To: Committee Secretary
Parliamentary Joint Committee on Human Rights
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Submission re
Freedom of Speech in Australia

This submission is made on behalf of the Western Australian Branch of the International Commission of Jurists. The ICJ has as its principal object to 'protect and sustain the Rule of Law and promote the observance of human rights and fundamental freedoms'.

The ICJ(WA) has previously commented on the content of the Exposure Draft of the *Freedom of Speech (Repeal of s. 18C) Bill 2014*. It maintains the position adopted then, that there is insufficient justification for any amendment to the *Racial Discrimination Act 1975* (Cth).

Racial Discrimination Act

The ICJ(WA) is concerned that the move to amend the *Racial Discrimination Act* is being driven by a single decision of the Federal Court: *Eatock v Bolton* [2011] FCA 1103. Regardless of views about the merits of that particular decision, it does not justify amendments to the *Racial Discrimination Act*.

There has been a significant experience in Western Australia of the operation of sections 18B to 18E of the *Racial Discrimination Act 1975* (Cth), as illustrated by the following cases arising out of fact situations in Western Australia:

- *Bropho v HREOC and West Australian Newspapers* [2002] FCA 1510;
- *Bropho v HREOC and West Australian Newspapers* [2004] FCAFC 16; (2004) FCR 105;
- *McGlade v Human Rights and Equal Opportunity Commission* [2000] FCA 1477;
- *McGlade v HREOC and Lightfoot* [2002] FCA 752;

- *McGlade v HREOC and Lightfoot* (2003) EOC 93-252; [2002] FCA 1457; (2002) 124 FCR 106;
- *Clarke v Nationwide News Pty Ltd trading as The Sunday Times* [2012] FCA 307.

While the cases which have gone to the Federal Court are of some significance, it should not be overlooked that the RDA imposes a compulsory conciliation process which precedes any Court process. The public benefit to be derived from that process, in terms of education and reconciliation of the participants, is not one which should be lost sight of by too narrow a focus upon the few examples of disputes which have been resolved in Court. The Australian Human Rights Commission plays an important role under the RDA in identifying and conciliating complaints and educating the public about what constitutes discrimination. The processes conducted by the Commission are important steps under the legislation which often result in the resolution of disputes, the dissipation of tensions and education and reconciliation of the participants. As a result, many complaints never proceed to applications in the Federal Court. It is a process which provides a venue for those who may have been vilified to seek a remedy where they may not have the resources to contemplate engaging in litigation against a well-resourced respondent.

Sections 18B-18E of the RDA were introduced as a result of the Racial Hatred Bill 1994 (Cth) (the Bill). The Bill was formed in response to a number of reports on racial violence including the *National Inquiry into Racist Violence*, the *Royal Commission into Aboriginal Deaths in Custody* and the Law Reform Commission's Report *Multiculturalism and the Law*.

French J in *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 pointed out that under these provisions "*free speech has been balanced against the rights of Australians to live free of fear and racial harassment*". He noted, at [70], that the then Attorney-General, Michael Lavarch, in his Second Reading Speech (Parl Deb H of R 15/11/94 at 3341) said –

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

As French J, at [70], said –

> In the light of the statutory policies so outlined the conduct caught by s 18C will be conduct which has, in the words of Kiefel J in the *Cairns Post* case at [16]:
>
> *'Profound and serious effects not to be likened to mere slights.'*

The *Sex Discrimination Act 1974* (Cth) section 28A defines sexual harassment as unwelcome conduct of a sexual nature "in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be **offended, humiliated or intimidated**". Those provisions have not been found to be unreasonable in their operation in the context of that legislation.

The definition of 'vilify' proposed in the exposure draft, being 'to incite hatred against a person or persons' and the definition of 'intimidate', meaning to cause **physical** harm' ignores the serious harm that racial attacks can cause for people where there is no proven incitement of others to hatred or no physical harm caused, but still there is what ordinary members of the public would regard as vilification. An example of this is in *Clark v Nationwide News Pty Ltd trading as The Sunday*

Times[1] where the description of three Aboriginal boys aged 15, 11 and 10, who died in a motor vehicle accident involving a car allegedly stolen by an older cousin, as "scum" whom the commentator would use as "landfill" was described by Barker J, at [309], "so deeply offensive, insulting and humiliating that it is breathtaking". And yet there was no real prospect of proving that such a statement incited hatred, or that it caused physical harm.

Other cases which demonstrate the legitimacy of the requirement for a provision such as section 18C of the RDA, including the words "offend" and "humiliate" are:

- cases involving holocaust denial and anti-Semitism[2]; and
- a case in which an Aboriginal woman and her family were subjected to a torrent of abuse, including being called [redacted]"[3].

In *Eatock v Bolt*,[4] Bromberg J stated that the ordinary (dictionary) meaning of the words 'offend, insult, humiliate or intimidate' used in previous cases was 'potentially quite broad' when read in the context of section 18C, that is more concerned with public mischief that is injurious to the public interest and social cohesiveness of society.[5]

Justice Bromberg found that 'offend' was wider than 'insult', 'humiliate' or 'intimidate', but should be interpreted conformably with the words chosen as its partners.[6]

The term 'insult' was found to be closely connected to a loss of or lowering of dignity.[7] As Justice Bromberg said in *Eatock v Bolt*:[8]

The definitions of 'insult' and 'humiliate' are closely connected to a loss of or lowering of dignity. The word 'intimidate' is apt to describe the silencing consequences of the dignity denying impact of racial prejudice as well as the use of threats of violence. The word 'offend' is potentially wider, but given the context, 'offend' should be interpreted conformably with the words chosen as its partners.

This is the same for the term 'humiliate', which also carries with it a meaning of:

…more than destruction of self-perception or self-esteem of a person. It affects others in the community by lowering their regard for, and demeaning the worthiness of, the person, or persons, subjected to that conduct. It stimulates contempt or hostility between groups of people within the community and it is the intent of the Act that such socially corrosive conduct be controlled.[9]

[11] [2012] FCA 307; (2012) 201 FCR 389.
[2] *Jones v Scully* (2002) 120 FCR 243; *Jones v Toben* [2002] FCA 1150
[3] *Campbell v Kirstenfeldt* [2008] FMCA 1356.
[4] [2011] FCA 1103.
[5] Ibid [263].
[6] Ibid [265].

[7] Ibid.

[8] (2011) 197 FCR 261, 324 [265].
[9] Ibid [266], citing Lee J in *Bropho* (2004) 135 FCR 105 at [138].

Justice Bromberg also observed that, 'intimidate' means silencing consequences of the dignity denying impact of racial prejudice as well as the use of threats of violence,[10] but noted that in *Bropho,*[11] this term was also interchangeable with the definition of 'humiliate' extracted directly above – 'more than destruction of self-perception or self-esteem of a person'.[12]

Justice Bromberg stated that the effect of the terms, taken together, is to apply to personal hurt *in conjunction with* 'some public consequence' that needn't be significant, but threatens the protection of the public interest that Part IIAof the RDA is required to protect.[13] Justice Bromberg summarised such acts as 'conduct which invades or harms the dignity of an individual or group, involves a public mischief in the context of an Act which seeks to promote social cohesion'.[14]

Cases which have excited a lot of interest in the current debate, but which have not been the subject of a full consideration of their legal merits, are the complaints about a Bill Leak cartoon published in *The Australian* and the complaint of *Prior against the Queensland University of Technology & others*.

The Leak cartoon was the subject of a highly publicised complaint by Melissa Dinnigan, which has been discontinued.[15] There remain two complainants by Kevin Gunn and Bruce Till.[16] Those complaints have yet to reach the stage of conciliation. The impact of section 18D upon those complaints has yet to be determined. However, the *Bropho* decision must be considered as indicative of a possible result.

In the *Prior* case Judge Jarrett in his decision on 4 November 2016 made a point of saying[17] that he had not dealt with the arguments in respect of section 18D of the RDA.

Constitutional basis of section 18C

The RDA was introduced in 1975 to make racial discrimination unlawful in Australia, 'and to provide an effective means of combating racial prejudice' in Australia in accordance with the obligations set out in the *International Covenant on the Elimination of All Forms of Racial Discrimination* (ICERD),[18] in particular Article 2, which provides that:

States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.

[10] Ibid [265].
[11] (2004) 135 FCR 105, [138] per Lee J.
[12] [2011] FCA 1103, [266].
[13] Ibid [267].
[14] Ibid.
[15] *The Weekend Australian*, November 5-6, p 4; November 12-13, p 4.
[16] *The Weekend Australian*, November 5-6, pp 1 and 4.
[17] *Prior v Queensland University of Technology v Others* [2016] FCCA 2853, at [80].

[18] Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 1975, 285 (Keppel Earl Enderby QC, Attorney-General and Minister for Customs and Excise). *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) ('ICERD').

Part IIA of the RDA, which was introduced in 1995 following the passage of the *Racial Hatred Bill 1994* (Cth), originally included offences relating to racist violence and a civil provision that made incitement to racist hatred and hostility unlawful.[19]

The Bill was introduced to implement Article 4 of the ICERD and in response to recommendations of three inquiries: the Human Rights and Equal Opportunity Commission (HREOC)'s *National Inquiry into Racist Violence* 1991, the *Royal Commission into Aboriginal Deaths in Custody* 1991 (the Royal Commission), and the Australian Law Reform Commission's *Multiculturalism and the Law Report* 1992 No. 57 (the ALRC's Report).

Like the balance of the RDA, Part IIA is supported by the External Affairs Power under section 51(xxix) of the *Australian Constitution*.[20]

Part IIA of the RDA is titled 'Prohibition of offensive behaviour based on racial hatred'. It contains five provisions – sections 18B to F. Sections 18C and 18D are critical, with the other provisions clarifying their scope and application.

Section 18C, by proscribing acts which are judged objectively to be offensive to a class of persons because of their race or ethnic origin, comprises a measure protecting persons within that racial group and guaranteeing them enjoyment of their human rights and fundamental freedoms; as Australia has agreed it will do, by subscribing to Article 2 of the CERD.

Section 18C is also consistent with obligations which Australia has adopted under the *International Convention on Civil and Political Rights* (ICCPR). Article 19 of the ICCPR recognises the right to freedom of expression, but Article 19(3) notes that freedom of expression "carries with it special duties and responsibilities" and is subject to restrictions provided by law and necessary "for respect of the rights and reputations of others". Section 18C is just such a restriction necessary to protect the human rights and reputations of racial groups.

The reach of section 18C is appropriate and adapted to the implementation of Australia's treaty obligations recited above.[21] The appropriateness of s 18C is enhanced by the exemptions from the operation of section 18C provided for by Section 18D. The statutory exceptions in s 18D are analogous to the defences to defamation, and indicate that s 18C is a form of statutory protection to the reputation of a person or persons arising from membership of a racial or ethnic group.

[19] Initially these reforms were pursued via the *Racial Discrimination Amendment Bill 1992* (Cth). This Bill lay in the Parliament in 1992-1993 to allow public discussion and scrutiny. A federal election was announced early in 1993, resulting in the lapse of the Bill. On 10 November 1994, a revised version of the Bill, the *Racial Hatred Bill 1994* (Cth), was introduced in the House of Representatives. The Bill included proposed criminal offences for incitement to racial violence and a civil penalty regime. On 2 February 1995 the Senate referred the Bill to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report.

[20] *Koowarta v Bjelke Petersen* (1982) 153 CLR 168.

[21] Cp Finlay, L, Zimmermann, A and Forrester, J, *Section 18 is too broad and too vague and should be repealed* http://theconversation.com/section-18c-is-too-broad-and-too-vague-and-should-be-repealed-64482 posted 31 August 2016.

The operation together of Sections 18C and 18D is consistent with the freedom of political communication implied from the right of the people to choose their political representatives: *Lange v Australian Broadcasting Corporation*[22]; *Coleman v Power*[23].

The freedom is not absolute. It is limited to what is "reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the system of responsible government prescribed by the Constitution": *Lange* at 567; *Coleman v Power* at 32, 50-51, 78 and 82.

It should be kept in mind that section 18C makes acts unlawful but not criminal.[24] It serves as a means of balancing civil rights between members of our society.

Constitutionally implied freedom of speech

This debate is occurring in a context where in Australia there is no guarantee of a right to freedom of speech under any express constitutional or statutory provision. On the contrary, any presumption of freedom of speech is qualified by laws dealing with defamation, obscenity, public order, copyright, censorship and consumer protection. All of these categories of law recognise that there are legitimate countervailing interests which require the imposition of limitations upon freedom of expression.

The Courts have implied into the *Constitution* (Cth) a freedom of communication upon matters relating to government and politics, as an indispensible incident of representative government, provided the material was not published recklessly or with malice and the publication was reasonable in the circumstances[25]; or was not actuated by malice: *Lange v Australian Broadcasting* Corporation (1997) 189 CLR 520; see *Eatock v Bolt* [2011] FCA 1103, at [230].

As McHugh J said in *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44; 224 CLR 322; 79 ALJR 1620, at [58]-[59] and [61][26]:

> 58. Since the decision of this Court in *Coleman v Power*[27], the test for determining whether a law infringes the freedom recognised in *Lange*[28] is:
>
> When a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the Constitution, two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible

[22] (1997) 189 CLR 520 at 559.
[23] (2004) 220 CLR 1.
[24] See the Note to section 18C of the *Racial Discrimination Act 1975* (Cth) (RDA).
[25] *Theophanus v Herald & Weekly Times* (1994) 182 CLR 104; *Stephens v Western Australian Newspapers Ltd* (1994) 182 CLR 211.
[26] See also *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44; 224 CLR 322; 79 ALJR 1620, per Gleeson CJ and Heydon J at [27]; Gummow J at [213]; Callinan J at [447]-[448]
[27] [2004] HCA 39; (2004) 78 ALJR 1166 at 1185 [92], [94], 1201 [196], 1203-1204 [211], 1207 [228]; 209 ALR 182 at 207-208, 229-230, 233, 238-239.
[28] [1997] HCA 25; (1997) 189 CLR 520 at 567-568.

> with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people. If the first question is answered "yes" and the second is answered "no", the law is invalid.
>
> 59. The first question then is whether the communication falls within the protected area of communication. That is, is it a communication concerning a government or political matter? If the answer to that question is "No", then the question of whether the law is reasonably appropriate and adapted does not arise.
>
> …
>
> 61. The freedom of political or governmental communication, identified in *Lange*, is tied to the specific provisions of the Constitution that deal with the requirement for free and direct elections of the Houses of Parliament, executive responsibility to Parliament and the referendum procedure for amending the Constitution. The freedom is necessary to give effect to the requirements of direct elections for the Senate and the House of Representatives in ss 7 and 24 respectively, the involvement of electors in a referendum under s 128, the exercise of executive power by Ministers who are members of the House of Representatives or Senate and thus responsible to the electorate under ss 62 and 64, the control of supply to the Executive by the Parliament in s 83 and the sittings of Parliament protected by parliamentary privilege under ss 6 and 49 of the Constitution.

Gummow J in *APLA Limited*[29] takes up the discussion and fully describes the doctrine as follows:

> The doctrine for which *Lange* is authority, as reformulated in *Coleman v Power*[30], is as follows. Where a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the Constitution, two questions are to be answered. The first question was stated in *Lange* as follows[31]:
>
> "First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect[32]?"
>
> The second question, as reformulated in *Coleman*, asks[33]:
>
> "[I]f the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end [in a manner] which is compatible with the

[29] At [213].
[30] [2004] HCA 39; (2004) 78 ALJR 1166 at 1185 [93], 1201 [196], 1203-1204 [211]; [2004] HCA 39; 209 ALR 182 at 207-208, 229-230, 233.
[31] [1997] HCA 25; (1997) 189 CLR 520 at 567.
[32] cf *Cunliffe v The Commonwealth* [1994] HCA 44; (1994) 182 CLR 272 at 337.
[33] [2004] HCA 39; (2004) 78 ALJR 1166 at 1201 [196]; [2004] HCA 39; 209 ALR 182 at 229.

> maintenance of the constitutionally prescribed system of representative and responsible government"?

Apposite to the present discussion, in *APLA* Limited, Hayne J at [381]-[382], makes the point that –

> The implied freedom of political communication is a limitation on legislative power; it is not an individual right. It follows that, in deciding whether the freedom has been infringed, the central question is what the impugned law does, not how an individual might want to construct a particular communication… The political point can be made if it is shorn of reference to the subjects with which the impugned regulations deal.

The freedom of expression arising from the *Constitution* precludes the curtailment of that freedom by an exercise of legislative or executive power. It is by that standard that the present provisions of the RDA are to be judged. Attempts to challenge the validity of the present content of sections 18A to 18D on the basis that they are contrary to that implied freedom have failed: see *Toben v Jones*[34].

As Carr J pointed out in *Toben v Jones*[35] –

> The preamble to the Act relevantly reads as follows:
>
> *`An Act relating to the Elimination of Racial and other Discrimination*
>
> *WHEREAS a Convention entitled the "International Convention on the Elimination of all Forms of Racial Discrimination" (being the Convention a copy of the English text of which is set out in the Schedule) was opened for signature on 21 December 1965:*
>
> *AND WHEREAS the Convention entered into force on 2 January 1969:*
>
> *AND WHEREAS it is desirable, in pursuance of all relevant powers of the Parliament, including, but not limited to, its power to make laws with respect to external affairs, with respect to the people of any race for whom it is deemed necessary to make special laws and with respect to immigration, to make the provisions contained in this Act for the prohibition of racial discrimination and certain other forms of discrimination and, in particular, to make provision for giving effect to the Convention:'*

Carr J[36] noted that –

> The Act in its then form (i.e. prior to the insertion of Part IIA) was held by the High Court of Australia [in *Koowarta v Bjelke-Petersen* [1982] HCA 27; (1982) 153 CLR 168] to be constitutionally valid, as an exercise of the external affairs power

[34] [2003] FCAFC 137.
[35] [2003] FCAFC 137, at [13].
[36] At [17].

> conferred by s 51(xxix) of the Constitution. It was common ground that the constitutional validity of Part IIA depended upon whether it too was an exercise of the external affairs power. As the Solicitor-General submitted, one basis on which the requisite connection with the subject-matter of "external affairs" is established is that the law is reasonably capable of being considered as appropriate and adapted to implementing a treaty to which Australia is a party: *Victoria v The Commonwealth* (1996) 187 CLR 416.

Carr J[37] took account of the fact that Article 4 of the relevant Convention provided that –

> *`States Parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, 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; ...'

Carr J noted[38] that Part IIA of the RDA does not fully implement Article 4 of the Convention, and concluded[39] as follows:

> 20 In my opinion it is clearly consistent with the provisions of the Convention and the ICCPR that a State Party should legislate to "nip in the bud" the doing of offensive, insulting, humiliating or intimidating public acts which are done because of race, colour or national or ethnic origin before such acts can grow into incitement or promotion of racial hatred or discrimination. The authorities show that, subject to the requisite connection referred to in paragraph 17 above, it is for the legislature to choose the means by which it carries into or gives effect to a treaty - *Victoria v The Commonwealth* at 487.
>
> 21 In my view the provisions of Part IIA are constitutionally valid as an exercise of the external affairs power.

Allsop J in *Toben v Jones*,[40] after undertaking a detailed review of the international and Australian legal history and context of the enactment of Part IIA of the RDA, at [145]-[148], expressed the following views:

> 145 For these reasons, in my view, Part IIA, s 18C and par 18C(1)((b) are not unconstitutional if not read down in the manner contended for [to encompass only

[37] At [15].
[38] At [18].
[39] At [20] and [21].
[40] At [83]-[104].

the expression of racial hatred], and there is then no requirement to read down s 18C and par 18C(1)(b) in accordance with s 15A of the *Acts Interpretation Act*. [Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.]

146 Whether or not the provisions can be seen as the best method of implementing the obligations in the Convention, or the best balance between the protections intended to be afforded by the Convention and what might be seen to be competing freedoms, are questions for the legislature. Hence the importance of the phrase "*reasonably capable of being considered as* appropriate and adapted" (as opposed to "appropriate and adapted" or perhaps even "reasonably appropriate and adapted").

147 It should be noted that no argument was propounded raising any question of any inconsistency between Part IIA, s 18C or par 18C(1)(b) in its statutory context, with the implied freedom of communication dealt with in *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520.

148 The appropriateness of recognising a balance between freedom of speech and expressions of intimidation and hate is evident even in circumstances of the clearest constitutional guarantee of freedom of speech: see *Virginia v Black*, U.S Supreme Court, 7 April 2003. No such high constitutional hurdle was the subject of argument before us, and not too much can be taken from the American jurisprudence in the context of the First Amendment. Nevertheless, the opinion expressed by Justice O'Connor on behalf of the Court with respect to Parts I, II and III recognises the powerful effect of deeply entrenched symbols and habits of intimidation (the Virginia statute there outlawing cross-burning). Here, the balance, save for any question raised by *Lange,* is to be struck by Parliament, as long as the result of its legislative activity conforms with the principles set out in *Victoria v The Commonwealth* and can be seen as a legitimate exercise of legislative power granted by s51(xxix) of the Constitution.

As the High Court concluded in *Lange*, the freedom of communication which the Constitution protects is not absolute. The freedom will not invalidate a law enacted to satisfy some other legitimate end, provided that -

(a) the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government; and

(b) the law is reasonably appropriate an adapted to achieving that legitimate object or end.

As was concluded in *Clark*, Sections 18A to 18D amply satisfy the test in *Lange*. The balance is correctly struck between the competing objects of proscribing racial vilification and not inhibiting freedom of speech by the provisions of section 18D, which exempt from the proscription the publication reasonably and in good faith expressions of opinion...

Any proposal to eliminate the elements of reasonableness and good faith from the proposed exempted publications, runs counter to the carefully considered common law test for setting the limits of the implied freedom of speech expressed by the High Court in *APLA, Lange, Theophanus* and *Stephens.*

The ICJ(WA) would urge the Committee not to recommend to the Parliament any amendment to the *Racial Discrimination Act*.

Procedures under ***Australian Human Rights Act***

Complaints of racial hatred are made by an aggrieved person to the AHRC in the first instance under section 46P of the *Australian Human Rights Commission Act 1986* (Cth).[41] When a complaint is lodged, the Commission is obliged by section 46PD to refer it to the President. When a complaint is referred to the President, the President is obliged by section 46PF to "inquire into the complaint and attempt to conciliate" it; unless the President is satisfied that the person aggrieved does not want the President to start or continue to inquire into it, or the President is satisfied that the complaint has been settled or resolved: section 46PF(5). The President's statutory **obligation** to inquire and conciliate sits alongside the President's **power** to terminate a complaint on any of the grounds set out in section 46P(1), which are:

> (a) the President is satisfied that the alleged unlawful discrimination is not unlawful discrimination;
>
> (b) the complaint was lodged more than 12 months after the alleged unlawful discrimination took place;
>
> (c) the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance;
>
> (d) in a case where some other remedy has been sought in relation to the subject matter of the complaint--the President is satisfied that the subject matter of the complaint has been adequately dealt with;
>
> (e) the President is satisfied that some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to each affected person;
>
> (f) in a case where the subject matter of the complaint has already been dealt with by the Commission or by another statutory authority--the President is satisfied that the subject matter of the complaint has been adequately dealt with;
>
> (g) the President is satisfied that the subject matter of the complaint could be more effectively or conveniently dealt with by another statutory authority;
>
> (h) the President is satisfied that the subject matter of the complaint involves an issue of public importance that should be considered by the Federal Court or the Federal Circuit Court;

[41] For more on the complaints process, see: https://www.humanrights.gov.au/complaints-information.

(i) the President is satisfied that there is no reasonable prospect of the matter being settled by conciliation.

Prior and QUT case

A large part of the recent public debate about the effectiveness of the AHRC's procedures has revolved around the events relating to the complaint of Cynthia Prior, a Queensland University of Technology staff member. Concern has been focussed upon the time it has taken to progress the matter and the involvement of students of the University in the process.[42]

This is a highly complex matter which is still in progress and so any analysis of the effectiveness of the relevant RDA and AHRC Act provisions on the basis of this case is, at best, premature.

What is presently on the public record concerning this case is that a complaint was made against 10 parties, including the Queensland University of Technology and members of staff of the University alleging racial discrimination and a breach of section 18C and several students of the University alleging a breach of s 18C in relation to postings on a "QUT Stalkerspace" Facebook page. [43]

The AHRC referred the matter to the President and the President conducted an investigation and conciliation of the complaint, as the Commission and President are obliged to do by the AHRC Act sections 46PD and 46PF.

Between May, 2014 and July, 2016 the QUT apparently participated in the investigation and conciliation process on its own behalf and purported to do so on behalf of all other respondent parties, advising the AHRC that it "would like to manage the process" of notifying the students.[44] According to the Vice-Chancellor of the University "good progress towards settlement was made.[45]

In August, 2015 the President exercised the power under section 46PH(1)(i) to terminate the complaint, being satisfied at that point that there was no reasonable prospect of the matter being settled by mediation.[46]

On 20 October 2015 Ms Prior made an application to the Federal Circuit alleging unlawful discrimination by ten respondents, as she was empowered to do by section 46PO(1) and (2) of the AHRC Act within 60 days of the issue of the notice under subsection 46PH(2). The complaint was withdrawn in relation to three parties.[47]

Judge Jarrett of the Federal Circuit Court conducted a Directions Hearing in relation to the matter on 7 December 2015,[48] conducted a hearing on 11 March 2016[49] in relation to applications by the students of the University who were Respondent for summary judgment dismissing the claims against them, and on 4 November 2016 delivered judgment dismissing the claims against them.[50] On 25 November 2016 Ms Prior lodged an appeal against the dismissal orders in respect of two of the

[42] *The Weekend Australian,* November 5-6, 2016, p 1, editorial,
[43] *Prior v Queensland University of Technology v Others* [2016] FCCA 2853.
[44] *The Weekend Australian,* November 19-20, 2016, p 2, quoting from documents provide to one of the students.
[45] *The Weekend Australian,* November 19-20, 2016, p 2, quoting from a letter provided to one of the students.
[46] *The Weekend Australian,* November 12-13, 2016, p 4, quoting from a document provided to one of the students.
[47] *Prior v Queensland University of Technology v Others* [2016] FCCA 2853 at [6].
[48] Transcript_Jude Jarrett_BRG900_2015_rec 17.11.16.
[49] Transcript_Jude Jarrett_BRG900_2015_rec 16.11.16; *Prior v Queensland University of Technology v Others* [2016] FCCA 2853.
[50] *Prior v Queensland University of Technology v Others* [2016] FCCA 2853.

student Respondents, and an and application for leave to appeal out of time will also be required to be determined by the Federal Court.[51]

There is nothing in that process which presently suggests a deficiency in the statutory provisions governing it. Different views might be taken about the time which elapsed or the manner in which the conciliation or legal process was conducted by Commission, the Court or the parties, but such views inevitably focus upon the peculiar circumstances of this particular case, and suggest nothing about any systemic or statutory deficiency.

G M G McIntyre SC
Chair, International Commission of Jurists
Western Australian Branch
2 December 2016

[51] *The Australian*, Thursday, December 8, 2016, pp 1 and 3.