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23 December 2016

Parliamentary Joint Committee on Human Rights: Inquiry into Freedom of Speech in Australia

Australian National University Law Students Research Hub (ANU LSRH) welcomes the opportunity to provide a submission in response to the Parliamentary Joint Committee on Human Rights inquiry on Freedom of Speech in Australia.

The ANU Law Reform and Social Justice (LRSJ) is a program at the ANU College of Law that supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are ANU law students, who are engaged with a broad range of projects with the aim of exploring law's complex role in society, and the part that lawyers play in using and improving law to promote both social justice and social stability.

A student research group (ANU LSRH) was formed within the LRSJ program in responding to the terms of reference in this inquiry, being as follows:

- Whether the operation of Part IIA of the *Racial Discrimination Act 1975* (Cth) (including ss 18C and 18D) impose unreasonable restrictions on freedom of speech and
- Whether the complaints handling procedures of the Australian Human Rights Commission (“the Commission”) should be reformed

We make the following general comments:

- A persistent criticism of s 18C is that it sets the bar for unlawful racial vilification too low because it applies merely to acts which ‘offend’ and ‘insult’. We contend that this criticism is unfounded as it fails to take into account the meaning of ‘offend, insult, humiliate or intimidate’ as determined by the Court. This meaning is of a higher threshold than its meaning in everyday, common language, and refers only to racist acts with ‘profound and serious effects’ and not ‘mere slights’.
- Criticism that ‘offence’ under s 18C is determined by reference to the victim’s ‘subjective response’ or ‘hurt feelings’ fails to hold up to the jurisprudence, which determines ‘offence’ by the application of an objective test. Whether a person has actually been offended is irrelevant in this determination.
- The appropriate balance between freedom of speech and protection from racial vilification is achieved in the emphasis of s 18C on conciliation and remedial measures, rather than punishment, and is more concerned with social cohesion than the restriction of speech.
- Much controversy has been generated by perceived problems in the procedure employed by the Commission in how it deals with a variety of claims, particularly in relation to racial discrimination claims.
- One possible option for reform is to require the Commission inform the complainant if they are satisfied the claim has no reasonable prospects of success. This allows the conciliation processes to continue while at the same time discourages complainants bringing unmeritorious cases to court, thus saving time and money for both the court and the respondent.
- The Commission should also adopt a policy that requires notification of the respondent directly where the Commission believes the complaint should not be terminated unless there are compelling reasons not to notify them.

If we can provide further information, please do not hesitate to contact us:

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1. Racial Discrimination Act

Whether the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) imposes unreasonable restrictions upon freedom of speech [as defined], and in particular whether, and if how so, ss18C and 18D should be reformed.

In this section, we first examine common claims made regarding the purported chilling effect of s 18C on free speech and address a number of misconceptions regarding the operation of the statute. We conclude that the high standard applied by the courts with respect to s 18C in conjunction with the exemptions under s 18D provide sufficient space for genuine public discussion.

1.1 Judicial Interpretation of Offend, Insult, Humiliate or Intimidate

A persistent criticism of s 18C is that it places unreasonable restrictions on freedom of speech. In particular critics have suggested that the phrase ‘offend, insult, humiliate or intimidate’ at subs 18C(1)(a) sets the bar for unlawful racial vilification too low.¹ Josh Frydenberg, the Minister for Environment and Energy, stated that the words ‘offend’ and ‘insult’ created a ‘hurt feelings test’.²

As stated in the *Traditional Rights and Freedoms Report*, critics of s 18C focus on the word, ‘offend’, and argue that this is an extensive limitation on freedom of speech.³ As noted above, critics of s 18C have argued that the words ‘offend’ or ‘insult’ in the statute provide a remedy for mere hurt feelings.⁴

We contend that these arguments fail as they do not hold up to the meaning of ‘offend, insult, humiliate and intimidate’ in the jurisprudence. This is because the meaning of ‘offend’ in s 18C as determined by the Court is of a higher threshold than its meaning in everyday, common language.

First, acts which are held to offend, insult, humiliate or intimidate are not directed towards trivial or insignificant matters. Kiefel J in *Creek v Cairns Post Pty Ltd* stated that these words refer to ‘profound and serious effects, not to be likened to mere slights’.⁵ This has been affirmed in subsequent cases, including *Prior v QUT*, in which Jarrett J summarily dismissed proceedings on the basis that the applicant had no reasonable prospect of success.⁶ In reaching this conclusion Jarrett J found that the Facebook posts made by two of the plaintiffs regarding a computer lab reserved for indigenous students were ‘mere slights’ and while the posts were capable of being seen as offensive or amounting to humiliation or intimidation

¹ *Racial Discrimination Act 1975 (Cth) s 18C(1)(a)*.

² Michelle Grattan, *Ministers set to look at 18C inquiry* (7 November 2016) SBS <<http://www.sbs.com.au/news/article/2016/11/06/ministers-set-look-18c-inquiry>>.

³ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Report No 129 (2015) 114.

⁴ *Ibid.*

⁵ (2001) 112 FCR 352, 356.

⁶ *Prior v Queensland University of Technology & Ors* [2016] FCCA 2853 (‘*Prior v QUT*’).

they were outside the range of conduct which would attract subs 18 C(1)(a).⁷ Jarrett J held that:

words and concepts which are ordinarily insulting and offensive may nonetheless not engage in s 18C(1)(a) because the circumstances in which the relevant acts [are] performed means they are not reasonably likely to offend, insult, humiliate or intimidate in the way envisaged by that subsection.⁸

Therefore, s 18C does not prescribe all speech which offends or insults, only where it is considered to have profound and serious effects.

Public discussion of s 18C usually focuses on the Bill Leak complaint and *Prior v QUT*,⁹ however this neglects cases of serious harm which have fallen under s 18C. It should be noted that the Bill Leak complaint was withdrawn and therefore never reached Court,¹⁰ and the impugned words in *Prior v QUT* were found to be ‘mere slight[s]’ and not unlawful under s 18C.¹¹ In *Sidhu v Raptis* an example of a direct slur was not considered a ‘mere slight’. The importance of s 18C in protecting victims of racist speech and the level of seriousness required to be found to be unlawful can be seen in *Sidhu v Raptis*.¹² *Sidhu v Raptis* dealt with two incidents: in the first incident, Mr Raptis repeatedly called Mr Sidhu, a person of Indian origin, a ‘coconut’; in the second incident, Mr Raptis was aggressive and told Mr Sidhu he looked like a ‘nigger’, then said ‘what you are offended Nigger? Nigger, Nigger, Nigger, Nigger, Nigger, with your beard and your hoodie you look like a Nigger’.¹³ The first incident was found not reasonably likely to carry ‘real offence’ with the degree of seriousness required,¹⁴ as Smith FM concluded that the use of the word ‘coconut’ in reference to a person of clear sub continental origin was not sufficient to fulfil the *Creek v Cairns* standard.¹⁵

However, the second incident was found to be unlawful.¹⁶ Smith FM stated that the incidents in this case are ‘at the lowest end of the range of conduct which might attract the language of s 18C(1)(a)’.¹⁷ This shows the high level of seriousness required for speech to be considered unlawful under s 18C.

Second, offence under s 18C is *not* determined by reference to the victim’s ‘subjective response’ or ‘hurt feelings’. This point is made clear by Bromberg J in *Eatock v Bolt*, who held that the words “‘offend, insult, humiliate or intimidate” were not intended to extend to

⁷ Ibid 57, 70.

⁸ Ibid 24.

⁹ Ibid.

¹⁰ Adam Gartrell, ‘Racial Discrimination Complaint against Cartoonist Bill Leak Dropped’, *Sydney Morning Herald* (online), 12 November 2016 <<http://www.smh.com.au/federal-politics/political-news/racial-discrimination-complaint-against-cartoonist-bill-leak-dropped-20161111-gsnsj9.html>>.

¹¹ *Prior v QUT* [2016] FCCA 2853 [23].

¹² [2012] FMCA 338.

¹³ Ibid.

¹⁴ Ibid [10].

¹⁵ Ibid [7].

¹⁶ Ibid [18].

¹⁷ Ibid [3].

personal hurt unaccompanied by some public consequence...’¹⁸ This is supported by Jarrett J in *Prior v QUT*, who stated that ‘[t]he fact that a person has actually been offended in the way contemplated by s 18C(1)(a) is not to the point’.¹⁹ Rather, ‘offence’ is determined by an objective test—that is, whether speech would be reasonably likely, in all of the circumstances, to offend, insult, humiliate or intimidate a hypothetical representative of one or other of the groups identified.²⁰

In other words, speech which is determined to be unlawful under s 18C does *not* depend on the subjective responses or feelings of its complainants.

Criticisms that s 18C is an extensive limitation on speech on the basis that it applies to all speech which ‘offends’ or that it is based on subjective feelings are therefore unfounded. Clearly mere offence is not sufficient to enliven the provision, and the ‘hurt feelings’ test referred by the Frydenberg simply does not exist. Racial vilification that is offensive insulting, humiliating or intimidating will only become unlawful where it crosses the threshold to profound and serious effects. This high threshold protects free speech, even where it constitutes racial vilification, Australians have a broad scope to be offensive so long as their actions do not have profound or serious effect. As will be discussed below, we believe that this threshold protects free speech while eliminating highly damaging vilification.

1.2 Operation of Section 18 D

Section 18D allows for exemptions to liability under s 18C. These exemptions directly address the concern of a ‘cooling’ effect on free speech by exempting reasonable public discourse made in good faith from the operations of s 18C.

Section 18D provides that actions will not be unlawful so long as they are 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.

Section 18D strikes a balance between protecting the right to free speech even where it may offend or insult while not extending protection to vilification that does not serve a purpose in public discourse. The balance between these concepts is illustrated in the outcomes of *Eatoock v Bolt*²¹ and the complaint regarding Bill Leak’s cartoon depicting a disengaged indigenous father.

¹⁸ *Eatoock v Bolt* (2011) 197 FCR 261, 325.

¹⁹ *Prior v QUT* [2016] FCCA 2853 [11].

²⁰ *Ibid* [12].

²¹ *Eatoock v Bolt* [2011] FCA 1103.

Bill Leak's cartoon published in *The Australian* was subject to a complaint under s 18C. This complaint was not subject either to conciliation or considered by the courts as the complainant withdrew the complaint. However had the complaint been considered by the courts it would have very likely fallen under s 18D(a) as part of the distribution artistic work or s 18D(c)(ii) as fair comment on an event or matter of public interest.²²

Conversely in *Eatoock v Bolt*.²³ Justice Bromberg found that claims made by Andrew Bolt did not attract an exemption under s 18D(c)(ii) as fair comment on a matter of public interest. Justice Bromberg found that the basis for Mr Bolt's comments were either untrue or subject to significant distortion.²⁴ Later Justice Bromberg noted that the orders should not suggest that it is unlawful to discuss racial identification or challenge the genuineness of the identification of a group of people. Rather it was the manner in which that subject matter was dealt with which precluded the application of section 18D.²⁵

Section 18D allows for robust discussion in public forums, even where that discussion may cause *profound and serious effects*²⁶ through racial vilification. In this way s 18D removes any undue burden on free speech. When ss 18C and 18D are read together it is clear that in the sphere of public debate only content which fulfils the *Creek v Cairns* standard and is made either without a reasonable basis or not in good faith is unlawful. This gives a great deal of latitude for free speech, even where it is offensive, insulting, humiliating or intimidating while precluding the kind of baseless discussion as in *Bolt* which adds little to no value to public discourse.

1.3 Section 18C's actual effects

Section 18C has been useful in helping 'promote racial tolerance', which is unequivocally a goal that we wish to achieve as society.²⁷ It encourages others to think about how their actions may affect people of different cultures and races.

As noted, critics of s 18C argue that it instigates a chilling effect in society, and that racial tolerance should not come at the cost of freedom of expression. However, the effect is not nearly as pronounced as critics claim.

As the information collected by the the Commission demonstrates, the majority of claims pursued under s 18C are dismissed, withdrawn or conciliated through the Commission.²⁸ In 2015-16, of the 77 complaints under s 18C received, only one complaint of racial hatred

²² *Racial Discrimination Act 1975* (Cth) s 18D(a), and 18 D(c)(ii).

²³ *Eatoock v Bolt* [2011] FCA 1103.

²⁴ *Ibid* at 384.

²⁵ *Ibid* at 461.

²⁶ *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356.

²⁷ *Eatoock v Bolt* [2011] FCA 1103, [207].

²⁸ Australian Human Rights Commission, *Race Hate and the RDA* (8 September 2016) <<https://www.humanrights.gov.au/our-work/race-discrimination/projects/race-hate-and-rda>>.

progressed to court.²⁹ 52% of racial vilification complaints were resolved at conciliation and 12% of complaints withdrawn.³⁰

As such, it could be argued that the cases that are actually pursued in court, involve highly damaging behaviour that prevents society achieving racial tolerance. For cases involving a lesser degree of offence towards a person, a simple apology usually suffices, as noted by the Commission.³¹

Recent cases have demonstrated that the actual behaviour which s 18C has rendered unlawful, has involved damaging and insulting interpersonal behaviour of a high degree, occasionally paired with physical violence. The Act has not been triggered by the subjective responses or feelings of its complainants. Rather, ‘offensive behaviour’ has been held to a higher threshold than what would ordinarily be thought as offensive in everyday society.

The above case of *Sidhu v Raptis* provides one example of the appropriate balance which is struck in the legislation between free speech and deeply offensive language that might trigger the Act.³² A further illustration is found in *Haider v Hawaiian Punch Pty Ltd*, wherein a vigorous verbal exchange, combined with the ensuing physical confrontation triggered the Act.³³

As such, s 18C can be seen not merely regulate public discourse, but often is utilised by the victims of traumatic interpersonal vilification, which is at times combined with physical violence as in *Haider v Hawaiian Punch Pty Ltd*.³⁴ In considering whether s 18C places an *unreasonable* burden on free speech it is necessary to understand that the statute does not just apply to newspaper columns, cartoons and Facebook posts. It is also applied in cases of direct and extreme inter-personal vilification which is anathema to a racially diverse society.

Critics may argue that the standard employed - the balance of probabilities - is a relatively low bar. This would exacerbate the chilling effect, as complaints would merely need to clear the low bar to prove a contravention of s 18C.

However, it should be noted that usage of the deeply insulting racial slur in *Sidhu v Raptis* was not immediately held to be an offensive racist act.³⁵ Rather, the case utilised the jurisprudence of Drummond J, who held that it was always ‘necessary to take into account the context in which the word is used’.^{36,37}

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² *Sidhu v Raptis* [2012] FMCA 338.

³³ *Haider v Hawaiian Punch Pty Ltd* [2015] FCA 37.

³⁴ Ibid.

³⁵ *Sidhu v Raptis* [2012] FMCA 338.

³⁶ Ibid, [43].

³⁷ *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615, [7].

As such, it is not easy to attract the operation of s 18C, which denies its usage as an effective tool to exact a chilling effect. The need to prove a sufficient linkage to race, colour or national or ethnic origin, prove all reasonable persons would be reasonably likely to be offended and need to prove the usage of the word in a derogatory context sufficiently prevents its vexatious usage.

As noted, media attention regarding s 18C has been focussed on three complaints. Two of these cases, *Eatock v Bolt*³⁸ and *Prior v QUT*³⁹ were taken to the Federal Court while the third complaint, surrounding Bill Leak's cartoon in the Australian was withdrawn by the complainant.⁴⁰ However, it is important to note that while the actions in these instances were subject to complaint, they fall on the less harmful end of the spectrum of s 18C.

Further, the operation of s 18D exempts actions such as political discourse or artistic expression, which require free speech from s 18C, negating the chilling effect and low standard of proof. This is because the public interest of political discussion and artistic expression in good faith, arguably outweigh the interest of racial tolerance.

This can be seen in *Kelly-Country v Beers and Another*, wherein the court found that although the comedic acts and tapes were 'impolite and offensive', they were intended to be comedic and fell within the 'artistic work' exemption in s 18D.⁴¹ *Walsh v Hanson* is another instance, wherein racial discrimination claims were dismissed as Hanson was exempted per the operation of s 18D.⁴²

Moreover, it should be noted that s18C refers to communications in a public space. This negates the chilling effect and efficiently balances the ideal of freedom of speech within the community and freedom from racial vilification, as people are free to express themselves in the private sphere.

For communication within the public sphere, s 18D balances these competing interests, which allows for controversial public discourse in debates. The speech rendered unlawful by the operation of s 18C has no good justification for its presence in society, and is not essential for public debate, otherwise it would be exempt from the operation of s 18C, per s18 D.

What is rendered unlawful – the right to make an inaccurate and false statement regarding race, is not a right that is essential to freedom of speech in debates. It should rightly give way to the greater interest of racial tolerance and harmony within society.

³⁸ *Eatock v Bolt* [2011] FCA 1103.

³⁹ *Prior v QUT* [2016] FCCA 2853.

⁴⁰ Adam Gartell, 'Racial discrimination complaint against cartoonist Bill Leak dropped' *The Sydney Morning Herald* (Online), November 12 2016, <<http://www.smh.com.au/federal-politics/political-news/racial-discrimination-complaint-against-cartoonist-bill-leak-dropped-20161111-gsnsj9.html>>.

⁴¹ *Kelly-Country v Beers and Another* (2004) 207 ALR 421, [105].

⁴² *Walsh v Hanson* [2000] HREOCA 8.

In summary, it appears that the conduct which has actually been found in contravention of s 18C, has had little link to freedom of speech. Rather, it has concerned instances where there has been a reasonably clear intent to use derogatory insults and actions that have intimidated others, based on their race, colour or origin. These are behaviours that society abhors, in the pursuit of racial tolerance.

For actions that pursue aims arguably more fundamentally important than racial tolerance such as freedom of political or artistic expression, s 18D has proven to effectively exempt those acting in a reasonable, good faith manner. Any chilling effect, can be said to be outweighed by the increase in racial tolerance encouraged by s 18C and conciliations, which have lead to greater cultural awareness between the parties.

1.4 Conciliation

The balance between freedom of speech and protection from racial vilification is also seen in the fact that the emphasis of s 18C is not on the regulation of speech, but on the protection of vulnerable minorities.⁴³ Further, Bromberg J in *Eatoock v Bolt* noted that as a civil provision, s 18C emphasises ‘remedial measures encouraging understanding and agreement, rather than punishment, deterrence and the stigma of a criminal conviction’.⁴⁴ The RDA requires that all complaints are first dealt with through conciliation by the Commission.⁴⁵ It is only when conciliation fails that a complaint can proceed to Court.⁴⁶

As such, s 18C is more concerned with encouraging social cohesion and discussion between the parties of a complaint to foster greater understanding, than with punishment and the restriction of speech.

⁴³ Elizabeth Hicks, ‘Context and the Limits of Legal Reasoning: The “Victim Focus” of Section 18C in Comparative Perspective’ (2016) 44(2) *Federal Law Review* 258, 277.

⁴⁴ *Eatoock v Bolt* [2011] FCA 1103, [207].

⁴⁵ *Australian Human Rights Commission Act 1986* (Cth) s 46P.

⁴⁶ Human Rights and Anti-Discrimination Bill 2012 (Cth) cl 120-3.

2. The complaints-handling procedures of the Australian Human Rights Commission

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.

Since the passing of the *Human Rights Legislation Amendment Act No. 1 1999* (Cth) the Commission has been unable to hear and determine discrimination claims.⁴⁷ Instead hearings are now conducted by the Federal Court and the Commission has no power to either commence or terminate a claim. The major function of the Commission is to attempt to conciliate claims.

2.1 Powers and Functions of the Commission

Any person can make a claim alleging unlawful discrimination to the Commission.⁴⁸ Once a claim is received the President is required to inquire into the claim and to attempt to conciliate it.⁴⁹

2.2 Open and transparent

One of the more controversial aspects of the conciliation process is its confidential status. While this may appear to not be in the interests of open and transparent airing of these issues, it is submitted that the opposite is true. Through confidentiality, parties can avoid undue or media attention and speculation and have the ability to frankly discuss a way forward. One of the flip sides of confidential conciliation is that unlike the judgment of a court, the outcome has no wider norm-creating effect on the general community. Instead any education or promotion of tolerance is limited to the parties themselves. Thus, where matters are resolved by confidential conciliation there is less opportunity for societal change above and beyond the parties. This is somewhat ameliorated, however, by the publishing of anonymised reports of cases on the Commission website and in their annual report.⁵⁰

2.3 Costs incurred by the Commission, parties

No lawyer is required to respond to a complaint.⁵¹ Much has been made of the costs that could have been incurred by the QUT students facing a claim in the Federal Court.⁵² It is submitted that the high costs of litigation are an important but separate issue.

2.4 Termination of complaint

Section 46PH of the *Australian Human Rights Commission Act* allows the termination of a discrimination complaint where the President of the Commission is satisfied that:⁵³

- There has been no unlawful discrimination.

⁴⁷ S 61-62.

⁴⁸ *Australian Human Rights Commission Act 1986* s 46P(1)-(2).

⁴⁹ *Ibid* s 46PF.

⁵⁰ Lucy J McNamara and Kathariune Gelber, ‘The impact of section 18C and other civil anti-vilification laws in Australia (2015) *University of Wollongong Research Online* 155, 159.

⁵¹ Australian Human Rights Commission, *Annual Report 2014-5*, 137.

⁵² Hedley Thomas, ‘Judge dismisses case against QUT students over 18C’ *The Australian* (online) 5 November 2016.

⁵³ *Ibid* s 46PH(1).

- The complaint was trivial, vexatious, misconceived or lacking in substance.
- Another remedy has adequately dealt with the complaint.
- A more appropriate remedy is reasonably available to the affected person/s.
- The subject matter has been adequately dealt with by the Commission or another statutory agency.
- The subject matter of the complaint could be more effectively or conveniently be dealt with by another statutory authority.
- The complaint involves an issue of public importance that should be considered by the Federal Court.
- There is no reasonable prospect of the matter being settled by conciliation.

While the Commission may dismiss complaints that are “trivial, vexatious, misconceived or lacking in substance” under s 46PH(1)(c), it is notable that the Commission is not given the power to dismiss a claim on the basis that it has no reasonable prospect of success. This is important because the bar imposed by s 46PH(1)(c) is very low and most complaints brought in good faith could be expected to clear it. For example, in *Pryor v QUT*⁵⁴ the complaint was dismissed by the Federal Court on the basis that it had no reasonable prospect of success. Yet when asked about the *Pryor* complaint on the ABC’s 7:30 Report, the current Human Rights Commissioner Gillian Triggs expressed the view that the threshold for conciliation was ‘very low’ and that as this case had a level of substance it would be inappropriate for the Commission to dismiss it under s 46PH(1)(c).⁵⁵ Thus, there seemed to be a disconnect between the high legal standard required to prove a discrimination complaint and the low standard that required the Commission to continue conciliation.

The lawyer for the respondents in *Pryer v QUT*, Tony Morris, QC, expressed the view that the Commission should have dismissed the case at an earlier time.⁵⁶ However there is a reasonable argument that with its current powers the Commission was unable to dismiss the claim or at the least considered it inappropriate to do so. Being able to dismiss claims that are unlikely to be successful in court may fill this gap in the Commission’s powers.

Another example where giving the Commission the power to dismiss claims on the basis that they are unlikely to succeed may prove useful is illustrated by the Bill Leak complaint. As noted above,⁵⁷ had the complaint proceeded to a court, it is very likely that s 18D would have operated to protect Bill Leak from the complaint. This view was shared by experts in discrimination law such as Professor Simon Rice who wrote that in order to be protected: “Bill Leak only needs to show that he’s reasonably depicting an issue of public interest in good faith”.⁵⁸ Despite its low likelihood of success, Gillian Triggs specifically stated that the Commission would not advise the complainant to drop the case.⁵⁹ The Commission’s seeming inability to dismiss a complaint that was unlikely to succeed in court, whether because of the ready availability of an 18D defence or otherwise, was criticised by some commentators, with Media Watch’s Paul Barry calling it ‘pretty ridiculous’.

⁵⁴ [2016] FCCA 2853.

⁵⁵ ABC, ‘Triggs on the debate over 18C’, *7.30 Report*, 7 November 2016 <<http://www.abc.net.au/7.30/content/2016/s4570705.htm>>.

⁵⁶ Sharnie Kim, ‘Facebook racial vilification case against university students thrown out’, *ABC News* (online), 4 November 2016 <<http://www.abc.net.au/news/2016-11-04/18c-racial-vilification-case-facebook-qut-thrown-out/7996580>>.

⁵⁷ See 1.2

⁵⁸ ABC, ‘The Oz defends right to offend’, *Media Watch*, 24 October 2016 <<http://www.abc.net.au/mediawatch/transcripts/s4562463.htm>>.

⁵⁹ ABC, above n 55.

In response to the above critiques it should be reiterated that the Commission terminating a complaint in no way restricts the ability of the complainant to pursue the matter in the Federal Court should they wish to do so. In relation to *Pryor v QUT*, the Commission had in fact dismissed the complaint back in August 2015 because there were no reasonable prospects of conciliation.⁶⁰ Notwithstanding the Commission's dismissal, the complainant still decided to bring their case to the Federal Court. This illustrates that the Commission terminating a complaint does not guarantee an end to the matter.

Nevertheless, the inefficiencies in a system that requires a complaint to be continued while knowing that it will not succeed in a court challenge are obvious. However, allowing or even requiring termination in this circumstance may be counterproductive to resolving the dispute, because it removes a potential extra-legal avenue, that is conciliation, from play. Even though a complaint may not clearly meet the legal threshold, or may be unlikely to withstand a s18D defence, attempting to resolve it is still beneficial to both the parties and allows opportunities for the Commission to engage in education and the promotion of tolerance in the wider community.

One possible option for reform is to require the Commission to inform the complainant if they are satisfied the claim has no reasonable prospects of success. This allows the conciliation processes to continue while at the same time attempts to discourage complainants bringing unmeritorious cases to court, thus saving time and money for both the court and the respondent.

RECCOMENDATIONS:

- If the President of the Commission is satisfied that a complainant has little chance of success, and their complaint does not otherwise meet grounds for termination, they should be required to inform the complainant that they view the complainant as having little chance of success.

2.5 Notification of the respondent

The Commission states that it will 'generally' notify the respondent about a complaint against them,⁶¹ however they are under no obligation to do so. There does not appear to be a clear set of guidelines that govern when a respondent will be notified directly and when they will not. The lack of notice given was one of the major points brought up in the debate surrounding the QUT complaint.⁶² Despite conciliation being undertaken for more than a year, the

⁶⁰ James Norman and Henry Belot, 'Human Rights Commission had 'no role' in racial vilification court case against QUT students', *ABC News* (online), 7 November 2016 < <http://www.abc.net.au/news/2016-11-07/18c-racial-vilification-facebook-qut-case-hrc-denies-involvement/8002598>>.

⁶¹ Australian Human Rights Commission, *The Complaint Process*.
<https://www.humanrights.gov.au/sites/default/files/WEB_the_complaint_process_UD.pdf>.

⁶² See eg, Joshua Forrester, Augusto Zimmerman and Lorraine Finlay, 'QUT discrimination case exposes Human Rights Commission failings', *The Conversation* (online), 7 November 2016
<<https://theconversation.com/qut-discrimination-case-exposes-human-rights-commission-failings-68235>>.

respondents were not made aware of the complaint until the final conciliation conference. Instead conciliation was undertaken with QUT.⁶³ The governing statute of the Commission only expressly requires the respondent be notified if they are required to attend a compulsory conference.⁶⁴ It is not clear if this requirement also applies to non-compulsory conciliation hearings. Even if there was no legal requirement for the Commission to promptly notify the respondent in this case, the long delay in notifying him of something that may well have a large adverse effect on his interests is inconsistent with principles of procedural fairness.

Requiring the Commission to directly give notice of the commencement of conciliation to the respondent would enhance the procedural fairness of the proceedings. However, this must be weighed against other potential negative effects. As statistics show most racial hatred complaints are made in employment context,⁶⁵ notification of a complaint could lead to victimisation of the complainant for lodging the claim.⁶⁶ Furthermore, if a complainant is aware that they must notify the respondent, they may be less likely to make a claim in the first place.

If this aspect of the Commission's complaints handling procedure is reformed, then a balance must be struck between the interests of the complainant and respondent. One possibility is to require the Commission to notify the respondent if it begins conciliation or terminates a claim after conciliation unless the President of the Commission is satisfied that compelling reasons exist to justify not notifying the respondent. By requiring notification as the default position, such a change would give requisite weight to the procedural interests of the respondent. However, at the same time it would allow for situations where notification may be undesirable.

RECCOMENDATIONS:

- The Commission should adopt policy that requires notification of the respondent directly where the Commission believes the complaint should not be terminated unless there are compelling reasons not to notify them.

2.6 Conciliation

2.6.1 The Purpose of Conciliation

Australia, along with similar jurisdictions such as Canada, New Zealand and the United States provides for conciliation as a mean of resolving certain discrimination claims. The administrative body, in this case the Australian Human Rights Commission, has responsibility for investigating and encouraging the conciliation of the complaint.⁶⁷

⁶³ Ibid.

⁶⁴ *Australian Human Rights Commission Act 1986* s 46PJ (3).

⁶⁵ Australian Human Rights Commission, *2015-2016 Complaint statistics* <<https://www.humanrights.gov.au/sites/default/files/AHRC%202015%20-%202016%20Complaint%20StatisticS.pdf>>.

⁶⁶ Though victimisation is unlawful: *Australian Human Rights Commission Act* s 26(2).

⁶⁷ Tracey Raymond and Jodie Ball, 'Alternative Dispute Resolution in the Context of Anti-Discrimination and Human Rights Law: some comparisons and considerations' Human Rights Commission (2000).

To effectively analyse the current process of the Commission regarding racial discrimination claims, one must first understand the principle form of conflict resolution employed in these types of cases, conciliation by the President. This process is set out in the *Australian Human Rights Commission Act 1986* Part IIB.

The oft-cited advantages of the conciliation process include:

- Efficiency
- Access to justice—making a complaint is free
- More cost effective than court processes
- Saves thousands of hours of Federal Court time each year
- More accessible to complainants
- Both parties get a fair hearing unconstrained by the rules of evidence or strict procedures of federal courts
- Party control over process and outcome.⁶⁸

It is submitted that the most important aspect of the conciliation process is the normative, restorative outcomes available to parties.⁶⁹ While remedies sometimes involve a payment to an aggrieved party,⁷⁰ this is often accompanied by (or indeed substituted by) more normatively appropriate remedies.⁷¹ These include the possibility of an apology, change in policy, reinstatement of employment, agreement by parties to undertake training to avoid similar complaints in the future.⁷² The Human Rights Commission facilitates this party-led process contrary to much conjecture in the media.⁷³

As noted by Raymond and Ball, ‘complainants are likely to come from more disadvantaged groups in society ... and informal dispute resolution mechanisms provide an accessible process which enables parties to maintain control of the dispute and attain outcomes reflective of their needs.’⁷⁴

2.6.2 Effectiveness of Conciliation

In conciliation proceedings, the function of the Commission is to ensure a fair process and to provide information about the law and its interpretation as requested.

The Commission has the power to compel parties to attend a conference and to compel the production of documents,⁷⁵ however these powers are yet to be utilised by the Commission who instead engage in a voluntary process of conciliation.

Because of the informal and confidential nature of conciliation, there is little information as to what it precisely involves. Though the Commission does publish a conciliation register which includes de-identified information such as remedies, it doesn’t include information such as whether parties had legal representation or the extent of the Commission’s own input in the proceedings. Therefore, it is hard to determine how each party’s rights and interests are

⁶⁸ Tracey Raymond and Sofie Georgalis, ‘Dispute resolution in the changing shadow of the law: a study of parties’ view on the conciliation process in the Federal Anti-Discrimination Law’ (2006).

⁶⁹ See Jeremy Waldron, *The Harm of Hate Speech* (Harvard University Press, 2012).

⁷⁰ See, eg, Australian Human Rights Commission, *Annual Report 2014-5*, 60.

⁷¹ Australian Human Rights Commission, *Annual Report 2014-5*, 59.

⁷² *Ibid.*

⁷³ See, eg, Gareth Hutchens, ‘Malcolm Turnbull says QUT case hurt Human Rights Commission’s credibility on 18C’ *The Australian* (online) 6 November 2016.

⁷⁴ Tracey Raymond and Jodie Ball, ‘Alternative Dispute Resolution in the Context of Anti-Discrimination and Human Rights Law: some comparisons and considerations’ Human Rights Commission (2000).

⁷⁵ *Australian Human Rights Commission Act* s 46PJ(4).

protected in the proceedings. Surveys conducted by the Commission report that 94% of parties are satisfied with the service provided during conciliation⁷⁶ which strongly points towards the Commission doing an effective job at balancing the interests of both parties.

Available statistics collected by the Commission also suggest the process is effective at resolving complaints. In 2015, 76% of finalised complaints were successfully resolved through conciliation.⁷⁷ Focusing only on complaints under the *Racial Discrimination Act* shows a similar result, with 70% of claims being resolved.⁷⁸ Furthermore, most complaints do not drag on as the QUT complaint did, but are resolved in a timely manner.⁷⁹ This suggests that conciliation is working to resolve disputes, however any such conclusion must be treated cautiously, as parties may also be proceeding with conciliation because of the difficulties in proceeding with a complaint.⁸⁰ Nevertheless, based on the available evidence, conciliation seems to be an effective method of resolving disputes to both parties' satisfaction. If any changes are sought to be made to the process, they should be based on accurate and up to date information about the process. To this end it may be desirable for the Commission to publish additional information about the proceedings on its register, such as whether parties have legal representation and contributions made by the Commission to the deliberations. A de-identified summary of what was said during the meeting would also prove incredibly valuable to evaluating the process. One option would be for the Commission to adopt something akin to the Chatham House Rule, allowing reporting of what was said during conciliation while making sure that the source of the information is not identifiable.

RECOMMENDATIONS:

- Additional de-identified information should be collected and published by the Commission in order to give a more comprehensive picture of the conciliation process and any reforms that may be necessary.

⁷⁶ Australian Human Rights Commission, *Complaints and the conciliation process* (24 October 2016) <<https://www.humanrights.gov.au/news/stories/complaints-and-conciliation-process>>.

⁷⁷ Australian Human Rights Commission, above n 53.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ See eg, Dominique Allen, 'Behind the Conciliation Doors: Settling Complaints in Victoria' (2009) 18(3) *Griffith Law Review* 786.