



**Australian  
Human Rights  
Commission**

# Inquiry into freedom of speech

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

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## Table of Contents

|          |  |           |
|----------|--|-----------|
| <b>1</b> | <b>Executive summary .....</b>   | <b>4</b>  |
| 1.1      | <b>Context.....</b>  | <b>4</b>  |
| 1.2      | <b>Structure of submission .....</b>   | <b>5</b>  |
| <b>2</b> | <b>Recommendations.....</b>  | <b>8</b>  |
| <b>3</b> | <b>International human rights law – providing for freedom of expression and protecting people from racial hatred .....</b> | <b>9</b>  |
| 3.1      | <b>Freedom of expression.....</b>  | <b>10</b> |
| 3.2      | <b>Permissible restrictions on freedom of expression .....</b>   | <b>10</b> |
| 3.3      | <b>Prohibition of hate speech .....</b>  | <b>11</b> |
| (a)      | Specific limitations .....   | 11        |
| (b)      | Reservations by Australia .....  | 13        |
| (c)      | Other obligations under ICERD .....  | 14        |
| <b>4</b> | <b>Part IIA of the <i>Racial Discrimination Act 1975</i> (Cth) .....</b>   | <b>16</b> |
| 4.1      | <b>Background .....</b>  | <b>16</b> |
| 4.2      | <b>The enactment of the <i>Racial Hatred Act 1995</i> (Cth) .....</b>  | <b>18</b> |
| 4.3      | <b>How does the law currently operate?.....</b>  | <b>21</b> |
| 4.4      | <b>Examples of racial hatred complaints .....</b>  | <b>25</b> |
| <b>5</b> | <b>Seriousness of the conduct caught by Part IIA.....</b>  | <b>26</b> |
| <b>6</b> | <b>Exemptions in section 18D .....</b>   | <b>28</b> |
| 6.1      | <b>Artistic works.....</b>   | <b>29</b> |
| 6.2      | <b>Public discussion and debate.....</b>   | <b>31</b> |
| 6.3      | <b>Fair comment.....</b>   | <b>32</b> |
| <b>7</b> | <b>Other measures to combat racial hatred in Australia.....</b>  | <b>33</b> |
| <b>8</b> | <b>The Commission’s complaint handling process .....</b>   | <b>33</b> |
| 8.1      | <b>Overview of the Commission .....</b>  | <b>33</b> |
| 8.2      | <b>Overview of the Commission’s complaint handling process.....</b>  | <b>34</b> |
| 8.3      | <b>Complaint statistics .....</b>  | <b>36</b> |
| (a)      | Total enquiries and complaints .....   | 36        |
| (b)      | Complaints finalised.....  | 37        |
| (c)      | Timeliness of the complaint process.....   | 37        |
| (d)      | Satisfaction with complaint process.....   | 37        |
| 8.4      | <b>Summary of responses to terms of reference .....</b>  | <b>40</b> |
| 8.5      | <b>Treatment of trivial or vexatious complaints .....</b>  | <b>41</b> |
| (a)      | Threshold for lodging complaints .....   | 42        |
| (b)      | Terminating complaints that are trivial or vexatious .....   | 44        |
| (c)      | Terminating complaints where satisfied that conduct is not unlawful.....   | 49        |
| (d)      | No reasonable prospect of ultimate success .....   | 50        |
| 8.6      | <b>Natural justice.....</b>  | <b>51</b> |
| (a)      | Applicability of natural justice rules.....  | 52        |
| (b)      | Complaint handling process .....   | 53        |
| 8.7      | <b>Open, transparent and accountable .....</b>   | <b>57</b> |
| (a)      | The processes used by the Commission are clear .....   | 58        |
| (b)      | The outcomes of conciliation are transparent .....   | 59        |

|   |  |                  |
|---|--|------------------|
| (c)   | <i>The Commission is accountable .....</i>                                     | <i>60</i>        |
| (d)   | <i>The Commission is not a court .....</i>                                     | <i>60</i>        |
| (e)   | <i>Importance of confidentiality to inquiry and conciliation process .....</i> | <i>60</i>        |
| <b>8.8</b>  | <b><i>Timeliness.....</i></b>  | <b><i>62</i></b> |
| <b>8.9</b>  | <b><i>Cost .....</i></b>   | <b><i>66</i></b> |
| <b>8.10</b>   | <b><i>Court proceedings .....</i></b>  | <b><i>67</i></b> |
| <b>9</b>  | <b><i>‘Soliciting’ complaints.....</i></b>                                     | <b><i>69</i></b> |
| <b>9.1</b>  | <b><i>Background to inaccurate media reports .....</i></b>                     | <b><i>70</i></b> |
| <b>9.2</b>  | <b><i>Functions of Race Discrimination Commissioner.....</i></b>               | <b><i>71</i></b> |
| <b>9.3</b>  | <b><i>President’s inquiry and conciliation function.....</i></b>               | <b><i>72</i></b> |
| <b>10</b>   | <b><i>Commission’s activities in relation to freedom of speech.....</i></b>    | <b><i>73</i></b> |
| <b>Attachment 1 – Principles to determine when freedom of expression might<br/>appropriately be restricted.....</b> |  | <b><i>79</i></b> |

## **1 Executive summary**

### **1.1 Context**

1. Australia is rightly proud of its strong democratic institutions, the liberties enjoyed by its citizens and its culture of mutual respect and tolerance.
2. Our civic culture fosters respect for the rights of individuals, and for the responsibilities we owe to each other. This culture is mutually reinforcing. By recognising our reciprocal obligations, we strengthen the rights of each of us.
3. As a country, we have given expression to these values in a number of ways. We have ratified international conventions setting out the human rights of all Australians. These conventions typically reflect rights that have long been part of the common law. We have also translated rights into domestic legislation. By doing so, we enable individuals to access remedies when their rights are breached and we establish standards for public conduct that reflect how we want our society to operate.
4. This inquiry is about both rights and responsibilities: the right to freedom of expression and the responsibility not to engage in acts amounting to racial hatred or racial discrimination.
5. The Australian Human Rights Commission welcomes the opportunity to discuss both of these fundamentally important rights and the Commission's role in promoting an understanding and acceptance of them.
6. The Commission has a particular role in relation to the legal provision that is the focus of this inquiry: section 18C of the *Racial Discrimination Act 1975* (Cth) (RDA). The Commission receives thousands of complaints of unlawful discrimination, including complaints under section 18C, and acts as a conciliator between the parties to complaints. The overwhelming majority of complaints that proceed to conciliation are successfully conciliated, with very high rates of reported satisfaction from both complainants and respondents with the Commission's processes. The Commission's processes are quick, accessible and free for all parties.
7. Each year over the past five years, on average fewer than four complainants elected to take their matter to court under section 18C. The decision about whether to make an application to the court is entirely one for a complainant. The Commission is not involved in that process.
8. There has been some confusion about the way in which sections 18C and 18D of the RDA operate and the Commission supports the promotion of a clearer understanding of these provisions, and how they operate at law. This submission aims to provide a good foundation for that to occur.
9. The Commission has previously proposed a number of statutory improvements to assist both it and the courts in dealing efficiently with

unmeritorious complaints. The recommendations in this submission reiterate these points.

10. For many years, the Commission has been active in promoting freedom of speech including by making submissions about proposed laws that may infringe freedom of speech, intervening as *amicus curiae* in court proceedings that raise freedom of speech issues, and convening public forums to discuss a range of areas including media and Internet regulation, intellectual property and defamation laws.
11. The current Human Rights Commissioner has announced that he plans to address these free speech issues in his term as Commissioner. The Commission would welcome a reference from the Government to report on these issues in more detail.

## **1.2 Structure of submission**

12. The Australian Human Rights Commission makes this submission to the Parliamentary Joint Committee on Human Rights in relation to its inquiry into freedom of speech.
13. The scope of the Committee's inquiry, as set out in the terms of reference, is focussed on whether Part IIA of the RDA imposes unreasonable restrictions on freedom of speech and whether improvements could be made to the way in which the Commission handles the complaints it receives.
14. The Commission welcomes the opportunity to assist the Committee with its inquiry into these matters. The Commission is uniquely placed to comment on these issues given our legislative mandate under the RDA and *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act),<sup>1</sup> and our role in inquiring into and attempting to conciliate complaints alleging breaches of section 18C of the RDA.
15. The right to freedom of expression<sup>2</sup> is of fundamental importance. It is vital to Australia's liberal democracy, just as it is to the pursuit of science, commerce, art, public debate, private discussion and other crucial endeavours. The risks associated with limiting freedom of expression mean that the freedom extends to expression that may be regarded as deeply offensive.
16. Freedom from racial vilification and racial hatred<sup>3</sup> is also crucially important. Racial vilification can harm the freedom of those who are its targets. It can have a silencing effect and can harm the ability of its victims to exercise their freedom of speech, among other freedoms.
17. Legislation that prohibits racial vilification ensures those who experience the harms of racial vilification have access to a legal remedy. Such legislation also sends a strong message about civility, respect and tolerance in a multicultural society.
18. Under international human rights law, and under Australian law, neither freedom of expression nor freedom from racial vilification has been considered an absolute or unfettered right. Each of these freedoms has always been

subject to limitations and restrictions. As a result, freedom of expression and freedom from racial vilification can and do co-exist. These two freedoms are also subject to further limitations and restrictions that accommodate other human rights and important interests.

19. In its current form, the RDA as applied by the courts and administered by the Australian Human Rights Commission has successfully resolved hundreds of complaints about racial vilification and racial hatred over the past two decades. Australian courts have interpreted section 18C to cover only acts that cause 'profound and serious effects, not to be likened to mere slights'. In addition, section 18D provides broad exemptions to protect freedom of speech, including fair comment, and discussion and debate about matters of public interest.
20. The Commission considers that Part IIA of the RDA as it has been interpreted by the courts strikes an appropriate balance between freedom of speech and freedom from racial vilification.
21. The Commission observes that there is some confusion about the legal meaning of sections 18C and 18D, and of the Commission's role in administering the RDA. In particular, it is important to make clear that the RDA does not prohibit speech or conduct that merely hurts a person's feelings. The Commission supports the promotion of a clearer understanding of the judicial interpretation and practical operation of section 18C and the free speech exemptions in section 18D.
22. Throughout this submission, the Commission has used case studies of matters dealt with under the legislation to provide concrete examples of how cases under section 18C of the RDA are dealt with in practice.
23. At this stage, no Government Bill to amend Part IIA of the RDA has been introduced into Parliament, nor has this Committee been tasked with considering any specific amendments to the RDA. If that situation were to change, the Commission would comment on any proposed amendments.
24. Any proposal to amend the RDA should involve extensive public consultation as it has the capacity to affect the human rights of all Australians. In particular, there should be consultation with those communities whose members are most vulnerable to experiencing racial discrimination.
25. It is also important to recognise that racial vilification cannot be addressed only by legal prohibitions. Complementary education and awareness raising measures are also required to promote a culture of respect for human rights and responsibilities. The Commission will continue to play a key role in this regard.
26. This inquiry has also been asked to consider the Commission's complaint handling function. Complaints made under section 18C of the RDA must first be made to the Commission. The same is true of any other complaint made under the RDA, the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth). The

Commission's role is to inquire into and attempt to conciliate complaints that are made.

27. The Commission performs a vital role in ensuring access to justice for people who have experienced discrimination, harassment and vilification. The Commission's processes are free for both complainants and respondents. In 2015-16 the Commission successfully resolved 76% of complaints that proceeded to conciliation thereby diverting these cases from going to court. During the same period, 94% of all surveyed parties (both complainants and respondents) reported that they were satisfied with the service provided by the Commission, with 73% rating the service as 'very good' or 'excellent'.
28. It is important to recognise that any change to the Commission's complaint handling process would affect the way in which all complaints are dealt with. Complaints under section 18C are a small part of the overall number of complaints received by the Commission. Over the last five years, the Commission has received an average of 2,282 complaints each year. Around 5% of these complaints (117 on average) were complaints under section 18C of the RDA. Of these, on average less than 4 complaints per year under section 18C proceeded to court.
29. This submission makes a number of recommendations that address issues raised by the terms of reference for the inquiry. Broadly, those recommendations fall into three categories: the process for dealing with unmeritorious complaints, the speed with which complaints are dealt with, and the protection of freedom of speech in contexts beyond section 18C of the RDA.
30. The Commission has previously proposed and supported a number of statutory improvements to the AHRC Act to assist both it and the courts in dealing efficiently with unmeritorious complaints. In the context of this inquiry, the Commission recommends that:
  - the threshold for lodging a complaint with the Commission be raised to require the person lodging the complaint to allege an act which, if true, could constitute unlawful discrimination
  - 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
  - if the President terminates a complaint on any of the grounds set out in section 46PH(1)(a) to (g) of the AHRC Act, (including that the complaint is trivial, vexatious, misconceived or lacking in substance) then an application cannot be made to the Federal Court or the Federal Circuit Court unless that court grants leave.
31. More detail about these recommendations is set out in section 8.5 below.
32. The speed with which complaints are handled by the Commission has been impacted by significant and ongoing resource constraints. These constraints have led to a reduction in staff and an increased burden on the remaining

staff. Timeframes for the handling of complaints would be significantly improved if the Commission were appropriately resourced. The Commission recommends that the specific funding cuts to the Commission in the 2014-15 Budget and the 2014-15 Mid-Year Economic and Fiscal Outlook (MYEFO), which have had a disproportionate impact on the Commission in comparison to other similar agencies, be restored.

33. Finally, the Commission has been active over many years in promoting an understanding and acceptance of freedom of speech in a broad range of contexts (see section 10 below). If this Committee considers that further inquiry is needed into freedom of speech issues as they arise in other areas of law – that is, beyond section 18C of the RDA – the Commission recommends that the Attorney-General request the Commission to undertake that broader inquiry.
34. This submission addresses the following issues in turn:
  - a. a summary of the Commission's recommendations;
  - b. Australia's international obligations to provide for freedom of expression while also protecting people from racial hatred;
  - c. the background to the enactment of Part IIA of the RDA, and how it currently operates;
  - d. the seriousness of the conduct caught by Part IIA, having regard to the recent public debate;
  - e. the exemptions available in section 18D;
  - f. other measures to combat racial vilification and racial hatred in Australia;
  - g. the Commission's processes for handling complaints of unlawful discrimination, including complaints under Part IIA of the RDA;
  - h. the incorrect suggestion in the terms of reference for this inquiry that the Commission has engaged in a practice of 'soliciting' complaints;
  - i. the Commission's work in relation to freedom of speech.

## **2 Recommendations**

35. The Commission makes the following recommendations:

### **Recommendation 1**

The Commission recommends that the requirements in section 46P of the AHRC Act for the lodging of a complaint with the Commission be amended to require that the person lodging the complaint must allege an act which, if true, could constitute unlawful discrimination.



## **Recommendation 2**

The Commission recommends that section 46P of the AHRC Act be amended to require the written complaint to set out details of the alleged unlawful discrimination which are reasonably sufficient to indicate an alleged contravention of the relevant Act.

## **Recommendation 3**

The Commission recommends that section 46PO of the AHRC Act be amended to provide that if the President terminates a complaint on any of the grounds 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 4**

The Commission recommends that the following particular steps are taken to alleviate the recent budget constraints that have had a disproportionate impact on the Commission in comparison to other similar agencies:

- (a) reverse the cuts announced in the 2014-15 MYEFO of \$1.7 million for 2016-17 and \$1.6 million for 2017-18;
- (b) restore in future budget processes the funding removed in the 2014-15 Budget for the 7<sup>th</sup> full time Commissioner (who has been appointed since early 2014); and
- (c) include in future budget processes equivalent funding for the 8<sup>th</sup> full time Commissioner (who has been appointed since mid-2016).

## **Recommendation 5**

The Commission recommends that if this Committee considers that a more comprehensive inquiry is needed into the other freedom of speech issues adverted to by this inquiry's terms of reference and referred to in section 10 of this submission, the Attorney-General request the Commission to undertake that broader inquiry.

## **3 International human rights law – providing for freedom of expression and protecting people from racial hatred**

- 36. Australia has accepted binding obligations under international law to ensure that people have the right to freedom of expression and the responsibility not to engage in acts amounting to racial hatred or racial discrimination in any form.
- 37. These rights and responsibilities are complementary. They are contained in the *International Covenant on Civil and Political Rights* (ICCPR) and *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD).

### **3.1 *Freedom of expression***

38. The right to freedom of expression is guaranteed by article 19(2) of the ICCPR. It includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media.

39. As the United Nations Human Rights Council has stated:

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

40. The right to freedom of expression should 'be understood to be an essential instrument for the promotion and protection of other human rights'.<sup>5</sup> As the UN Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion has stated:

The importance of the right to freedom of opinion and expression for the development and reinforcement of truly democratic systems lies in the fact that this right is closely linked to the rights to freedom of association, assembly, thought, conscience and religion, and participation in public affairs. It symbolizes, more than any other right, the indivisibility and interdependence of all human rights. As such, the effective enjoyment of this right is an important indicator with respect to the protection of other human rights and fundamental freedoms.<sup>6</sup>

### **3.2 *Permissible restrictions on freedom of expression***

41. Article 19(1) of the ICCPR provides that everyone has the right to hold opinions without interference.

42. The right to freedom of expression in article 19(2) is of fundamental importance, and extends to 'expression that may be regarded as deeply offensive'.<sup>7</sup> It is not, however, an absolute or unfettered right and 'carries with it special duties and responsibilities'. Because of these duties and responsibilities to others and to society in general, freedom of expression 'may therefore be subject to certain restrictions'.<sup>8</sup>

43. The scope of permissible restrictions to the right to freedom of expression is set out in article 19(3) of the ICCPR. Other particular restrictions are also required by article 20 of the ICCPR and article 4 of the ICERD in order to ensure that rights of others are protected.

44. Article 19(3) of the ICCPR requires that three conditions must be met in order for a restriction on freedom of expression to be permissible. The restriction must:

- a. be provided for by law;

- b. pursue one of the legitimate aims set forth in the article, namely:
    - i. respect of the rights or reputations of others;
    - ii. the protection of national security or public order; or
    - iii. the protection of public health or morals; and
  - c. be necessary in order to achieve that aim.
45. The UN Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion has developed a set of principles to assist in determining what constitutes a legitimate restriction or limitation of freedom of expression, and what constitutes an 'abuse' of that right. These principles are set out in **Attachment 1** to this submission.
46. As a general principle, the Rapporteur notes that 'permissible limitations and restrictions must constitute an exception to the rule and must be kept to the minimum necessary to pursue the legitimate aim of safeguarding other human rights'.<sup>9</sup> In this context, 'necessary' has been interpreted as meaning that any proposed restriction is pursuant to a legitimate aim, is proportionate to that aim and is no more restrictive than is required for the achievement of the desired purpose.<sup>10</sup> Put differently, 'the relationship between the right and the limitation / restriction or between the rule and the exception must not be reversed'.<sup>11</sup>

### **3.3 Prohibition of hate speech**

#### *(a) Specific limitations*

47. While article 19(3) describes the general test for permissible limitations to freedom of expression, there are a small number of 'very specific limitations' that are required by international law in order to avoid 'serious injury to the human rights of others'.<sup>12</sup> The two most relevant requirements for the purposes of this submission are found in:
- Article 20(2) of the ICCPR: which establishes that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'; and
  - Article 4(a) of the ICERD: which establishes the requirement to 'declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin ...'.
48. Article 20(2) of the ICCPR sets a high threshold for hate speech that States are required to prohibit by law. This provision relates to advocacy of hatred that also constitutes incitement to discrimination, hostility or violence. Accordingly:
- advocacy of national, racial or religious hatred is not a breach of article 20, paragraph 2, of the Covenant on its own. Such advocacy becomes an offence

only when it also constitutes incitement to discrimination, hostility or violence; in other words, when the speaker seeks to provoke reactions (perlocutionary acts) on the part of the audience, and there is a very close link between the expression and the resulting risk of discrimination, hostility or violence. In this regard, context is central to the determination of whether or not a given expression constitutes incitement.<sup>13</sup>

49. The UN Human Rights Committee, the monitoring committee set up under the ICCPR, has also clarified that ‘a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3’.<sup>14</sup> In other words, while States are required to impose the prohibitions described in article 20, these prohibitions must also satisfy the requirements set down in article 19(3).

50. The chapeau of Article 4 of ICERD requires that States Parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form. States Parties are also required to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination.

51. In particular, States are required to take the measures referred to in article 4(a) of the ICERD, namely that they:

declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin ... .

52. This requires States to take actions to prohibit five main areas of conduct:

- dissemination of ideas based upon racial superiority or hatred
- incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent or national or ethnic origin
- threats or incitement to violence against persons or groups
- expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination, when it clearly amounts to incitement to hatred or discrimination
- participation in organisations and activities which promote and incite racial discrimination.<sup>15</sup>

53. The Committee on the Elimination of Racial Discrimination has commented that ‘the expression of ideas and opinions made in the context of academic debates, political engagement or similar activity, and without incitement to hatred, contempt, violence or discrimination, should be regarded as legitimate exercises of the right to freedom of expression, even where such ideas are controversial’.<sup>16</sup>

54. As the Committee has noted, Article 4 ‘serves the functions of prevention and deterrence, and provides for sanctions when deterrence fails’.<sup>17</sup> It also has:

an expressive function in underlining the international community’s abhorrence of racist hate speech, understood as a form of other-directed speech which rejects the core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society.<sup>18</sup>

(b) *Reservations by Australia*

55. Australia has a reservation to Article 20 of the ICCPR which relevantly provides that:

Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interest of public order (*ordre public*), the right is reserved not to introduce any further legislative provision on these matters.

56. Australia also has a reservation to Article 4(a) of ICERD which relevantly provides that:

The Government of Australia ... declares that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4(a) of the Convention.

57. The reservation in relation to Article 4(a) of ICERD is explicitly limited to the creation of offences contemplated by that article, rather than the creation of civil prohibitions, such as those contained in Part IIA of the RDA.<sup>19</sup> It appears that the reservation in Article 20 of the ICCPR takes into account the reservation previously made in relation to Article 4(a) of CERD and deals with the same issue.

58. While Australia’s reservations to these articles mean that it does not have an obligation under international law to introduce further laws beyond the existing protections against hate speech, the nature of Australia’s reservations recognise the importance of preventing the harm to which those articles are directed through existing mechanisms.

59. Australia has identified the civil prohibitions in Part IIA of the RDA as a measure taken to prohibit vilification on the basis of race in accordance with article 4 of the ICERD and with the ICERD more broadly.<sup>20</sup> Most recently, in January 2016, Australia reported to the Committee on the Elimination of Racial Discrimination:

Australia has a strong tradition of freedom of expression and considers that its current laws in relation to racial hatred and vilification are appropriate. Accordingly, Australia will not be introducing legislation to give any further effect to article 4(a) nor does Australia have any intention to withdraw its reservation to this article.

At the federal level, the Racial Discrimination Act 1975 (Cth) contains a civil prohibition on racial hatred. The AHRC has the power to conciliate complaints of racial hatred under this Act. If the conciliation is unsuccessful, legal proceedings can be commenced by the complainant in the Federal Court of Australia or the Federal Circuit Court.<sup>21</sup>

(c) *Other obligations under ICERD*

60. The obligations under ICERD to prevent racial discrimination in all its forms are broader than the requirement to create an offence in the terms described in article 4(a).

61. The Committee on the Elimination of Racial Discrimination, the monitoring body established under the ICERD, has noted that when this treaty was adopted, the prohibition of hate speech was regarded as integral to the elimination of racial discrimination in all of its forms:

At that time, there was a widespread fear of the revival of authoritarian ideologies. The proscription of the dissemination of ideas of racial superiority, and of organised activity likely to incite persons to racial violence, was properly regarded as crucial.<sup>22</sup>

The drafters of the Convention were acutely aware of the contribution of speech to creating climate of racial hatred and discrimination, and reflected at length on the dangers it posed.<sup>23</sup>

62. In the landmark case of *Toben v Jones*, Justice Allsop as part of the Full Court of the Federal Court elaborated on the crucial link between prohibiting racial hatred and preventing racial discrimination:

The unexpected recrudescence, in the winter of 1959-1960, of some of the most recent and horrific manifestations of racist behaviour enlivened the world community to act swiftly and ... unanimously, to take steps towards the elimination of the perceived evil. The perceived evil was all forms of racial discrimination and racial prejudice, the manifestation of which had been, in recent generations, at times horrifically violent and strident, at times overt, and at times less overt and less brutal, but nevertheless insidiously pervasive. In any form, it was recognised by all nations in the international community, to strike at the dignity and equality of all human beings.

Racial hatred was ... the form of the perceived evil most likely to lead to brutality and violence ...<sup>24</sup>

63. When Justice Allsop was assessing whether Part IIA was supported by the external affairs power and Australia's obligations under ICERD, his Honour said:

Art 4 is not the only matter in the Convention to which Part IIA can be seen as directed. The context and aim of the Convention were ... racial discrimination and its elimination, in *all* its forms. Sections 18B, 18C and 18D can be seen as intended to assist in the endeavour of eliminating racial discrimination in all its forms, including by dealing with racial hatred.<sup>25</sup> (emphasis in original)

64. The Full Court held that Part IIA of the RDA is constitutionally valid and supported by the external affairs power on the basis that it is consistent with Australia's obligations under ICERD and the ICCPR.<sup>26</sup>
65. For example, Justice Carr said that:
- it is clearly consistent with the provisions of [ICERD] and the ICCPR that a State Party should legislate to 'nip in the bud' the doing of offensive, insulting, humiliating or intimidating public acts which are done because of race, colour or national or ethnic origin before such acts can grow into incitement or promotion of racial hatred or discrimination.<sup>27</sup>
66. Justice Kiefel agreed, noting that it was 'not necessary to read into s 18C(1) a requirement that the act in question be done because of racial hatred to reach that conclusion'.<sup>28</sup>
67. In reaching this view, the Court (and Justice Allsop in particular) referred to the following obligations undertaken by Australia in ratifying ICERD:<sup>29</sup>
- eliminating racial discrimination and promoting understanding among races (article 2);
  - prohibiting and bringing to an end by an appropriate means, including legislation, as required by circumstances in Australia, racial discrimination by any person (article 2, para (d));
  - eliminating barriers between races and discouraging anything which tends to strengthen racial division (article 2, para (e));
  - adopting positive measures designed to eradicate all incitement to, or acts of, racial hatred and discrimination in any form (article 4);
  - assuring everyone in Australia effective protection and remedies through competent tribunals against any acts of racial discrimination which violate human rights and fundamental freedoms contrary to the Convention (article 6); and
  - adopting an effective measure to combat prejudices which lead to racial discrimination and to promote tolerance and friendship among racial or ethnic groups (article 7).
68. Article 5 of ICERD also acknowledges that all people have the right to equality before the law. This includes the right to enjoy their rights without discrimination, including the enjoyment of the right to freedom of expression. Racial vilification can harm the freedom of those who are its targets. It can have a silencing effect and harm the ability of victims to exercise their freedom of speech, among other freedoms. As the Committee on the Elimination of Racial Discrimination has stated:

The protection of persons from racist hate speech is not simply one of opposition between the right to freedom of expression and its restriction for the benefit of protected groups: the persons and groups entitled to the protection of the Convention also enjoy the right to freedom of expression and

freedom from racial discrimination in the exercise of that right. *Racist hate speech potentially silences the free speech of its victims.*<sup>30</sup> (emphasis added)

## **4 Part IIA of the *Racial Discrimination Act 1975* (Cth)**

### **4.1 Background**

69. Consideration had been given to proscribing racial hatred at the national level from as early as 1973 when the original draft of the Bill that became the Racial Discrimination Act proposed the introduction of criminal sanctions. Those provisions were ultimately not included in the RDA as passed in 1975 due to concerns that such criminal offence provisions would unduly restrict freedom of expression. Instead, there was a focus on conciliation and education to address issues of racial vilification.

70. The Human Rights Commission, the predecessor to the current AHRC, published a report (Number 7) in 1983 entitled *Proposal for Amendments to the Racial Discrimination Act to cover Incitement to Racial Hatred and Racial Defamation*. The Commission noted that even though racist statements were not covered by the legislation as it then existed, ‘fully one-quarter of all complaints [to the Commission] concern racist statements’. The Commission analysed almost 1,200 formal complaints over a seven-year period in which the principal matter of the complaint was said to be a statement which incited racial hatred or was defamatory of a racial or ethnic group. It noted that:

Whilst some of these complaints concern relatively minor, though still hurtful, matters, others concern gross racist propaganda and powerful attacks on the equal opportunities of minority groups. In two cases where there had been prior complaints to the Commissioner, tension resulted in violence and the death of one of the protagonists.<sup>31</sup>

71. The Commission proposed the insertion into the RDA of two new provisions.<sup>32</sup> The first was a proposed protection against incitement to racial hatred. The Commission proposed making it unlawful:

for a person publicly to utter or to publish words or engage in conduct which, having regard to all the circumstances, is likely to result in hatred, contempt or violence against a person or persons, or a group of persons, distinguished by race, colour, descent or national or ethnic origin.<sup>33</sup>

72. It was proposed that the provision also ensure that ‘certain valid activities are not brought within its scope, e.g. the publication or performance of bona fide works of art; genuine academic discussion; news reporting of demonstrations against particular countries; or the serious and non-inflammatory discussion of issues of public policy’.

73. The second proposal was a protection against ‘racial defamation’. The Commission proposed to make it unlawful ‘publicly to threaten, insult or abuse an individual or group, or hold that individual or group up to contempt or slander, by reason of race, colour, descent or national or ethnic origin’.<sup>34</sup>



74. In 1992, the federal government committed to introducing legislative protections, in the wake of the findings and recommendations of three significant national inquiries:
- The Human Rights and Equal Opportunity Commission's *National Inquiry into Racist Violence* – which proposed the introduction of a mix of criminal and civil sanctions;
  - The national report of the Royal Commission into Aboriginal Deaths in Custody – which supported the introduction of civil, but not criminal sanctions; and
  - The Australian Law Reform Commission's report on multiculturalism and the law – in which the majority of the Commission supported criminal sanctions and a minority supported civil sanctions.
75. The Report of the *National Inquiry into Racist Violence* stated the case for introducing protections as follows:
- Evidence to the Inquiry indicates that existing laws are failing to deal with the problems of racist violence and intimidation, racist harassment and incitement to racial hostility. Legislative change was seen by many groups as an essential part of the solution to the violence they suffered.<sup>35</sup>
- Political leaders and opinion makers must work to break the silence and build a culture which condemns racism and racist violence and encourages respect for cultural differences.<sup>36</sup>
76. The Inquiry expressed concern about 'a climate conducive to racist harassment, intimidation and violence. Legislating against incitement and vilification is an important way of addressing the problem directly and provides a strong statement from national leaders that racist violence and behaviour will not be tolerated in Australian society'.<sup>37</sup>
77. Both the earlier Human Rights Commission report and the *National Inquiry into Racist Violence* sought the introduction of protections to address pervasive and serious instances of racial abuse.
78. As the *National Inquiry into Racist Violence* explained:
- No prohibition or penalty is recommended for the simple holding of racist opinions without public expression or promotion of them or in the absence of conduct motivated by them. Nor would any of the proposed measures outlaw 'casual racism', for example the exchange of 'Irish jokes'. ...
- [T]he Inquiry is not talking about protecting hurt feelings or injured sensibilities. Its concern is with conduct with adverse effects on the quality of life and well-being of individuals or groups who have been targeted because of their race.
- The legislation would outlaw public expressions or acts of incitement, *not* private opinions. As in the case of defamation laws, the context, purpose and effect of the words or material need to be considered before determining whether or not they are acceptable under the Act. Savings clauses should

make it clear that the legislation will not impede freedom of speech in the following forms:

- private conversations and jokes;
- genuine political debate;
- fair reporting of issues or events;
- literary and other artistic expressions;
- scientific or other academic opinions, research or publications.

The threshold for prohibited conduct needs to be higher than expressions of mere ill will to prevent the situation which occurred in New Zealand, where legislation produced a host of trivial complaints. The Inquiry is of the opinion that the term 'incitement of racial hostility' conveys the level and degree of conduct with which the legislation would be concerned.

Incitement of racial hostility is not as serious as outright racist violence and intimidation. It need not, therefore, be subject to criminal laws and criminal penalties. It should be dealt with as a civil matter under the Racial Discrimination Act, with the same remedies (conciliation and compensation) as provided for racial discrimination.<sup>38</sup>

## **4.2 The enactment of the Racial Hatred Act 1995 (Cth)**

79. The *Racial Hatred Act 1995* (Cth) was adopted by the federal Parliament in 1995 following an extensive debate that stretched over nearly a full parliamentary sitting year. The Act inserted Part IIA into the RDA (comprising sections 18B-18E). These provisions in the RDA have remained unamended since their introduction.
80. Section 18B provides that if an act is done for two or more reasons and one of those reasons is the race of a person, then the act is taken to be done because of race.
81. Section 18C provides that it is unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people, and the act is done because of the race, colour or national or ethnic origin of the other person or some or all of the people in the group.
82. Section 18D provides for a number of exemptions from the prohibition in section 18C. The exemptions cover anything done reasonably and in good faith in three contexts:
  - a. in the performance, exhibition or distribution of an artistic work
  - b. in the course of any statements, publications, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest
  - c. in making or publishing:
    - i. a fair and accurate report of any event or matter of public interest;

- 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.

83. Section 18E provides for vicarious liability for employers and principals for acts done by their employees and agents in connection with their duties. However, vicarious liability does not apply if the employer or principal took all reasonable steps to prevent the employee or agent from doing the act.

84. The social context for the introduction of protections against racial vilification was an 'upsurge in the activities of extreme racist groups which have resulted in the harassment and intimidation of individuals'. The then Attorney-General noted that:

public gatherings of ethnic communities have been disrupted, sometimes violently. In Sydney, police are investigating seven arson attacks on synagogues in less than four years. In Melbourne, there have been reports of teenage gangs targeting Australians of Asian background. While these incidents are not everyday occurrences, they tear at the fabric of our society and cause immense concern to many of our citizens.<sup>39</sup>

85. The Explanatory Memorandum to the Racial Hatred Bill 1994 (Cth) noted that a balance between competing rights was carefully considered in the drafting of the legislation:<sup>40</sup>

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

The Bill maintains a balance between the right to free speech and the protection of individuals and groups from harassment and fear because of their race, colour or national or ethnic origin.

86. This was particularly the case in drafting the exemptions in section 18D:<sup>41</sup>

Proposed section 18D provides a number of very important exemptions to the civil prohibition created by proposed section 18C. The exemptions are needed to ensure that debate can occur freely and without restriction in respect of matters of legitimate public interest.

However, the operation of proposed section 18D is governed by the requirement that to be exempt, anything said or done must be said or done reasonably and in good faith.

87. Even 20 years ago, the civil provisions in section 18C of the RDA were not new. The provisions were modelled on the prohibition of sexual harassment in the *Sex Discrimination Act 1984* (Cth) (SDA). As the then Attorney-General noted:

The format of the civil provision is similar to the model used in other Commonwealth human rights legislation such as the Sex Discrimination Act. It is—

- based upon the availability of a remedy in specified circumstances,

- judged against the objective criteria of what is reasonably likely in all the circumstances to give rise to a valid complaint, and
- limited and targeted through the use of exemptions.

The requirement that the behaviour complained about should 'offend, insult, humiliate or intimidate' is the same as that used to establish sexual harassment in the Sex Discrimination Act. The commission is familiar with the scope of such language and has applied it in a way that deals with serious incidents only.<sup>42</sup>

88. The then Attorney-General also provided the following reasons for introducing the legislation as a whole, including both criminal and civil provisions:

The Racial Discrimination Act does not eliminate racist attitudes. It does not try to, for a law cannot change what people think. But it does target behaviour—behaviour that causes an individual to suffer discrimination. The parliament is now being asked to pass a new law dealing with racism in Australia. It too targets behaviour—behaviour which affects not only the individual but the community as a whole. ...

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

89. The Racial Hatred Act was not adopted in the form originally proposed by the then government. An amendment was proposed by the Senate to remove criminal sanctions from the Bill and retain the civil provisions. When the Bill was returned to the House of Representatives the amendment was agreed to.<sup>44</sup>
90. The RDA has proven valuable in providing an effective remedy for people who have experienced racial discrimination, harassment and vilification, and has also had a broader impact in setting a standard for civility, respect and tolerance in a multicultural society.<sup>45</sup>
91. However, providing for remedies in legislation is not sufficient by itself to eliminate racial discrimination and the incidence of racial discrimination in society remains significant. According to the latest annual national survey by the Scanlon Foundation in 2016, 20% of respondents experienced discrimination because of their national, ethnic or religious background in the last twelve months.<sup>46</sup> This figure is the highest recorded since the Scanlon Foundation began conducting its survey in 2007.
92. In 2016 those of a non-English speaking background reported the highest incidence of discrimination (27%). The most frequent form of discrimination that people reported was being made to feel like they didn't belong (56% of those who experienced discrimination), verbal abuse (55%), and not being offered work or being treated unfairly at work (17%).<sup>47</sup>

93. The Commission, in its public consultations with communities, has noted similar patterns of experience.<sup>48</sup> In addition, the Commission has been given accounts of how various multicultural and Indigenous communities have experienced racial abuse and vilification in public. It is a commonly expressed sentiment that the experience of racial vilification can cause significant and profound harm.<sup>49</sup>
94. In its *Freedom from Discrimination* report of 2015, the Commission noted the damaging social and civic effects of racial vilification:
- In addition to the harm that it can inflict on a person's wellbeing and sense of freedom, it can also undermine a sense of belonging to the community. For those on the receiving end, the experience of racial abuse can alienate them from Australian society – and feed a sense of disillusion and disempowerment. This accorded with the description of one community leader, who has observed that racial vilification is 'a direct attack on the target's humanity and dignity', which undermines not only their 'basic sense of safety and security' but also the 'good standing' of targets in the broader community.<sup>50</sup>
95. Based on its public consultations, the Commission notes that many members of the Australian community, from various ethnic and racial backgrounds, believe the presence of a legal prohibition against racial hatred serves to set a standard for public conduct in society.<sup>51</sup> This submission deals in section 7 below with other complementary methods of combatting racial hatred.

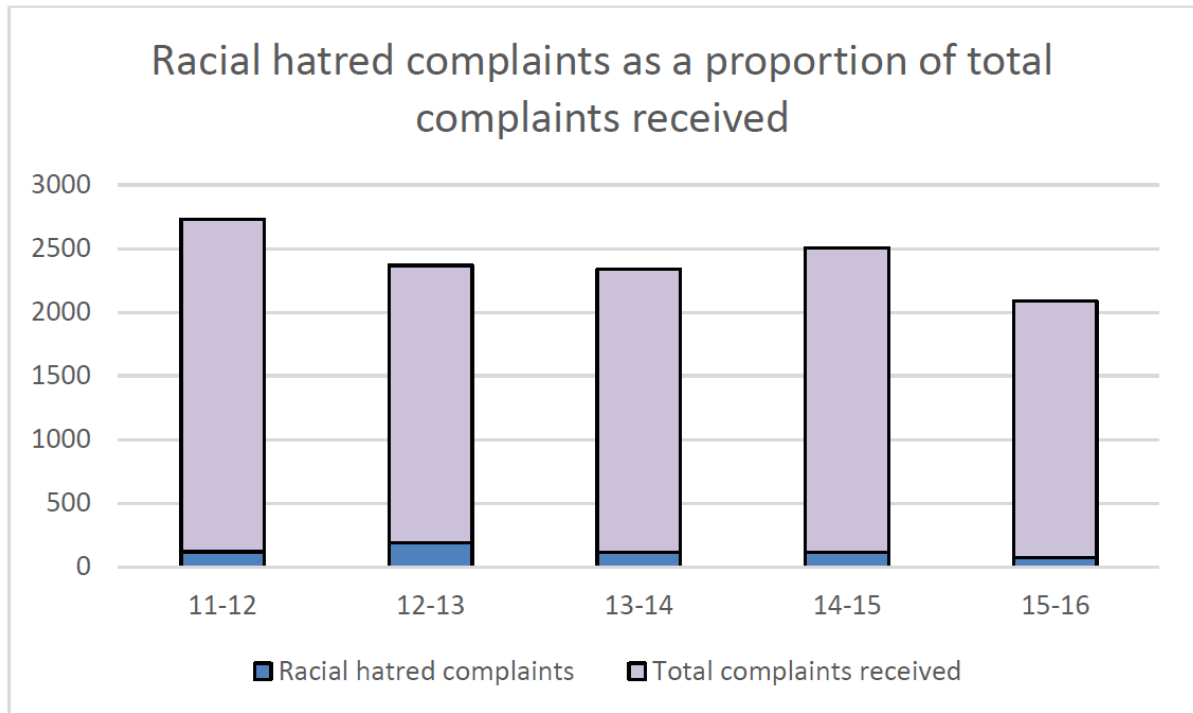
#### **4.3    *How does the law currently operate?***

96. Complaints that conduct has breached Part IIA of the RDA must be made to the Commission in the first instance. In order for a complaint to be valid, it must be in writing, it must make an allegation of unlawful discrimination and it must be by or on behalf of a person who is aggrieved by the alleged unlawful conduct. If these requirements are satisfied, the President (or his or her delegate) must inquire into and attempt to conciliate the complaint. There are separate provisions relating to finalising complaints as resolved, discontinued, withdrawn or terminated once an inquiry has commenced. These provisions are described in more detail in the discussion of the Commission's complaint handling process in section 8 below.
97. There are some significant misunderstandings about the nature of section 18C and the way in which the Commission's inquiry and conciliation process operates once a complaint under section 18C is made. Section 18C of the RDA is a civil provision and not a criminal provision. A person can never be 'charged' under section 18C. A finding by a court that a person has contravened section 18C is not a finding that they are 'guilty' of an 'offence'. The Commission's role in an inquiry into an allegation that there has been a breach of section 18C is not one of a 'prosecutor', nor does the Commission act as a 'judge'. Instead, the role of the Commission is to impartially inquire into and attempt to conciliate the complaint.
98. The functions of inquiring into and attempting to conciliate complaints made under the RDA are performed by the President (or his or her delegate) and

staff of the Commission in the Investigation and Conciliation Service. The Race Discrimination Commissioner plays no role in handling complaints.

99. The Commission is not a court or a tribunal. It does not make determinations about whether or not a breach of the law has occurred. The rationale for instituting a two stage process for dealing with discrimination matters under Commonwealth law is to seek to resolve complaints through conciliation at the Commission, if possible, without the need to go to court. The Commission's focus is on providing access to justice in a manner that is accessible, quick and inexpensive.
100. In many cases, the way in which conciliation takes place at the Commission is through a conciliation conference. At a conciliation conference, the conciliator has no authority to make decisions about whether discrimination has occurred or to direct the parties as to how the complaint should be resolved. 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.
101. The overwhelming majority of cases that proceed to conciliation are resolved at conciliation. Most complaints under section 18C which are successfully resolved through conciliation result in some combination of the following outcomes:
  - an apology
  - in the case of material published online, an agreement to remove material
  - systemic outcomes such as changes to policies and procedures, training for staff and training for individual respondents
  - a financial settlement.
102. The Commission's conciliation process is voluntary. The Commission cannot and does not direct either party to resolve a dispute on any particular terms.
103. As is the case with negotiated settlement of disputes across many areas of law, parties may agree to resolve a matter on terms which include a financial payment (in some cases on a 'no admission of liability' basis where the respondent does not admit they have breached the law). The fact that a dispute is resolved on this basis does not mean that there was no genuine dispute between the parties. Recent criticisms about parties paying 'go-away money' in resolving disputes misunderstand the role of the conciliation process and the nature of negotiated settlements in many areas of law.
104. The Commission publishes a conciliation register which contains de-identified information about how previous complaints have been resolved. Parties can look at the register to assist their own decision making process when considering options for resolving a complaint.

105. If the complaint is not resolved through conciliation, the Commission ‘terminates’ the complaint. The termination of a complaint does not mean that the Commission has dismissed the complaint. For example, one ground of termination is that the President or his or her delegate is satisfied that there is no reasonable prospect of the matter being settled by conciliation.
106. If a complaint is terminated, the complainant can then apply for the allegations to be heard and determined by the Federal Court or the Federal Circuit Court. There is no requirement or expectation that the complainant should take their complaint to court, it is entirely a matter for the complainant. The Commission has no role in a decision by a complainant whether or not to proceed to court. If a court case is filed, the Commission does not take any part in the proceeding, whether for the complainant or the respondent.<sup>52</sup>
107. If the court finds that there has been a breach of section 18C and that section 18D does not apply, it may order a range of outcomes including:
- a declaration that the respondent breached the law;
  - an order directing the respondent not to repeat or continue the conduct; or
  - an order requiring the respondent to perform any reasonable act to redress any loss or damage suffered by an applicant including the payment of compensation.<sup>53</sup>
108. Over the last five years, the Commission received an average of 2,282 complaints each year. Of this total number, 117 complaints (5%) on average allege a breach of section 18C. While the total number of annual complaints to the Commission remains in excess of 2,000, the last reporting year has seen a decrease in the number of complaints alleging a breach of section 18C, from 116 complaints in 2014-15 to 77 complaints (3.8% of all complaints) in 2015-16.



109. In 2015-16, 51 per cent of finalised complaints under section 18C were resolved at conciliation, 29 per cent were withdrawn or discontinued and 20 per cent were terminated by the Commission on one of the grounds in section 46PH of the AHRC Act. Further detail about the Commission's complaint handling process is described in section 8 below.
110. Of all of the complaints under section 18C finalised by the Commission over the last 5 years, 18 proceeded to court (3% of finalised complaints). In 2015-16 only one complaint under section 18C proceeded to court. This outcome is consistent with the intent of discrimination law to provide a quick, accessible and inexpensive means of resolving complaints without recourse to judicial processes.
111. It is also noted that the conciliation process, as conducted by the Commission, fulfils an educative function, assisting those involved in complaints to understand more about rights and responsibilities in relation to racial discrimination.
112. While the Race Discrimination Commissioner is not involved in the complaint handling process, he or she also plays an active role in advancing public understanding and debate about racism, race relations and the RDA.<sup>54</sup>
113. Public consultations conducted by the Race Discrimination Commissioner have shown that there is an under-reporting of experiences of racial discrimination. There are a number of factors that contribute to this. There is a reluctance of some individuals and communities to lodge complaints under the RDA.<sup>55</sup> There are also differences in the level of awareness and understanding of the provisions of the RDA across different groups in the community. Based on the views expressed during public consultations, there may be a lower level of knowledge about the RDA among newly arrived immigrant groups and among young people.<sup>56</sup>



114. Part of the role of the Race Discrimination Commissioner is to promote an understanding and acceptance of, and compliance with, the RDA.<sup>57</sup>

#### **4.4 Examples of racial hatred complaints**

Some examples of racial hatred complaints received by the Commission are included below. These examples are recorded in the Commission's publicly available conciliation register.<sup>58</sup>

1. The complainant is a Filipino woman with dark skin. She worked as a teacher's assistant at the respondent private school and claimed that over a number of years two managers made offensive comments towards her, including referring to her as 'black tart', 'black ' and 'black slave'. The complainant said one of her managers was transferred to a different work site after senior management became aware of the behaviour, but the other manager continued to supervise her.
2. The complainant, of Jewish ethnic origin, alleged that video clips on a video sharing site advocate hatred towards Jewish people and include content such as offering money to kill Jewish people.
3. The complainant, who is of Asian background, complained about a website which he said advocated violence against Asians. The comments on the website included: 'Asian People Flood our city with their Asian shops with their language all over them, having their own dedicated "china town" and their own suburb ...' '... we understand everyone has different levels of hate for Asians and so we have ... Yellers. Their job is to Yell at the Asians with passion i.e. —YOU GOOK F\*\*K OFF TO CHINA! and do whatever they can to show Asians they are not welcome in Australia ... Fighters ... are there to express their anger physically by laying the Gooks out'.
4. The complainant, who is of Aboriginal descent, claimed that he left his employment because, over a number of months, he was racially abused by a work colleague while they were working in public areas. The alleged comments included 'nigger', 'nigger c\*\*t', 'abo', 'boong', 'f\*\*king nigger', 'I've never worked with a nigger before', 'spear catcher', 'why don't you go and sit with your black family and get drunk' and 'get f\*\*ked you nigger dog'. Following the cessation of his employment, the complainant was assessed by a psychiatrist and subsequently the company's insurer accepted liability for the psychological injury the complainant had sustained arising from the alleged events.
5. The complainant claimed that video footage of a Pakistani woman and her child had been loaded onto the website of a video sharing site. The complainant claimed that the individual who posted the material also made racially derogatory comments on the site such as 'Paki ', 'f\*\*k those Curry munching scum', 'poo faces', 'stupid paki women' and 'silly smelling Pakis, they need to f\*\*k off home'.

## 5 Seriousness of the conduct caught by Part IIA

115. The Commission recognises that there has been widespread debate about the scope of the conduct prohibited in section 18C, namely, acts done because of someone's race that are reasonably likely to 'offend, insult, humiliate or intimidate' them.
116. While the ordinary meaning of these words is potentially broad, the Federal Court has interpreted them as referring only to 'profound and serious effects, not to be likened to mere slights'.<sup>59</sup> This observation was first made by Justice Kiefel, when her Honour was a judge of the Federal Court. It has been followed by the Federal Court since then, including by Justice French (as he then was) as part of the Full Court of the Federal Court in *Bropho v HREOC*.<sup>60</sup> This standard can now be regarded as settled law.<sup>61</sup>
117. Because section 18C is directed to serve public and not private purposes, the section has been interpreted as being concerned with consequences that are 'more serious than mere personal hurt, harm or fear'.<sup>62</sup> Section 18C does not protect 'hurt feelings'.
118. As noted above, in the second reading speech for the Racial Hatred Bill 1994 (Cth), the then Attorney-General noted that the language of 'offend, insult, humiliate or intimidate' was substantially the same as that used to establish sexual harassment in section 28A of the SDA. The current test for sexual harassment requires an unwelcome sexual advance or unwelcome conduct of a sexual nature. Further, the conduct must occur in circumstances in which a reasonable person, having regard to all the circumstances, 'would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated'.
119. In 1994, the Attorney-General noted that, in the context of sexual harassment, those words had been applied in a way that dealt with 'serious incidents only'. The Federal Court has had regard to those comments in interpreting the scope of section 18C of the RDA.<sup>63</sup>
120. Despite the court requiring a high threshold for conduct to fall within the terms of section 18C, some commentators have suggested that section 18C should be amended so as not to include conduct done because of a person's race that is reasonably likely to 'offend' or 'insult'. This issue was considered by Justice French in *Bropho v HREOC*.
121. His Honour said:

The lower registers of the preceding definitions [in s 18C] and in particular those of 'offend' and 'insult' seem a long way removed from the mischief to which Art 4 of CERD is directed. They also seem a long way from some of the evils to which Part IIA [of the RDA] is directed as described in the Second Reading Speech. But as Allsop J said in *Toben v Jones* (at [36]), Pt IIA encompasses conduct extending beyond expressions of 'racial hatred', and is 'intended to pursue a policy of eliminating race discrimination and promoting understanding among races' – an objective to which States Parties to CERD are committed pursuant to Art 2(ii).<sup>64</sup>

122. In saying this, Justice French referred with approval to the previous finding by the Full Court of the Federal Court that Part IIA was constitutionally valid because it was supported by Australia's obligations under ICERD (see paragraphs 63 to 67 above).<sup>65</sup>
123. In considering the scope of the conduct caught by section 18C, Justice French said that it was important to take into account the ordinary meaning of the words, the context in which they were used, and the extrinsic materials for the Racial Hatred Bill 1995 (Cth) which referred to the importance of balancing freedom from racial vilification with freedom of speech. In relation to the last of those points, it was important to recognise that 'freedom of expression is not limited to speech or expression which is polite or inoffensive'.<sup>66</sup> Indeed, the European Court of Human Rights had observed that the guarantee of freedom of expression in article 10 of the European Convention on Human Rights applies not only to information or ideas that are favourably received or regarded as inoffensive but also to:

... those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broad mindedness without which there is no 'democratic society'.<sup>67</sup>

124. As with article 19 of the ICCPR, article 10 of the European Convention is subject to limitations that are necessary for protecting the reputation or rights of others. In the Australian context, the balance struck by Part IIA of the RDA had to be read in light of the purpose sought to be achieved by the relevant limitation on speech. Justice French referred to the following comments made in the second reading speech:

In this Bill, free speech has been balanced against the rights of Australians to live free of fear and racial harassment. Surely the promotion of racial hatred and its inevitable link to violence is as damaging to our community as issuing a misleading prospectus, or breaching the *Trade Practices Act*.

125. Further, Justice French noted the comparison made by the then Attorney-General with the SDA referred to above.<sup>68</sup> That is, the equivalent language in the SDA had been applied 'in a way that deals with serious incidents only'.
126. Taking into account the aims of the legislation as revealed in the extrinsic material, Justice French reached the following conclusions about the scope of the conduct proscribed by section 18C:

In the light of the statutory policies so outlined the conduct caught by s 18C will be conduct which has, in the words of Kiefel J in the *Cairns Post* case at [16]:

Profound and serious effects not to be likened to mere slights.<sup>69</sup>

127. In 1991, prior to the enactment of Part IIA of the RDA, the Commission published its Report of the National Inquiry into Racist Violence in Australia. The Commission recommended that the Federal Government accept ultimate responsibility for ensuring, through national leadership and legislative action, that no person in Australia is subject to violence, intimidation or harassment on the basis of race.<sup>70</sup>

128. As the Commission noted at the time, the Inquiry was not concerned with ‘protecting hurt feelings or injured sensibilities. Its concern is with adverse effects on quality of life and well-being of individuals or groups who have been targeted because of their race’. The recommendations made by the Commission and others were taken up in the enactment of Part IIA.
129. The Commission observes that there is some confusion about the legal meaning of sections 18C and 18D, and of the Commission’s role in administering the RDA. In particular, it is important to make clear that the RDA does not prohibit speech or conduct that merely hurts a person’s feelings. The Commission supports the promotion of a clearer understanding of the judicial interpretation and practical operation of section 18C and the free speech exemptions in section 18D.

### **Case study 1**

Many of the complaints under section 18C that are made to the Commission involve racial abuse.

The most recent case in which damages were awarded by a court in relation to a breach of section 18C of the RDA was *Murugesu v Australian Postal Corporation*. The judgment on damages was handed down on 8 August 2016.<sup>71</sup> It has received little or no media attention.

Mr Murugesu was employed by Australia Post as a courier to deliver packages by truck. The Court found that the person usually responsible for organising his loads, also an employee of Australia Post, called him a ‘black [redacted]’ and a ‘f\*\*king black [redacted]’, told him to ‘go home to Sri Lanka by boat’ and said ‘you black [redacted] should do the slave jobs’.<sup>72</sup>

There was no dispute among the parties that if this level of abuse was established, it would constitute a contravention of the RDA.<sup>73</sup> There was a significant amount of evidence about the impact that the conduct had on Mr Murugesu.

The court found that these were ‘racial taunts’ and ‘on any view of the matter ... these remarks were, on their face, grossly offensive’.<sup>74</sup> The Court did not make any findings about whether the remarks would be humiliating or intimidating.

## **6 Exemptions in section 18D**

130. Section 18D of the RDA contains a number of ‘exemptions’ to the prohibition in section 18C which are designed to protect freedom of expression.
131. In *Bropho v HREOC*, Justice French described an alternative way of viewing the interaction between sections 18C and 18D, namely that ‘s 18C itself creates an exception to the general principle that people should enjoy freedom of speech and expression’.<sup>75</sup> According to this view, section 18D ‘is not in substance an exemption but rather defines areas of freedom of speech and expression not subject to the proscription imposed by s 18C’.<sup>76</sup>

## 6.1 **Artistic works**

132. There are a number of cases in which the exemption for artistic works in section 18D(a) of the RDA has operated to prevent conduct that otherwise fell within the terms of section 18C breaching the RDA.

### **Case study 2**

In *Bropho v HREOC*,<sup>77</sup> the Full Court of the Federal Court considered a cartoon published in the West Australian newspaper in 1997. The cartoon dealt with the return from the United Kingdom of the head of an Aboriginal warrior, Yagan, who had been killed by settlers in 1833. There was debate within the Aboriginal community about who had the appropriate cultural claims, by descent, to bring the remains back to Western Australia.

The Nyungar Circle of Elders had lodged a complaint with the Commission about the cartoon. At the time the complaint was lodged, the Commission had the power to conduct hearings and make determinations about whether or not there had been unlawful discrimination. The Commission no longer has the power to make determinations about whether conduct amounts to unlawful discrimination.<sup>78</sup> The complaint was dismissed by the Commission. The complainant sought judicial review of the Commission's decision.

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

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

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

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

The application for review of the Commission's decision was unsuccessful.

133. If a similar case were to come to the Commission now, the Commission would contact the publisher of the cartoon to seek a response to the allegations. In particular, the Commission may ask whether the publication was done reasonably and in good faith, in order to make an assessment about whether the exemption in section 18D(a) (or another limb of section 18D) applied. If the Commission was satisfied that section 18D applied, it may decide to terminate the complaint.
134. The exemption in section 18D(a) has been applied in other circumstances.
135. In *Kelly-Country v Beers*, an Aboriginal man Mr John Morris Kelly-Country complained about two video-taped performances by Mr Beers. Mr Beers was a comedian whose act involved dressing up as a character he called 'King Billy Cokebottle' and pretending to be Aboriginal. Mr Beers applied black stage make up to his face and arms, wore a fake beard and applied a white or ceremonial ochre stripe across his nose and cheek bones.<sup>79</sup> Mr Kelly-Country alleged that Mr Beers portrayed Aboriginal people as 'rude, stupid, unable to pronounce longer words, unable to speak English properly, dirty, ill educated, always drunk (or at least always drinking) and always swearing'. He also complained about 'references to sacred tribal activities which should be discussed only by and in the presence of initiated Aboriginal male persons'.<sup>80</sup> Federal Magistrate Brown found that some may find Mr Beer's performances as being unsophisticated or crude, but that they were clearly part of a creative process and fell within the exemption in section 18D(a).<sup>81</sup> His Honour referred to the Explanatory Memorandum for the Racial Hatred Bill 1995 (Cth) which made clear that comedy acts were to be included within the category of 'artistic works'. The performance was reasonable having regard to the conventions of stand-up comedy and was done in good faith.<sup>82</sup>
136. In *Bryl v Nowra*, Ms Hanna Bryl and Ms Anna Kovacevic complained about the production of a play titled 'Miss Bosnia' written by Louis Nowra and performed by the Melbourne Theatre Company.<sup>83</sup> Again, this complaint was made at the time that the Commission had a function of hearing and determining complaints. The complainants said that the play was written and performed in the context of, and at the same time as, armed aggression against Bosnia-Herzegovina which led to genocide and the continuing suffering and denial of human rights of its people. They said that the play trivialised this aggression and portrayed Bosnians as morally weak which repeated and reinforced specific accusations and slanders that had been made against the people of Sarajevo by their aggressors. They said that the play implied that Bosnian society was inherently violent, corrupt and lacking in social cohesion.
137. There was no debate that the play was an artistic work. In assessing whether the play met the requirements of reasonableness, Commissioner Johnston said that the decision maker should 'exercise a margin of tolerance and not find the threshold of what is unreasonable conduct too readily crossed'. He noted that 'the mere fact that ... a play deals with a topic that may touch on activities involving genocide or crimes against humanity ... does not preclude a person from writing about it in a comic way. Such topics are not categorically or inherently beyond parody.' Commissioner Johnston said that section 18D(a) did not involve the Commission drawing up standards or a rule book laying down what is acceptable in the way an artistic work is produced. Rather, the

exemption 'is premised on a high degree of tolerance of artistic licence even where hurt, outrage, insult or controversy is the result'. The provisions 'permit the presentation of even shocking artistic works which may be highly offensive to a group, provided they do not exceed the limits laid down, somewhat liberally, in section 18D'. The Commissioner found that the play fell within the exemption in section 18D(a) on the basis that the play was an artistic work which was written and produced reasonably and in good faith.

138. The Commission considers that artistic works performed, exhibited or distributed reasonably and in good faith, including comedy, satire and parody should not be prohibited by the RDA.

## **6.2 Public discussion and debate**

139. Section 18D(b) protects anything said or done reasonably and in good faith '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'.
140. Each of the State and Territory Acts that contain civil prohibitions on racial vilification contain free speech exemptions for matters of public discussion and debate in similar forms. In order for these exemptions to apply, all of these Acts require that the conduct was done 'reasonably and honestly'<sup>84</sup> or 'reasonably and in good faith'<sup>85</sup> or 'in good faith'.<sup>86</sup>
141. In the context of section 18D of the RDA, whether an act was done 'reasonably' does not involve an evaluative judgment about whether a court agrees with the conduct. As Justice French explained in *Bropho v HREOC*, an act is done reasonably in relation to discussions or debates for genuine academic, artistic or scientific purposes if it bears a rational relationship to the activity and is not disproportionate to what is necessary to carry it out.<sup>87</sup>

### **Case study 3**

In *Walsh v Hanson*,<sup>88</sup> the Commission considered whether the publication of a book titled 'Pauline Hanson The Truth', the copyright in which was held by Ms Hanson, contravened section 18C of the RDA.

Again, this complaint was made when the Commission had the power to conduct hearings and make determinations about whether or not there had been unlawful discrimination. The hearing Commissioner noted that 'the book is expressly political and is concerned with arguing in defence of the political position of Pauline Hanson and her supporters and against that of her political opponents'.

Among other things, the book argued that the Aboriginal community was being unfairly favoured by governments and the courts. The hearing Commissioner said that these statements were part of a genuine political debate and 'whether valid or not, the statements of the respondents must be regarded as done reasonably and in good faith for a genuine purpose in the public interest,

namely the course of a political debate concerning the fairness of the distribution of social welfare payments in the Australian community’.

142. By contrast, if a comment on a matter of public interest in relation to a particular ethnic group ‘was written in a way that offered gratuitous insults by, for example, referring to members of the group in derogatory racist slang terms, then it would be unlikely that the comment would be offered “reasonably”’.<sup>89</sup>
143. The requirement that the act be done in ‘good faith’ again does not require an assessment by the court as to whether it agrees with or approves of the act. Rather, it requires that the conduct was engaged in honestly and in accordance with the spirit of the law.<sup>90</sup>
144. A requirement of ‘good faith’ would also prohibit racist abuse offered up in the course of a public discussion. In *Toben v Jones*, a case that dealt with a website that contained a range of anti-Semitic material, the trial judge noted that the material did not satisfy the test of ‘good faith’ because it was ‘deliberately provocative and inflammatory’, it was ‘contrived to smear’ Jews and to ‘paint Jews in a bad light’.<sup>91</sup> One example of this was the use of the phrase ‘Jewish-Bolshevik Holocaust’ which, in the context in which it was used, conveyed that Jews as a group were responsible for perpetrating a ‘Holocaust’ comparable to that ascribed in modern history to the Nazis.
145. The RDA should not permit gratuitous racial abuse, even if it occurs in the course of a ‘public discussion’ about some other issue. If conduct that would otherwise be reasonably likely to breach section 18C is to be protected by a free speech exemption because it occurred in the course of a public discussion, then it is appropriate to require that conduct to have been done reasonably and in good faith.

### **6.3 Fair comment**

146. Section 18D(c) protects two other kinds of public comment done reasonably and in good faith.
147. The first is a fair and accurate report of any event or matter of public interest. For example, a news service that broadcasts a story containing an example of racial vilification engaged in by someone else will not itself have breached section 18C.
148. The second is 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. The Federal Court has drawn on defamation law in explaining what is meant by ‘fair comment’. In defamation law, the defence of fair comment is available where the comment is based on facts that are true or protected by privilege.<sup>92</sup> The comment must be recognisable as a comment, (that is, a statement of opinion) and the facts upon which the comment is based must be expressly stated, referred to or notorious.<sup>93</sup> The purpose of this requirement is so that a person hearing the comment is able to judge whether or not the comment is well founded.



149. If the comment amounts to a statement that a person genuinely believes and it is clear what the factual basis for the comment is, then it will be protected by section 18D(c)(ii).

## **7 Other measures to combat racial hatred in Australia**

150. It is important to recognise that racial vilification cannot be addressed only by legal prohibitions. Education and awareness raising are also required to promote a community understanding of and respect for human rights and for people's responsibilities.
151. Notably, all sides of politics have supported the need for complementary non-legislative measures alongside racial hatred laws. There is a critical role for educative measures that promote cultural diversity, tolerance and the value of the multicultural nature of our society, while also sending a strong message of opposition to racial discrimination and hatred.
152. The Commission has the function of undertaking educational programs for the purpose of promoting human rights. One example of this is the National Anti-Racism Partnership and Strategy which the Commission has led since 2011.<sup>94</sup> This was formally launched in Melbourne on 24 August 2012 and in 2015 it was extended for a further three years. The aim of the National Anti-Racism Strategy is to promote a clear understanding in the Australian community of what racism is, and how it can be prevented and reduced. This aim is achieved through three objectives:
- create awareness of racism and how it affects individuals and the broader community
  - identify, promote and build on good practice initiatives to prevent and reduce racism, and
  - empower communities and individuals to take action to prevent and reduce racism and to seek redress when it occurs.
153. A key component of the strategy is a national anti-racism campaign, *Racism. It Stops with Me*.<sup>95</sup> The campaign now has over 350 organisational supporters, from across local and state governments, business, education, sporting organisations, the arts and civil society.
154. The Commission considers that a continuing commitment to public education in relation to the harms caused by racial vilification and hatred, and ways of addressing it, remains a vital element in combatting this kind of conduct and spreading a strong anti-racism message.

## **8 The Commission's complaint handling process**

### **8.1 Overview of the Commission**

155. The Commission is Australia's national human rights institution (NHRI). It is recognised by the United Nations as an 'A status' institution that complies with

the Principles relating to the Status of National Institutions, commonly referred to as the 'Paris Principles'.<sup>96</sup>

156. The Commission operates under the AHRC Act as well as federal laws that seek to ensure freedom from discrimination on the basis of age, disability, race, sex, sexual orientation, intersex status and gender identity. The Commission also has specific responsibilities under the *Native Title Act 1993* (Cth) and the *Fair Work Act 2009* (Cth).
157. The Commission's role is to work towards an Australia in which human rights are respected, protected and promoted, finding practical solutions to issues of concern, advocating for systemic change and raising awareness across the community.
158. The Commission provides direct services to the Australian community, in particular by assisting people to resolve disputes about discrimination and breaches of human rights. Much of the Commission's work is also at the policy level – encouraging government, industry and community groups alike to see fundamental rights and freedoms realised. It involves building the case for change on issues ranging from age discrimination in employment to constitutional recognition of Aboriginal and Torres Strait Islander peoples. It involves providing a human rights analysis to the courts and parliamentary inquiries, conducting research and contributing to partnerships.
159. The Commission's work also involves exchanging ideas with equivalent bodies around the world, while closer to home, the Commission monitors and reports on the experiences of those particularly vulnerable to disadvantage.

## **8.2 Overview of the Commission's complaint handling process**

160. One of the most important functions of an NHRI is receiving and investigating complaints from individuals who allege that their human rights have been breached.<sup>97</sup> The particular way in which these complaint handling functions are carried out will vary from country to country but typically focusses on alternative dispute resolution. This complements the process for the protection of human rights offered by the courts. Some advantages of alternative dispute resolution are that it provides an accessible, quick and inexpensive means to resolve human rights disputes.

### **Previous processes of the Commission**

Up until 1993, the Human Rights and Equal Opportunity Commission (as the Commission was then known) could make determinations in response to complaints of unlawful discrimination, but these determinations were not binding or conclusive between the parties to the determination.

Legislative changes in 1993 allowed for HREOC determinations to be registered with the Federal Court.<sup>98</sup> Upon registration, a determination had effect as if it were an order of the Court. However, in *Brandy v Human Rights and Equal Opportunity Commission*,<sup>99</sup> the High Court held these provisions were unconstitutional on the basis that they purported to allow the Commission to exercise judicial power.

Two sets of legislative amendments were introduced in response to the High Court's decision in *Brandy*: the first in 1995 and the second in 1999.<sup>100</sup>

Under the current complaint handling regime, which has been in operation since 13 April 2000, the Commission no longer has the power to make determinations about whether conduct amounts to unlawful discrimination. Instead, the Commission's complaints process is focussed on conciliation and alternative dispute resolution.

161. In carrying out its conciliation function, the Commission performs a vital role in ensuring access to justice for people who have experienced discrimination, harassment and vilification. It is part of a range of measures including court proceedings designed to ensure that, consistently with article 2(3)(a) of the ICCPR, people whose human rights or freedoms have been breached have access to an effective remedy.
162. The Commission's complaints process is set out in the AHRC Act. This Committee's inquiry is concerned with complaints of unlawful discrimination made under Part IIB of the AHRC Act. The Commission receives complaints of unlawful discrimination under four federal anti-discrimination statutes:
  - the RDA
  - the SDA
  - the *Disability Discrimination Act 1992* (Cth) (DDA)
  - the *Age Discrimination Act 2004* (Cth) (ADA).
163. Any person who wants to make a complaint of unlawful discrimination under one of these federal Acts must first make the complaint to the Commission. The Commission inquires into the complaint and attempts to conciliate it. If a complaint cannot be resolved, the complainant then has the option of making an application to the Federal Circuit Court or the Federal Court.
164. The Commission's process and the judicial process are complementary. In comparison with judicial determination, the Commission's complaint process with its focus on informal dispute resolution, provides an accessible, timely and cost efficient way for parties to deal with discrimination related disputes. This provides a significant benefit to the individual parties to a complaint. Users of the Commission's service, both complainants and respondents, report high levels of satisfaction.
165. The Commission's complaints process also has substantial broader benefits to society more generally. The process creates significant efficiencies by resolving the majority of cases without the need for parties to go to court. This results in costs savings not only for the parties but also a saving in resources associated with the administration of court hearings. It is also possible for conciliation outcomes to extend beyond individual remedies and include systemic outcomes that contribute to the broader goals of eliminating discrimination and promote equality.<sup>101</sup> This is consistent with the

Commission's other functions of promoting an understanding and acceptance of human rights in Australia.<sup>102</sup>

166. In the past 10 reporting years, the Commission has received an average of 2,158 complaints per year.<sup>103</sup> The way that complaints have been counted has changed over time, so it is difficult to arrive at an exact number of complaints the Commission has received since it was established in 1986. However, on the basis of available data, the Commission is likely to have assisted with more than 65,000 complaints over this 30-year period.
167. While the Commission continues to receive more than 2,000 complaints each year, the Commission has faced significant budget cuts and increased costs (such as the appointment of additional Commissioners without the provision of additional funding to pay for their positions). This has had a significant impact on the Commission's complaints function and has required the Commission to reduce the number of staff allocated to perform this core statutory function. This decrease in funding and staff numbers impacts on the Commission's ability to provide a timely investigation and conciliation service.

### **8.3 Complaint statistics**

#### *(a) Total enquiries and complaints*

168. In 2015-16 the Commission received 16,836 enquiries.<sup>104</sup> The majority of enquiries (63%) were received via the Commission's National Information Hotline.<sup>105</sup> The main issues raised by enquirers in this reporting year related to disability discrimination (18%), general employment matters including harassment and bullying (15%), discrimination on grounds covered by the SDA (11%), human rights related issues including immigration and immigration detention (7%) and racial discrimination, including racial hatred (7%).
169. In 2015-16 the Commission received 2,013 complaints of alleged discrimination and breaches of human rights:
- 37% of complaints were lodged under the DDA
  - 21% of complaints were lodged under the RDA
  - 20% of complaints were lodged under the SDA
  - 14% of complaints were lodged under the AHRC Act
  - 8% of complaints were lodged under the ADA.
170. Complaints about employment made up 82% of complaints under the SDA, 62% of complaints under the ADA, 35% of complaints under the DDA and 21% of complaints under the RDA. The provision of goods, services and facilities was the other main area of complaint making up 33% of complaints under the DDA, 23% of complaints under the ADA, 18% of complaints under the RDA and 12% of complaints under the SDA.

171. Complaints including racial hatred as a ground made up less than 4% of the total complaints received by the Commission in 2015-16.

*(b) Complaints finalised*

172. The Commission finalised 1,982 complaints during 2015-16. The Commission conducted approximately 1,308 conciliation processes of which 989 complaints (76%) were successfully resolved. This represents successful dispute resolution for more than 1,978 people and organisations involved in complaints before the Commission. This conciliation success rate is the highest on record.



173. Information on the outcomes of conciliated complaints under federal anti-discrimination law indicates that 34% included terms that will have benefits for people beyond the individual complainant. For example, agreements to introduce anti-discrimination policies and provide anti-discrimination training in workplaces and agreements to undertake modifications to buildings and services to address potential discriminatory factors.
174. Commission survey data also highlights the educative effect of the Commission's complaint process. For example, in relation to conciliated complaints, 72% of surveyed participants indicated that involvement in the complaint process had assisted them to understand better their rights and responsibilities under federal human rights and anti-discrimination law.
175. Data provided to the Commission by the courts indicates that in 2015-16, there were 47 applications to court alleging unlawful discrimination under the RDA, SDA, DDA and ADA combined. This represents approximately 2% of all finalised complaints regarding unlawful discrimination. Of these court applications, only one related to racial hatred.

*(c) Timeliness of the complaint process*

176. In 2015-16, just under half of all complaints were finalised within 3 months (47%), 82% were finalised within 6 months, 94% within 9 months and 98% within 12 months. The average time from receipt to finalisation of a complaint was approximately 3.8 months.

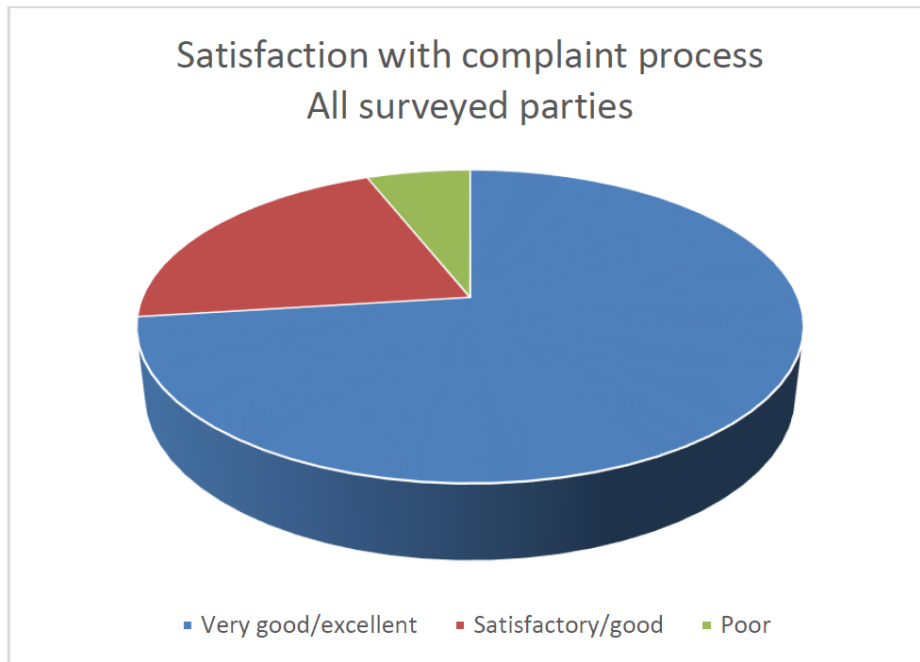
*(d) Satisfaction with complaint process*

177. The Commission seeks feedback on aspects of the service from both complainants and respondents. The survey can be completed online or in other formats. Feedback is sought regardless of the outcome of the complaint,

including from parties where the complaint was terminated, withdrawn or discontinued.

178. In 2015-16:

- 94% of all surveyed parties reported that they were satisfied with the service provided, with 73% rating the service as 'very good' or 'excellent'. Where complaints were conciliated, these figures increased with 98% reporting they were satisfied and 82% rating the service as 'very good' or 'excellent'.



- 88% of complainants surveyed said they were satisfied with the service and 68% rated the service 'very good' or 'excellent'. Examples of comments received from complainants are:

"This is a really great service that is not only cost effective but also where normal everyday people don't feel intimidated and can understand."

"The proactive approach, responsiveness and clear guidance from the Commission's representative was impressive and, in my view, contributed significantly to the successful resolution of this matter."



- 98% of respondents surveyed indicated they were satisfied with the service and 78% rated the service as 'very good' or 'excellent'. Examples of comments received from respondents are:

"I found the officer's approach ... to be fair and reasonable without bias. She took the time to understand the challenges we face within the business and how they related to this specific complaint. Overall, I found the officer's approach definitely took a potentially stressful and onerous process and made it an approach that was timely and concise."

"I found that everything was explained perfectly and all parties were given a fair hearing."



## 8.4 Summary of responses to terms of reference

179. The following sections of this submission deal with each of the issues raised in paragraph 2 of the Committee's terms of reference. In summary, the Commission's position in relation to each of these issues is as follows:

- **TOR 2(a): Treatment of trivial or vexatious complaints:** The Commission recommends that three amendments be made to: raise the threshold for lodging a complaint, require complaints to set out reasonably sufficient details of the alleged unlawful discrimination, and require the leave of the court to commence proceedings if the Commission terminates a complaint on a range of grounds including that it was trivial or vexatious.
- **TOR 2(b): Natural justice:** The Commission is required to, and does, afford natural justice to both complainants and respondents to the complaint handling process. Any party can seek judicial review of a decision of the Commission if they believe that the Commission has failed to accord them natural justice. The Commission also provides its own complaints mechanism under its Charter of Service.
- **TOR 2(c): Open, transparent and accountable:** The Commission publishes clear and accessible information about its investigation and conciliation processes and publishes information about the outcomes of conciliated matters. The Commission is accountable for decisions that it makes in the course of the complaint handling process. The Commission is not a court and its processes are significantly different from court processes. An important feature of the conciliation process is that it is confidential.
- **TOR 2(d): Timeliness:** The Commission is committed to dealing with complaints in the most appropriate, timely and efficient way possible. In 2015-16 nearly half of all the complaints finalised by the Commission (47%) were finalised within three months of receipt, 82% were finalised within 6 months, 94% within 9 months and 98% within 12 months. The average time from receipt to finalisation of a complaint in the 2015-16 reporting year was 3.8 months. As a result of budget constraints the Commission's Investigation and Conciliation Service (ICS) now has approximately 24% fewer staff than it did three years ago (see paragraph 291 below). Over this period of time the Commission has continued to receive in excess of 2,000 formal complaints each year. Timeframes for the handling of complaints would be significantly improved if the Commission were appropriately resourced in order to be able to employ sufficient ICS staff to continue to meet the continuing high level of demand for the Commission's services.
- **TOR 2(e): Cost:** The Commission's service is free for both complainants and respondents. There are no costs involved with lodging a complaint at the Commission and there is no requirement that complainants or respondents engage lawyers when participating in the Commission's complaint handling process.



- **TOR 2(f): Court proceedings:** If the President terminates a complaint, the complainant has the option of applying to the court alleging unlawful discrimination. This right arises regardless of the ground on which the complaint is terminated (including if the President is satisfied that the complaint is misconceived or lacking in substance). 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 any part in the proceeding, whether for the complainant or the respondent.

## **8.5 Treatment of trivial or vexatious complaints**

180. Paragraph 2(a) of the terms of reference for this inquiry requires the Committee to inquire into the appropriate treatment of trivial or vexatious complaints and complaints which have no reasonable prospect of ultimate success.
181. The key submissions of the Commission are:
- a. The AHRC Act contains a low threshold for lodging a complaint. It is enough to satisfy the threshold for lodging a complaint that there be a bare allegation that unlawful discrimination has occurred. A complaint will trigger the Commission's complaint-handling process even if it does not allege an act which, if true, could constitute unlawful discrimination and even if it does not contain any particulars of the alleged acts or practices being complained about.

### **Recommendation 1**

The Commission recommends that the requirements in section 46P of the AHRC Act for the lodging of a complaint with the Commission be amended to require that the person lodging the complaint must allege an act which, if true, could constitute unlawful discrimination.

### **Recommendation 2**

The Commission recommends that section 46P of the AHRC Act be amended to require the written complaint to set out details of the alleged unlawful discrimination which are reasonably sufficient to indicate an alleged contravention of the relevant Act.

- b. The Commission has the power to terminate complaints that are trivial, vexatious, misconceived or lacking in substance. This is a power that is used by the Commission in appropriate cases. In some cases, the Commission may write to a complainant and indicate the Commission's view that the complaint may be lacking in substance and ask the complainant whether they wish to pursue their complaint. The Commission considers that, if the recommendations noted above are implemented, its powers to deal with unmeritorious complaints are sufficient.

- c. The Commission notes that the proposed changes to anti-discrimination law in 2012 included a requirement that applicants seek the leave of the court before commencing proceedings if the Commission had closed a complaint on one of a number of grounds including that it was trivial or vexatious. This would limit the number of unmeritorious complaints being brought before the courts.

### **Recommendation 3**

The Commission recommends that section 46PO of the AHRC Act be amended to provide that if the President terminates a complaint on any of the grounds 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.

- d. The Commission does not consider that the AHRC Act should include a specific ground of termination that a complaint has no reasonable prospect of ultimate success. If a complaint cannot be terminated on the basis that it is trivial, vexatious, misconceived or lacking in substance it is undesirable for the Commission to instead terminate the complaint on the basis that the Commission considers that the case is unlikely to ultimately succeed if it goes to court. A key reason for this is that the role of the Commission is not to make binding determinations about the substance of unlawful discrimination complaints.

#### *(a) Threshold for lodging complaints*

182. There are three requirements for lodging a complaint of unlawful discrimination with the Commission and these are set out in section 46P of the AHRC Act.
183. The first requirement is that the complaint must be in writing. If it appears to the Commission that a person wants to make a complaint and needs assistance to formulate the complaint or reduce it to writing, then the Commission must take reasonable steps to assist the person.<sup>106</sup>
184. The second requirement is that the complaint must be made by a person or persons aggrieved, either on their own behalf or on behalf of themselves and other persons aggrieved, or by a person or a trade union on behalf of one or more other persons aggrieved. Whether a person is a 'person aggrieved' by an act is a mixed question of fact and law.<sup>107</sup> A person does not qualify as a person aggrieved merely because he or she feels an intellectual or emotional concern with the conduct. Rather, the person must be someone who can show a grievance which will be or has been suffered as a result of the act or practice complained of beyond that which he or she has as an ordinary member of the public.<sup>108</sup> However, the term 'person aggrieved' should not be interpreted narrowly.<sup>109</sup> A person need not be directly affected by the conduct. It is at least arguable that derivative or relational interests will support the claim of a person to be 'aggrieved'.<sup>110</sup> The categories of eligible interest to support standing as a person aggrieved are not closed.<sup>111</sup>

185. The third requirement is that the complaint must allege unlawful discrimination. At present, this is a very low threshold. Two cases in the Federal Court have considered the level of detail required to be included in a complaint under the previous section 50 of the SDA, which used language substantially similar to the current section 46P of the AHRC Act.
186. In the first of these cases, *Simplot Australia Pty Ltd v HREOC*, Justice Merkel held that:
- Section 50 of the [SDA] does not require that any details of the alleged act be set out in the complaint. The section merely provides for a complaint in writing which alleges that a person has done an act that is unlawful under Pt II of the Act. If such an allegation is made in the complaint it will comply with the section. ...
- The specificity of the legislature's requirements as to the obligation of HREOC to inquire and not to inquire in respect of a complaint or a matter referred to it, supports the conclusion that the jurisdiction and power to inquire can be invoked upon the lodging of a complaint which merely alleges an act is unlawful under the Act, notwithstanding that subsequently it may be determined that the act alleged in the complaint is not unlawful.<sup>112</sup>
187. This passage was considered by Justice Branson in *Commonwealth v Sex Discrimination Commissioner*. Her Honour referred to the passage from Justice Merkel's judgment in *Simplot* and said:
- In the *Simplot Australia* case at 93-94 Merkel J took the view that s 50 of the Act does not require the complaint in writing to include any details of the allegedly unlawful act. In my view, s 50 is open to the construction that the complaint in writing must allege some conduct by a person which is alleged to be unlawful by virtue of a provision of Part II. However, as I am not satisfied that the construction of the section adopted by Merkel J was plainly wrong, I adopt his Honour's construction of the section.<sup>113</sup>
188. The task of Commission staff in determining whether a complaint satisfies the requirements of section 46P (and, if necessary, section 46PB) is essentially a mechanical one. It does not involve an assessment at the threshold of whether the acts alleged are in fact unlawful.<sup>114</sup> In particular, a person assessing whether section 46P is satisfied is not required to consider whether a complaint is 'trivial, vexatious, misconceived or lacking in substance'. Such an assessment will only be made by the President or his or her delegate under section 46PH(1)(c) once a complaint has been accepted.
189. It is enough to satisfy the threshold for lodging a complaint that there be a bare allegation that unlawful discrimination has occurred. A complaint will be valid even if it does not contain any particulars of the alleged acts or practices being complained about and even if it does not allege anything that if true could constitute unlawful discrimination.
190. Once a valid complaint is lodged, the President (or his or her delegate) must inquire into it and attempt to conciliate it.<sup>115</sup> The fact that the threshold is so low has two consequences:

- First, in practice the Commission can spend considerable time and resources dealing with complaints that are unmeritorious or ill-conceived.
  - Secondly, if these complaints are not withdrawn and need to be terminated under section 46PH, for example because they are trivial, vexatious or lacking in substance, then the complainant is able to make a complaint to the court in the same terms, which has cost and resource implications for both the parties and the court.
191. To address this situation, the Commission **recommends** that the requirements in section 46P for the lodging of a complaint with the Commission be amended to require that the person lodging the complaint must allege an act which, if true, could constitute unlawful discrimination. The Commission has made this recommendation to Government on a number of occasions.<sup>116</sup>
192. Further, the Commission **recommends** that section 46P be amended to require the written complaint to set out details of the alleged unlawful discrimination which are reasonably sufficient to indicate an alleged contravention of the relevant Act. Such a requirement is currently contained in anti-discrimination legislation in Queensland,<sup>117</sup> and similar provisions exists in South Australia<sup>118</sup> and Tasmania.<sup>119</sup> Including a requirement in this form would not detract from the obligation on the Commission to take reasonable steps to assist a person to formulate a complaint or reduce it to writing. In taking those steps, the Commission takes into account difficulties that a person may have, for example because of any disability. However, if, despite steps being taken by the Commission to take into account any disability a person has, the person is unable or unwilling to provide sufficient details of a complaint to the Commission, then this would be a basis for a conclusion that a valid complaint had not been made.
- (b) *Terminating complaints that are trivial or vexatious*
193. As noted above, once a complaint has been lodged, the President or his or her delegate must inquire into and attempt to conciliate the complaint.<sup>120</sup> The AHRC Act does not specify the way in which the inquiry and conciliation process must occur, subject to some requirements in relation to the procedures for compulsory conferences.<sup>121</sup>
194. Section 46PH of the AHRC Act provides that the President (or his or her delegate) may terminate a complaint on a number of grounds, including that he or she is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance. The full list of grounds is as follows:
- (a) the President is satisfied that the alleged unlawful discrimination is not unlawful discrimination;
  - (b) the complaint was lodged more than 12 months after the alleged unlawful discrimination took place;
  - (c) the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance;

- (d) 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;
- (e) 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;
- (f) 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;
- (g) the President is satisfied that the subject matter of the complaint could be more effectively or conveniently dealt with by another statutory authority;
- (h) the President is satisfied that the subject matter of the complaint involves an issue of public importance that should be considered by the Federal Court or the Federal Circuit Court;
- (i) the President is satisfied that there is no reasonable prospect of the matter being settled by conciliation.

195. If a complaint is terminated on any of the grounds in section 46PH and a notice of termination is issued, any person who was an affected person in relation to the complaint may make an application to the Federal Court or the Federal Circuit Court, alleging unlawful discrimination by one or more of the respondents to the terminated complaint.<sup>122</sup> It is important to recognise that an application can be made to court regardless of the ground of termination. If the Commission terminates a complaint on the ground that it is trivial or vexatious, that does not prevent the complainant from having access to the courts if they want to pursue the matter.
196. An assessment of whether a complaint is trivial, vexatious, misconceived or lacking in substance is not an assessment of whether or not the case has reasonable prospects of succeeding if it were to be taken to court. It is an assessment at a much lower threshold.
197. A complaint is ‘trivial’ if it is ‘trifling, inconsiderable, unimportant’;<sup>123</sup> or ‘of little importance, trifling, insignificant’.<sup>124</sup>
198. The nature of a ‘vexatious’ claim was considered by Justice Mansfield in *Rana v Commonwealth*:

Proceedings have been held to be ‘vexatious’ in the past if they are instituted with the intention of annoying or embarrassing the person against whom they are brought; they are brought for collateral purposes, and are not for the purpose of having the court adjudicate on the issues to which they give rise; irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless; or they are scandalous, disclose no reasonable cause of action, are oppressive, are embarrassing, or are an abuse of the process of the court: see generally *Attorney-General v Wentworth* (1988) 14 NSWLR 481.

It has also been pointed out that ‘vexatiousness’ is a quality of the proceeding rather than a litigant’s intention so that the ‘question is not whether they have

been instituted vexatiously but whether the legal proceedings are in fact vexatious': *Re Vernazza* [1960] 1 QB 197 at 208.<sup>125</sup>

199. Most of the case law in relation to the meaning of 'misconceived' and 'lacking in substance' in the context of the termination of inquiries by the Commission relates to regimes that previously existed in specific discrimination legislation including the RDA. In *Assal v Department of Health, Housing and Community Services*, former President of the Commission Sir Ronald Wilson described the meaning of 'lacking in substance' in the following terms:

A claim which presents no more than a remote possibility of merit or which does no more than hint at a just claim would ordinarily, I think, be found to be lacking in substance.<sup>126</sup>

200. This test was endorsed by Justice von Doussa in *Nagasinghe v Worthington*,<sup>127</sup> by Justice Drummond in *Ebber v Human Rights and Equal Opportunity Commission*,<sup>128</sup> and by the Full Court of the Federal Court in *Rana v Human Rights and Equal Opportunity Commission (No 3)*.<sup>129</sup> In *Ebber*, Justice Drummond went on to find that:

The power ... to bring the applicants' complaint to a summary end is only available in a very limited class of case. The Commission should not bring a complaint to an end in this way in other than a clear case, given the interests that the RDA is designed to protect.<sup>130</sup>

As to the threshold required, Justice Drummond held:

A complainant must therefore have at the outset of the inquiry into his complaint sufficient material (it need not be legally admissible evidence ...) to show that he has more than a remote possibility of a well-founded claim, if he is to defeat an application for the summary dismissal of the case that can be made at the start of the inquiry.<sup>131</sup>

(As the language of this extract shows, this case was decided at a time when the Commission had the power to make binding determinations.)

201. A complaint may be terminated at any stage of the Commission's complaint handling process.<sup>132</sup> For example, it may be done after the complaint is lodged, once further particulars have been provided from the complainant or after a response has been received from the respondent.
202. The President (or his or her delegate) regularly terminates a proportion of complaints on the basis that they are satisfied that the complaint was misconceived or lacking in substance. Before terminating a complaint, the Commission will write to a complainant and indicate the President's view that the complaint may be lacking in substance and ask the complainant whether they wish to pursue their complaint. The President may grant leave to a complainant to withdraw the complaint if satisfied that all of the people on whose behalf the complaint was lodged agree to the withdrawal.<sup>133</sup> Alternatively, the President may decide not to continue to inquire into a complaint if the President is satisfied that the person does not wish to pursue the complaint.<sup>134</sup> One advantage from the respective points of view of respondents and the court is that if a complaint which may be lacking in

substance is withdrawn or discontinued rather than terminated, then the complainant does not have a right to make an application to the court (and may not be inclined to even if this were possible, given their intention to withdraw or discontinue). The Commission's complaint handling process is discussed in more detail in section 8.6(b) below.

203. The following table shows data for the proportion of complaints over the past five financial years that were conciliated, terminated (on any ground in section 46PH), withdrawn and discontinued. Note that the conciliation percentages in this table are expressed as a proportion of all complaints finalised, whether or not conciliation was attempted. The conciliation success rate, that is, the proportion of matters successfully resolved where conciliation was attempted, is significantly higher. For example, in 2015-16 approximately 76% of matters that went to conciliation were successfully conciliated.

#### **Finalised complaints**

| <b>Year</b>   | <b>2011-12</b> | <b>2012-13</b> | <b>2013-14</b> | <b>2014-15</b> | <b>2015-16</b> |
|---|----------------|----------------|----------------|----------------|----------------|
| Conciliated   | 48%            | 45%            | 49%            | 51%            | 52%            |
| Terminated*   | 31%            | 33%            | 23%            | 23%            | 19%            |
| Withdrawn**   | 12%            | 13%            | 16%            | 16%            | 17%            |
| Discontinued***   | 8%             | 9%             | 9%             | 9%             | 9%             |
| Referred for reporting (human rights and ILO complaints only)<br>**** | 1%             | -              | 3%             | 1%             | 3%             |

\* 'Terminated' includes all grounds in section 46PH. This includes matters where the Commission was satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance. It also includes matters where conciliation has taken place but was unsuccessful and the President is satisfied that there is no reasonable prospect of the matter being settled by conciliation.

\*\* 'Withdrawn' includes situations where a complainant asks to withdraw their complaint due to personal circumstances, or after receiving information from the respondent, or after being provided with information from the Commission about the law and/or a preliminary assessment of their complaint.

\*\*\* ‘Discontinued’ includes situations where a complainant does not respond to the Commission’s attempts to contact them including after being provided with a preliminary assessment of the complaint.

\*\*\*\* Only human rights and ILO<sup>135</sup> complaints under Part II of the AHRC Act are referred for possible reporting to the Attorney-General. This category is not relevant to unlawful discrimination complaints.

204. The Commission considers that these grounds for termination, withdrawal and discontinuance work well in their current form and provide a sound basis for ceasing to inquire into matters that trivial, vexatious, misconceived or lacking in substance.
205. However, the Commission recommends that a legislative amendment could usefully be introduced to reduce the extent to which courts are required to deal with matters that the Commission has assessed as unmeritorious.
206. In particular, the Commission recommends an amendment to the AHRC Act in the form proposed in the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth).<sup>136</sup> Clause 121 of that draft Bill proposed that it would be necessary for an applicant to seek the leave of the court before commencing proceedings in the Federal Circuit Court or the Federal Court if the Commission had closed a complaint on one of the following grounds:
- the Commission is satisfied that the conduct is not unlawful
  - the complaint was made more than 12 months after the alleged conduct occurred
  - the Commission is satisfied that the complaint is frivolous, vexatious, misconceived or lacking in substance
  - if some other more appropriate remedy has been sought in relation to the subject matter of the complaint and the Commission is satisfied the subject matter of the complaint has been adequately dealt with
  - the Commission is satisfied that some other more appropriate remedy is reasonably available.
207. Under those proposed amendments, it would not be necessary to seek leave if the Commission had closed a complaint on the grounds that the Commission was satisfied that the subject matter of the complaint involves an issue of public importance that should be considered by the Federal Court or the Federal Circuit Court; or that the Commission was satisfied that there was no reasonable prospect of the matter being settled by conciliation. In those cases, an applicant could make an application to court without first seeking leave.
208. The Explanatory Notes for the Exposure Draft of the Bill provided the following rationale for the proposed change:<sup>137</sup>

The rationale for limiting access to the courts is to provide the Commission with an increased ability to dismiss clearly unmeritorious complaints and to focus resources on meritorious complaints; this in turn should limit the number



of unmeritorious complaints being brought before the courts. With the early dismissal of unmeritorious complaints comes the potential deregulatory benefit of only involving respondents in the matter when there is an arguable matter to be dealt with.

209. The Commission welcomed this feature of the Exposure Draft at the time it was considered.<sup>138</sup>
210. The Commission recommends that an equivalent amendment be made to the AHRC Act. In particular, the Commission **recommends** that section 46PO of the AHRC Act be amended to provide that if the President terminates a complaint on any of the grounds 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.
211. While this amendment would be likely to reduce the burden on courts of dealing with unmeritorious cases by allowing them to be disposed of more quickly if the court formed the view that they should not have leave to proceed, it could also be expected to increase the regulatory burden on the Commission.
212. The Commission anticipates that if there are different consequences that flow from different termination grounds, it is likely that there will be an increase in requests from respondents for the Commission to terminate complaints under one of the grounds that result in complainants being required to obtain leave from the court before commencing proceedings. In particular, respondents may be more likely to make these requests when they consider that there is at least some prospect that the request would be successful, even though it may be more likely than not that the termination ground will not be made out. This may create an additional administrative step in the complaint handling process for some matters which would take additional time and resources to deal with.
213. In addition, there is some prospect that complainants may be more inclined to seek judicial review of termination decisions if these decisions change the process by which they are able to access to the courts.
214. Given the likely increased regulatory burden on the Commission, the Commission emphasises the importance of adequate resourcing, including through ameliorating the impact of previous budget cuts and resource constraints in order for the Investigation and Conciliation Service to function effectively. This issue is dealt with in recommendation 4 in section 8.8 below.

(c) *Terminating complaints where satisfied that conduct is not unlawful*

215. The President or his or her delegate has the power to terminate a complaint under section 46PH(1)(a) when he or she is satisfied that the alleged unlawful discrimination is not unlawful discrimination. This termination ground is usually used where a particular exemption to discrimination applies. For example, section 38 of the ADA provides that an act done in direct compliance with a Commonwealth Act relating to superannuation does not constitute age discrimination. If a complaint was made about the operation of superannuation law, and the complaint was not discontinued or withdrawn after the

complainant was advised of the exemption, then the Commission would terminate the complaint under section 46PH(1)(a).

216. Some exemptions, such as the one described above, can be applied based on a review of the law and the surrounding factual circumstances of a complaint. Other exemptions can only be applied after obtaining further information from a respondent. For example, in order to apply the exemption to section 18C of the RDA in relation to artistic works,<sup>139</sup> it would usually be necessary to have some evidence from the respondent to satisfy the President or his or her delegate that the artistic work had been created reasonably and in good faith.
217. The Commission will only terminate a complaint under section 46PH(1)(a) in clear cases. Given the nature of the conciliation process, the Commission will not necessarily have the same material in front of it as a court. Where complaints are arguable, the practice of the Commission is to explore conciliation of the complaint with the parties. If there is ultimately no reasonable prospect of the matter being settled by conciliation, the Commission would usually terminate on that ground.

(d) *No reasonable prospect of ultimate success*

218. The President does not have the power to terminate a complaint on the ground that it has no reasonable prospects of ultimate success. Such a power is given to the Federal Circuit Court and the Federal Court. The Commission considers that this allocation of powers is appropriate.
219. The question of whether the Commission could terminate a complaint on the ground that it had no reasonable prospect of success was considered by President Wilson in *Assal*. The President distinguished the test for 'lacking in substance' described in paragraph 197 above from different threshold that had been proposed by the then Race Discrimination Commissioner, Ms Irene Moss, who had suggested that a complaint should not be dismissed on these grounds 'unless it is clear that the complainant has no reasonable prospects of success'. In relation to this alternative test, the President said:<sup>140</sup>

With respect, I wonder if this test does not raise the threshold too high. It is possible that a complainant's case will exhibit substance, notwithstanding that the ultimate outcome remains clouded in doubt. Bearing in mind that the power to dismiss a complaint summarily may be exercised at any stage of an inquiry, I believe it may be inappropriate in some cases to relate the criterion of 'lack of substance' to the complainant's prospects of success at all.

220. The Federal Circuit Court and the Federal Court each have the power to grant summary judgment for one party against the other in relation to the whole or any part of a proceeding if the court is satisfied that the other party has no reasonable prospects of successfully defending or prosecuting that part of the proceeding.<sup>141</sup>
221. This is a higher threshold than the test under section 46PH(1)(c) of the AHRC Act for determining whether a matter is lacking in substance. For example, there is nothing inconsistent with the President or his or her delegate not

terminating a complaint because they were not satisfied that the complaint was lacking in substance, and a court later deciding that the complainant has no reasonable prospect of successfully prosecuting an application alleging unlawful discrimination based on the same complaint.

222. The Commission considers that the test of ‘no reasonable prospect of success’ more appropriately belongs to courts and tribunals which have the role of making a legally binding determination made on the merits of the case. As described in the box in section 8.2 above, since 2000, the Commission no longer has the function of hearing and determining complaints alleging unlawful discrimination.<sup>142</sup> Instead, the Commission’s role is to inquire into and attempt to conciliate complaints of unlawful discrimination. This does not necessarily involve the parties providing the Commission with all of the information or evidence that they would rely on if the matter were to proceed to court.
223. At the time of introducing the amendments which passed in 1999, the Attorney-General said:

The first major reform introduced by this bill is the government’s response to the High Court’s decision in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1. In that case the enforcement mechanism in the *Racial Discrimination Act 1975* was found to be unconstitutional on the basis that the commission, as an administrative body, could not make a final determination as to the rights of the parties to a dispute. This decision also affected the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992*, and the *Privacy Act 1988*.

... The bill therefore proposes to maintain the commission’s conciliation role, but to provide the parties with direct access to the Federal Court should conciliation prove unsuccessful. This will enable the parties to obtain a timely and enforceable determination of their respective rights.<sup>143</sup>

224. This reform placed the focus of the Commission’s complaint handling work on providing access to justice through the Commission’s alternative dispute resolution and conciliation processes. In the specific circumstances of the law administered by the Commission and the non-determinative complaint processes which flow from this, the Commission does not consider that it is appropriate to provide the Commission with the ability to terminate a complaint on the basis that it does not have reasonable prospects of success at final hearing.

## **8.6 Natural justice**

225. Paragraph 2(b) of the terms of reference for this inquiry require the Committee to inquire into whether persons who are the subject of complaints are afforded natural justice and paragraph 2(e) requires the Committee to inquire into whether complaints are dealt with fairly.
226. The Commission is required to, and does, afford natural justice to both complainants and respondents to the complaint handling process. Any party can seek judicial review of a decision of the Commission if they believe that the Commission has failed to accord them natural justice.

(a) *Applicability of natural justice rules*

227. The Commission is a Commonwealth administrative agency and is subject to the requirements of Commonwealth administrative law. Decisions that are made under the AHRC Act are reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). For a decision to be reviewable it must be a substantive decision that is final or determinative of an issue.
228. One of the grounds of review of a decision under the ADJR Act is that a breach of the rules of natural justice occurred in connection with the making of the decision.<sup>144</sup>
229. Broadly speaking, the principle of natural justice requires that a person is entitled to a fair and unbiased hearing before decisions are taken that affect their interests. For this reason, some judges prefer to use the term ‘procedural fairness’ instead of ‘natural justice’,<sup>145</sup> although ‘natural justice’ is more often used in legislation. Typically, natural justice will require the person to be made aware of the nature of allegations made against him or her; to be given access to material on which those allegations are based; and to be given the opportunity to make submissions in response to those allegations and that material. Natural justice requires that decision makers must act without actual bias and without the appearance of bias.
230. In conducting research for this submission, the Commission identified 16 cases in the last 10 years in which a claim has been made under the ADJR Act against a decision of the Commission in relation to any of its complaint handling functions (that is, including complaints of unlawful discrimination,<sup>146</sup> other kinds discrimination in employment,<sup>147</sup> and breaches of human rights<sup>148</sup>). In nine of these cases the application was dismissed after hearing argument from the parties. One case was dismissed for want of prosecution and three cases were discontinued. In three of these cases the Commission agreed to orders remitting the matter to the Commission for reconsideration. None of these cases resulted in any finding that the Commission had breached the rules of natural justice.
231. The Commission also publishes a Charter of Service which sets out the standards of service that complainants and respondents can expect from the Commission.<sup>149</sup> The Commission commits to provide a service that is professional, accessible, fair and timely. People using the Commission’s service can expect the Commission to:
- a. treat them with respect and courtesy
  - b. provide them with clear and accurate information
  - c. collect, store, use and disclose their personal information in accordance with Australian law
  - d. keep them informed about the progress of the complaint
  - e. be impartial and fair to everyone involved
  - f. progress enquiries and complaints in a timely manner; and

g. provide reasons for its decisions.

232. People can make complaints to the Executive Director of the Commission if they are unhappy with any aspect of the Commission's service. Over the past five years, the Commission has received a total of five complaints under the Charter; on average one complaint per year out of more than 2,000 cases handled by the Commission each year.

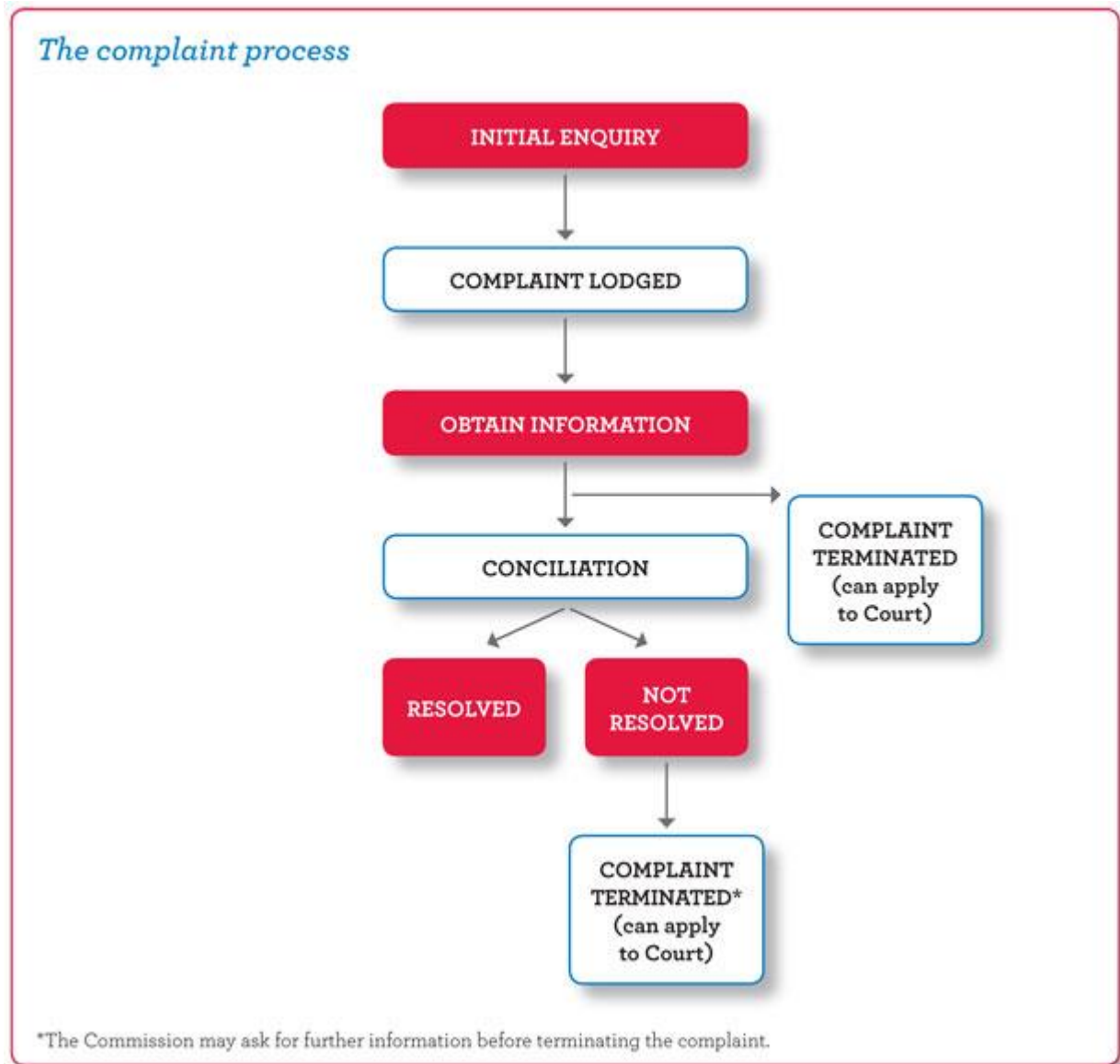
(b) *Complaint handling process*

233. The Commission acts in accordance with the principles of natural justice when making decisions under the AHRC Act and when inquiring into and attempting to conciliate complaints.

234. The Commission, under the AHRC Act, has discretion in the way it conducts inquiries.<sup>150</sup> The particular approach taken by the Commission to a given complaint will depend on the circumstances and the nature of the complaint. The legislation does not, for example, specify what an 'inquiry' into a complaint should entail. The Commission currently provides a flexible complaint resolution process that extends beyond a single model of alternative dispute resolution (ADR). While the law refers to 'conciliation', in practice the complaint resolution process is best classified as a hybrid ADR model which can span the traditional facilitative model of mediation and the more advisory aspects of statutory conciliation.<sup>151</sup>

235. In practice, the process is not strictly linear. That is, the law does not require all matters to be subject to a detailed written inquiry prior to conciliation, and the process has a level of flexibility to suit the specifics of a particular complaint. For example, it is open to parties to complaints to agree to proceed directly to conciliation if this is considered appropriate. This may occur where, for example, the parties are already aware of the issues when the complaint is lodged with the Commission and where there may have already been some internal investigation of the issues by the respondent. In some cases, the parties may already be in negotiations to resolve the matter when the complaint is lodged with the Commission.

236. A simplified outline of the Commission's typical complaint process is shown in the following flow chart.



237. A complaint to the Commission of unlawful discrimination must be in writing. Typically complainants will fill out a complaint form available on the Commission's website which prompts complainants to provide information that will be relevant to their complaint.<sup>152</sup> Officers will assist a person put their complaint in writing if necessary and complaints can be made in any language. However, often people making complaints do not provide sufficient details about their claims. In those cases, the Commission will seek further details about the acts or practices that are alleged to constitute unlawful discrimination. Obtaining this information at an early stage helps the Commission to understand better the claims being made and assists respondents to understand better the allegations that are made against them.
238. All incoming correspondence is assessed by a senior manager upon receipt. This ensures quality assessment of issues and enables matters to be

allocated for priority handling and fast-tracked to resolution, where this is appropriate. Examples of complaints assessed for priority action include:

- a. complaints involving workplace discrimination where the person is in ongoing employment or is at risk of being dismissed;
- b. complaints involving a child who is at school and is seeking accommodation for his or her disability.

239. Once the claims that constitute the subject matter of the complaint are clear the Commission's usual process is to contact the respondents to the complaint to advise them of the complaint and to provide them with a copy of the complaint and the sections of the law that appear relevant to the complaint. At the start of the complaint process respondents are provided with:

- a. an information sheet dealing with the Commission's process and responding to complaints;<sup>153</sup>
- b. an information sheet dealing with the conciliation process;<sup>154</sup>
- c. the Commission's Charter of Service which sets out the standards of service that complainants and respondents can expect from the Commission.<sup>155</sup>

240. The Commission provides information about the role of the Commission and the Commission's complaint handling process, including the option of resolving matters by conciliation and what may happen if the complaint is not resolved. The Commission advises respondents they have the opportunity to put forward their views about the allegations and to provide a written response if they wish to do so. In some matters, the Commission may ask respondents to provide certain information and documents relevant to the inquiry. The complaint process is, however, very flexible and when respondents are advised of complaints either verbally or in writing, they are also provided with the opportunity to proceed to conciliation prior to the provision of any formal written reply.

241. The Commission's complaint process relies on the voluntary participation of complainants and respondents. While the Commission has the power to issue notices requiring the production of information and documents<sup>156</sup> and the power to hold compulsory conciliation conferences,<sup>157</sup> these powers are rarely used. In the Commission's experience, an alternative dispute resolution process will only be successful if the parties willingly participate in it.

242. Respondents are generally very cooperative in responding to any requests for information and documents. There are few instances where a respondent does not reply to the Commission or comply with specific requests for information. It is the Commission's general practice to provide complainants with a copy of a respondent's written reply.

243. On receipt of the respondent's reply to the complaint, the Commission assesses the information provided by the parties and considers whether conciliation should be attempted, or whether the President or his or her

delegate should terminate the complaint on the basis of one of the grounds contained in section 46PH of the AHRC Act.

244. Investigators and decisions-makers are impartial and make decisions based on a balanced and considered assessment of the information and evidence before them without favouring one party over another.
245. Before making a decision to terminate a complaint, for example on the ground that it is misconceived or lacking in substance, the Commission provides complainants with a preliminary assessment of the matter. The preliminary assessment describes the Commission's view on why a complaint may be terminated along with the Commission's reasons for that view. When a preliminary assessment is provided, the Commission asks the complainant whether they want to pursue their complaint and, if so, whether they want to make any further submissions. This gives the complainant an opportunity to let the Commission know why the complaint should not be terminated. The reason for providing a preliminary assessment is to provide procedural fairness to complainants in relation to making a decision to terminate a complaint.
246. If a complainant does not respond to the correspondence from the Commission containing the preliminary assessment, the President or his or her delegate may be satisfied that the complainant does not wish to pursue the complaint and may finalise the complaint as discontinued. A second possibility is that after receiving the Commission's preliminary assessment the complainant may ask to withdraw their complaint. If the President or his or her delegate is satisfied that all people on whose behalf a complaint was lodged agree to with the withdrawal, the complaint may be finalised as withdrawn.
247. A third possibility is that the complainant may tell the Commission that they wish to pursue the complaint. If the complainant provides additional submissions about why the complaint should not be terminated, the Commission will consider those submissions before making a decision. If a complaint is terminated, the President or his or her delegate provides detailed written reasons for the decision.
248. The appropriateness of conciliation is assessed on a case by case basis and may depend on a number of factors including the willingness of the parties to participate in conciliation. Conciliation may be attempted at any time during the complaint process and, as noted above, in some cases this can take place very early in the process.
249. The conciliation process may take many forms depending on the circumstances of the complaint. Conciliation can take place in a face-to-face meeting called a 'conciliation conference' or through a telephone conference. In some cases, complaints can be resolved through an exchange of letters or by passing messages through the conciliator.
250. Prior to any conciliation conference both complainants and respondents are provided with detailed information about the conciliation process and the role of the conciliator. This is done through the provision of a written information sheet about conciliation, providing links to an online video presentation which



explains the conciliation process, providing information about the Commission's conciliation register, which contains de-identified examples of complaints resolved through conciliation and the conciliator having pre-conference discussions with all parties participating on the day. At the conference the respondents are provided with the opportunity to hear and respond to the allegations that have been made against them and the conciliator makes sure that both complainants and respondents are provided with a fair and unbiased conciliation process.

251. Conciliation is not like a public hearing before a court or tribunal. Those involved are not required to prove or disprove the allegations and the Commission does not make a decision about whether discrimination has occurred. Rather, conciliation provides an opportunity to discuss the relevant issues and explore different ways the complaint may be resolved.
252. The legitimacy of ADR processes, such as the Commission's conciliation process, is based on consensuality and ADR practitioner neutrality and impartiality. Parties to ADR processes generally consider them to be fair if they are willing participants and are in control of the decision making. Overwhelmingly, conciliation processes at the Commission are voluntary. Conciliation proceedings are run in a manner which aims to maximise party control over decision-making. As set out in section 8.3(d) above, both complainants and respondents involved in the Commission's complaint handling process report very high rates of satisfaction.
253. The term 'neutrality' is best understood in terms of two key elements. First, ADR practitioners should not have a personal interest in the outcome of the dispute. Secondly, ADR practitioners should conduct the proceedings in an unbiased and impartial way that does not privilege one party over another.
254. The conciliator is an impartial third party during the conciliation process. The conciliator helps both sides talk about the issues in the complaint and makes sure that the process is as fair as possible for everyone involved. The conciliator's role is not to determine whether there has been a breach of the law or to direct the parties towards a particular outcome. The conciliator does not tell a complainant what they should ask for or advise a respondent what they should offer. Rather, the role of the conciliator is to facilitate the exploration of possible settlement options and the resolution process to ensure parties are able to make informed choices about settlement. This can include providing information about the strengths and weaknesses of a party's case and providing information about how other similar matters have been resolved or determined. How a complaint is ultimately resolved depends upon what is agreed between the parties.

## **8.7    *Open, transparent and accountable***

255. Paragraph 2(c) of the terms of reference for this inquiry require the Committee to inquire into whether complaints are dealt with in an open and transparent manner.
256. This section deals with the following key points:

- a. The Commission publishes clear and accessible information about its investigation and conciliation processes, and provides a National Information Hotline to provide further information to people about discrimination law and the Commission's processes.
- b. The Commission publishes information about the outcomes of conciliated matters.
- c. The Commission is accountable for decisions that it makes in the course of the complaint handling process.
- d. The Commission is not a court and its processes are significantly different from court processes.
- e. An important feature of the conciliation process is that it is confidential.

(a) *The processes used by the Commission are clear*

257. The Commission provides a significant amount of information to the public about how complaints to the Commission are handled. For example, the Commission publishes detailed information on its website including the following guides:
- a. Information guides for people making complaints.<sup>158</sup>
  - b. Information guides for people and organisations responding to complaints.<sup>159</sup>
  - c. Information guides about the complaint process and the Commission's role in that process.<sup>160</sup>
  - d. Information guides about conciliation - what it is, how it works and how to prepare for it.<sup>161</sup>
  - e. Information about the law and what constitutes discrimination under each of the Commonwealth anti-discrimination Acts.<sup>162</sup>
258. Information about the Commission's complaint process is provided in Arabic, Bosnian, Chinese, Croatian, Dari, Dinka, English, Greek, Farsi, Hazaragi, Hindi, Indonesian, Italian, Korean, Malay, Polish, Serbian, Sinhalese, Somali, Spanish, Swahili, Tamil, Turkish and Vietnamese.<sup>163</sup> People can also access information about the Commission in these or other languages by using the free Telephone Interpreter Service.
259. The Commission publishes videos on its website to further assist people in understanding the conciliation process. These videos include:
- a. Information in Auslan about the complaint process.<sup>164</sup>
  - b. A video presentation called *Pathways to Resolution* which outlines the various forms the conciliation process may take, explains the role of the conciliator, outlines how parties should prepare for and approach conciliation and, with reference to an example case study, walks

viewers through the various stages of a face-to-face conciliation meeting.<sup>165</sup>

260. In 2015-16, there were more than 9 million page views in the course of more than 4.7 million visits to the Commission's website.<sup>166</sup> These figures relate to all of the parts of the Commission's website including its policy work across the range of portfolios of each of the Commissioners, education, submissions, and reporting on human rights issues. During that year, there were 243,156 page views in the course of 176,670 visits to the complaints section of the Commission's website.<sup>167</sup>
261. The Commission also provides a National Information Service which provides information and referrals for individuals, organisations and employers about a range of human rights and discrimination issues. This service is free and confidential. People can call the NIS and speak to a Commission officer in their own language by using the Telephone Interpreter Service. The NIS provides information about:
- a. rights and responsibilities under federal human rights and anti-discrimination law
  - b. whether a person may be able to make a complaint to the Commission or how the law might apply to their situation
  - c. how to make a complaint, respond to a complaint or deal with specific discrimination issues
  - d. referrals to other organisations that may be able to assist a person if the Commission cannot.
262. During 2015-16, the Commission assisted more than 16,836 people and organisations by providing them with information about the law and the complaint process, assisting them with problem solving and providing referrals to other services.<sup>168</sup>
- (b) *The outcomes of conciliation are transparent*
263. Every year the Commission publishes detailed statistical information about the outcomes of its complaint handling process. The Commission's statistical report for 2015-16 runs to 30 pages and provides a broad range of information about complaints received and finalised by the Commission including: the Act under which the complaint was made, the relevant ground within each Act, the area of activity in which the conduct occurred, certain demographic data of the complainant, the time taken to deal with complaints, and the outcome of finalised complaints.<sup>169</sup>
264. The Commission also publishes a conciliation register which provides summaries of individual complaints that have been resolved through conciliation.<sup>170</sup> One purpose of providing this information is to assist people involved in complaints to prepare for the conciliation process by giving them information on how other similar matters have been resolved.

(c) *The Commission is accountable*

265. As noted in section 8.6(a) above, the Commission is accountable for decisions that it makes during the conciliation process. The Commission has its own complaints mechanism under its Charter of Service. In addition, decisions made by the Commission are reviewable under the ADJR Act.

(d) *The Commission is not a court*

266. In responding to this term of reference, it is important to recognise that the Commission is not a court. The Commission cannot make legally binding determinations that unlawful discrimination has occurred.
267. The Commission is an administrative agency which has the statutory function to investigate and conciliate complaints and its focus is on providing access to justice through its alternative dispute resolution processes.
268. For the reasons set out in more detail below, it is important to the Commission's ability to perform its conciliation function effectively that the process is able to be carried out in a confidential manner. It would not be appropriate for the Commission's inquiry and conciliation functions to be carried out in public like court or tribunal proceedings.

(e) *Importance of confidentiality to inquiry and conciliation process*

269. Conciliation is a private process with no right of access to information raised as part of the conciliation for any person other than the conciliator and parties.<sup>171</sup> In order to be successful, conciliation relies on the goodwill of each of the parties. That in turn depends on the conciliator having the trust of the parties. An important aspect of conciliation which builds the trust of the parties and allows them to participate freely is the agreement of the parties that what occurs during conciliation is confidential.<sup>172</sup>
270. Parties involved in the Commission's conciliation process routinely participate on the basis of general agreement between them that what is discussed in the process will remain confidential and that it will not be used in any subsequent court proceedings.
271. The Commission considers privacy and confidentiality to be a fundamental requirement of the successful operation of its conciliation function. Privacy and confidentiality of the conciliation process at the Commission encourages voluntary participation in the process and allows the parties to:
- a. engage meaningfully in conciliation
  - b. have frank and honest discussions and come up with creative solutions to the issues
  - c. reach agreement in relation to longer term educative and systemic responses to discrimination and breaches of human rights
  - d. resolve complaints without the need to go to court.

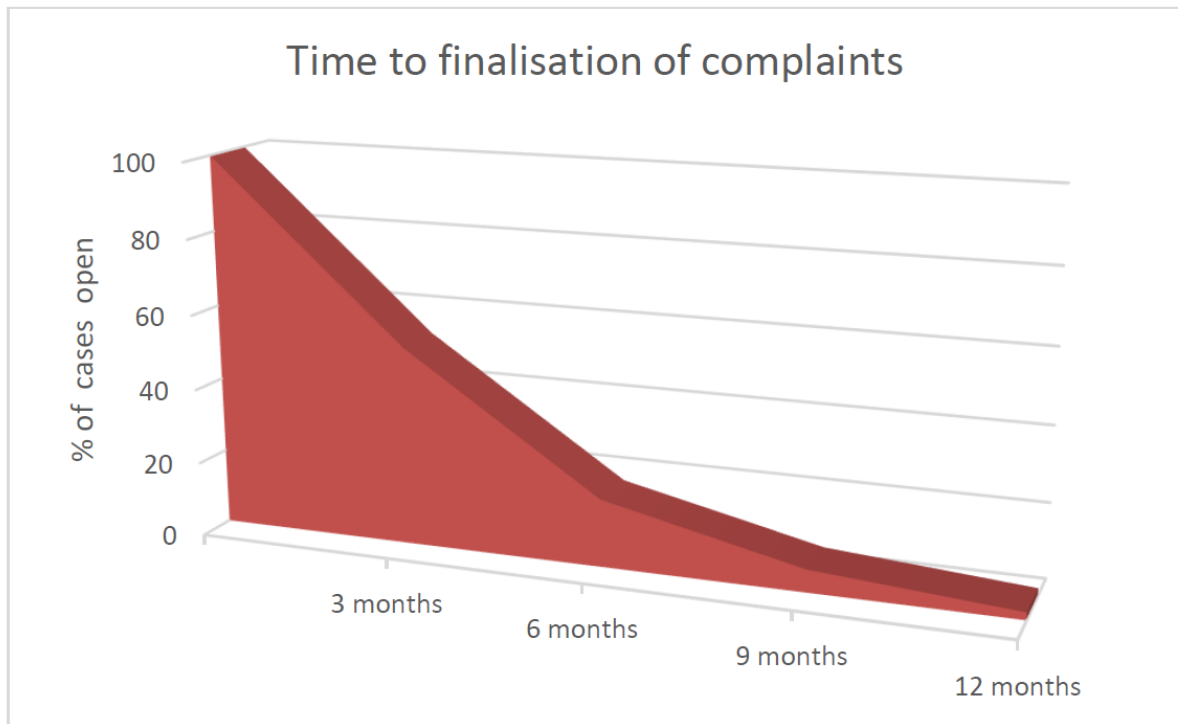
272. Complainants are aware that when complaints are lodged they will be treated with confidentiality by the Commission.<sup>173</sup> That removes the potential impact of adverse publicity, which might otherwise deter complainants from approaching the Commission. This has heightened importance for complaints which are particularly sensitive, for example, complaints of sexual harassment which may contain allegations of a very personal and sexually intimate nature.
273. In a recent case in the Federal Court, Justice Mortimer said:
- The Commission deals with complaints of unlawful discrimination under a number of federal statutes. Often, the subject matter of those complaints is intensely personal. Many complainants are not legally represented. They may, to use a colloquialism, “pour their hearts out” in a complaint to the Commission. However they express their complaints, they do so in the confidence of a private process, designed to facilitate resolution of complaints through confidential conciliation.<sup>174</sup>
274. Similarly, respondents are aware that if complaints are successfully conciliated, the existence of the complaint and the outcome can be kept confidential. A complaint can be successfully conciliated on a ‘no admissions’ basis without a court making a public finding of wrongdoing by a respondent. Privacy and confidentiality provide an incentive to respondents both to participate in the conciliation process and to strive to achieve successful outcomes during conciliation.
275. While the Commission’s expectation is that parties will agree to participate in conciliation on the basis that what is discussed is confidential, the Commission does not require the terms of conciliation agreements to be confidential and this is a matter that is negotiated between the parties. In some cases, parties may see benefit in the terms of agreement not being confidential. For example, in cases where terms of agreement include undertakings to modify policies or procedures or make practical changes to services, both parties may see value in the outcome being publicised.
276. Under the Australian National Mediator Standards, which also apply to conciliators, a conciliator must respect the confidentiality of the participants. They shall not, except in very limited circumstances, divulge any information by which parties to mediations can be identified.<sup>175</sup> The Commission’s conciliators are accredited under these standards.
277. It is clear from the terms of the AHRC Act that confidentiality is an important aspect of conciliations before the Commission. For instance, under section 46PS, the President cannot include details of anything said or done in the course of conciliation proceedings in any report provided to a court under that section. Under section 49(2), staff of the Commission must not divulge or communicate to a court any information relating to the affairs of another person acquired in the course of exercising their duties, except where necessary for the purposes of the AHRC Act.
278. The Paris Principles that relate to the operation of national human rights institutions (see paragraph 155 above) provide that where an NHRI is authorised to hear and consider complaints, the functions entrusted to them

may be based on principles such as seeking an amicable settlement through conciliation on the basis of confidentiality.<sup>176</sup>

279. The then Federal Magistrates Court has held that statements made during a conciliation before the Commission cannot be introduced in evidence during any subsequent court proceedings.<sup>177</sup>
280. Confidentiality has been recognised by both the Administrative Appeals Tribunal and the Freedom of Information Commissioner as an essential feature of the conciliation of complaints by the Commission. The Tribunal and Commissioner have both held that to disclose the content of communications passing between the Commission and parties to a complaint about the settlement of the complaint before the Commission could reasonably be expected to have a substantial adverse effect on the functioning of the conciliation process. As a consequence, those bodies have ruled that such information is not required to be disclosed under the FOI Act.<sup>178</sup>
281. The general confidentiality of the conciliation process or any terms of agreement that may be entered into by the parties does not prevent the Commission from providing public information in a de-identified form about issues raised in complaints and outcomes obtained through conciliation. For example, as noted above the Commission has developed a conciliation register that provides de-identified summaries of conciliated complaints. The Commission also publishes de-identified case studies in its annual report, on its webpage and in policy documents.

## **8.8 Timeliness**

282. Paragraph 2(d) of the terms of reference for this inquiry require the Committee to inquire into whether complaints are dealt with without unreasonable delay.
283. The Commission is committed to dealing with complaints in the most appropriate, timely and efficient way possible. The Commission's complaints process is intentionally flexible and responsive in order to provide complainants and respondents with a process that is adaptive to their specific circumstances.
284. In 2015-16 nearly half of all the complaints finalised by the Commission (47%) were finalised within three months of receipt. 82% were finalised within 6 months, 94% within 9 months and 98% within 12 months. The average time from receipt to finalisation of a complaint in the 2015-16 reporting year was 3.8 months. This demonstrates that the Commission is able to successfully work with all parties to a complaint to ensure a quick and efficient process.



285. However, as described in more detail below, the Commission's ability to continue to deliver an efficient and timely service is being put under significant pressure by resource constraints.
286. A complaint may be finalised quickly where the parties are highly motivated to resolve the dispute. In some cases the parties may have already been engaged in negotiation for some time before the complaint is lodged with the Commission. Alternatively, a complaint may be finalised quickly because the complainant elects not to proceed with the complaint after having preliminary discussions with an officer of the Commission about the substance of the complaint, or where legislative exceptions mean that the conduct complained of was clearly not unlawful. Complaints may be terminated soon after receipt where it appears that the complaint is misconceived or lacking in substance.
287. Some delays may occur in the process to accommodate the needs of the parties. For example, a respondent may request additional time to provide formal written submissions in reply to the complaint or either party may request the complaint be put on hold while the parties explore alternative resolution pathways, such as workers compensation proceedings. A number of complainants bringing matters to the Commission (and parties responding to complaints) have complex disabilities which need to be accommodated throughout the complaint process and this can require additional time.
288. If the Commission's recommendations 1 and 2 set out in section 8.5 above are implemented, this will have a positive impact on the timeliness of the Commission's complaint handling functions by allowing it to deal more expeditiously with unmeritorious matters.
289. The Commission currently has a backlog of unallocated complaints and the average time taken to deal with complaints increasing. These effects are the

result of significant and ongoing resource constraints. Recent constraints include:

- a \$5 million budget cut over three years beginning in 2015-16;<sup>179</sup>
- the costs associated with having an additional full time commissioner appointed to the Commission in early 2014 bringing the total number of full time commissioners up to seven, without the restoration of the funding cut instituted in the 2014-15 Budget of \$1.650 million over four years when the number of full time commissioners was reduced from seven to six;<sup>180</sup>
- the costs associated with having a further full time commissioner appointed to the Commission in mid-2016 bringing the total number of full time commissioners up to eight, with no additional budget;<sup>181</sup>
- restructuring of the Commission's staffing and work program in order to accommodate the referral from the Attorney-General to the Commission of a national inquiry, *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability*, with no additional budget;<sup>182</sup>
- the application of portfolio-wide efficiency dividends.

290. To date the Commission has handled its financial challenges by improving the efficiency of its complaint handling process; reducing its staffing through natural attrition, contract management and offering redundancies; significantly restructuring its policy area so that it could provide appropriate support to an increasing number of Commissioners while also continuing to execute a smaller work program; and reducing the operational hours of the National Information Service that provides information about federal discrimination laws.
291. These constraints have had significant impact on the Commission's Investigation and Conciliation Service (ICS). In particular, these constraints have led to a reduction in staff and an increased burden on the remaining staff. For example, in 2013 the ICS had four dedicated investigation and conciliation teams. With budget constraints the ICS now has three complaint handling teams and approximately 24% fewer staff than three years ago. The average staffing level (ASL) for ICS for the 2012-13 financial year was 33.08. The ASL for ICS for the 2015-16 financial year was 25.26. The ASL is the average number of full time equivalent staff members on pay (including any paid leave) employed by the Commission over the course of the year in question.
292. ICS staff deal with more than 2,000 complaints each year. Over recent years ICS has improved and streamlined its processes. Increased efficiencies have been obtained through changes to record keeping, file management, and the inquiry and conciliation processes, including a focus on early resolution where appropriate and consistent case management of similar complaints. As a result of decreasing staff numbers, ICS staff now have caseloads which are on average 30% higher than standard caseloads.



293. The practical result of the current backlog of complaints is that for non-urgent matters there may be a delay of up to eight weeks from receipt of complaint until the complaint can be allocated to an ICS officer for actioning. Timeframes for the handling of complaints would be significantly improved if the Commission were appropriately resourced in order to be able to employ sufficient ICS staff to continue to meet the high level of demand for the Commission's services.

#### **Recommendation 4**

The Commission recommends that the following particular steps are taken to alleviate the recent budget constraints that have had a disproportionate impact on the Commission in comparison to other similar agencies:

- (a) reverse the cuts announced in the 2014-15 MYEFO of \$1.7 million for 2016-17 and \$1.6 million for 2017-18;
- (b) restore in future budget processes the funding removed in the 2014-15 Budget for the 7<sup>th</sup> full time Commissioner (who has been appointed since early 2014); and
- (c) include in future budget processes equivalent funding for the 8<sup>th</sup> full time Commissioner (who has been appointed since mid-2016).

294. Some more detailed information about complaint timeframes over the past three reporting years is set out below.

#### **Time from receipt to finalisation in 2015-16**

| <b>Time taken</b> | <b>Percentage</b> |
|-------------------|-------------------|
| 0 - 3 months      | 47%               |
| 3 - 6 months      | 82%               |
| 6 - 9 months      | 94%               |
| 9 - 12 months     | 98%               |
| Average time      | 3.8 months        |

#### **Time from receipt to finalisation in 2014-15**

| <b>Time taken</b> | <b>Percentage</b> |
|-------------------|-------------------|
| 0 - 3 months      | 47%               |
| 3 - 6 months      | 82%               |
| 6 - 9 months      | 95%               |
| 9 - 12 months     | 99%               |
| Average time      | 3.7 months        |

#### **Time from receipt to finalisation in 2013-14**

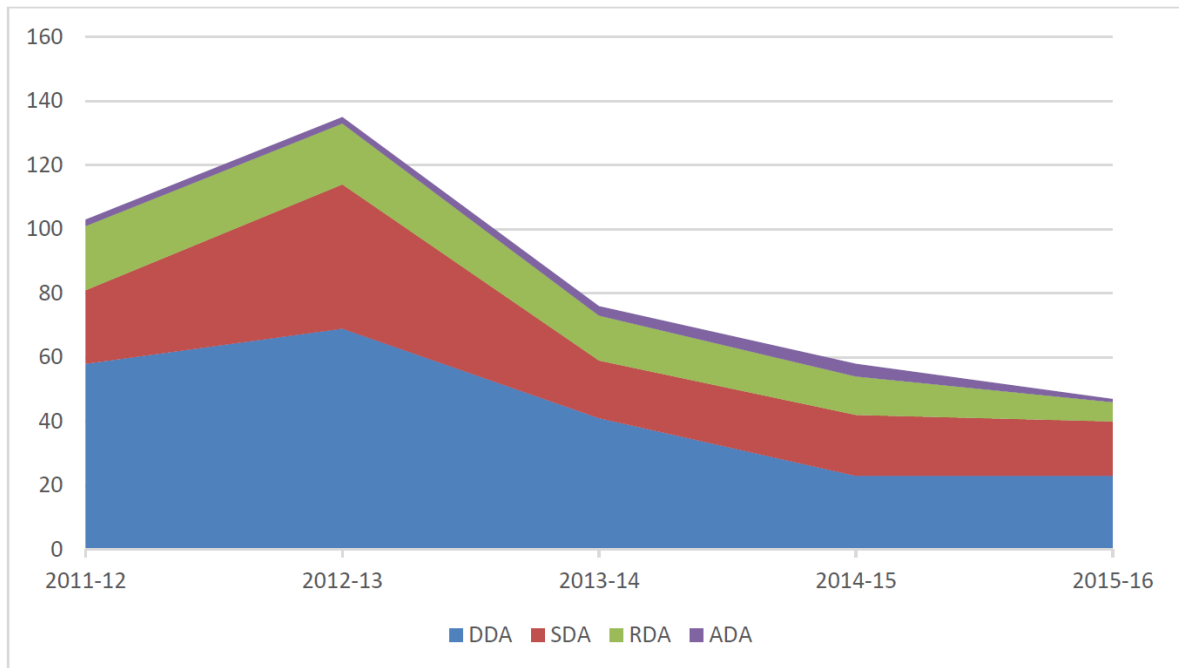
| <b>Time taken</b> | <b>Percentage</b> |
|-------------------|-------------------|
| 0 - 3 months      | 54%               |
| 3 - 6 months      | 85%               |
| 6 - 9 months      | 94%               |
| 9 - 12 months     | 97%               |
| Average time      | 3.4 months        |

## **8.9 Cost**

295. Paragraph 2(e) of the terms of reference for this inquiry require the Committee to inquire into whether complaints are dealt with without unreasonable cost being incurred either by the Commission or by persons who are the subject of such complaints.
296. The Commission's service is free for both complainants and respondents. There are no costs involved with lodging a complaint at the Commission and there is no requirement that complainants or respondents engage lawyers when participating in the Commission's complaint handling process.
297. The Commission acknowledges that in some instances complainants and respondents may incur costs while the complaint is before the Commission, however those costs are far less than the potential costs incurred by parties in circumstances where complaints proceed to court.
298. If the Commission's recommendations 1, 2 and 3 set out in section 8.5 above are implemented, this is likely to lead to cost savings for the courts and respondents as both the Commission and the courts will be able to deal more expeditiously with unmeritorious complaints.
299. The number of applications to the courts has decreased over the past five years. While the decision whether to take a particular matter to court once it has been terminated by the Commission is entirely a matter for a complainant, the fact that the Commission continues to improve its success rate for conciliation means that there are fewer cases which are able to be taken to court. In 2015-16, 76% of complaints which proceeded to conciliation were successfully resolved. This conciliation success rate is the highest on record. This diversion of cases from court represents a significant cost saving both for individual parties to complaints and to the community as a whole.

300. The graph below shows the numbers of court applications across all grounds of unlawful discrimination over the past five years.

**Applications to court alleging unlawful discrimination**



### 8.10 Court proceedings

301. Paragraph 2(f) of the terms of reference for this inquiry require the Committee to inquire into the relationship between the Commission's complaint handling processes and applications to the court arising from the same facts.
302. Complainants are unable to make an application to the court alleging unlawful discrimination unless they have first lodged a complaint with the Commission and the complaint has been terminated. The aim of this structure is to attempt to resolve complaints through conciliation so that they do not need to go to court.
303. The requirements for making an application to the court are set out in section 46PO of the AHRC Act. In summary, those requirements are:
- a complaint has been lodged with the Commission
  - the Commission has terminated the complaint
  - the President or her delegate has issued a notice of termination.
304. It does not matter on which ground under section 46PH a complaint has been terminated, the complainant's right to go to court is the same. This means that even if a complaint is terminated on the ground that it is trivial, vexatious, misconceived or lacking in substance, the complainant may still make an application to the court. Decisions made by the Commission to terminate complaints do not prevent a person from obtaining access to the court.

305. If recommendation 3 set out in section 8.5 above is adopted, this would have a significant impact on the efficiency of court proceedings. In particular, if a complaint were terminated on the ground that it is trivial, vexatious, misconceived or lacking in substance, then the applicant would require the leave of the court before commencing proceedings. This would give the court an increased ability to deal expeditiously with unmeritorious complaints, based on the initial assessment by the Commission of the merits of the complaint.
306. Once the criteria described in paragraph 303 above are satisfied, then the complainant (or a person on whose behalf the complaint was lodged) may make an application to either the Federal Circuit Court or the Federal Court alleging unlawful discrimination by one or more of the respondents to the terminated complaint.
307. There is a time limit of 60 days from the date of issue of the notice of termination in which any application to the court must be made.
308. If a complainant decides to make an application to the court, the unlawful discrimination alleged in the application must be in substance the same as the unlawful discrimination that was the subject of the terminated complaint, or must arise out of substantially the same acts, omissions or practices.
309. 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 a complainant whether or not to proceed to court. If a person decides to make an application to the court, the Commission may help the person to prepare the forms required to make the application.<sup>183</sup> If a court case is filed, the Commission does not take any part in the proceeding, whether for the complainant or the respondent.
310. The court that hears the application deals with the matter afresh. The hearing is not a review of a decision made by the President or her delegate in terminating the complaint. If the court is satisfied that there has been unlawful discrimination by any respondent the court may make such orders as it thinks fit, including:
- a. an order declaring that the respondent has committed unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination
  - b. an order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant
  - c. an order requiring the respondent to employ or re-employ an applicant
  - d. an order requiring a respondent to pay an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent
  - e. an order requiring a respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by an applicant

- f. an order declaring that it would be inappropriate for any further action to be taken in the matter.
311. Where cases raise novel issues of law, a relevant special-purpose Commissioner may seek leave to appear as *amicus curiae*. Each of the Commissioners other than the President are ‘special-purpose Commissioners’. They have the function of assisting the Federal Circuit Court and the Federal Court as *amicus curiae* in proceedings where they are satisfied that:
- a. the orders sought may affect to a significant extent the human rights of persons who are not parties to the proceedings
  - b. the proceedings have significant implications for the administration of the RDA, the SDA, the DDA or the ADA
  - c. there are special circumstances which mean that it would be in the public interest for the special-purpose Commissioner to assist the court.
312. The special-purpose Commissioners may not appear as of right; leave of the court must be obtained. If they do appear, they do not appear to argue on behalf of either the complainants or the respondents. Rather, their function is to assist the court with the interpretation and application of relevant discrimination law principles.
313. The President is solely responsible for complaint handling when complaints are before the Commission (to the exclusion of the other Commissioners) and does not have this *amicus curiae* function.

## 9 ‘Soliciting’ complaints

314. Paragraph 3 of the terms of reference provides that the Committee is to inquire into and report on the following matter:
- Whether the practice of soliciting complaints to the Commission (whether by officers of the Commission or by third parties) has had an adverse impact upon freedom of speech or constituted an abuse of process of the powers and functions of the Commission, and whether any such practice should be prohibited or limited.
315. The Commission was asked a similar question on notice through the Senate Estimates process following the Commission’s appearance before the Senate Legal and Constitutional Affairs Legislation Committee on 18 October 2016. The question sought statistics about complaints in the past 24 months alleging a breach of section 18C of the RDA and then asked:
- 4. How many of the complaints were preceded by a Commissioner of the AHRC calling for complaints to be lodged?
    - a. Is this a principle that is condoned.
316. The answer to that question on notice was ‘none’. Commissioners have not called for complaints to be lodged under section 18C of the RDA. As

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

### **9.1 Background to inaccurate media reports**

317. It appears that the question on notice following Senate Estimates and paragraph 3 of the terms of reference for this inquiry proceed from the false premise, which has been widely reported, that the Race Discrimination Commissioner ‘called for’ or ‘solicited’ complaints in relation to a cartoon drawn by Mr Bill Leak and published in *The Australian* newspaper on 4 August 2016.

318. The Commissioner did not call for or solicit complaints about this cartoon. In response to a question from a journalist, the Commissioner provided advice about the availability of the complaints process. In doing so, he also noted the exemptions that may apply to any complaint that was made. At no stage did the Commissioner suggest that complaints about the cartoon should be made or offer any view on whether any complaint about the cartoon would be successful. Indeed, he drew specific attention to exemptions to protect artistic expression and public comment that would be available in relation to any such claim.

319. A description of the relevant events is as follows. On 4 August 2016, Fairfax Media reported that the Indigenous Affairs Minister, Senator the Hon Nigel Scullion, had described the cartoon by Mr Leak as ‘racist’.<sup>184</sup> The Minister was also quoted as saying:

Although Australian cartoonists have a rich tradition of irreverent satire, there is absolutely no place for depicting racist stereotypes. I would urge *The Australian* to be more aware of the impact cartoons like the one published today can have on Indigenous communities.

320. Fairfax Media sought comment from a number of people, including the Race Discrimination Commissioner, Dr Soutphommasane, about the cartoon in light of the Minister’s comments. The Commissioner was quoted in the article as saying:

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

321. He was also quoted as saying that ‘a significant number’ of people would agree that the cartoon by Mr Leak was a racial stereotype of Aboriginal Australians.

322. The direct quotes from the Commissioner were accurately recorded. They were taken from an email sent by him to the journalist in response to a number of questions about the cartoon. Those questions included ‘Is it racist?’ and ‘Will any action be taken from AHRC with regards to this?’

323. The full answer given by the Commissioner was:

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

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

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

324. The Commissioner later posted a message on Facebook in substantially the same terms and included a link to the article. The full text of the Facebook message read:

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

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

## **9.2 Functions of Race Discrimination Commissioner**

326. One of the functions of the Race Discrimination Commissioner is to promote an understanding and acceptance of, and compliance with, the RDA.<sup>185</sup> In the course of performing this function, it is appropriate for the Commissioner to make people aware of the complaints mechanisms available under the RDA.
327. As part of the Commissioner's advocacy role, it is also appropriate for him to provide his opinion on matters of public interest that relate to questions of racial discrimination. There is an expectation, particularly from members of communities that experience racial discrimination, that the Commissioner plays this role.<sup>186</sup>
328. The Commissioner's advocacy role is in accordance with the Paris Principles that apply to national human rights institutions such as the Commission (see paragraph 155 above). The Paris Principles address a number of aspects of the work of NHRIs including their competence and responsibilities, their composition and guarantees of independence and pluralism, and their methods of operation.
329. The responsibilities of NHRIs include publicising efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and the media.<sup>187</sup>

330. The methods of operation of NHRIs include freely considering any questions falling within its competence and addressing public opinion directly or through the media in order to publicise its opinions and recommendations.<sup>188</sup>
331. Responding accurately to media questions about the availability of remedies under anti-discrimination law is entirely consistent with the role of leaders of national human rights institutions.

### **9.3 *President's inquiry and conciliation function***

332. The President of the Commission is the senior member of the Commission.<sup>189</sup> A number of the functions given to the Commission are functions to be performed by the President.<sup>190</sup> Among these is the function under section 11(1)(aa) of the AHRC Act 'to inquire into, and attempt to conciliate, complaints of unlawful discrimination'. The definition of 'unlawful discrimination' includes complaints made under section 18C of the RDA.<sup>191</sup>
333. The other members of the Commission, including the Race Discrimination Commissioner, have no role in inquiring into and attempting to conciliate complaints of unlawful discrimination. While the President may delegate his or her powers to deal with complaints of unlawful discrimination under Part IIB of the AHRC Act to a member of staff of the Commission (or another person or body approved by the Commission), the President may not delegate any of these powers to any other Commissioner.<sup>192</sup>
334. The structural separation between the President's complaint handling functions and the functions performed by the other Commissioners has been in place since 2000. In the second reading speech for the Bill that introduced these amendments, the then Attorney-General said:

The second major reform involves the consolidation of the three complaint handling schemes under the sex, race and disability discrimination acts into one uniform scheme. The bill provides that all complaints of unlawful discrimination under those acts, and complaints involving alleged breaches of human rights and equality of opportunity will now be made under the Human Rights and Equal Opportunity Commission Act 1986 [now the AHRC Act]. The president will assume responsibility for all complaint handling under the new uniform scheme while commissioners are to be given an *amicus curiae* function to argue the policy imperatives of their legislation before the Federal Court.

...

The bill also clearly delineates the commission's function of impartially attempting to conciliate complaints from the commissioners['] advocacy role in promoting the protection of human rights.<sup>193</sup>

335. Given the President's specific role in relation to complaint handling, he or she typically does not comment on complaints before the Commission unless, for example, the details are already in the public domain.



## 10 Commission's activities in relation to freedom of speech

336. Paragraph 4 of the terms of reference provides that the Committee is to inquire into and report on the following matter:
- Whether the operation of the Commission should be otherwise reformed in order better to protect freedom of speech and, if so, what those reforms should be.
337. The Committee has also been asked, in particular, to consider the recommendations of the Australian Law Reform Commission in its *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* [ALRC Report 129 – December 2015], in particular Chapter 4 – “Freedom of Speech”.
338. For many years, the Commission has been active in public discussion on free speech issues and has undertaken a wide range of activities in relation to freedom of speech and the freedom to participate in public affairs. These activities include:
- a. making submissions on proposed legislation which has the potential to impact on the right to freedom of speech
  - b. in response to complaints from members of the public, conducting inquiries into acts and practices of the Commonwealth that may be inconsistent with or contrary to the right to freedom of speech
  - c. intervening as *amicus curiae* in court proceedings that raise freedom of speech issues in order to provide assistance to the court in applying the law in a way that sufficiently takes this right into account
  - d. convening public forums to discuss freedom of speech issues that arise in a range of areas including media and Internet regulation, intellectual property and defamation laws.
339. Those activities have been carried out in accordance with the Commission's existing statutory functions.<sup>194</sup> Relevantly, the Commission has the following functions:
- to examine enactments and proposed enactments, for the purpose of ascertaining whether they are inconsistent with or contrary to any human right;<sup>195</sup>
  - to inquire into any act or practice by or on behalf of the Commonwealth or under a Commonwealth enactment that may be inconsistent with or contrary to any human right;<sup>196</sup>
  - to intervene in court proceedings that involve human rights issues where the Commission considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court;<sup>197</sup>

- to promote an understanding and acceptance, and the public discussion, of human rights in Australia;<sup>198</sup>
  - to undertake research and educational programs for the purpose of promoting human rights.<sup>199</sup>
340. A range of particular activities that have been undertaken by the Commission in relation to freedom of speech pursuant to these functions are summarised below.
341. The Commission has a strong focus on protecting freedom of speech. In recent years, the Commission has made submissions that emphasise the importance of protecting freedom of speech to the following inquiries:
- a. The Senate Environment and Communications References Committee inquiry into harm being done to Australian children through access to pornography on the Internet (April 2016). In the course of this submission, the Commission referred to previous work about proposals to address potentially problematic behaviour online and noted that this required consideration of balancing regulatory frameworks with freedom of expression and opinion.
  - b. The Inquiry into the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (January 2015). The Commission considered the impact of the proposed mandatory data retention scheme on the right to freedom of expression and other rights.
  - c. The Parliamentary Joint Committee on Intelligence and Security inquiry into the Counter Terrorism Legislation Amendment Bill (No 1) 2014 (September 2015). The Commission raised concerns about the impact of control orders on freedom of expression and other rights.
  - d. The Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Copyright Amendment (Online Infringement) Bill 2015 (Cth) (April 2015). The Commission submitted that the Copyright Act should include a reasonable 'fair use' provision that accommodates both freedom of expression and the protection of property rights.
  - e. The Parliamentary Joint Committee on Intelligence and Security inquiry into the National Security Legislation Amendment Bill (No 1) 2014 (August 2014). The Commission made submissions suggesting amendments to the new disclosure of information offences. The Commission submitted these offences had the potential to capture the work of journalists and potentially limit the right to freedom of expression.
  - f. Australian Law Reform Commission inquiry into Serious Invasions of Privacy in the Digital Era (May 2014). The Commission supported the ALRC proposal that if a statutory cause of action for serious breach of privacy were to be introduced, the plaintiff should have the onus to prove that their privacy interest outweighs any competing public interest of the defendant to free speech.

- g. Department of Communications inquiry into Enhancing Online Safety for Children (March 2014). The Commission submitted that any proposed law to limit online speech for the purpose of protecting the safety of children would need to be reasonable and proportionate to achieving that policy goal in order to be consistent with article 19 of the ICCPR.
  - h. The Senate Environment and Communications Committee in relation to the Parliamentary Proceedings Broadcasting Amendment Bill 2013 (Cth) (December 2013). The Commission submitted that the re-broadcasting of parliamentary proceedings for the purposes of satire or ridicule falls within the right to freedom of expression.
  - i. Australian Communications and Media Authority inquiry in relation to its inquiry into Contemporary Community Safeguards (July 2013). The Commission submitted that the right to freedom of information and expression imposes a substantial burden of justification on government agencies before restrictions on these rights can be accepted as permissible.
  - j. Treasury inquiry in relation to the exposure draft of the Charities Bill 2013 (Cth) (May 2013). The Commission submitted that charities should not be prevented from political debate and advocacy regarding laws, or regarding policies and practices of Australian governments.
  - k. Council of Australian Governments Review Committee inquiry in relation to its review of counter terrorism legislation (September 2012). Among other things, the Commission submitted that control orders had the potential to infringe a number of rights including the right to freedom of expression. The Commission recommended that a court issuing a control order should apply a stricter test of proportionality when imposing conditions that would interfere with these rights.
  - l. Independent National Security Legislation Monitor inquiry in relation to his review of counter terrorism and national security legislation (September 2012). The Commission again raised issues about the impact of control orders on freedom of expression and other rights.
  - m. Australian Curriculum Assessment and Reporting Authority inquiry in relation to the Civics and Citizenship Draft Shape Paper (August 2012). The Commission recommended the inclusion of references to internationally recognised human rights in the Civics and Citizenship curriculum where relevant, including the right to freedom of expression.
342. The Commission has conducted inquiries, pursuant to its function in section 11(1)(f) of the AHRC Act, and prepared reports to the Attorney-General in relation to acts or practices that it found were inconsistent with or contrary to the right to freedom of expression, including:
- a. Report of an inquiry into a complaint by Mr Daniel Clark against the Minister for Foreign Affairs and Trade alleging a breach of his right to freedom of expression [2006] AusHRC 34;

- b. Report of an inquiry into a complaint made on behalf of federal prisoners detained in New South Wales correctional centres that their human rights had been breached by the decision to ban distribution of the magazine 'Framed' [2006] AusHRC 32.
343. The Commission has intervened in Court proceedings that raise the freedom of expression and the freedom of association, including:
- a. The Commission was granted leave to appear as *amicus curiae* in proceedings in the Full Court of the Federal Court in *Langer v Australian Electoral Commission (No 1)* (1996) 59 FCR 450, which followed on from the High Court's decision in *Langer v Commonwealth* (1996) 186 CLR 302 dealing with the implied freedom of political communication.
  - b. The Commission was granted leave to appear as *amicus curiae* in *Tajjour v New South Wales* [2014] HCA 35. The key issues were whether NSW anti-consorting laws breached the implied freedom of political communication, and whether there was a free-standing implied freedom of association.
  - c. The Commission has written to the Attorney-General notifying the Attorney of its intention to seek leave to intervene in the High Court case of *Doctors for Refugees v Commonwealth*. The plaintiff challenges the validity of the secrecy provisions in the *Australian Border Force Act 2015* (Cth) on the basis that they are contrary to the implied freedom of political communication.
344. The Commission has undertaken the following consultations and activities that deal with freedom of expression:
- a. The 2014 Free Speech Symposium. This symposium brought the numerous issues that affect free speech in Australia to the table for public discussion. The topics were wide-ranging, including media and Internet regulation, intellectual property and defamation laws.
  - b. The 2014 Rights and Responsibilities national consultation. This consultation focused discussions on some of the key rights and freedoms that have traditionally underpinned our liberal democracy in Australia, including the right to freedom of opinion and expression, the right to freedom of thought, conscience and religious worship, and the right to freedom of association. The current Human Rights Commissioner has announced that he plans to address the free speech issues identified in this consultation process in his term as Commissioner.
  - c. The 2013 paper on Human Rights in cyberspace. This paper raised for consideration the issue of freedom of expression and internet censorship.
345. The Commission will continue to promote an understanding and acceptance, and the public discussion, of all human rights including the right to freedom of

speech. The Commission considers that its existing functions are sufficient for it to carry out this work.

346. The Australian Law Reform Commission has recently provided a report to the Australian Government on Traditional Rights and Freedoms. The terms of reference for the inquiry required the required the ALRC to:
- identify Commonwealth laws that encroach on traditional rights, freedoms and privileges, and
  - critically examine those laws to determine whether that encroachment is appropriately justified.<sup>200</sup>
347. Given the scope of the task, the ALRC's Final Report identified a range of laws across the areas identified in the terms of reference that could benefit from further review, but did not make any specific recommendations for reform in relation to any of those areas.
348. The report identified the following kinds of laws which interfered with the right to freedom of speech:
- criminal laws (including offences relating to advocating terrorism; prescribed terrorist organisations; using a postal service to menace, harass or cause offence; and incitement and conspiracy laws)
  - secrecy laws (including laws that impose criminal sanctions for breaches of secrecy or confidentiality obligations such as Part 6 of the *Australian Border Force Act 2015* (Cth) and section 35P of the *Australian Security Intelligence Organisation Act 1979* (Cth))
  - suppression orders made by courts and tribunals
  - privilege and contempt laws (including contempt of Parliament, contempt of court and legislative provisions that protect the processes of tribunals, commissions of inquiry and regulators by creating offences that apply to using insulting language towards public officials or the interruption of proceedings)
  - Part IIA of the RDA
  - media, broadcasting and communications laws (including obscenity laws and classification categories)
  - information laws (including the *Freedom of Information Act 1982* (Cth))
  - intellectual property laws, and
  - a range of other laws including laws against secondary boycotts and laws preventing charities from promoting or opposing a political party or a candidate for political office.
349. The report identified a number of these laws that it considered should be further reviewed to determine whether or not they unjustifiably limit freedom of speech.
350. If this Committee considers that further inquiry is needed into freedom of speech issues as they arise in other areas of law – that is, beyond section 18C of the RDA – the Commission recommends that the Attorney-General request the Commission to undertake that broader inquiry.

**Recommendation 5**

The Commission recommends that if this Committee considers that a more comprehensive inquiry is needed into the other freedom of speech issues adverted to by this inquiry's terms of reference and referred to in section 10 of this submission, the Attorney-General request the Commission to undertake that broader inquiry.

## **Attachment 1 – Principles to determine when freedom of expression might appropriately be restricted**

The following principles were developed by the UN Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion in order to assist in determining what constitutes a legitimate restriction or limitation of freedom of expression, and what constitutes an ‘abuse’ of that right.<sup>201</sup>

79. The Special Rapporteur proposes the following principles for determining the conditions that must be satisfied in order for a limitation or restriction on freedom of expression to be permissible:
- (a) The restriction or limitation must not undermine or jeopardize the essence of the right of freedom of expression
  - (b) The relationship between the right and the limitation/restriction or between the rule and the exception must not be reversed
  - (c) All restrictions must be provided for by pre-existing statutory laws issued by the legislative body of the State
  - (d) Laws imposing restrictions or limitations must be accessible, concrete, clear and unambiguous, such that they can be understood by everyone and applied to everyone. They must also be compatible with international human rights law, with the burden of proving this congruence lying with the State
  - (e) Laws imposing a restriction or limitation must set out the remedy against or mechanisms for challenging the illegal or abusive application of that limitation or restriction, which must include a prompt, comprehensive and efficient judicial review of the validity of the restriction by an independent court or tribunal
  - (f) Laws imposing restrictions or limitations must not be arbitrary or unreasonable and must not be used as a means of political censorship or of silencing criticism of public officials or public policies
  - (g) Any restrictions imposed on the exercise of a right must be “necessary”, which means that the limitation or restriction must:
    - (i) Be based on one of the grounds for limitations recognized by the Covenant
    - (ii) Address a pressing public or social need which must be met in order to prevent the violation of a legal right that is protected to an even greater extent
    - (iii) Pursue a legitimate aim
    - (iv) Be proportionate to that aim and be no more restrictive than is required for the achievement of the desired purpose. The burden

of demonstrating the legitimacy and the necessity of the limitation or restriction shall lie with the State

- (h) Certain very specific limitations are legitimate if they are necessary in order for the State to fulfil an obligation to prohibit certain expressions on the grounds that they cause serious injury to the human rights of others. These include the following:
  - (i) Article 20 of the Covenant, which establishes that “any propaganda for war” and “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”
  - (ii) Article 3, paragraph 1 (c), of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, which provides that States must ensure that their criminal law covers “producing, distributing, disseminating, importing, exporting, offering, selling or possessing [...] child pornography”
  - (iii) Article 4 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination, which establishes the requirement to “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin”
  - (iv) Article III (c) of the Convention on the Prevention and Punishment of the Crime of Genocide, which states that “direct and public incitement to commit genocide” shall be punishable
- (i) Restrictions already established must be reviewed and their continued relevance analysed periodically
- (j) In states of emergency which threaten the life of the nation and which have been officially proclaimed, States are permitted to temporarily suspend certain rights, including the right to freedom of expression. However, such suspensions shall be legitimate only if the state of emergency is declared in accordance with article 4 of the Covenant and general comment No. 29 of the Human Rights Committee. A state of emergency may not under any circumstances be used for the sole aim of restricting freedom of expression and preventing criticism of those who hold power
- (k) Any restriction or limitation must be consistent with other rights recognized in the Covenant and in other international human rights instruments, as well as with the fundamental principles of universality, interdependence, equality and non-discrimination as to race, colour, sex, language, religion, political or other belief, national or social origin, property, birth or any other status



- (l) All restrictions and limitations shall be interpreted in the light and context of the particular right concerned. Wherever doubt exists as to the interpretation or scope of a law imposing limitations or restrictions, the protection of fundamental human rights shall be the prevailing consideration.
80. The principles set out herein should be understood to be of an exceptional nature. They are suggested as a means of ensuring that States do not abuse restrictions or limitations for political ends and that the application of such restrictions or limitations does not cause other rights to be violated. The principles should be applied in a comprehensive manner.
81. The Special Rapporteur also wishes to stress that, as provided in paragraph 5 (p) of Human Rights Council resolution 12/16, restrictions on the following aspects of the right to freedom of expression are not permissible:
- (i) Discussion of government policies and political debate; reporting on human rights, government activities and corruption in government; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups
  - (ii) The free flow of information and ideas, including practices such as the banning or closing of publications or other media and the abuse of administrative measures and censorship
  - (iii) Access to or use of information and communication technologies, including radio, television and the Internet.

## Endnotes

- <sup>1</sup> In particular s 20 of the RDA and s 11(1)(e), (g) and (h) of the AHRC Act.
- <sup>2</sup> Throughout this submission, the Commission uses the terms ‘freedom of speech’ and ‘freedom of expression’ interchangeably. Article 19(2) of the ICCPR uses the term ‘freedom of expression’.
- <sup>3</sup> Throughout this submission, the Commission uses the terms ‘racial vilification’ and ‘racial hatred’ interchangeably. The title to Part IIA of the RDA uses the term ‘racial hatred’, although the Federal Court has held that an applicant is not required to prove that an act had its basis in ‘racial hatred’ in order to establish a breach of section 18C of the RDA (*Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 357 [18] (Kiefel J); *Toben v Jones* (2003) 129 FCR 515, 549 [137] (Allsop J)).
- <sup>4</sup> UN Human Rights Council, *Resolution 12/16, Freedom of opinion and expression*, UN Doc A/HRC/RES/12/16, 12 October 2009, preamble. At [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/RES/12/16](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/RES/12/16) (viewed 8 December 2016).
- <sup>5</sup> F La Rue, *2010 Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, UN Doc A/HRC/14/23, 20 April 2010, para 28. At [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/14/23](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/14/23) (viewed 8 December 2016).
- <sup>6</sup> F La Rue, *2010 Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, para 27. At [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/14/23](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/14/23) (viewed 8 December 2016).
- <sup>7</sup> United Nations Human Rights Committee, *General Comment 34 – Article 19: Freedom of opinion and expression*, UN Doc CCPR/C/GC/34, 12 September 2011, para 11. At [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en) (viewed 8 December 2016).
- <sup>8</sup> Article 19(3), ICCPR.
- <sup>9</sup> F La Rue, *2010 Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, UN Doc A/HRC/14/23, 20 April 2010, para 77. At [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/14/23](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/14/23) (viewed 8 December 2016).
- <sup>10</sup> F La Rue, *2010 Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, UN Doc A/HRC/14/23, 20 April 2010, para 77. At [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/14/23](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/14/23) (viewed 8 December 2016). See also United Nations Human Rights Committee, *General Comment 34 – Article 19: Freedom of opinion and expression*, para 22.
- <sup>11</sup> F La Rue, *2010 Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, UN Doc A/HRC/14/23, 20 April 2010, para 79. At [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/14/23](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/14/23) (viewed 8 December 2016).
- <sup>12</sup> F La Rue, *2010 Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, UN Doc A/HRC/14/23, 20 April 2010, para 79(h). At [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/14/23](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/14/23) (viewed 8 December 2016).
- <sup>13</sup> F La Rue, *2011 Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, UN Doc A/66/290, 10 August 2011, para 28. At <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/449/78/PDF/N1144978.pdf?OpenElement> (viewed 8 December 2016).
- <sup>14</sup> United Nations Human Rights Committee, *General Comment 34 – Article 19: Freedom of opinion and expression*, UN Doc CCPR/C/GC/34, 12 September 2011, para 50. At [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en) (viewed 8 December 2016).
- <sup>15</sup> UN Committee on the Elimination of Racial Discrimination, *General Recommendation 35 – Combating racist hate speech*, UN Doc CERD/C/GC/35, 26 September 2013, para 13. At [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fGC%2f35&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fGC%2f35&Lang=en) (viewed 8 December 2016).
- <sup>16</sup> UN Committee on the Elimination of Racial Discrimination, *General Recommendation 35 – Combating racist hate speech*, UN Doc CERD/C/GC/35, 26 September 2013, para 25. At [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fGC%2f35&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fGC%2f35&Lang=en) (viewed 8 December 2016).
- <sup>17</sup> UN Committee on the Elimination of Racial Discrimination, *General Recommendation 35 – Combating racist hate speech*, UN Doc CERD/C/GC/35, 26 September 2013, para 10. At [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fGC%2f35&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fGC%2f35&Lang=en) (viewed 8 December 2016).

- 18 UN Committee on the Elimination of Racial Discrimination, *General Recommendation 35 – Combating racist hate speech*, UN Doc CERD/C/GC/35, 26 September 2013. At [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fGC%2f35&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fGC%2f35&Lang=en) (viewed 8 December 2016).
- 19 See the reports submitted by Australia to the United Nations Committee on the Elimination of Racial Discrimination pursuant to article 9 of ICERD on 20 July 1999 (UN Doc CERD/C/335/Add.2) at [416], at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2FC%2F335%2FAdd.2&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2FC%2F335%2FAdd.2&Lang=en) (viewed 8 December 2016); and on 7 January 2010 (UN Doc CERD/C/AUS/15-17) at [26], at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fAUS%2f15-17&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fAUS%2f15-17&Lang=en) (viewed 8 December 2016).
- 20 See the reports submitted by Australia to the United Nations Committee on the Elimination of Racial Discrimination pursuant to article 9 of ICERD on 20 July 1999 (UN Doc CERD/C/335/Add.2) at [409], at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2FC%2F335%2FAdd.2&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2FC%2F335%2FAdd.2&Lang=en) (viewed 8 December 2016); and on 7 January 2010 (UN Doc CERD/C/AUS/15-17) at [26], at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fAUS%2f15-17&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fAUS%2f15-17&Lang=en) (viewed 8 December 2016).
- 21 Report submitted by Australia to the United Nations Committee on the Elimination of Racial Discrimination pursuant to article 9 of ICERD on 2 February 2016 (UN Doc CERD/C/AUS/18-20) at [97]–[98], at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fAUS%2f18-20&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fAUS%2f18-20&Lang=en) (viewed 8 December 2016).
- 22 UN Committee on the Elimination of Racial Discrimination, *General Recommendation 15 on article 4 of the Convention*, 17 March 1993, para 1. At [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7487&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7487&Lang=en) (viewed 8 December 2016).
- 23 UN Committee on the Elimination of Racial Discrimination, *General Recommendation 35 – Combating racist hate speech*, UN Doc CERD/C/GC/35, 26 September 2013, para 5. At [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fGC%2f35&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fGC%2f35&Lang=en) (viewed 8 December 2016).
- 24 *Toben v Jones* (2003) 129 FCR 515 at 537–538 [98], [100] (Allsop J).
- 25 *Toben v Jones* (2003) 129 FCR 515 at 549 [136] (Allsop J).
- 26 *Toben v Jones* (2003) 129 FCR 515 at 524–525 [19]–[21] (Carr J), 528 [50] (Kiefel J), and 551 [144] (Allsop J).
- 27 *Toben v Jones* (2003) 129 FCR 515 at 525 [20] (Carr J).
- 28 *Toben v Jones* (2003) 129 FCR 515 at 529 [50] (Kiefel J).
- 29 *Toben v Jones* (2003) 129 FCR 515 at 524 [19] (Carr J), 528 [50] (Kiefel J), and 549 [136] (Allsop J).
- 30 UN Committee on the Elimination of Racial Discrimination, *General Recommendation 35 – Combating racist hate speech*, UN Doc CERD/C/GC/35, 26 September 2013, para 28. At [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fGC%2f35&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fGC%2f35&Lang=en) (viewed 8 December 2016).
- 31 Human Rights Commission, *Proposal for Amendments to the Racial Discrimination Act to cover Incitement to Racial Hatred and Racial Defamation*, Report No 7 (1983), p 2 [6]. At [https://www.humanrights.gov.au/sites/default/files/HRC\\_report7\\_0.pdf](https://www.humanrights.gov.au/sites/default/files/HRC_report7_0.pdf) (viewed 8 December 2016).
- 32 Human Rights Commission, *Proposal for Amendments to the Racial Discrimination Act to cover Incitement to Racial Hatred and Racial Defamation*, Report No 7 (1983), p 14 [53]. At [https://www.humanrights.gov.au/sites/default/files/HRC\\_report7\\_0.pdf](https://www.humanrights.gov.au/sites/default/files/HRC_report7_0.pdf) (viewed 8 December 2016).
- 33 Human Rights Commission, *Proposal for Amendments to the Racial Discrimination Act to cover Incitement to Racial Hatred and Racial Defamation*, Report No 7 (1983), p 14 [53]. At [https://www.humanrights.gov.au/sites/default/files/HRC\\_report7\\_0.pdf](https://www.humanrights.gov.au/sites/default/files/HRC_report7_0.pdf) (viewed 8 December 2016).
- 34 Human Rights Commission, *Proposal for Amendments to the Racial Discrimination Act to cover Incitement to Racial Hatred and Racial Defamation*, Report No 7 (1983), p 14 [53]. At [https://www.humanrights.gov.au/sites/default/files/HRC\\_report7\\_0.pdf](https://www.humanrights.gov.au/sites/default/files/HRC_report7_0.pdf) (viewed 8 December 2016).

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- <sup>35</sup> Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into Racist Violence*, 1991, p 269. At <https://www.humanrights.gov.au/our-work/race-discrimination/publications/racist-violence-1991> (viewed 8 December 2016).
- <sup>36</sup> Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into Racist Violence*, 1991, p 268. At <https://www.humanrights.gov.au/our-work/race-discrimination/publications/racist-violence-1991> (viewed 8 December 2016).
- <sup>37</sup> Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into Racist Violence*, 1991, p 269. At <https://www.humanrights.gov.au/our-work/race-discrimination/publications/racist-violence-1991> (viewed 8 December 2016).
- <sup>38</sup> Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into Racist Violence*, 1991, pp 297-300. At <https://www.humanrights.gov.au/our-work/race-discrimination/publications/racist-violence-1991> (viewed 8 December 2016).
- <sup>39</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1994, p 3337 (the Hon Michael Lavarch MP, Attorney-General, second reading speech for the Racial Hatred Bill 1994). At <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansard%2F1994-11-15%2F0052;query=Id%3A%22chamber%2Fhansard%2F1994-11-15%2F0065%22> (viewed 8 December 2016).
- <sup>40</sup> Explanatory Memorandum to the Racial Hatred Bill 1994 (Cth) p 1. At [http://www.austlii.edu.au/au/legis/cth/bill\\_em/rhb1994119/memo\\_0.pdf](http://www.austlii.edu.au/au/legis/cth/bill_em/rhb1994119/memo_0.pdf) (viewed 8 December 2016).
- <sup>41</sup> Explanatory Memorandum to the Racial Hatred Bill 1994 (Cth) pp 10-11. At [http://www.austlii.edu.au/au/legis/cth/bill\\_em/rhb1994119/memo\\_0.pdf](http://www.austlii.edu.au/au/legis/cth/bill_em/rhb1994119/memo_0.pdf) (viewed 8 December 2016).
- <sup>42</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1994, p 3341 (the Hon Michael Lavarch MP, Attorney-General, second reading speech for the Racial Hatred Bill 1994). At <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansard%2F1994-11-15%2F0052;query=Id%3A%22chamber%2Fhansard%2F1994-11-15%2F0065%22> (viewed 8 December 2016).
- <sup>43</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1994, p 3336 and 3342 (the Hon Michael Lavarch MP, Attorney-General, second reading speech for the Racial Hatred Bill 1994). At <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansard%2F1994-11-15%2F0052;query=Id%3A%22chamber%2Fhansard%2F1994-11-15%2F0065%22> (viewed 8 December 2016).
- <sup>44</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 31 August 1995, p 945. At <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansard%2F1995-08-31%2F0015;query=Id%3A%22chamber%2Fhansard%2F1995-08-31%2F0015%22> (viewed 8 December 2016).
- <sup>45</sup> Australian Human Rights Commission, *Freedom from Discrimination: Report on the 40<sup>th</sup> anniversary of the Racial Discrimination Act* (2015), pp 47-49. At <http://www.humanrights.gov.au/our-work/race-discrimination/publications/freedom-discrimination-report-40th-anniversary-racial> (viewed 8 December 2016). T Soutphommasane, *I'm Not Racist But ... 40 years of the Racial Discrimination Act* (2015), Ch 2.
- <sup>46</sup> A Markus, *Mapping Social Cohesion: The Scanlon Foundation Surveys 2016* (2016), p 25. At <http://scanlonfoundation.org.au/wp-content/uploads/2016/11/2016-Mapping-Social-Cohesion-Report-FINAL-with-covers.pdf> (viewed 8 December 2016).
- <sup>47</sup> A Markus, *Mapping Social Cohesion: The Scanlon Foundation Surveys 2016* (2016), p 26. At <http://scanlonfoundation.org.au/wp-content/uploads/2016/11/2016-Mapping-Social-Cohesion-Report-FINAL-with-covers.pdf> (viewed 8 December 2016).
- <sup>48</sup> Australian Human Rights Commission, *Freedom from Discrimination: Report on the 40<sup>th</sup> anniversary of the Racial Discrimination Act* (2015), pp 34-45. At <http://www.humanrights.gov.au/our-work/race-discrimination/publications/freedom-discrimination-report-40th-anniversary-racial> (viewed 8 December 2016).
- <sup>49</sup> Australian Human Rights Commission, *Freedom from Discrimination: Report on the 40<sup>th</sup> anniversary of the Racial Discrimination Act* (2015), p 37. At <http://www.humanrights.gov.au/our-work/race-discrimination/publications/freedom-discrimination-report-40th-anniversary-racial> (viewed 8 December 2016).



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- 50 Australian Human Rights Commission, *Freedom from Discrimination: Report on the 40<sup>th</sup> anniversary of the Racial Discrimination Act* (2015), p 38. At <http://www.humanrights.gov.au/our-work/race-discrimination/publications/freedom-discrimination-report-40th-anniversary-racial> (viewed 8 December 2016).
- 51 Australian Human Rights Commission, *Freedom from Discrimination: Report on the 40<sup>th</sup> anniversary of the Racial Discrimination Act* (2015), pp 47-49. At <http://www.humanrights.gov.au/our-work/race-discrimination/publications/freedom-discrimination-report-40th-anniversary-racial> (viewed 8 December 2016).
- 52 Special-purpose Commissioners, including the Race Discrimination Commissioner (but not the President) have the function of intervening in court proceedings as *amicus curiae*. This function is described in paragraphs 311 to 313 of this submission. If a special-purpose Commissioner appears as *amicus curiae*, it is to assist the court and is not on behalf of any party.
- 53 AHRC Act, s 46PO(4).
- 54 Australian Human Rights Commission, *Freedom from Discrimination: Report on the 40<sup>th</sup> anniversary of the Racial Discrimination Act* (2015), p 74. At <http://www.humanrights.gov.au/our-work/race-discrimination/publications/freedom-discrimination-report-40th-anniversary-racial> (viewed 8 December 2016).
- 55 Australian Human Rights Commission, *Freedom from Discrimination: Report on the 40<sup>th</sup> anniversary of the Racial Discrimination Act* (2015), p 74. At <http://www.humanrights.gov.au/our-work/race-discrimination/publications/freedom-discrimination-report-40th-anniversary-racial> (viewed 8 December 2016).
- 56 Australian Human Rights Commission, *Freedom from Discrimination: Report on the 40<sup>th</sup> anniversary of the Racial Discrimination Act* (2015), p 71. At <http://www.humanrights.gov.au/our-work/race-discrimination/publications/freedom-discrimination-report-40th-anniversary-racial> (viewed 8 December 2016).
- 57 RDA, s 20(a).
- 58 The Commission's conciliation register is available at <https://www.humanrights.gov.au/complaints/conciliation-register> (viewed 8 December 2016).
- 59 *Creek v Cairns Post* (2001) 112 FCR 352 at 356 [16] (Kiefel J).
- 60 *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at 124 [70] (French J).
- 61 See, for example *Jones v Scully* 120 FCR 243 at 269 [102] (Hely J), *Eatock v Bolt* (2011) 197 FCR 261 at 325 [268] (Bromberg J).
- 62 *Eatock v Bolt* (2011) 197 FCR 261 at [263].
- 63 *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at 124 [70].
- 64 *Bropho v HREOC* (2004) 135 FCR 105 at 123 [68].
- 65 *Bropho v HREOC* (2004) 135 FCR 105 at 123 [68].
- 66 *Bropho v HREOC* (2004) 135 FCR 105 at 124 [69].
- 67 *Handyside v United Kingdom* (1976) 1 EHRR 737. Article 10 of the European Convention on Human Rights is the equivalent of article 19 of the ICCPR.
- 68 *Bropho v HREOC* (2004) 135 FCR 105 at 124 [70].
- 69 *Bropho v HREOC* (2004) 135 FCR 105 at 124 [70].
- 70 Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into Racist Violence*, 1991, p 270. At <https://www.humanrights.gov.au/our-work/race-discrimination/publications/racist-violence-1991> (viewed 8 December 2016).
- 71 *Murugesu v Australian Post & Anor (No 2)* [2016] FCCA 2355.
- 72 *Murugesu v Australian Postal Corporation & Anor* [2015] FCCA 2852 at [7], [219] and [224].
- 73 *Murugesu v Australian Post & Anor (No 2)* [2016] FCCA 2355 at [4]-[6].
- 74 *Murugesu v Australian Post & Anor (No 2)* [2016] FCCA 2355 at [7]-[8].
- 75 *Bropho v HREOC* (2004) 135 FCR 105 at 125 [72].
- 76 *Bropho v HREOC* (2004) 135 FCR 105 at 127 [76].
- 77 *Bropho v HREOC* (2004) 135 FCR 105.
- 78 This process changed in two sets of legislative amendments: the first in 1995, and the second in the *Human Rights Legislation Amendment Act (No. 1) 1999* (Cth) which took effect from 13 April 2000.
- 79 *Kelly-Country v Beers* (2004) 207 ALR 421 at 426 [30].
- 80 *Kelly-Country v Beers* (2004) 207 ALR 421 at 422 [5].
- 81 *Kelly-Country v Beers* (2004) 207 ALR 421 at 448 [121].

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- <sup>82</sup> *Kelly-Country v Beers* (2004) 207 ALR 421 at 449 [127], 450 [133].
- <sup>83</sup> *Bryl v Nowra* [1999] HREOCA 11.
- <sup>84</sup> *Discrimination Act 1991* (ACT) s 66.
- <sup>85</sup> *Anti-Discrimination Act 1977* (NSW) s 20C; *Anti-Discrimination Act 1991* (Qld) s 124A; *Civil Liability Act 1936* (SA) s 73; *Racial and Religious Tolerance Act 2001* (Vic) s 11.
- <sup>86</sup> *Anti-Discrimination Act 1998* (Tas) s 19.
- <sup>87</sup> *Bropho v HREOC* (2004) 135 FCR 105 at 128 [80].
- <sup>88</sup> *Walsh v Hanson* [2000] HREOCA 8.
- <sup>89</sup> *Bropho v HREOC* (2004) 135 FCR 105 at 128-129 [81] (French J).
- <sup>90</sup> *Bropho v HREOC* (2004) 135 FCR 105 at 131 [93] (French J).
- <sup>91</sup> *Toben v Jones* (2003) 129 FCR 515 at 554 [161] (Allsop J, referring to comments by Carr J at first instance).
- <sup>92</sup> *Eatock v Bolt* (2011) 197 FCR 261 at 343 [354].
- <sup>93</sup> *Eatock v Bolt* (2011) 197 FCR 261 at 343 [355].
- <sup>94</sup> Australian Human Rights Commission, *National Anti-Racism Strategy and Racism. It Stops with Me Campaign*, at <https://www.humanrights.gov.au/our-work/race-discrimination/projects/national-anti-racism-strategy-and-racism-it-stops-me-campaign> (viewed 8 December 2016).
- <sup>95</sup> Australian Human Rights Commission, *Racism. It Stops with Me Campaign*, at <https://itstopswithme.humanrights.gov.au/> (viewed 8 December 2016).
- <sup>96</sup> The Paris Principles were adopted by UN General Assembly resolution 48/134 of 20 December 1993. At <http://www.un.org/documents/ga/res/48/a48r134.htm> (viewed 8 December 2016).
- <sup>97</sup> Centre for Human Rights, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (1995) p 28. At <http://www.ohchr.org/Documents/Publications/training4en.pdf> (viewed 8 December 2016).
- <sup>98</sup> *Sex Discrimination and Other Legislation Amendment Act 1992* (Cth) which commenced on 13 January 1993. Some of these provisions were subsequently amended by the *Law and Justice Legislation Amendment Act 1993* (Cth).
- <sup>99</sup> *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 264 (Mason CJ, Brennan and Toohey JJ), 271 (Deane, Dawson, Gaudron and McHugh JJ).
- <sup>100</sup> *Human Rights Legislation Amendment Act 1995* (Cth); *Human Rights Legislation Amendment Act* (No. 1) 1999 (Cth).
- <sup>101</sup> T Raymond, 'Alternative Dispute Resolution as a tool for social change: a discussion of issues and evidence' (2008). At <https://www.humanrights.gov.au/our-work/complaint-information-service/publications/alternative-dispute-resolution-tool-social> (viewed 8 December 2016).
- <sup>102</sup> AHRC Act, s 11(1)(g) and (h).
- <sup>103</sup> Complaints data are reported by the Commission in its Annual Reports (and from 2015-16 in a separate document on the same webpage as the Annual Report) which are available on its website at <https://www.humanrights.gov.au/our-work/commission-general/publications/annual-reports-index> (viewed 8 December 2016).
- <sup>104</sup> The Commission's complaint statistics for 2015-16 are published on the same webpage as the Commission's 2015-16 Annual Report at <https://www.humanrights.gov.au/our-work/commission-general/publications/annual-report-2015-2016> (viewed 8 December 2016).
- <sup>105</sup> Contact details for the National Information Service are available on the Commission's website at <https://www.humanrights.gov.au/complaints/contact-national-information-service> (viewed 8 December 2016).
- <sup>106</sup> AHRC Act, s 46P(4).
- <sup>107</sup> *Cameron v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 509 at 515 (Beaumont and Foster JJ), 519 (French J), considering s 22 of the RDA as it then was; *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313 at 327-331 (Neaves J), considering s 46P of the AHRC Act.
- <sup>108</sup> *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 54 FLR 421 (Ellicott J) referring to equivalent terminology in the *Administrative Decisions (Judicial Review) Act 1977* (Cth), cited in *Cameron v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 509 at 516.
- <sup>109</sup> *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313 at 329 [44]-[45] (Neaves J).
- <sup>110</sup> *Cameron v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 509 at 519 (French J).

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- <sup>111</sup> *Cameron v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 509 at 519 (French J).
- <sup>112</sup> *Simplot Australia Pty Ltd v Human Rights and Equal Opportunity Commission* (1996) 69 FCR 90 at 93-94.
- <sup>113</sup> *Commonwealth v Sex Discrimination Commissioner* (1998) 90 FCR 179 at 187-188 (Branson J).
- <sup>114</sup> For example, see *Proudfoot v Human Rights and Equal Opportunity Commission* (1991) 100 ALR 557 at 566 (Neaves J); *Ellenbogen v Human Rights and Equal Opportunity Commission* [1993] FCA 570 (Whitlam J); *Simplot Australia Pty Ltd v Human Rights and Equal Opportunity Commission* (1996) 69 FCR 90 at 93 (Merkel J); *Commonwealth v Sex Discrimination Commissioner* (1998) 90 FCR 179 (Branson J).
- <sup>115</sup> AHRC Act, s 46PF.
- <sup>116</sup> Most recently to the Attorney-General and the Attorney-General's Department on 30 July 2014, 29 September 2014 and in April 2015; and as part of a response to questions taken on notice from the Senate Estimates hearing on 18 October 2016.
- <sup>117</sup> *Anti-Discrimination Act 1991* (Qld), s 136.
- <sup>118</sup> *Equal Opportunity Act 1984* (SA), s 93(1c)(a).
- <sup>119</sup> *Anti-Discrimination Act 1998* (Tas), s 62(1)(c).
- <sup>120</sup> AHRC Act, s 46PF.
- <sup>121</sup> AHRC Act, s 46PK.
- <sup>122</sup> AHRC Act, s 46PO.
- <sup>123</sup> *The Shorter Oxford English Dictionary* (3<sup>rd</sup> ed, 1992), p 2367.
- <sup>124</sup> *The Macquarie Dictionary* (3<sup>rd</sup> ed, 1997), p 2264.
- <sup>125</sup> *Rana v Commonwealth of Australia* [2013] FCA 189 at [42]-[43].
- <sup>126</sup> *Assal v Department of Health, Housing and Community Services* (1992) EOC ¶92-409 at 78,900; [1990] HREOCA 8.
- <sup>127</sup> *Nagasinghe v Worthington* (1994) 53 FCR 175 at 178.
- <sup>128</sup> *Ebber v Human Rights and Equal Opportunity Commission* (1995) 129 ALR 455 at 468.
- <sup>129</sup> *Rana v Human Rights and Equal Opportunity Commission (No 3)* (1999) 54 ALD 337 at 340 [11] and 342 [26].
- <sup>130</sup> *Ebber v Human Rights and Equal Opportunity Commission* (1995) 129 ALR 455 at 466.
- <sup>131</sup> *Ebber v Human Rights and Equal Opportunity Commission* (1995) 129 ALR 455 at 468.
- <sup>132</sup> *Ebber v Human Rights and Equal Opportunity Commission* (1995) 129 ALR 455 at 467.
- <sup>133</sup> AHRC Act, s 46PG.
- <sup>134</sup> AHRC Act, s 46PF(5)(a).
- <sup>135</sup> 'ILO' complaints are complaints of discrimination in employment under grounds covered by International Labour Organization *Convention (No 111) concerning Discrimination in respect of Employment and Occupation*. This includes discrimination in employment on grounds that are not otherwise unlawful under Commonwealth anti-discrimination law, for example discrimination in employment on the basis of religion, trade union activity, medical record or irrelevant criminal record.
- <sup>136</sup> Exposure Draft Human Rights and Anti-Discrimination Bill 2012 (Cth). At [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13/antidiscrimination2012/info/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/antidiscrimination2012/info/index) (viewed 8 December 2016).
- <sup>137</sup> Explanatory Notes to the Exposure Draft Human Rights and Anti-Discrimination Bill 2012 (Cth), p 86. At [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13/antidiscrimination2012/notes/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/antidiscrimination2012/notes/index) (viewed 8 December 2016).
- <sup>138</sup> Australian Human Rights Commission, Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Exposure Draft Human Rights and Anti-Discrimination Bill 2012 (Cth), p 6. At <http://www.aph.gov.au/DocumentStore.ashx?id=6c5b537d-5f1b-4032-88b3-2676906599d9> (viewed 8 December 2016).
- <sup>139</sup> Section 18D(a), see section 6.1 above.
- <sup>140</sup> *Assal v Department of Health, Housing and Community Services* (1992) EOC ¶92-409 at 78,900; [1990] HREOCA 8.
- <sup>141</sup> *Federal Court of Australia Act 1976* (Cth), s 31A; *Federal Circuit Court of Australia Act 1999* (Cth), s 17A.
- <sup>142</sup> This structural change to the Commission was implemented through the *Human Rights Legislation Amendment Act (No 1) 1999* (Cth).

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- <sup>143</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 1998, p 1276 (the Hon Daryl Williams MP, Attorney-General), second reading speech for the Human Rights Legislation Amendment Bill 1998 (Cth). At <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F1998-12-03%2F0021%22> (viewed 8 December 2016).
- <sup>144</sup> ADJR Act, s 5(1)(a).
- <sup>145</sup> For example, see *Kioa v West* (1985) 159 CLR 550 at 585 (Mason J) and 601 (Wilson J); and *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 53 (Dawson J).
- <sup>146</sup> Part IIB of the AHRC Act confers functions on the Commission in relation to complaints of unlawful discrimination under the RDA, SDA, DDA and ADA.
- <sup>147</sup> Part II, Division 4 of the AHRC Act confers functions on the Commission in relation to equal opportunity in employment in pursuance of Australia's international obligations under ILO *Convention (No 111) concerning Discrimination in respect of Employment and Occupation*, done at Geneva on 25 June 1958.
- <sup>148</sup> Part II, Division 3 of the AHRC Act confers functions on the Commission in relation to complaints of acts or practices that are inconsistent with or contrary to certain human rights.
- <sup>149</sup> Australian Human Rights Commission, *Charter of Service*. At <https://www.humanrights.gov.au/complaints-charter-service> (viewed 8 December 2016).
- <sup>150</sup> AHRC Act, s 14(1).
- <sup>151</sup> J Ball and T Raymond, 'Facilitator or Advisor?: A discussion of conciliator intervention in the resolution of disputes under Australian human rights and anti-discrimination law'. At <https://www.humanrights.gov.au/our-work/complaint-information-service/publications/facilitator-or-advisor-discussion-conciliator> (viewed 8 December 2016).
- <sup>152</sup> A copy of the Commission's complaint form is available at <https://www.humanrights.gov.au/complaints/make-complaint> (viewed 8 December 2016).
- <sup>153</sup> Australian Human Rights Commission, *Information for people and organisations responding to complaints – Unlawful Discrimination*. At <http://www.humanrights.gov.au/information-people-and-organisations-responding-complaints-unlawful-discrimination> (viewed 8 December 2016).
- <sup>154</sup> Australian Human Rights Commission, *Understanding and preparing for conciliation - Unlawful Discrimination*. At <https://www.humanrights.gov.au/understanding-and-preparing-conciliation-unlawful-discrimination> (viewed 8 December 2016).
- <sup>155</sup> Australian Human Rights Commission, *Charter of Service*. At <https://www.humanrights.gov.au/complaints-charter-service> (viewed 8 December 2016).
- <sup>156</sup> AHRC Act, s 46PI.
- <sup>157</sup> AHRC Act, s 46PJ.
- <sup>158</sup> Australian Human Rights Commission, *Information for people making complaints*. At <https://www.humanrights.gov.au/information-people-making-complaints> (viewed 8 December 2016).
- <sup>159</sup> Australian Human Rights Commission, *Information for people and organisations responding to complaints*. At <https://www.humanrights.gov.au/complaints/complaint-guides/information-people-and-organisations-responding-complaints> (viewed 8 December 2016).
- <sup>160</sup> Australian Human Rights Commission, *The Australian Human Rights Commission's Complaint Process: for complaints about sex, race, disability and age discrimination*. At <https://www.humanrights.gov.au/australian-human-rights-commission-s-complaint-process-complaints-about-sex-race-disability-and-age> (viewed 8 December 2016).
- <sup>161</sup> Australian Human Rights Commission, *Conciliation – how it works*. At <https://www.humanrights.gov.au/complaints/complaint-guides/conciliation-how-it-works> (viewed 8 December 2016). Australian Human Rights Commission, *Understanding and preparing for conciliation - Unlawful Discrimination*. At <https://www.humanrights.gov.au/understanding-and-preparing-conciliation-unlawful-discrimination> (viewed 8 December 2016).
- <sup>162</sup> Australian Human Rights Commission, *Complaints under the Racial Discrimination Act*, at <https://www.humanrights.gov.au/complaints-under-racial-discrimination-act> (viewed 8 December 2016). Australian Human Rights Commission, *Complaints under the Sex Discrimination Act*, at <https://www.humanrights.gov.au/complaints/complaint-guides/making-complaint/complaints-under-sex-discrimination-act> (viewed 8 December 2016). Australian Human Rights Commission, *Complaints under the Disability Discrimination Act*, at <https://www.humanrights.gov.au/complaints/complaint-guides/what-you-can-complain-about/complaints-under-disability-discrimination> (viewed 8 December 2016). Australian Human



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- <sup>163</sup> Australian Human Rights Commission, *Making a Complaint*, at <https://www.humanrights.gov.au/about/translated-information> (viewed 8 December 2016).
- <sup>164</sup> Australian Human Rights Commission, *Complaint information in Auslan*. At <https://www.humanrights.gov.au/complaints/complaint-guides/complaint-information-auslan> (viewed 8 December 2016).
- <sup>165</sup> Australian Human Rights Commission, *Pathways to Resolution: The conciliation process of the Australian Human Rights Commission*. At <https://www.humanrights.gov.au/complaints/complaint-guides/pathways-resolution-conciliation-process-australian-human-rights> (viewed 8 December 2016).
- <sup>166</sup> Australian Human Rights Commission, *Annual Report 2015-16*, p 15. At <https://www.humanrights.gov.au/our-work/commission-general/publications/annual-report-2015-2016> (viewed 8 December 2016).
- <sup>167</sup> Australian Human Rights Commission, *Annual Report 2015-16*, p 26. At <https://www.humanrights.gov.au/our-work/commission-general/publications/annual-report-2015-2016> (viewed 8 December 2016).
- <sup>168</sup> Australian Human Rights Commission, *Annual Report 2015-16*, p 26. At <https://www.humanrights.gov.au/our-work/commission-general/publications/annual-report-2015-2016> (viewed 8 December 2016).
- <sup>169</sup> Australian Human Rights Commission, *Complaint Statistics 2015-16*. At <https://www.humanrights.gov.au/our-work/commission-general/publications/annual-report-2015-2016> (viewed 8 December 2016).
- <sup>170</sup> Australian Human Rights Commission, *Conciliation register*. At <https://www.humanrights.gov.au/complaints/conciliation-register> (viewed 8 December 2016).
- <sup>171</sup> H Astor and C Chinkin, *Dispute Resolution in Australia* (2<sup>nd</sup> ed, 2002), p 178.
- <sup>172</sup> K Brown, 'Confidentiality in mediation: Status and implications' (1991) 2 *Journal of Dispute Resolution* 307 at 310.
- <sup>173</sup> Australian Human Rights Commission, *Information for people making complaints*. At <https://www.humanrights.gov.au/information-people-making-complaints> (viewed 8 December 2016).
- <sup>174</sup> *Oldham v Capgemini Australia Pty Ltd* [2015] FCA 1149 at [31].
- <sup>175</sup> The Standards are issued by the Mediator Standards Board, and are available at <http://www.msb.org.au> (viewed 8 December 2016).
- <sup>176</sup> Office of the High Commissioner for Human Rights, *Principles relating to the Status of National Institutions (The Paris Principles)*, UN Doc A/RES/48/134 (4 March 1994), Annex, p 7 'Additional principles concerning the status of commissions with quasi-jurisdictional competence' para (a). At [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/48/134](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/48/134) (viewed 8 December 2016).
- <sup>177</sup> *Bender v Bovis Lend Lease Pty Ltd* (2003) 175 FLR 446.
- <sup>178</sup> *Lynch v Human Rights and Equal Opportunity Commission and Higgs* [1991] AATA 390. This decision was upheld by Morling J in the Federal Court of Australia and on appeal by the Full Court of the Federal Court: *Lynch v Human Rights and Equal Opportunity Commission* (1992) 27 ALD 647. More recently, see 'L' and *Australian Human Rights Commission* [2012] ALCmr 21.
- <sup>179</sup> Australian Government, *Mid-Year Economic and Fiscal Outlook 2014-15*, p 138. At [http://www.budget.gov.au/2014-15/content/myefo/download/MYEFO\\_2014-15.pdf](http://www.budget.gov.au/2014-15/content/myefo/download/MYEFO_2014-15.pdf) (viewed 8 December 2016).
- <sup>180</sup> Australian Government, *Portfolio Budget Statements 2014-15, Budget Related Paper No. 1.2, Attorney-General's Portfolio*, pp 194-195. At <https://www.ag.gov.au/Publications/Budgets/Budget2014-15/Documents/00%20Attorney-General%20s%20portfolio%20PBS%202014-15%20full%20book.PDF> (viewed 8 December 2016).
- <sup>181</sup> Senator the Hon George Brandis QC, Attorney-General, 'Appointments to the Australian Human Rights Commission' Media release, 5 May 2016. At <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/SecondQuarter/5-May-2016-Appointments-to-the-Australian-Human-Rights-Commission.aspx> (viewed 8 December 2016).

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- <sup>182</sup> Senator the Hon George Brandis QC, Attorney-General, 'Launch of the Australian Human Rights Commission national inquiry into employment discrimination against older Australians and Australians with a disability' Media release, 15 April 2015. At <https://www.attorneygeneral.gov.au/MediaReleases/Pages/2015/SecondQuarter/15-April-2015-Launch-of-the-Australian-Human-Rights-Commission-national-inquiry-into-employment-discrimination-against-old.aspx> (viewed 8 December 2016).
- <sup>183</sup> AHRC Act, s 46PT.
- <sup>184</sup> C Johnston, 'Indigenous Affairs Minister Nigel Scullion condemns "racist" Bill Leak cartoon,' *Sydney Morning Herald*, 4 August 2016. At <http://www.smh.com.au/national/is-this-bill-leak-cartoon-in-the-australian-racist-20160804-ggkub9.html> (viewed 8 December 2016).
- <sup>185</sup> RDA, s 20.
- <sup>186</sup> Australian Human Rights Commission, *Freedom from Discrimination: Report on the 40<sup>th</sup> anniversary of the Racial Discrimination Act* (2015), pp 52-53. At <http://www.humanrights.gov.au/our-work/race-discrimination/publications/freedom-discrimination-report-40th-anniversary-racial> (viewed 8 December 2016).
- <sup>187</sup> Office of the High Commissioner for Human Rights, *Principles relating to the Status of National Institutions (The Paris Principles)*, UN Doc A/RES/48/134 (4 March 1994), Annex, p 4 'Competence and responsibilities' para 3(g). At [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/48/134](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/48/134) (viewed 8 December 2016).
- <sup>188</sup> Office of the High Commissioner for Human Rights, *Principles relating to the Status of National Institutions (The Paris Principles)*, UN Doc A/RES/48/134 (4 March 1994), Annex, p 6 'Methods of operation' paras (a) and (c). At [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/48/134](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/48/134) (viewed 8 December 2016).
- <sup>189</sup> AHRC Act, s 8A(2).
- <sup>190</sup> AHRC Act, s 8(6).
- <sup>191</sup> AHRC Act, s 3: the definition of 'unlawful discrimination' includes in paragraph (b) acts, omissions or practices that are unlawful under Part IIA of the RDA.
- <sup>192</sup> AHRC Act, s 19(2A). Other functions can be delegated to other Commissioners, or to any other person or body of persons approved by the Commission.
- <sup>193</sup> Commonwealth, *Parliamentary Debates*, House of Representatives (3 December 1998), p 1276 (the Hon Daryl Williams MP, Attorney-General), second reading speech for the Human Rights Legislation Amendment Bill 1998 (Cth). At <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F1998-12-03%2F0021%22> (viewed 8 December 2016).
- <sup>194</sup> In particular, the functions set out in AHRC Act, s 11(1)(e), (f), (g), (h), (o) and (p).
- <sup>195</sup> AHRC Act, s 11(1)(e).
- <sup>196</sup> AHRC Act, s 11(1)(f).
- <sup>197</sup> AHRC Act, s 11(1)(o).
- <sup>198</sup> AHRC Act, s 11(1)(g).
- <sup>199</sup> AHRC Act, s 11(1)(h).
- <sup>200</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws: Final Report*, Report 129 (2015) p 5. At <https://www.alrc.gov.au/publications/freedoms-alrc129> (viewed 8 December 2016).
- <sup>201</sup> F La Rue, *2010 Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, UN Doc A/HRC/14/23, 20 April 2010, paras 79-81. At [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/14/23](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/14/23) (viewed 8 December 2016).