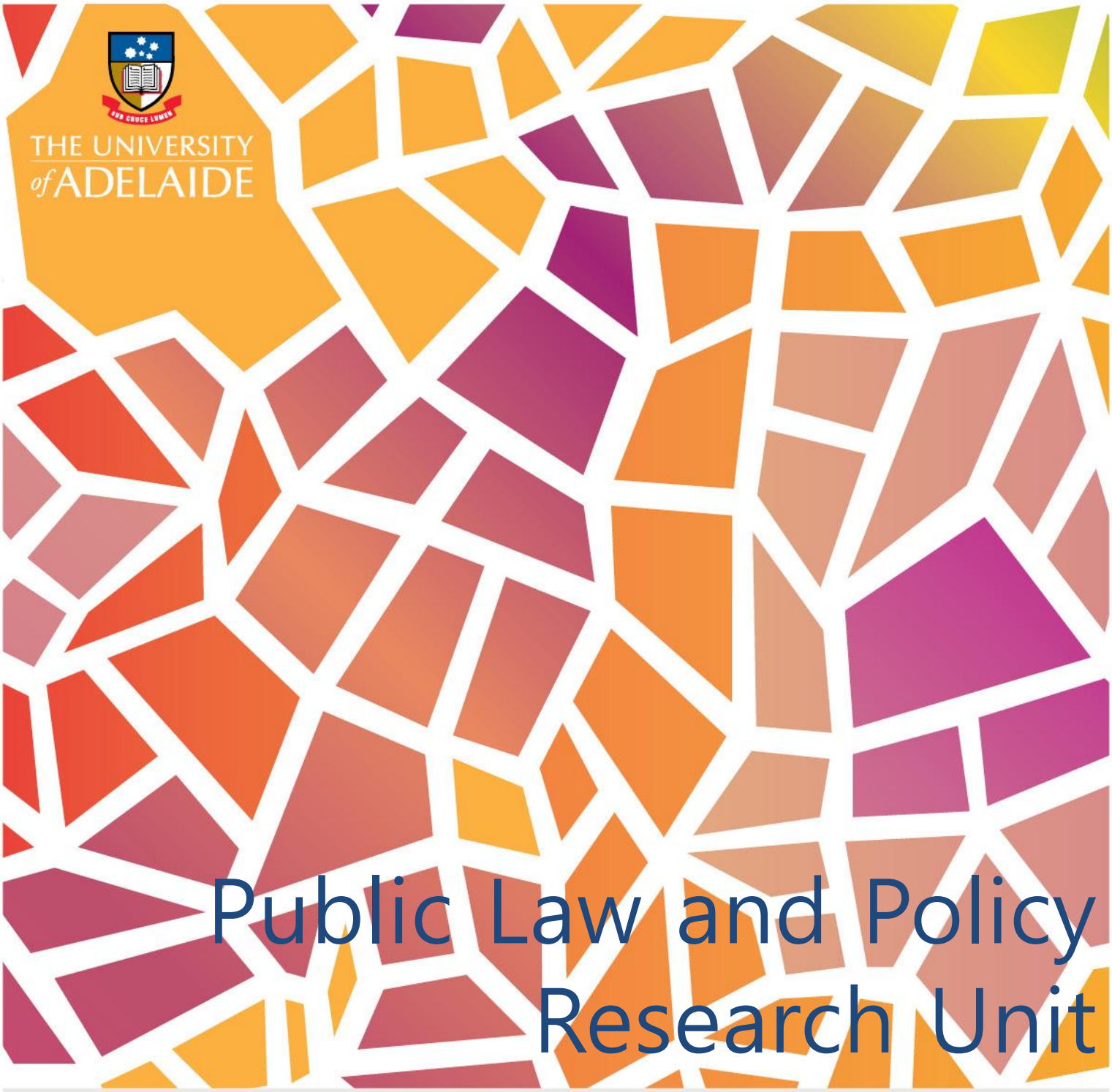

Public Law and Policy Research Unit

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

December 2016

Outline of Submission

The Public Law and Policy Research Unit, University of Adelaide

The Public Law & Policy Research Unit at the University of Adelaide contributes an independent scholarly voice on issues of public law and policy vital to Australia's future. It provides expert analysis on government law and policy initiatives and judicial decisions and contributes to public debate through formulating its own law reform proposals.

The Public Law and Policy Research Unit brings a range of theoretical, comparative, international and interdisciplinary perspectives to its research and scholarship. It has a particular focus on the functioning of Australia's constitutional and political systems, government integrity and accountability, human rights and anti-discrimination law, environmental law, local government law and migration and refugee issues. The Research Unit facilitates and hosts seminars, workshops and conferences on these areas of law and policy, as well as coordinating submissions to government and parliamentary bodies on current issues. Our members are committed to active community engagement.

The primary authors of this submission by the Public Law and Policy Research Unit at the University of Adelaide are the Hon. Catherine Branson QC (Adjunct Professor, former President of the Australian Human Rights Commission and former Federal Court Judge), Associate Professor Laura Grenfell, Professor Geoffrey Lindell AM, Professor Emerita Rosemary Owens AO and Associate Professor Matthew Stubbs.

Introduction

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

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

In our view, the operation of Part IIA of the *Racial Discrimination Act* does not impose unreasonable restrictions on freedom of speech. Accordingly, we submit that Part IIA of the *Racial Discrimination Act* should not be amended. In our submission, sections 18C and 18D of the *Racial Discrimination Act*, as they are currently drafted, represent an appropriate restriction on freedom of speech in a multicultural and democratic society that values diversity. It is our further view that the present powers of the President of the Commission in respect of complaints are sufficient to permit the appropriate handling of complaints, and that no other relevant amendments are necessary or desirable.

This submission has five parts:

(i) the first part explains why protections against racially motivated hate speech are an appropriate and necessary restriction on free speech in modern Australia;

(ii) the second part argues that ss 18C and 18D, together, establish an appropriate balance between protecting against racially motivated hate speech and ensuring that free speech on matters of public importance is not unduly infringed, because:

(a) the protection provided by s 18C is of an appropriate breadth; and

(b) the defence contained in s 18D strikes an appropriate balance with free speech;

(iii) the third part explains why no changes are necessary to the statutory scheme for the handling of complaints, given the President's very broad powers to terminate conciliation proceedings and the important functions those proceedings serve;

(iv) the fourth part argues that any fettering of the ability of persons to make complaints would be inappropriate; and

(v) the fifth part submits that no further changes are necessary.

Free speech in Australian society today

Australian society is amongst the oldest in the world. Tens of thousands of years before colonisation by the British, Australia's first peoples lived from the land and practised their culture, language and laws. Today, Australian society is among the most diverse in the world. As at June 2015 an estimated 28.2 per cent of our resident population was born overseas.[1] Persons born in the UK made up 5.1 per cent of our overseas born residents, followed by persons born in New Zealand (2.6%), China (2.0%), India (1.8%) and the Philippines and Vietnam (each 1%). Australian residents born in Nepal, Pakistan, Brazil, India, and Bangladesh have been the fastest increasing groups in the last decade.

This historical and contemporary multicultural diversity provides us with great benefits and strengths as well as posing challenges. Those challenges include the importance of maintaining social cohesion within a multicultural society and the need to protect vulnerable individuals and groups from persecution by others. In recent memory in Australia, there have been a number of incidences where racist attacks have threatened this social cohesion and individuals within the community.

1 Australian Bureau of Statistics, *Australia's population by country of birth,* Issued 30/03/2016 http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/3412.0Main%20Features32014-15?opendocument&tabname=Summary&prodno=3412.0&issue=2014-15&num=&view.

These challenges directly confront the fundamental democratic value of freedom of speech. Freedom of speech is recognised as both a *fundamental* value within a democratic society[2] and a necessarily *limited* value.[3] Article 19 of the *International Covenant on Civil and Political Rights* recognises this inherent internal conflict:

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

Importantly, article 19 emphasises that while the exercise of the right to freedom of *expression* may be subject to restrictions, the right to freedom of *opinion* should not be limited. Thus, the right to freedom of opinion is absolute, but its expression, which may cause harm to others or broader social harm, may be limited in certain circumstances.

Restrictions on freedom of speech must, no doubt, be carefully crafted to prevent their abuse, resulting in unjustified and dangerous limitations on public discourse and criticism. Indeed, democracy is necessarily built on the freedom of speech. There is something attractive about conceptualising this as a complete freedom. Echoing JS Mill, Justice Holmes expressed the notion that it is only through competition in a free market that truth will be uncovered, good ideas will flourish and bad ideas will fail.[4] But this is a highly idealised view, and could only operate where there is equality of access to public discourse.

Australia today remains far from this free speech utopia. An unregulated marketplace of ideas in modern Australian society would simply allow those with money, power and access to mass media to distort the truth. The voices of vulnerable racial minorities would not always be heard. Racially motivated hate speech often silences their voices. It is targeted to vilify and silence groups who have, historically, been denied equality and participation within society. Professor Jeremy Waldron has explained that hate speech is designed to tell its targets they are

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2 *Tajjour v New South Wales* (2014) 254 CLR 508; *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, [151] (Heydon J) citing *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 283; *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 551; *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115, 125-127; *Momcilovic v The Queen* (2011) 245 CLR 1, 178 [444].

3 *Coleman v Power* (2004) 220 CLR 1, [185] (Gummow and Hayne JJ). See also Stanley Fish, *There's No Such Thing as Freedom of Speech and it's a Good Thing Too* (Oxford University Press 1994).

4 *Abrams v United States* (1919) 250 US 616, 630 (in dissent); see also JS Mill *On Liberty*.

not welcome within society, to remind them of their historically lower status.[5] Even if they choose to speak out, their voices will often be unable to rival the reach of other voices that can be, and are, broadcast through the mass media. It may also lead to these groups brooding over their treatment, and this disaffection may breed extremism and violence, further threatening social cohesion.

In a liberal democracy, freedom of speech ought to be limited by prohibitions against racially based hate speech such as those contained in the current ss 18C and 18D of the *Racial Discrimination Act*. These limits achieve three important goals. They protect against the harm caused to individuals by this speech: discrimination is now proven to be linked to poor physical and mental health.[6] They protect the social cohesion that forms the basis of the strength of our multicultural society. Finally, they protect our democracy by ensuring public discourse is not dominated by the rich and powerful.[7]

If restrictions on freedom of speech are properly crafted, which we submit is the case with the combined operation of ss 18C and 18D, they should not encroach on democratic values, nor on the pursuit of truth. Well-crafted restrictions advance democratic values and the pursuit of truth by promoting equal participation and preventing distortion. The sections do not prevent any group within the Australian community from engaging in public debate, provided that engagement is reasonable, and not based on falsehoods so as to distort the debate.

The protection provided by s 18C is of an appropriate breadth

In a consideration of the breadth of s 18C as it stands, the critical wording is 'reasonably likely … to offend, insult, humiliate or intimidate another person or a group of people'. It seems to us beyond question that conduct which is reasonably likely to intimidate a person on the basis of their race should be unlawful.

Whether conduct that offends, insults or humiliates should be unlawful is the subject of the present debate. What is missed, however, in this debate is that judicial interpretations of 'offend', 'insult' and 'humiliate' in s 18C are very narrow. Courts have repeatedly held that only

5 Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012); see also Catherine Branson, 'Can One Have Too Much of a Good Thing? Reflections on Freedom of Speech in a Diverse Society' (Annual Sylvia Walton Equity and Diversity Annual Public Lecture, 10 December 2013, State Library of Victoria).

6 See, eg, M Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate 2002) 193.

7 Dan Meagher, 'So Far So Good? A Critical Evaluation of Racial Vilification Laws in Australia' (2004) 32 *Federal Law Review* 225.

conduct capable of causing 'profound and serious effects' upon a person comes within s 18C, and that a 'mere slight or insult' is not rendered unlawful by s 18C.[8]

The present s 18C of the *Racial Discrimination Act*, as interpreted by the courts, ensures that only racially offensive acts, racial insults and acts causing racial humiliation *that in fact have profound or serious effects* are rendered unlawful. In our view, this strikes the appropriate balance between free speech and the right of all members of society to live their lives free from debilitating racial attacks.

It may be that it is appropriate to amend s 18C to read 'reasonably likely … (i) to cause profound or serious offence, insult, or humiliation or (ii) intimidate another person or a group of people' so that the words of the section make clear to all members of the public that only conduct causing profound or serious offence, insult or humiliation is rendered unlawful. This amendment would enshrine the current judicial interpretation of s 18C.

The defence contained in s 18D strikes an appropriate balance with free speech

The current s18D ensures that the restrictions placed on freedom of speech in s 18C are reasonable and appropriately balanced against the need to ensure free and equal democratic discourse.

Section 18D ensures s 18C does not render anything unlawful that was said or done 'reasonably and in good faith':

> (a) in the performance, exhibition or distribution of an artistic work;
>
> (b) in the course of any statement, publication, discussion of 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

[8] The authorities establish that s 18C applies only to acts which have 'profound and serious effects, not to be likened to mere slights': *Creek v Cairns Post* (2001) 112 FCR 352, [16] (Kiefel J); that 'a mere slight or insult is insufficient': *Kelly-Country v Beers* (2004) 207 ALR 421, [87] (Brown FM); and that it applies only to conduct 'more serious than mere personal hurt, harm or fear' which 'is injurious to the public interest … in a socially cohesive society': *Eatock v Bolt* [2011] (2011) 197 FCR 261, [263] (Bromberg J). See also: *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105, 123 (French J); *Jones v Toben* [2002] FCA 1150, [92] (Branson J); *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, [67]–[69]; *Prior v Queensland University of Technology* (No 2) [2016] FCCA 2853, [30], [57]-[58], [70]–[71].

(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.

The judgment and penalty applied against columnist Andrew Bolt in *Eatock v Bolt*[9] demonstrates the *appropriateness* of this exemption, not, as it has sometimes been reported and argued, its *unacceptable* restriction on free speech. In that case, Bromberg J of the Federal Court took a wide approach to the elements of the exemption. However, even so, he found that Mr Bolt (and his publisher, Herald & Weekly Times) were not entitled to the exemption in s 18D because the articles in question were not written or published 'reasonably and in good faith', they were not written for a general purpose of being in the public interest and they were not fair comment on a matter of public interest. The articles imputed that 'fair skinned' Aboriginal people were not genuinely Aboriginal persons, but were motivated by personal gain to falsely identify as Aboriginal.

Bromberg J based these conclusions on his findings that the articles contained 'material' deficiencies and 'significant distortions' of fact.[10] Bromberg J found that Mr Bolt had used inflammatory and provocative language and engaged in mockery and derision of Aboriginal peoples and particularly targeted to sting those people he identified,[11] and that the 'extent of mockery and inflammatory language utilised by Mr Bolt to disparage many of the individuals … far exceeded that which was necessary to make Mr Bolt's point.'[12] Further, Bromberg J found that Mr Bolt could have provided fair comment in the public interest without including the racially offensive imputations.[13]

What Bromberg J's judgment demonstrates is that ss 18C and 18D do not provide an outright prohibition on commentary of the kind provided by Mr Bolt, but that a number of reasonable limits existed to this commentary. These limits included that it not be based on known-distorted facts or include irrelevant and gratuitous insulting or offensive matters.

Importantly, Bromberg J noted that the restrictions placed on Mr Bolt's speech by s 18C were 'of no greater magnitude than that which would have been imposed by the law of defamation'.[14] Indeed, had Mr Bolt been pursued for defamation, it is highly likely he would have been required to pay substantial damages to the plaintiffs for his comments (based as they were on incorrect facts) in addition to legal costs. The law of defamation, as a long-standing and acceptable limit on free speech, provides a good yardstick to assess the reasonableness of the restrictions in ss 18C and 18D.

9 (2011) 197 FCR 261.
10 Ibid [384].
11 Ibid [412].
12 Ibid [414]. See also at [341].
13 Ibid [445-6].
14 Ibid [423].

Recent decisions involving ss 18C and 18D do not indicate any need for legislative change

Two highly publicised cases have helped to generate renewed debate about ss 18C and 18D of the *Racial Discrimination Act*. However, we submit that neither case supports the need to amend the Act. In fact, when examined dispassionately, they show that these provisions are being interpreted and applied in a way that strikes the appropriate balance with freedom of speech.

First, the summary dismissal of the complaint made against three students at the Queensland University of Technology by the Federal Circuit Court in *Prior v Queensland University of Technology (No 2)*[15] on the grounds that it did not enjoy reasonable prospects of success. The complainant, a university administrative officer, took legal proceedings after claiming she was vilified when she asked the students to leave a computer laboratory reserved for Indigenous students. His Honour Judge Jarrett concluded that the complaints failed to meet the threshold tests needed to engage the operation of s 18C, including the need to show that the impact of the words complained of was sufficiently profound or serious. The complainant failed to adduce evidence of sufficiently serious offense, insult, humiliation or intimidation caused by the words used by one of the students which attracted the complaint; or that certain other words attributed to one of the students had actually been used by that student. Recent reports indicate that the complainant has now been ordered by the judge to pay costs which may well prove to be quite substantial.[16] The failure of an individual complainant to substantiate on the facts part of a claim made, and the judge's conclusion that sufficiently serious harm did not result from comments found to have been made, does not reflect adversely on the legislation. To the contrary, it indicates that the legislative test in s 18C is appropriate, in that it is not inappropriately rendering unlawful free speech. Further, the rejection of this case may well serve as a disincentive against the bringing of unsuccessful claims in the future, thereby further minimising the potential for infringing freedom of speech.

Second, the understandable rejection by the Human Rights Commission of the complaint lodged by Senator Leyonhjelm against a journalist who accused the Senator of being an 'angry white male' apparently because, on his own admission, the Senator was not truly offended or upset by the article containing the accusation in question, which might in any event have attracted the

15 [2016] FCCA 2853 (4 November 2016). It is understood that the complainant has sought leave to appeal to the Federal Court against this decision.

16 Sharmie Kim, 'Queensland woman ordered to pay legal costs after failed Facebook racial vilification case', ABC News, 9 December 2016 <http://www.abc.net.au/news/2016-12-09/woman-ordered-to-pay-legal-costs-after-18c-racism-case/8108442>. Some reports suggest that the amount ordered to be paid was as high as $200,000: see 'QUT complainant ordered to pay $200,000 costs in thrown-out 18c case', Brisbane Times, 9 December 2016, <http://www.brisbanetimes.com.au/queensland/qut-complainant-ordered-to-pay-200000-costs-in-thrownout-18c-case-20161209-gt833x.html>.

fair comment defence in s 18D.[17] The reasons given by the Commission underline the need for the infringement to be serious (as is required by the current case law), and to go beyond the bounds of genuine discourse on matters of public interest, in order to attract any liability under ss 18C and 18D. Again, this case illustrates the appropriate functioning of ss 18C and 18D.

No changes are necessary to the statutory scheme for the handling of complaints

In our view, no changes are necessary to the statutory scheme for the handling of complaints. Under s 46PH of the *Australian Human Rights Commission Act 1986* (Cth), the President has extremely broad powers to dismiss complaints, including (but not limited to) on the following bases:

- the complaint has insufficient merit – it is 'trivial, vexatious, misconceived or lacking in substance' or simply alleges something which 'is not unlawful discrimination';
- the complaint was not made in a timely fashion – it was 'lodged more than 12 months after the alleged unlawful discrimination took place';
- the complaint duplicates one made under another procedure, or would be more appropriately made under another procedure, or there is a more appropriate remedy available from another source, or has already been remedied;
- an issue of public importance should be considered by the Federal Court or Federal Circuit Court; or
- 'there is no reasonable prospect of the matter being settled by conciliation'.

These powers are comprehensive and offer the President ample opportunities for terminating complaints in appropriate cases. We make no comment as to the exercise of the President's powers in the widely-publicised case of *Prior v Queensland University of Technology (No 2)*[18] because sufficient facts to enable a proper judgment to be made are not in the public domain. We were unable, however, to find any criticism of the conduct of the President as regards any possible failure to exercise these powers in the judgment of Judge Jarrett of the Federal Circuit Court.

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17 Duncan Fine, 'Don't feel too sorry for our angry white men', The Sydney Morning Herald, 15 August 2016 <http://www.smh.com.au/comment/dont-feel-too-sorry-for-our-angry-white-men-20160815-gqstua.html>, Michael Kuziol, 'Human Rights Commission rejects David Leyonhjelm 'angry white male' discrimination claim', The Sydney Morning Herald, 10 November 2016 <http://www.smh.com.au/federal-politics/political-news/human-rights-commission-rejects-david-leyonhjelm-angry-white-male-discrimination-claim-20161129-gt0el9.html>.

18 [2016] FCCA 2853.

It must be recalled that in attempting to conciliate complaints of unlawful discrimination as required by the *Australian Human Rights Commission Act,* the President or his or her delegate is performing an administrative, not a judicial, function. The statutory requirement that a person may not make an allegation of unlawful discrimination to the Federal Court or the Federal Circuit Court without first having their complaint to the Australian Human Rights Commission terminated (see Part IIB Division 2 of the Act) serves important public purposes, including:

- where possible, facilitating the fair, efficient and informal resolution of disputes concerning unlawful discrimination without the need to resort to proceedings in the federal courts;
- promoting understanding, discussion and acceptance of human rights principles;
- assisting parties (including importantly vulnerable or disadvantaged parties without access to legal representation) to understand the relevant legislation and, in particular, how its provisions concerning complaints operate and, as appropriate, assisting them to articulate their cases (whether as claimants or respondents) so as to allow the real issues in dispute between them to be identified;
- enabling more creative and flexible outcomes to disputes relating to alleged unlawful discrimination.

The above purposes suggest that the President should not move with undue haste to terminate a complaint of unlawful discrimination. The achievement of one or more of the above purposes may be dependent on the President engaging with the parties in a meaningful way. Equally, however, should it be, or should it become, apparent in a particular case that none of these purposes can be achieved, the powers granted by s 46PH give the President ample opportunity to terminate the complaint.

In our submission, the President's existing powers to dismiss complaints are entirely adequate and appropriate, and properly vest a discretion in the President to determine when the conciliation process has some benefits to offer or should be terminated.

There should be no barriers to the making of complaints

We are not aware of the basis for any view that there is an inappropriate 'practice of soliciting complaints to the Commission (whether by officers of the Commission or by third parties)'. As a general principle, all Australians should have access to judicial and other processes for the vindication of their legal rights, whether directly through the activities of the Commission or through the activities of third parties.

The Australian Human Rights Commission's statutory functions include 'to inquire into, and attempt to conciliate, complaints of unlawful discrimination'[19], 'to promote an understanding and acceptance, and the public discussion, of human rights in Australia',[20] and 'to undertake research and educational programs and other programs, on behalf of the Commonwealth, for the purpose of promoting human rights'.[21] Any or all of these statutory conferrals of functions on the Commission would justify any activities of the Commission to publicise its complaint-handling processes, including to potential complainants, which may be what the terms of reference mean by the phrase 'practice of soliciting complaints'.

As a general principle, there should also be no barrier to third parties (including, for example, legal representatives, community groups, non-government organisations) offering assistance to potential complainants in the formulation and/or lodgement of complaints. We are not aware of any indication that there are factors which would justify deviation from this principle. In our submission, there is no justification for restricting either the Commission or third parties from offering assistance to potential claimants seeking to vindicate their legal rights.

No further changes are necessary

We are not aware of any other changes that are necessary or desirable to make in connection with the terms of reference of this inquiry.

Conclusion

In our submission, Part IIA of the *Racial Discrimination Act* provides measured and appropriate restrictions on freedom of speech that allow our multicultural and democratic society to thrive. We do not believe that there is a case for reforming these provisions.

If any reform is warranted, it should be directed to amending s18C so that it applies to conduct which is 'reasonably likely …. (i) to cause profound or serious offence, insult or humiliation or (ii) intimidate another person or a group of people'. Such an amendment would be useful in bringing this section in line with judicial interpretation and it would thereby offer a clearer guide for public behaviour in our democratic and multicultural society.

In our submission, no other changes are required to the statutory scheme for the handling of complaints, nor in any other respect raised by the terms of reference.

19 *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(aa).
20 *Australian Human Rights Commission Act 1986* (Cth) s 11(g).
21 *Australian Human Rights Commission Act 1986* (Cth) s 11(h).