Chapter 2

Freedom of speech and Part IIA of the *Racial Discrimination Act 1975* (Cth)

Introduction

2.1 This chapter focuses on the first term of reference of the inquiry:

> Whether the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) [(RDA)] imposes unreasonable restrictions upon freedom of speech, and in particular whether, and if so how, ss. 18C and 18D should be reformed.[1]

2.2 The committee received extensive and substantial evidence from submitters in relation to this term of reference. The evidence included submissions both for and against amending Part IIA of the RDA. A number of submitters also provided evidence about experiences of racism in contemporary Australia and whether, and to what extent, the RDA provided protection from such racism. The scope afforded to freedom of expression also emerged in evidence as a serious issue. The range of views provided to the committee reflected different underlying concerns about the balance between protection from racial discrimination and freedom of expression as well as legal principles such as the rule of law and constitutionality.

2.3 The views of submitters in favour of repealing or changing Part IIA of the RDA demonstrated a range of concerns. These concerns included the scope afforded to freedom of speech, but also a separate concern that the extent of confusion about the scope and effect of Part IIA could undermine its purposes. In particular, from a rule of law perspective, concerns were expressed that the scope of conduct prohibited under section 18C of the RDA was not clear and accessible on the face of the provision.

2.4 The views of submitters in favour of retaining the existing protections under Part IIA also demonstrated a range of concerns. Many multicultural and community groups considered that Part IIA of the RDA has an important symbolic role and provided protection against forms of racially discriminatory speech. These groups were concerned that repealing or amending Part IIA would send a negative message that racism was acceptable. It was also argued to the committee that in legal terms the application of the law is well settled and concerns were expressed that any changes to the law would give rise to significant uncertainty as to the meaning and scope of any new law.

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1 Parliamentary Joint Committee on Human Rights, *Inquiry report: Freedom of speech in Australia*, Terms of Reference, Chapter 1 at paragraph [1.1].

2.5 The first and second parts of this chapter describe the background to the enactment of Part IIA of the RDA, and the scope of conduct caught under Part IIA of the RDA, including how it has been interpreted by the courts.

2.6 The third part of this chapter outlines the wide range of views of submitters in relation to Part IIA of the RDA, including proposals for reform. It canvasses the case for repeal, the case for change, the case for retaining the existing protections and the role that increased education could play.

2.7 The fourth part of this chapter sets out the committee's views on the question of the need for reforming Part IIA of the RDA and recommendations based on evidence received.

Background to, and enactment of, Part IIA of the RDA

2.8 The introduction of legislative protections against certain forms of racially discriminatory speech in the 1990s were informed by recommendations and findings by a number of significant inquiries which had identified gaps in legal protections available to victims of racism:

- The *National Inquiry into Racist Violence in Australia* prepared by the predecessor to the AHRC, the Human Rights and Equal Opportunities Commission;[2]
- The *National Report* of the Royal Commission into Aboriginal Deaths in Custody;[3] and
- The *Multiculturalism and the Law Report* of the Australian Law Reform Council.[4]

2.9 The introduction of such legislative protections was also informed by Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the International Covenant on Civil and Political Rights (ICCPR) which impose specific obligations on states to prohibit certain

2 Hon Michael Lavarch, Attorney-General, *House of Representatives Hansard,* Second reading speech, 15 November 1994, 3336; and Human Rights and Equal Opportunity Commission (HREOC), *Racist Violence: National Inquiry into Racist Violence in Australia*, March1991.

3 Hon Michael Lavarch, Attorney-General, *House of Representatives Hansard,* Second reading speech, 15 November 1994, 3336; explanatory memorandum to the Racial Hatred Bill 1994, 1 (EM 1994).

4 Hon Michael Lavarch, Attorney-General, *House of Representatives Hansard,* Second reading speech, 15 November 1994, 3336; Australian Law Reform Council, *Multiculturalism and the Law* (1991).

serious forms of racially discriminatory speech.[5] Australia ratified the CERD and the ICCPR in 1975 and 1980 respectively.[6]

2.10 Protection against forms of discriminatory speech on the basis of race were introduced into Part IIA of the RDA in 1995 through the passage of the *Racial Hatred Bill 1994* (Racial Hatred Bill).

2.11 The Racial Hatred Bill was the subject of extensive parliamentary debate. It was also subject to substantial amendment prior to finally passing both houses of parliament.[7] Specifically, the bill was amended to remove provisions which would have amended the *Crimes Act 1914* to create three criminal offences prohibiting the making of motivated threats to a person's property because of their race, and intentionally inciting racial hatred.[8]

2.12 The explanatory memorandum to the Racial Hatred Bill 1994 (EM 1994) explained that the Racial Hatred Bill was intended to support social cohesion and close a gap in legal protection for victims of racist speech which had been identified by significant inquiries:

> The Bill closes a gap in the legal protection available to the victims of extreme racist behaviour. The Bill is intended to strengthen and support the significant degree of social cohesion demonstrated by the Australian community at large. The Bill is based on the principle that no person in Australia need live in fear because of his or her race, colour, or national or ethnic origin.[9]

2.13 While acknowledging the importance of freedom of speech, the EM 1994 states that 'the right to free speech must be balanced against other rights and interests.'[10]

2.14 The EM 1994 further states that the provisions now contained in Part IIA of the RDA were intended to provide a balance between freedom of speech and the protection of individuals and groups from harassment and fear because of their race, colour or national or ethnic origin.[11] The 1994 EM noted that the drafting of the

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5 International Convention on the Elimination of All Forms of Racial Discrimination (CERD) article 4, International Covenant on Civil and Political Rights (ICCPR) article 20. See, also, Hon Michael Lavarch, Attorney-General, *House of Representatives Hansard,* 16 November 1994, 3341.

6 CERD, opened for signature 7 March 1966, 660 UNTS 195 (entry into force in Australia 30 November 1975); ICCPR, opened for signature 19 December 1966, 999 UNTS 171 (entered into force in Australia 13 November 1980).

7 Centre for Comparative Constitutional Studies, *Submission 137*, 3.

8 Racial Hatred Bill 1994.

9 EM 1994, 1.

10 EM 1994, 1.

11 EM 1994, 1.

Racial Hatred Bill was intended to allow scope for public debate about important issues:

> …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.
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> 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. The Bill is intended to prevent people from seriously undermining tolerance within society by inciting racial hatred or threatening violence against individuals or groups because of their race, colour or national or ethnic origin. [12]

2.15 Part IIA of the RDA has not been amended since its enactment through the passage of the Racial Hatred Bill in 1995.

Current anti-vilification laws at the federal level

2.16 At the federal level, Part IIA of the RDA is the source of legislative protection against racial vilification. Part IIA (comprising sections 18A–18E) of the RDA provides the framework for protecting against forms of speech on the basis of race.

2.17 In particular, section 18C of the RDA contains the operative provision making specified conduct unlawful, as a civil wrong. It provides:

> (1) It is unlawful for a person to do an act, otherwise than in private, if:
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> > (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
> >
> > (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

2.18 Many submitters to the inquiry noted that the terms in section 18C are subject to judicial interpretation to determine their legal meaning in context.[13]

2.19 The scope of section 18C cannot be understood without consideration of section 18D. Section 18D operates to provide some 'exemptions' or defences from section 18C of the RDA. Section 18D of the RDA provides:

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

12 EM 1994, 1.

13 See, for example: Discrimination Law Expert Group, *Submission 118*, 8; Centre for Comparative Constitutional Studies, *Submission 137*, 3; Kate Eastman SC and Trent Glover, *Submission 157*, 1-2.

(a) in the performance, exhibition or distribution of an artistic work; or

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in making or publishing:

(i) a fair and accurate report of any event or matter of public interest; or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

Meaning and scope of conduct caught

2.20 The meaning and scope of section 18C of the RDA has been the subject of judicial consideration, which is essential to understanding its application. While this is unremarkable in a legal context, in this instance statutory interpretation plays a particularly important role because in general usage the words 'insult' and 'offend' may be employed in relation to conduct with effects that range from slight to severe. However, the breadth of application for legal purposes is significantly narrower than the senses in which the words 'offend, insult, humiliate or intimidate' are generally understood. This is especially important in the context of section 18C as it is concerned with public conduct engaged in because of the subject's race.

Legal meaning of 'offend, insult, humiliate or intimidate'

2.21 The Federal Court in *Jones v Scully* explicitly set out the dictionary definitions of the terms 'offend, insult, humiliate or intimidate' in an attempt to establish the meaning to be given to each word individually.[14] The ordinary meaning of the words provided in *Jones v Scully* provide some guidance, but must also be consistent with the threshold established by Kiefel J,[15] in *Creek v Cairns Post Pty Ltd,*[16] that section 18C only applies to conduct having 'profound and serious effects, not to be likened to mere slights'. This standard has been affirmed in the case law.[17]

2.22 It is worth noting, however, that the Court generally does not consider each term in isolation. Although in *McGlade v Lightfoot* the relevant conduct was found to be reasonably likely to 'offend' and 'insult', the Court made it very clear that it was

14 [2002] FCA 1080.

15 Kiefel J is now the Chief Justice of the High Court.

16 [2001] FCA 1007, [16].

17 *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at 131, [70] (French J) (*Bropho*); *Jones v Scully* (2002) 120 FCR 243, [102]; *Eatock v Bolt* (2011) 197 FCR 261 at [267]-[268] (Justice Bromberg) (*Eatock*).

not reasonably likely to humiliate or intimidate.[18] This means that the legal meaning of 'offend, insult, humiliate or intimidate' does not wholly correspond with the ordinary or 'common sense' meaning of the terms. In other words, as interpreted by the courts, conduct that is merely offensive or merely insulting will not be captured by section 18C of the RDA, but only more serious forms of conduct on the basis of race. While some submitters suggested that the words used in section 18C created uncertainty, the committee received evidence from other witnesses that the legal meaning and judicial interpretation of section 18C was well settled as applying only to conduct at the more serious end of the range.[19]

Nature of the test

2.23 Under section 18C of the RDA the conduct complained of must be 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate'.[20] This has been judicially interpreted as importing an 'objective test' rather than a 'subjective test' in relation to conduct.[21] This means that the determinative question is not whether subjectively the particular complainant was 'insulted, offended, intimidated or humiliated': the question is whether the act is reasonably likely to have a 'profound and serious effect', in all the circumstances.

2.24 An objective test is often applied with reference to how a reasonable member of the Australian community or reasonable person would respond. However, the form of the 'objective test' that has been applied by the courts in the context of section 18C of the RDA is one in which the 'reasonable person' is the member of a group: the 'objective test' applied in section 18C requires assessing the likely effect of the conduct on a reasonable hypothetical member of a particular racial or ethnic group which is the target of the alleged conduct.[22] A number of witnesses suggested this test should be broadened to the reasonable member of the Australian community, which is discussed in [2.80].

Application to public conduct

2.25 Part IIA only applies to conduct 'otherwise than in private'. This means that there is no prohibition on expressing views that 'offend, insult, humiliate or intimidate' on the basis of race, colour or national or ethnic origin in private.

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18 *McGlade v Lightfoot* (2002) 124 FCR 106, 120 at [61]-[62].

19 See, for example: Law Institute of Victoria, *Submission 184*, 4; Mr Iain Anderson, Deputy Secretary, Attorney-General's Department, *Committee Hansard*, 17 February 2017, 21-22.

20 *Racial Discrimination Act 1975* (RDA), section 18C.

21 *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2001) 105 FLR 56, [15].

22 *Eatock* (2011) 197 FCR 261, [243], [250].

Defences

2.26 As set out above, section 18D of the RDA contains a number of defences or 'exemptions' to conduct that would otherwise be captured by section 18C of the RDA. These exemptions cover acts done 'reasonably and in good faith.' It includes artistic works, statements made for any genuine academic, artistic or scientific purpose or in the public interest. These 'exemptions' also extend to publishing a fair and accurate report of any event or matter of public interest or a fair comment on any event or matter of public interest if it is a genuine belief held by the person making the comment.[23] The scope of the defences established by section 18D, and its importance for protection of the right to freedom of expression, was the subject of testimony during the inquiry and is explored further below.

Civil-complaint based model

2.27 The model adopted at a federal-level in Australia under the RDA is a civil-complaint based model rather than a criminal model. This means that proceedings are initiated by individual complainants rather than the government. If a respondent is found to have engaged in unlawful conduct under Part IIA they are liable to civil rather than criminal sanctions.

Box 2.1: Case study—*Bropho v HREOC*

The case of *Bropho v HREOC* is a key decision for interpretation of the scope of section 18D exemptions and was important to some areas of evidence given to the committee. The AHRC has described the key elements of the case as follows:

In *Bropho v HREOC*, 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. 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;

23 RDA section 18D.

- 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, in a case which took seven years to resolve. The cartoonist, Dean Alston, has written about the impact of the legal action on his life.[24]

Source: AHRC, Submission 13, 29.

The case for change – repealing sections 18C and 18D

2.28 Some submitters to this inquiry argued strongly for Part IIA to be repealed in its entirety and not replaced by any other racial vilification laws at a federal level. For example, Mr Simon Breheny, Director of Policy, the Institute of Public Affairs (IPA) argued that Part IIA should be repealed in its entirety on the basis of the restrictions it imposes on free speech:

> Section 18C of the Racial Discrimination Act is one of the most significant restrictions on freedom of speech in this country. Along with the rest of the provisions of Part IIA of the Racial Discrimination Act, section 18C ought to be repealed outright. It is an excessive, unnecessary and counterproductive restriction on Australians' liberties. Alternative proposals for reform would not solve the problems with the legislation that have been identified in particular by recent court cases involving

24 Dean Alston, 'Cartoons are risky business', *The West Australian*, 6 November 2016, https://thewest.com.au/news/wa/cartoons-are-risky-business-dean-alston-ng-ya-122268.

> section 18C. In our analysis, simply removing some of the words from the section—or worse, replacing those words with new words—would be ineffective or redundant, or would create even more uncertainty about the scope of the law.[25]

2.29 A number of submitters, particularly journalists and lawyers employed to represent them, argued that section 18C had a 'chilling effect' in relation to freedom of speech.[26] For example, Dr Augusto Zimmerman identified that, as an academic, he has come across people 'who are intimidated and afraid of expressing their opinions', and further:

> …even on radio interviews that I have given I have asked the person conducting the interview if he feels comfortable to say certain things. People are getting really worried these days about making comments.[27]

2.30 Dr Sev Ozdowski, a former Australian Human Rights Commissioner and also Disability Discrimination Commissioner, stated that:

> With any act likely to offend, insult, humiliate or intimidate a person because of race, I believe the bar is high and we need to look at it. In particular, I believe this because I have seen the chilling effects of that legislation on the discussion of any cultural characteristics. Questions about cultural practices are risky to ask. It also builds resentment and distrust. It creates a 'them and us' attitude. In my view, it may put multiculturalism at risk. It also creates enormous repercussions that damage the respondent to a complaint, regardless of whether the allegation is proved or not. Being accused of racism is a similar thing to being accused of sexual violence. It is having a very negative impact on people who are accused of racism.[28]

2.31 Mr Justin Quill, a lawyer for Nationwide News, stated that section 18C is 'self-censoring':

> …there is a hidden cost of the legislation, and I think I have an unusual insight into it. The committee may not have heard of it. Every week, I …[review] hundreds of articles—newspaper articles, radio editorials and TV reports; it is literally hundreds a week. Every single day, 18C is having an impact. It is not the sort of impact that we read about in the Bill Leak case, the Andrew Bolt case or the [Queensland University of Technology (QUT)] case—the headline-grabbing cases. Those are three big, headline-grabbing cases where everyone can see a real impact. They are very

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25 Simon Breheny, Director of Policy, the Institute of Public Affairs, *Committee Hansard*, 31 January 2017, 27.

26 Mr Justin Quill, Nationwide News, *Committee Hansard*, 10 February 2017, 36; Dr Augusto Zimmerman, *Committee Hansard*, 3 February 2017, 26.

27 Dr Augusto Zimmerman, *Committee Hansard*, 3 February 2017, 26.

28 Dr Sev Ozdowski, *Committee Hansard*, 1 February 2017, 21.

> serious cases with real impacts and are really important. But there is a hidden thing that happens every day in Australia. It is a result of 18C and the very low bar that 18C has.[29]

2.32 Mr Bill Leak, an editorial cartoonist at *The Australian* newspaper who was subject to an 18C complaint, shared his concerns about the impact of his case on other cartoonists:

> I think that that hypothetical person working for some magazine that might be online - goodness knows - or whatever but does not have the backing of an organisation like News Corp is going to look at what happened to me and say: 'That bloke really got into a lot of trouble for telling the truth. I better not tell it myself.' If that is not a dampener on freedom of expression and freedom of speech, I do not know what is. To me, I think it is extremely sinister.[30]

2.33 Mr Paul Zanetti, also a cartoonist subject to an 18C complaint, shared this concern:

> I am more exposed than Bill because I am an independent syndicator. It is a concern because it is designed to stifle freedom of thought, freedom of speech, freedom of expression. It is a form of thought police, where if you dare to step outside certain boundaries we have this law where anybody is entitled to come after you and drag you in front of a government institution. It could send you broke. You could lose your house—the ramifications of the rest of it where you are held personally liable. There is no protection for anybody who wants to exercise real freedom of speech or expression.[31]

2.34 When asked to respond to how the chilling effect impacts the work of a media organisation, Ms Sarah Waladan, Head of Legal and Regulatory Affairs from Free TV Australia said:

> …media organisations are likely to advise against publication of material where 18C is likely to be an issue. The implication of that is obviously a moderation of reporting and a stifling of commentary around the social issues of the day, which can then lead to a distorted view of the issue being portrayed.[32]

2.35 In contrast, the committee also received evidence from Professors Katharine Gelber and Luke McNamara who had examined ten years of section 18C complaints from 2000–2010 which questioned whether section 18C had a 'chilling effect' on freedom of expression although neither of them had been subject to a complaint

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29 Mr Justin Quill, Nationwide News, *Committee Hansard*, 10 February 2017, 36.

30 Mr Bill Leak, *Committee Hansard*, 10 February 2017, 36.

31 Paul Zanetti, *Committee Hansard*, 10 February 2017, 85.

32 Ms Sarah Waladan, Free TV Australia, *Committee Hansard*, 2 February 2017, 54.

under the RDA.[33] In addition, other submitters argued that they found that forms of racially discriminatory speech themselves had a 'chilling' or silencing effect in relation to their exercise of freedom of expression and in dissuading people affected from pursuing legal remedies (discussed further below at [2.83]).[34]

2.36 Another basis for arguing that Part IIA should be repealed that was explored before the committee is that criminal and other laws provided sufficient protection in relation to serious forms of threating or discriminatory speech.[35] For example, Mr Graham Young, Executive Director, Australian Institute for Progress argued that words which fall short of a threat of physical injury or violence should not be actionable, and that there is sufficient protection in existing laws, such as defamation law: [36]

> Intimidation in various forms beyond a certain point certainly ought to be illegal, but it is illegal in a lot of cases, like harassment in various places and forms. It should not be in an act like this for the use of a particular number of subgroups. In fact, we would argue it is adequately covered in other legislation. If it is not adequately covered in other legislation then you should look at that other legislation. You do not need to have it in here.[37]

2.37 However, the committee was given examples that demonstrated that these laws do not address some key forms of racial hatred, do not necessarily provide sufficient remedies, were not well targeted to address discrimination and would not be comprehensive.[38] For example, it was noted that while all other states and territories have some form of anti-vilification laws, the Northern Territory (NT) does not and therefore any complaints of racial vilification in the NT must be brought under section 18C of the RDA.[39] Additionally, the committee received evidence that

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33 Professors Luke McNamara and Katharine Gelber, S*ubmission 2*, 3.

34 See, for example: Dr Andre Oboler, Victorian Multicultural Faith and Community Coalition, *Committee Hansard*, 31 January 2017, 4; Ms Adrianne Walters, Human Rights Law Centre, *Committee Hansard*, 31 January 2017, 20.

35 See, for example: Institute of Public Affairs, *Submission 58*, 27; Mr Graham Young, Executive Director, Australian Institute for Progress, *Committee Hansard*, 10 February 2017, 15.

36 Mr Graham Young, Executive Director, Australian Institute for Progress, *Committee Hansard*, 10 February 2017, 15.

37 Mr Graham Young, Executive Director, Australian Institute for Progress, *Committee Hansard*, 10 February 2017, 20.

38 See, for example: Aboriginal Legal Service, *Submission 59*, 14; Ms Karly Warner, Executive Officer, National Aboriginal and Torres Strait Islander Legal Services, *Committee Hansard*, 31 January 2017, 12; Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, 1 February 2017, 61; Australian Council of Human Rights Authorities, *Submission 149,* 19.

39 Ms Sally Sievers, Anti-Discrimination Commissioner, Northern Territory Anti-Discrimination Commission, *Committee Hansard*, 20 February 2017, 3.

Federal anti-discrimination laws were needed because state and territory anti-discrimination laws did not cover conduct by the Commonwealth or Commonwealth officers. For example, Ms Robin Banks, Tasmanian Anti-Discrimination Commissioner, explained that a Commonwealth officer engaging in racially discriminatory conduct in Tasmania would not be coved by the Tasmanian legislation:

> My act does not cover everything that happens in Tasmania; it covers everything but actions of the Commonwealth. And that can be a staff member of part of the Public Service that exists—a Commonwealth public sector employee in Tasmania. I guess that the most important thing is state and territory laws do not cover Commonwealth entities. If the Commonwealth were to engage, either as an entity or through one of its employees, in conduct that potentially breached the act, I cannot deal with it; I have to reject that on the basis that it is out of my jurisdiction.[40]

2.38 Advocates of repealing section 18C argued that its removal would better support social cohesion and combat racism because it would be out in the open and able to be addressed and responded to, both by victims of racism and their advocates and allies.[41] However, other submitters to the inquiry argued against this proposition on the basis that it assumed an 'equal playing field' and that people who experience racism would not feel marginalised or unsafe in expressing their views and would have equal access to the media.[42]

2.39 Councillor Jacinta Price indicated to the committee that while she did not agree with the inclusion of the terms 'offend', 'insult' and 'humiliate' in section 18C she still considered that there should be protection against 'hate speech':

> I do not think that any racial abuse is acceptable. Regarding the words 'offend', 'humiliate' and 'insult', offence is something that people feel, so, again, it is about who determines that level of offence. I think that, absolutely, there should be no exceptions for hate speech, which can obviously lead to violence. I do not agree with that whatsoever.[43]

The case for change – amending sections 18C and 18D

2.40 The committee received evidence from many submitters that amendments to Part IIA of the RDA (rather than repeal) would assist to address concerns regarding

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40 Ms Robin Banks, Anti-Discrimination Commissioner, Equal Opportunity Tasmania, *Committee Hansard*, 30 January 2017, 3.

41 See, for example: Institute of Public Affairs, *Submission 58*, 27.

42 See, for example: Mr Romlie Mokak, Chief Executive Officer, Lowitja Institute, *Committee Hansard*, 31 January 2017, 19; Mr George Vardas, Secretary, Australian Hellenic Council of NSW, *Committee Hansard*, 17 February 2017 15; Dr Andre Oboler, Victorian Multicultural Faith and Community Coalition, *Committee Hansard*, 31 January 2017, 5.

43 Councillor Jacinta Price, *Committee Hansard*, 20 February 2017, 27.

freedom of expression while continuing to provide protection against serious forms of discriminatory speech.[44]

2.41 While the courts have interpreted section 18C of the RDA as not covering conduct that is merely 'offensive' or 'insulting' but only conduct that has 'profound and serious effects' on the basis of race, the committee received substantial evidence that there was confusion about the meaning and scope of section 18C of the RDA.[45]

2.42 This mirrored some of the arguments raised by the Australian Law Reform Commission (ALRC) in its *Final Report on Traditional Rights and Freedoms-Encroachments by Commonwealth Laws* (Freedoms Inquiry) referred to in the inquiry's terms of reference.[46] This report stated 'there are arguments that [section] 18C lacks sufficient precision and clarity, and unjustifiably interferes with freedom of speech by extending to speech that is reasonably likely to "offend"'.[47] Professor Rosalind Croucher, President of the ALRC, clarified, however, that these comments were restricted to the words of section 18C on the face of the legislation rather than how those words had been interpreted by the courts:

> The comments are about the wording of the provision, not as it has been interpreted in the courts. The focus of our analysis is the requirement under the international convention in relation to protection of freedom of speech in the International Covenant on Civil and Political Rights, particularly the provision which accompanies that. But the essence of the right to freedom of expression is in article 19 of that particular convention—to which Australia, of course, is a signatory. But in article 20 of the convention, there is a limitation that is allowed in relation to freedom of expression and so the racial discrimination legislation is a limitation on freedom of expression in the way that it is described in those terms.[48]

2.43 Professor Sarah Joseph, of the Castan Centre for Human Rights Law, argued that the judicial interpretation of section 18C may save it from 'crossing the line' with

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44 See, for example: Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance, *Committee Hansard,* 17 February 2017, 6.

45 See, for example: Mr Martyn Iles, Legal Counsel, Australian Christian Lobby, *Committee Hansard*, 40; Mr Justin Quill, Nationwide News, *Committee Hansard*, 10 February 2017, 36, 38; Australian Christian Lobby, *Submission 114*, 5; Mr Brett Savill, Chief Executive Officer, Free TV Australia, *Committee Hansard*, 2 February 2017, 52.

46 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachment by Commonwealth Laws*, Final Report, December 2015.

47 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachment by Commonwealth Laws*, Final Report, December 2015, 119.

48 Professor Rosalind Croucher, President, Australian Law Reform Commission *Committee Hansard*, 2 February 2017, 2.

respect to interference with the right to freedom of expression, but that a layperson is not necessarily going to understand this:

> The fact is that the courts have given a narrow interpretation to the relevant words—for me, 'offend' and 'insult'—and that may in fact save the provision from crossing the line, as it were, under international human rights law…
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> 'Offend' and 'insult'—they have not actually been interpreted as 'offend' in the everyday way that we think of 'offend', or 'insult' in the everyday way that we think of 'insult'…But you are not necessarily going to know that as a lay person looking at the law.[49]

2.44 In this context, the committee received evidence that there was a rule of law argument that laws should be clear and accessible on their face.[50] The significant gap between the judicial interpretation of section 18C of the RDA and the ordinary meaning of the words has given rise to serious misunderstanding about the scope of the law and, for some, worrying uncertainty about its application. Mr Martyn Iles, Legal Counsel, Australian Christian Lobby stated in evidence to the committee that 'It is a rule of law question. It is unknown which issues can be spoken or cannot be spoken.'[51]

2.45 Professor Adrienne Stone, Director, Centre for Comparative Constitutional Studies, University of Melbourne also argued in favour of codifying the case law on section 18C of the RDA based on rule of law concerns:

> …there is a case to amend section 18C so that its actual terms reflect better what is its current legal effect. I think the fact that the section invites misunderstanding is actually a problem from a rule of law perspective. It is better if our laws more closely resemble on their first reading their actual operation…I think there is at least a significant gap at the moment between the wording of section 18C as it might appear to a lay reader and the actual effect of section 18C that I think this committee should give serious consideration to…codifying the judicial interpretation of section 18C to the section. It might seem unimportant or symbolic, but I do actually think there are very significant rule-of-law values generally when the law is not readily understandable by a person who reads it, and I think there might be particular problems when a law governing speech has that quality, because if you do not understand really what are the limits of your capacity speak there is a risk of self-censorship, and I think that is

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49 Professor Sarah Joseph, Director, Castan Centre for Human Rights Law, *Committee Hansard*, 30 January 2017, 13-14.

50 Mr Martyn Iles, Legal Counsel, Australian Christian Lobby, *Committee Hansard*, 30 January 2017, 40.

51 Mr Martyn Iles, Legal Counsel, Australian Christian Lobby, *Committee Hansard*, 30 January 2017, 40.

> something that all of us interested in robust debate in a vibrant democracy would want to protect.[52]

2.46 A number of submitters identified ways to address the difficulties and confusion arising from this situation, including proposals for legislative amendment that seek to retain the effect of the law, while making its scope apparent from a plain reading of the text. For example, the Gilbert + Tobin Centre for Public Law suggests possible amendments to address misconceptions about Part IIA of the RDA which may, in its view, act to undermine the objectives of Part IIA of the RDA and lead to a chilling effect.[53] Noting that section 18C had been interpreted as only applying to more serious forms of conduct, the Gilbert + Tobin Centre for Public Law proposed one option for codifying the judicial interpretation:

> …section 18C(1)(a)…might be amended to reflect the judicial interpretation of the current language, which would read:
>
> > the act is reasonably likely, in all the circumstances, seriously to offend~~,~~ or insult, or humiliate or intimidate another person or a group of people; and[54]

2.47 The committee received a range of evidence in support of codifying the judicial interpretation of section 18C of the RDA in some form.[55] However, other submitters were of the view that such an amendment carried with it other risks and uncertainties, such as the potential for unintended consequences and the need for fresh interpretation to understand the precise scope of any new law.[56] Mr Peter

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52 Professor Adrienne Stone, Director, Centre for Comparative Constitutional Studies, University of Melbourne, *Committee Hansard*, 31 January 2017, 46.

53 Associate Professor Gabrielle Appleby, Professor Rosalind Dixon, Ms Gemma McKinnon, Associate Professor Sean Brennan (Gilbert + Tobin Centre of Public Law at UNSW), S*ubmission 107*, 2.

54 Associate Professor Gabrielle Appleby, Professor Rosalind Dixon, Ms Gemma McKinnon, Associate Professor Sean Brennan (Gilbert + Tobin Centre of Public Law at UNSW), S*ubmission 107*, 3. Recommended amendments underlined.

55 See, for example: Dr Yadu Singh, President, Federation of Indian Associations of NSW, *Committee Hansard*, 37; Professor Adrienne Stone, Director, Centre for Comparative Constitutional Studies, University of Melbourne, *Committee Hansard*, 31 January 2017, 46. See, also, Professor George Williams, *Committee Hansard*, 1 February 2017, 75; Professor Anne Twomey, *Committee Hansard*, 1 February 2017,76; Gilbert + Tobin Centre for Public Law, *Submission 107*, 2.

56 See, for example: Mr Hugh de Kretser, Executive Director, Human Rights Law Centre, *Committee Hansard*, 31 January 2017, 23; Ms Stephanie Cousins, Advocacy and External Affairs Manager, Amnesty International Australia, *Committee Hansard*, 1 February 2017, 32; Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, 1 February 2017, 64; Mr Bill Swannie, Chair, Human Rights/Charter of Rights Committee, Law Institute of Victoria, *Committee Hansard*, 31 January 2017, 61.

Wertheim, Executive Director, Executive Council of Australian Jewry, outlined some of the risks associated with codification:

> …codification is usually used when there is an ambiguity or a gap in the law or some conflict in the judicial opinions. That is not the case with regard to [P]part IIA. The judicial decisions are remarkably consistent, so I do not see the need for codification. The other danger I see in proceeding down that path is that what may begin as an intention to codify existing case law does not actually get translated as such by the parliamentary drafts person [sic] and you end up with a de facto amendment with unintended consequences.[57]

2.48 Mr Hugh de Kretser, Executive Director, Human Rights Law Centre similarly noted that codification may lead to unintended consequences:

> The cons are that when you amend a piece of legislation you risk changing the interpretation of that legislation, and courts may change their interpretation by raising the threshold higher. They may not do that, but that is a risk. The bigger risk, in my mind, is that the debate around section 18C over the past few years is so highly charged and politicised that any perceived weakening—we may call it a codification, but ethnic communities will see that as a weakening—of the law will also be seen by those who are against 18C as enabling the kind of racial vilification that we try to prohibit through this law. So, on balance, that is why we have come to the conclusion that, while there are arguments in favour of codification and clarifying the meaning as it has been sensibly interpreted by the courts, overall it is better at this stage not to amend 18C.[58]

2.49 The Attorney-General's Department raised further potential considerations in relation to codification:

> …on the one hand the committee has had evidence and has formed some views as to whether the existing provisions are well understood by the community, on the other hand they are well understood judicially. We do have very clear jurisprudence on what they mean taken together as a package. As a matter of generality, in my experience any time you change a judicially well understood set of terms, you will create an incentive for people to then relitigate those matters because no matter how well the drafters do their job, there will always be question as to have they managed, in trying to change words or codify or whatever, to actually still

57 Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, 1 February 2017, 64.

58 Mr Hugh de Kretser, Executive Director, Human Rights Law Centre, *Committee Hansard*, 31 January 2017, 23.

> capture the right intention? I think you would find more litigation and uncertainty as to what any new terms actually meant.[59]

2.50 Other suggestions for legislative amendment sought both to clarify the face of the legislation and somewhat alter the current scope of the law. For example, some submitters to the committee suggested that the words 'offend' and 'insult' in section 18C be replaced with the word 'vilify'.[60] The media section of the Media, Entertainment Arts Alliance, an organisation representing journalists, argued that such an amendment would 'elevate the threshold' and strike a balance between protecting freedom of speech while making 'hate speech' unlawful:

> The position supported by our media section members, following a period of careful consideration, is to replace the words 'offend' and 'insult' with the word 'vilify'…elevating the threshold for enlivening the provision. …section 18D we do not believe requires any amendment.
>
> …every day vigorous journalism provokes. At times, it can offend or insult. That is the nature of public debate. But, because vigorous journalism is provocative, or because it can offend or insult at the time, that does not mean it intends to vilify. If such journalism does intend to vilify on the particular basis of race, then it deserves to be condemned, particularly as it is outside what is considered ethical journalism.
>
> …we believe that a balance needs to be struck between making hate speech unlawful, while protecting and preserving freedom of speech.[61]

2.51 This approach is consistent with the proposal by the NSW Council for Civil Liberties (NSW CCL):

> NSWCCL recommends amending s 18C(1)(a) by repealing the words 'to offend', and possibly to 'insult', and replacing them with conduct of a more demanding standard.
>
> Specifically, 'vilify' could be used as a substitute for 'offend' and/or 'insult'. To vilify is to defame or to traduce, and it incorporates the notion of inciting hatred or contempt. It would also coincide with both the original intention and the public purposes the RDA.[62]

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59 Mr Iain Anderson, Deputy Secretary, Attorney-General's Department, *Committee Hansard*, 17 February 2017, 20-21.

60 Professor Sarah Joseph, Castan Centre for Human Rights Law, *Committee Hansard*, 14; Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance, *Committee Hansard,* 17 February 2016, 6; Dr Murray Wesson, Adjunct Professor Holly Cullen, Ms Fiona McGaughey, *Submission 133*, 6; Caxton Legal Centre and Townsville Community Legal Service*, Submission 23*, 3

61 Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance, *Committee Hansard,* 17 February 2017, 6.

62 NSW Council for Civil Liberties, *Submission 146*, 10.

2.52 It is also supported by the NSW Young Liberal Movement in the following terms:

> The NSW Young Liberals support changes to Section 18C and [section] 18D of the Racial Discrimination Act as outlined in the Governments Exposure Draft. Specifically we support the removal of the terms 'offend, insult' and the inclusion of the term 'vilify'.[63]

2.53 While arguing that sections 18C and 18D of the RDA in its current form is compatible with human rights, Dr Murray Wesson, Adjunct Professor Holly Cullen and Ms Fiona McGaughey also agreed that there is a case for replacing 'offend' and 'insult' with 'vilify' to reflect the judicial interpretation of the law:

> There is a case for amending s 18C so that its text is brought in line with its actual operation in the Federal Court e.g. by substituting the word 'vilify' for 'offend and 'insult.' Furthermore, given the controversy surrounding s 18C this would clarify the meaning of the provision in the public mind. It would also be a minor amendment would allow s 18C to continue to perform its important function in limiting hateful acts in Australia's multicultural society.[64]

2.54 This submission also indicated that such an amendment would be compatible with international human rights obligations.[65]

2.55 Similarly, Professor Sarah Joseph gave evidence to the committee that, while she would want to hear evidence from the groups the amendments are most likely to affect, speaking 'purely as a lawyer' she would 'probably replace "offend" and "insult" with another word such as "vilify"' and 'keep "intimidate" and "humiliate"' to strengthen the scope afforded to freedom of expression on the face of the legislation.[66] Professor Joseph also argued that this would be compatible with human rights obligations.

2.56 As can be seen from the above, the proposal to make such a change generated considerable support, which gives rise to some technical considerations including whether replacing 'offend' and 'insult' with 'vilify' would raise the bar with

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63 NSW Young Liberal Movement, S*ubmission 22*, 3.

64 Dr Murray Wesson, Adjunct Professor Holly Cullen and Ms Fiona McGaughey, S*ubmission 133*, 16.

65 Dr Murray Wesson, Adjunct Professor Holly Cullen and Ms Fiona McGaughey, S*ubmission 133*, 16.

66 Professor Sarah Joseph, Castan Centre for Human Rights Law, *Committee Hansard*, 30 January 2017, 14.

respect to conduct caught under section 18C and whether it would actually clarify the terms of the provision.[67]

2.57 For example, The Gilbert + Tobin Centre for Public Law suggested using an alternative to 'vilify' on the basis that it is a technical term and may be less understood by the community, instead it suggested the legislation be amended to say that:

> …the act is reasonably likely, in all the circumstances, to ~~offend, insult~~ demean, degrade, humiliate or intimidate another person or group of people, or to promote hatred; and[68]

2.58 The Caxton Legal Centre and Townsville Community Legal Service suggested replacing 'offend' and 'insult' with vilify, but noted that it should have an ordinary rather than technical meaning:

> The replacement of offend and insult with vilify is a sensible means of adjusting the threshold of offending conduct to the standard settled at common law, that is, the 'profound and serious' test.
>
> We are concerned, however, that there may be unintended consequences flowing from such an amendment unless it made very clear that *vilify* takes its common meaning and not (or not only) the concept of vilification as is found in other legislation including the *Anti-Discrimination Act* 1991 (Qld).[69]

2.59 Mr Gregory McIntyre SC, President, Western Australian Branch, International Commission of Jurists expressed concern with removing the term 'offend' from section 18C on the basis that it may have an impact on cases that, in his view, were properly decided as involving racial vilification:

> …to remove the word 'offend' will have an impact on some of the cases which I have just mentioned. In my view, for cases such as the *Clarke v Nationwide News* case, and also a case which I was not involved in but which is mentioned in the report, where terms such as 'nigger', 'black mole' and 'black bastard' were used, do fit within the concept of 'offence'

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67 Professor Sarah Joseph, Castan Centre for Human Rights Law, *Committee Hansard*, 30 January 2017, 19; Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance, *Committee Hansard,* 17 February 2017, 6; Dr Murray Wesson, *Committee Hansard*, 3 February 2017, 30.

68 Associate Professor Gabrielle Appleby, Professor Rosalind Dixon, Ms Gemma McKinnon, Associate Professor Sean Brennan (Gilbert + Tobin Centre of Public Law at UNSW), S*ubmission 107*, 3. Recommended amendments underlined.

69 Caxton Legal Centre and Townsville Community Legal Service, S*ubmission 23*, 3.

> but would not fit within any of the other concepts which are in the present version of the legislation.[70]

2.60 A number of advocates of change, however, noted that there would likely be no meaningful legal effect of replacing the words 'offend' and 'insult' with 'vilify' as these words have interchangeable meaning. They argued that if the purpose of reform is to broaden the scope of free speech, this proposal should not be pursued.[71]

2.61 An alternative suggestion was made by Mr Joshua Forrester, Dr Augusto Zimmermann and Ms Lorraine Finlay to replace sections 18C and 18D with a criminal offence of inciting racial enmity. They suggest:

> …a more narrowly focused law that makes intent to incite racial enmity a crime. Enmity is defined as hatred or contempt creating an imminent danger of physical harm to persons or property.[72]

2.62 The proposal is explained in more detail as follows:

> The law prohibits incitement to enmity. We have used 'enmity' deliberately, as it connotes the severity of the conduct required to breach the law. Portraying a group as an enemy suggests one wants them destroyed. We have defined enmity to mean hatred creating an imminent danger of violence. This means that hatred and contempt that does not create an imminent danger of violence isn't prohibited. However, given the importance of freedom of expression, and the risk that an overbroad law may be unjustly applied, we have erred on the side of freedom.[73]

2.63 A further suggestion was submitted by Mr Tim Wilson, the Federal Liberal Member for Goldstein and former Human Rights Commissioner. Mr Wilson suggests that section 18C of the RDA is currently flawed and argues that:

> The correct test is not 'offend, insult or humiliate'. The correct test is harassment, which includes high-level, or serious, humiliation and denigration causing intimidation. Harassment does not make challenging ideas unlawful. Harassment stops one person using their freedom to diminish the worth of another alongside their own ability to exercise their freedom.[74]

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70 Mr Gregory McIntyre SC, President, Western Australian Branch, International Commission of Jurists, *Committee Hansard*, 3 February 2017, 1.

71 See Mr Simon Breheny, Director of Policy, IPA, *Committee Hansard*, 31 January 2017, 30; Professor James Allan, *Committee Hansard*, 2 February 2017, 41-42; Mr Justin Quill, Nationwide News, *Committee Hansard*, 10 February 2017, 40.

72 Mr Joshua Forrester, Dr Augusto Zimmermann and Ms Lorraine Finlay, *Submission 181*, 3.

73 Mr Joshua Forrester, Dr Augusto Zimmermann and Ms Lorraine Finlay, *Submission 181*, 85-86, see also 83-97 generally.

74 Mr Tim Wilson MP, S*ubmission 203*, 9.

2.64 The committee received limited evidence from other submitters about this specific proposal.[75] However, the committee notes more generally that the 1991 *Report of the National Inquiry into Racist Violence in Australia* specifically recommended that the RDA be amended to prohibit 'racist harassment'.[76] It noted that:

> It is desirable that there be a clear statement of the unlawful-ness of conduct which is so abusive, threatening or intimidatory as to constitute harassment on the ground of race, colour, descent or national or ethnic origin. It is also desirable that individuals who have been the victims of such words or conduct be given a clear civil remedy under the Racial Discrimination Act in the same terms as those subjected to other forms of racial discrimination covered by the Act.[77]

2.65 A submission from the Australian Lawyers for Human Rights cites examples of racial harassment laws from comparable jurisdictions and notes that:

> …although Australia has no comparable federal racial harassment law, s.18C of the RDA currently operates so as to capture some of the forms of racial harassment discussed above because it captures acts which 'humiliate' and 'insult'.[78]

2.66 In a similar vein, while stating that it was of 'profound importance that Australia has national laws that provide protection not only against anti-Semitic speech but other forms of hate speech', Justice Ronald Sackville proposed amending section 18C to ensure that the right to freedom of expression is 'not unduly curtailed' by:

> …substituting for the current language ("to offend, insult, humiliate or intimidate") a more demanding standard which could be "to degrade, intimidate or incite hatred or contempt".[79]

2.67 This proposal was supported by some other submitters, who argued that it would provide a better balance with freedom of expression.[80]

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75 Concerns about the approach were identified by Mr Joshua Forrester, Dr Augusto Zimmermann and Ms Lorraine Finlay, *Submission 181*, 83.

76 HREOC, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, March 1991, 298-99, 301-302.

77 HREOC, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, March 1991, 298-99.

78 Australian Lawyers for Human Rights, *Submission 5*, 13.

79 Justice Ronald Sackville, *Opening statement,* 2 (tabled 1 February 2017).

80 Professor George Williams, *Committee Hansard*, 1 February 2017, 75; Professor Anne Twomey, *Committee Hansard*, 1 February 2017, 76.

2.68 Suggested amendments were also made in relation to other elements of section 18C. Some submitters argued that the current 'objective test' applied in section 18C, which requires an assessment of the likely effect of the conduct on a reasonable hypothetical member of a particular racial or ethnic group or sub-group, in effect introduces subjective elements.[81] As Justice Sackville explained in evidence to the committee:

> …the subjective element in 18C introduces the opportunity for evidence from people or groups that have been affected and in practice the evidences to subjective reactions to the hate speech has been of very great importance in determining whether there has been a contravention of 18C and, indeed, whether the exemption in 18D applies.[82]

2.69 Ms Sarah Waladan, Head of Legal and Regulatory Affairs from Free TV Australia shared their experience with the committee:

> It is extremely difficult to provide legal advice on the legislation because of the subjective test, because it is impossible to know whether or not someone will be offended. That in turn means that media organisations are likely to advise against publication of material where 18C is likely to be an issue…[83]

2.70 Justice Sackville proposed that section 18C 'should incorporate an objective test for determining whether the hate speech is likely to have the prohibited effect, thus requiring the courts to have reference to the standards of a reasonable member of the community at large.'[84] In evidence to the committee Justice Sackville explained how he thought this proposed test would operate:

> I do not think that a test that focuses upon what a reasonable member of the community would think requires you to consider how would that reasonable member of the community react to the particular slight. The test would be: how would a reasonable member of the community view this particular attack on this particular minority group, having regard to the characteristics of that minority group and the nature of the speech or even actions that are directed towards that group? I think that distinction is actually quite important.
>
> I do not think that there is as much difficulty as many people consider in interposing that kind of objective test. What it does is to move away from regarding the subjective impact upon the group as more or less

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81 Justice Ronald Sackville AO, *Committee Hansard*, 1 February 2017, 40; Professor George Williams, *Committee Hansard*, 1 February 2017, 75; Professor Anne Twomey, *Committee Hansard*, 1 February 2017, 76.

82 Justice Ronald Sackville AO, *Committee Hansard*, 1 February 2017, 40.

83 Ms Sarah Waladan, Head of Legal and Regulatory Affairs, Free TV Australia, *Committee Hansard*, 2 February 2017, 54.

84 Justice Ronald Sackville, *Opening statement*, 2, (tabled 1 February 2017).

> determinative of the outcome at least where the subjective impact can be regarded as serious or some other adjective being satisfied.[85]

2.71 A number of submitters supported this proposal.[86] However, others considered that the current test is objective, only narrower in scope than a general 'reasonable person' test. Proponents of the current test argued that this was appropriate given the type of harm the provision is aimed at addressing, which 'accrues to people by virtue of their membership of a group'.[87] It was also argued that a general community standard test could risk importing 'prevailing prejudice' in the general community into the test:

> …a general community standard test might inadvertently import prevailing prejudices in the community into the test so that one of the protective functions of 18C would be abrogated. One of those protective functions is to protect vulnerable and, in particular, unpopular minorities. So if there is prevailing prejudice against a minority community which happens at the time to be unpopular—and many of our communities that I mentioned earlier have been, at various stages of Australian history, in that category—then there is a danger that the application of a more general community standard test will undermine the basic protective function of the legislation.[88]

2.72 Some submitters argued that while section 18D is intended to establish a foundation for defences, or 'exemptions' in particular circumstances for action that would otherwise constitute a breach of section 18C, they provide insufficient or unclear protection for freedom of expression. For example, Mr Justin Quill, a lawyer for Nationwide News, explained that the defences under section 18D are only available once the person complained about proves that they apply, such that:

> The onus shifts to you, and you have to justify why it is that you should be entitled to say this. That reverse onus of free speech does not sit well in my view of a democratic society, and it ought not to.[89]

2.73 Some submitters to the inquiry noted that while 'fair comment' was a defence to some conduct under section 18C of the RDA, 'truth' was not specifically a

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85 Justice Ronald Sackville AO, *Committee Hansard*, 1 February 2017, 41.

86 Professor George Williams, *Committee Hansard*, 1 February 2017, 76; Professor Anne Twomey, *Committee Hansard*, 1 February 2017, 76.

87 Professor Adrienne Stone, Director, Centre for Comparative Constitutional Studies, University of Melbourne, *Committee Hansard*, 31 January 2017, 48.

88 Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, 1 February 2017, 63-64.

89 Mr Justin Quill, Nationwide News, *Committee Hansard*, 10 February 2017, 36.

separate defence.[90] Mr Joshua Forrester argued in evidence to the committee that 'truth' should be included as an additional defence alongside existing exemptions in section 18D.[91] By contrast, the Attorney-General's Department told the committee that there may be some public policy reasons in the context of anti-vilification laws not to include a truth defence.[92] Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, cautioned that 'if you make truth a prerequisite for a defence under section 18D, you would be setting the bar impossibly high for the respondent.'[93]

2.74 While not seeking to alter the current content of the law in this respect, the Gilbert + Tobin Centre for Public Law proposed an amendment that would merge the provisions of sections 18C and 18D of the RDA into a single provision. This would have the effect of emphasising the 'relationship between the *protections* in s 18C and the "*exemptions*" in s 18D'.[94]

Box 2.2: Studies in relation to public views about section 18C

During the course of the inquiry, the committee was presented with results from two contrasting studies in relation to public support for changes to section 18C of the RDA.

The Institute of Public Affairs commissioned a study by Galaxy Online Omnibus on 11 December 2016, the results of which were tabled at the public hearing in Melbourne on 31 January 2017. As part of the study, a sample of 1,000 Australians aged 18 years and older, distributed throughout Australia, were asked to respond to two questions.

First, participants were asked how important freedom of speech was to them, and were asked to choose one of the following five responses: very important, important, unimportant, very unimportant, and don't know. The results indicated that 95% of Australians surveyed said that freedom of speech is important to them, with 57%

90 Mr Martyn Iles, Legal Counsel, Australian Christian Lobby, *Committee Hansard*, 30 January 2017, 42; Mr Jonathan Holmes, *Committee Hansard*, 1 February 2017, 57; Mr Joshua Forrester, *Committee Hansard*, 3 February 2017, 23; Mr Laurence Maher, *Committee Hansard*, 3 February 2017, 46.

91 Mr Joshua Forrester, *Committee Hansard*, 3 February 2017, 23.

92 Mr Iain Anderson, Deputy Secretary, Attorney-General's Department, *Committee Hansard*, 17 February 2017, 20, 22-23.

93 Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, 1 February 2017, 63.

94 Associate Professor Gabrielle Appleby, Professor Rosalind Dixon, Ms Gemma McKinnon, Associate Professor Sean Brennan (Gilbert + Tobin Centre of Public Law at UNSW), *Submission 107*, 3 (emphasis in original). See also, Federation of Indian Associations, *Submission 112*, 5.

saying it is very important. Of the remaining, 3% said freedom of speech is not important to them, and 2% said they don't know.

Participants were also asked about their attitudes towards a proposal to change the RDA, such that it would no longer be unlawful to 'offend' or 'insult' someone because of their race or ethnicity, noting that the prohibition to 'humiliate' or 'intimidate' someone because of their race or ethnicity would be retained. The results showed that 48% of Australians surveyed approved of the proposal to change the RDA, while 36% disapproved and 16% said they don't know.

This mirrored results of an Essential Research poll conducted in November and September 2016.[95]

In contrast, a study by Essential Research, commissioned by the Cyber Racism and Community Resilience Research Project (CRaCR) during the week of 8 February 2017, found that a high percentage of respondents (over 90%) either strongly disagreed or disagreed with statements relating to whether people should be free to offend, insult, humiliate or intimidate someone on the basis of their race, culture or religion.

The sample varied across the four substantive questions in the study, ranging from 882 to 903 Australians aged 18 years and older, distributed throughout Australia. The statements people were asked were whether they disagreed, agreed, or neither agreed nor disagreed with the following:

- People should be free to offend someone on the basis of their race, culture or religion
- People should be free to insult someone on the basis of their race, culture or religion
- People should be free to humiliate someone on the basis of their race, culture or religion
- People should be free to intimidate someone on the basis of their race, culture or religion

Sources: Document tabled at a public hearing in Melbourne on 31 January 2017 by the Institute of Public Affairs – Galaxy research poll, 8; *Document provided as additional information following public hearing in Adelaide on 2 February 2017 by the Cyber Racism and Community Resilience Research Project – Reporting Survey.*

95 Essential Media Communications, *Essential Report – Racial Discrimination Act* (November 2016) at http://www.essentialvision.com.au/racial-discrimination-act-2; *Essential Report – Racial Discrimination Act* (September 2016) at http://www.essentialvision.com.au/racial-discrimination-act.

The case for retaining the existing protections in sections 18C and 18D

2.75 The committee heard evidence from a range of community groups, multicultural and legal organisations and social researchers that Part IIA of the RDA is viewed as being an important protection against forms of racially discriminatory speech and racism in Australia.[96] For example, Dr Colin Rubenstein, Executive Director, Australia/Israel and Jewish Affairs Council explained in evidence to the committee:

> The availability of legal redress against extreme or pervasive racial vilification, we would argue, is essential to maintaining the right of Australians to live their lives free from harassment, from psychological intimidation, from the hurt, anger, anxiety and loss of self-esteem which comes with the reality of bigotry and racism that many Australians still experience. We are probably the most tolerant and multicultural society on earth but, nonetheless, we can do better, and there are those elements that still exist in Australian society. In fact, this also helps to protect the right to freedom of expression for members of vulnerable groups who otherwise can be marginalised in a society even like ours.[97]

2.76 In its submission to the Committee the Executive Council of Australian Jewry outlined the importance of protections in section 18C and cautioned about gaps in the law which would be left without such protections:

> To offend or insult a person or group because of their "*race, colour or national or ethnic origin*", necessarily sends a message that such people, by virtue of who they are, and regardless of how they behave or what they believe, are not members of society in good standing. This cannot but vitiate the sense of belonging of members of the group and their sense of assurance and security as citizens. To offend or insult a person or group because of their "*race, colour or national or ethnic origin*" thus constitutes an assault upon their human dignity. In our view, this is the evil which the legislation was enacted to address.
>
> The case law (including the QUT case) therefore contradicts the contention that the use of the word "offend" in s.18C sets the bar too low. Further, the word "offend" or "offensive" appears in a variety of other laws, including the criminal law, yet the effect is not considered to be controversial. Indeed, the words "offend", "humiliate" and intimidate" in section 18C were copied from the definition of sexual harassment in sub-section 28A(1) of the *Sex Discrimination Act 1984 (Cth).* The word

96 See, for example: Professor Luke McNamara and Professor Katharine Gelber, *Submission 2*, 2-3; Ms Tasneem Chopra, Australian Muslim Women's Centre for Human Rights, *Committee Hansard*, 31 January 2017, 4; Dr Andre Oboler, Victorian Multicultural Faith and Community Coalition, *Committee Hansard*, 31 January 2017, 7.

97 Dr Colin Rubenstein, Executive Director, Australia/Israel and Jewish Affairs Council, *Committee Hansard*, 31 January 2017, 60.

> "offensive" is also used in sections 471.12 and 474.17 of the *Criminal Code 1995 (Cth)*, which make it unlawful to use a postal service or a carriage service to menace, harass or cause "offence". State criminal laws also proscribe certain types of "offensive" behaviour.
>
> The removal of any of the words, "offend" and "insult," would therefore leave severe gaps in the protections provided compared to those provided by the current legislation. For example, in certain cases there would be no remedy, as is available under the current legislation, for victims of gross negative stereotyping and serious instances or repetitions of written or verbal abuse on the basis of race or ethnicity…. This could deny the victims the protection currently offered by the legislation. From a public policy perspective, it would signal to the Australian public that the impact on the victims and the wider community is insufficient to warrant legal protection and that the conduct is now to be tolerated.[98]

2.77 Similarly, Ms Tasneem Chopra, chairperson of the Australian Muslim Women's Centre for Human Rights, argued that:

> It is important to recognise that the existing complaint mechanisms provide a recourse for individuals who are experiencing discrimination to feel that they are being heard. This promotes a stronger, more understanding nation, and that is our bottom line here. Retaining 18C as is assists individuals to participate in civic life and contribute confidently.
>
> There is a cost to society, which our organisation has seen, where discrimination leads to stress, isolation, health problems and social and economic downfall. This is a cost, both to the state and to individuals, that is born [sic] when we do not protect our citizens.[99]

2.78 Mr Ramdas Sankaran, President of the Ethnic Communities Council of WA Inc., noted that although members have not exercised their rights under section 18C of the RDA frequently, it was important to community members that such protections were there:

> What is more important is the symbolic value that legislation like this has, in terms of tempering racist speech and actions, to the extent it can. We know it would eliminate it and there is plenty of evidence on a daily basis in the media, on the internet and in the parliament itself. We know it is not going to go away but, at least, there is a moral exemplar, in terms of the standards we set as a society.[100]

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98 Executive Council of Australian Jewery, *Submission 11*, 7.

99 Ms Tasneem Chopra, Chairperson, Australian Muslim Women's Centre for Human Rights *Committee Hansard*, 31 January 2017, 4.

100 Mr Ramdas Sankaran, President, Ethnic Communities Council of WA Inc., *Committee Hansard*, 3 February 2017, 12

2.79 The committee heard extensive evidence from submitters regarding the serious impact of racism, including racially discriminatory speech, on the well-being of individuals.[101] For example, the Northern Territory Anti-Discrimination Commissioner, Ms Sally Sievers, explained the serious health and other impacts of racism including discriminatory speech:

> I want to briefly go through was what the actual impact of this experience of day-to-day racism is on people. We know that it is accepted that… [people] experience impacts on people's mental health and causes psychological distress, but we are also finding now from the health research that it moves into physical symptoms. The sorts of physical symptoms that have come up…are lower birth weights, cardiovascular disease and possible links to obesity and diabetes. Contrary to the old adage that you or I might have been brought up with—'sticks and stones will break your bones, but names will never hurt you'—the medical research is now strongly saying that this day-to-day experience of racism is making the groups it happens to sick. Last week on the phone, when I was taking an inquiry from an Aboriginal person who was telling a story about their experience of racism, that is how the phone call ended: 'This is making us sick.'[102]

2.80 Associate Professor Daphne Habibis, Deputy Director, Institute for the Study of Social Change, University of Tasmania explained the findings of a recent study that examined the impact of racism on Aboriginal people in Darwin:

> Almost three-quarters—84 per cent—of survey respondents agreed that the way white people behave makes them sick and tired of everything. One-fifth of respondents said it was always true that the way white people behave makes them sick and tired of everything.
>
> The atmosphere of racism and disregard also affect self-esteem. Forty-three per cent of survey respondents agreed that it was only rarely or never that the way that white people behave makes them feel good about themselves as an Aboriginal person. Only a fifth had a positive view of how the behaviour of white people makes them feel about themselves. It also affects self-efficacy. In the same set of questions we asked how the behaviour of white people affected their capacity to achieve their goals. Over a quarter responded that it made it difficult to achieve their goals.[103]

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101 Dr Andre Oboler, Victorian Multicultural Faith and Community Coalition, *Committee Hansard*, 31 January 2017, 7; Ms Karly Warner, Executive Officer, National Aboriginal and Torres Strait Islander Legal Services, *Committee Hansard*, 31 January 2017, 12; Refugee Council of Australia, *Submission 8*, 2.

102 Ms Sally Sievers, Anti-Discrimination Commissioner, Northern Territory Anti-Discrimination Commission, *Committee Hansard*, 20 February 2017, 2.

103 Associate Professor Daphne Habibis, Deputy Director, Institute for the Study of Social Change, University of Tasmania, *Committee Hansard*, 30 January 2017, 20.

2.81 Mr Romlie Mokak, Chief Executive Officer of the Lowitja Institute, explained research the Lowitja institute had conducted in Victoria about rates and experiences of racism for Aboriginal people:

> The experiences of racism survey 2010-2011 was undertaken here, surveying 755 Aboriginal Victorians aged 18 years and older living in two rural locations and two metropolitan locations…Ninety-seven per cent of those surveyed had experienced racism in the previous 12 months, and more than 70 per cent of respondents had experienced eight or more racist incidents in that period. The types of racism included: 92 per cent of those surveyed had been called racist names, teased, heard jokes and comments that relied on stereotypes about Aboriginal people; 85 per cent had been ignored, treated with suspicion or treated rudely because of their race; and 84 per cent—over four out of five surveyed—had been sworn at, verbally abused or subjected to offensive gestures because of their race.
>
> The survey presented results that link racism to health. Participants were assessed through a version of the Kessler-6 scale, a well established assessment tool which screens for psychological distress. High psychological distress is an indicator or increased risk of mental illness and, overall, it found that those who had higher incidences of racism were more greatly distressed. It is not a conclusion that anyone would not draw.[104]

2.82 Mr George Vellis from the Australian Hellenic Council spoke to the committee of the deep and lasting impact of racism on individuals and older community members in particular:

> …you could see with a lot of the elderly that, once I brought up racism, they were pretty much teary eyed, and you could feel the emotion in that room, and it was going back decades.
>
> What I mean by that is that racism is something that sticks with you for decades. It is not something that can heal within two to three weeks. It is not a bruise or a broken arm, for example. It is something, as you know, that makes a person feel inferior.[105]

2.83 The committee received evidence that experiences of racially discriminatory speech may have a 'chilling' or silencing effect in respect of the right to freedom of expression of those who experience such discrimination. Dr Andre Oboler, speaking about examples from the work of the Online Hate Prevention Institute, informed the committee that:

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104 Mr Romlie Mokak, Chief Executive Officer, Lowitja Institute, *Committee Hansard*, 31 January 2017, 14.

105 Mr George Vellis, Coordinator, Australian Hellenic Council NSW Inc, *Committee Hansard*, 17 February 2017, 15.

> The impact at the lowest level is that people do not feel safe having their views, expressing their views or speaking on social media. So we are actually seeing that racism and discrimination is removing people's freedom of speech. It is making some people unable to participate in the civic life of the country...[106]

2.84 Ms Penelope Taylor gave evidence to the committee that research by the Larrakia Nation Aboriginal Corporation indicated that changes to section 18C of the RDA was likely to negatively affect the freedom of speech of members of the Larrakia Nation community:

> The overwhelming evidence arising out of the recent Larrakia Nation research project indicates that, far from promoting freedom of speech, the removal of parts of section 18C is more likely to negatively affect the freedom of speech of many segments of our community, those very segments which often go unheard and unrepresented in public discourse, resulting in the exclusion of important information and perspectives from public discussion. These groups, including Aboriginal people, are in far greater need of having their freedom of speech supported and protected than those dominant racial groups whose freedom of speech a weakening of section 18C would theoretically benefit.[107]

2.85 These views contrast with the views of other submitters who considered that Part IIA of the RDA had a 'chilling effect' on their freedom of speech (discussed further above at [2.29] to [2.35]).[108]

2.86 The committee heard that the public debate about section 18C often fails to take into account the role played by section 18D of the RDA:

> An unfortunate feature of the public debate surrounding Pt IIA has been the making of the unqualified claim that s 18C makes it unlawful to 'offend or insult' a person on the grounds of their race. Such claims overlook the extensive defences provided by s 18D…the defences may be relied upon by artists, academics, journalists, public commentators — indeed, anyone who can show a 'genuine purpose in the public interest.' They thus qualify the operation of s 18C in contexts critical to public debate. In fact, provided a defence is available, it *is* entirely possible, and lawful, to engage in offensive, insulting and even humiliating and intimidating speech on the grounds of race.[109]

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106 Dr Andre Oboler, Victorian Multicultural Faith and Community Coalition, *Committee Hansard*, 31 January 2017, 5.

107 Ms Penelope Taylor, *Committee Hansard,* 20 February 2017, 35.

108 Mr Justin Quill, Nationwide News, *Committee Hansard*, 10 February 2017, 36; Dr Augusto Zimmerman, *Committee Hansard*, 3 February 2017, 26.

109 Professor Adrienne Stone, *Submission 137*, 7. (emphasis in original)

2.87 Similarly the Gilbert + Tobin Centre for Public Law noted the importance of discussing the law in the context of its judicial interpretation:

> It is our view and primary submission that the current statutory protections contained in ss 18C and 18D of the *Racial Discrimination Act 1975* (Cth), when read in the context of their judicial interpretation, provide an appropriately robust protection for vulnerable racial minority groups against hate speech while also providing appropriate exemptions for free and fair speech on race-related topics…. Some will have an *a priori* disagreement with our view on Part IIA because of the extremely high priority they attach to free speech. However, we also believe that in much of the recent public debate on this issue, a singular focus on the term 'offend' and/or 'insult' in s 18C, divorced from the statutory context (including s 18D) and from judicial interpretation, has fed an exaggerated perception amongst many about the impact that s 18C has on free speech.[110]

2.88 A number of submitters, opposed changes to weaken section 18C of the RDA on the basis that it would send a 'negative signal' that racial discrimination and racist speech was acceptable.[111] For example Professor Anne Twomey said:

> The reform of s 18C of the *Racial Discrimination Act* raises not only legal issues, but also cultural and social ones. In the best of all possible worlds, the abuse of people on the ground of their race, or indeed any other grounds, would be so socially unacceptable that no law on the subject would be necessary. However, because we do have such a law in relation to offensive racial communications, there is a considerable risk that if it is repealed or altered, this will have the effect of sending out a cultural message that such abuse is now acceptable and given legal sanction. The difficulty facing the Committee and the Parliament is essentially that even if s 18C warrants reform, the message sent out by undertaking the reform might itself result in damage that outweighs the benefits of the reform.[112]

2.89 A number of submissions were made on this point by multicultural organisations and human rights organisations. For example, Mr Romlie Mokak, expressed serious concerns about any changes to weaken section 18C of the RDA:

> The institute is gravely concerned, given high levels of prevalence of racism and its impact on health and wellbeing, that amendments to

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110 Associate Professor Gabrielle Appleby, Professor Rosalind Dixon, Ms Gemma McKinnon, Associate Professor Sean Brennan (Gilbert + Tobin Centre of Public Law at UNSW), *Submission 107*, 1-2.

111 See, for example: Dr Andre Oboler, Victorian Multicultural Faith and Community Coalition, *Committee Hansard*, 31 January 2017, 7; Mr Romlie Mokak, Chief Executive Officer, Lowitja Institute, *Committee Hansard*, 31 January 2017, 14; Ms Adrianne Walters, Human Rights Law Centre, *Committee Hansard*, 31 January 2017, 20.

112 Dr Anne Twomey, *Submission 10,* 1.

> section 18C of the Racial Discrimination Act would send a very negative signal that it is acceptable to offend, insult, humiliate or intimidate another person or group of people on the basis of race. Many arguments that have been put forward for the change centre on the right to have freedom of speech as if it is an absolute right. We note that section 18C of the RDA is not the only area of Australian law that limits freedom of expression, and the committee would be well aware of that.[113]

2.90 Similarly, in evidence to the committee Dr Andre Oboler from the Victorian Multicultural Faith and Community Coalition explained such concerns:

> …any change to the act, even changes that could improve it, carr[ies] a risk at this point in time. Any change would create an impression that there is some feedback from the parliament that the sort of hate we are seeing and the sorts of comments that have been saying that this law should be removed, which have been tied largely to those promoting that hate, have traction, and I think that is actually quite dangerous.[114]

2.91 Ms Adrianne Walters, Director of Legal Advocacy, Human Rights Law Centre stated that moves to weaken section 18C would send a 'dangerous message':

> Any move to weaken sections 18C or 18D of the Racial Discrimination Act will send a dangerous message, particularly at a time when we know that more people are reporting experiences of racial discrimination. Experiences of racism…are all too common for Aboriginal and Torres Strait Islander people and those from culturally and linguistically diverse communities. Racism is incredibly harmful. It has negative impacts on mental and physical health and a chilling effect on the freedom of expression and public participation of minority groups.[115]

2.92 The Very Reverend Dr Keith Joseph, Dean of the Christchurch Anglican Cathedral in Darwin, informed the committee at its public hearing in Darwin that, if section 18C is repealed, 'self-labelled white nationalists and alt-right', with whom he has come into contact through his ministry, 'will be able to say more outrageous things politically because there will be fewer safeguards'.[116]

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113 Mr Romlie Mokak, Chief Executive Officer, Lowitja Institute, *Committee Hansard*, 31 January 2017, 14.

114 Dr Andre Oboler, Victorian Multicultural Faith and Community Coalition, *Committee Hansard*, 31 January 2017, 7; See also Ms Karly Warner, Executive Officer, National Aboriginal and Torres Strait Islander Legal Services, *Committee Hansard*, 31 January 2017, 13.

115 Ms Adrianne Walters, Director of Legal Advocacy, Human Rights Law Centre, *Committee Hansard*, 31 January 2017, 20.

116 The Very Reverend Dr Keith Joseph, Dean, Christchurch Anglican Cathedral, Darwin, *Committee Hansard*, 20 February 2017, 46.

2.93 Some submitters to the inquiry shared stories of their experiences of racism with the committee.[117] For example, Mr Burhan Zangana, Refugee Communities Advocacy Network, Refugee Council of Australia explained:

> I and many of my fellow community members have experienced racism and hate speech in Australia. We have been subjected to name-calling and racial slurs while we were waiting for the bus, while we were walking in the streets, in workplaces and in many other public places. We were told to go back to where we came from and labelled as terrorists. These incidents can shake you and are hard to forget. After 16 years I very clearly remember the racist behaviour directed at me by two men shortly after the September 11 attacks. I remember clearly another incident that happened a couple of years ago in another workplace where I was told I am black haired and a wog and was laughed at. Knowing that a law exists that supports you can act as a good psychological support. I always choose to let those incidents pass, but it is good for me to know that I am protected by the law, even if I may never consider using it to make a complaint.[118]

2.94 Mr Justin Mohamed, Chief Executive Officer of Reconciliation Australia explained the lifelong impacts of racial discrimination on many Aboriginal people and his own personal experience:

> A lot of Aboriginal people still feel as a fringe-dweller in their own communities in rural and regional Australia and maybe in their suburbs, and feel they do not quite fit because they have been told that they do not.
>
> It has a long-lasting effect and it takes a lot of support and strength from individuals to encourage them. It is an ongoing thing; it has not stopped. As a father of five, I see my children faced with different sorts of racism but racism challenging who they are and what they do through their education right through to university, where a couple of them are now. So it still continues.[119]

2.95 The committee also received evidence about the prevalence of racism in Australian society including evidence indicating potential increasing rates of racism.[120] For example, the Refugee Council of Australia pointed to finding by the

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117 See, for example: Mr Burhan Zangana, Refugee Communities Advocacy Network, Refugee Council of Australia, *Committee Hansard*, 1 February 2017, 27.

118 Mr Burhan Zangana, Refugee Communities Advocacy Network, Refugee Council of Australia, *Committee Hansard*, 1 February 2017, 27.

119 Mr Justin Mohamed, Chief Executive Officer, Reconciliation Australia, *Committee Hansard*, 2 February 2017, 16.

120 Refugee Council of Australia, *Submission 8*, 1-2; Mr Romlie Mokak, Chief Executive Officer, Lowitja Institute, *Committee Hansard*, 31 January 2017, 14.

Scanlon Foundation, *Mapping Social Cohesion*, released in November 2016, indicating:

- the highest level of reported experience of discrimination (20%) since the surveys began [in 2007];
- with 27% of people from non--English speaking backgrounds reporting an experience of discrimination in the past year;
- 31% of those experiencing discrimination reporting experiencing it about once a month or most weeks in the year; and
- 55% of those experiencing discrimination were verbally abused, 17% were not offered work or were not treated fairly at work; 10% had their property damaged; and 8% were physically attacked, and 22-25% of people consistently report a personal negative opinion of Muslims.[121]

2.96 In respect of the most recent annual youth survey conducted by Mission Australia, Ms Jacquelin Plummer, Head of Policy and Advocacy at Mission Australia noted:

> We discovered that over one-quarter of young people had experienced some form of unfair treatment or discrimination in the last 12 months. Of those young people, race or cultural background was the reason for discrimination in over 30 percent of these cases. This was the second most common reason after gender. In addition, half of young people surveyed had witnessed someone else being unfairly treated or discriminated against in the last 12 months. The discrimination they witnessed was most commonly on the basis of race or cultural background.
>
> Importantly, for Aboriginal and Torres Strait Islander young people the burden was unevenly distributed. One in five Aboriginal and Torres Strait Islander young people reported experiencing discrimination on the basis of race or culture background—more than three times the proportion of non-Indigenous people.[122]

2.97 While some submitters argued that continuing levels of racism indicated that section 18C should be repealed or weakened on the basis it was ineffective,[123] a

121 Refugee Council of Australia, S*ubmission 8*, 1-2.

122 Ms Jacquelin Plummer, Head of Policy and Advocacy, Mission Australia, *Committee Hansard*, 30 January 2017, 49.

123 See, for example: Mr Timothy Andrews, Executive Director, Australian Taxpayers' Alliance, *Committee Hansard*, 1 February 2017, 84; Institute of Public Affairs, *Submission 58*, 24.

number of submitters rejected this view.[124] For example, Professor Katharine Gelber argued that:

> My comment on that is it would be a shame to blame section 18C for the ongoing continuation of racism and other types of marginalisation in this country. The reasons for such types of marginalisation are complex.[125]

2.98 Dr Colin Rubenstein, Executive Director of the Australia/Israel and Jewish Affairs Council, also supported the existing provisions:

> …we would say that 18C and 18D provide a very important substantive, as well as symbolic, framework of enhancing Australian harmony and cohesion—particularly important at a time of growing populism and xenophobia internationally, and even elements of that within our happy, multicultural Australia. We cannot think of a worse time to dilute these modest legislative protections, which we would suggest are working very well.[126]

2.99 The Race Discrimination Commissioner, Dr Tim Soutphommasane, noted a recent Canadian study which found there had been a 600 percent increase in online hate incidents in the period between November 2015 and November 2016, following the repeal in 2013 of a Canadian law providing civil redress for racial vilification:

> Specifically, if we were to view the Canadian situation, I believe it is an illustration of the important message that the law can send to society about what should be acceptable standards when it concerns racial hatred and abuse. The Canadian experience would indicate that there are some dangers when you do weaken legal protections against hate speech, including of a racial kind. It may have the effect of emboldening people to believe that they have greater freedom to inflict racial hatred and bigotry onto others. It is worth noting that, in that research from the CBC [Canadian Broadcasting Corporation], I believe that there was some indication that white supremacist messages, among others, had increased substantially. That should be a consideration for the committee in its deliberations on the signal issue of legislation.[127]

2.100 The committee received evidence from a significant number of submitters, including those who work at the intersection of legal and community representation, who considered that the current law provided an appropriate balance between

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124 Professor Katharine Gelber, *Committee Hansard*, 10 February 2017, 5; Dr Tim Soutphommasane, Race Discrimination Commissioner, Australian Human Rights Commission (AHRC), *Committee Hansard*, 17 February 2017, 51.

125 Professor Katharine Gelber, *Committee Hansard*, 10 February 2017, 5.

126 2.972.98 Dr Colin Rubenstein, Executive Director, Australia/Israel and Jewish Affairs Council, *Committee Hansard*, 31 January 2017, 60.

127 Mr Thinethavone (Tim) Soutphommasane, Race Discrimination Commissioner, AHRC, *Committee Hansard*, 17 February 2017, 51.

protecting against serious forms of racially discriminatory speech and freedom of expression.[128] For example, Professor Simon Rice from the Discrimination Law Experts Group stated in evidence to the committee that:

> In essence, we advocate a conservative position. No change needs to be made to 18C… We say that 18C and 18D and the related case law operate together to limit free speech only insomuch as is necessary to protect against racially discriminatory speech. At the same time—and this is an important point of policy—this balance protects the right to free speech of people who would otherwise be silenced by offensive language. So it operates notoriously to limit free speech to an extent, but it needs to be kept in mind the work that it does to enable free speech among those who would otherwise be oppressed.[129]

2.101 Ms Stephanie Cousins, Advocacy and External Affairs Manager from Amnesty International Australia also considered that the current provisions strike the correct balance between these rights:

> We are satisfied that the balance struck by the RDA is consistent with…Australia's international human rights obligations and we do not see a reasonable justification for amending the legislation. Indeed, to do so could have profound and serious consequences for those in our community who experience racism. To embolden those who would seek to denigrate others on the basis of their race would be a reckless move for this parliament, in our view, and we urge the committee not to go down that road.[130]

2.102 Professor Anna Cody, representing Kingsford Legal Centre and the National Association of Community Legal Centres, stated their position that 'the racial vilification provisions strike the right balance between freedom of speech and freedom from racial vilification.'[131]

2.103 Many submitters were concerned by, and acknowledged, that difficulties arose in some difficult high-profile cases that were brought to the AHRC in recent years. While these warrant consideration in terms of reviewing important matters of

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128 See, for example: Refugee Council of Australia, *Submission 8*, 1-2; Discrimination Law Expert Group, *Submission 118*, 1; Professor Simon Rice, Member, Discrimination Law Experts Group, *Committee Hansard*, 1 February 2017, 6; Professor Anna Cody, Director, Kingsford Legal Centre; and Member, National Association of Community Legal Centres, *Committee Hansard*, 1 February 2017, 46; Ms Kate Eastman SC and Mr Trent Glover, *Submission 157*, 6.

129 Professor Simon Rice, Member, Discrimination Law Experts Group, *Committee Hansard*, 1 February 2017, 1.

130 Ms Stephanie Cousins, Advocacy and External Affairs Manager, Amnesty International Australia, *Committee Hansard*, 1 February 2017, 26.

131 Professor Anna Cody, Director, Kingsford Legal Centre; and Member, National Association of Community Legal Centres, *Committee Hansard*, 1 February 2017, 46.

process (discussed in more detail in Chapter 3), it was argued to the committee that these were not representative of the vast majority of thousands of matters and that the issue was not with the fact of, or threshold of, protection currently afforded. For example, Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre argued:

> If we look at something like what happened to Lindy Chamberlain, that was a gross miscarriage of justice yet our criminal justice system continues—we have not taken murder off the books. We have to recognise that any legal system sometimes gets it wrong—that is why we have appeals.[132]

2.104 Ms Lisa Annese, Chief Executive Officer of the Diversity Council Australia (DCA), a not-for-profit independent diversity adviser to businesses in Australia, which has approximately 400 members (including ANZ Bank, AMP, Boral, Coles, IBM Australia, Myer, Orica, Rio Tinto and Westpac) gave evidence to the committee regarding the impact of section 18C and section 18D of the RDA on its members. Ms Annese noted that DCA consulted with its membership about changes to sections 18C and 18D of the RDA, and 'have been uniformly supported' in the view that no changes are required and that DCA's members:

> …have developed a framework for appropriate behaviour within their workplaces which is based around the current legislation, and this works very well for them. They also acknowledge that cultural diversity and the capacity to operate in a workplace where difference is treated with respect and people are afforded the opportunity to be valued in terms of their diversity—and all of the research and the evidence research demonstrates this—is really good for business. [133]

2.105 In respect of the QUT case, Professor Simon Rice, from the Discrimination Law Experts Group, stated that 'you so rarely get a QUT case that to hang public policy on it would be, with respect, a huge mistake because it does not represent a problem that needs to be addressed'. Professor Rice commented that the QUT case was 'unremarkable', as it 'represents what happens in cases', and further noted that '[t]he QUT case does not represent the way things might go wrong in the commission processes with all the other complaints. It really does distort an understanding of how the commission exercises its powers.'[134]

2.106 Further, Mr Bill Swannie, Chair of the Human Rights/Charter of Rights Committee at the Law Institute of Victoria, similarly argued that:

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132 Mr Jonathon Hunyor, Chief Executive Officer, Public Interest Advocacy Centre, *Committee Hansard*, 1 February 2017, 29.

133 Ms Lisa Annese, Chief Executive Officer, Diversity Council Australia, *Committee Hansard*, 20 February 2017, 31.

134 Professor Simon Rice, Member, Discrimination Law Experts Group, *Committee Hansard*, 1 February 2017, 6.

> There is an old saying that tough cases make bad law and that we should not amend the law because of one case—for example, the [QUT case].[135]

Proposals to strengthen Part IIA of the RDA

2.107 Although the first of the terms of reference has an emphasis on limits on freedom of speech, consideration of the balance between it and protection from racially hateful speech led some submitters to argue for amendments to strengthen Part IIA of the RDA. Kingsford Legal Centre suggested that section 18(1)(b) of the RDA be amended to cover conduct based on both presumed or actual race.[136] Further, a number of submitters suggested that section 18C should be amended to include religion as a ground for protection.[137] However, some other submitters argued against such an extension.[138]

2.108 Noting that Part IIA is a civil regime, there were some submitters who argued that a federal criminal offence of racial hatred could be created.[139] Other submitters argued that the current criminal law did not afford sufficient protection.[140] For example, Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry stated:

> The demonstrated ineffectiveness of federal and state criminal provisions which are intended to proscribe the urging of violence on the basis of race further underlines the need for strong and effective civil remedies.[141]

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135 Mr Bill Swannie, Chair, Human Rights/Charter of Rights Committee, Law Institute of Victoria, *Committee Hansard*, 31 January 2017, 41.

136 Kingsford Legal Centre, *Submission 187*, 3.

137 Online Hate Prevention Institute, *Submission 36*, 6; Victorian Multicultural, Faith and Community Organisations, *Submission 125*, 1; Ethnic Communities' Council of Victoria, *Submission 198*, 4; Cyber Racism and Community Resilience (CRaCR) Research group, *Submission 54*, 2.

138 Queensland Council for Civil Liberties, *Submission 76*, 3; Rationalist Society of Australia, *Submission 84*, 3.

139 Equal Opportunity Tasmania, *Submission 167*, 47; Australian Lawyers for Human Rights, *Submission 5*, 18; Dr Murray Wesson, *Committee Hansard*, 3 February 2017, 28; Australian Education Union, *Submission 77*, 4.

140 See, for example, Aboriginal Legal Service, *Submission 59*, 14; Ms Karly Warner, Executive Officer, National Aboriginal and Torres Strait Islander Legal Services, *Committee Hansard*, 31 January 2017, 12; Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, Committee Hansard, *1 February 2017*, 61.

141 Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, *Committee Hansard*, 1 February 2017, 61. See also: Ms Anna Talbot, Legal and Policy Adviser, Australian Lawyers Alliance, *Committee Hansard*, 1 February 2017, 34; Ms Roxanne Moore, Indigenous Rights Campaigner, Amnesty International Australia, *Committee Hansard*, 1 February 2017, 32; Victorian Government, *Submission 57*, 2; Legal Aid Commission of New South Wales, *Submission 73*, 11; Refugee Council of Australia, *Submission 8,* 5.

2.109 As these matters were beyond the terms of reference of the inquiry they did not receive much attention from the committee, however, it may be useful for such laws to be re-examined.

The role for education

2.110 The committee received substantial evidence about the critical role that education can play both in tackling racism; properly understanding legal mechanisms and rights; and to reassure people about the limits to what is seen by some as unjustifiable encroachments on freedom of speech.[142] For example, Ms Roxanne Moore, Indigenous Rights Campaigner at Amnesty International Australia stated in evidence to the committee that human rights education 'goes to both making sure that people who have had their rights violated know about the process to begin with and then also that they are able to access it as well.'[143]

2.111 Similarly, in its submission to the inquiry, Legal Aid NSW expressed its support for the Commissioners' consultative and educational activities:

> …which protect and promote human rights in the Australian community. When individuals understand their right to lodge a complaint with the Commission, they are more likely to bring genuine and meritorious complaints about acts or practices inconsistent with human rights. Where an individual or client raises circumstances which could give rise to a complaint under the AHRC Act, it is wholly appropriate that they be advised of their right to make a complaint and be assisted to do so.[144]

2.112 The Victorian Government noted that 'Racially motivated hatred will not be effectively addressed by legal restrictions alone. Education is also vital to promote a culture of shared responsibility and respect.'[145]

2.113 Many submitters were very supportive of education programs to address issues of racism, such as, the 'Racism. It Stops with Me' campaign and similar programs.[146]

2.114 Noting common and significant misunderstandings about the meaning and scope of section 18C of the RDA as judicially interpreted, a number of submitters suggested that education programs could be further developed to ensure that the

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142 Ms Karly Warner, Executive Officer, National Aboriginal and Torres Strait Islander Legal Services, *Committee Hansard*, 31 January 2017, 15.

143 Ms Roxanne Moore, Indigenous Rights Campaigner, Amnesty International Australia, *Committee Hansard*, 1 February 2017, 32.

144 Legal Aid NSW, *Submission 73*, 11.

145 Victorian Government, *Submission 57*, 2.

146 Mr Joe Caputo, OAM, JP, Board Director, Ethnic Communities' Council of Victoria, *Committee Hansard*, 31 January 2017, 3; National Aboriginal and Torres Strait Islander Women's Alliance, *Submission 53*, 10.

legal interpretation of Part IIA is better understood.[147] For example, Ms Robin Banks, Tasmanian Anti-Discrimination Commissioner stated:

> …we can engage in public discourse about matters relating to race, immigration and other things without falling foul of 18C or its equivalents in states and territories. I think there is a difference between the public perception of the law—and this is sometimes heightened by people building it up, feeding the fire—and what the law actually does. That says to me that what we need perhaps is to do more education about what the proper balance is and when speech is entirely okay and when it may, in fact, fall foul of the law. So I think there is an educational role for all of us to play.[148]

2.115 Some submitters were of the view that education in itself may be sufficient to address the significant misunderstandings about the scope and effect of section 18C of the RDA.[149] Ms Kate Eastman SC explained the potential role for education in clarifying the way section 18C operates:

> I am an expert in the area, but I do agree that the law should be clear and simple, so if clarification to reflect the way the courts are interpreting the law would assist, then I would support that approach. But I am not sure it would need it if there were sufficient education about how these provisions are intended to operate and the impact they have on ordinary people.[150]

2.116 Mr Kevin Kadirgamar, President of the Multicultural Council of the Northern Territory, explained that misconceptions about the scope of section 18C have led some people to being fearful about openly discussing matters that are not actually covered by the section 18C and there was an important role for education to play in addressing such issues:

> …it is not the legislation that needs fixing, rather it is education and awareness as to what that means to both sides…If those people were properly educated on what 18C really means and on the kinds of

147 See, for example: Professor Gillian Triggs, President, AHRC, *Committee Hansard*, 12 December 2016, 21; Mr Bill Swannie, Chair, Human Rights/Charter of Rights Committee, Law Institute of Victoria, *Committee Hansard*, 31 January 2017, 61; Dr Karen O'Connell, Member, Discrimination Law Experts Group, *Committee Hansard*, 1 February 2017, 4; Associate Professor Gabrielle Appleby, *Committee Hansard*, 1 February 2017, 5; Mr Kevin Kadirgamar, President, Multicultural Council of the Northern Territory, *Committee Hansard*, 20 February 2017, 20.

148 Ms Robin Banks, Anti-Discrimination Commissioner, Equal Opportunity Tasmania, *Committee Hansard*, 30 January 2017, 3.

149 Dr Karen O'Connell, Member, Discrimination Law Experts Group, *Committee Hansard*, 1 February 2017, 4; Associate Professor Gabrielle Appleby, *Committee Hansard*, 1 February 2017, 5.

150 Ms Katherine Eastman SC, *Committee Hansard*, 1 February 2017, 4.

> comments that can be made and cannot be made, those concerns would not exist.[151]

2.117 Northern Territory Anti-Discrimination Commissioner, Ms Sally Sievers, was supportive of an education campaign so that there was better understanding within the wider community about the limits of section 18C:

> In any of these spaces, people knowing what their rights are and what their obligations are is what we are all about. It is a jurisdiction which is preventative. So anti-discrimination law is all about the fact that we do not want people complaining to us. If we have done our job really well, if we have gone out and talked to employers and we have told them, 'You need to put these things in place, all this training, all this education for your employees; you need to be on the lookout for this,' then it does not happen. That is the real focus of antidiscrimination.[152]

2.118 The committee also heard evidence that further education is required as many people were not aware of the scope of protections under section 18C of the RDA or the ability to complain to the Commission.[153] For example, in its submission to the inquiry, the Refugee Council of Australia stated that:

> …more could be done to increase community awareness regarding the process for making a complaint to the [Commission]. Most people consulted for this submission were not aware of the process for making a complaint and how such an issue is resolved. More education sessions, community engagement activities and dissemination of fact sheets could help towards increasing community understanding of the conciliation process of the Commission.[154]

2.119 Speaking about a recent research project, *Telling It Like It Is: Aboriginal Perspectives on Race and Race Relations in Darwin*, Associate Professor Daphne Habibis, chief investigator for the study, explained that the research findings indicated a lack of knowledge in remote communities about the law:

> …we do not think 18C is going to be used very much by everyday Aboriginal people; it is more that it provides an opportunity for Aboriginal leaders, and perhaps other people on their behalf, to take action. There is a degree of a lack of understanding of the law. Some people who live in remote communities but who were visiting Darwin were picked up in the

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151 Mr Kevin Kadirgamar, President, Multicultural Council of the Northern Territory, *Committee Hansard*, 20 February 2017, 24.

152 Ms Sally Sievers, Anti-Discrimination Commissioner, Northern Territory Anti-Discrimination Commission, *Committee Hansard*, 20 February 2017, 2.

153 Mr Justin Mohamed, Chief Executive Officer, Reconciliation Australia, *Committee Hansard*, 2 February 2017, 20; Mr Rodney Little, Co-Chair, National Congress of Australia's First Peoples, *Committee Hansard*, 1 February 2017, 53.

154 Refugee Council of Australia, *Submission 8*, 5.

> interviews; their understanding may not be so great. Amongst other urban Aboriginal people, their understanding was good.[155]

2.120 Mr Rodney Little, Co-Chair, National Congress of Australia's First Peoples stated in evidence to the committee that:

> Certainly we have an obligation to our membership and our communities to inform people; that is why we see more and more of our peoples using the process of 18C and being more informed about the legislation…
>
> I think that we all in our society have an obligation to inform our brothers and sisters and our families. I also think that all Australians have that obligation to inform all Australians of the process that is available to all Australians when they feel as though they have been discriminated against or they have been hurt—and of the views of some that may be called the 'privileged' against others who are different.[156]

2.121 Some submitters indicated that the potential risks of sending a 'dangerous message' through an amendment to the RDA could be minimised through a public education campaign.[157] For example, Professor Adrienne Stone stated that:

> My own view is that, well handled, I would hope that risk would be minimised, and in a sense I think there would be a very strong message that would come out of the fact that this section has been up for review and possible amendment twice. If what is done is codification, I think it is actually a strong reinforcement of the value of section 18C as an important law in our multicultural democracy. I would hope that that message could be communicated in those circumstances.[158]

2.122 Similarly, Professor Sarah Joseph while discussing a possible amendment to replace the words 'offend' and 'insult' in section 18C with 'vilify', and what message such an amendment would send, stated:

> I think the government could then maybe accompany [an amendment]with a campaign to even support 'Racism: It Stops With Me'—the Human Rights Commission. So maybe, in that respect, that could be a good idea.[159]

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155 Associate Professor Daphne Habibis, Deputy Director, Institute for the Study of Social Change, University of Tasmania, *Committee Hansard*, 30 January 2017, 25.

156 Mr Rodney Little, Co-Chair, National Congress of Australia's First Peoples, *Committee Hansard*, 1 February 2017, 53.

157 Professor Adrienne Stone, Director, Centre for Comparative Constitutional Studies, University of Melbourne, *Committee Hansard*, 31 January 2017, 46.

158 Professor Adrienne Stone, *Committee Hansard*, 31 January 2017, 46. See also Professor Sarah Joseph, Castan Centre for Human Rights Law, *Committee Hansard*, 30 January 2017, 14.

159 Professor Sarah Joseph, Director, Castan Centre for Human Rights Law, *Committee Hansard*, 30 January 2017, 14.

Committee views and recommendations

2.123 The committee thanks the many submitters who have given their time and expertise to provide thoughtful contributions to the inquiry into this important issue.

2.124 There is an important role for what might be termed civility, common human decency, social norms and education in preventing the use of racist language and recognising shared humanity. Providing due consideration and civility to others and engaging in respectful dialogue is an important task with which all members of Australian society can assist.

2.125 Unlike the United States of America, which has a tradition of unrestrained free speech protected by the First Amendment, the Anglo-Australian tradition has been that there can be reasonable fetters on free speech: the question for Parliaments has been to determine where the balance lies.

2.126 The committee acknowledges that Part IIA of the RDA is considered to be an important protection against forms of racially discriminatory speech and racism in Australia by many, including multicultural organisations and Aboriginal and Torres Strait Islander groups. It is also consistent with Australia's international human rights obligations.

2.127 The committee was deeply concerned to hear extensive evidence about the range and extent of daily experiences of racism in Australian society. This is a concern for individuals, for businesses and for society. The evidence illustrated the serious, profound and lasting impacts of racially discriminatory forms of speech, including on the mental and physical health of those affected.

2.128 At the same time, the right to freedom of expression is of fundamental importance. The committee considers there needs to be scope for dialogue on serious and difficult questions, including matters of race. The committee has also received considerable evidence on this issue.

2.129 Part IIA of the RDA cannot be viewed without consideration of the decided cases. In the two decades since the enactment of sections 18C and 18D, the case law has provided a limited but important protection against Holocaust denial and serious racial abuse against Aboriginal and Torres Strait Islander groups and ethnic communities, while allowing, among other things, some artistic expression through cartoons and satire. Similarly the complaints about Part IIA need to be viewed in the context of concerns about the processes of the AHRC and appeals to the Court following a termination by the AHRC (these matters are covered in Chapter 3).

2.130 While the courts have interpreted section 18C of the RDA as not covering conduct that is merely 'offensive' or 'insulting', but only applying to conduct that has 'profound and serious effects' on the basis of race, the committee received substantial evidence that there was confusion regarding the meaning and scope of sections 18C and 18D of the RDA.

2.131 From a rule of law perspective there is a persuasive argument that the meaning of the law should be sufficiently apparent from the words of the legislation. However, the scope of the current formulation of section 18C and the accompanying section 18D 'exemptions' as applied by the courts is not clear and accessible on the face of the provisions.

2.132 This problem has significant implications for understanding what conduct is prohibited by Part IIA and what is protected, particularly as the words 'offend' and 'insult' in section 18C are not applied as generally understood in common usage. The committee considers that there is a significant and substantial case for addressing such confusion.

2.133 In addition, the committee has received evidence that the law unjustifiably limits freedom of speech.

2.134 The committee has received evidence from a wide range of submitters of ways to rectify these problems, including the important role that education could play to raise awareness of the scope of the current law, as well as possible amendments to Part IIA of the RDA.

2.135 One suggested amendment that emerged consistently in evidence was to codify the judicial interpretation of section 18C as meaning 'profound and serious effects'. Another amendment which was suggested was to replace the words 'offend', 'insult' and 'humiliate' with 'harass'. Many of these amendments may assist to both clarify and enhance the weight afforded to freedom of expression in Australia particularly noting the importance of this right. These ideas are relatively new developments in the context of the debate on section 18C and require further consideration. In particular, while there has been a broad debate on removal of the words 'offend' and 'insult' there has been less detailed consideration of removing the word 'humiliate' or its replacement with the word 'harass'. The committee also considers that education has a critical role to play in this respect.

2.136 The committee is cognisant of the evidence presented to it that even changes that could improve understanding of the existing law risk being taken as an indication that racism is acceptable to the Parliament. In canvassing possible amendments to Part IIA, the committee does not intend to signal acceptance of any licence for racism in Australia. The committee considers that should any amendments to Part IIA of the RDA proceed they should be accompanied by education programs to ensure that such amendments are properly understood—both by the Australian community at large and by those communities that are particularly affected—as a strong endorsement of the value of protections for serious forms of racially hateful or discriminatory speech.

Recommendation 1

2.137 **The committee recommends further supporting, strengthening and developing education programs including those:**

- **addressing racism in Australian society;**
- **addressing the scope of conduct caught by Part IIA of the *Racial Discrimination Act 1975* as judicially interpreted; and**
- **about the meaning and scope of any amendments to Part IIA of the *Racial Discrimination Act 1975*.**

Recommendation 2

2.138 **Recognising the profound impacts of serious forms of racism, the committee recommends that leaders of the Australian community and politicians exercise their freedom of speech to identify and condemn racially hateful and discriminatory speech where it occurs in public.**

Recommendation 3

2.139 **The committee received evidence about a number of proposals in relation to Part IIA of the *Racial Discrimination Act 1975*. Given the nature and importance of the matters considered by the committee for this inquiry – primarily the right to freedom of speech, the right to be free from serious forms of racially discriminatory speech, and the importance of the rule of law – views varied among members of the committee as to how to balance these appropriately. The range of proposals that had the support of at least one member of the committee included:**

(a) no change to sections 18C or 18D;

(b) amending Part IIA of the *Racial Discrimination Act 1975* to address rule of law concerns and to ensure that the effect of Part IIA is clear and accessible on its face, by codifying the judicial interpretation of the section along the lines of the test applied by Kiefel J in *Creek v Cairns Post Pty Ltd* that section 18C refers to 'profound and serious effects not to be likened to mere slights';

(c) removing the words 'offend', 'insult' and 'humiliate' from section 18C and replacing them with 'harass';

(d) amending section 18D to also include a 'truth' defence similar to that of defamation law alongside the existing 18D exemptions;

(e) changing the objective test from 'reasonable member of the relevant group' to 'the reasonable member of the Australian community'; and

(f) criminal provisions on incitement to racially motivated violence be further investigated on the basis that such laws have proved ineffective at the State and Commonwealth level in bringing

successful prosecutions against those seeking to incite violence against a person on the basis of their race.