



# Freedom of Speech in Australia

## Summary of Position – Racial Discrimination Act

1. Part IIA of the RDA serves an important purpose in furthering the objects of and giving effect to the substantial provisions of article 4 of the CERD. As Allsop J (as his Honour then was) remarked in *Toben v Jones* (2003) 129 FCR 515,<sup>1</sup> Part IIA of the RDA provides for the balancing of free speech with “legal protection to victims of racist behaviour”, “the strengthening of social cohesion and preventing the undermining of tolerance in the Australian community” and the “removal of fear because of race, colour, national or ethnic origin”. The case also discusses the form of the perceived evil to which CERD was directed.<sup>2</sup>
2. Since 2014, studies have shown an increase in experiences of discrimination. For example, the Scanlon Foundation 2016 survey, *Mapping Social Cohesion*, found an increase in discrimination experienced on the basis of skin colour, ethnicity or religion from 15% respondents in 2015 to 20% respondent in 2016, the highest level since the surveys commenced in 2007.<sup>3</sup> This demonstrates the importance of continuing to protect those at risk from racial discrimination and vilification.
3. Some commentators have expressed concern in relation to some of the broad language used in section 18C of the RDA (which they suggest may go beyond the obligations of States parties under article 4 of CERD).<sup>4</sup> Notwithstanding such concerns, the courts have construed the provision in a conservative manner to the protection of the important right to freedom of speech and expression (as demonstrated by the authorities considered below), and have found contraventions of section 18C only in cases of “profound and serious effects”, and not in cases involving “mere slights”.
4. A concern has also been expressed about the operation of the exemptions in section 18D of the RDA. The ICJ (WA) considers that the exemptions in section 18D have provided important and effective safeguards for freedom of expression consistently with such protections which exist elsewhere in the law.
5. In a publicly available memorandum of advice to the Premier of New South Wales in relation to the Exposure Draft, dated 4 April 2014 (the **Moses Memorandum of Advice**) Arthur Moses SC concluded that the amendments proposed in the Exposure Draft would “undermine the very purpose” of the RDA, and “potentially create a climate where each of the objectives of the current provisions [of Part IIA] will be placed in jeopardy”.
6. In weighing amendment to the language of sections 18B to 18D, the PJCHR should consider the impact of the provisions on the enjoyment of human rights, both in terms of the promotion of, as well as interference in the enjoyment of human rights. It is well-recognised in international

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<sup>1</sup> *Toben v Jones* (2003) 129 FCR 515, [129].

<sup>2</sup> *Ibid*, [100].

<sup>3</sup> Scanlon Foundation, *Mapping Social Cohesion: The Scanlon Foundation 2016 Surveys*, (2016), available at [http://www.monash.edu/\\_data/assets/pdf\\_file/0005/697748/mapping-social-cohesion-national-report-2016.pdf](http://www.monash.edu/_data/assets/pdf_file/0005/697748/mapping-social-cohesion-national-report-2016.pdf)

<sup>4</sup> See, e.g., Jane Norman, ‘18C: Malcolm Turnbull announces inquiry into Racial Discrimination Act’, *ABC News* (online), 8 November 2016 <<http://www.abc.net.au/news/2016-11-08/malcolm-turnbull-announces-racial-discrimination-act-inquiry/8004640>>; Fergus Hunter, ‘Gillian Triggs backs changes to section 18C as government announces inquiry into freedom of speech’, *The Sydney Morning Herald* (online), 8 November 2016 <<http://www.smh.com.au/federal-politics/political-news/gillian-triggs-backs-changes-to-section-18c-20161107-gsk64e.html>>; David Crowe and Rosie Lewis, ‘Gillian Triggs backs calls to reform section 18C of Racial Discrimination Act’, *The Australian* (online), 8 November 2016 <<http://www.theaustralian.com.au/national-affairs/gillian-triggs-backs-calls-to-reform-section-18c-of-racial-discrimination-act/news-story/425568d374f82b48e63c24ee2e0844a0>>.

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and comparative jurisprudence, as well as by the PJCHR itself, and the ALRC that an application of a proportionality approach can achieve an appropriate balance in recognising rights to both freedom from racial discrimination and racial vilification, and freedom of expression or speech. The proportionality principle involves consideration of whether the provisions of Part IIA as a whole, as well as individually, have a legitimate objective, and are suitable and necessary to meet that objective.

7. In this regard, the ICJ (WA) notes that in its current form, Part IIA incorporates a proportionality approach, by including a requirement in paragraph 18C(1)(a) that the act be "**reasonably** likely, in all the circumstances, to offend ..." etc., and by reason of the exemptions in section 18D.<sup>5</sup>

## A Proportionality-Based Approach to Balancing ‘Competing’ Rights

8. That two (or more) human rights may conflict is not a circumstance unique to the sphere of racial vilification. Nor is it a circumstance novel to Australia's anti-discrimination legislation. The recent ALRC Freedoms Inquiry Report provides numerous illustrations of the encroachment by Commonwealth legislation on one human right, often to support or protect another human right.
9. Courts in jurisdictions with comparable and sophisticated domestic human rights legislation, including the United Kingdom, the United States, Canada and New Zealand, are frequently called upon to adjudicate matters said to involve "competing" human rights.<sup>6</sup>
10. The following principles emerge from the case law in those jurisdictions:<sup>7</sup>
  - (a) There is no hierarchy of rights. The aim must be to respect the importance of competing conflicting rights, or sets of rights, engaged by the particular circumstances of the case.<sup>8</sup>
  - (b) The "core" of a right is more protected than its periphery.<sup>9</sup>
  - (c) The full context, facts and societal values at stake must be considered.<sup>10</sup>
  - (d) The extent of the interference with each right must be considered.<sup>11</sup>

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<sup>5</sup> Section 18D provides: Section 18C does not render unlawful anything said or done reasonably and in good faith: (a) in the performance, exhibition or distribution of an artistic work; or (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or (c) in making or publishing: (i) a fair and accurate report of any event or matter of public interest; or (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment."

<sup>6</sup> George C Christie, *Philosopher Kings? The adjudication of conflicting human rights and social values* (Oxford University Press Inc, 2011).

<sup>7</sup> See, e.g. Australian Law Reform Commission, *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2015) [2.64], citing G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014).

<sup>8</sup> See, e.g., *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835.

<sup>9</sup> See, e.g., *Bull v Hall and Preddy* [2013] UKSC 73; *Reference re Same-Sex Marriage* [2004] SCC 79 [46].

<sup>10</sup> See, e.g., *R v Oakes* [1986] 1 SCR 103.

<sup>11</sup> See, e.g., *Syndicat Northcrest v Amselem* [2004] SCC 47.

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11. These principles provide a useful conceptual basis within which to consider the tension that arises in the context of racial vilification laws between the right to freedom from discrimination on the ground of race and the right to freedom of speech or expression.
12. Since its establishment by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the PJCHR has consistently applied a proportionality analysis to provisions which appear to limit human rights.<sup>12</sup> Where a provision appears to limit rights, the PJCHR considers three key questions:
  1. whether and how the limitation is aimed at achieving a legitimate objective;
  2. whether and how there is a rational connection between the limitation and the objective; and
  3. whether and how the limitation is proportionate to that objective.<sup>13</sup>
13. In considering whether a limitation on a right is proportionate, the PJCHR has identified some factors that might be relevant to include:
  - (a) whether there are other less restrictive ways to achieve the same aim;
  - (b) whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;
  - (c) the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate; and
  - (d) whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.<sup>14</sup>
14. In *McCloy v New South Wales* [2015] HCA 34 in their joint judgment French CJ, Kiefel, Bell and Keane JJ at [3] described the term proportionality in Australian law as follows:

*The term 'proportionality' in Australian law describes a class of criteria which have been developed by this Court over many years to determine whether legislative or administrative acts are within the constitutional or legislative grant of power under which they purport to be done. Some such criteria have been applied to purposive powers; to constitutional legislative powers authorising the making of laws to serve a specified purpose; to incidental powers, which must serve the purposes of the substantive powers to which they are incidental; and to powers exercised for a purpose authorised by the Constitution or a statute,*

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<sup>12</sup> As the ALRC has observed, the concept of proportionality is commonly used by courts to test the validity of laws that limit rights protected by constitutions and statutory bills of rights: *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2015) [2.62]. See generally Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012); G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014). However, proportionality tests can also be a valuable tool for law makers and others to test the justification of laws that limit other important—even if not strictly constitutional—rights and principles. Huscroft, Miller and Webber provide the following formulation of the proportionality test: 1. Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right? 2. Are the means in service of the objective rationally connected (suitable) to the objective? 3. Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective? 4. Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right?"

<sup>13</sup> See, eg, Practice Note 1; also *Annual Report 2012-2013* at [1.53]; *Guide to Human Rights*, June 2015 at [1.15].

<sup>14</sup> Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guide to Human Rights* (2015) [1.21].

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*which may limit or restrict the enjoyment of a constitutional guarantee, immunity or freedom, including the implied freedom of political communication. Analogous criteria have been developed in other jurisdictions, particularly in Europe, and are referred to in these reasons as a source of analytical tools which, according to the nature of the case, may be applied in the Australian context.*<sup>15</sup>

15. In *McCloy v New South Wales*, the plurality applied a structured proportionality test to determine whether a law infringed the constitutional right to political communication.
16. The United Nations Human Rights Committee has confirmed that where a State party to the *International Covenant on Civil and Political Rights (ICCPR)* makes any restrictions on the Covenant rights, it must “demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights.”<sup>16</sup>
17. In its Freedoms Inquiry Report, the ALRC observed (emphasis added):

*It is widely recognised that there are reasonable limits to most rights. Only a handful of rights are considered to be absolute. Limits on traditional rights are also recognised by the common law, although such limits may be regarded as part of the scope of common law rights. But how can it be determined whether a law that limits an important right is justified? Proportionality tests are now the most widely accepted tool for structuring this analysis.*

*Proportionality is used to test limits on constitutional rights by the High Court and by constitutional courts and law makers around the world. This involves considering whether a given law that limits rights has a **legitimate objective** and is **suitable and necessary** to meet that objective, and whether—on balance—the public interest pursued by the law outweighs the harm done to the individual right. The use of proportionality tests suggests that important rights and freedoms should only be interfered with reluctantly—when truly necessary. In the Report, the ALRC often draws upon proportionality analyses when considering whether particular laws that limit rights are justified.*<sup>17</sup>

18. A structured proportionality analysis would assist the PJCHR when considering Part IIA of the RDA and any limits it may impose on the right to freedom of speech or expression, or the right to be free from racial discrimination and racial vilification. This analysis involves consideration of whether the provisions of Part IIA of the RDA, as a whole and individually, have a legitimate objective and are suitable and necessary to meet that objective, and whether – on balance – the public interest pursued by Part IIA as a whole (or particular provisions or aspects of provisions in Part IIA) outweighs any interference with the right to freedom of speech and expression. As noted above, in its current form, Part IIA incorporates a proportionality approach. The ICJ (WA) does not consider its provisions (including in particular s 18C together with the exemptions in s 18D) impose unnecessary or disproportionate limits on freedom of speech and expression.

## Part IIA of the Racial Discrimination Act

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<sup>15</sup> *McCloy v New South Wales* [2015] HCA 34 [3] per French CJ, Kiefel, Bell and Keane JJ.

<sup>16</sup> UN Human Rights Committee, General Comment No. 31 (2004), para. 6.

<sup>17</sup> *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2015) [1.14]-[1.15].

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## International origins

19. The RDA was enacted in 1975. The preamble to the RDA refers to CERD<sup>18</sup>, and recites Parliament's desire to provide for "the prohibition of racial discrimination and certain other forms of discrimination and, in particular, to make provision for giving effect to" CERD.<sup>19</sup>
20. Article 4 of CERD lists immediate and positive measure designed to eradicate all incitement to, or acts of, racial discrimination. Article 4 states relevantly:

*States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:*

*(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;*

*(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;*

*(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.<sup>20</sup>*

21. It is plain from the terms of article 4(a) that racial hatred is a form or manifestation of racial discrimination. As Allsop J observed in *Toben v Jones* (2003) 129 FCR 515 at [100]:

*Racial hatred was one form or manifestation of the perceived evil [of racial discrimination]. ... It was the form of the perceived evil most likely to lead to brutality and violence, but it was not the only form of the perceived evil antithetical to the dignity and equality inherent in all human beings upon which the Charter of the United Nations was based. It was to all such forms and manifestations that the Convention was directed.*

22. Australia deposited a reservation to article 4(a) on 30 September 1975. The reservation came about because of the inability of the Commonwealth Parliament at the time to enact a provision creating a criminal offence, contained in clause 28 of the Racial Discrimination Bill 1974,<sup>21</sup> in satisfaction of Australia's obligations under article 4(a).

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<sup>18</sup> The Convention was done at New York on 7 March 1966. Australia signed the Convention on 13 October 1966. It came into force generally on 4 January 1969 (except article 14 which came into force on 4 December 1969). The Convention entered into force for Australia on 30 October 1975.

<sup>19</sup> *Eatock v Bolt* (2011) 149 FCR 261 [197].

<sup>20</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 4.

<sup>21</sup> For an account of the matters which led to the deletion of clause 28 from the Bill see *Toben v Jones* (2003) 129 FCR 515 [114]-[116].

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23. In 1980, Australia ratified the ICCPR.<sup>22</sup> Article 19 of the ICCPR provides:

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
  - (a) *For respect of the rights or reputations of others;*
  - (b) *For the protection of national security or of public order (ordre public), or of public health or morals.*<sup>23</sup>

24. Article 20(2) of the ICCPR states:

*Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

25. Australia deposited reservations to articles 19 and 20 of the ICCPR as follows:

## *Article 19*

*Australia interprets paragraph 2 of Article 19 as being compatible with the regulation of radio and television broadcasting in the public interest with the object of providing the best possible broadcasting services to the Australian people.*

## *Article 20*

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

26. Against this background, national laws addressing racial vilification clearly involve an exercise of recognising both:

- (a) the right to freedom from discrimination on the ground of race, as recognised in CERD and article 20(2) of the ICCPR, on the one hand; and
- (b) the right to freedom of expression (or speech) contained in article 19(2) of the ICCPR, on the other hand.

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<sup>22</sup> The ICCPR was done at New York on 7 March 1966. Australia signed the ICCPR on 13 November 1980. It came into force generally on 23 March 1976 (except article 41).

<sup>23</sup> See also *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948) art 18.

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## The genesis of Part IIA of the Racial Discrimination Act

27. The RDA was amended by the *Racial Hatred Act 1995* (Cth) to insert Part IIA into the Act. Part IIA is titled “Prohibition on offensive behaviour based on racial hatred”.<sup>24</sup>

28. During the second reading speech of the *Racial Hatred Bill*, the Attorney-General stated:

*The Bill is about protection of groups and individuals from threats or violence and incitement of racial hatred, which inevitably leads to violence. ... The Bill places no new limits on genuine public debate. Australians must be free to speak their minds, to criticise actions and policies of others, and to share a joke. The Bill does not prohibit people from expressing ideas and having beliefs, no matter how unpopular the views may be to many other people.*<sup>25</sup>

29. The preamble to the *Racial Hatred Act* provides:

*An Act to prohibit certain conduct involving the hatred of other people on the ground of race, colour or national or ethnic origin, and for related purposes.*

30. In *Toben v Jones* (2003) 129 FCR 515, Allsop J described the operation of Part IIA:

*The civil provisions (now found, relevantly, in ss 18B, 18C and 18D of the RD Act) were new in their terms and structure. They were different from the various provisions of the State and Territory Acts and the provisions in the 1992 bill. The 1992 bill had used the words “hatred, serious contempt or severe ridicule” and recklessness or intent was required. Under the new provisions, no intent or recklessness was required; but s 18D had a body of justified conduct. The words of Part IIA, especially s 18C, did not require there to be an expression of racial hatred, or intended “vilification”; s 18C did not refer to incitement to violence. Rather, Part IIA of the RD Act had a less charged body of expression. It worked in the following way. Reading ss 18B, 18C and 18D together as a cohesive whole, acts were made unlawful which reasonably caused offence etc (see par 18C(1)(a)) to a person or persons in circumstances where one of the reasons (see s 18B as to more than one reason) for the act in question was the race etc (see par 18C(1)(b)) of the person or persons reasonably likely to be offended and where the act was not justifiable as a form of expression contemplated by s 18D.*<sup>26</sup>

31. Subsection 18C(1) of the RDA makes unlawful an act done otherwise than in private that is reasonably likely, in the circumstances, to ‘offend, insult, humiliate or intimidate’ another person or a group of people because of the race or national or ethnic origin of the other person or of some or all of the people in the group.

32. The words “offend, insult, humiliate or intimidate” which appear in section 18C of the RDA can be contrasted with:

- (a) the language of article 4(a) of CERD, which refers to “racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts”; and

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<sup>24</sup> The constitutional validity of Part IIA was upheld in *Toben v Jones* (2003) 129 FCR 515.

<sup>25</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1994, 3336.

<sup>26</sup> *Toben v Jones* (2003) 129 FCR 515 [128]; see also *Eatock v Bolt* (2011) 149 FCR 261 [203].

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- (b) the words used in section 20C of the *Anti-Discrimination Act 1977* (NSW) (**ADA**), which are “incite hatred towards, serious contempt for, or severe ridicule”.<sup>27</sup>
33. It has been held that in the absence of any statutory definition, the words “offend, insult, humiliate or intimidate” are to be given their ordinary English meanings.<sup>28</sup>
34. While most attention in the current debate has focussed on section 18C of the RDA, it is also necessary to bear in mind sections 18B, 18D and 18E.
35. Section 18B provides that if an act is done for two or more reasons and one of the reasons is the race, colour or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act) then, for the purposes of Part IIA of the RDA, the act is taken to be done because of the person’s race, colour or national or ethnic origin.
36. Section 18D provides the following important exemptions from the prohibition in section 18C:
- Section 18C does not render unlawful anything said or done reasonably and in good faith:*
- (a) *in the performance, exhibition or distribution of an artistic work; or*
  - (b) *in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or*
  - (c) *in making or publishing:*
    - (i) *a fair and accurate report of any event or matter of public interest; or*
    - (ii) *a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.*
37. Although section 18D is commonly referred to as containing the “defences” to section 18C, the exemptions in section 18D strictly operate as exemptions from or exceptions to the prohibition in section 18C.<sup>29</sup>
38. Section 18E establishes vicarious liability for contraventions of section 18C.

## Construing and applying the existing provisions

39. In *Eatock v Bolt* [2011] FCA 1103, Bromberg J noted the importance of the requirement for a contravention of section 18C that the relevant act be a public one:

*Proscribing offensive conduct in a public place not only preserves public order but protects against personal offence. The wounding of a person’s feelings, the lowering of their pride,*

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<sup>27</sup> See also ACT: “incite hatred toward, revulsion of, serious contempt for, or severe ridicule” (s67A(1) of the *Discrimination Act 1991*); VIC: “incite hatred against or serious contempt for, or revulsion or severe ridicule” (s24(1) and (2) of the *Racial and Religious Tolerance Act 2001*); TAS: “incite hatred towards, serious contempt for, or severe ridicule” (s19 of the *Anti-Discrimination Act 1998*); QLD: “incite hatred towards, serious contempt for, or severe ridicule” (s124A(1) of the *Anti-Discrimination Act 1991*); WA: “treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person of a different race; or segregates the aggrieved person from persons of a different race.” (s36(1) of the *Equal Opportunity Act 1984*). Those words can also be contrasted with overseas legislation including the *Public Order Act 1987* (UK), which prohibits insulting words or behaviour if there is objectively or subjectively an intention to stir up racial hatred. That Act is presently being amended to remove the reference to ‘insulting’.

<sup>28</sup> *Jones v Scully* [2002] FCA 1080 [102].

<sup>29</sup> *Jones v Trad* [2013] NSWCA 489 [105]. See also *Sunol v Collier (No 2)* [2012] NSWCA 44 [60].

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*self-image and dignity can have an important public dimension in the context of an Act which seeks to promote tolerance and social cohesion. Proscribing conduct with such consequences will clearly serve a public purpose. Where racially based disparagement is communicated publicly it has the capacity to hurt more than the private interests of those targeted. That capacity includes injury to the standing or social acceptance of the person or group of people attacked. Social cohesion is dependent upon harmonious interactions between members of a society. As earlier explained, harmonious social interactions are fostered by respectful interpersonal relations in which citizens accord each other the assurance of dignity. Dignity serves as the key to participatory equality in the affairs of the community. Dignity and reputation are closely linked and, like reputation, dignity is a fundamental foundation upon which people interact, it fosters self-image and a sense of self-worth...*<sup>30</sup>

40. The test for whether the relevant act is “reasonably likely in all the circumstances” to offend, insult, humiliate or intimidate another person is an objective one, to be determined objectively by reference to the likely reaction of the person or of the people within the group.<sup>31</sup>
41. This test presents considerable scope for the operation of the exemptions in section 18D. For example, it has been said that section 18C creates a liability that arises with some ease.<sup>32</sup> Having regard to the relative ease with which the proscription in section 18C might be enlivened, the question arises as to whether the exemptions in section 18D sufficiently recognise the interference with freedom of speech and expression.
42. The chapeau of section 18D requires the relevant act to be done “reasonably” and “in good faith”. These terms have been the subject of extensive consideration by the Courts.
43. In *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, French J (as his Honour then was) said:

*In a statutory setting, the requirement to act in good faith ... will require honest action and fidelity to whatever norm, or rule or obligation the statute prescribes as attracting the requirement of good faith observance. That fidelity may extend beyond compliance with the black letter of the law absent the good faith requirement. In ordinary parlance it may require adherence to the “spirit” of the law.*<sup>33</sup>

44. His Honour addressed the relationship between section 18C and the exemptions in section 18D as follows:<sup>34</sup>

*In my opinion, the balance struck in ss 18C and 18D between proscription and freedom requires more in the exercise of the protected freedom than honesty. Section 18D assumes that the conduct it covers would otherwise be unlawful under s 18C. The freedom it protects is broadly construed. But, given that its exercise is assumed to insult, offend, humiliate or intimidate a person or group of persons on the grounds of race, colour, or national or ethnic*

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<sup>30</sup> *Eatock v Bolt* [2011] FCA 1103 [264].

<sup>31</sup> *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 [66], *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615 [15], *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 [12], *Jones v Scully* (2002) 120 FCR 243 [99], *McGlade v Lightfoot* (2002) 124 FCR 106 [42]-[45]; *Prior v Queensland University of Technology* [2016] FCCA 2853 [30 (c)].

<sup>32</sup> T Blackburn SC, ‘Proposed repeal of section 18C of the Racial Discrimination Act 1975 – Anti-discrimination and free-speech perspective’ (Speech delivered at the NSW Law Society, 19 March 2014) [8].

<sup>33</sup> *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, 131 [93] per French J.

<sup>34</sup> *Ibid*, [94]-[96]; see also [144] per Carr J.

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*origin, there is no legislative policy which would support reading “good faith” more narrowly than its ordinary meaning.*

*How does this approach operate in the context of section 18D? It requires a recognition that the law condemns racial vilification of the defined kind but protects freedom of speech and expression in the areas defined in paragraphs (a), (b) and (c) of the section. The good faith exercise of that freedom will, so far as practicable, seek to be faithful to the norms implicit in its protection and to the negative obligations implied by section 18C. It will honestly and conscientiously endeavour to have regard to and minimize the harm it will, by definition, inflict. It will not use those freedoms as a “cover” to offend, insult, humiliate or intimidate people by reason of their race or colour or ethnic or national origin.*

45. Accordingly, a person wishing to rely on any of the exemptions in section 18D must satisfy a court that “he or she is subjectively honest, and objectively viewed, has taken a conscientious approach to advancing the exercising of that freedom in a way that is designed to minimise the offence or insult, humiliation or intimidation suffered by people affected by it”.<sup>35</sup>
46. The final assessment for the purposes of section 18D is an “objective determination as to whether the act may be said to have been done in good faith having regard to the degree of harm likely to be caused and to the extent to which the act may be destructive of the object [of the legislation]”.<sup>36</sup>
47. A person “who exercises the freedom carelessly disregarding or wilfully blind to its effect upon the people who will be hurt by it or in such a way as to enhance that hurt” may be unable to satisfy the court of his or her good faith.<sup>37</sup>
48. It has been argued that this requirement to demonstrate objective, as opposed to subjective good faith operates at the risk of closing down public debate for persons who are not intellectually or socially equipped to meet the requisite duty.<sup>38</sup> However, the ICJ (WA) and NSW Bar Association are not aware of any case law or other evidence to suggest that this has occurred in practice.
49. Further, the imposition of an objective element in making out an exemption under section 18D is consistent with the mode by which a defendant must make out the defence to defamation based on the implied freedom of political communication described by the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
50. The implied Constitutional right to freedom of political communication explained by *Lange* requires a defendant to prove that the publication of the defamatory imputation was “reasonable in all the circumstances of the case”.<sup>39</sup> The exemptions in section 18D would appear to be more generous to defendants than the implied constitutional right of political expression developed in *Lange*. Section 18D does not require proof that the person who made the relevant imputation “had reasonable grounds for believing the imputation was true, took

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<sup>35</sup> Ibid 133 [102].

<sup>36</sup> *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, 415 [131] per Barker J; *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, 132 [96] per French J; *Eatock v Bolt* (2011) 197 FCR 261, 341 [346]-[348] per Bromberg J.

<sup>37</sup> *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, 133 [102].

<sup>38</sup> T Blackburn SC, ‘Proposed repeal of section 18C of the Racial Discrimination Act 1975 – Anti-discrimination and free-speech perspective’ (Speech delivered at the NSW Law Society, 19 March 2014) [52].

<sup>39</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 574.

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proper steps, so far as they were reasonably open, to verify the accuracy of the statement, or that they did not believe the imputation to be untrue”.

51. The balance struck in *Lange* in relation to freedom of expression recognises that freedom of speech and expression is not absolute. That approach is consistent with the traditional common law approach to the protection of the “fundamental common law right to freedom of expression” which has always recognised limitations on freedom of expression; for example, laws dealing with defamation, blasphemy, contempt of court and of Parliament, confidential information, and the torts of negligent misstatement, deceit and injurious falsehood. Further, a wide range of legislative restrictions on the right of freedom of speech and expression exist, including statutory provisions dealing with obscenity, public order, copyright, censorship and consumer protection.
52. As noted in the Moses Memorandum of Advice, “free speech” is a matter for Parliaments to regulate and Parliaments have historically recognised many limitations on absolute free of speech.<sup>40</sup>
53. The law (common law and statute) clearly accepts, in a wide range of areas other than racial vilification, that there are legitimate countervailing interests which require the imposition of limits upon freedom of speech and expression. The language of section 18C reflects the similar considerations of offence, intimidation or humiliation in the context of sexual harassment and unwelcome conduct of a sexual nature in section 28A of the *Sex Discrimination Act 1984* (Cth).

## Case law on the operation of s 18C of the Racial Discrimination Act

54. Case law on Part IIA demonstrates that the courts have interpreted sections 18C and 18D as a reasonable, necessary and proportionate limit on free speech for the purpose of promoting racial tolerance and protecting against the dissemination of racial prejudice. Examples of the court’s approach to balancing rights to free speech and freedom from racial discrimination in claims under section 18C include:
  - the words or conduct must be of a serious nature – s 18C applies only to ‘profound and serious effects not to be likened to mere slights’;<sup>41</sup> and
  - the words or conduct must be ‘injurious to the public’s interest in a socially cohesive society’, not a mere personal hurt;<sup>42</sup> and
  - whether conduct is reasonably likely to offend a group of people is to be objectively assessed on the reasonable victim test assessed by reference to community standards – so that relevant context is taken into account.<sup>43</sup>
55. Racially vilifying speech is lawful under s 18D in numerous circumstances, including when it is a ‘fair comment’ or a fair and accurate report of an event or matter of public interest. When this requirement is met, the level of offence, insult, humiliation or intimidation caused by the speech is irrelevant and any complaint will be dismissed.

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<sup>40</sup> Arthur Moses SC, *Memorandum of advice to the Premier of New South Wales regarding the Freedom of Speech (Repeal of s.18C) Bill 2014 Exposure Draft*, 4 April 2014 [4.7].

<sup>41</sup> *Eatock v Bolt* (2011) 283 ALR 505 [263].

<sup>42</sup> *Ibid.*

<sup>43</sup> Bropho [66].

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56. For over twenty years, section 18C of the RDA has provided a low cost, predominantly non-litigious avenue for redress against racially offensive behaviour in Australia. The case law demonstrates that section 18C sets clear limits about what behaviour is acceptable in Australian society and provides remedies for people affected by public acts that are objectively likely to seriously offend, insult, humiliate or intimidate a person.
57. In *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615, the applicant claimed that a decision of the trustees not to remove a sign “The ES ‘Nigger’ Brown Stand” designating a grandstand at the ground contravened section 18C. At first instance, Drummond J held that the trustees’ decision not to remove the sign was not an act reasonably likely in the circumstances to offend, insult, humiliate or intimidate an indigenous Australian or indigenous Australians generally. His Honour had regard to the context in which the word ‘Nigger’ was used and to evidence of community perceptions of the sign. The Full Federal Court dismissed an appeal.
58. In *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, the Cairns Post published photographs of the applicant, an indigenous Australian, depicting her in a bush camp with an open fire and shed or lean-to in which young children could be seen. The photographs appeared together with ones depicting the white family from whom a young orphaned indigenous Australian girl had been removed and placed into the applicant’s care. Kiefel J held that while the respondent’s employees who chose the photographs might be guilty of “thoughtlessness”, the requirement that the act was done on the ground of race was not made out.
59. In *Jones v Scully* (2002) 120 FCR 243, Hely J found that the respondent had contravened section 18C of the RDA by distributing leaflets which had titles including ‘The Jewish Khazar Kingdom’, ‘Russian Jews Control Pornography’ and ‘The Most Debated Question of Our Time - Was There Really a Holocaust?’.
60. In *McGlade v Lightfoot* (2002) 124 FCR 106, Carr J held that the respondent, a senator, contravened section 18C by making statements in an interview with a journalist, which were subsequently published in the *Australian Financial Review* and *West Australian* newspapers, that:
- Aboriginal people in their native state are the most primitive people on earth.*
- If you want to pick out some aspects of Aboriginal culture which are valid in the 21st century, that aren't abhorrent, that don't have some of the terrible sexual and killing practices in them, I'd be happy to listen to those.*<sup>44</sup>
61. Carr J held that in the context of the respondent’s other observations, “a reasonably objective person would read the use of the word ‘primitive’ not as being some benign observation by way of contrast with, say, western civilization, but as a pejorative remark carrying the least favourable meaning of that word i.e. undeveloped or crude”.<sup>45</sup> In the circumstances, an indigenous Australian who continued to lead a traditional way of life and others who are related to those persons or who were descendants of indigenous Australia who formerly led a traditional way of life would be offended and insulted by the comment.<sup>46</sup> Significantly, the

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<sup>44</sup> *McGlade v Lightfoot* (2002) 124 FCR 106 [17], [74] per Carr J.

<sup>45</sup> *Ibid* [60] per Carr J.

<sup>46</sup> *McGlade v Lightfoot* (2002) 124 FCR 106 [61].

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respondent chose not to put any evidence before the Court which meant he had failed to discharge the onus of proof that any of the exceptions in section 18D applied.<sup>47</sup>

62. In *Jones v Toben* [2002] FCA 1150, the respondent published articles on the internet which contained statements to the effect that:

(a) *there was serious doubt that the Holocaust occurred;*

(b) *it was unlikely that there were homicidal gas chambers at Auschwitz;*

(c) *Jewish people who were offended by and challenge Holocaust denial were of limited intelligence; and*

(d) *some Jewish people, for improper purposes, including financial gain, exaggerated the number of Jews killed during World War II and the circumstances in which they were killed.*

63. Branson J observed at [93]:

*The applicant gave evidence that the Australian Jewish community has the highest percentage of survivors of the Holocaust of any Jewish community in the world outside of Israel. Each of the first two of the imputations identified [above] above thus challenges and denigrates a central aspect of the shared perception of Australian Jewry of its own modern history and the circumstances in which many of its members came to make their lives in Australia rather than in Europe. To the extent that the material conveys these imputations it is, in my view, more probable than not that it would engender feelings of hurt and pain in the living by reason of its challenge to deep seated belief as to the circumstances surrounding the deaths, or the displacement, of their parents or grandparents. For the same reason, I am satisfied that it is more probable than not that the material would engender in Jewish Australians a sense of being treated contemptuously, disrespectfully and offensively.*

64. Her Honour concluded that section 18C had been contravened by publication of the material described above on a website.

65. In *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, the applicant complained that a cartoon published in the *West Australian* newspaper contravened section 18C of the RDA. While the Commission considered that the publication contravened section 18C, it concluded that subsections 18D(a) and (c) applied to exonerate the breach. An application for judicial review of the Commission's decision was dismissed by RD Nicholson J. The Full Federal Court dismissed an appeal from that decision. It is from this case, and particularly the reasoning of French J, that the present construction of sections 18B-18E is derived.

66. In *Eatock v Bolt* (2011) 197 FCR 261, the applicant and others on whose behalf she brought the litigation, who were described as "fair-skinned Aboriginal people", complained about two newspaper articles written by the respondent and published in the *Herald Sun* newspaper and on the newspaper's online site. Bromberg J held that fair-skinned Aboriginal people (or some of them) were reasonably likely, in the circumstances, to have been offended, insulted,

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<sup>47</sup> *Ibid*, [74].

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humiliated or intimidated by imputations conveyed by the articles, and that section 18C of the RDA had been contravened.

67. Throughout his reasons for decision, consistent with earlier decisions, Bromberg J recognised the conflicting human rights at play:

*Racial discrimination is a product of the dissemination of racial prejudice. At the core of racial prejudice is the idea that some people are less worthy than others because of their race. The dissemination of racial prejudice usually involves attributing negative characteristics or traits to a specific group of people.*

...

*Ascribing negative traits to people by reason of their group membership disseminates the idea that members of the group are not worthy or less worthy and are thus deserving of disdain and unequal treatment.<sup>48</sup>*

68. After an extensive analysis of the human right to freedom from discrimination on the ground of race, his Honour concluded:

*... equality and dignity to provide the underlying rationale for protecting both individuals and society from the ills of the dissemination of racial prejudice. These are the underlying values which, in my view, s 18C is directed to protect. They are consonant with the commitment to equal dignity for all persons upon which CERD is based and which the RDA was enacted to give effect to.<sup>49</sup>*

69. Bromberg J also considered the human right to freedom of expression and the particular interference in that right by section 18C of the RDA:

*Whilst the importance and fundamental nature of freedom of expression is recognised in each of the international, constitutional and common law spheres to which I have referred, the fact that the right is not unqualified is also unequivocally the case in each sphere.<sup>50</sup>*

70. A significant portion of Bromberg J's reasons for decision is devoted to the operation of the exemptions in section 18D. In that context, his Honour observed:

*In Bropho at [69], French J recognized that freedom of speech is not limited to expression which is polite or inoffensive. However, the minimization of harm which French J spoke of involves a restraint upon unnecessarily inflammatory and provocative language and gratuitous insults. The language utilized should have a legitimate purpose in the communication of a point of view and not simply be directed to disparaging those to whom offence has been caused: Toben at [77] (Kiefel J).*

*I accept that the language utilised in the Newspaper Articles was inflammatory and provocative. The use of mockery and derision was extensive. The tone was often cynical. ... It was language chosen by Mr Bolt in writing articles intended to confront those that he accused with "the consequences of their actions" and done with the expectation that they*

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<sup>48</sup> *Eatock v Bolt* (2011) 197 FCR 261 [215] per Bromberg J.

<sup>49</sup> *Ibid* [226] per Bromberg J.

<sup>50</sup> *Ibid* [235] per Bromberg J.

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*would be both “offended” and “upset” and in the hope that they would be “remorseful” (the words quoted are Mr Bolt’s).*<sup>51</sup>

71. In the result, Bromberg J ordered a corrective notice be published adjacent to the respondent’s regular column in the *Herald Sun*.<sup>52</sup> His Honour declined to order an apology be given (something which had been sought by the applicant).<sup>53</sup>
72. Likewise, the litigation to prevent the holding of the “Cronulla Riots Memorial” by the “Party for Freedom” provides an example of the consistency between Part IIA of the RDA and other laws which require the courts to consider the permissible limits on freedom of speech or expression with the protection of civil society.
73. In *NSW Commissioner of Police v Folkes* [2015] NSWSC 1887, Adamson J ordered, on the application of the NSW Police, that the holding of the public assembly be prohibited pursuant to section 25(1) of the *Summary Offences Act 1988* (NSW). In doing so, her Honour considered the competing rights namely “the right, jealously guarded, of the citizen to exercise freedom of speech and assembly integral to a democratic system of government and way of life, and the right of other citizens to not have their own activities impeded or curtailed by the exercise of those rights”.<sup>54</sup>
74. On the same day, in the Federal Court, in *Sutherland Shire Council v Folkes* (2015) 331 ALR 494, Rares J issued injunctive relief to restrain unlawful racial discrimination. His Honour proceeded on the basis that “freedom of speech and the freedom of assembly are essential human rights in a democracy governed by the rule of law... “. His Honour acknowledged that no freedom was absolute because to do so would necessarily impede some other essential right and that both the common law and statute often had to balance competing rights, including in defamation.<sup>55</sup>
75. Justice Rares observed as follows in relation to Part IIA of the RDA:

*Part IIA of the RD Act is framed in a way that seeks to strike such a balance. First, s 18C(1) imposes a limitation on the freedom of speech and expression by making it unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or group of people and the act is done because of the race, colour or national or ethnic origin of the other person or some or all of the people in the group. Secondly, however, s 18D qualifies that limitation. It provides, relevantly, that anything said or done reasonably and in good faith in the course of any statement, publication, discussion or debate made or held for any genuine purpose in the public interest is not rendered unlawful by s 18C.*<sup>56</sup>

76. His Honour concluded that the likely contravention of section 18C would not have been reasonable. This is a process of analysis consistent with the approach to the constitutional right of free speech described in *Lange*. That was because:

*(a) there are likely to be generalisations stereotyping all persons of Lebanese or Middle Eastern race, nationality or ethnic origin, as being thugs, gang members, rapists and generally detestable;*

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<sup>51</sup> *Ibid*, [411] – [412] per Bromberg J.

<sup>52</sup> *Eatock v Bolt (No 2)* [2011] FCA 1180.

<sup>53</sup> *Ibid* [14].

<sup>54</sup> *NSW Commissioner of Police v Folkes* [2015] NSWSC 1887 [12], [62].

<sup>55</sup> *Sutherland Shire Council v Folkes* (2015) 331 ALR 494 (2015) 331 ALR 494, [49].

<sup>56</sup> *Ibid* [51].

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- (b) *the generalisations would be made because of the race or ethnic origin of the persons called Middle Eastern or Lebanese;*
- (c) *it is fallacious to suggest that because one or more persons of a particular national or ethnic origin engaged or were suspected of engaging in criminal activity that therefore all persons of the same race or national or ethnic origin have the same propensity; and*
- (d) *no reasonable argument could be put that because some persons of a particular race engaged in a class of conduct that all persons of that race would do so.*<sup>57</sup>

77. In *Prior v Queensland University of Technology*<sup>58</sup>, Judge Jarrett found that a claim under section 18C RDA relating to comments about an Aboriginal-only computer lab at the Queensland University of Technology had 'no reasonable prospect of success' and therefore was dismissed. This case had been through a conciliation process at the AHRC before being pursued at the Federal Circuit Court. As the Commission's media release has explained, the Commission did not have any role in the law suit at the Federal Circuit Court. This case is one of the only 3% of cases finalised by the Commission which have subsequently gone to court. This case does not demonstrate any concerns with section 18C RDA. The Commission has relevantly noted that it has asked for amendments to raise the threshold for accepting complaints (see discussion below). The case simply reiterates the existence of a high bar for section 18C complaints, with the Judge noting that the complaints, if they could have been proven, would simply have had the effect of a 'mere slight' and were outside the range of conduct which would fall under section 18C.<sup>59</sup>

## Broader review of vilification laws

78. In its Freedoms Inquiry Report, the ALRC concluded that it had not established whether section 18C has, in practice, caused unjustifiable interferences with freedom of speech. However, it appeared that "Part IIA of the RDA, of which section 18C forms a part, would benefit from more thorough review in relation to freedom of speech".<sup>60</sup> The ALRC also recommended:

*A review of pt IIA might best be done in conjunction with a more general review of vilification laws that could consider not only existing encroachments on freedom of speech, but also whether existing Commonwealth laws effectively discourage the urging of violence towards targeted groups distinguished by race, religion, nationality or ethnic origin or political opinion.*<sup>61</sup>

79. The ICJ (WA) notes that the PJCHR's terms of reference do not extend to a more general review of vilification laws as recommended by the ALRC (although the PJCHR has been asked to consider the conclusions of the ALRC Freedoms Inquiry Report). The ICJ (WA) submits that there would be value in a more general review of vilification laws with a view to promoting greater harmonisation between Commonwealth, State and Territory laws. Although, as noted by the ALRC, all States and the ACT have racial discrimination laws, which are quite similar to the RDA, there are differences. For example, in Western Australia only criminal sanctions are imposed

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<sup>57</sup> Ibid [63]-[65].

<sup>58</sup> *Prior v Queensland University of Technology* [2016] FCCA 2853.

<sup>59</sup> See, e.g. [70].

<sup>60</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws*, Report No 129 (2016) at [4.207].

<sup>61</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws*, Report No 129 (2016) 119.

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under racial vilification laws, while in New South Wales civil and criminal sanctions are imposed. In the Northern Territory, there are no racial vilification laws.

80. However, the ALRC also considered that any such review should not take place in isolation, noting *inter alia*<sup>62</sup>:
- a. concerns that existing laws do not effectively prohibit more serious ‘hate speech’ (for example, the suggestion by AIJAC that the Australian Government consider amendments to ss 80.2A and 80.2B of the *Criminal Code* to improve their effectiveness against ‘incitement to racially motivated violence and racial hatred including on online platforms’;
  - b. that the Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (Cth), introduced on 12 November 2015, would create a new offence of advocating genocide in div 80 of the *Criminal Code*;
  - c. a related issue concerning Australia’s compliance with CERD, article 4(a) of which provides that State parties should criminalise the dissemination of ideas based on racial superiority or hatred and all other propaganda activities promoting and inciting racial discrimination: the ALRC noted that article 4 is not fully implemented in Australian law because s 18C does not create a criminal offence, and that in 2000, the UN Committee on the Elimination of Racial Discrimination recommended that Australia ‘continue making efforts to adopt appropriate legislation’ giving full effect to art 4(a) of CERD; and
  - d. that greater harmonisation between Commonwealth, state and territory laws in this area may also be desirable: while all States and the ACT have racial discrimination legislation in many ways similar to the RDA, the approaches to racial vilification and other conduct based on race hate are not uniform.

## Australian Human Rights Commission Complaints Process

81. To effectively combat unlawful discrimination the law must provide a pathway for victims to seek legal remedies. This requires a complaints system that is fair, accessible and capable of catering to the needs of vulnerable complainants. The AHRC’s complaints and conciliation procedures appear to work satisfactorily, providing an efficient, low cost alternative to litigation and facilitates access to justice for victims of unlawful discrimination. In 2015-16, the AHRC received 16,836 enquiries and 2,013 complaints. 1,308 conciliation processes were conducted and 76% of these complaints successfully resolved.<sup>63</sup>
82. In a 2011 review and consolidation of discrimination law, the Commission stated that their ‘current complaint process ensures an accessible, timely and inexpensive means to resolve disputes’, citing a high conciliation rate and conciliation success rate, as well as high levels of public satisfaction with the service.<sup>64</sup> Accordingly, the AHRC did not see a need for ‘significant legislative changes to the current complaint inquiry and conciliation provisions.’<sup>65</sup> Further, the AHRC noted that the ‘combination of inquiry and conciliation functions and lack of overly prescriptive process requirements is central to its ability to provide a flexible, timely and

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<sup>62</sup> Ibid at [4.209]- [4.215].

<sup>63</sup> <http://hrc.org.au/wp-content/uploads/2016/11/161130-open-letter-racial-vilification-laws-AHRC.pdf>

<sup>64</sup> Australian Human Rights Commission, ‘Consolidation of Commonwealth Discrimination Law’ (December 2011) Australian Human Rights Commission Submission to the Attorney-General’s Department <[https://www.humanrights.gov.au/sites/default/files/20111206\\_consolidation.pdf](https://www.humanrights.gov.au/sites/default/files/20111206_consolidation.pdf)> 56.

<sup>65</sup> Ibid 57.

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appropriate service.<sup>66</sup> These statements and the well-functioning of the complaints process are corroborated by a 94 per cent complainant satisfaction rate (of surveyed parties) with the AHRC's service in 2015-16.<sup>67</sup>

83. The complaints and conciliation mechanisms under the AHRC Act apply generally to complaints about “unlawful discrimination” on the basis of age, race, disability and sex.
84. The AHRC has no discretion to reject a complaint which otherwise meets the requirements of section 46P of the AHRC Act. Provided that a person is eligible to lodge a complaint, all that is required is a written complaint alleging unlawful discrimination. The AHRC makes no relevant “decision” with respect to whether a complaint may or may not be made or whether it is valid: see for example the former section 50 of the *Sex Discrimination Act 1984* (Cth) considered in *Harris v Bryce, Sex Discrimination Commissioner and Human Rights and Equal Opportunity Commission* (1993) 41 FCR 388.
85. Section 46PD of the AHRC Act provides that a complaint that is made to the AHRC under section 46P must be referred to the President. The effect of section 46PD (and several other of the provisions in this Part) was explained by Nicholas J in *Haraksin v Murrays Australia Ltd (No 2)* (2013) 211 FCR 1 at [17]:

*A complaint that is made to the Commission under s 46P must be referred to the President (s 46PD). The President must, subject to some limited exceptions, inquire into a complaint (s 46PF). The President is given power to require a person to provide relevant information or relevant documents (s 46PI). The President may decide to hold a compulsory conference, and if so, the President must direct the complainant and respondent to attend (s 46PJ). Section 46PH provides for termination of a complaint by the President. There are various grounds upon which the President may terminate a complaint under s 46PH. They include:*

- *if the President is satisfied that the alleged unlawful discrimination is not unlawful discrimination (subs (1)(a));*
- *if the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance (subs (1)(c));*
- *if the President is satisfied that some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to each affected person (subs (1)(e));*
- *if the President is satisfied that the complaint involves a matter of public importance that should be considered by the Federal Court or Federal Magistrates Court (subs (1)(h));*
- *if the President is satisfied that there is no reasonable prospect of the matter being settled by conciliation (subs (1)(i)).<sup>68</sup>*

86. The President's role and powers to address the merits of complaints are also confined. The President's role is directed to investigation and conciliation. The President does not exercise any adjudicative function nor is required to determine the merits of the complaint.

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<sup>66</sup> Ibid.

<sup>67</sup> <https://www.humanrights.gov.au/news/media-releases/racial-discrimination-complaints>

<sup>68</sup> See also *Maiocchi v Royal Australian & New Zealand College of Psychiatrists* [2013] FCA 1046 [47] per Nicholas J; *French v Gray, Special Minister of State* [2013] FCA 263 [144] per Besanko J; *Walker v State of Victoria* [2012] FCAFC 38 [12] per Gray J.

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87. The President's power to terminate a complaint by reference to the grounds in section 46PH of the AHRC Act may convey an impression that the President makes an assessment of the merits of the complaint. But from a practical perspective, it does not matter which of the grounds the President relies on to terminate a complaint. The purpose of terminating a complaint is to bring the investigation and conciliation phase to an end and confer a right in the complainant to commence judicial proceedings in the Federal Court of Australia or the Federal Circuit Court.
88. If a complainant commences a judicial proceeding, the Court is not bound by the President's opinion or the reasons why the complaint was terminated. In practice, the President's reasons for terminating a complaint are irrelevant. The President's reasons do not act as a filter for claims lacking any merit being commenced in the Court.
89. Unlike the President, the Court may only dismiss a complaint if the respondent makes a successful application for summary dismissal or the matter is dismissed following a final hearing. The grounds for summary dismissal by the Court are narrower when compared to section 46PH of the AHRC Act. The authorities make it clear that precluding a person from having their case determined on its merits at a final hearing is a serious step taken only with great care, and where it is possible to conclude with confidence that there is no reasonable prospect of success.

## Suggestions for reform of complaints handling procedures

90. To date, various suggestions for reform of these mechanisms have been proposed. For example, the Federal Member for Berowra, Mr Julian Leeser MP, has suggested that a part-time judicial member of the AHRC could be appointed to initially consider complaints, and those with little prospect of success could be quickly terminated.<sup>69</sup> A complainant could seek to have the determination reviewed by the Federal Court only on the ground of jurisdictional error. Mr Leeser has also proposed a mechanism for complainants to provide security for costs before seeking judicial review.
91. This proposal broadly reflects the arrangements that operated prior to 2000 and the significant amendments brought about by the *Human Rights Legislation Amendment Act (No. 1) 1999*, and as a result of the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245. Prior to these amendments, AHRCs and Disability Discrimination Commissioners were empowered to investigate and conciliate complaints. The Commissioners could determine whether a complaint may be referred to the Commission for a hearing. The Commissioners were empowered to "decline" complaints on the basis that a complaint was *inter alia* misconceived, lacking in substance or vexatious. The complainant then had a right to seek a review of the Commissioner's decision. The review was undertaken by the President of the Commission with the assistance of the Commission's legal officers. The President considered the merits afresh, and determined whether the complaint should be declined or proceed to a hearing in the Commission. If a complaint was declined, the complainant had a right to seek judicial review in the Federal Court.
92. This approach resulted in complaints handling procedures, in some instances, being costly and lengthy. Respondents were often unaware of complaints or, if they were involved, then they incurred costs that could never be recovered. A return to such an approach is not recommended.

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<sup>69</sup> Mr Julian Leeser MP (Speech delivered to the Chinese Australian Services Society, 4 November 2016).

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93. The ICJ (WA) draws attention to New South Wales anti-discrimination and racial vilification legislation. In New South Wales, complaints of unlawful discrimination, including racial vilification, are made to the Anti-Discrimination Board (**ADB**) under the ADA. The ADB performs a conciliation function, similar to that performed by the AHRC. Complaints that are unable to be resolved through conciliation by the ADB may be referred to the NSW Civil and Administrative Tribunal (**NCAT**). The NCAT then hears and determines a claim by way of a public hearing.
94. In 2004, an amendment to the ADA empowered the President of the ADB to reject complaints during an investigation if the President is satisfied that:
- (a) the complaint, or part of the complaint, is frivolous, vexatious, misconceived or lacking in substance, or
  - (b) the conduct alleged, or part of the conduct alleged, if proven, would not disclose the contravention of a provision of this Act or
  - (c) the nature of the conduct alleged is such that further action is not warranted, or
  - (d) another more appropriate remedy has been, is being, or should be, pursued in relation to the complaint or part of the complaint, or
  - (e) the subject-matter of the complaint has been, is being, or should be, dealt with by another person or body, or
  - (f) the respondent has taken appropriate steps to remedy or redress the conduct, or part of the conduct, complained of, or
  - (g) it is not in the public interest to take any further action in respect of the complaint or any part of the complaint.
95. The President must provide written reasons for the decision. The effect of such a decision means that the complaint process will come to an end unless the complainant notifies the President within 21 days of the decision that he or she wishes the matter to be referred to NCAT.<sup>70</sup>
96. If a complaint declined under section 92 is referred to the NCAT, the matter cannot be the subject of proceedings unless the NCAT grants leave to the complainant to proceed. In *Ekeremawi v Administrative Decisions Tribunal of New South Wales* [2009] NSWSC 143, the NSW Supreme Court identified the principles to be applied when determining whether to grant leave for declined complaints to proceed:
- (a) *that a cautious approach should be adopted because a refusal of leave will “finally determine the rights of the parties under this legislative scheme, which is dealing with important human rights”;*
  - (b) *that the Tribunal’s discretion is unfettered and is not confined to the grounds on which the President of the ADB may decline a complaint;*
  - (c) *that leave must be granted or refused “depending on what (is) fair and just in the particular circumstances, with an onus falling on the plaintiff to establish that the leave should be granted; and*
  - (d) *noted that where it is apparent that the complaint lacks substance leave may be refused, if that is what justice dictates.*<sup>71</sup>

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<sup>70</sup> *Anti-Discrimination Act 1977* (NSW) s 93A(1).

<sup>71</sup> *Ekeremawi v Administrative Decisions Tribunal of New South Wales* [2009] NSWSC 143 [28] – [29].

# Freedom of Speech in Australia

97. The ICJ (WA) raises for consideration by the PJCHR amendments to section 46PO of the AHRC Act by which a complainant must seek from the Court leave to proceed if the President has terminated the complaint on grounds identified in section 46PH(1)(a)–(g) of the AHRC Act. Any such amendment should ensure that no significant costs are incurred to either party to such an application.
98. There is also no explicit requirement in the AHRC Act for the Commission to notify the respondent about the complaint being made against them. There are also no requirements in relation to timeframes within which the Commission must notify the parties about key stages and developments in the complaints process.
99. The ICJ (WA) recommends that, consistent with procedural fairness principles, the AHRC Act be amended to provide for minimum notification periods within which the AHRC should notify:
- (a) the respondent(s) about the complaint which has been made against them; and
  - (b) the complainant and respondent(s) about the complaint being inquired into, including its termination, and their attendance at any conciliation conference.
100. The ICJ (WA) does not, at this stage, recommend any reforms to the handling of complaints powers as there is no indication, in its view, that the current definitions are causing an inundation of vexatious or unsubstantiated complaints. The ICJ (WA) is supportive of the AHRC's position on whether their complaints handling powers under the AHRC Act are in need of reform. The ICJ (WA) is of the view that the AHRC is best placed to decide whether they are able to appropriately treat trivial or vexatious complaints, and complaints which have no reasonable prospect of success.
101. The ICJ (WA) submits that these terms of reference are ill-conceived and misunderstand the aim of the legislation which is to encourage conciliation. Conciliation is a flexible, private and confidential process – one that is voluntary for the complainant. The benefit of conciliation is that it provides an efficient, low cost alternative to litigation. Further, the ICJ (WA) considers that the AHRC's current powers are sufficient for fairly and efficiently handling complaints. Any reforms to the complaints handling process should, the ICJ (WA) submits, focus on the threshold requirements for accepting complaints based on the experience of the AHRC, not on the procedure itself.

## **The “practice of soliciting complaints”**

102. The ICJ (WA) is not aware of any practice of soliciting complaints to the AHRC that have an adverse effect on freedom of speech, or at all. In these circumstances, no amendment to address any practice of soliciting complaints is called for.

## **Whether the operation of the AHRC should otherwise be reformed**

103. The ICJ (WA) does not consider there to be any case for the operation of the AHRC to otherwise be reformed.