



# Freedom of Speech in Australia

## **Submission to the Parliamentary Joint Committee on Human Rights**

**9 December 2016**



## About Reconciliation Australia

Reconciliation Australia was established in 2001 and is the lead body on reconciliation in the nation. Our vision is that all Australians wake to a reconciled, just and equitable Australia. We are an independent not-for-profit organisation which promotes and facilitates reconciliation by building relationships, respect and trust between the wider Australian community and Aboriginal and Torres Strait Islander peoples.

Our ambition is to enable all Australians to contribute to the reconciliation of our nation. Our vision of reconciliation is based on five inter-related dimensions: race relations, equality and equity, unity, institutional integrity and historical acceptance. We ambitiously work to meet the challenges of reconciliation through a framework of these five dimensions.

### 1. Introduction

#### 1.1 Background

Reconciliation Australia makes this submission to the Australian Government's Parliamentary Joint Committee on Human Rights to express our concerns regarding the inquiry into *Freedom of Speech in Australia* (the Parliamentary Inquiry).

Our vision is to build an Australia that is reconciled, just, and equitable for all. At the heart of what we do, is the relationship between the broader Australian community and Aboriginal and Torres Strait Islander people.

We believe a reconciled Australia is one where:

- positive two-way relationships built on trust and respect exist between Aboriginal and Torres Strait Islander and non-Indigenous Australians throughout society
- Aboriginal and Torres Strait Islander Australians participate equally and equitably in all areas of life, i.e. we have closed the gaps in life outcomes, and the distinctive individual and collective rights and cultures of Aboriginal and Torres Strait Islander peoples are universally recognised and respected, i.e. Aboriginal and Torres Strait Islander people are self-determining
- our political, business and community institutions actively support all dimensions of reconciliation
- Aboriginal and Torres Strait Islander histories, cultures and rights are a valued and recognised part of a shared national identity and, as a result, there is national unity
- there is widespread acceptance of our nation's history and agreement that the wrongs of the past will never be repeated—i.e. there is truth, justice, healing and historical acceptance.

Reconciliation Australia condemns all forms of racism. Racism, racial discrimination and racial vilification cause real and serious damage to our society, and we resolutely believe that Australia needs strong protections against racial vilification.

## 1.2 Executive Summary

In 2016, Reconciliation Australia launched the *State of Reconciliation in Australia* report (the Report).<sup>1</sup> The Report highlights five inter-related dimensions of reconciliation, and makes recommendations on how we can progress reconciliation.

These five dimensions are:

- race relations
- equality and equity
- unity
- institutional integrity
- historical acceptance.

The five dimensions do not exist in isolation; they are interrelated and Australia can only achieve full reconciliation if we progress in all five dimensions. This submission will focus on the **race relations** dimension of the Report; in particular, **racism** in the wider context of freedom of speech. We see this issue at the centre of the current dialogue of this Parliamentary Inquiry.

In the creation of an Australia that is free from racism, strong legislative protections are needed to ensure that all Australians are afforded mutual respect, and able to live free from racial discrimination. Reconciliation Australia does not agree with any reforms to the *Racial Discrimination Act 1975 (Cth)* (RDA) that weaken protections against racial vilification, specifically amendment or removal of section 18C (S18C) and/or section 18D (S18D). We believe the RDA in its current form strikes the right balance between the right to feel protected against racial vilification, and the right to freedom of expression.

The Australian Human Rights Commission (AHRC) plays an important role in balancing protections against racial vilification with the right to freedom of speech. The AHRC does not initiate or prosecute complaints, but has a key role to investigate complaints and try to conciliate. We support the AHRC and fundamentally respect the function they serve as a public institution. Reconciliation Australia notes that it is on the public record that the AHRC is open to recommendations that may result from the Parliamentary Inquiry. Reconciliation Australia will not agree with recommendations that weaken the ability of the AHRC to investigate complaints of those whom experience racism and racial vilification, but will support recommendations that increase the ability of the AHRC to act on complaints in an effective and efficient manner.

In **Section 2** of this submission we discuss the impacts of racism, and why protections against racism are particularly important to reconciliation.

**Section 3** measures the success of the RDA over the past twenty years, including how the RDA currently balances a right to protection from racial discrimination, with a right to freedom of expression.

**Section 4** outlines Reconciliation Australia's support for the AHRC and notes our support for recommendations that increase the ability of the AHRC to act on complaints in an efficient and effective manner.

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<sup>1</sup> Reconciliation Australia (2016) *The State of Reconciliation in Australia*; [https://www.reconciliation.org.au/wp-content/uploads/2016/02/The-State-of-Reconciliation-report\\_FULL\\_WR.pdf](https://www.reconciliation.org.au/wp-content/uploads/2016/02/The-State-of-Reconciliation-report_FULL_WR.pdf); Retrieved 30/11/2016.

## 1.3 Summary of recommendations

**Recommendation 1:** That Part IIA of the RDA does not impose unreasonable restrictions upon freedom of speech, and S18C and S18D of the RDA should not be reformed.

**Recommendation 2:** The Government should only consider changes to the RDA that genuinely strengthen legal protections against racial vilification, and that has the support of the general community, particularly those most affected by racism.

**Recommendation 3:** Reconciliation Australia does not agree with reforms that weaken the ability of the AHRC to investigate complaints of those whom experience racism and racial vilification. We will however support recommendations that increase the ability of the AHRC to act on complaints in an effective and efficient manner.

## 2. Reconciliation and racism

### 2.1 Background

At the heart of reconciliation is the relationship between the broader Australian community and Aboriginal and Torres Strait Islander people. To achieve reconciliation, we need to develop strong relationships built on trust and respect, and that are free of **racism**. Racism harms individuals and directly damages the relationship between Aboriginal and Torres Strait Islander Australians and the wider community. It is a significant barrier to achieving our vision for a reconciled, just and equitable Australia.

### 2.2 Racism in Australia

Racism is a serious and continuous problem in Australia. Recent incidents of racial prejudice on the sports field, such as the racially charged attacks against Adam Goodes and Eddie Betts, to filmed slander towards Aboriginal and Torres Strait Islander Australians on public transport demonstrate the prevalence of racism, and the abhorrent need for legal protections against such attacks.

Reconciliation Australia conducts the Australian Reconciliation Barometer (the Barometer) every two years to measure progress towards reconciliation, and to better understand the underlying attitudes, perceptions and behaviours that shape the relationship between Aboriginal and Torres Strait Islander people, and the general community. The 2016 results, yet to be published, demonstrate that Aboriginal and Torres Strait Islander experiences of racial prejudice have increased since our 2014 Barometer, and remain more likely than in the general community. In the six months prior to the 2016 Barometer, compared to the general community, Aboriginal and Torres Strait Islander Australians were approximately:

- **3x** more likely to have experienced verbal abuse
- **6x** more likely to have experienced physical violence
- **6x** more likely to have been prevented from renting of buying a property, and
- **8x** more likely to have been refused entry to a venue.<sup>2</sup>

Furthermore, the 2016 Barometer found that more Australians—both Aboriginal and Torres Strait Islander people, and the general community—now agree or strongly agree that Australia is a racist country. In breaking down these statistics, we can see that Aboriginal and Torres Strait Islander

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<sup>2</sup> Reconciliation Australia (2016) *Australian Reconciliation Barometer 2016*; Results yet to be published.

Australians are three times more likely to strongly agree that Australia is a racist country, compared to the general community.

Similarly, the Scanlon Foundation's annual *Mapping Social Cohesion Survey 2016* found that the reported experience of discrimination on the basis of 'skin colour, ethnic origin or religion' increased significantly, rising from 15 per cent in 2015 to 20 per cent in 2016. Of those who reported discrimination in 2016, 14 per cent indicated that this discrimination occurred '*often – most weeks in the year*'. The research indicated that verbal abuse was found to be the second highest experience of discrimination (following '*being made to feel like they did not belong*').<sup>3</sup>

These results further confirm that racial discrimination is overly apparent and increasing in Australian society, and overcoming racism must be a national priority. A zero tolerance approach to racism is required, backed by effective institutional and legislative settings such as the RDA in its current form, and effective and efficient AHRC complaints processes.

### 2.3 The effects of racism

Modern Australia prides itself on creating a fair, equitable and welcoming society. Aboriginal and Torres Strait Islander Australians represent the world's oldest continuing cultures, and millions of Australians from diverse cultural backgrounds now call Australia home. Cultural diversity strengthens the identity of our nation. However, discrimination on the basis of skin colour or cultural origin, threatens Australia's values founded on equality, and has long-term and detrimental effects for individuals, and groups of people.

Racism can lead to anxiety, depression, suicide risk and overall poor mental health, with links emerging between racism and diabetes, obesity, high blood pressure, and drug and alcohol abuse among Aboriginal and Torres Strait Islander peoples.<sup>4</sup> The most consistent finding is the association between racism and mental health conditions such as psychological distress, depression and anxiety.<sup>5</sup> Racism negatively influences the education, employment and incarceration rates of Aboriginal and Torres Strait Islander peoples, with the Closing the Gap Clearinghouse citing racism as one of the multifaceted causes of lower Aboriginal and Torres Strait Islander employment rates.<sup>6</sup> Discrimination also influences Aboriginal and Torres Strait Islander peoples' attendance and achievement at school, and many researchers report that schools with an inclusive and safe environment, free from racism, are more likely to have higher attendance and retention.<sup>7</sup>

Discrimination on the basis of race is harmful, and has the ability to destroy the confidence, self-esteem and health of individuals. It undermines efforts to create fair and inclusive communities, breaks down relationships and erodes trust. Direct racism discourages Aboriginal and Torres Strait Islander people from accessing health, education and employment services, and on a systematic level racial discrimination denies Aboriginal and Torres Strait Islander Australians access to power, resources and opportunities, perpetuating inequalities between us. As a result, racism remains a major barrier not only

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<sup>3</sup> Markus, A (2016) *Mapping Social Cohesion: The Scanlon Foundation surveys*; <http://scanlonfoundation.org.au/wp-content/uploads/2016/11/2016-Mapping-Social-Cohesion-Report-FINAL-with-covers.pdf>; Retrieved 30/11/2016.

<sup>4</sup> Burrow S and Ride K (2016) *Review of diabetes among Aboriginal and Torres Strait Islander people*; Australia Indigenous HealthInfoNet; <http://www.healthinfonet.ecu.edu.au/chronic-conditions/diabetes/reviews/our-review>; Retrieved 29/11/2016.

<sup>5</sup> Beyond Blue (2016) *Educate yourself about racism: You can help stop discrimination against Aboriginal and Torres Strait Islander people*; <https://www.beyondblue.org.au/who-does-it-affect/the-invisible-discriminator/educate-yourself-about-racism>; Accessed 28/11/2016.

<sup>6</sup> Gray M, Hunter B and Lohar S (2012) *Increasing Indigenous employment rates*; Issues Paper No. 3; Produced for the Closing the Gap Clearinghouse; <http://www.aihw.gov.au/uploadedFiles/ClosingTheGap/Content/Publications/2012/ctg-ip03.pdf>; Retrieved 29/11/2016.

<sup>7</sup> Ibid.

for our organisation, but Australia as a whole, in achieving our vision for a just, equitable and reconciled Australia.

### **2.3 Racism as a barrier to reconciliation**

Continuing occurrences of racism towards Aboriginal and Torres Strait Islander peoples today undermine efforts towards reconciliation. Racism breaks down relationships, erodes trust and undermines social progress. It does more than hurt people's feelings; it denies Aboriginal and Torres Strait Islander peoples the right to fully participate in the social and economic life of the nation.

For Aboriginal and Torres Strait Islander peoples, the experience of racism today has a strong historical context. Racial discrimination against Aboriginal and Torres Strait Islander Australians has been apparent and ongoing throughout Australian history. Beginning with the British declaration that Australia was *Terra Nullius* or '*land that belongs to no one*', then continuing through racially discriminatory policies to assimilate Aboriginal and Torres Strait Islander peoples, our history has been marked by mistrust and injustice. These past experiences for Aboriginal and Torres Strait Islander people continue to have significant effects. The historical legacy and subsequent historical trauma of discriminatory policies and practices contributes to the devastating levels of Aboriginal and Torres Strait Islander disadvantage experienced today.

Today racism continues to damage community cohesion, trust, and the relationship between the broader Australian community and Aboriginal and Torres Strait Islander Australians. One of the most significant and consistent findings of the Barometer since it began in 2008 is that trust between the general community and Aboriginal and Torres Strait Islander people is low and prejudice is high. The 2016 Barometer found that the gap in trust perceptions between Aboriginal and Torres Strait Islander Australians and non-Indigenous Australians is evermore increasing. We are seeing more and more Aboriginal and Torres Strait Islander Australians saying they trust other Australians whilst other Australians still believe Aboriginal and Torres Strait Islander trust for them is much lower.<sup>8</sup> Until Australia reconciles this trust gap, it is imperative to have strong and robust legal protections to deter racial discrimination that may result from a lack of trust.

Low levels of trust and high levels of prejudice are the measurable indicators of racism against Aboriginal and Torres Strait Islander people in Australia society today. This directly impacts the lives of Aboriginal and Torres Strait Islander people because they feel less confident to do everyday things such as access health services, attend school or apply for a job. Again, we reiterate that racism harms individuals and directly damages the relationship between Aboriginal and Torres Strait Islander Australians and the wider community. It is a significant barrier to achieving a reconciled, just and equitable Australia, and must be a national priority.

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<sup>8</sup> Reconciliation Australia (2016) *Australian Reconciliation Barometer 2016*; Results yet to be published.

### 3. The Racial Discrimination Act 1975

#### 3.1 Overview

As outlined in our previous section, levels of racial discrimination in Australia indicates there is absolute requirement for strong and effective legislation to protect against racial discrimination. The purpose of legislation is to reflect community standards and values of what is acceptable and not acceptable in society to create trust, order, stability and justice for all Australian citizens. It is widely accepted by Australian society, and international human rights law, that everyone has the right to be protected from racial vilification. Reconciliation Australia resolutely believes that this should be reflected in our nation's legislation.

The RDA ensures all Australians are protected from discrimination on the grounds of race, colour, descent or ethnic origin. Reconciliation Australia does not agree with any reforms to the RDA that weaken protections against racial vilification, specifically amendment or removal of S18C and/or S18D. The RDA in its current form strikes the right balance between the right to feel protected against racial vilification, and the right to freedom of expression.

Furthermore, the RDA represents Australia's international commitment to global law under the International Convention on the Elimination of all Forms of Racial Discrimination. As a signatory to the Convention, Australia has committed to not engaging in any act or practice of racial discrimination against individuals, groups of persons or institutions, and to ensure that public authorities and institutions do likewise.<sup>9</sup>

#### 3.2 Freedom of Speech (repeal of S18C) Bill 2014

In March 2014, Attorney-General George Brandis released draft changes to the RDA. Reconciliation Australia responded via submission to the draft changes, advocating that the changes to the RDA weakened protections against racial vilifications.<sup>10</sup>

Reconciliation Australia agreed overwhelmingly with the majority of responses from community, with 76 per cent opposing the 2014 proposal.<sup>11</sup> This is a considerable indication of Australia's disapproval of reform to the RDA, particularly from racial and ethnic and minority groups most affected by those changes.

As we recommended in 2014, Reconciliation Australia agrees that the RDA ensures all Australians are protected from discrimination on the grounds of race, colour, descent or ethnic origin. As we emphasised in our 2014 submission, any changes to the RDA that weaken protections from racial vilification would pave the way for a less reconciled, a less just and a less equitable Australia.

#### 3.3 Contemporary interpretation of the Racial Discrimination Act 1975

There has been much debate in recent times over the scope of S18C, and its ability to balance one's right to freedom of speech with one's right to protection from racial vilification. This debate has been most recently exacerbated by the recent Federal Circuit Court ruling on S18C involving students from

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<sup>9</sup> United Nations General Assembly (Ratified 1965) *International Convention on the Elimination of All Forms of Racial Discrimination*; <http://www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf>; Accessed 28/11/2016.

<sup>10</sup> Reconciliation Australia (2014) *Submission to the Attorney-General: Proposed amendments to the Racial Discrimination Act 1975 (Freedom of Speech (Repeal of S. 18C) Bill 2014)*; [https://www.reconciliation.org.au/wp-content/uploads/2014/04/RASubmission\\_RDA\\_amendments\\_30April2014.pdf](https://www.reconciliation.org.au/wp-content/uploads/2014/04/RASubmission_RDA_amendments_30April2014.pdf).

<sup>11</sup> Aston, H (2014) *Tony Abbott dumps controversial changes to 18C racial discrimination laws*; Sydney Morning Herald; <http://www.smh.com.au/federal-politics/political-news/tony-abbott-dumps-controversial-changes-to-18c-racial-discrimination-laws-20140805-3d65l.html>; Accessed 26/08/2016.

Queensland University of Technology (QUT). This particular example has been used as a primary example in argument for free speech in various national dialogues. Reconciliation Australia believes that for a fair assessment of S18C and its impact to freedom of speech, it is essential to understand the legislation with regard to both S18C **and** S18D.

S18C outlines that is unlawful to '*offend, insult, humiliate or intimidate another person or a group of people due to the race, colour or national or ethnic origin of the other people, or some of the people in the group*'. What is so often missed in media reporting and political commentary is the importance of S18D, and the value added by this piece of legislation for those arguing for free speech. There is a myriad of exemptions for S18C offered by S18D.

These are as follows:

#### *Section 18D – Exemptions*

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

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

Considering the above exemptions, it must be understood that complaints of racial vilification using S18C and S18D are those that have *offended* or *insulted, humiliated* or *intimidate* on the basis of race, colour, ethnicity, that are:

- not done in good faith
- that have no purpose in the public interest
- that are not fair and accurate reporting of an event of matter of public interest
- are not a fair comment that is an expression of a genuinely held belief of the person making the comment.

S18D provides more than adequate exemptions for freedom of speech, and any changes to the RDA in its current form would disrupt this balance, and subsequently sacrifice a person's right to feel protected against racial vilification. We view this action inconsistent with the values and morals of inclusivity and acceptance that Australian society is based upon.

Despite recent media coverage, particularly in the case of Eatock vs Bolt (2011) and Prior vs Thwaites and Powell (2016), the reality is that very few claims made under the RDA progress beyond conciliation at the AHRC; in fact, only 5 per cent of complaints handled by the AHRC progress to the law courts. The majority of cases are conciliated via the AHRC, or are withdrawn or dismissed, with many cases ending with a simple apology. An example of this is a series of complaints made against One Nation Senator Pauline Hanson in 1997. Six complaints were made against Ms Hanson in regard to comments she made to the *Australian* newspaper, arguing that Aboriginal people received too many benefits. The complaints were subsequently dismissed by the AHRC under exemptions outlined in S18D, with the AHRC stating that Ms Hanson did not say she wished to take anything away from Aboriginal and Torres Strait Islander people, nor did she say she would be fighting against them.

### 3.4 Rights to free speech

Reconciliation Australia believes resolutely in the right to free speech. However, the right to free speech needs to be balanced carefully with the right to live free from racial discrimination. Freedom of speech is a fundamental right, but it is not an absolute right. Furthermore, the current legislation upholds our global commitment to the International Covenant on Civil and Political Rights.

S18D of the RDA currently contains explicit, and fair exemptions for the protection of free speech (see Section 2.3). Additionally, the courts have consistently interpreted S18C and S18D as maintaining a fair balance between freedom of speech and freedom from racial vilification. For conduct to be covered by S18C, courts have ruled repeatedly that the conduct must involve “*profound and serious*” effects, not “*mere slights*”.<sup>12</sup>

With the exemptions provided by S18D, the RDA ensures that free speech in the interest of public discussion and debate is always protected as long as it is done accurately and in good faith. Reconciliation Australia argues that the requirement for truth in the RDA is mirrored in other Australian legislation, balancing the right to freedom of speech with protection of other individual’s rights. Furthermore, it must also be noted in this discussion that Australia has a plethora of other laws that put limits on what a person, group of people, or organisation can say. These laws hold striking similarities to the unlawful actions outlined in the RDA, and they provide a uniform benchmark across Australian legislation on the limitations of what people can and cannot say in the name of free speech. Defamation laws, libel laws, national security laws, trade practices laws, criminal summary offence laws and the border protection laws are additional examples of Australian legislation that inhibit freedom of speech that are deserving of mention in this discussion.

We believe that the current RDA places no more restrictions on free speech than other legislation regularly enforced in Australian society. The RDA in its current form has worked to protect all Australians from racial discrimination, while allowing free speech, for the past 20 years. Before the RDA was introduced, there was little that people could do in response to experiencing racial discrimination. As such, S18C and S18D are an imperative legislative instrument that provide legal protections for those affected by racial hatred and vilification. Based on the interpretation of the law to date we believe there is no compelling reason to reform S18C or S18D of the RDA, as the current legislation strikes a fair and effective balance between the right to free speech, and the right for protection against racial vilification.

**Recommendation 1:** That Part IIA of the *Racial Discrimination Act 1975 (Cth)* does not impose unreasonable restrictions upon freedom of speech, and Sections 18C and 18D of the *Racial Discrimination Act 1975 (Cth)* should ***not*** be reformed.

### 3.5 Consultation and community support for change

Reconciliation Australia consistently advocates for effective engagement and community consultation as the basis for sound policy development. To consult respectfully, we believe it is important to listen to different points of view and to genuinely consider the views of the community in policy responses. Most importantly, genuine consultation requires an openness to change.

<sup>12</sup> Triggs, G (2013) *Freedom of Speech and Racial Vilification: one man’s freedom ends where another’s starts*; Speech given at the Sydney Institute; <https://www.humanrights.gov.au/news/speeches/freedom-speech-and-racial-vilification-one-man-s-freedom-ends-where-another-s-starts>.

The majority of the Australian public and community organisations representing minority groups support the existing racial vilification laws, and were opposed to the proposed amendments to the RDA in the 2014 Inquiry. Of the 4100 submissions to the 2014 Inquiry, there was overwhelming community support for retaining S18C, with 76 per cent opposed to the proposal. Just 20.5 per cent were in favour of the changes.<sup>13</sup> We believe that this is a considerable indication of the wider Australian public's disapproval of reform to the RDA, particularly from groups representing racial and ethnic minorities that are most affected.

On 14 April 2014, a Fairfax-Nielsen poll found that 88 per cent of respondents thought it should be unlawful to “*offend, insult or humiliate*” someone because of their race or ethnicity. Another survey published in 2014 found that 90 per cent of respondents support laws that prohibit causing offence on the basis of race, with 66 and 74 per cent of respondents agreeing that it should be unlawful to offend, insult or humiliate on the basis of race.<sup>14</sup>

In November 2016, we were one of 18 Aboriginal and Torres Strait Islander, ethnic, religious and community organisations to sign an open letter to the Attorney-General, the Prime Minister, and the Chair of the Parliamentary Joint Committee on Human Rights. This letter called for the Australian Government to retain strong and effective protections against racial hatred and retention of an independent and accessible AHRC.<sup>15</sup> This letter demonstrates that support for strong racial vilification protections stretches across many demographics in Australian society.

Recently, the AHRC Race Discrimination Commissioner Tim Soutphommasane commented that ‘*before the Act (RDA) was introduced, there was little that people could do in response to experiencing racial discrimination. The law was not on the side of many victims of discrimination*’.<sup>16</sup> Further to this, the Race Discrimination Commissioner has recently expressed his support that Part IIA of the RDA, in particular that S18C and S18D does not impose unreasonable restrictions upon freedom of speech.<sup>17</sup>

We must emphasise again that we believe that this is a considerable indication of the wider Australian public's disapproval of reform to Part IIA, in particularly S18C and S18D, of the RDA. Reconciliation Australia believes that changes should only be made to the RDA that are supported by the Australian community, and most importantly, by those most affected by racism.

**Recommendation 2:** The Government should only consider changes to the *Racial Discrimination Act 1975 (Cth)* that genuinely strengthen legal protections against racial vilification, and that has the support of the general community, particularly those most affected by racism.

<sup>13</sup> Aston H, *op cit*.

<sup>14</sup> University of Western Sydney (2014) *Racism survey shows public supports existing Racial Discrimination Act*; [https://www.westernsydney.edu.au/newscentre/news\\_centre/research\\_success\\_stories/australias\\_largest\\_study\\_on\\_racism\\_s\\_hows\\_public\\_supports\\_existing\\_racial\\_discrimination\\_act](https://www.westernsydney.edu.au/newscentre/news_centre/research_success_stories/australias_largest_study_on_racism_s_hows_public_supports_existing_racial_discrimination_act); Accessed 28/11/2016.

<sup>15</sup> Human Rights Law Centre (2016) *Open Letter: Australia needs to maintain strong protections against racial hatred and an independent and accessible Human Rights Commission*; <https://www.hrlc.org.au/news/2016/12/2/strong-and-effective-racial-vilification-laws-needed-to-stop-the-spread-of-racial-hatred>.

<sup>16</sup> Marlow K (2016) *A history of Section 18C and the Racial Discrimination Act*; SBS National Indigenous Television; Retrieved 2/5/2016

<sup>17</sup> Soutphommasane T (2016) *Blog: The Racial Discrimination Act – Parliamentary Joint Committee on Human Rights Inquiry*; <https://racediscriminationcommissioner.wordpress.com/>; Accessed 28/11/2016.

## 4. The Australian Human Rights Commission

### 4.1 Background

To effectively address unlawful discrimination under Part IIA of the RDA, in particular S18C and S18D, the law must provide a pathway for victims to seek legal remedies and assistance. This requires a fair and equitable complaints system, that is accessible and affordable and that fulfills the needs of the complainants. The AHRC was established in 1986 by an act of the Federal Parliament (*Australian Human Rights Commission Act 1986*) (the *AHRC Act*), as a public institution to carry out these responsibilities; to uphold human rights and recognise the inherent value of each person, regardless of background, where they live, what they look like, think or believe.

### 4.2 The Australian Human Rights Commission and the Part IIA of the Racial Discrimination Act 1975

Racial vilification laws provide a very accessible and affordable dispute resolution, with the first step in any RDA action being to complain to the AHRC. Reconciliation Australia acknowledges that the AHRC does not initiate, or prosecute a complaint. As per the AHRC Act, upon receiving a written complaint alleging a case of discrimination, the AHRC has a legal obligation to investigate the facts and attempt to conciliate the matter. The AHRC's focus is on resolving disputes, so parties can avoid court proceedings. This provides an efficient, and effective mechanism for individuals to report and manage complaints against racial discrimination. The operation of the AHRC as an independent statutory body is imperative to fair implementation of the RDA.

Over the past five years, the Commission has received an average of **130 racial vilification complaints** each year.<sup>18</sup>

In 2015 alone, the Commission:

- received 16, 836 inquiries
- received 2, 013 complaints
- conducted 1, 308 conciliation processes
- resolved 75 per cent of these complaints, with the vast majority of these complaints related to employment, and access to goods and services.<sup>19</sup>

A very small percentage of complaints, 5 per cent in 2014 -2015, are terminated because they are trivial, misconceived or lack substance.<sup>20</sup> The majority are resolved through mediation and conciliation. Only a handful of complaints finalised by the Commission were lodged in court – on average 3 per cent.<sup>21</sup> Worthwhile mentioning in this discussion is that during the 2012 – 2013 financial year, the Commission received a 59 per cent increase in complaints under S18C. This dramatic increase in racial discrimination complaints is concerning, but it is a testament to the effective operations of the AHRC that 53 per cent of racial vilification complaints in 2012 – 2013 were resolved at conciliation, with less than 3 per cent of racial hatred complaints proceeding to court.<sup>22</sup> Approximately 15 claims brought by Aboriginal and Torres Strait Islander Australians under S18C of the Racial Discrimination Act have reached the courts in the last twenty years.<sup>23</sup>

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<sup>18</sup> Southphommasane T (2014) *Legislative innovation and the Racial Discrimination Act*; Plenary address to the National Institute of Administrative Law Annual Conference, University of Western Australia, Perth

<sup>19</sup> AHRC (2016) *Complaint Statistics*; <https://www.humanrights.gov.au/sites/default/files/AHRC%202015%20-%202016%20Complaint%20Statistics.pdf>; Retrieved 30/11/2016.

<sup>20</sup> AHRC (2016) *Racial Discrimination Complaints*; Available <http://www.humanrights.gov.au/news/stories/racial-discrimination-complaints>; Accessed 2/12/2016.

<sup>21</sup> *Ibid.*

<sup>22</sup> Southphommasane T (2014) *op cit.*

<sup>23</sup> Marlow *op cit.*

Most complaints that are resolved by the Commission provide one or more of the following outcomes:

- (a) an apology
- (b) an agreement to remove the offending publication or comments, for example from a website
- (c) compensation
- (d) changes to policies and procedures or training.

If conciliation fails at the AHRC, a complaint can proceed to the Federal Court or Federal Circuit Court, as was the case of *Prior vs Thwaites and Powell* (2016). In 2015 – 2016, the Commission finalised 86 complaints about racial hatred (a small fraction considering the AHRC receives on average 2, 000 complaints per year), with only one complaint about racial hatred proceeding to court.<sup>24</sup> This further confirms the effective conciliation function that the AHRC serves in regards to the RDA. Thus, it is evident that the AHRC reduces the burden on our legal and judicial system, and reduces time and cost for the complainants during the mediation process. The Australian Government should consider recommendations that further enable the AHRC to carry out this important business in an effective, and efficient manner.

### 4.3 The Australian Human Rights Commission and Reconciliation Australia

Reconciliation Australia notes the AHRC is open to recommendations from the Parliamentary Inquiry to strengthen the AHRC's ability to address cases in an effective and efficient manner. In particular, we note that the AHRC has requested amendments that streamline the process by raising the threshold for accepting complaints.

Recently, there has been considerable public interest in the AHRC's handling of complaints processes, particularly in regard to the recent *Prior vs Thwaites and Powell* (2016) case, also referred to as the QUT case in the media. As outlined in the *AHRC Act*, the AHRC has no legal grounding to initiate or prosecute a complaint. If the AHRC receives a complaint in writing, the *AHRC Act* states that the AHRC must investigate and attempt to conciliate. Reconciliation Australia acknowledges that the AHRC had a legal obligation to investigate this particular case, and worked within its legal constraints to attempt to conciliate.

In the 2015 - 16 reporting year, the average time it took the Commission to finalise a complaint was 3.8 months. In the same reporting year, 94 per cent of surveyed parties were satisfied with the AHRC's service.<sup>25</sup> We support and believe that the work that the AHRC undertakes is imperative to upholding a society based on respect and equality. Reconciliation Australia supports recommendations that enable the AHRC to undertake, and complete its work in a timely manner that is cost efficient for all parties. We note that the Commission has provided advice to successive governments and to Attorneys-General on amendments to the *AHRC Act*, and in particular amendments to streamline the process by raising the threshold for accepting complaints.

Reconciliation Australia will not support recommendations from the Parliamentary Committee regarding the AHRC handling processes that weaken protections against racial vilification. We note that the AHRC has publically expressed that it is treating the Parliamentary Inquiry as an educational process, and is open to recommendations. Recommendations provided by the Parliamentary Committee will have the support of Reconciliation Australia if they satisfy the following criteria:

- genuinely strengthen protections against racial vilification

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<sup>24</sup> AHRC (2016) *Race hate and the RDA*; [https://www.humanrights.gov.au/sites/default/files/AHRC\\_RDA\\_Explainer\\_2016.pdf](https://www.humanrights.gov.au/sites/default/files/AHRC_RDA_Explainer_2016.pdf); Accessed 29/11/2016.

<sup>25</sup> AHRC (2016) *Racial Discrimination Complaints*; *op cit*.

- have the agreement and support of the AHRC
- have the support of the general Australian public, and most importantly, by those most affected by racism.

Effective community and stakeholder consultation is at the key of good public policy reform. We see it as imperative that the government consult a subsequent phase of consultation, particularly with those minority groups most affected, if recommendations to the AHRC complaints processes result from the Parliamentary Inquiry. If, as a result of this Parliamentary Inquiry, reforms to the current AHRC processes are recommended, it is imperative that the AHRC maintain a fair and effective complaints resolution process for the thousands of people who experience discrimination on the basis of sex, gender, disability, race and age.

We reiterate that Reconciliation Australia will not support any recommendations or reforms to the AHRC's processes that weaken protections against racial vilification; however we will support recommendations that increase the ability of the AHRC to act on complaints in an effective and efficient manner.

**Recommendation 3:** Reconciliation Australia does not agree with reforms that weaken the ability of the AHRC to investigate complaints of those whom experience racism and racial vilification. We will however support recommendations that increase the ability of the AHRC to act on complaints in an effective and efficient manner.

## 5. Conclusion

Federal racial vilification laws and processes have been operating effectively for more than 20 years via RDA legislation and AHRC complaints and handling processes, with RDA laws being considered in less than 100 finalised court cases since 1995.<sup>26</sup> In the history of RDA, and in particularly Part IIA - S18C and S18D, the majority of cases demonstrate that the laws have been applied sensibly and effectively by the courts. We urge the Australian Government not to allow recent attention to the cases of *Eatock vs Bolt* (2011) and *Prior vs Thwaites and Powell* (2016) to draw attention away from the hundreds of people that the RDA has been effective in protecting against racial vilification.

Reconciliation Australia believes the RDA legislation strikes an appropriate balance between the right to freedom of expression, and the right to freedom from racial discrimination and vilification. In our view, there are no compelling reasons to warrant reforming Part IIA, in particular S18C and S18D. Reconciliation Australia does not agree with reforms that weaken the ability of the AHRC to investigate complaints of those whom experience racism and racial vilification, however we will support recommendations that increase the ability of the AHRC to act on complaints in an effective and efficient manner.

Australia as a society prides itself on multiculturalism, diversity, and equality, and we should not put these national values and morals at risk. By reforming our current protections against racial vilification, we will make our society increasingly vulnerable to racial intolerance and discrimination. A society where racial protections are forfeited for the right for free speech is against Reconciliation Australia's core values and in contradiction of our vision of a reconciled, just and equitable Australia.

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<sup>26</sup> Refugee Council of Australia (2014) *Submission on Changes to the Racial Discrimination Act*; <https://www.refugeecouncil.org.au/r/sub/1404-RDA.pdf>; Accessed 28/11/2016