[159] *Coleman;* 195, [37].

99. Coleman was found guilty of all offences except the last and he appealed to the High Court, having had some limited success along the way (in overturning the charge in relation to s 7A(1)(c) of the VA in the Queensland Court of Appeal). That success was based on a finding that s 7A(1)(c) of the VA was invalid as it infringed the implied freedom of political communication established in *Lang.* Not content with that outcome, Mr Coleman as a self-represented litigant was successful in obtaining special leave to appeal the remaining charges in the High Court. It was his argument (accepted only by McHugh J), that if the charges the reason for the arrest were invalid (based on the freedom of political communication) all the charges thereafter failed.

100. In this context, the majority[160] allowed the appeal in relation to the charge of using insulting words, finding s 7A(1)(c) of the VA was invalid. However, Mr Coleman was ultimately unsuccessful as the majority of the High Court (except for McHugh J) dismissed the appeal regarding the remaining charges that arose from the circumstances of Coleman's arrest. That is, the High Court[161] determined that the convictions for obstructing a police officer and assaulting a police officer in the execution of his duty should not be set aside because s 7(1)(d) of the Vagrants Act was valid.

Coleman and "insulting communication"

101. As noted by Ancioni[162], a live issue in this case was whether insulting communication could be covered by the freedom of political communication.

> *"…[T]he insulting nature of Coleman's communications and their subject matter (State police officers) led to a discussion of whether such communication could be covered by the freedom. A majority concluded that insults could constitute political communication.*
>
> ***McHugh J stated** that... **Insults are as much a part of communications concerning political and government matters as is irony, humour or acerbic criticism. He later stated that 'insults are a legitimate part of the political discussion protected by the Constitution. Gummow and Hayne JJ seem to have agreed with this: 'Insult and invective have been employed in political communication at least since the time of Demosthenes.' Kirby J also agreed, emphasising how politics is practised in Australia.** This should not be a surprising conclusion by the majority, considering the relatively recent discussion by the High Court in Roberts v Bass, where the Court found that it was legitimate to target an electoral candidate's reputation in a political*

[160] *Coleman;* McHugh J, Gummow, Kirby and Hayne JJ. Gleeson CJ, Callinan and Heydon JJ dissenting, that the conviction for using insulting words to a person in a public place should be set aside.
[161] Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ, McHugh J dissenting.
[162] Ancioni, E. "Developments in Free Speech Law in Australian: Coleman and Mulholland" (2005) 33 FLR 1; 7.

campaign, and in light of the Court's previous statements regarding the combative nature of politics.

… Callinan J considered the words of Lange and argued that 'to attract the application of the implication it is necessary that the spoken or written communication be capable of throwing light on government or political matters.' He concluded that in this situation, they did not, characterising them as '[i]nsulting or abusive words' which may 'generate heat' but not throw light on political issues. This conclusion is consistent with the emphasis in his judgment regarding 'civilized' community, suggesting ***that insulting language plays no part in civilised political discourse.*** *Callinan J seems to have restricted what he considers is protected communication by stating:* ***'it is only reasonable conduct that the implication protects. Threatening, insulting, or abusive language to a person in a public place is unreasonable conduct. The implication should not extend to protect that.'*** *…* ***his position appears to be that insulting language does not constitute relevant political communication.*** *…*

Heydon J appears to have adopted a position between the majority mentioned above and Callinan J. … At first Heydon J seemed to accept that 'some communications on government and political matters are insulting' and that the legislation may burden the freedom, although any such burden would be 'very slight'. However, he went on to suggest that insulting words are detrimental 'to the exchange of useful communications', characterised such words as neither information, opinions nor argument relevant to political communication and concluded that '[t]o address insulting words to persons in a public place is conduct sufficiently alien to the virtues of free and informed debate on which the constitutional freedom rests that it falls outside of it.'[163]*"* ***[Footnotes omitted.]***

102. Thus, *Coleman* appears to place Part IIA of the RDA squarely in the cross hairs. Having said that there is no reference to *Coleman* or discussion of the issues raised therein in the Report.

DOES THE RDA INFRINGE FREEDOM OF SPEECH?

103. The leading case in relation to whether Part IIA of the RDA infringes the implied freedom of political communication (which is not an unfettered freedom of speech for the reasons set out above) was *Jones v Scully*[164]. It was an appeal from the decision of Commissioner Cavanough QC in *Hobart Hebrew Congregation v Scully*[165]. At first instance and taking into account *Levy*[166] and *Lange v ABC*[167] the Commissioner found that the restrictions

[163] Ancioni; 7-9.
[164] *Jones v Scully* (2002) 120 FCR 243 ("*Jones v Scully*").
[165] *Hobart Hebrew Congregation v Scully*; Unreported, Human Rights and Equal Opportunity Commission, Commissioner Cavanough QC, 21 September 2000 (extract at (2000) EOC 93-109) ("*Hobart Hebrew Congregation v Scully*").
[166] *Levy v Victoria* (1997) 189 CLR 579 ("Levy").

imposed by s 18C(1) of the RDA may, in some circumstances, impinge upon freedom of communication about government and political matters. However, it was his view that the exemptions contained in s 18D meant that Part IIA of the RDA was,

> "*reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of government prescribed under the Constitution*.[168]"

The legitimate end included the fulfilment of Australia's international obligations under ICERD, in particular article 4.

104. On Appeal in Jones v Scully, Justice Hely agreed with Commissioner Cavanough QC and held Part IIA was constitutionally valid because,

> "…*bearing in mind the exemptions available under s 18D, Pt IIA of the RDA is reasonably appropriate and adapted to serve the legitimate end of eliminating racial discrimination. Section 18D, by its terms, does not render unlawful anything that is said or done "reasonably and in good faith" providing that it falls within the criteria set out in pars (a)-(c).* ***I consider that those exemptions provide an appropriate balance between the legitimate end of eliminating racial discrimination and the requirement of freedom of communication about government and political matters required by the Constitution. I accordingly reject the respondent's argument that the RDA should be declared unconstitutional 'for the sake of freedom to communicate political matters****."*[169]" [Emphasis added.]

105. However, *Jones v Scully* was decided in 2002, two years before *Coleman*. Thus when the High Court denied leave to appeal *Bropho*[170] Justice Kirby raised the issue of Constitutional invalidity of s 18C in the following way,

> *KIRBY J: Thinking of Coleman v Power and the recent decision of the Court and the need to construe legislation always conformably with the Constitution, can it be said that the approach below is sustained by the constitutional inhibition on laws of the Parliament that it would impede free speech about matters of political and current discourse in our representative democracy? It does not seem to have been expressly litigated but I wonder if one view is that the approach taken by the Full Court is conformable with the constitutional requirement and the approach that you are urging might run into constitutional problems.*
>
> *MR McINTYRE: There is at the heart of this matter a question of balance between the general issue of freedom of speech and, of*

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[167] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ("*Lange v ABC*").
[168] *Hobart Hebrew Congregation v Scull;* 12-14.
[169] *Jones v Scully*, 306 [240].
[170] *Bropho v HREOC & Anor* - [2005] HCATrans 9 ("*Bropho Leave*").

course, the statutory provision which is the subject of these proceedings which places a limitation upon the freedom of speech in order to protect a particular group that are identified or particular classes of persons who are identified in this piece of legislation. The importance of this case is that particularly Justice Lee and Justice French looked at the question of that matter of balance, the question of a proper analysis of how the racial vilification legislation fits with that broader notion of freedom of expression.

KIRBY J: I am just raising the question that no one has put into the balance that potentially rather large weight of the constitutional rule inhibiting legislative interference in free expression on matters of political current concern relevant to a parliamentary democracy.

MR McINTYRE: Yes. I take your Honour to be suggesting that there may be some underlying issue as to the validity of the legislation in question?

KIRBY J: Well, that question has not been litigated but short of validity, there is the point raised in Coleman v Power, at least in some of the reasons, that you look at the construction of the statute having regard to the constitutional framework in which the statute must operate and that framework contains, following Lange and other cases, the requirement that any inhibitions on free expression including in cartoons on matters of current political and public concern is limited by the necessity of the Constitution not interfering with the representative democracy.

106. This was not surprising given Kirby J's approach (and those of the majority) in *Coleman*, especially in relation to whether insults were protected under the freedom. Unfortunately, perhaps, the parties had not pleaded their cases by reference to this matter and so it was not determined on that basis.

107. Regardless, I would say that Callinan J's approach in *Coleman* is to be preferred, noting his comments,

> *"In seeking to prevent provocative statements of an insolent, scornful, contemptuous or abusive character, s 7(1)(d) does seek to serve legitimate ends.* ***Insulting statements give rise to a risk of acrimony leading to breaches of the peace, disorder and violence, and the first legitimate end of s 7(1)(d) is to diminish that risk. A second legitimate end is to forestall the wounding effect on the person publicly insulted. A third legitimate end is to prevent other persons who hear the insults from feeling intimidated or otherwise upset: they have an interest in public peace and an interest in feeling secure, and one specific consequence of those interests being invaded is that they may withdraw from public debate or desist from contributing to it. Insulting words are a form of uncivilised violence and intimidation. It is true that the violence is verbal, not physical, but it is violence which, in its outrage to self-respect, desire for***

> ***security and like human feelings, may be as damaging and unpredictable in its consequences as other forms of violence.*** *And while the harm that insulting words cause may not be intended, what matters in all instances is the possible effect - the victim of the insult driven to a breach of the peace, the victim of the insult wounded in feelings, other hearers of the insult upset.*[171]'

These comments are consistent with a view that acts of violence lie along a spectrum and vilification laws protect against the verbal end of that spectrum of violence.

108. It is my view that if the test for invalidity rests upon the "*maintenance of the constitutionally prescribed system of representative and responsible government*" (being the second limb of the test in *Lange*), it also rests upon Australian citizens' abilities to participate in the proscribed system of representative democracy. Specifically, to be able to engage and be heard. Given the great amount of evidence as to the damage racism can have on people's ability to participate in a representative democracy, whether as set out in Gelber and McNamara's work or research on the mental health impacts (being injuries interfering with/preventing participation), the test in Lange requires s 18C be upheld as valid.

Other Constitutional Challenges

109. In *Toben v Jones*[172], it was argued that because section 18C of the RDA extended to make less serious conduct unlawful, the section was outside the scope of the external affairs power in s 51(xxix) of the *Constitution.* Put another way, because Article 4 of ICERD specifically refers to discrimination because of 'racial hatred' anything less than such conduct was unsupported by the Constitutional.

110. The Full Federal Court rejected this argument, stating that on its terms, Article 4 of the Convention anticipates signatory states would enact legislation giving rise to criminal offences. By contrast, Part IIA, "*are set in a framework of conciliation in cognate legislation* ...[173]" That is, as stated in the explanatory memorandum[174], the emphasis was on promoting tolerance by providing a process for conciliating complaints, thus encouraging parties to come to their own resolution of the complaint without need for litigation. That process is, of its nature, very different from the regime for dealing with criminal offences (which generally involve police and prosecution authorities) and was consistent with ICERD.

111. In that context, s 18C of the RDA was constitutionally valid (and did not need to be read down), as it was reasonably capable of being considered appropriate and adapted to implement the obligations under ICERD. Further, the failure to "completely implement" ICERD (i.e. making conduct

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[171] *Coleman*; 121, [323] (Callinan J).
[172] *Toben v Jones* (2003) 129 FCR 515 ("*Toben v Jones*").
[173] *Toben* at [135] (Allsop J); *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at [68] (French J).
[174] Explanatory Memorandum to the Racial Hatred Bill 1994 (Cth); 9.

satisfying the description of racial hatred a criminal offence) did not render Part IIA substantially inconsistent with the convention. Finally, the Full Court noted that Part IIA of the RDA was not limited to Article 4 of ICERD and was directed at other provisions of ICERD and the *International Covenant on Civil and Political Rights*, which sought to eliminate racial discrimination in all its forms[175].

SUMMARY

112. The debate about removing and/or changing Part IIA of the RDA reveals a lack of engagement with the case law and the social realities of racism based on empirical research. Further it is predicated on the notion of a "right to freedom of speech" in Australia that does not exist, except in the negative as an implied freedom of political communication. In that context, the RDA cannot be said to be inconsistent because it is about protecting the franchise and political agency of those who may otherwise be politically marginalised by racism.

113. There is certainly room to improve the legislation, which is complex and difficult to traverse without legal representation. However, there is no proper argument to increase the burdens on Applicant's alone (such as to allow Courts to take into account offers made by respondents only to settle complaints during the conciliation period). Indeed, the criticisms with regard to the cost of litigation under s 18C may be levelled at any litigation under any legislation. As such that is an issue that ought to be dealt with generally and not to the specific detriment of Applicants who bear the burden and the risks (including significant legal costs) of upholding a public wrong.

114. Regardless, the specific amendments made to the AHRCA will make it more difficult for applicants to bring claims in an open public forum. Given the research on the prevalence of racial discrimination (of which vilification is but one type of claim), it remains a mystery as to why there is such a low report rate by reference to claims. These recent amendments will not make understanding that discrepancy any easier as they will disappear further from the public view (noting the confidentiality provisions affecting the work of the AHRC).

115. Finally, the failure to ensure that not just those suffering from racial discrimination were consulted about the that changes to the AHRCA has led to weaknesses in the law, some of which are arguably contrary to the legislation the AHRCA is supposed to facilitate (being the ADA, the SDA and the DDA). Arguably the very loud debate in relation to s 18C has acted as a shield to the more serious implications represented by the Amendment Act, which include reducing the accessibility of public review of alleged discrimination overall.

[175] *Toben v Jones*: as per Carr J at 524-525, [17]-[21]; Kiefel J at 528, [50] and Allsop J at 534- 551, [83]-[144].

Attachment A

TERMS OF REFERENCE PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

To inquire, and report to the Parliament by 28 February 2017, on the following matters:

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 ("the Commission") 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 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.*

5. *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".

6. *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.*

Attachment B

RACIAL HATRED ACT 1995 NO. 101, 1995
RACIAL HATRED ACT 1995 NO. 101, 1995 -
TABLE OF PROVISIONS

1. Short title
2. Principal Act
3. Insertion of new Part
4. Consequential amendments

SCHEDULE (Assented to 15 September 1995 - Date of commencement 13 October 1995) RACIAL HATRED ACT 1995 No. 101, 1995 –
LONG TITLE An Act to prohibit certain conduct involving the hatred of other people on the ground of race, colour or national or ethnic origin, and for related purposes

RACIAL HATRED ACT 1995 No. 101, 1995 –
SECT 1 Short title

1. This Act may be cited as the Racial Hatred Act 1995. (Minister's second reading speech made in-House of Representatives on 15 November 1994 Senate on 28 November 1994)

RACIAL HATRED ACT 1995 No. 101, 1995 –
SECT 2 Principal Act

2. In this Part, "Principal Act" means the Racial Discrimination Act 1975.*1* Racial Discrimination Act 1975 *1* No. 52, 1975, as amended. For previous amendments, see No. 91, 1976; No. 18, 1980 (as amended by No. 25, 1981); No. 38, 1983; No. 126, 1986; No. 38, 1988; No. 115, 1990; Nos. 132, 165 and 179, 1992; and No. 13, 1994.

RACIAL HATRED ACT 1995 No. 101, 1995 –
SECT 3 Insertion of new Part

3. After Part II of the Principal Act, the following Part is inserted:

"PART IIA-PROHIBITION OF OFFENSIVE BEHAVIOUR BASED ON RACIAL HATRED Reason for doing an act

"18B. If:

(a) an act is done for 2 or more reasons; and

(b) one of the reasons is the race, colour or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act);

then, for the purposes of this Part, the act is taken to be done because of the person's race, colour or national or ethnic origin. Offensive behaviour because of race, colour or national or ethnic origin

"18C.

(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.

Note: Subsection (1) makes certain acts unlawful. Section 22 allows people to make complaints to the Human Rights and Equal Opportunity Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence. "

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

(a) causes words, sounds, images or writing to be communicated to the public; or

(b) is done in a public place; or

(c) is done in the sight or hearing of people who are in a public place. "

(3) In this section: 'public place' includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

Exemptions

18D. 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.

Vicarious liability 18E.

(1) Subject to subsection (2), if:

(a) an employee or agent of a person does an act in connection with his or her duties as an employee or agent; and

(b) the act would be unlawful under this Part if it were done by the person; this Act applies in relation to the person as if the person had also done the act.

(2) Subsection (1) does not apply to an act done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing the act.

State and Territory laws not affected

18F. This Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory."

RACIAL HATRED ACT 1995 No. 101, 1995 - SECT 4 Consequential amendments 4. The Principal Act is amended as set out in the Schedule.
RACIAL HATRED ACT 1995 No. 101, 1995 - SCHEDULE

SCHEDULE
Section 4

CONSEQUENTIAL AMENDMENTS OF THE RACIAL DISCRIMINATION ACT 1975 Paragraph 20(1)(a): Insert "or Part IIA" after "Part II". Paragraph 20(1)(d): Add at the end "or Part IIA". Subsection 22(1): Insert "or Part IIA" after "Part II". Paragraph 24(1)(b): Insert "or Part IIA" after "Part II". Paragraph 24(2)(a): Add at the end "or Part IIA". Section 25W: (a) Insert "or Part IIA" after "Part II". (b) Omit "that Part", substitute "those Parts". Section 25X: Insert "or Part IIA" after "Part II". Section 26: Add at the end "or Part IIA".

Comparison Table of Changes to the AHRCA

NEW	**OLD**
Section 11(1) (f) to: (i) inquire into any act or practice that may be inconsistent with or contrary to any human right; and (ii) if the Commission considers it appropriate to do so— endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and	Section 11(1) (f) to inquire into any act or practice that may be inconsistent with or contrary to any human right, and: (i) where the Commission considers it appropriate to do so—to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement—to report to the Minister in relation to the inquiry; and
Section 20(2) (2) The Commission may decide not to inquire into an act or practice, or, if the Commission has commenced to inquire into an act or practice, may decide not to continue to inquire into the act or practice, if: …[new] (ba) the Commission is satisfied, having regard to all the circumstances, that an inquiry, or the continuation of an inquiry, into the act or practice is not warranted; or (c) in a case where a complaint has been made to the Commission in relation to the act or practice: … [new] (iib) the Commission is satisfied that	Section 20(2)(b) (2) The Commission may decide not to inquire into an act or practice, or, if the Commission has commenced to inquire into an act or practice, may decide not to continue to inquire into the act or practice, if: … (c) in a case where a complaint has been made to the Commission in relation to the act or practice: …

there is no reasonable prospect of the matter being settled by conciliation; or (9) The Commission must act fairly in the performance of the functions referred to in paragraph 11(1)(f). (10) If a complaint is made under paragraph (1)(b), the Commission: (a) must act expeditiously in dealing with the complaint; and (b) must use the Commission's best endeavours to finish dealing with the complaint within 12 months after the complaint was made. (11) Subsections (9) and (10) do not impose a duty on the Commission that is enforceable in court. (12) Subsection (11) does not affect a legally enforceable obligation to observe the rules of natural justice.	
New s 20A **20A Reports to the Minister** If: (a) the Commission has inquired into an act or practice that may be inconsistent with or contrary to any human right; and (b) the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right; the Commission may report to the Minister in relation to the inquiry.	
S 31(b) [repealed and inserted] (b) to: (i) inquire into any act or practice (including any systemic practice) that may constitute discrimination; and (ii) if the Commission considers it appropriate to do so— endeavour, by conciliation, to effect a	(b) to inquire into any act or practice, including any systemic practice, that may constitute discrimination and: (i) where the Commission considers it appropriate to do so—to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the

settlement of the matters that gave rise to the inquiry;	inquiry; and (ii) where the Commission is of the opinion that the act or practice constitutes discrimination, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement—to report to the Minister in relation to the inquiry;
New 46P(1) (1) A written complaint may be lodged with the Commission: (a) alleging: (i) that one or more acts have been done; or (ii) that one or more omissions or practices have occurred; and (b) alleging that those acts, omissions or practices are unlawful discrimination. Note: ***Unlawful discrimination*** is defined in subsection 3(1). (1A) It must be reasonably arguable that the alleged acts, omissions or practices are unlawful discrimination. (1B) The complaint must set out, as fully as practicable, the details of the alleged acts, omissions or practices.	
S46F(1) ["Inquiry by President" repealed and inserted] (1) Subject to subsections (1A) and (5), if a complaint is referred to the President under section 46PD, the President must: (a) consider whether to inquire into the complaint, having regard to the matters referred to in section 46PH; and (b) if the President is of the opinion	S 46F (1) Subject to subsection (5), if a complaint is referred to the President under section 46PD, the President must inquire into the complaint and attempt to conciliate the complaint. (2) If the President thinks that 2 or more complaints arise out of the same or substantially the same circumstances or subject, the President may hold a single inquiry,

that the complaint should be terminated—terminate the complaint without inquiry; and (c) unless the President terminates the complaint under paragraph (b) or section 46PH—inquire into the complaint and attempt to conciliate the complaint. (1A) For the purposes of paragraph (1)(a), the President may inform himself or herself of such facts and circumstances as are necessary to form the opinion referred to in paragraph (1)(b). (1B) If the President terminates the complaint under paragraph (1)(b), the President must comply with the notification requirements of subsections 46PH(2), (2A) and (3). [add new 46PF(6) placing additional obligations on the President to "act fairly" and "expeditiously", including additional obligations to notify respondents as soon as there is a decision in inquire into a complaint, unless such notification would "prejudice the safety" of a person or "it is not practicable to do so", but none of these impose obligations enforceable in Court or affect the requirement to provide procedural fairness.	or conduct a single conciliation, in relation to those complaints. (3) With the leave of the President, any complainant or respondent may amend the complaint to add, as a respondent, a person who is alleged to have done the alleged unlawful discrimination. Note: In some cases, a person is regarded as having done unlawful discrimination by being treated as responsible for the acts and omissions of another person. See sections 56 and 57 of the *Age Discrimination Act 2004*, sections 122 and 123 of the *Disability Discrimination Act 1992*, sections 18A and 18E of the *Racial Discrimination Act 1975* and sections 105, 106 and 107 of the *Sex Discrimination Act 1984*. (4) A complaint cannot be amended after it is terminated by the President under section 46PH. (5) The President may decide not to inquire into the complaint, or, if the President has started inquiring into the complaint, may decide not to continue to inquire into the complaint, if: (a) the President is satisfied that the person aggrieved by the alleged unlawful discrimination does not want the President to inquire, or to continue to inquire, into the complaint; or (b) the President is satisfied that the complaint has been settled or resolved.
Repeal s 46PH(1)(c) [insert instead] (c) the President is satisfied, having regard to all the circumstances, that an inquiry, or the continuation of an inquiry, into the complaint is not warranted;	(c) the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance;
Repeal s 46PH(1)(i)	s 46PH(1)(i) (i) the President is satisfied that there is

[Insert] (1A) A complaint may be terminated under subsection (1) at any time, even if an inquiry into the complaint has begun. *Mandatory termination of complaint* (1B) The President must terminate a complaint if the President is satisfied that: (a) the complaint is trivial, vexatious, misconceived or lacking in substance; or (b) there is no reasonable prospect of the matter being settled by conciliation. (1C) The President must terminate a complaint if the President is satisfied that there would be no reasonable prospect that the Federal Court or the Federal Circuit Court would be satisfied that the alleged acts, omissions or practices are unlawful discrimination. (1D) A complaint may be terminated under subsection (1B) or (1C) at any time, even if an inquiry into the complaint has begun. Additional note at end of s 46PI(1) added requiring the President to consider the exemptions in making the decision (including s 18D of the RDA).	no reasonable prospect of the matter being settled by conciliation.
S 46 PH(2) (insert new subsection) (2A) A notice under subsection (2) must include a statement explaining that the Federal Court and the Federal Circuit Court can award costs in proceedings under section 46PO.	S 46PH(2) (2) If the President decides to terminate a complaint, the President must notify the complainants in writing of that decision and of the reasons for that decision.
Ss 46PJ and 46PK repealed and insert instead S 46PJ President may hold conferences *President may decide to hold a*	46PI President's power to obtain information

conference (1) For the purpose of attempting to conciliate a complaint in accordance with section 46PF, the President may decide to hold a conference, to be presided over by: (a) the President; or (b) a suitable person (other than a Commission member) determined by the President. *President may invite people to attend* (2) The President may: (a) invite any or all of the complainants or respondents to attend the conference; and (b) invite any other person to attend the conference if: (i) the President reasonably believes that the person is capable of giving information that is relevant to the conciliation of the complaint; or (ii) the President considers that the person's presence at the conference is likely to be conducive to the conciliation of the complaint *President may require people to attend* (3) The President may, by written notice given to a person referred to in subsection (2), require the person to attend the conference (whether or not the person has already been invited to attend the conference). Note: Failure to comply with a notice is an offence—see subsection (5). (4) A notice under subsection (3):	(1) This section applies if the President has reason to believe that a person is capable of providing information (***relevant information***) or producing documents (***relevant documents***) relevant to an inquiry under this Division. (2) The President may serve a written notice on the person, requiring the person to do either or both of the following within a reasonable period specified in the notice, or on a reasonable date and at a reasonable time specified in the notice: (a) give the President a signed document containing relevant information required by the notice; (b) produce to the President such relevant documents as are specified in the notice. (3) If the notice is served on a body corporate, the document referred to in paragraph (2)(a) must be signed by an officer of the body corporate. (4) If a document is produced to the President in accordance with a requirement under this section, the President:

(a) must specify the place and time of the conference, not being a time that is less than 14 days after the notice is given; and (b) must set out the effect of subsection (5). (5) A person commits an offence if: (a) the person has been given a notice under subsection (3) requiring the person to attend a conference; and (b) the person refuses or fails to comply with the requirement. Penalty: 10 penalty units. (6) Subsection (5) is an offence of strict liability.Note: For strict liability, see section 6.1 of the *Criminal Code*. *Expenses for attendance* *(7)* A person who is required to attend the conference is entitled to be paid, by the Commonwealth, a reasonable sum for the person's expenses of attendance. **S 46PK Proceedings at conferences** (1) Subject to this section, a conference mentioned insubsection 46PJ(1) is to be conducted in such manner as the person presiding at the conference considers appropriate. (2) The conference is to be conducted in private. (3) The person presiding at the conference must take all reasonable steps to ensure that the conduct of the conference does not disadvantage any complainant or respondent. (4) Unless the person presiding at the conference consents:	(a) may take possession of the document; and (b) may make copies of the document or take extracts from the document; and (c) may retain possession of the document for as long as is necessary for the purposes of the inquiry to which the document relates. (5) While the President retains any document under this section, the President must allow the document to be inspected, at all reasonable times, by any person who would be entitled to inspect the document if it were not in the possession of the President. **NB s 46PL repealed and replaced by s46PJ(3)** **46PJ Directions to attend compulsory conference** (1) For the purpose of dealing with a complaint in accordance with section 46PF, the President may decide to hold a conference, to be presided over by the President or by a suitable person (other than a member) appointed by the President. (2) The conference must be at a reasonable time and at a reasonable place. (3) If the President decides to hold a conference, the President must, by notice in writing, direct each complainant and each respondent to

(i) an individual is not entitled to be represented at the conference by another person; and (ii) a body (whether or not incorporated) is not entitled to be represented at the conference otherwise than by a person who is an officer or employee of the body. (5) Despite paragraph (4)(a), an individual who is unable to attend the conference because the individual has a disability is entitled to nominate another person to attend instead on his or her behalf. (6) If the person presiding at the conference considers that an individual is unable to participate fully in the conference because the individual has a disability, the individual is entitled to nominate another person to assist him or her at the conference. (7) For the purposes of this section, ***disability*** has the same meaning as in the *Disability Discrimination Act 1992*. S 46PKA **Things said in conciliation are not admissible in evidence in certain proceedings** **(1)** Evidence of anything said or done by a person in the course of the conciliation of a complaint in accordance with section 46PF is not admissible in any proceedings relating to the alleged acts, omissions or practices. **(2)** Subsection (1) does not apply for the purposes of the application of section 46PSA.	attend the conference. (4) The President may also, by notice in writing, direct any of the following persons to attend the conference: (a) any person who, in the opinion of the President, is likely to be able to provide information relevant to the inquiry; (b) any person whose presence at the conference is, in the opinion of the President, likely to be conducive to the settlement of the matter to which the alleged unlawful discrimination relates. (5) A person who is directed under this section to attend a conference is entitled to be paid by the Commonwealth a reasonable sum for the person's attendance at the conference. (6) In a notice to a person under this section, the President may require the person to produce such documents at the conference as are specified in the notice.

S 46PO(3) (concerning jurisdiction of the Court) [new subsection inserted] (3A) The application must not be made unless: (a) the court concerned grants leave to make the application; or (b) the complaint was terminated under paragraph 46PH(1)(h); or (c) the complaint was terminated under paragraph 46PH(1B)(b).	 Where 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") Where the President is satisfied that “"there is no reasonable prospect of the matter being settled by conciliation”.
46PSA Costs—court may have regard to an offer to settle Court may have regard to offers made to settle a terminated complaint in awarding costs.	