



**Australian  
Human Rights  
Commission**

# Inquiry into freedom of speech

**Australian Human Rights Commission  
supplementary submission to the  
Parliamentary Joint Committee on Human Rights**

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## Table of Contents

<b>1</b>	<b>Executive summary .....</b>	<b>3</b>
<b>2</b>	<b>Additional recommendations .....</b>	<b>4</b>
<b>3</b>	<b>Commission’s complaint-handling process.....</b>	<b>4</b>
<b>3.1</b>	<b><i>Dealing early with unmeritorious complaints .....</i></b>	<b>5</b>
(a)	<i>Current process .....</i>	5
(b)	<i>Raising the threshold for complaints to be made .....</i>	7
(c)	<i>Additional termination grounds .....</i>	7
<b>3.2</b>	<b><i>Dealing fairly with complainants and respondents.....</i></b>	<b>9</b>
(a)	<i>Current process .....</i>	9
(b)	<i>Principles of dispute resolution .....</i>	9
(c)	<i>Notification.....</i>	11
<b>3.3</b>	<b><i>Protecting respondents from unmeritorious legal proceedings.....</i></b>	<b>13</b>
<b>4</b>	<b>Process in complaints involving sections 18C and 18D of the RDA.....</b>	<b>15</b>
(a)	<i>Complaint lodged.....</i>	15
(b)	<i>Obtain and review information .....</i>	16
(c)	<i>Preliminary assessment.....</i>	16
(d)	<i>Conciliation .....</i>	18
(e)	<i>Termination.....</i>	18
(f)	<i>Complainant’s option of court proceedings .....</i>	18
<b>5</b>	<b>Outcomes in section 18C cases .....</b>	<b>19</b>
<b>5.1</b>	<b><i>Outcomes through the conciliation process .....</i></b>	<b>19</b>
<b>5.2</b>	<b><i>Private settlement of legal cases .....</i></b>	<b>21</b>
<b>5.3</b>	<b><i>Court orders in section 18C cases .....</i></b>	<b>22</b>
	<b>Annexure A .....</b>	<b>24</b>

## 1 Executive summary

1. The Commission made a submission to this inquiry on 9 December 2016 and appeared before the Committee to give evidence in person on 12 December 2016. It tabled some documents on that occasion and answered some questions on notice.
2. Since providing that evidence, the Commission has considered closely many of the written submissions published by the Committee and the evidence given at the public hearings. In light of this material, the Commission has given further consideration to amendments to the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) dealing with the way in which complaints to the Commission are handled.
3. The Commission's previous recommendations and the additional recommendations in this supplementary submission are designed to:
  - assist the Commission to deal early with unmeritorious complaints;
  - reinforce procedural fairness in the Commission's processes; and
  - protect respondents from unmeritorious legal proceedings.
4. This supplementary submission provides more specific detail on how the Commission handles complaints under section 18C of the *Racial Discrimination Act 1975* (Cth) (RDA). It also describes the circumstances in which the Commission will consider the application of the freedom of speech exemptions in section 18D.
5. Finally, this submission sets out details of outcomes in complaints under section 18C of the RDA in cases that are resolved through conciliation at the Commission and in cases that have gone to court.
6. Most successful conciliations in section 18C cases are resolved without any financial payment being made. In those matters, the most common outcomes agreed by the parties are either an apology by a respondent, or an acknowledgement by a complainant that they were satisfied that their concerns had been heard.
7. The Commission does not make recommendations about settlement, whether financial or otherwise. In 2016, only 28% of complaints under section 18C that were successfully conciliated involved a financial payment by a party. In the minority of cases where a financial payment is agreed between the parties during conciliation at the Commission, the amounts proposed and agreed to by the parties are broadly similar to the amounts that have been ordered in court proceedings.

## **2 Additional recommendations**

8. In addition to the recommendations made by the Commission in its primary submission dated 9 December 2016, the Commission makes the following recommendations:

### **Recommendation 6**

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

### **Recommendation 7**

The Commission recommends that the AHRC Act be amended to provide that the principles applicable to inquiries conducted pursuant to sections 11(1)(aa), 20(1)(b) and 32(1)(b) of the AHRC Act are that:

- (a) dispute resolution should be provided as early as possible; and
- (b) the type of dispute resolution offered should be appropriate to the nature of the dispute; and
- (c) the dispute resolution process is fair to all parties; and
- (d) dispute resolution should be consistent with the objectives of the AHRC Act.

### **Recommendation 8**

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

## **3 Commission's complaint-handling process**

9. The Commission is always seeking to improve the way that it operates, including its complaint-handling process. Over the last few years, the Commission has increased the efficiency of its processes in a number of ways. These include:
- changes to electronic record keeping, database and file management
  - changes to process, including a focus on early resolution where appropriate and consistent case management of similar complaints

- changes to accommodate the needs of particular cohorts, including a streamlined process for small businesses who are respondents to complaints.
10. In pursuance of the enhanced Commonwealth government performance framework under the *Public Governance, Performance and Accountability Act 2013* (Cth) the Commission will incorporate more robust performance reporting in relation to all aspects of complaint handling, including the timeliness of the process, in its annual performance statement.
  11. As noted in the Commission's primary submission dated 9 December 2016, over the last few years the Commission has also made recommendations to Government for legislative changes to further improve its process for handling complaints. The recommendations in the Commission's primary submission built on those previous recommendations to Government.
  12. During the course of this inquiry, the Commission has carefully considered submissions that have recommended process improvements. In light of these submissions and the more general public debate about the Commission's complaint handling process, the Commission has proposed some further improvements.
  13. The recommendations made by the Commission in the course of this inquiry seek to address three issues:
    - a) Ensuring that unmeritorious complaints are dealt with early
    - b) Ensuring fairness in the Commission's process to both complainants and respondents
    - c) Providing some protection to respondents from facing legal proceedings that are unmeritorious.
  14. This submission deals with each of those issues.

### **3.1 *Dealing early with unmeritorious complaints***

#### *(a) Current process*

15. Around a third of all complaints that are made to the Commission do not proceed to conciliation.<sup>1</sup> In large part, this is the direct result of the Commission providing complainants with information about the law or an early assessment of the merits of their complaint.
16. **Annexure A** to this submission is a flowchart of the Commission's process for handling complaints of unlawful discrimination. A copy of this flowchart was tabled by the Commission at the public hearing of the Committee on 12 December 2016. Two minor additions have been made to this chart to

indicate where consideration of s 18D would take place in a complaint under section 18C of the RDA.

17. One feature of this process is a 'preliminary assessment' by the Commission where it is considering terminating the complaint before going to conciliation. If the Commission is considering early termination, it will write to the complainant and set out why the complaint may be terminated. For example, the Commission may explain that it appears that the free speech exemption in section 18D of the RDA (or some other exemption) may apply so that the conduct complained of is not unlawful, or the Commission may explain that the complaint may be trivial, vexatious, misconceived or lacking in substance.
18. A complainant that receives a preliminary assessment from the Commission may decide to withdraw his or her complaint. In 2015-16, 17% of all finalised complaints were withdrawn.
19. A complainant that receives a preliminary assessment from the Commission may not provide any response and may disengage from further contact with the Commission. In those cases, the Commission may discontinue the inquiry on the basis that it is satisfied that the person does not want the Commission to continue to inquire into the complaint. In 2015-16, 9% of all finalised complaints were discontinued.
20. Complaints may be withdrawn or discontinued for a range of reasons and this may occur at any stage of the complaints process. However, it is more likely to occur early in the process and is often the result of the Commission providing feedback about the merits of the complaint.
21. Submitters to this inquiry with direct and regular experience of the Commission's processes confirm that the Commission will let complainants know if their case is not strong. For example, the Caxton Legal Centre and Townsville Community Legal Service said:

In our experience clients seeking advice about marginal complaints report receiving robust guidance from the Commission about the risks of proceeding with a complaint that is not strong, and are appropriately referred to lawyers for advice on whether there is a better, less risky way to proceed.<sup>2</sup>
22. There are cases where a complainant disagrees with the Commission's preliminary assessment and decides that they want to proceed with their complaint. The complainant may take the opportunity to provide more information in support of the complaint. If, after receiving the response from the complainant, the Commission still considers that it is appropriate that the complaint be terminated early, it will do so. In 2015-16, the Commission terminated at least 5% of all complaints prior to conciliation.

(b) *Raising the threshold for complaints to be made*

23. The Commission's written submission of 9 December 2016 made two recommendations to raise the threshold for people making a complaint to the Commission.
24. At present, under the law a complaint will be valid if it merely makes a bare allegation that unlawful discrimination has occurred, without providing any detail.
25. The Commission recommended that:
- the threshold for lodging a complaint to the Commission be raised to require the person lodging the complaint to allege an act which, if true, could constitute unlawful discrimination (**Recommendation 1**)
  - the written complaint to the Commission be required to set out details of the alleged unlawful discrimination which are reasonably sufficient to indicate an alleged contravention of the relevant Act (**Recommendation 2**).
26. If these recommendations were adopted, it would mean that the Commission could more efficiently decline to deal with complaints that have no substance at all.

(c) *Additional termination grounds*

27. The Commission has carefully considered recommendations in some submissions to the Committee that the grounds for termination in section 46PH(1) of the AHRC Act should be expanded to make it easier for the Commission to effectively deal with unmeritorious complaints.
28. The Commission agrees that it is appropriate to include an additional ground of termination. We recommend that the grounds for termination in section 46PH(1) be expanded to include a power to terminate where, having regard to all the circumstances of the case, the President is satisfied that an inquiry, or further inquiry, into the matter is not warranted.

**Recommendation 6**

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

29. This ground of termination would bring the Commission's process into line with equivalent inquiry processes by the Commonwealth Ombudsman and the Inspector General of Intelligence and Security. It would also mirror the

processes used by the New South Wales Anti-Discrimination Board and the Victorian Equal Opportunity and Human Rights Commission.

30. The Ombudsman may decide not to investigate a complaint about an action taken by a Department or prescribed authority if he or she is of the opinion that an investigation, or further investigation, of the action is not warranted having regard to all the circumstances.<sup>3</sup>
31. The Inspector-General may decide not to inquire into an action taken by an intelligence agency if the Inspector-General is satisfied that, having regard to all the circumstances of the case, an inquiry or further inquiry into the action is not warranted.<sup>4</sup>
32. The New South Wales Anti-Discrimination Board may decline a complaint or part of a complaint at any stage of the investigation of the complaint if the President is satisfied that no further action should be taken in respect of the complaint, or part of the complaint.<sup>5</sup>
33. The Victorian Equal Opportunity and Human Rights Commission may decline to provide or continue to provide dispute resolution if, having regard to all the circumstances, the Commission considers it is not appropriate to provide or to continue to provide dispute resolution.<sup>6</sup>
34. Some submissions have suggested that an additional step be added to the Commission's process that would require the Commission to make a decision about whether to accept or reject a complaint. In the course of the public hearings, this has been described as a mandatory 'accept/reject' phase. This is the procedure that takes place in Equal Opportunity Tasmania.<sup>7</sup>
35. The Tasmanian Anti-Discrimination Commissioner strongly recommended against introducing a mandatory 'accept/reject' phase into the AHRC Act based on her own experience. Evidence given by the Commissioner was that:

the inclusion of an accept/reject stage early in the complaints process does not expedite proceedings. Rather, it opens up the preliminary stages of the complaints process to more costly review procedures and delays the capacity to engage in dispute-resolution as early as possible in the life of the complaint.<sup>8</sup>
36. In her oral evidence before the Committee, the Commissioner again emphasised that in Tasmania a mandatory accept/reject phase caused additional delay and added costs for parties because it encouraged them to litigate decisions made during the conciliation phase of complaint handling.<sup>9</sup>
37. For these reasons, the Commission considers that it is appropriate for the grounds of termination in section 46PH to be expanded in the way described in recommendation 6 and to remain discretionary. As noted above, this is consistent with the process in equivalent federal investigatory agencies and



with the process used by discrimination law agencies in New South Wales and Victoria.

### **3.2 *Dealing fairly with complainants and respondents***

#### *(a) Current process*

38. The Commission provided a detailed response in its previous submission about the procedures it currently has in place to ensure that both complainants and respondents are dealt with fairly and in accordance with the principles of natural justice.<sup>10</sup>
39. The Committee has since received submissions from a number of organisations that have direct and regular experience with the Commission's conciliation processes. These submissions have confirmed that:

Conciliators do not make decisions and they are neutral and impartial. All parties have equal access to the AHRC and they are made aware of arguments and any relevant documents provided by the other side.<sup>11</sup>

In our experience, the Commission's conciliation power is routinely used to encourage early settlement and to save parties' and Courts' resources. Without this, more cases might simply find their way to the Courts, with no filtering process. In our experience, the Commission takes care to ensure that both complainants and respondents are afforded a fair opportunity to participate and put material to the Commission. Our experience is also that, in confidential conciliations, while the Commission is careful not to give legal advice, it may provide useful background information which alerts complainants to potential weaknesses in their case.<sup>12</sup>

Based on Legal Aid NSW's experience and observations, the Commission deals with complaints in an open and transparent manner. In our experience, Commission conciliators maintain neutrality in disputes, and facilitate appropriate discussions between parties with a view to encouraging creative resolutions.<sup>13</sup>

In NAAJA's experience, the quality of complaints handling was very high. The conciliators were professional in their approach, and clearly communicated about the process to be followed, the timeframes for the handling of the complaint and were proactive in guiding the complaint towards a possible resolution.<sup>14</sup>

#### *(b) Principles of dispute resolution*

40. The Commission publishes a Charter of Service which sets out its commitment to provide a service that is professional, accessible, fair and timely.<sup>15</sup> People using the Commission's service can expect the Commission to:
- treat them with respect and courtesy

- provide them with clear and accurate information
  - collect, store, use and disclose their personal information in accordance with Australian law
  - keep them informed about the progress of the complaint
  - be impartial and fair to everyone involved
  - progress enquiries and complaints in a timely manner; and
  - provide reasons for its decisions.
41. In Victoria, the *Equal Opportunity Act 2010* (Vic) sets out in legislation the principles governing the conduct of the dispute resolution service offered by the Victorian Equal Opportunity and Human Rights Commission (VEOHRC). Section 112 of the Victorian legislation provides that:
- The principles of dispute resolution offered by the Commission are that –
- (a) dispute resolution should be provided as early as possible; and
  - (b) the type of dispute resolution offered should be appropriate to the nature of the dispute; and
  - (c) the dispute resolution process is fair to all parties; and
  - (d) dispute resolution is voluntary; and
  - (e) dispute resolution should be consistent with the objectives of the Act.
42. The Commission considers that it would be appropriate for similar principles to be included in the AHRC Act in order to reinforce the importance of these principles for the Commission’s complaint-handling process.
43. Each of the principles in subsections (a), (b), (c) and (e) of the Victorian legislation applies equally to the Commission’s functions of:
- inquiring into and attempting to conciliate complaints of unlawful discrimination (s 11(1)(aa))
  - inquiring into any act or practice that may be inconsistent with or contrary to any human right when a complaint in writing is made to the Commission (s 20(1)(b))
  - inquiring into any act or practice that may amount to discrimination in employment under ILO 111 when a complaint in writing is made to the Commission (s 32(1)(b)).

44. There are some differences between the powers available to the Commission and to the VEOHRC. In particular, the Commission has some additional compulsory powers including powers to obtain information and documents (ss 21 and 46PI) and power to direct parties to attend a compulsory conference (s 46PJ).
45. The almost invariable practice of the Commission is not to hold compulsory conciliation conferences. Instead, if a conciliation conference is held, it will be done on a voluntary basis. This is because, in the Commission's view, parties are more amenable to conciliation when they are able to make their own decisions about their participation, the nature of the process and the outcomes. The Commission has broad powers under section 14 of the AHRC Act to hold inquiries in such manner as it thinks fit. This provides a degree of flexibility, which is an important in being able to tailor the process to the circumstances of the case. In all cases, the Commission seeks to act in a way that provides procedural fairness to all parties.
46. However, given the particular powers available to the Commission (even if they are rarely used) the Commission considers that it would not be appropriate to include a provision equivalent to section 112(d) of the *Equal Opportunity Act 2010* (Vic). Otherwise, it would support a provision along similar lines.

#### **Recommendation 7**

The Commission recommends that the AHRC Act be amended to provide that the principles applicable to inquiries conducted pursuant to sections 11(1)(aa), 20(1)(b) and 32(1)(b) of the AHRC Act are that:

- (a) dispute resolution should be provided as early as possible; and
- (b) the type of dispute resolution offered should be appropriate to the nature of the dispute; and
- (c) the dispute resolution process is fair to all parties; and
- (d) dispute resolution should be consistent with the objectives of the AHRC Act.

#### **(c) Notification**

47. The AHRC Act does not specify how or when respondents to complaints should be notified of the complaint.
48. There are some specific requirements for notification in relation to the Commission's power to direct parties to attend compulsory conciliation conferences; however, as noted above, the almost invariable practice of the Commission is not to hold compulsory conciliation conferences.

49. In some cases, it is not necessary for respondents to be notified at all because the matter is withdrawn or discontinued as a result of initial inquiries made by the Commission of the complainant.
50. The Commission's usual practice is to send emails to both complainants and respondents at the same time when the Commission confirms that it is inquiring into a complaint. The notification to the respondents may ask for a written response to the complaint.
51. In some matters, the Commission relies on one respondent to notify others. For example, if there is an incident in a workplace and a complaint is made against both the employer organisation and another employee, the Commission may rely on the employer organisation to notify the employee.
52. In such circumstances, the Commission's current practice is to ensure that it receives confirmation from the organisation that the individual respondents have been notified. The Commission's standard template contains the following paragraphs:

**Contact with the individual respondent/s**

In relation to the complaint against [Insert individual respondent name(s)], please provide [insert name of individual respondent(s)] with a copy of this email and a copy of the complaint as it relates to the allegations against [him/her]. Please confirm with the Commission in writing that this has occurred. Please also advise in writing whether [insert name of organisation respondent] is representing [insert name of individual respondent(s)] in relation to this complaint. It is preferred that this information is provided in an electronic format and sent by email.

If [you/name of company/organisation] [prefer/prefers] that the Commission communicates directly with [insert individual respondent's name] about the complaint, please advise the Commission within seven (7) days of the date of this email and provide direct contact details for [insert name of individual respondent]. Alternatively, please request that [insert name of individual respondent] contact the officer who is handling this matter within seven (7) days of the date of this email. Contact details for the officer are provided at the end of this email.

53. The Commission has made a specific recommendation below for legislative amendment in relation to notification.
54. We do not recommend that a fixed time limit be set on notification of respondents. This is for two reasons. First, where, as now, the Commission is working under significant resource constraints, the Commission can have a backlog of unallocated complaints, which would make notification within a fixed timeframe from lodgement unfeasible.
55. Secondly, in some situations a complainant decides not to proceed with a complaint after receiving initial feedback from the Commission and asks for

their complaint to be withdrawn. For example, in cases that appear to be trivial, vexatious, misconceived or lacking in substance, the Commission will regularly provide early feedback to a complainant to this effect. If a complainant decides to withdraw the complaint, there is effectively no complaint on foot. In those cases, a requirement for notification would be an additional, unnecessary step.

56. The Commission recommends that any new provision in relation to notification require steps to be taken to ensure that all respondents to a complaint are notified of the complaint at or around the same time.

#### **Recommendation 8**

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

### **3.3 *Protecting respondents from unmeritorious legal proceedings***

57. The Commission has recommended that the AHRC Act be amended to reduce the extent to which the courts are required to deal with matters that the Commission has assessed as unmeritorious.
58. In its submission dated 9 December 2016, the Commission made the following recommendation:
- The Commission recommends that section 46PO of the AHRC Act be amended to provide that if the President terminates a complaint on any ground set out in section 46PH(1)(a) to (g), then an application cannot be made to the Federal Court or the Federal Circuit Court unless that court grants leave (**Recommendation 3**).
59. If this recommendation were adopted, then a complainant would need to seek leave from the court before commencing proceedings if the Commission had terminated the complaint on one of a number of grounds relating to the merits of the complaint or the availability of alternative remedies. The particular grounds of termination that this process would apply to are that:<sup>16</sup>
- the President is satisfied that the alleged unlawful discrimination is not unlawful discrimination
  - the complaint was lodged more than 12 months after the alleged unlawful discrimination took place

- the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance
  - in a case where some other remedy has been sought in relation to the subject matter of the complaint – the President is satisfied that the subject matter of the complaint has been adequately dealt with
  - the President is satisfied that some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to each affected person
  - in a case where the subject matter of the complaint has already been dealt with by the Commission or by another statutory authority – the President is satisfied that the subject matter of the complaint has been adequately dealt with
  - the President is satisfied that the subject matter of the complaint could be more effectively or conveniently dealt with by another statutory authority.
60. In response to questions asked by the Committee, the Commission provided further details on notice as to how it expected that such applications for leave would be dealt with.<sup>17</sup> In particular, the Commission expects that the courts would apply the test that is used when leave is sought to appeal from an interlocutory decision such as a summary dismissal. That is, the Court would ask whether:
- in all the circumstances of the case, the decision is attended by sufficient doubt to warrant being reconsidered; and
  - substantial injustice would result if leave were refused, supposing the decision to be wrong.
61. In applying this test, the Commission expects that the courts would take into account the legislative purpose that the requirement for leave is to act as a 'filter' and that this purpose would be advanced by a construction that protected respondents from appeals as of right by complainants whose complaints had already been assessed as lacking merit.<sup>18</sup> If necessary, these tests could be codified in legislation.
62. The Commission prefers this method of dealing with unmeritorious complaints to a requirement that complainants be required to provide security for costs. The Commission's proposal would mean that complainants would need to satisfy a court that, despite the assessment by the Commission, their case still had sufficient merit to proceed. By contrast, a requirement for security for costs would effectively create a means test for an application to the courts, with the result that only complainants who were sufficiently wealthy could obtain access to justice.

#### **4 Process in complaints involving sections 18C and 18D of the RDA**

63. The process for handling complaints of unlawful discrimination at the Commission is described in detail at pages 53 to 57 of the Commission's submission dated 9 December 2016. A flowchart of this process, which was tabled at the hearing on 12 December 2016, appears at **Annexure A** to the present submission. As noted above, two minor additions have been made to this chart to indicate where consideration of s 18D would take place in a complaint under section 18C of the RDA.
64. We set out below some further explanation of this process as it applies to complaints under section 18C of the RDA, including how section 18D is considered as part of this process.
- (a) *Complaint lodged*
65. When a complaint under section 18C of the RDA is lodged, the Commission checks that it complies with section 46P of the AHRC Act. The complaint must be in writing, by a person aggrieved, and allege unlawful discrimination. In some cases complainants will refer explicitly to section 18C; in some cases the nature of the complaint will be clear from the description of the incident. If a complainant uses the Commission's standard complaint form,<sup>19</sup> they are provided space to describe the event that they want to complaint about. There are also a number of boxes in the section headed 'Part C – What are you complaining about?' that provide an opportunity for complainants to be specific about the ground of discrimination that they allege. They may have ticked one of the boxes marked:
- I have been discriminated against because of my race**  
This includes race, colour, national origin, descent, ethnicity and immigrant status.
  - I have experienced racial hatred**
66. It is not necessary for a written complaint to be made using the Commission's standard complaint form or for particular boxes to be ticked. Where the complaint form is used, the information provided by the complainant assists the Commission to identify the nature of the complaint.
67. The Commission reviews the written complaint to identify the issues raised and to determine the most appropriate way to handle the complaint. In some cases, the Commission may form an initial view that there are issues regarding the substance of the complaint that need preliminary consideration.
68. In relation to section 18C complaints, two of the most significant issues of substance that the Commission considers are whether:

- the act complained of appears reasonably likely to offend, insult, humiliate or intimidate another person or group of people; and
- the information provided supports an allegation that the act complained of was done *because of* the race of the other person.

69. If it appears from the written complaint that the conduct alleged does not satisfy one or both of these requirements, the Commission may contact the complainant and indicate the Commission's preliminary view that the conduct may not amount to a breach of section 18C. The complainant may agree with the Commission's preliminary view and withdraw the complaint, or it may provide further information to substantiate its complaint.

(b) *Obtain and review information*

70. If it appears that the complaint could, if true, satisfy each of the requirements in section 18C identified above, the Commission's usual course is to then notify the respondents in writing and ask for a response to the complaint. A written response is not always sought. For example, if the parties have already been in negotiations prior to the complaint being lodged with the Commission, the issues in dispute may be clear to all parties and the Commission may instead consider that an early conciliation is more appropriate.

71. The notification email to the respondents will include a copy of the written complaint, copies of the relevant sections of the law and details of the Commission's complaint process. Where a written response is sought, the notification will include some general questions and ask for a response, usually within 21 days.

72. In complaints under section 18C, the Commission would usually ask for:

- a response to the allegation that the conduct alleged amounts to a breach of section 18C of the RDA (that is: was the conduct reasonably likely in all the circumstances to offend, insult humiliate or intimidate a person or group of people; and was it done because of the race of that person or group of people?)
- a submission about whether any of the exemptions in section 18D of the RDA apply.

73. The Commission will review any response received from the respondents and then consider what steps to take.

(c) *Preliminary assessment*

74. A preliminary assessment refers to a process of considering whether a complaint should be terminated on one of the grounds set out in section 46PH



of the AHRC Act. In the flowchart in **Annexure A**, this stage is shown after the stage of obtaining and reviewing information. When the Commission is considering terminating a complaint because it is not unlawful (s 46PH(1)(a)) or because it is trivial, vexatious, misconceived or lacking in substance (s 46PH(1)(c)) this is often when a preliminary assessment will occur. In practice, this kind of assessment may occur at any stage of the complaint handling process.

75. The President (or his or her delegate) may decide to terminate a complaint as not unlawful discrimination (s 46PH(1)(a)) if he or she is satisfied that an exemption applies.<sup>20</sup>
76. In the case of complaints under section 18C, the relevant exemptions are the free speech protections in section 18D. In order to be satisfied that an exemption applies, the Commission must have some evidence in front of it. An essential aspect of the free speech exemptions in section 18D is that the conduct is done 'reasonably and in good faith'. It is therefore usually necessary for the respondent to provide a submission that explains, at least, why the conduct was done reasonably and in good faith. This is the kind of information that the Commission typically asks a respondent to provide at the point in the flowchart titled 'obtain and review information'.
77. The President (or delegate) will not terminate a complaint on this basis if it is arguable, but not sufficiently certain, that one of these exemptions applies. That is, the application of section 18D must be clear-cut.
78. Most complaints made under section 18C of the RDA relate to verbal racial abuse, often in the workplace or in the provision of goods and services. In these cases, it would be difficult for the President (or delegate) to be satisfied that a free speech exemption under section 18D applies because there is likely to be a genuine dispute about whether the conduct was done 'reasonably and in good faith'. (Note that this does not mean that there has been a breach of section 18C, only that in the Commission's view such an allegation is arguable.)
79. In some cases, it may be easier to be satisfied that a free speech exemption under section 18D applies, for example, if the complaint is about an artistic work (s 18D(a)) where the case law suggests that a broad degree of artistic licence is typically afforded. In those cases, if a respondent has provided a submission that the artistic work was made reasonably and in good faith, this will be highly relevant.
80. In order to ensure procedural fairness, before terminating a complaint on the basis that the conduct is not unlawful, or the complaint is trivial, vexatious, misleading or lacking in substance, the President (or delegate) will write to a complainant indicating his or her preliminary view and invite a response (see section 3.1(a) above).

(d) *Conciliation*

81. If a complaint is not withdrawn or discontinued, and if it is not earlier terminated by the Commission, it will proceed to conciliation. In 2015-16, approximately 66% of all finalised complaints had first proceeded to conciliation.
82. Conciliation can take many different forms. It may involve the Commission acting as a conduit for the exchange of information between the parties. It may involve a telephone conference with all of the parties. It may involve a face-to-face conciliation. It may involve a combination of some or all of these.
83. A key aspect of the conciliation process is that it is voluntary. The Commission does not compel any party to attend or participate in conciliation.
84. In the course of this process, the conciliator is an impartial third party whose role is to ensure that the process is as fair as possible and to assist the parties to explore options for informal resolution of the complaint. The conciliator does not act as an advocate for any party. The conciliator does not decide whether there has been a breach of the law, or direct the parties as to how the complaint should be resolved. Conciliators can and do provide information to the parties about how the law may be applied to the complaint. Conciliators can and do provide information to the parties about the risks involved if the matter proceeds to court.
85. In 2015-16, 76% of all complaints that proceeded to conciliation were successfully conciliated. That is, the parties voluntarily agreed to an outcome between themselves.
86. As described in more detail in section 5.1 below, in the 2016 calendar year, there were 32 complaints under section 18C that were successfully resolved by conciliation. The range of outcomes in those cases is described in more detail in that section.

(e) *Termination*

87. If a complaint cannot be resolved following conciliation, then the President (or delegate) may decide to terminate the complaint on the ground that he or she is satisfied that there is no reasonable prospect of the matter being settled by conciliation (s 46PH(1)(i)).
88. It is also possible that other grounds of termination may be used following conciliation.

(f) *Complainant's option of court proceedings*

89. If a complaint is terminated, the complainant has the option of commencing court proceedings (s 46PO). The Commission does not provide advice to

complainants about whether or not to make an application to the court. The Commission has no role in a decision by an applicant whether or not to proceed to court. If a court case is filed, the Commission does not take part in the proceeding, whether for the complainant or the respondent.

## **5 Outcomes in section 18C cases**

90. This section of the submission sets out details of the outcomes of complaints under section 18C of the RDA that are resolved through conciliation at the Commission and in cases that have gone to court.
91. In the minority of section 18C cases successfully conciliated at the Commission where a financial payment is made, the amount paid is broadly similar to awards of financial compensation made in court proceedings under section 18C. However, there are key differences in process. The most important differences are that while the complaint is before the Commission:
- participation in any conciliation conference is voluntary
  - any settlement reached during a conciliation conference is voluntary
  - Commission conciliators are impartial, do not advocate for either party, and do not suggest any particular settlement outcome.
92. By contrast, when an application is made to the court, the outcomes are determined by the court.
93. The following sections set out:
- a) data for complaints that were resolved through conciliation at the Commission during 2016 where at least one aspect of the complaint was a complaint under section 18C of the RDA and a financial payment was made as part of the terms of settlement
  - b) some brief comments about private settlement of legal proceedings
  - c) data for compensation awards that have been made in cases under section 18C of the RDA that have gone to court since 2000. The data is taken from the Australian Human Rights Commission's publication *Federal Discrimination Law*.<sup>21</sup>

### **5.1 Outcomes through the conciliation process**

94. The Commission has manually reviewed its files for all cases resolved by conciliation during the 2016 calendar year in which a complaint of racial hatred under section 18C of the RDA was at least one of the grounds of complaint.

95. During this period, 32 complaints that included a complaint under section 18C of the RDA were resolved through the Commission’s conciliation process.
96. Of these 32 complaints, nine of them (28%) included a financial payment as an outcome. Of the remaining 23 complaints the most common outcomes were:
- apologies or statements of regret by a respondent (also nine cases, or 28% of complaints); or
  - an acknowledgement by the complainant that their concerns had been heard (six cases, or 19% of complaints).
97. In eight out of the nine cases where a payment was made, the complainant was not just complaining about conduct under section 18C. Each of those cases also involved other complaints of racial discrimination under the RDA. These cases involved racial discrimination in employment (sections 9 and 15 of the RDA) and racial discrimination in the provision of goods and services (sections 9 and 13 of the RDA). The amounts paid in these cases ranged from \$20 to \$55,000 and are set out in detail in the following table.
98. The average financial payment across the nine complaints where a payment was made was \$9,050. Seven out of nine complaints involved a payment of \$5,000 or less.
99. The highest amount of compensation paid was \$55,000. In this case, the complainant and respondent were in an employment relationship. There were also separate allegations of racial discrimination in the course of that employment and of victimisation contrary to section 27(2) of the RDA.

**Complaints resolved at conciliation in 2016 in which at least one aspect was a complaint under section 18C of the RDA and the parties agreed to a financial payment**

Complaint grounds	Complaint area	Compensation amount
Racial discrimination Racial hatred	Goods and services	\$140
Racial discrimination Racial hatred	Goods and services	\$780

<b>Complaint grounds</b>	<b>Complaint area</b>	<b>Compensation amount</b>
Racial discrimination Racial hatred	Employment	\$1,500
Racial hatred	Racial hatred	\$3,000
Racial discrimination Racial hatred	Goods and services	\$12,500
Racial discrimination Racial hatred	Employment	\$5,000
Racial discrimination Racial hatred	Employment	\$3,500
Racial discrimination Racial hatred Victimisation	Employment	\$55,000
Racial discrimination Racial hatred	Goods and services	\$20

## **5.2 Private settlement of legal cases**

100. If a matter does not resolve at conciliation at the Commission and a complainant decides to make an application to the court, the parties may still decide to settle the proceeding between themselves prior to hearing.
101. The Commission does not take any part in court proceedings after it terminates a complaint and, similarly, the Commission is not involved in any

settlement discussions between the parties after it terminates a complaint. It does not have any data on the results of these settlements.

### 5.3 Court orders in section 18C cases

102. Under section 46PO(4)(d) of the AHRC Act, if a court is satisfied that there has been unlawful discrimination, including a breach of section 18C of the RDA, it may make an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent.
103. The following table gives an overview of damages awarded in section 18C cases since the function of hearing and making determinations about these complaints was transferred from the Commission to the Federal Magistrates Court (now the Federal Circuit Court) and the Federal Court on 13 April 2000.
104. Further details of the basis for these awards is described in the Commission's publication *Federal Discrimination Law*. Cases have been added to the table to illustrate instances where a breach of section 18C was found but no damages were awarded.

**Damages awarded in court cases under section 18C**

No	Case	Damages awarded
1.	<i>McMahon v Bowman</i> [2000] FMCA 3	\$1,500 (non-economic loss)
2.	<i>Horman v Distribution Group</i> [2001] FMCA 52	\$12,500 (non-economic loss, including medication)
3.	<i>Jones v Scully</i> [2002] FCA 1080	No damages awarded
4.	<i>Jones v Toben</i> [2002] FCA 1150	No damages awarded
5.	<i>McGlade v Lightfoot</i> [2002] FCA 1457	No damages awarded
6.	<i>San v Dirluck Pty Ltd</i> [2005] FMCA 750	\$2,000 (non-economic loss)
7.	<i>Silberberg v The Builders Collective of Australia Inc</i> [2007] FCA 1512	No damages awarded

No	Case	Damages awarded
8.	<i>Campbell v Kirstenfeldt</i> [2008] FMCA 1356	\$7,500 (non-economic loss)
9.	<i>Eatock v Bolt</i> (2011) 197 FCR 261	No damages awarded
10.	<i>Clarke v Nationwide News Pty Ltd (t/as the Sunday Times)</i> (2012) 201 FCR 389	\$12,000 (non-economic loss)
11.	<i>Sidhu v Raptis</i> [2012] FMCA 338	\$2,000 (non-economic loss)
12.	<i>Barnes v Northern Territory Police</i> [2013] FCCA 30	\$3,500 (non-economic loss) plus interest
13.	<i>Kanapathy v In De Braekt (No 4)</i> [2013] FCCA 1368	Total damages: \$12,500 \$10,500 (non-economic loss) \$2,000 (medical expenses)
14.	<i>Haider v Hawaiian Punch Pty Ltd (t/as Honeypot Club)</i> [2015] FCA 37	\$9,000 (non-economic loss)
15.	<i>Murugesu v Australia Post &amp; Anor (No.2)</i> [2016] FCCA 2355	\$40,000 (non-economic loss, taking into account medical evidence)

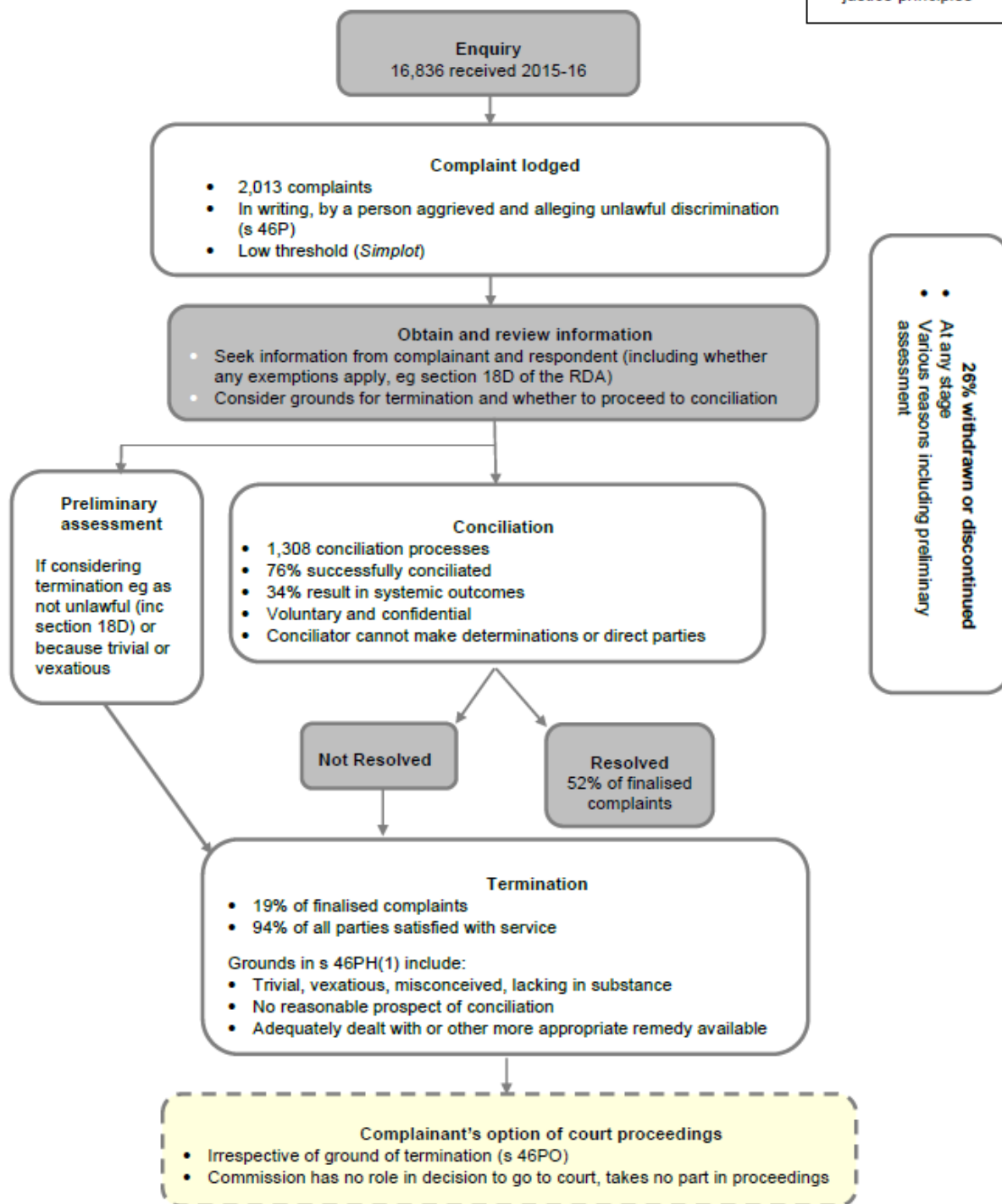
105. Unlike the complaints listed in the table in paragraph 99 above, the amounts in this table (with the exception of *Murugesu v Australia Post*) represent damages for a breach of section 18C only. In the complaints listed in the table in paragraph 99 above, all of the complaints except one also alleged other breaches of the RDA.

## Annexure A

### Unlawful discrimination complaints process

e.g. Sex Discrimination Act, Racial Discrimination Act, Disability Discrimination Act and Age Discrimination Act

Process varies with circumstances and complies with natural justice principles





## Endnotes

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- <sup>1</sup> In 2015-16, 34% of finalised complaints did not proceed to conciliation. In 2014-15, 32% of finalised complaints did not proceed to conciliation. In 2013-14, 34% of finalised complaints did not proceed to conciliation.
- <sup>2</sup> Caxton Legal Centre and Townsville Community Legal Service, *Submission to the Parliamentary Joint Committee on Human Rights Inquiry into Freedom of Speech*, submission 23, 7 December 2016, p 6. At <http://www.aph.gov.au/DocumentStore.ashx?id=42545f5b-9d69-4a36-a4c0-994511e48261&subId=461117> (viewed 14 February 2017).
- <sup>3</sup> *Ombudsman Act 1976* (Cth), s 6(1)(iii).
- <sup>4</sup> *Inspector-General of Intelligence and Security Act 1986* (Cth), s 11(2)(c).
- <sup>5</sup> *Anti-Discrimination Act 1977* (NSW), s 92(1)(b).
- <sup>6</sup> *Equal Opportunity Act 2010* (Vic), s 116(e).
- <sup>7</sup> *Anti-Discrimination Act 1998* (Tas), s 64.
- <sup>8</sup> Equal Opportunity Tasmania, *Submission to the Parliamentary Joint Committee on Human Rights Inquiry into Freedom of Speech*, submission 167, 23 December 2016, p 40. At <http://www.aph.gov.au/DocumentStore.ashx?id=beb0ee58-4f5f-48dd-a53f-85f149dd0d06&subId=462714> (viewed 14 February 2017).
- <sup>9</sup> Evidence to the Parliamentary Joint Committee on Human Rights, *Inquiry into Freedom of Speech in Australia*, Hobart, 30 January 2017, pp 10 and 12 (Ms Robin Banks, Anti-Discrimination Commissioner, Equal Opportunity Tasmania). At <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Fcommjnt%2F7676cbb9-3001-44ed-99ea-dc49e62d202a%2F0001;query=Id%3A%22committees%2Fcommjnt%2F7676cbb9-3001-44ed-99ea-dc49e62d202a%2F0000%22> (viewed 14 February 2017).
- <sup>10</sup> Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Human Rights Inquiry into Freedom of Speech*, submission 13, 9 December 2016, pp 51-57. At
- <sup>11</sup> JobWatch Inc, *Submission to the Parliamentary Joint Committee on Human Rights Inquiry into Freedom of Speech*, submission 29, December 2016, p 10. At <http://www.aph.gov.au/DocumentStore.ashx?id=29eb42d5-b590-4461-8bee-ff47dc30a2c8&subId=461154> (viewed 14 February 2017).
- <sup>12</sup> Ryan Carlisle Thomas Lawyers, *Submission to the Parliamentary Joint Committee on Human Rights Inquiry into Freedom of Speech*, submission 66, 9 December 2016, p 6. At <http://www.aph.gov.au/DocumentStore.ashx?id=449d1d5e-3e6e-4922-9c5a-43d158e00363&subId=461488> (viewed 14 February 2017).
- <sup>13</sup> Legal Aid NSW, *Submission to the Parliamentary Joint Committee on Human Rights Inquiry into Freedom of Speech*, submission 73, December 2016, p 7. At <http://www.aph.gov.au/DocumentStore.ashx?id=5b52e330-0c1e-4b73-ae1b-fa8dbf389cab&subId=461497> (viewed 14 February 2017).
- <sup>14</sup> National Aboriginal & Torres Strait Islander Legal Services (NATSILS), *Submission to the Parliamentary Joint Committee on Human Rights Inquiry into Freedom of Speech*, submission 171, December 2016, p 14. At <http://www.aph.gov.au/DocumentStore.ashx?id=adff2105-e708-4ab9-a625-d8472e8ef497&subId=462717> (viewed 14 February 2017).
- <sup>15</sup> Australian Human Rights Commission, *Charter of Service*. At <https://www.humanrights.gov.au/complaints-charter-service> (viewed 14 February 2017).
- <sup>16</sup> AHRC Act, s 46PH(1)(a)-(g).
- <sup>17</sup> Australian Human Rights Commission, answers to questions on notice from public hearing of the Parliamentary Joint Committee on Human Rights, *Inquiry into Freedom of Speech*, 12 December 2016, Question No 4. At [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights\\_inquiries/Freedom\\_of\\_Speech/Australia/Additional\\_Documents](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/Freedom_of_Speech/Australia/Additional_Documents) (viewed 14 February 2017).
- <sup>18</sup> See *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Limited* [2008] FCAFC 60 at [61] (Rares J).

- <sup>19</sup> Australian Human Rights Commission, *Make a complaint*, at <http://www.humanrights.gov.au/complaints/make-complaint> (viewed 14 February 2017).
- <sup>20</sup> For more detail, see the Commission's submissions of 9 December 2016 at [215]-[217].
- <sup>21</sup> Australian Human Rights Commission, *Federal Discrimination Law (2016)*, p 383. At [http://www.humanrights.gov.au/sites/default/files/document/publication/AHRC\\_Federal%20Discrimination%20Law\\_2016.pdf](http://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_Federal%20Discrimination%20Law_2016.pdf) (viewed 14 February 2017). Note that the case of *Murugesu v Australia Post & Anor (No.2)* [2016] FCCA 2355 has been added to this table as it was handed down after the publication cut-off date of 30 June 2016.