

Aboriginal Legal Service of Western Australia (Inc)



***Submission to Federal Parliamentary Joint
Committee on Human Rights Inquiry into Freedom
of Speech in Australia***

8 December 2016

EXECUTIVE SUMMARY

The Aboriginal Legal Service of Western Australia (Inc) ('ALSWA') is strongly against any reform to the *Racial Discrimination Act 1975* (Cth) ('the RDA') that dilutes the right to be protected from racial hatred and racial prejudice. ALSWA considers that the current provisions of Part IIA of the RDA are appropriate because they strike the right balance between safeguarding the right to be free from racial vilification and the right to freedom of speech.

ALSWA favours the current system of using conciliation as the first response to complaints against s 18C of the RDA. While ALSWA has no specific recommendations regarding the processes for handling complaints by the Australian Human Rights Commission ('AHRC'), it does not object in principle to appropriate improvements to the system that promote fairness, accountability and transparency or reduce unnecessary delays.

Parliament must provide leadership and set appropriate standards to the general community. Racial vilification laws send an important message about civility and tolerance in a multicultural society and ensure those who experience the harm of racial vilification have access to an effective legal remedy.

ABOUT ALSWA

ALSWA is a community based organisation that was established in 1973. ALSWA aims to empower Aboriginal peoples and advance their interests and aspirations through a comprehensive range of legal and support services throughout Western Australia. ALSWA aims to:

- deliver a comprehensive range of culturally-matched and quality legal services to Aboriginal peoples throughout Western Australia;
- provide leadership which contributes to participation, empowerment and recognition of Aboriginal peoples as the First Peoples of Australia;
- ensure that Government and Aboriginal peoples address the underlying issues that contribute to disadvantage on all social indicators, and implement the relevant recommendations arising from the Royal Commission into Aboriginal Deaths in Custody; and
- create a positive and culturally-matched work environment by implementing efficient and effective practices and administration throughout ALSWA.

ALSWA uses the law and legal system to bring about social justice for Aboriginal peoples as a whole. ALSWA develops and uses strategies in areas of legal advice, legal representation, legal education, legal research, policy development and law reform.

ALSWA is a representative body with executive officers elected by Aboriginal peoples from their local regions to speak for them on law and justice issues. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law, and human rights law. ALSWA also provides support services to prisoners and incarcerated juveniles. Our services are available throughout Western Australia via 12 regional and remote offices and one head office in Perth.

THE INQUIRY

Background

On 8 November 2016 the Federal Attorney-General requested the Parliamentary Joint Committee on Human Rights ('the Committee') to inquire and report on two issues relating to freedom of speech in

Australia. The first concerns the operation of Part IIA of the RDA and the second relates to the complaints handling procedures of the AHRC. Submissions are due by 9 December 2016 and the Committee is required to report by 28 February 2017.

The inquiry has been established against a background of increasing concerns amongst some members of the community (including politicians and media outlets) that s 18C of the RDA constitutes an unnecessary or inappropriate restriction on freedom of speech and that the process for dealing with complaints under the *Australian Human Rights Commission Act 1986* (Cth) is ineffective and unfair. ALSWA urges the Committee to examine the issues in a reasoned, careful and objective manner and bear in mind that important legal protections should not be abandoned solely on the basis of one or two controversial and highly publicised cases. As an analogy, no one would suggest amending or repealing the offence of murder simply because a handful of individuals were found to have been unfairly charged, prosecuted and mistakenly convicted of murder.

Terms of Reference

The Committee's terms of reference are:

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 ("the Commission") under the *Australian Human Rights Commission Act 1986* (Cth) should be reformed, in particular, in relation to:
 - the appropriate treatment of:
 - i. trivial or vexatious complaints; and
 - ii. complaints which have no reasonable prospect of ultimate success;
 - ensuring that persons who are the subject of such complaints are afforded natural justice;
 - ensuring that such complaints are dealt with in an open and transparent manner;
 - ensuring that such complaints are dealt with without unreasonable delay;
 - ensuring that such complaints are dealt with fairly and without unreasonable cost being incurred either by the Commission or by persons who are the subject of such complaints;
 - 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.

ALSWA has acted for individuals who have lodged a complaint to the AHRC on the basis of a breach of s 18C. This submission is informed, in part, by ALSWA's direct experience with these cases.

THE SUBMISSION

BACKGROUND

Australia's historical background

Aboriginal people¹ have occupied the land, known as Australia, for at least 50,000 years and Aboriginal people have the 'oldest living cultural history in the world'.² European settlement occurred

1 ALSWA uses the term 'Aboriginal people' in this submission to refer to Aboriginal and Torres Strait Islander people.
2 <http://www.australia.gov.au/about-australia/australian-story/austn-indigenous-cultural-heritage>.

in 1788 on the notion of 'terra nullius'. 'Terra nullius' did not mean that the land was uninhabited, it meant that Aboriginal peoples' relationship with the land was not recognised as a proprietary one, due to a perceived lack of Eurocentric notions of cultivation, such as fencing. Settlers appropriated Australian land for the purposes of agriculture, forestry, fishing, pastoralism and mining. This involved extensive frontier violence. In dispossessing the Aboriginal owners of their land, the settlers sexually abused, massacred and poisoned Aboriginal people.

Since colonisation, Aboriginal people have been marginalised from full participation in Australian life by successive government policies that did not recognise Aboriginal people as the original inhabitants of this land. In Western Australia, Aboriginal people were first legislated against in the 1840s and, since then, they have been subjected to an increasing range of discriminatory laws. For example, in 1871 the Western Australian Parliament banned public executions; however, the legislation was amended to allow for the public execution of Aboriginal people. This law remained in force until repealed in November 1952.³ Towards the end of the 19th century, Aboriginal workers were an integral part of the pastoral industry in north Western Australia and if they tried to leave their employment, they faced long terms of imprisonment. Aboriginal people at the turn of the century were also imprisoned for entering certain town sites, consuming alcohol, and in the case of Aboriginal women, cohabiting with non-Aboriginal men.⁴ Aboriginal people also experienced significant inequality in relation to their role in the Australian defence force, fighting wars for a country that did not recognise them as citizens upon their return.

Aboriginal people continue to experience discrimination on a daily basis. Part of this discrimination is systemic: Aboriginal people are grossly overrepresented in prison and this is, partly, a consequence of discriminatory laws and practices within the justice system itself (eg, mandatory sentencing laws; lack of access to Aboriginal language interpreters; imprisonment for fine default; lack of culturally appropriate rehabilitation programs; lack of access to diversionary options and over-policing). One recent example of the cumulative effects of institutional racism is the tragic death of 22-year-old Ms Dhu in police custody in South Hedland in 2014. Ms Dhu had first come to the attention of police at the age of 17 years and she was arrested for using offensive language towards police and refusing to provide her personal details to police. Instead of being cautioned or referred to a diversionary option she was arrested, charged and ultimately received fines when she was dealt with by the court. She later received further fines for some subsequent low-level offending. In August 2014, Ms Dhu was arrested on a warrant of commitment for unpaid fines totalling \$3,622.34. She was held in the police lock up for three days. Ms Dhu was gravely ill, eventually passing away as a result of septicemia caused from a previous rib fracture. While the decision in the coronial inquest in this matter has not yet been handed down, it is clear that some police and hospital staff dismissed the seriousness of her condition and made stereotypical assumptions about the cause of distress.

Furthermore, Aboriginal children are removed from their families and communities at a far higher rate than non-Aboriginal children. The systemic bias within the child protection system includes a lack of culturally appropriate early intervention and prevention programs for families experiencing social disadvantage and to support reunification with family as well the failure to identify and support alternative Aboriginal carers where removal is the only safe option available. Furthermore, in ALSWA's experience it is clear that Aboriginal people continue to frequently experience racism and discrimination by police, government workers, health professionals, business operators and other members of the community.

ALSWA emphasises that any examination of the utility or appropriateness of Part IIA of the RDA must take into account the historical experiences of Aboriginal people and recognise that the provisions under the RDA provide a forum for disempowered people who continue to experience racial

3 Cunneen C, 'Colonial Processes, Indigenous Peoples, and Criminal Justice Systems', in Tonry M and Bucerius S (Eds), *The Oxford Handbook of Ethnicity, Crime, and Immigration* (New York: Oxford University Press, 2013) 18.

4 Haebich A, *For Their Own Good: Aborigines and Government in the South West of Western Australia 1900-1940*, (Nedlands, University of Western Australia Press, 1988) 71-73.

discrimination and prejudice to pursue justice. As Barker J stated in *Clarke v Nationwide News Pty Ltd t/s Sunday Times*⁵:

an act done, something said, that might not offend one group of Australians because it will be considered by them as a mere slight only, may well be considered reasonably likely, in the circumstances, to offend another, minority group. Communications about a historically oppressed minority group are far more likely to cause relevant harm to that group, than communications which relate to a dominant majority.⁶

And, as recently stated by the Race Discrimination Commissioner, Dr Tim Soutphommasane:

Too often, the voices of those on the margins who encounter racism get drowned out by the voices of the powerful who are fortunate never to experience bigotry.⁷

ALSWA considers that the right to seek a remedy for breaches of s 18C represents an important aspect of the ongoing reconciliation between Aboriginal and non-Aboriginal Australians.

Legislative background

The RDA was enacted in 1975 to give effect to Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* ('CERD'). In October 1975, at a ceremony for the proclamation of the RDA, then Prime Minister Gough Whitlam described the legislation as 'a historic measure', which aimed to 'entrench new attitudes of tolerance and understanding in the hearts and minds of the people'.⁸ The Act was Australia's first federal human rights and discrimination law. It was based on the fundamental belief that all Australians irrespective of race, colour or national or ethnic origin are entitled to fair treatment.⁹ Having been enacted soon after the 'formal abandonment of the White Australia policy, it was a legislative expression of a new commitment to multiculturalism'.¹⁰

Section 18C of the RDA was inserted with the passage of the *Racial Hatred Act* in 1995. The *Racial Hatred Bill 1994* contained provisions establishing criminal offences relating to racial hatred and violence as well as the civil prohibition scheme created under Part IIA of the RDA. The Attorney-General, Michael Lavarch, stated in the Second Reading Speech that this legislation

is an appropriate and measured response to closing the identified gap in the legal protection of all Australians from extreme racist behaviour. It strikes a balance between the right of free speech and the other rights and interests of Australia and Australians. It provides a safety net for racial harmony in Australia and sends a clear warning to those who might attack the principle of tolerance. And importantly this bill provides Australians who are the victims of racial hatred or violence with protection.¹¹

The Explanatory Memorandum stated that the 'Bill is intended to strengthen and support the significant degree of social cohesion demonstrated by the Australian community at large'. It also highlighted, in regard to freedom of speech, that there is 'no unrestricted right to say or publish anything regardless of the harm that can be caused'.¹²

5 [2012] FCA 307.

6 Ibid [74].

7 <http://www.smh.com.au/comment/there-isnt-a-silent-majority-of-racists-in-australia-20161121-gsu2bc.html>.

8 Australian Human Rights Commission, *Freedom from Discrimination: Report on the 40th anniversary of the Racial Discrimination Act* (2015) 1.

9 Australia, Parliamentary Debates, House of Representatives, 15 November 1994, 3336 (Lavarch).

10 Australian Human Rights Commission, *Freedom from Discrimination: Report on the 40th anniversary of the Racial Discrimination Act* (2015) 1.

11 Australia, Parliamentary Debates, House of Representatives, 15 November 1994, 3342 (Lavarch).

12 Racial Hatred Bill 1994, Explanatory Memorandum, 1.

In *Eatock v Bolt*¹³ it was observed that the legislative history for Part IIA of the RDA demonstrates that it is not restricted to 'extreme racist behaviour based upon racial hatred or behaviour calculated to induce racial violence'.¹⁴ It was further stated that:

The proposed civil provisions (which became Part IIA of the RDA) made no reference to the incitement of racial hatred and did not require an act to intentionally inflict harm as an element of breach. Instead, the civil provisions focused upon racially offensive behaviour and (by what became s 18D) included free speech protections which were not included in the proposed criminal offence of racial hatred.¹⁵

Detrimental consequences of racism and discrimination

It is clear that members of the Australian community continue to experience racism and discrimination. The Scanlon Foundation has recently observed that the experience of discrimination on the basis of skin colour, ethnicity or religion in Australia has increased from 15% in 2015 to 20% in 2016.¹⁶ It also found that in 2015, the lowest level of discrimination was experienced by third generation Australians and the highest by people of non-English speaking backgrounds born overseas. The highest level experienced in the preceding 12 months was 77% for South Sudanese people. The report also found that the level of discrimination experienced by Aboriginal people was at a very high level (59%).¹⁷ Similarly, the Australian Bureau of Statistics (ABS) National Aboriginal and Torres Strait Islander Social Survey in 2014-2015 found that approximately 33% of Aboriginal and Torres Strait Islander people aged 15 years and over 'felt that they had been treated unfairly at least once in the previous 12 months, because they were of Aboriginal or Torres Strait Islander origin'.¹⁸

The effects of racism are not limited to the immediate hurt and pain caused by a particular incident. The Commissioner for Children and Young People in Western Australia has observed that '[r]acism and discrimination are key determinants of health and wellbeing, with a growing body of evidence demonstrating the adverse effects of discrimination and racism on children and young people's health, development and social and emotional wellbeing'.¹⁹ The AHRC recently observed that research shows that racial vilification leads to emotional trauma and that there are 'identified links between discrimination and health effects including cardiovascular ill health, depression, smoking, diabetes and substance abuse'.²⁰ Experiences of racism have been found to create in its victims 'a sense of acceptance, resignation and helplessness because people either don't know what to do or believe quite strongly that nothing will be done'.²¹ The National Aboriginal and Torres Strait Islander Health Survey (NATSIHS) found that racism is associated with psychological distress, diabetes, smoking and substance-misuse,²² and with depression and poor mental health in the DRUID study.²³ Analysis of the DRUID study found that racism explained one-third of the prevalence of depression and poor self-assessed health status among Indigenous Australians.²⁴ Racism has also been

13 [2011] FCA 1103.

14 Ibid [196] (Bromberg J).

15 Ibid [202].

16 Scanlon Foundation, *Mapping Social Cohesion: The Scanlon Foundation Survey 2016* (2016) 4. Participants in the survey were asked whether they had experienced such discrimination in the past 12 months.

17 Scanlon Foundation, *Australians Today* (2016) 60.

18 ABS, National Aboriginal and Torres Strait Islander Social Survey, 2014-15, 4714.0 available at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4714.0~2014-15~Main%20Features~Social%20networks%20and%20wellbeing~4>.

19 Commissioner for Children and Young People, *Listen to Us: Using the views of WA Aboriginal and Torres Strait Islander children and young people to improve policy and service delivery* (2015) 16.

20 Australian Human Rights Commission, *Freedom from Discrimination: Report on the 40th Anniversary of the Racial Discrimination Act* (2015) 38.

21 Queensland Aboriginal and Torres Strait Islanders Corporation for Legal Aid, Submission No 3.17 to Human Rights and Equal Opportunity Commission, *National Inquiry into Racist Violence in Australia*, 1991.

22 Yin Paradies, 'Exploring the Health Effects of Racism for Indigenous people', (Paper presented at the *Rural Health Research Colloquium*, Tamworth, NSW, 2007).

23 Yin Paradies, *Race, Racism, Stress and Indigenous Health* (PhD thesis, Centre for Health and Society, The University of Melbourne, 2006).

24 Ibid.

associated with substance use, emotional and behavioural difficulties, and suicide risk for young Aboriginal Australians aged 12-17 years.²⁵

Section 18C was introduced in response to recommendations of major inquiries including the *National Inquiry into Racist Violence*, the Australian Law Reform Commission's *Multiculturalism and the Law* report and the *Royal Commission into Aboriginal Deaths in Custody*. These inquiries found that racial hatred and vilification can cause emotional and psychological harm to their targets, and reinforce other forms of discrimination and exclusion. They found that seemingly low-level behaviour can soften the environment for more severe acts of harassment, intimidation or violence by impliedly condoning such acts.²⁶

ALSWA considers that allowing absolute freedom of speech will have serious consequences to the health and wellbeing of many people in marginalised communities. The removal of section 18C and its associated clauses will have serious consequences for victims of racial hatred and prejudice. In addition, the removal of a forum of conciliation between aggressors and victims of racist conduct may encourage parties to act outside of the law. At a forum that ALSWA attended, a shopkeeper who had experienced racial discrimination stated that in the absence of a remedy under section 18C, he would be more assertive in protecting himself from racially offensive conduct and consider taking the law into his own hands.

The international framework

There are various provisions under international human rights standards that are relevant to the current inquiry. Article 19(2) of the *International Covenant on Civil and Political Rights* ('ICCPR') provides that 'everyone shall have the right to freedom of expression'. The right to freedom of speech is of fundamental importance and extends to expression that may be regarded as offensive. It is not, however, an absolute or unfettered right and carries with it duties and responsibilities. It may therefore be subject to restrictions, as provided by law, necessary for the respect of the rights or reputations of others (Article 19(3) ICCPR).

Article 20 of the ICCPR provides that states must prohibit by law any advocacy of racial hatred that constitutes incitement to discrimination, hostility or violence. The United Nations Declaration on the Rights of Indigenous Peoples is also relevant. Article 2 states 'Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.' Australia is also a party to the CERD. Article 4 provides that parties shall declare to be an offence 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'.

The ALRC suggested that because s 18C is broader than Article 20 of the ICCPR it may be considered an unjustified interference with freedom of speech²⁷ yet, at the same time, recognised that arguably Australia does not comply with international standards because s 18C does not create a criminal offence (ie, as required by Article 4 of CERD).²⁸ ALSWA cautions against any reform to the RDA that would impact on Australia's international reputation as a nation that prohibits racial discrimination.

25 Naomi C Priest et al, 'Racism as a determinant of social and emotional wellbeing for Aboriginal Australian youth' (2011) 194(10) *The Medical Journal of Australia* 546, 546.

26 Australian Human Rights Commission, *At a glance: Racial vilification under sections 18C and 18D of the Racial Discrimination Act*, (2013).

27 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Report No. 129 (2016) [4.193].

28 *Ibid* [4.2.13]

Media reporting

Much of the recent public debate concerning s 18C of the RDA has been underpinned by a perceived threat to freedom of the press. In this regard it is vital to remember that s 18C does not prohibit the reporting of accurate information or opinion about the conduct of a particular individual who happens to be a member of a racial or ethnic group. Nor does it prohibit accurate reporting about the conduct of a specific group of persons. What it does prohibit is conduct in public that is reasonably likely to 'offend, insult, humiliate or intimidate a person or group of people on the basis of race, colour or national or ethnic origin' unless the conduct is done reasonably and in good faith for one of the identified exemptions.

Media holds an extremely powerful and privileged role in the community. It is the method by which everyday members of the community are informed about matters of public interest, political activities and community issues. Concern about the way in which media portray Aboriginal people (as well as other minority groups) is not new. The AHRC has stated that there is a 'perceived tendency for mainstream media to sensationalise matters concerning race and religion. There was a marked concern that sensationalism fed unhelpful stereotypes about certain communities'.²⁹ In 1992 the ALRC observed in its report on *Multiculturalism and the Law*, that its consultations 'revealed that there is a great deal of concern about recurring racism in the media and the lack of effective sanctions against offenders, even when complaints are upheld by the Australian Press Council or regulatory bodies'.³⁰ It further observed that:

Inflammatory media coverage of current events, for example the Gulf War, the portrayal of Islam as a malevolent force, the stereotyping of Aborigines as criminals and drunkards, does not inform; it misinforms and contributes to racial tensions. In the Commission's own consultations a great deal of concern has been expressed about the role of the media in exacerbating racial prejudice, and the lack of redress for the damage this does to individuals, communities and social relations generally.³¹

In regard to current media regulation, the Australian Press Council Statement of General Principles includes:

3. Ensure that factual material is presented with reasonable fairness and balance, and that writers' expressions of opinion are not based on significantly inaccurate factual material or omission of key facts.
6. Avoid causing or contributing materially to substantial offence, distress or prejudice, or a substantial risk to health or safety, unless doing so is sufficiently in the public interest.

The Australian Press Council Guideline on the Reporting of 'race' states that boundaries are not cut and dried but rather determined by tone and context. The Council is 'principally concerned about references to race, colour, ethnicity or nationality which promote negative stereotypes in the community.' Further, the Media Alliance Code of Ethics expresses the importance of journalists showing respect for the rights of others and the code states '[d]o not place unnecessary emphasis on personal characteristics, including race'.

It is ALSWA's view that these principles are consistent with, and complement, the RDA and that they should continue to operate concurrently. It is important to note that there is a significant power disparity between journalists, cartoonists or other media presenters and their publishers, and the minority groups the RDA is designed to protect. It is crucial that the RDA reminds journalists and others of their responsibility to take care to adhere to the above guidelines and the RDA to avoid substantial offence, distress or prejudice and to minimise the adoption of racist views in the community.

²⁹ Australian Human Rights Commission, *Freedom from Discrimination: Report on the 40th Anniversary of the Racial Discrimination Act* (2015) 44.

³⁰ Australian Law Reform Commission, *Multiculturalism and the Law*, Report No. 57 (1992) [7.49].

³¹ *Ibid.*

While not commenting on the merits or otherwise of the recent complaints to the AHRC in relation to the Bill Leak cartoon, ALSWA takes this opportunity to provide its general views in regard to media content that portrays negative stereotypes of Aboriginal people. In some circumstances, accurate reporting of dysfunction in particular Aboriginal families may arguably constitute a legitimate public issue; however, blanket statements implying that all or even many Aboriginal parents neglect their children is inaccurate, unfair and inappropriate. Likewise, the implication that Aboriginal children who are in detention or involved in the justice system are there solely as a consequence of parental neglect is equally misleading. As any informed member of the community would know, involvement in criminal behaviour and, in particular, criminal behaviour precipitated by substance misuse can touch any family, from any walk of life, and from any racial or ethnic background. ALSWA emphasises that negative stereotypes of Aboriginal people in the media undermines reconciliation and the health and wellbeing of Aboriginal people generally. In addition, it arguably fuels discriminatory behaviour. It is important to question the general societal attitudes that enable Aboriginal people to be targeted unnecessarily by police, shopkeepers, transport security officers and the like. One must question why an Aboriginal person is requested to pay for petrol upfront or hand over bags for inspection by a shop owner while non-Aboriginal people in the same place are left untouched.

For the purpose of the current debate and this inquiry, it is worth highlighting that in Western Australia as at 31 March 2016 there were 106 Aboriginal children in detention and a further 636 Aboriginal children under some form of supervision by the Department of Corrective Services.³² While ALSWA continues to advocate for solutions to reduce the unacceptable overrepresentation of Aboriginal children in the justice system, this overrepresentation should not be used as an excuse to brand all Aboriginal children as criminals or all Aboriginal parents as neglectful. ABS census data for 2011 shows that there were 36,000 Aboriginal young people under the age of 18 years living in Western Australia.³³ While that figure would have increased by now, it is fair to say that there would be about 35,000 Aboriginal children in Western Australia who are not involved in the criminal justice system at all. Where are the media reports about the parents of these children?

It is also vital to remember the impact of social media and the ease by which racial hatred and prejudicial attitudes can be distributed. The AHRC observed that if 'racial vilification in the past may have required someone to reveal themselves in public to their target, today it does not'.³⁴ ALSWA considers that media outlets have the moral and legal responsibility to report news concerning members of racial or ethnic groups fairly and in an unbiased manner. To do anything less, helps to promote more insidious attacks via anonymous social media use.

A shocking example of the way social media can be used to distribute racial hatred occurred in recent months in Kalgoorlie. In early September 2016, the ABC reported that prior to the tragic death of a 14-year-old Aboriginal boy, Elijah Doughty, numerous racially offensive comments had been posted to local community Facebook pages. Elijah was killed after allegedly being struck by a vehicle and a non-Aboriginal man has been charged with his manslaughter. According to the ABC report:

After a woman had posted about two Indigenous boys breaking into a ute, a man had commented on one of the pages: "Feel free to run the oxygen thieves off the road if you see them." Another wrote: "Everyone talks about hunting down these sub human mutts, but no one ever does."³⁵

A comment reportedly posted in July 2016 stated:

32 http://www.correctiveservices.wa.gov.au/_files/about-us/statistics-publications/statistics/2016/quick-ref/201603-qrs-youth-custody.pdf.

33 Commissioner for Children and Young People, *Listen to Us: Using the views of WA Aboriginal and Torres Strait Islander children and young people to improve policy and service delivery* (2015) 26.

34 Australian Human Rights Commission, *Freedom from Discrimination: Report on the 40th Anniversary of the Racial Discrimination Act* (2015) 42.

35 Purtill J, 'Racist. Violent. Deleted: The Facebook posts dividing Kalgoorlie', ABC, 1 September 2016 see <http://www.abc.net.au/triplej/programs/hack/the-facebook-posts-dividing-kalgoorlie/7805346>.

Couldn't agree more Paul. they are black when it comes to the law and white when they want to be. bloody coconuts, brown on the outside, white in the middle.³⁶

On the same date, another read:

Robyn we have been around them all our life. things will never change unless there is an annual cull.³⁷

The ABC report also states that members of the community had complained to police for months; ALSWA also raised concerns about these Facebook pages with the local police but no action was taken.

The importance of Parliament providing leadership and appropriate standards to the general community

As ALSWA notes above, the media has an important educative role in the community; however, the role of Parliament in setting appropriate standards for the community is even more vital. The law reflects our values as a society; it sets a standard for acceptable behaviour. As Australia's Race Discrimination Commissioner, Dr Soutphommasane, states if 'as a society, we repudiate racism, it is only right to have laws that express that commitment.'³⁸ History shows that legislation reflects the shifting of public ideals as society becomes more inclusive.

The arena of Australian Football League (AFL) can be examined as a microcosm of the broader Australian community. Over the years the AFL management has made it clear to fans that racist language will not be tolerated. This has led to a shift in the response to racist language being used at AFL games as well as players feeling more confident to speak up about racism. This was clearly shown by the incident where Adam Goodes was called an 'ape' by a young girl. This incident became an opportunity for Goodes to explain the hurt this name caused him, the girl to be educated about racism and for the community to be deterred from using this offensive language in the future. Without the leadership coming from the AFL management this would not have happened.

The former Attorney-General and the Honourable John Brown emphasised the educative role of legislation during the Second Reading Speech for the Racial Hatred Bill 1994. Mr Brown said 'provisions of legal penalties can have a powerful educative effect. The socialising process for all people follows from a mixture of learning from example, as kids do in the home, and learning from sanctions, which may be simple admonitions from their parents or social attitude, which sometimes becomes encapsulated in our legal framework.'³⁹ Further, the Honourable Clyde Holding, espoused 'this legislation asserts our values as a community. It is about community values. We are saying that this sort of activity cannot and will not be tolerated ... there is a view that they are only words, but words can wound, words can maim and words can incite people to carry out antisocial activity.'⁴⁰

TERM OF REFERENCE 1

The first term of reference questions whether Part IIA imposes unreasonable restrictions upon freedom of speech and whether the provisions should be reformed. To respond to this question it is both necessary to examine the 'right to free speech' as well as the way in which Part IIA has been interpreted in practice.

36 Ibid.

37 Ibid.

38 Dr Tim Soutphommasane, Speech, 'Populism, Race and Democracy', 6 September 2016.

39 Australia, Parliamentary Debates, House of Representatives, 15 November 1994, 3366 (Brown).

40 Ibid, 3371 (Holding).

The right to free speech

The right to free speech and expression is not absolute; 'one person's freedom ends where another person's freedom begins'.⁴¹ There are numerous examples of laws that restrict total freedom of expression.⁴² The Explanatory Memorandum for the Racial Hatred Bill 1994 highlighted that there is 'no unrestricted right to say or publish anything regardless of the harm that can be caused'.⁴³ It was further observed that the civil prohibition under Part IIA of the RDA is 'analogous to that applying to sexual harassment under the *Sex Discrimination Act 1984* in which unwelcome acts are done in circumstances in which a reasonable person would be offended, intimidated or humiliated'.⁴⁴ Sexual harassment includes 'unwelcome requests for sexual favours' and unwelcome statements of a sexual nature (whether orally or in writing).⁴⁵ There are other laws that restrict freedom of speech or expression (eg, censorship, defamation, trade practices and cyber bullying offences). Some of these are discussed below.

While some offences that cover cyber bullying are directed towards behaviour that is threatening or intended to cause harm, s 474.17 of the *Criminal Code Act 1995* (Cth) creates a criminal offence for using a carriage service to 'menace, harass or cause offence'. The provision states that if a person uses a carriage service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive, the person is guilty of an offence with a maximum penalty of 3 years' imprisonment.

In *Monis v The Queen*,⁴⁶ the High Court examined the constitutional validity of s 471.12 of the *Criminal Code Act 1995* (Cth). This provision is similar to the offence above; it creates an offence to use a postal or similar service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive. The six judges were divided and, as a result, the decision of the New South Wales Court of Appeal (that decided the provision was valid) was upheld. The appellants had been charged under s 471.12 as a result of sending letters to the parents and family members of soldiers killed on active duty in Afghanistan criticising Australia's involvement in the war, including extremely derogatory comments about the deceased soldiers. The High Court was not required to determine whether reasonable persons would regard the content of the letters as offensive within the meaning of s 471.12. However, Crennan, Kiefel and Bell JJ observed that s 471.12 'seeks to deter a particular use of a postal service. It may be taken to recognise a citizen's desire to be free, if not the expectation that they will be free, from the intrusion into their personal domain of unsolicited material which is seriously offensive'.⁴⁷ They further stated that legislation concerning 'the regulation of communications usually attempts to strike a balance between competing interests' and that s 471.12 'may be taken to do so by prohibiting communications which are offensive to a higher degree'.⁴⁸

Further, there are various laws throughout Australia that criminalise 'disorderly behaviour', which includes the use of offensive language. In Western Australia a person can be arrested, detained and charged with an offence for using insulting or offensive language in a public place.⁴⁹ As noted earlier, the death of Ms Dhu in police custody followed her arrest for unpaid fines that had been imposed, in part, for an offence of using offensive language towards police at the age of 17 years and another offence of using offensive language on the streets of South Hedland at the age of 18 years.

41 Dr Tim Soutphommasane, Speech, 'Populism, Race and Democracy', 6 September 2016.

42 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Report No. 129 (2016) [4.4] - [4.5].

43 Racial Hatred Bill 1994, Explanatory Memorandum, 1.

44 Racial Hatred Bill 1994, Explanatory Memorandum, 10.

45 See *Sex Discrimination Act 1984* (Cth) s 28A.

46 [2013] HCA 4.

47 Ibid [320].

48 Ibid [333].

49 There are other laws providing for the good governance of prisons and universities by prohibiting the use of insulting language.

It is difficult to contend racially offensive or racially insulting language or conduct in public should be lawful when any type of offensive or insulting language or conduct may potentially give rise to criminal prosecution and sanction.

The Honourable Tim Fischer stated during the Second Reading Speech 'this legislation is enhancing freedom of speech. It is protecting freedom of speech. It is protecting the rights of individuals who happen to be of a different racial background from the dominant group in the society to be able to live their lives and express their views and their culture without fear of intimidation, without fear of threats and without fear of having racial hatred and ultimately violence incited against them.'⁵⁰

In ALSWA's view the current legislation strikes the correct balance between freedom of speech and protection from racial hatred and prejudice. The current legislation is not an excessive fetter on free speech bearing in mind that it allows for comment that may be racially discriminatory if made in private, or if it is said reasonably in good faith, for scientific, artistic, or academic reasons. Moreover, unlike some of the examples discussed above (eg, offensive language offences and using a postal service to send offensive material) s 18C of the RDA does not create a criminal offence.

The interpretation of s18C

Section 18C of the RDA provides:

(1) It is unlawful for a person to do an act, otherwise than in private, if:

(a) the act is **reasonably likely**, in all the circumstances, to **offend, insult, humiliate or intimidate** another person or a group of people; and

(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

(a) causes words, sounds, images or writing to be communicated to the public; or

(b) is done in a public place; or

(c) is done in the sight or hearing of people who are in a public place.

(3) In this section:

"public place " includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

To address the first term of reference, it is not sufficient to simply look at the words in the legislation. Judicial interpretation is a crucial component of examining the appropriateness of any legislative provision because this impacts on how the provision operates in practice. The judiciary has interpreted the meaning of the current words used in section 18C to require 'profound and serious effects, not to be likened to mere slights.'⁵¹

50 Australia, Parliamentary Debates, House of Representatives, 15 November 1994, 3355-6.
51 *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356-7 (Kiefel J).

Furthermore, the ALRC observed that ‘the words “offend, insult, humiliate or intimidate” were “not intended to extend to personal hurt unaccompanied by some public consequence” of the kind [Part] IIA of the RDA is directed to avoid.’⁵² As Bromberg J stated in *Eatock v Bolt* ⁵³

The ordinary meaning of these words is potentially quite broad. To “offend” can mean to hurt or irritate the feelings of another person. If the concern of the provision was to fully protect people against exposure to personal hurt, insult or fear, it might have been expected that the private domain would not have been excluded by the phrase “otherwise than in private” found in the opening words of s 18C(1). The fact that it is, suggests that the section is at least primarily directed to serve public and not private purposes...That suggests that the section is concerned with consequences it regards as more serious than mere personal hurt, harm or fear. It seems to me that s 18C is concerned with mischief that extends to the public dimension. A mischief that is not merely injurious to the individual, but is injurious to the public interest and relevantly, the public’s interest in a socially cohesive society.⁵⁴

ALSWA submits that the public interest in ensuring a socially cohesive society and that members of racial minorities are not subjected to racial prejudice means that particular case examples (such as the Bill Leak cartoon) should not be viewed through a narrow lens; it is not just whether members of the Aboriginal community would have been offended, insulted, humiliated or intimidated, but also whether the promotion of false stereotypes in the public arena is detrimental to future social cohesion. For example, ALSWA is aware of some Aboriginal fathers who were offended and insulted by the Bill Leak cartoon. Comments that were typically made by those fathers were to the effect that such a racially derogatory cartoon is counter productive in breaking down racial barriers between Australia’s First Nations Peoples and non-Aboriginal Australians.

It is also noted that the inclusion of the word ‘reasonably’ in s 18C and the reference to ‘all the circumstances’ imports an objective test.⁵⁵ The court does not simply rely on how a particular person or group of people subjectively felt about or reacted to the relevant act. Instead, the court assesses whether, objectively, the act complained of was ‘reasonably likely, in all the circumstances to offend, insult, humiliate or intimidate’ another person or a group of people.⁵⁶ When applying the objective test it is necessary to regard the perspective of the hypothetical person or group, sometimes referred to as the ‘reasonable victim’, who might possibly be offended by an act of the type complained of.⁵⁷ The test has objective and subjective elements. It is subjective in the sense that it considers the actual ‘values, standards and circumstances’ of the target group; it is objective in the sense that it considers the likely reactions of a reasonable member of that group, rather than the actual response of the particular targets.⁵⁸ A group of people may include the ‘sensitive as well as the insensitive, the passionate and the dispassionate, the emotional and the impassive.’ For that reason it is necessary to consider only the perspective of the ordinary or reasonable member or members of the group, not those at the margins of the group whose view may be considered unrepresentative.⁵⁹ The courts have held that extreme, atypical or intolerant reactions are not sufficient.

The interpretation of s18D

Section 18D provides:

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

⁵² Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Report No. 129 (2016) [4.191].

⁵³ [2011] FCA 1103.

⁵⁴ *Ibid* [263].

⁵⁵ *Hagan v Trustee of Toowoomba Sportsground Trust* [2000] FCA 1615; BC200006905 at [15] per Drummond J; *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 at [12] per Kiefel J (*Cairns Post*).

⁵⁶ *Hagan v Trustees of Toowoomba Sports Ground Trust* [2000] FCA 1615 at [15]; *Creek v Cairns Post Pty Ltd* [2001] FCA 1007; (2001) 112 FCR 352 (*Cairns Post*) at [12]; *Jones v Scully* [2002] FCA 1080; (2002) 120 FCR 243 (*Jones v Scully*) at [98]–[100]; *Eatock v Bolt* [2011] FCA 1103; (2011) 197 FCR 261 (*Bolt*).

⁵⁷ *Clarke v Nationwide News Pty Ltd* [2012] FCA 307, at [50].

⁵⁸ *Eatock v Bolt* [2011] FCA 1103; [253].

⁵⁹ *Clarke v Nationwide News Pty Ltd* [2012] FCA 307, at [61].

- (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.

Section 18D of the RDA and each of the State and Territory Acts that contain civil prohibitions on racial vilification contain free speech exemptions for matters of public discussion and debate in similar forms. In order for these exemptions to apply, the legislation requires that the conduct be done 'reasonably and honestly' or 'reasonably and in good faith' or 'in good faith'.

There have been numerous cases considered by the courts, where an act has caused racial offence, insult, humiliation or intimidation, but it has been held that the act is protected by section 18D. For example, in the case of *Bropho v Human Rights and Equal Opportunity Commission*⁶⁰ a cartoon which ridiculed Nyungar mythology and Aboriginal leader, Yagan, was found to be offensive, insulting, humiliating or intimidating to any reasonable Aboriginal person, or to a person belonging to the Nyungar group of Aboriginal persons, but to also fall within s 18D of the Act. In this case, the Federal Court explained the interpretation of 'reasonableness' in s18D. French J held that

A person acting in the exercise of a protected freedom of speech or expression under s 18D will act in good faith if 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. That is one way, not necessarily the only way, of acting in good faith for the purpose of s 18D. On the other hand, a person who exercises the freedom carelessly disregarding or wilfully blind to its effect upon people who will be hurt by it or in such a way as to enhance that hurt may be found not to have been acting in good faith.⁶¹

ALSWA considers that the combination of s 18C and s 18D provide an appropriate balance between prohibiting racial vilification and enabling appropriate freedom of speech.

Other remedies are insufficient

Critics of section 18C have observed that there are other potential remedies to combat racial discrimination. For example, Chapter XI of the *Criminal Code (WA)* creates a number of criminal offences concerning racial harassment and the incitement of racial hatred. Some of these offences require proof of an intention to incite racial animosity or racially harass (ie, threaten, seriously and substantially abuse or severely ridicule) while others require the conduct to be likely to incite racial animosity or harassment. Defences analogous to the provisions in s 18D of the RDA apply to the strict liability offences in this Chapter.

As far as ALSWA is aware, there is only one reported case involving an offence under Chapter XI of the *Criminal Code*.⁶² Ironically, the first person to be charged with an offence under Chapter XI was a 16-year-old Aboriginal girl, although the prosecution was unsuccessful.⁶³ On a number of occasions,

⁶⁰ [2004] FCAFC 16.

⁶¹ Ibid 102.

⁶² *Mulhall v Barker* [2010] WASC 359.

⁶³ see <http://www.abc.net.au/am/content/2006/s1741596.htm>.

ALSWA has referred racial harassment cases to the Western Australia Police and charges have not been laid against offenders.

CASE STUDY 1

A person in a regional Western Australian community posted some highly offensive and discriminatory material on Facebook about Aboriginal people including references to Aboriginal children as 'little black buggers'; references to Aboriginal parents as alcoholics and neglectful; and the use of the term 'boong'. It was also stated that if the 'cops' and courts couldn't do anything, the community would. A complaint was made under section 18C in the Australian Human Rights Commission against the individual. The matter was not conciliated successfully because the parties could not agree on appropriate terms of resolution, and it proceeded to the Federal Court. It settled following mediation and the respondent agreed to publish a public apology in the local paper and fund an educational program for the local radio station.

When the matter was put to the state authorities to investigate the potential criminal offences, no charges were laid. This matter demonstrates that the current legislation provides an effective tool to set a community standard as to what is appropriate behaviour in the public sphere.

Current proposals for reform

There are two bills before the Commonwealth Parliament proposing reform to the RDA. The *Racial Discrimination Law Amendment (Free Speech) Bill 2016* (Cth) seeks to repeal Part IIA of the RDA in its entirety. During the Second Reading Speech, Senator Leyonhjelm argued that *unrestricted* freedom of speech enables racist views to be challenged; otherwise such views may remain sinister and hidden. He further contended that prohibiting racist speech will not prevent racist thoughts.⁶⁴

ALSWA is of the view that it would be wholly inappropriate and reprehensible for the Commonwealth Parliament to repeal Part IIA of the RDA. While it is true that prohibiting racist speech may not prevent all racist thoughts, the evil to which the provisions are directed is the expression of racial hatred and prejudice in public. Moreover, using the analogy referred to earlier, just because murder laws do not prevent all people from committing murder is not a reason to repeal those laws. ALSWA also considers that the view expressed by Senator Leyonhjelm fails to give sufficient weight to the reality that racial vilification promotes racial discrimination and may lead to violent and threatening behaviour.

The other Bill, the *Racial Discrimination Amendment Bill 2016* (Cth), seeks to omit the words 'offend' and 'insult' from s 18C. In support of this Bill, Senator Bernardi challenges those who support s 18C in its current form to justify its use in relation to cases such as the Bill Leak cartoon. He further contends that the Bill Leak cartoon simply sought to highlight family dysfunction in Aboriginal communities. Moreover, he argues that 'offending or insulting someone should not be cause to drag someone before a commission or a court'.⁶⁵

As explained above, the interpretation of s 18C goes well beyond simply establishing that someone has been offended or hurt. It concerns the public dissemination of the information and the public interest in achieving a cohesive society. Furthermore, as discussed earlier, there are a number of *criminal* provisions that enable individuals to be arrested, prosecuted and punished for engaging in offensive or insulting behaviour. It is always a question of balancing different public interests.

⁶⁴ Commonwealth, Parliamentary Debates, Senate, 15 September 2016 and 24 November 2016.

⁶⁵ Commonwealth, Parliamentary Debates, Senate, 31 August 2016, 255.

TERM OF REFERENCE 2

The second term of reference concerns the processes for handling complaints made to the AHRC, in particular, whether the legislation should be reformed in relation to:

- the appropriate treatment of:
 - i. trivial or vexatious complaints; and
 - ii. complaints which have no reasonable prospect of ultimate success;
- ensuring that persons who are the subject of such complaints are afforded natural justice;
- ensuring that such complaints are dealt with in an open and transparent manner;
- ensuring that such complaints are dealt with without unreasonable delay;
- ensuring that such complaints are dealt with fairly and without unreasonable cost being incurred either by the Commission or by persons who are the subject of such complaints;
- the relationship between the Commission's complaint handling processes and applications to the Court arising from the same facts.

ALSWA has no particular concerns with the current processes for dealing with complaints made to the AHRC and supports the current framework for s 18C of the RDA which is focused on resolving disputes so parties can avoid litigation. The majority of complaints are successfully resolved through conciliation. During the 2015-2016 financial year 76% of complaints where conciliation was attempted were successfully resolved. In the same year, of the 86 complaints the AHRC finalised about racial hatred, only one complaint in relation to section 18C proceeded to court.⁶⁶ The statistics show that the current framework is effective in encouraging parties to conciliate their disputes. As the Royal Commission into Aboriginal Deaths in Custody observed, the 'voluntary settlement of a complaint through conciliation may hold the best promise of altering personal attitudes. Through the respondent's confrontation with the individual he/she has discriminated against, and the realisation of the offence caused, a genuine shift in understanding may be achieved'.⁶⁷

As explained by the AHRC, the conciliation process under the AHRC Act results in various outcomes including apologies or statements of regret, changes in policy for respondents and monetary payments.⁶⁸ In one example, the outcomes included that the respondent company agreed to establish an anti-discrimination policy and provide anti-discrimination training to all employees.⁶⁹ In another case, an Aboriginal male who left his apprenticeship as a result of racial vilification received monetary compensation and the business agreed to introduce an anti-discrimination policy and undergo Aboriginal cultural awareness training.⁷⁰ In ALSWA's experience most complaints are resolved with the following outcomes: a personal apology; an agreement to remove material; an agreement to publish corrective material and/or an apology; education such as training for staff; a change to policies and procedures; payment of money to a third party such as a charitable organisation or for education programs; and/or payment of compensation for pain and suffering. Thus, it is clear that the benefits of these conciliated outcomes extend beyond the individual complainant.

ALSWA considers that there are enormous benefits to be gained from accessing justice via the conciliation process as evidenced by the following case studies. Furthermore, where conciliation cannot be achieved recourse to court proceedings is appropriate and necessary.

⁶⁶ Australian Human Rights Commission, 'Racial Discrimination Complaints' e-news, 8 November 2016.

⁶⁷ Royal Commission into Aboriginal Deaths in Custody (1991) Vol 4 [28.3.7].

⁶⁸ Australian Human Rights Commission, *Freedom from Discrimination: Report on the 40th Anniversary of the Racial Discrimination Act* (2015) 31.

⁶⁹ Ibid.

⁷⁰ Ibid 39.

CASE STUDY 2

An Aboriginal woman was involved in an incident with a male authority figure in regional Western Australia. The male said to her and her friends, amongst other things, 'I am sick and tired of you hairy monkeys always coming into my town and behaving the way you do.' The woman was extremely upset and traumatised by the incident. The matter went to conciliation and this gave the woman and the male an opportunity to discuss each of their points of view and feelings. They both empathised with the other's position and had an emotional discussion. They resolved the matter and both parties left with newfound respect for the other.

CASE STUDY 3

An Aboriginal leader read some offensive and discriminatory material in The Sunday Times newspaper. The comments, which were made within an advertisement for the sale of used cars, were derogatory in nature and directed at Aboriginal leaders and people of the Aboriginal race regarding their capacity to be responsible for their lives and the lives of their children. The Aboriginal leader commenced proceedings in the Federal Court of Australia against the advertiser pursuant to s18C after the conciliation of his complaint against the advertiser and The Sunday Times was unsuccessful in the Australian Human Rights Commission.

The matter was resolved by the advertiser agreeing to publish an apology in the newspaper and pay the sum of \$2500.00 to a charity.

CASE STUDY 4

Aboriginal patrons in a regional Western Australian community were required to be breathalysed before they were allowed to enter a particular licensed premises. The breathalyser had to read 0.00%. Non-Aboriginal patrons were not asked to be breathalysed before entering the same premises. In addition, the white patrons were allowed to enter through a back entry, while the Aboriginal patrons had to enter at the front gate where the breathalyser was located. A complaint was made under s18C to the Australian Human Rights Commission against the licensed premises. The matter was successfully resolved at conciliation and the licensed premises erected signage relating to entry requirements and breathalysing patrons, and about access to the back entry. The business also implemented cultural awareness training for all staff.

CASE STUDY 5

An influential community member of a regional Western Australian community made highly discriminatory comments in the media and on the public record. The matter was brought to ALSWA's attention by a member of the Aboriginal community. A complaint was made under s18C to the Australian Human Rights Commission against both the public organisation and the individual who made the offensive comments. The matter was not conciliated successfully and was taken to the Federal Circuit Court. The matter was settled favourably through negotiation between the parties' lawyers. A monetary payment was paid for the purpose of reducing the overrepresentation of Aboriginal children in custody, an apology was published in the local paper and on the public organisation's website, and the public organisation is due to hold an event to discourage racism in their community.

CASE STUDY 6

An Aboriginal woman and her young family were asked to prepay for petrol at a petrol station. The other people refuelling their cars at the petrol station at the time were able to pay after they had put the petrol in their cars. The attendant told the woman that she had to prepay because they had a high rate of Aboriginal people driving off without paying. The matter was not resolved at conciliation and proceeded to a court hearing. During the court proceedings the attendant denied saying the woman had to prepay because they had a high rate of Aboriginal people driving off without paying and that he required prepayment for a different reason in accordance with the station's policy. The applicant did not have any other evidence to prove the attendant said this and therefore, given the applicant bore the burden of proof, her action was unsuccessful.

The woman was severely traumatised by the incident and found the legal process intimidatory. She felt uncomfortable going in to the court building and found it hard giving evidence while being the only Aboriginal person in the court room. Despite the difficulties, the applicant felt empowered that she had a forum in which to voice her complaint.

CASE STUDY 7

An Aboriginal woman, Natalie Clarke, was the subject of highly offensive and discriminatory press coverage after three of her children (young males, aged 10, 11 and 15) were killed when the vehicle they were travelling in hit a lamp post. The car was being driven by another young Aboriginal male.

The case concerned the publication of highly offensive 'Readers' comments' on The Sunday Times' perthnow.com.au website following the report in the newspaper about the motor vehicle accident.

The comments inferred that Ms Clark did not provide parental supervision, that Aboriginal parents do not supervise their children, that a lot of Aboriginal children get involved in theft and burglary because of lack of adult supervision and that Aboriginal people give their children free reign.

Ms Clark initially made a complaint to the Australian Human Rights Commission against The Sunday Times and The West Australian. The AHRC subsequently terminated the complaints by notice on the grounds that there was no prospect of settling the matter with conciliation. .

Ms Clark then commenced proceedings against both The West and The Sunday Times, in the Federal Magistrates Court in 2010 and shortly thereafter transferred the proceedings to the Federal Court of Australia. The proceedings alleged that The West and The Sunday Times' publication of various comments by their readers contravened s18C of the RDA.

Following mediation by a Federal Court Registrar, Ms Clark withdrew her claim against The West and proceeded only against the Sunday Times.

On 27 March 2012, Justice Barker found that four of the comments published had contravened s18C and ordered the Sunday Times to pay Ms Clark \$12,000 in damages and pay her legal costs and to remove the comments immediately.

TERM OF REFERENCE 3

The third term of reference requires the Committee to examine 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.

Assuming that part of this term of reference is directed to the media reports about ALSWA's lodgement of two complaints about the Bill Leak cartoon, ALSWA makes the following observations and comments.

ALSWA obligations under its Funding Agreement

ALSWA is funded by the Commonwealth Government to provide legal services to Aboriginal people in Western Australia (under the Indigenous Legal Assistance Programme). Under its funding agreement with the Commonwealth Government, ALSWA is required to 'deliver services in line with the National Strategic Framework for Legal Assistance. One of the key principles in this framework is that **'People**

are empowered to understand and assert their legal rights and responsibilities and to address, or prevent legal problems'. It is further stated that:

Many people are unaware that they have legal problems or that legal remedies exist, and take no action to resolve their legal problems. The successful resolution of legal problems is highly dependent upon a person's level of knowledge and capability. While it is not possible to address all unmet legal need, it is important to empower people to understand their legal rights and how they can access legal assistance.... Access to information and support facilitates positive participation in the justice system, particular for Indigenous communities. It also builds resilience in communities, enhancing access to justice for disadvantage people and strengthening the rule of law.⁷¹

ALSWA is funded and expected to conduct community legal education and outreach services to regional and remote Aboriginal communities. Moreover, the Funding Agreement stipulates that ALSWA must 'plan and target services to Indigenous people experiencing financial disadvantage' and who fall within one or more of the specified client groups. This list includes people residing in rural or remote areas.

Further, it is clear that some Aboriginal people are not aware of their legal rights in regard to discrimination, racial hatred and prejudice. Specifically, in relation to children, the Commissioner for Children and Young People in Western Australia has observed that:

Evidence demonstrates there is only a low level of awareness of anti-discrimination legislation in the Australian community. This lack of awareness can be compounded by the unique range of barriers that children and young people face in making complaints about their experiences or the way they are treated.⁷²

Likewise, one participant from Darwin told the AHRC during its consultations for the 40th Anniversary Report of the RDA, that:

I work with the Department of Children and I go out to communities. Out there, discrimination is almost the norm. It's like people don't even know they're being discriminated against until you tell them.⁷³

Solicitation

Before commenting on the particulars of the Bill Leak complaints, ALSWA highlights that the RCIADIC recommended:

211. That the Human Rights and Equal Opportunity Commission and State Equal Opportunity Commissions should be encouraged to further pursue their programs designed to inform the Aboriginal community regarding anti-discrimination legislation, particularly by way of **Aboriginal staff members attending at communities and organisations to ensure the effective dissemination of information as to the legislation and ways and means of taking advantage of it.**⁷⁴
212. That the Human Rights and Equal Opportunity Commission and State Equal Opportunity Commissions should be encouraged to consult with appropriate Aboriginal organisations and **Aboriginal Legal Services with a view to developing strategies to encourage and enable Aboriginal people to utilise anti-discrimination mechanisms more effectively**, particularly in the area of indirect discrimination and representative actions.⁷⁵

These recommendations speak for themselves.

71 National Strategic Framework for Legal Assistance 2015-20, 8.

72 Commissioner for Children and Young People, *Listen to Us: Using the views of WA Aboriginal and Torres Strait Islander children and young people to improve policy and service delivery* (2015) 78.

73 Australian Human Rights Commission, *Freedom from Discrimination: Report on the 40th Anniversary of the Racial Discrimination Act* (2015) 67.

74 Royal Commission into Aboriginal Deaths in Custody (1991) Recommendation 2.11.

75 Royal Commission into Aboriginal Deaths in Custody (1991) Recommendation 2.12.

Nonetheless, for the avoidance of any doubt, ALSWA has a moral and contractual obligation to provide legal education to members of the Aboriginal community in regard to anti-discrimination legislation and the legal remedies available. This obligation extends to education and awareness about specific instances of racial discrimination or racial vilification. As a useful comparison, if the Commonwealth government introduces a national redress scheme for victims of institutional child sexual abuse (as recommended by the Royal Commission), ALSWA would be expected (and possibly provided with additional funding) to visit remote Aboriginal communities to inform the members of those communities of the existence of the scheme, the criteria for applying and the likely outcomes including the maximum compensation available.

Bearing in mind the currency of the two Bill Leak complaints and the fact that at the time of writing this submission, one complaint is still on foot, ALSWA intends only to comment on the circumstances surrounding the visit to Fitzroy Crossing by an ALSWA lawyer. It would be inappropriate at this stage to include any discussion of the contents of the communication between that lawyer and the two Aboriginal men on behalf of whom complaints were made to the AHRC.

An ALSWA civil lawyer attended Fitzroy Crossing in the company of a pro-bono volunteer from a private law firm to attend the regular scheduled outreach visit to the Kimberley. The cost of travel and accommodation for the volunteer was paid for by the private law firm. The ALSWA lawyer and volunteer flew to Broome and later drove from Broome to Fitzroy Crossing. Apart from any new civil matters that may have arisen, the purpose of the visit was to see existing clients in regard to a number of different cases (including allegations of serious police misconduct, a coronial inquest, and another discrimination case). ALSWA's outreach services in civil and human rights law are conducted with the support and encouragement of the Commonwealth Attorney General's Department as ALSWA's sole funding agency for legal services.

In addition, a number of reports have identified a significant gap in access to civil and family law services for Aboriginal people in regional and remote areas.⁷⁶ The Productivity Commission identified a number of additional barriers that hinder effective access to justice such as a lack of awareness of legal rights and obligations and the availability of potential legal remedies.⁷⁷ The recent Senate Inquiry into Aboriginal and Torres Strait Islander experience of law enforcement and justice services recommended that the 'Commonwealth Government adequately support legal assistance services, and that specifically funding should focus on:

- **community legal education** for Aboriginal and Torres Strait Islander people;
- **outreach workers** to assist Aboriginal and Torres Strait Islander people; and
- interpreters for Aboriginal and Torres Strait Islander people in both civil and criminal matters to ensure that they receive effective legal assistance.⁷⁸

The Indigenous Legal Needs Project in Western Australia identified discrimination as one of five priority areas.⁷⁹ Forty percent of participants identified at least one experience of discrimination in the past two years. However, only 16% of these individuals sought legal assistance or other support. The report stated that '[b]arriers inhibiting responses include a lack of awareness of rights, difficulties identified with the legal complaints process itself and poor access to legal and other support'.⁸⁰

ALSWA does not consider that providing outreach services to members of the Aboriginal community on a regular basis including the provision of relevant community legal education is an activity that

⁷⁶ Productivity Commission, *Access to Justice Arrangements*, Inquiry Report Overview (September 2014); Allison F, Schwartz M & Cunneen C, *The Civil and Family Law Needs of Indigenous People in WA* (A report of the Australian Indigenous Legal Needs Project (2014).

⁷⁷ Productivity Commission, *Access to Justice Arrangements*, Inquiry Report Volume 2 (2014) 762–765.

⁷⁸ Federal Senate Finance and Public Administration References Committee, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (October 2016) Recommendation 1.

⁷⁹ Allison F, Schwartz M & Cunneen C, *The Civil and Family Law Needs of Indigenous People in WA* (A report of the Australian Indigenous Legal Needs Project (2014) 11.

⁸⁰ Ibid 13.

undermines freedom of speech or constitutes an abuse of process. Any attempt to preclude ALSWA, and other similar not-for-profit legal service providers, from ensuring members of the Aboriginal community have effective access to justice would be a draconian step backwards.

TERM OF REFERENCE 4

The final term of reference asks 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.

ALSWA has no comment in relation to this final term of reference.

CONCLUSION

ALSWA does not consider that there is any justification for reforming the current provisions under Part IIA of the RDA. ALSWA lawyers represent clients who have suffered severe discrimination on a regular basis and it believes that any watering down of the current regime will further promote discrimination and violent behaviour based on racial prejudice. The current system promotes outcomes that are beneficial to the wider community and litigation is the option of last resort.

If it is considered appropriate that members of the community should be empowered to say whatever they like in public irrespective of the social harm caused, then the only logical option is to remove all laws that currently restrict freedom of speech. This is contrary to long held principles that the right to freedom of speech is not absolute. There are circumstances where the right to freedom of speech must be balanced with competing rights. ALSWA is firmly of the view that the right to live free from racial vilification and prejudice is such a right and the public interest in enhancing social cohesion and preventing discriminatory behaviour demands that the law does not change.

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