Dissenting Report by Australian Greens

Referral and Terms of Reference

On 8 November 2016, pursuant to section 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Attorney-General wrote to the Parliamentary Joint Committee on Human Rights (the Committee) to refer the following matters for inquiry and report:

1. Whether the operation of Part IIA of the *Racial Discrimination Act 1975* (Cth) imposes unreasonable restrictions upon freedom of speech, and in particular whether, and if so how, ss 18C and 18D should be reformed.
2. Whether the handling of complaints made to the Australian Human Rights Commission (AHRC) under the *Australian Human Rights Commission Act 1986* (Cth) should be reformed, in particular, in relation to:
    a. The appropriate treatment of:
        i. Trivial or vexatious complaints: and
        ii. Complaints which have no reasonable prospect of ultimate success;
    b. Ensuring that the persons who are the subject of such complaints are afforded natural justice;
    c. Ensuring that such complaints are dealt with in an open and transparent manner;
    d. Ensuring that such complaints are dealt with without unreasonable delay;
    e. Ensuring that such complaints are dealt with fairly and without unreasonable cost being incurred either by the Commission on by persons who are the subject of such complaints;
    f. The relationship between the Commission's complaint handling processes and applications to the Court arising from the same facts.
3. Whether the practice of soliciting complaints to the Commission (whether by officers of the Commission or by third parties) has had an adverse impact upon freedom of speech or constituted an abuse of the powers and functions of the Commission, and whether any such practice should be prohibited or limited.

4. Whether the operation of the Commission should be otherwise reformed in order better to protect freedom of speech and, if so, what those reforms should be.

The Committee is asked, in particular, to consider the recommendations of the Australian Law Reform Commission in its *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* [ALRC Report 129 – December 2015], in particular Chapter 4 – "Freedom of Speech".

In this reference, "freedom of speech" includes, but is not limited to, freedom of public discussion, freedom of conscience, academic freedom, artistic freedom, freedom of religious worship and freedom of the press.

Recommendations

Recommendation 1:

The Australian Greens recommend the retention of Section 18C of the *Racial Discrimination Act 1975* (Cth) in its current form.

Recommendation 2:

The Australian Greens recommend the suggestions made by the Australian Human Rights Commission (the Commission) regarding changes to the Commission's capacity to terminate complaints that lack merit be adopted.

Executive Summary

The Parliamentary Joint Committee on Human Rights has heard from many multicultural and Aboriginal and Torres Strait Islander groups who have expressed significant concern about potential changes which would weaken protections against racist hate speech contained in the *Racial Discrimination Act 1975* (Cth).

The Committee has heard horrific stories of everyday racism from these groups, some of which expressed concern that even the holding of an inquiry into the *Racial Discrimination Act 1975* (Cth) has increased racism within Australia.

Multicultural and Aboriginal and Torres Strait Islander groups who made submissions and gave evidence to the Committee overwhelmingly concluded that any weakening of s 18C of the *Racial Discrimination Act 1975* (Cth) would send a message of acceptance of racist behaviour and therefore result in an increase in that behaviour.

The Australian Greens share the concern that any weakening of the protections contained in s18C of the *Racial Discrimination Act 1975* (Cth) could be damaging to social cohesion, particularly in our current social and political climate. Many multicultural and Aboriginal and Torres Strait Islander groups provided evidence that racist behaviour is currently increasing.

The Australian Greens agree with submissions made to the Committee reiterating the importance of freedom of speech as a civil right, but maintain that the right is not unfettered.

Section 18D of the *Racial Discrimination Act 1975* (Cth) provides strong and broad defences to prosecution under s 18C and in so doing upholds the right to freedom of speech to an appropriate extent.

The Australian Greens stand strongly in support of s18C in its current form, and against racism and racist hate speech in Australia.

By ratifying the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) Australia voluntarily accepted obligations in relation to right to freedom of expression (or freedom of speech) and the right to be free from racial discrimination including racial "hate speech" or serious forms of racially discriminatory speech.[1]

The rights to freedom of opinion and expression are protected by article 19 of the ICCPR.

1 ICCPR, articles 19, 20 and 26; CERD, article 4.

The right to freedom of opinion is the right to hold opinions without interference and cannot be subject to any exception, restriction or limitation.[2]

However, the right to freedom of expression extends to the communication of information or ideas through any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising.[3] The right to freedom of expression may be subject to limitations, and in fact is subject to specific parameters.

The United Nations (UN) Human Rights Council has emphasised the importance of the right to freedom of expression:

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

Article 19(3) of the ICCPR provides that the exercise of the right to freedom "carries with it special duties and responsibilities" and the right to freedom of expression may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order (*ordre public*),[5] or public health or morals. In order for a limitation to be permissible under international human rights law, limitations must:

- be prescribed by law;
- pursue a legitimate objective;
- be rationally connected to the achievement of that objective; and

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2 ICCPR, article 19. Part 11A of the RDA does not limit the right to hold opinions.

3 ICCPR, article 19(2).

4 UN Human Rights Council, *Resolution 12/16, Freedom of opinion and expression*, UN Doc A/HRC/RES/12/16, 12 October 2009, preamble. At: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/RES/12/16 (viewed 8 December 2016).

5 'The expression 'public order (*ordre public*)'…may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (*ordre public*)': Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights U.N. Doc. E/CN.4/1985/4, Annex (1985), clause 22.

- be a proportionate means of achieving that objective.[6]

The Australian Greens believe the limitations on freedom of expression currently imposed by s18C of the RDA are appropriate and within the parameters established by the ICCPR.

6 See, generally, Human Rights Committee*, General comment No 34 (Article 19: Freedoms of opinion and expression)*, CCPR/C/GC/34, paras 21-36 (2011).

Chapter 1

The scope of s 18C of the *Racial Discrimination Act 1975* (Cth)

1.1 While freedom of speech is an essential right, it is not a right that is unfettered. There are many areas of Australian law which impede upon the right to freedom of speech to a much greater extent than what is accused of the *Racial Discrimination Act 1975* (Cth).

1.2 Examples of laws which limit freedom of speech, yet are not subject to the same level of scrutiny as the *Racial Discrimination Act 1975* (Cth) are defamation laws, and s 42 of the *Border Force Act 2015* (Cth) (which provides that an 'entrusted person' speaking about the occurrences within Australia's offshore and onshore detention centres faces up to two years in prison for doing so).

1.3 Ms Stephanie Cousins, Advocacy and External Affairs Manager, Amnesty International Australia in evidence to the Committee stated:

> Several of our submissions note that there are serious threats to freedom of expression in Australia, but they do not come from the much debated sections 18C and 18D of the Racial Discrimination Act. Numerous laws in Australia criminalise speech that ought to be protected in the public interest. The Border Force Act, section 35P of the ASIO Act and several pieces of counterterror legislation curtail free speech in ways that are concerning and were highlighted as such by the Australian Law Reform Commission in its 'Freedom of speech' chapter in its final report of Traditional rights and freedoms, which is noted in the terms of reference. But it seems that these laws are conspicuous in their absence from the terms of reference of the inquiry. We have addressed a number of these laws in our submissions anyway and we welcome discussion of these matters today.[7]

1.4 The Institute of Public Affairs (IPA) is vehemently opposed to s 18C of the *Racial Discrimination Act 1975* (Cth). The IPA maintains that s 18C constitutes a serious and unnecessary impeachment on the right to Freedom of Speech. However, when asked to elaborate on why the IPA had failed to take any meaningful action on other areas of law for the same reason, the only reason that could be provided by Mr Simon Breheny, Director of Policy of the IPA was:

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7 COUSINS, Ms Stephanie, Advocacy and External Affairs Manager, Amnesty International Australia, Committee Hansard, 1 February 2017, 26.

> We are participating not only in this committee hearing but in the public debate on s 18C to the extent that we have on this issue because it is a live political issue. If defamation becomes a live political issue in the same way that s 18C is, we will be right there with you.[8]

1.5 The Australian Greens have serious concern that s 18C has become a 'live political issue'. Those who argue to water down or weaken s 18C of the *Racial Discrimination Act 1975* (Cth) are effectively arguing that the law should be changed to make it easier to engage in racist hate speech in Australia.

1.6 The concern from proponents of change that the Committee heard regarding the scope of s 18C were often misconceived. They were largely based on the fact that the words "offend" and "insult" in the provision are too broad and encompass behaviour that should not be unlawful by not imposing a high enough threshold of harm.

1.7 Such fears are misconceived in light of the decision of Kiefel J (as she then was) in the case of *Creek v Cairns Post Pty Ltd*[9]*.* In that case, Kiefel J held that the relevant harm threshold under s 18C of the *Racial Discrimination Act 1975* (Cth) is behaviour that has "profound and serious effects, not to be likened to mere slights."[10] This threshold is, in fact, quite high and its acceptance by the Courts has provided certainty that mere hurt feelings are not enough for successful proceedings under s 18C of the *Racial Discrimination Act 1975* (Cth).

1.8 Professor George Williams in evidence to the Committee stated:

> The second thing I would say is that even though I do see an issue with section 18C I think it is a very weak example of a much larger problem—that is, that there are many, many laws on the statute book which seriously infringe freedom of speech in Australia. I think this committee should be looking at those broader examples which, rather than this section, actually impose very significant criminal penalties, including on journalists, in circumstances where they might be gaoled for transmitting information that is clearly in the public interest. My view, having looked at over 350 laws on the statute book, is that there is a very broad problem in

8 BREHENY, Mr Simon, Director of Policy, Institute of Public Affairs, Committee Hansard, 31 January 2017,27.

9 (2001) 112 FCR 352.

10 Ibid, at 365 [16].

> Australia about free speech protection, and personally I would like to see action which addresses the larger problem in addition to section 18C.[11]

1.9 Ms Tasneem Chopra, Chairperson, Australian Muslim Women's Centre for Human Rights submitted that the existing wording of s18C is sufficient and does not warrant further modification:

> The Australian Muslim Women's Centre for Human Rights has had a 25-year experience of dealing with racism, discrimination and racist violence in particular. Reports and surveys conducted historically from 2008 up until last year by ourselves, Deakin University, Western Sydney University, the Scanlon Foundation—even the Essential Media poll—have all consistently shown feelings of antipathy and hatred, feelings of supporting a ban against Muslims in this country, and a variety of other ill-willed intent against a minority community in this country. That is all included in our report to you in our submission. The centre here believe the existing wording of 18C is sufficient, together with the exceptions included in section 18D, not to warrant further watering down or modification. These sections allow for recognition of the right to human dignity through respectful communication to continue unabated. Surely we cannot be arguing to enshrine the rights of bigots to hate over the right of dignity of our citizens?[12]

The effects of racism

1.10 The Committee heard numerous submissions on the devastating effect that everyday racism has on multicultural and Aboriginal and Torres Strait Islander groups. Associate Professor Daphne Habibis, Deputy Director of the Institute of Social Change at the University of Tasmania and Professor Maggie Walter, Vice Chancellor at Aboriginal Research and Leadership, the University of Tasmania, conducted research into the effects of racism on Aboriginal people in Darwin, and presented their research to the Committee.

1.11 It is undeniable that being the victim of racism is detrimental to the mental wellbeing of an individual. The Commission heard numerous submissions to this effect. Professor Habibis and Professor Walter also provided evidence that being a victim of racism may have detrimental effects to an individual's physical health as well. Professor Walter submitted:

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11 WILLIAMS, Prof. George, Private capacity, Committee Hansard, 1 February 2017, 74.

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

> **…**this is not just about sticks and stones, that constant and regular experience of negative racialised interactions – whether that be through the media aimed at your racial group or speaking about that racial group or immediate interpersonal interactions – has huge impacts on health. It has shown to impact on asthma, diabetes, spiritual and mental wellbeing.[13]

1.12 The assertion of Professor Habibis and Professor Walters that the effects of racism can manifest in detriment to a person's physical health is well documented. The OXFAM Australia organisation 'Close the Gap' (which campaigns to achieve indigenous health equality) reported that a factor in the 10-17 year life expectancy difference between Aboriginal and Torres Strait Islanders and other Australians is partly due to the fact "mainstream health services often lack cultural sensitivity and are unwelcoming places for many indigenous people."[14]

1.13 The Australian Greens are concerned that even the holding of this inquiry has had have negative effects on multicultural and Aboriginal and Torres Strait Islander groups within Australia. In addition to the wide range of testimony the Committee heard as to the negative effects of racism, the Committee also heard that multicultural and Aboriginal and Torres Strait Islander groups believe that the racism they experience will increase with any weakening of the protections afforded by s 18C of the *Racial Discrimination Act 1975* (Cth).

1.14 Mr Mostafa Rachwani, from the Lebanese Muslim Association, provided examples to the Committee of the type of racist behaviour his organisation and members are subjected to:

> We have had cards smeared with bacon and pig's fat sent to the office. We have had calls for massacres and genocide on our Facebook page. We have had emails from people insulting and demeaning us. We have had bomb threats, threats to protest and riot and threats of sexual violence. All of these moments, fleeting as they may be for the perpetrators, have lasting impacts on the staff and stakeholders of the LMA. I cannot count the times I have had to console shaken and traumatised staff who have had to face barrages of racial vilification. We have spent hours upon hours deleting threatening, disgusting comments on pictures of people praying on our Facebook page, having to read each and every single one.

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13 WALTER, Professor Maggie, Pro Vice-Chancellor (Aboriginal Research and Leadership) University of Tasmania, Committee Hansard, 30 January 2017, 20.

14 Australian Medical Association, 2007 AMA Indigenous Health Report Card – 'Institutionalised Inequality – Not Just a Matter of Money' May 2007, p. 5.

> All of these circumstances, all of these threats and messages, do not emerge out of a political and cultural vacuum.[15]

1.15 The National Aboriginal Aboriginal and Torres Strait Islander Legal Service (NATSILS) makes reference to the unequal distribution of power between Indigenous communities and the dominant non-Aboriginal society, and maintains that that ss 18C and 18D are essential with regard to this imbalance as they were introduced into the *Racial Discrimination Act 1975* (Cth) in 1995 following the Royal Commission into Aboriginal Deaths in Custody.

1.16 The Lowitja Institute presented evidence from surveys conducted which demonstrate that the higher the levels of racism experienced, the more damage that is suffered by an individual with regards to their mental health. The Lowitja Institute is concerned with the symbolic value of s 18C. To 'water-down' the provision would send that message that such damage to the health of individuals who are victims of racism does not matter.

1.17 The Commission heard from a group of multicultural organisations which included among others the Victorian Multifaith and Multicultural Coalition, the Ethnic Communities Council of Victoria, and the Victorian Multicultural Commission When asked if they felt racism in Australia would increase as a result of the proposed changes to s 18C of the *Racial Discrimination Act 1975* (Cth) all members of this group vehemently agreed with the statement.

1.18 The Victorian Multicultural Commission (VMC) has reported (based on findings from the National Inquiry into Racist Violence and the Royal Commission into Aboriginal Deaths in Custody as well as the VMC's own findings from community consultations) that racial vilification which may appear to be "low-level behaviour" can lead to an environment which fosters "severe acts of harassment, intimidation, or violence by seeming to condone such acts." It is the contention of VMC that the combined effect of ss 18C and 18D of the Racial Discrimination Act 1975 (Cth) is the maintenance of "a balance between freedom of speech and freedom from racial vilification."

1.19 VMC states that s 18C provides a "robust safeguard" against racial vilification. VMC further contends that the threshold to be met for conduct to be classified as "offensive behaviour" under s 18C is high, with the courts holding that

15 RACHWANI, Mr Mostafa, President, Project Manager and Media Officer, Lebanese Muslim Association, Committee Hansard, 1 March 2017, 13.

the behaviour in question must have "profound and serious" effects", and not "mere slights."

1.20 The VMC submitted that freedom of speech is adequately protected in the *Racial Discrimination Act 1975* (Cth) by s 18 D and the exemptions it provides to behaviour that would be unlawful under s 18C. The combination of ss 18C and 18D, is therefore "a satisfactory balance between freedom of speech … and freedom from racial vilification."

1.21 Mr Joe Caputo, the Board Director of the Ethnic Communities Council of Victoria, when asked if racism against the people he represents would increase if s 18C were to be watered down stated:

> Yes, I believe that will happen. The current situation has served Australia well. Any changes or any watering down would send a clear message to the community: 'Okay, now we can say whatever we want.' That would send a very nasty message to our community.[16]

1.22 It is a serious concern of the Australian Greens that in the current social and political climate it would be especially damaging to social cohesion to amend s 18C of the *Racial* Discrimination Act 1975 (Cth). The Committee heard testimony from several multicultural and Aboriginal and Torres Strait Islander groups that racist behaviour has increased in recent years. Ms Helen Kapalos, Chairperson of the Victorian Multicultural Commission, stated the following in regard to racism:

> I would argue that we are seeing a more severe, more acute brand of racism as a result of some communities being linked with acts of terrorism around the world. I would say that without [the protections afforded by s 18C of the Racial Discrimination Act 1975 (Cth)] in place we would face very damaging consequences for our Australian society.[17]

Freedom of speech and s 18D of *Racial Discrimination Act 1975* (Cth)

1.23 Section 18D of the *Racial Discrimination Act 1975* (Cth) was widely ignored by proponents of changes to the Act in the submissions heard by the Committee. Section 18D is extremely relevant to the question of whether the *Racial Discrimination Act 1975* (Cth) impedes upon freedom speech, as it provides a broad range of defences for unlawful behaviour under s 18C.

16 CAPUTO, Mr Joe, OAM, JP, Board Director, Ethnic Communities' Council of Victoria, Committee Hansard, 31 January 2017, 1.

17 KAPALOS, Ms Helen, Chairperson, Victorian Multicultural Commission, Committee Hansard, 31 January 2017, 1.

1.24 The lack of discussion regarding s 18D of the *Racial Discrimination Act 1975* (Cth) was addressed during the submissions of Mr Bill Swannie, the Chair of the Human Rights/Charter of Rights Committee of the Law Institute of Victoria:

> Our current position is that 18D should be left as it is … There is an established body of case law interpreting that provision. We say no changes should be made to s 18D.[18]

1.25 The Australian Greens agree with the evidence of Ms Robin Banks, the then Tasmanian Anti-Discrimination Commissioner, made to the Committee in Hobart, stating that ss 18C and 18D strike an appropriate balance between the right to freedom of speech and the right to freedom from racial discrimination:

> I am of the view that the current provisions, 18C and its following provisions, do appropriately find the balance between freedom of speech as recognised in international law and other international law rights, including the right to equality and the right to be free from discrimination.[19]

1.26 Not only would a weakening of s 18C send a message that the right to freedom of speech of certain groups in the community is more important than the right to be free from discrimination of other groups, several multicultural groups provided the Committee with evidence that a watering down of s 18C would in fact be detrimental to freedom of speech.

1.27 Professor Sarah Joseph, Director for Castan Centre for Human Rights Law, is of the opinion that s 18C of the *Racial Discrimination Act 1975* (Cth) is drafted too broadly. She states that although the right to freedom of speech/freedom of expression is not an absolute right, and may be subject to permissible limitations, the right to freedom of expression cannot be displaced by the right to be free from offence or insult. It is Professor Joseph's assertion that the words "offend" and "insult" should not have been included in s 18C of the *Racial Discrimination Act 1975* (Cth). Professor Joseph does acknowledge that prior to any amendments, she would want hear the views of those most affected by changes s 18 and that the judicial

18 SWANNIE, Mr Bill, Chair, Human Rights/Charter of Rights Committee, Law Institute of Victoria, Committee Hansard, 31 January 2017, 39.

19 BANKS, Ms Robin, Anti-Discrimination Commissioner, Equal Opportunity Tasmania, Committee Hansard, 30 January 2017, 1.

interpretation of s 18C may mean that it constitutes a permissible limitation on the right to freedom of expression.[20]

1.28 Freedom of speech, however, may well be hindered by the amendments to s 18C of the *Racial Discrimination Act 1975* (Cth). It has been documented that racism leads to the silencing of minority groups, and is therefore impedes upon their right to freedom of speech/freedom of expression. As was stated by Ms. Banks, the then Tasmanian Anti-Discrimination Commissioner, with regards to the effect of racially offensive behaviour:

> …they end up being silenced, which is an anathema to freedom of speech. It causes people to feel that they have to hide from society, shut themselves down, withdraw from active engagement and not speak out because of fear of being further attacked for being different.[21]

1.29 The fact that s 18C of the *Racial Discrimination Act 1975* (Cth) may be said to protect the right to freedom of speech/freedom of expression aside, that right is further protected by s 18D of the Act, which provides broad exemptions to conduct being deemed unlawful under s 18C.

1.30 The Human Rights Law Centre (HRLC) states that we are currently living in a time where more people are reporting instances of racism, and therefore to weaken s 18C or 18D of the *Racial Discrimination Act 1975* (Cth) would send that message that these instances are tolerable.

1.31 Mr Hugh de Krester, Executive Director of the HRLC (HRLC), when asked what he thought would be the effect on the ground in Australia today of watering down the protections contained in 18C stated:

> I think you would have a rise in racial vilification, a rise in racial discrimination and it would undermine the multicultural success that we have in Australia.[22]

1.32 Ms Adrienne Walters, Director of Legal Advocacy, HRLC added:

> With that rise would come the well-documented negative effects on people's physical and mental health, their ability to participate

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

21 BANKS, Ms Robin, Anti-Discrimination Commissioner, Equal Opportunity Tasmania, *Committee Hansard*, 30 January 2017, 1.

22 de KRETSER, Mr Hugh, Executive Director, Human Rights Law Centre, *Committee Hansard*, 31 January 2017, 20.

> productively in society. We know that it is connected to reduced life expectancy amongst Aboriginal and Torres Strait Islander people … [23]

1.33 Ms Walters went on to raise the example of the recent death in custody of indigenous woman Ms Dhu. Ms Walters stated that the coroner in that instance declared that institutionalised racism had had an impact into Ms Dhu's death.

1.34 Not only do Mr de Kretser and Ms Walters of the HRLC express concerns regarding occurrences such as this if ss 18C and 18D of the *Racial Discrimination Act 1975* (Cth) were to be watered down, but they also express concerns that watering down the relevant sections sends a message of acceptance of such circumstance.

1.35 Dr Colin Rubenstein, Executive Director, Australia/Israel and Jewish Affairs Council was asked if the Jewish community was seeing a rise in anti-Semitism or racism:

> We do see the resurgence of anti-Semitism internationally, unquestionably, in many countries—in Europe in particular, and elsewhere. Jeremy is the expert on that in Australia, and I will let him respond to it. I think everybody around this table understands that we are seeing a resurgence of a degree of xenophobia and populism, on the extreme Left as well as the extreme Right, having an impact on mainstream politics in many centres in a very worrying and perturbing way. Many of the actors on the fringes are all for abolishing this legislation for their own reasons, and I do not suggest that these are the reasons for many of the conscientious, serious people who want reform for the best of reasons as they see it. I am not suggesting that everyone wanting reform is in that popular xenophobic camp—far from it, but many of them in that camp are for reform. The most important thing is that these are really very effective tools in containing that racial vilification. Diluting that useful tool at this time when, in Australia and internationally, we do see resurgence of this political extremism would be extraordinarily bad timing and would be very, very unhelpful in trying to contain that extremism.[24]

1.36 Mr Jeremy Jones, Director of International and Community Affairs, Australia/Israel and Jewish Affairs Council added:

> The issue of anti-Semitism and other forms of racism in Australia ebbs and flows. At the moment, what we have globally is a real belief that we are

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

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

> going through dynamic, dramatic changes in all sorts of areas. We look at Europe and North America, and I think it is a time when people are looking for some sort of moral leadership—and moral leadership that says, 'Let's dilute protections against racism,' as against moral leadership that says, 'You as an individual member of our community have recourse against people who are trying to take away your human rights,' is a very important statement to be reaffirming at this time.[25]

1.37 The Australian Greens are concerned that those most likely to seek assistance under s 18C of the *Racial Discrimination Act 1975* (Cth) are racial minorities who are often disempowered groups within our society. The argument that s 18C impedes upon freedom of speech may be seen as an argument that the right to freedom of speech of these racial minorities (as well as the right to freedom from discrimination) is less important than the right to freedom of speech of groups with whom the power imbalance in Australian society swings in favour of.

25 JONES, Mr Jeremy, Director of International and Community Affairs, Australia/Israel and Jewish Affairs Council, *Committee Hansard*, 31 January 2017, 60.

Chapter 2

The Australian Human Rights Commission

2.1 The Australian Greens accept the recommendations provided by the Australian Human Rights Commission to assist the Commission with dealing with complaints that lack merit.

2.2 Currently, s 46PH (1) of the Australian *Human Rights Commission Act 1986* (Cth) requires the Commission to investigate whenever a complaint is made. The Australian Greens support the Commission's recommendation that the President be given the power to terminate where investigation is not warranted.

2.3 No reliable evidence was submitted to the Committee to suggest that the Commission has solicited complaints.

2.4 The Australian Greens are concerned that the Commission's educative function may be curtailed by allegations of solicitation. The Commission's complaint handling function is dependent on people being able to access it. With regards to s 18C of the Racial Discrimination Act 1975 (Cth) the educative function of the Commission is essential as it is often marginalised groups who will need to seek access under that legislation.

The complaint handling process of the Commission

2.5 The Commission's current complaint process requires only a bare allegation that unlawful discrimination has occurred for a complaint to be valid. The Commission has made two recommendations to raise the threshold for Complaints made to it:

> 1. The person lodging a complaint must allege an act which, if true, would constitute unlawful discrimination.
>
> 2. The details of the alleged unlawful discrimination must be set out in the written complaint, and the details provided must be sufficient to indicate an alleged contravention of the relevant Act.[26]

2.6 The current grounds the Commission has for terminating a complaint are provided in s 46PH(1) of the *Australian Human Rights Commission Act 1986* (Cth). The Commission has further recommended that these grounds should be expanded to include the following:

> The Commission recommends that the grounds for termination is s 46PH(1) of the AHRC Act be expanded to include a power to terminate

26 Australian Human Rights Commission, *Submission 13*, 18.

> where, having regard to all the circumstances of the case, the President is satisfied that an inquiry, or further inquiry, into the matter is not warranted.[27]

2.7 The Commission upholds all human rights, and has committed to maintaining a balance between of all human rights, including the right to freedom of speech and the right to be free from discrimination.[28] The Australian Greens agree that the Commission has been effective at doing so.

2.8 The Ethnic Communities Council of Victoria (ECCV) submitted that it has found, on a review of data published by the Commission, that of the complaints received regarding racial discrimination, only a small amount proceeded past the complaints process with only 3% then proceeding past the conciliation process to court.

2.9 It is the contention of ECCV, based on this collected data that s 18C is "being appropriately applied" and that there is therefore no evidence to suggest a high amount of vexatious or trivial complaints are "jamming up" the conciliation or court processes.

2.10 The Human Rights Law Centre also submitted that of all complaints received by the commission in 2015-2016, only 4% "related to s 18C and that 52% of complaints received under s 18C were resolved at conciliation, 12% were withdrawn and only one complaint commenced court proceedings. Further evidence provided by HRLC as to the ability of the Commission to handle to complaints submitted to it are surveys of both complainants and respondents which reported 88% of complainants "reported satisfaction".

Soliciting complaints – the educative function of the Commission

2.11 No reliable evidence was submitted to the Committee to support the assertion that the Commission is guilty of 'soliciting' complaints.

2.12 The Australian Greens have serious concerns regarding accusations of solicitation of complaints by the Commission.

2.13 The Commission has an essential educative function, and that function is not to be confused with solicitation. The Commission must be able to assist people in understanding both their rights and responsibilities in the areas of law which it covers.

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27 Australian Human Rights Commission Submission, *Submission 13*, 9.

28 Australian Human Rights Commission, *Submission 13,* 76.

2.14 The educative function of the Commission is particularly relevant with regard to the *Racial Discrimination Act 1975* (Cth). The individuals likely to seek assistance under this legislation may suffer from the following disadvantages:

- Limited English language skills;
- A lack of understanding of Australia's legal system and the avenues of justice that may be open to them;
- Experiences gained in detention and/or migration which may have instilled a mistrust of authority and/or government agencies.

2.15 The above factors were highlighted by Mr Cederic Manen, the Chief Executive Officer of Family Planning Tasmania in his submission to the Committee in Hobart:

> A range of the Tasmanian population who are culturally and linguistically diverse have endured significant post-traumatic stress pre-migration which has impacted significantly on their cognitive ability. They have been marginalised in their countries of origin and they do not generally seel systematic type support because of their inherent suspicion of bureaucracy.[29]

2.16 The Commission would be unable to offer assistance to often marginalised groups such as migrants if its educative function was in any way curtailed.

The QUT Case

2.17 The Australian Greens are concerned that the case of *Prior v Queensland University & Others*[30] (the QUT case) is often used to support argument that the Commission is ineffective in handling complaints.

2.18 The Australian Greens agree with the statements that Professor Gillian Triggs, President of the Australian Human Rights Commission made to the Committee:

> … hard cases make bad law. The Queensland University of Technology complaint … [has] attracted public attention, particularly by those advocating for a change to s 18C of the Racial Discrimination Act … the

29 MANEN, Mr Cedric, Chief Executive Officer, Family Planning Tasmania Inc, *Committee Hansard*, 30 January 2017, 28.

30 [2016] FCCA 2853

> commission handles thousands of complaints every year without controversy.[31]

2.19 The Australian Greens are concerned by calls to alter the Commission's complaint handling process in response to the length of the QUT case. This concern is heightened due to evidence from Professor Triggs, of the fact that the complaint handling process of the Commission was not relevant to the length of the QUT case, as the Commission's handling of the case was only slightly above average:

> **Senator McKim:** I wanted to ask my first ever question about the details of the QUT case, because I have always regarded it as an outlier case. But just so that I understand: your evidence today and the time line you have provided to the committee make it clear that the substantive work that the commission did on this case was over a period from May 2015 to August 2015 – is that correct?
>
> **Professor Triggs:** That is correct.
>
> **Senator McKim: …** you are looking at somewhere about a four-month process there. That would be close to your average length of time to resolve matters, would it not?
>
> **Professor Triggs:** That is true. The average is 3.8, and the amount of time we actually spent in this matter, outside the private negotiations between the parties, was about four months.[32]

2.20 The Commission should not be criticised for not dismissing the QUT case at the first instance. As was stated by Professor Triggs:

> Our role is to facilitate to bring the parties together to encourage them to find a resolution. That is the role of our accredited conciliation officers.[33]

2.21 In evidence to the Committee, Professor Triggs stated:

> The argument that the commission should have terminated this matter early also misses the point that there are benefits to both respondents and complainants in participating in the commission's processes, not least of which is the potential for resolution so that cases do not have to proceed to court. Termination by the commission has serious consequences. For the complainant it may mean that the only option is to pursue a complaint by applying to the court.

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31 TRIGGS, Professor Gillian, President, Australian Human Rights Commission, *Committee Hansard*, 12 December 2016, 1.

32 TRIGGS, Professor Gillian, President, Australian Human Rights Commission, *Committee Hansard*, 17 February 2017, 62.

33 TRIGGS, Professor Gillian, President, Australian Human Rights Commission, *Committee Hansard*, 17 February 2017, 71.

> The case against the students was ultimately struck out by a judge of the Federal Circuit Court as having no reasonable prospects of success. Judge Jarrett was able to reach this view once all the evidence had been filed. However, in a costs judgement published on 9 December last year Judge Jarrett made it clear that at the time the case was filed with the commission it could not be said that the case was hopeless and bound to fail. I should just correct any misunderstanding: at the time the case was filed with the court it could not be said that the case was hopeless and bound to fail.[34]

2.22 The Commission does not have the function of a court. Even with the addition recommended to s 46PH of the Australian Human Rights Commission Act 1986 (Cth), the QUT case would not have been necessarily terminated at the first instance. Professor Triggs gave evidence to the effect that at the time the complaint was made to the Commission, it seemed likely that the parties to the dispute had a good chance of negotiating to a successful resolution. The Commission's primary role is the facilitation of such arrangements.

2.23 The Australian Greens accept that the active role that the Commission played in this matter was limited to only a few months and was broadly consistent with the average time it takes to resolve such cases.

Senator Nick McKim

Committee member

34 TRIGGS, Professor Gillian, President, Australian Human Rights Commission, *Committee Hansard*, 17 February 2017, 47.