Australian Human Rights Commission

President
Professor Gillian Triggs

23 February 2017

Ms Toni Matulick
Committee Secretary
Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Ms Matulick,

Senate Legal and Constitutional Affairs Legislation Committee, Estimates hearing

I refer to your letter of 10 February 2017, attaching correspondence from Mr Anthony Morris QC dated 24 October 2016 but date stamped 19 December 2016.

Mr Morris's letter refers to questions that I was asked at the Estimates hearing on 12 December 2016 about the QUT case.

As you may be aware, on 17 February 2017 I appeared before the Parliamentary Joint Committee on Human Rights in a public hearing regarding its inquiry into Freedom of Speech in Australia. I attach for your information an extract from the Proof version of the transcript from that hearing at which I gave a full description of the Commission's handling of the complaint by Ms Prior against the Queensland University of Technology, two staff members and seven students. I also attach a chronology relating to that complaint, that was tabled at that hearing.

As part of my opening statement, I provided an explanation as to why the Commission had decided not to make a claim of public interest immunity in relation to the questions asked by Senator Paterson about the QUT case during the hearing of the Parliamentary Joint Committee on Human Rights on 12 December 2016.

I hope this information will be of assistance to the committee at the upcoming Additional Estimates hearing.

Yours sincerely,

Gillian Triggs
President

COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

Freedom of speech in Australia

(Public)

FRIDAY, 17 FEBRUARY 2017

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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

Friday, 17 February 2017

Members in attendance: Senators McKim, Moore, Paterson and Mr Goodenough, Ms Madeleine King, Mr Leeser, Mr Perrett.

Terms of Reference for the Inquiry:

To inquire into and report on:

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.

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

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

EDGERTON, Mr Graeme, Acting Deputy Director, Legal Section, Australian Human Rights Commission

SANTOW, Mr Edward (Ed), Human Rights Commissioner, Australian Human Rights Commission

SOUTPHOMMASANE, Mr Thinethavone (Tim), Race Discrimination Commissioner, Australian Human Rights Commission

TRIGGS, Professor Gillian, President, Australian Human Rights Commission

CHAIR: I now welcome representatives of the Australian Human Rights Commission. I advise witnesses that in giving evidence to the committee they are protected by parliamentary privilege. I remind both committee members and witnesses that significant responsibilities accompany the use of this privilege, and encourage participants to exercise it with these in mind.

I invite witnesses to give evidence that is relevant to the committee's terms of reference, without commenting unnecessarily adversely on any particular person. I remind committee members that privilege resolution 1 outlines the procedures to be observed by committees for the protection of witnesses, including that witnesses who are assisting committees should be treated equitably. As chair, I am required to ensure that questions are put and answered in an orderly manner, and to ensure that proceedings are conducted with courtesy on all sides.

I remind senators and members that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanation of policies or factual questions about when and how policies were adopted.

I particularly draw the attention of witnesses to an order of the Senate of 13 May 2009, specifying the process by which a claim of public interest immunity should be raised. Witnesses are specifically reminded that a statement about information or a document that is confidential or consists of advice to government is not a statement that meets the requirements of the 2009 order. Instead, witnesses are required to provide some specific indication of the harm to the public interest that could result from the disclosure of the information or the document. Officers are also reminded that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for this claim.

I invite you to make a brief opening statement and then members of the committee will proceed to some questions.

Prof. Triggs: Thank you, Chair, for inviting the commission to appear a second time. What I am about to say, I fear, does not meet your suggestion that I be brief. I really will take, if I may, a few minutes, and I do ask for your tolerance and that of the members of this committee.

CHAIR: Certainly.

Prof. Triggs: That is because I hope it will be useful for you in your deliberations. The commission has been following the proceedings of this committee. We have listened to the public hearings and reviewed most of the nearly 400 written submissions published on the committee's website. The committee has received submissions from many organisations with direct and regular experience of the commission's conciliation processes. These organisations, law firms, legal advisers and NGOs, among others, have confirmed that the commission's accredited conciliators are neutral and impartial, ensure both complainants and respondents have a fair opportunity to take part in the complaints process and facilitate discussions between the parties to encourage resolution.

In light of the submissions, and to provide the best possible assistance to the committee, the commission has made a supplementary submission recommending legislative improvements to our complaints process. These proposals are designed to ensure that the commission deals as early as possible with unmeritorious complaints while also ensuring procedural fairness. Our proposal also aims to protect respondents from unmeritorious legal proceedings in the future—an issue that lies at the heart of this inquiry.

In brief, our additional recommendations are: firstly, to allow the President of the Australian Human Rights Commission to terminate a complaint on the additional and wider ground that she is satisfied an inquiry into the matter is not warranted; secondly, to adopt guiding principles for early resolution of disputes and to ensure fairness to all the parties; and, thirdly, to require notification of a complaint to each respondent at or about the same time. As these recommendations are explored in some detail in our supplementary submission, I will not repeat them here. But, of course, I am very happy to answer questions in relation to them.

I would now like to turn, if I may, to a matter that was raised when I last gave evidence to this inquiry. The matter that stimulated, in part, this inquiry is the complaint in the case of Prior v Queensland University of Technology & Ors. This matter was finalised by the commission three years ago, along with 2,000 other complaints. Some committee members have asked about the commission's handling of this specific complaint. I took these questions on notice as proceedings are still before the Federal Court. I then wrote to the Attorney-General, as indeed you have pointed out, Chair, that it is the primary responsibility of the Attorney-General, to ask whether a public interest immunity claim should be made. He advised in a response to my letter that the decision to do so is one for the President of the Australian Human Rights Commission. I also requested independent legal advice from the Australian Government Solicitor.

I have decided that, as the Queensland University of Technology matter is of significant public importance and may inform any recommendations made by this inquiry, I will explain how the commission dealt with the case. My decision to do so is exceptional. Usually, the commission does not comment on complaints because our conciliation processes depend upon confidentiality. If confidentiality is assured, the parties are free to have clear and honest discussions and to agree upon a resolution, as is the outcome in 76 per cent of matters. The QUT complaint, however, calls for a different approach. This is because the disclosures in the media by some parties of some, but not all, information relating to the complaint are different approaches also warranted because witnesses to this inquiry have provided further details of the complaint processes.

For all these reasons, I will provide a chronological description of what occurred in the QUT complaint, and I will table that chronology once I have concluded my statement. The story began on 28 May 2013 at the Oodgeroo Unit—a computer lab set up by the Queensland University of Technology to support Aboriginal and Torres Strait Islander students at the university. Ms Prior, the administration officer at the unit, asked three non-Indigenous men who had entered the lab if they were Indigenous. They said they were not. Ms Prior then advised the students that there were other facilities on the campus where they might access a computer and asked them to leave. Shortly after, a number of comments were posted on a public Facebook page called 'QUT Stalker Space'. I will repeat some of these comments, only to give the inquiry a truer sense of the substance of the complaint as it was first made by Ms Prior to the commission. These are the kinds of comments that were made: 'I just got kicked out of the unsigned Indigenous computer room. QUT's stopping segregation with segregation.' Another: 'That is more retarded than a women's collective.' A third: 'ITT niggers.' A fourth: 'I wonder where the white supremacist computer lab is.' A fifth: 'Today is your lucky day. Join the white supremacist group and we'll take care of your every need.' And: 'By'—the person named's—'logic, it's also fine to start a KKK club.' And, finally: 'How did the Aboriginal gentleman gain entry to the university? Through the window.'

Ms Prior first complained directly to QUT about these comments. QUT contacted the students who were apparently responsible for them and asked the students to take the posts down. Ultimately, all the comments were removed. Ms Prior then emailed QUT and said that the incident had caused distress, and she had safety concerns about returning to work.

In December 2013, she made a formal complaint to QUT under its grievance resolution procedures. The students were not party to that process, suggesting to the commission that Ms Prior was primarily concerned at that time about the university's treatment of her, rather than about the comments allegedly made by the students. This complaint was not resolved through the university's internal processes.

On 27 May 2014, one year less a day after the incident at the computer lab, Ms Prior made a written complaint to the Australian Human Rights Commission. She alleged she had been discriminated against because of her race under section 18C of the Racial Discrimination Act and that the university had failed properly to deal with her complaint. Ms Prior's complaint to the commission was made against QUT, to QUT staff members and seven students. Contact details were provided for five of those students but not for the other two. Within two days of receiving the complaint, the commission contacted Ms Prior's lawyers. The commission, both by phone and email, suggested that she might appropriately confine her complaint to the university but not proceed against the students. Ms Prior's lawyers then advised the commission that they were currently negotiating with QUT to resolve the complaint. Ms Prior, with the university's agreement, asked the commission not to take any action to serve the complaint on the students or to list the matter for conciliation until these discussions had been finalised. The commission agreed to this request as it appeared that the negotiations had a good prospect of successfully resolving the complaint. And I might add that the commission will typically take direction from the parties because this is a voluntary process, and if they feel that there is a possibility of resolution, we would normally give them a certain measure of discretion to seek a solution.

Over the following months, the commission monitored the progress of discussions between QUT and Ms Prior. Eight months later, on 30 January 2015, the lawyers for Ms Prior wrote to the commission to say that the

university had accepted Ms Prior's proposal for resolution, including in respect of the students. This in-principle agreement was subject to a deed of settlement to be drafted by the university.

The commission regularly followed up with the university and Ms Prior to see if the deed of settlement had indeed been finalised. By 5 May 2015, two years after the incident in the computer lab, it appeared that the private negotiations between Ms Prior and the university were not progressing. During this period, as has been pointed out in evidence to you, Ms Prior changed her lawyers.

The commission then contacted the lawyers for both Ms Prior and the university to encourage them to move the matter forward. The commission again sought confirmation from Ms Prior as to whether or not she wanted to pursue her complaint against the students. Critically, Queensland University of Technology told the commission that, if Ms Prior decided to pursue her complaint against the students, the university wanted to be responsible for notifying them.

A number of significant events occurred on 23 and 24 June 2015. Ms Prior's solicitors confirmed for the first time that she would, indeed, pursue her complaint against each of the seven students originally named in the complaint. The commission then set a date for conciliation in Brisbane on 3 August 2015, six weeks hence. The commission insisted that, if the conciliation conference was to proceed, the students must be notified. The commission also advised that it did not have the addresses for all the students.

Queensland University of Technology again repeated that it would manage the process by which the students were to be notified. Two weeks later, on 7 July, QUT confirmed that it was available to attend the conciliation conference and told the commission that it was in the process of notifying the students. Another two weeks passed, and on 21 July Ms Prior provided QUT with her settlement proposal. QUT told the commission for a second time that it was in the process of notifying the students. Again, on 24 July, the commission asked for confirmation from QUT that all respondents, including the students, had been duly notified about the conciliation conference.

The following week on 28 July 2015 and one week before the scheduled conciliation conference, QUT asked the commission to postpone the meeting. The commission officer declined to do so on the grounds that the complaint had been on foot for over a year, that the conciliation had been planned at least six weeks in advance and that the university had been given ample time to notify the students. We advised also that other options might be available than the conciliation conference that had been arranged, for example through the telephone, through the shuttle process or a combination of these. Later that day, on 28 July 2015, Queensland University of Technology confirmed that it had sent notification letters to each of the students by registered post and copies had been sent by email, including Ms Prior's complaint and the commission's guide to conciliation processes. Also on that day, the solicitors for the university advised the commission that the university could not be sure that the contact details for the students were up to date as it relied on the students to keep their details current on their online profile. QUT also told the commission that it would pass immediately any information as to whether and which students might choose to attend the conference. The following day, on 29 July, Queensland University of Technology confirmed that two of the students had responded, saying they would attend the conference, and that QUT was trying to arrange a further discussion with each student.

The conciliation conference duly took place on 3 August and two of the students attended. The commission understood that all of the students had been notified and that the two students who attended were the only ones who wanted to attend. As the complaint was not in fact resolved at that conciliation meeting, and as the delegate of the president was now satisfied that there was no reasonable prospect of the matter being settled by conciliation, the complaint was terminated on 25 August 2015. Ms Prior then decided to file an application with the Federal Court, alleging racial discrimination by Queensland University of Technology and contraventions of section 18C by a number of students. The commission was not involved in Ms Prior's decision to commence proceedings. The commission neither encouraged nor endorsed this decision and took no part in the subsequent court proceedings.

That is the chronology and we will provide that to you now or as soon as I finish the statement, if I may. But what I would like to do now, very briefly, is to address some of the criticisms that have been made about the commission's handling of this matter and to take them on the basis of main themes, the first being the timing. From the time that Ms Prior's complaint was lodged with the matter until it was terminated, the complaint was with the commission for 15 months. That is an exceptionally long time for a complaint to be on foot and even a rare period. As I previously advised this inquiry, most complaints are resolved under four months, the average being 3.8 months, and 98 per cent are resolved within a year. In very unusual cases, they may take longer. Of the 15-month period the commission dealt with the Prior matter, it is notable that, at the request of both Queensland University of Technology and Ms Prior, negotiations between them were private at their request for over 11

months of that time. While the commission regularly monitored progress, the discussions were driven voluntarily by those two parties. From the information given to the commission by QUT and Ms Prior, it appeared likely that the negotiations would resolve the matter, including with respect to the students. Indeed, at one stage, as I have described, there was an in-principle agreement subject to settling the terms of a deed of settlement. When these private negotiations broke down, the commission proposed a conciliation conference. The commission's engagement with the process thus lasted fewer than four months before the complaint was terminated. I suggest to the committee that the QUT's case does not demonstrate any systemic problem with time frames in the commission's complaint handling processes.

The second thematic idea was about stopping cases going to court. Some comments have been made about this case that have suggested that the commission could or should have stopped the case from going to court. The commission, however, does not have the power to stop cases going to court. The commission can terminate its complaint handling processes for a number of reasons including, as I am sure you are well aware now, because it is frivolous, vexatious, misconceived or lacking in substance. Alternatively, a complaint can be terminated because the president is satisfied there is no reasonable prospect of the matter being settled by conciliation. But as the law currently stands, regardless of the reason for termination, the complainant has the right to make an application to the court. I think we have just had an interesting discussion with your previous witness about the importance of access to justice that has underpinned the work of the commission.

There are good public policy reasons for it. An administrative agency should not have the ability to stop people having their day in court. The recommendations that the commission has proposed would nonetheless allow it to deal more efficiently with unmeritorious complaints and to provide some additional protection to respondents from unmeritorious legal proceedings. A significant disincentive to litigating cases that are not strong is the risk that the plaintiffs must pay costs of the other side if the claim is not successful. A very small proportion of cases that are terminated by the commission ever proceed to court.

The next issue is termination of trivial or vexatious matters. Some commentators have suggested that the commission should have terminated the QUT complaint on the grounds that it was trivial, vexatious, misconceived or lacking in substance. One reason this did not occur is that Ms Prior's complaint was a combination of several interrelated complaints. She complained that the Facebook posts were in breach of section 18C of the Racial Discrimination Act, but she also complained that Queensland University of Technology's conduct had breached section 9 of that act. At least one of the Facebook posts contained language that was arguably racist. The commission did not form a view as to whether that language amounted to a breach of 18C. This question was not decided by the Federal Circuit Court because the judge found that the comment was not made by the person alleged by Ms Prior to have made it. One thing was clear: the comment was sufficiently serious to engage the commission's complaints processes with respect to section 18C. Ms Prior's complaints against QUT in relation to section 9 of the RDA are continuing, and I do not wish to make any comments about those proceedings.

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

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

The last substantive issue in relation to the QUT case is the question of notification—possibly the most common concern raised by many commentators and submissions. Missing from the public discussion have been the following facts: from the start of the complaint the commission suggested to Ms Prior that she not proceed against the students as it seemed her primary complaint lay against Queensland University of Technology. Ms Prior and the university asked the commission not to notify the students because they genuinely believed that they could resolve their dispute without the students having to be notified. If I may add my personal view, I believe that the university acted in genuine good faith in attempting to protect the interests of the students by trying to resolve the matter as soon as they possibly could. Private negotiations are in fact almost always successful in

resolving a dispute, and that is another reason why we would tolerate an extra period of time if we think that there is any reasonable chance of the matter being resolved without having to go to court.

When these private negotiations ultimately failed the commission intervened and proposed a conciliation conference. It was only at this point that Ms Prior confirmed that she wanted to pursue her complaint against the students. The commission emphasised that if the conference were to proceed the students should be notified. QUT repeatedly asked to take responsibility for notifying the students and the university repeatedly assured the commission that it was in the process of doing so. By the time of the conciliation conference the commission believed that each of the students had been duly notified, however it now appears that two of the five students did not receive notification in advance of the conference. One of those students was in the United Kingdom and it appeared that, while his father signed for the letter that was sent to the address in Australia, his son was not advised of it. It appears that the other letter was not able to be delivered. The commission was not aware that these two letters had not reached their intended addressees.

Two students decided to attend the conciliation conference. Each of these students made submissions to Ms Prior about why she should not proceed with her complaint against them. Despite these submissions, Ms Prior was not prepared to withdraw her complaint against the two students who had attended. It seems highly unlikely that she would have taken a different course of action in relation to any of the other students named in the complaint had they also attended the conference. As I said earlier, if a complainant is determined to proceed with their complaint, there is nothing that the commission can do to prevent them commencing court proceedings. In this case, Ms Prior was legally represented and would have been aware of the risks of going to court.

If a similar case were to come to the commission today, the commission would handle the aspect of notification differently. If an organisation such as an employer wants to notify individual respondents—most particularly obviously and typically its employees—the commission seeks written confirmation that all the individuals have been notified. In our supplementary submission provided to you this week, we have suggested that a new provision be included in the Australian Human Rights Commission Act that would formalise this process by requiring all respondents to be notified at the same time as is now our current practice.

Now I would like to make some very brief comments about the complaint concerning a cartoon by Mr Bill Leak. Yet another series of complaints to the commission have attracted significant media attention concerning a cartoon by Mr Leak published in *The Australian* on 3 August 2016. The first complaint was made by Ms Melissa Dinnison. The entire process from the time the respondents were notified of her complaint until the time the complaint was finalised took 39 days. The commission twice asked the respondents for a submission in relation to section 18D providing the basis of a justification. The respondents chose not to provide one. Had a submission in relation to section 18D being provided, there is a good chance that the complaint could have been dealt with even more quickly. Most of the time taken in the course of that inquiry related to two matters. First, the commission had to consider a claim by the respondents that the commission should appoint an external delegate to deal with the complaint because of an alleged apprehension of bias. Secondly, 24 of the 39 days were taken waiting for the respondents to respond to the commission's correspondence.

Now a comment about the commission's processes. As I said last time when I appeared to you, hard cases make bad law. The Queensland University of Technology complaint and the complaints about Mr Leak's cartoons have attracted public attention, particularly by those advocating for a change to section 18C of the Racial Discrimination Act. In comparison with these two cases, the commission handles thousands of complaints every year without controversy. We provided detailed quantitative and qualitative information in our submission in December about the commission's complaint handling processes as a whole. These processes are carried out every day by hardworking investigators and accredited conciliators at the commission in a way that I suggest to you provide fair, accessible, quick and inexpensive access to justice for thousands of Australians. All laws and processes are properly subject to review and amendment. The commission regularly seeks to improve the ways in which we operate our processes. We have made a number of what, we believe, are sensible recommendations to this inquiry for improving those processes, and I do commend them to you.

Finally, may I say something about section 18C of the Racial Discrimination Act. I think you will be aware that we have, in our submissions, made some suggestions in relation to those provisions, if you decide that you would like to make some proposals for legislative change. But after considering all of the evidence that is provided to this committee, the commission's position on 18C remains a consistent position. Sections 18C and D have been interpreted and applied consistently by federal courts over 20 years. We believe at the commission that the law strikes an appropriate balance between freedom of speech and freedom from racial abuse. These provisions have served our multicultural democracy well in sending the message that racial vilification is not acceptable in Australia.

Thank you for your forbearance in listening to this very long opening statement. We are, of course, very happy indeed to answer any questions. I will make sure that you receive both the chronology and, in due course, the opening statement for your information.

CHAIR: Thank you, Professor Triggs. We will proceed to questions.

Mr LEESER: Thank you very much, Professor Triggs, for appearing today, for the supplementary submission and for the very full chronology and information you have given us about the QUT case. What is the big learning that you take from the QUT case? Is there a learning from it at all, from the commission's perspective?

Prof. Triggs: There are many learnings from this matter, and it has been an important time for the commission for some self-reflection about our processes, to see how we can be consistent with our statutory obligations but also to acknowledge some of the difficulties that arise in any system of accusation. Whenever anybody makes an allegation, particularly when they release it in the public arena, a lot of damage is done, and it seems that damage has been done to a number of parties.

We have already amended our processes so that, if there is more than one respondent, we will notify all respondents at exactly the same time so they will be treated in exactly the same way. With the benefit of hindsight, I think that we perhaps gave the parties too long to negotiate, but I can honestly say on behalf of the commission that we believed in good faith, as I believe the negotiating parties believed in good faith, it would be possible to reach a resolution. I will not repeat it again, but I think it was very clear to us that this was the best chance of a resolution and of avoiding the matter going to court. But it is at least arguable that, if we had insisted a little earlier that they really had to agree on the terms of the deed of settlement and proceed to sign it, maybe that would have produced the outcome. But of course we do not know. I think we would require absolute confirmation of notification and receipt by respondents in the future.

Mr LEESER: Has it been the process of the commission usually to contact respondents directly, or was this an outlier case, as it were? I can imagine a scenario, for instance, where these were students at a university and it may have been seen to be a reasonable thing to ask the university to notify the students. Has that tended to be the commission's process, or has the commission's process been to—

Prof. Triggs: Yes, indeed. This was an extremely unusual case, and I have considered all along that the university acted in good faith in protecting the interests of the students.

Putting that to one side, it is not at all unusual for respondents to have a claim against a major organisation—an employer, a group, a government entity, a major shopping complex or a factory—where the incident will typically have occurred in engaging an employee but where the substance and real essence of the claim is against the entity. In the past, we have agreed to a request by that entity to leave, for the moment, the employees out of it so that the major organisation can handle it as best possible and hopefully achieve a resolution. We have permitted that in the past, and it has been a successful part of the process. But, as I say, in future, where a person—perhaps an employee—is specifically named in a complaint, we will not hesitate to insist that all respondents are notified at exactly the same time.

Mr LEESER: Is it fair to say that the reason you did not terminate the complaint was that, when viewed by itself, the line about QUT stopping segregation with segregation might be seen in one light but, if you put it in the context that you have put it in, with all of the other matters, it is seen in a different light? Is it fair to say that the other matters in that Facebook string or that web string were the reason that you did not terminate it straightaway? Are you prepared to say anything about that?

Prof. Triggs: I think that without knowing the facts—which ultimately, of course, became available to the judge of the Federal Circuit Court—on the face of it we have to accept a complaint that was set out in a clear way and that made those allegations. We had to embark on the process. We could not have declined to consider those matters. But you make an interesting point, and it is an important one, that because this was a matter against numerous respondents the case might have been stronger in relation to one or two of them than in relation to others. But we typically deal with these matters as a whole, so we proceeded with it, firstly not knowing some of the facts and possibly accepting that some of the remarks would not have met a threshold.

Mr LEESER: Do you think that the recommendations that you have made will give you enough information if a matter like that happened again, particularly in terms of the recommendation you made in your first submission about the nature of the detail of the complaint—the specificity of the complaint? How might that have changed things in this scenario, if at all?

Prof. Triggs: I think one of the suggestions we have made is that if the president has the power not to proceed or to terminate a matter on the grounds that it is not warranted then that would be supplemented if it were possible

to have the additional detail so that it will be possible earlier on to say that the facts did not live up to the allegation, and it will be easier to decline to proceed with a matter. So, the suggestions we have made are really suggestions right at that beginning stage, because that, in a way, is the most dangerous in the sense that that is when some of the hurt starts to occur. That is when respondents are named. And in rare cases the matters are presented into the media, and that is where the most dangerous point is, and that is where it will be appropriate for the president to have stronger powers to terminate the matter.

Mr LEESER: You said in your opening statement that if a complainant is determined to proceed to court there is nothing the president can do to stop that. It seems to me that perhaps we should be looking to do something along those lines. You have proposed an application to the court to seek leave to appeal.

Prof. Triggs: Yes.

Mr LEESER: Do you think that will be enough to discourage these sorts of cases? In particular, in your supplementary submission you have set out the test that the court applies. It seems to me to be quite a generous test, to favour the person making the appeal. I wondered whether you thought we might need to tighten things up a little bit here in these circumstances.

Prof. Triggs: Well, that is one of our suggestions, and I might ask Mr Edgerton to respond to that as senior lawyer within the commission.

Mr Edgerton: I think it is the commission's view that that would provide more protection to respondents than is currently the case. So I think our recommendation is that if the president has decided to terminate a matter on effectively a merit-based ground—the president is satisfied that the conduct is not discrimination or the president is satisfied that the complaint is trivial, vexatious, misconceived or lacking in substance—then she will provide a certificate that states those grounds. The complainant would still have the right to go to court, but there would be an additional hurdle that they would have to get over—namely, that they would have to get the leave of the court. Now, I understand what you are saying about the breadth of the test. I think there is a nuance in how that test is applied when an application is sought for leave to appeal from an interlocutory judgement that the case has no reasonable prospects of success. And judgements in those cases say that the application of the leave requirement has to be interpreted as a filter and it has to be interpreted in a way that there is not a default position that the court would allow a case to proceed where it has already been determined to be lacking in substance in some way. So, I think that the court is really alive to the fact that the leave requirement is not just an open door, that there actually needs to be a substantive assessment of the merits of the complaint and a real positive finding that there is in order for that case to go forward.

Mr LEESER: Perhaps I could take you to some parts of your submission that deal with the conciliation process, just to get a better understanding of that. In relation to the conciliation process, one of the things you have updated in this submission compared with the previous one is particularly on the chart, where you have included where 18D is considered, and my colleague Senator Reynolds particularly wanted to have a sense of that. Is there a conciliation manual, as it were, that the commission might be prepared to share with the committee, or a public document that the committee might—

Prof. Triggs: We do not have a manual as such, but we do have a guide to our processes, and we are very, very happy to provide to this committee all of that narrative guide, which essentially is reflected in the submission narration in the supplementary submission.

Mr LEESER: One of the things I suppose I was trying to understand from the supplementary submission, particularly from paragraph 65 to 69, is the extent to which you are considering the law as determined by the court and the extent to which a complainant coming to make a complaint to the commission has a sense that what 18C offers is actually an incredibly limited protection. We have talked a lot at this committee hearing about Justice Kiefel's test in the *Cairns Post* case. If I take you for instance to the boxes at paragraph 65, there is no sense—and I understand that this is a document for the purpose of any sort of complaint, not just section 18C complaints—there are a couple of things here. Dissent and immigrant status are not matters in 18C, for instance. Maybe they are matters in other parts of the act. There is no sense here about the fact that it is, at least for 18C purposes—and I cannot say about the rest of the Racial Discrimination Act—a higher test. To what extent would somebody coming to lodge a complaint understand that it is not just mere offence; it has to be that higher standard as outlined by Justice Kiefel?

Prof. Triggs: As you are aware, we may not provide legal advice to a complainant coming in to the office to seek assistance or to lodge a complaint. But we can say that certain matters have been determined by the court to constitute a breach of 18C, and others have not, and we have many examples of that on our website, and we will refer potential complainants to those examples. We do try to ensure, depending on the particular case—and you

know that 18C cases are very few, so I am speaking generally, but it will be true of 18C as well—that we try to explain what the law basically requires, but particularly by reference to case examples, so that they can look at something and say, 'We can see why a court would hold that it did not come within 18C and we can see why something else does.'

Mr LEESER: I suppose I am asking a slightly different question. I am asking really, given Justice Kiefel's quite narrow test there, to what extent does somebody who is coming to make a complaint understand that it is quite a limited protection? That just says, 'I've experienced racial hatred' or 'I've been discriminated against because of my race.' That is a much lower threshold than what the courts are dealing with in 18C, and I am trying to understand the extent to which the commission is applying the law as determined by the court and saying to people coming with complaints, 'Actually, this is a narrower test', through the documents it produces.

Mr Edgerton: I think there are probably two steps to that. And I take the point that that detail does not appear in the complaint form. And perhaps we can take on notice whether there needs to be an amendment to the complaint form to more clearly indicate the elements of the test there. But certainly once the complaint has actually been made to the commission then advice is given to complainants—not legal advice, but they are given a realistic idea of what the law says. And, as the president has said, they are given access to examples of cases that have been found to be in breach of the law and cases that have not been. But absolutely the commission does test with complainants the strength of their case, and I think we have described in our supplementary submission that process of a preliminary assessment. Often once the commission has had that discussion with complainants about what the law actually says then some complainants decide to withdraw their complaint and some complainants decide to discontinue their complaint.

Mr LEESER: And that is the point where you consider section 18D as well. Can you just explain to us how section 18D is considered in that initial assessment process?

Prof. Triggs: When the complaint comes in we assess whether it reaches even the minimal threshold. We would then perhaps discuss it with the complainant. Or we may have had relations with them earlier than that, when they are just understanding what they could possibly do. But once the complaint has come through and we must respond to it, we then approach the respondent or respondents and ask what they would like to say in relation to the justifications that would be available to them under 18D. So they are advised that they have that option. Indeed, as you will know from 18D, it is not an objective series of tests that the commission itself can make up its mind about; it is that the respondent needs to be able to show that it has acted in good faith. That is a matter that does require at least some answer from the respondent—that when they drew the cartoon or made the comment they did so by virtue of their right of freedom of expression, and they did so in good faith as an artistic exercise or in the public interest.

Mr LEESER: Thank you. The chair is winding me up, so I might come back to you later.

Mr PERRETT: Perhaps I can take you to a Canadian situation where, in 2013, the conservative government repealed section 13 of the Canadian Human Rights Act 1977. Section 13 was a civil redress for racial vilification. The committee has been told that a recent study by Canada's national broadcaster, CBC, found that there has been a 600 per cent increase in online hate incidents in just the last 12 months. Have you consulted the Canadian Human Rights Commission about the effect of the repeal of their legislation? My understanding is that a former Liberal Attorney-General is actually bringing forward a private member's piece of legislation to reinstall that legislation against racial vilification.

Prof. Triggs: If I may, I will ask my colleague, Mr Tim Soutphommasane, to answer that question.

Dr Soutphommasane: We have not in recent times consulted with our Canadian colleagues about this particular question, although we are aware of some of the concerns that have been expressed following the repeal of section 13 of the Canadian Human Rights Act and we are familiar with the research you have cited, which I believe comes from the Canadian Broadcasting Corporation. I am aware, as well, that advocates for racial equality in Canada have expressed consistent concern about the signal that the repeal of section 13 sent concerning hate messages. As you will be aware, section 13 of the Canadian Human Rights Act is concerned with telephonic hate communication.

Specifically, if we were to view the Canadian situation, I believe it is an illustration of the important message that the law can send to society about what should be acceptable standards when it concerns racial hatred and abuse. The Canadian experience would indicate that there are some dangers when you do weaken legal protections against hate speech, including of a racial kind. It may have the effect of emboldening people to believe that they have greater freedom to inflict racial hatred and bigotry onto others. It is worth noting that, in that research from the CBC, I believe that there was some indication that white supremacist messages, among

others, had increased substantially. That should be a consideration for the committee in its deliberations on the signal issue of legislation.

Mr PERRETT: For my next question, I refer you to the submission received from the former Human Rights Commissioner, Mr Tim Wilson MP, who is now a Liberal member of parliament. Although he was a human rights commissioner, my understanding is that he is not a lawyer. I would like you to comment, in your capacity as president of the Human Rights Commission and with your experience as a public international lawyer, on some of Mr Wilson's comments:

In its current form the law is inconsistent with human rights, operates anathema to liberal democratic values and is utterly inconsistent with a free society.

Another quote:

The test is applied subjectively based on the attitude of a person from a sub-group, and not an objective test of a reasonable Australian.

I am not sure if you were here earlier when Mr Williams from Minters was giving evidence and I made the point that it was not dissimilar to some of the Sex Discrimination Act tests. Would you like to respond, Commissioner Triggs?

Prof. Triggs: With regard to the substantive comment that Australian law is inconsistent with human rights law and is an anathema to free society, I am afraid I have to disagree.

Mr PERRETT: And to liberal democratic values.

Prof. Triggs: And to liberal democratic values. I disagree. Indeed, if you were going to discuss infringements upon the right to freedom of speech in Australian law, you would not start with section 18C. There are many other aspects of legislation that have a much more significant chilling or damning effect on the rights to freedom of speech. Tim was a good colleague at the commission. He worked well with us and, indeed, worked with us in any public statements we made on these matters. I feel that, since he has left the commission, his views have crystallised—one might say—but I do disagree with them.

Mr PERRETT: Could I take you further to that second question: the subjective test. On that point, I put it to you that it is not any different to a test of sexual harassment in the Sex Discrimination Act, which I quote:

… in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

And the circumstances that they must turn their mind to include:

… the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed

For example—and I think I used this with Mr Williams—I am not an intersex person, but I would have to anticipate how an intersex person may react to something that I say about them. Could you respond to that, especially in light of the submission put forward by former Commissioner Wilson?

Prof. Triggs: I think you have, in part, provided an answer to your question, but I will ask Dr Soutphommasane to answer.

Dr Soutphommasane: It is not correct to say that there is a purely subjective test involved in the legal tests involving part IIA. The words of section 18C make it clear that it is unlawful to do an act which is 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people' because of their race. Those words 'reasonably likely, in all the circumstances' embody an objective test. The courts have applied a test which focuses on the reasonable member of the target group as opposed to a reasonable member of the community at large. I understand that there are debates about whether that constitutes a sufficient level of objectivity. It is important for the legislation to respect the lived experience of racism and racial difference. If we were to adopt a more stringent, objective standard which does not take into account racial difference then it may end up frustrating the objects and purposes of part IIA of the Racial Discrimination Act. I hope that is helpful. It is not correct to say that there is a subjective hurt feelings test involved in section 18C, for the reasons I have noted. The 'reasonable member of the target group' test would legally be considered an objective test as well, because the mere assertion by someone that they have experienced damage is not determinative of a contravention of the law taking place.

Mr PERRETT: Thank you for this. Another part of Mr Wilson's submission is:

A falsely perpetuated myth is that the introduction of section 18C, D and E was justified because it was supported by the conclusions of three preceding independent inquiries. These inquiries were:

1. *The Royal Commission into Aboriginal Deaths in Custody*.

2. The Human Rights and Equal Opportunity Commission's *National Inquiry into Racist Violence*.

3. The Australian Law Reform Commission's report into *Multiculturalism and the Law*.

This claim is false.

I am not sure who is the best historian but I thought it was true that these three inquiries did highlight concerns which were then addressed by the legislation that you enforce. Would you like to make comment on that?

Dr Soutphommasane: Mr Perrett, I had the opportunity in 2015 to commemorate through the commission their 40th anniversary of the Racial Discrimination Act and the opportunity to look into some detail into the debates leading up to an enactment of the RDA in 1975 and also the passage of the Racial Hatred Bill in 1995. The explanatory memorandum for the Racial Hatred Bill does refer to the National Inquiry into Racist Violence and also the Royal Commission into Aboriginal Deaths in Custody. The second reading speech delivered by the then Attorney-General Michael Lavarch also refers specifically to the three reports you have noted—the national inquiry, the royal commission and also the *Multiculturalism and the law* report of the Australian Law Reform Commission. That is what the record in *Hansard* tells us.

Mr PERRETT: The first law officer—

Senator PATERSON: Mr Perrett, if I could jump in there. I think you have misrepresented Mr Wilson's position and provided an incomplete quote from his submission. Mr Wilson does not believe, and does not argue, that those reports did not lead to the law, but that those reports recommended a different law to the law that was subsequently enacted. And his view is supported by the *Bills Digest*, prepared by the Parliamentary Library into the bill, which demonstrates there is an inconsistency to what the report recommended and what the law—

Mr PERRETT: Thanks, Senator Paterson. I am going to ask my questions. You feel free to ask yours. Have you finished, Mr Soutphommasane?

Dr Soutphommasane: To Senator Paterson's point, if I may, and with your indulgence, Mr Perrett—

Mr PERRETT: Sure.

Dr Soutphommasane: If my memory serves me correctly—

Mr PERRETT: I can see the vision here, but it is about a minute behind the words. It is a bit disconcerting, but I am following.

Dr Soutphommasane: The Royal Commission into Aboriginal Deaths in Custody recommended both criminal and civil provisions concerning racial hatred. The national inquiry and the *Multiculturalism and the law* report recommended civil provisions concerning racial hatred. The words which were enacted by the parliament do not, word for word, reflect the recommendations of the national inquiry and the *Multiculturalism and the law* report. So in that respect, Senator Paterson, you could say that it does not reflect those reports. But the thrust of those recommendations is also clear—which is that there should be civil mechanisms for dealing with racial hatred and harassment so as to close a gap in the law as it existed at that time.

Mr PERRETT: I am comfortable with the fact that I have accurately read the direct quote from the MP Mr Wilson's submission and from my reading of the former Attorney-General's speech. I will move on to another question, Chair. One of the issues that has been raised with the committee is that the law, as it has been interpreted judicially and its operation, is misunderstood by the community and, in fact, by some lawyers and some media organisations. One of the functions of the Human Rights Commission is an educative one. In your view, Commissioner Triggs, would a concentrated education program around section 18C increase the public's understanding of the current operation of this section? I ask that question in light of your, as you said, extraordinary discussion of the QUT case and other cases in your opening remarks.

Prof. Triggs: Thank you, Mr Perrett. I would have to say that one of the primary strategic objectives of the Australian Human Rights Commission lies in the area of education. We spend what resources we can to a significant degree in promoting an understanding of Australia's legislation that protects human rights on race, sex, disability and age, and on promoting the international treaties to which we are a party that form part of our jurisdiction. It is a major objective for us because we know, as I am sure you do, that almost invariably, compliance with these laws depends upon education and a cultural acceptance of them. I do think that the public, partly because of the misinformation in some parts of the media, has a view that section 18C applies at a very low level. We know, and you know, that the jurisprudence of the Federal Court places the threshold at a relatively high level. That is the gap. I think if it were possible to have more resources to put into education about the true meaning of 18C as applied by the courts, that would be very helpful. I should, of course, mention the Racism. It Stops with Me campaign that Dr Soutphommasane chairs on behalf of the Australian government's initiative, and

there are very many other initiatives now that are being taken up within sections of the media and the community. But we do need more, if only to disentangle the misinformation that appears to have been out there about section 18C.

Mr PERRETT: A final question. In their submission, Castan Centre for Human Rights Law say in relation to removing 'offend and insult' that:

the removal of those words could send a much more dangerous message than it would actually convey in law. The political context and impact of the debate cannot be ignored. The rolling back of a law sends a message, as does the passage of one. It can send the message that it is acceptable to offend and insult another person on the basis of their race.

Do you agree that any change to section 18C might send the message to the community about what behaviour is acceptable and that, consequently, people would suffer and their right to be free from discrimination could be impinged upon?

Prof. Triggs: I can say that I think there is a very severe risk that that will be the case, but I will pass again to my colleague Dr Soutphommasane. I do so because he is the commissioner with the particular mandate in relation to the Racial Discrimination Act. He has a great deal of experience in the area.

Dr Soutphommasane: There is a significant risk indeed of sending a signal, perhaps even unintended, to people if there were to be a change in the Racial Discrimination Act. You may be aware of some of the survey evidence that indicates that racism may be on the rise in Australia. The Scanlon Foundation in 2016, in its annual survey concerning social cohesion, found that 20 per cent of its respondents had experienced discrimination in the last 12 months, which was an increase from 15 per cent in 2015. Last week, Reconciliation Australia also released the results of their Barometer survey, which found that 46 per cent of Aboriginal and Torres Strait Islander people say that they had experienced racism during the past six months, which is an increase from 39 per cent in 2014. We have also mentioned the Canadian experience, which is also pertinent to this consideration.

It is also worth adding that there are strong indications that the vast majority of the Australian community believe that it is important to have legal protections against racial hatred. Just this week, researchers at Western Sydney University and the University of Technology Sydney released the results of a survey that they conducted in partnership with Essential Media, which involved a weighted representative sample of the Australian population. They found that well over 75 per cent of those respondents in the survey supported making it unlawful to offend, insult, humiliate or intimidate people on the basis of race. Their findings indicate that no more than 10 per cent of people surveyed believe that people should be free to offend or insult others on the basis of race.

Senator PATERSON: Professor Triggs, thank you for coming back to the committee for a second time. I particularly appreciate your advice to the committee yesterday that you will not be making a public interest immunity claim about the QUT matter. I am very grateful for the time line of events that you provided, because that will assist us. It would have been very difficult for us to complete our work if we had not had your side of the story on this, so I do very much appreciate that.

My first question is one that I will ask up-front because I know you will definitely have to take it on notice, and I will provide you with a copy of the documents or refer to documents I am seeking. Are you familiar with a freedom of information request from Hedley Thomas of *The Australian* about this matter?

Prof. Triggs: Indeed, yes.

Senator PATERSON: I have here a letter from the Human Rights Commission to Mr Thomas—there is a copy for Professor Triggs and for the committee—in which it responds to his request and provides some documents in full, provides some documents in part and refuses access to some documents. I would like to make a request on notice for you to please provide to the committee the documents that you have refused Mr Thomas access to. I ask you to provide them to the committee. I ask you to grant us access in full to the documents that you provided to him that have been redacted, with the exception of any personal information. I understand why that would need to be redacted.

Prof. Triggs: I will take that on notice.

Senator PATERSON: Thank you. I will now move to the substantive questions that I have. I want to provide you with an opportunity to respond. You were here earlier when Mr Williams was giving his evidence, and you addressed part of his evidence in your opening statement. I just want to provide you with another opportunity to respond if there was anything that he said in his evidence that you feel you have not already addressed in your opening statement.

Prof. Triggs: Thank you, Senator Paterson. I came in halfway through his evidence, so I would need to look at the *Hansard* record to make absolutely certain. I hope that I understood him correctly in accepting that it was

the Queensland University of Technology that had specifically and repeatedly requested that they have responsibility for notifying the students and that we had repeatedly asked them to confirm that. So I believe that that evidence was accurate, and—

Senator PATERSON: That was not really the impression that I got from Mr Williams. That is a very charitable interpretation.

Prof. Triggs: I am trying to be charitable because I need to see the *Hansard* before I make any statement—

Senator PATERSON: Of course.

Prof. Triggs: but I did raise it with him afterwards, and his memory of what he wanted to say is what I believe to be the truth. If there is a slight error in what he actually said, I have very little doubt that he will correct it. We both may be referring to the same thing, but I would like to look at the *Hansard* record first.

Senator PATERSON: Obviously, I do not have a *Hansard* record either, so I am relying on my memory, but I was not left with the impression from his evidence that it was largely the university's request that the students be notified by them and not by you that was the cause for them not being notified. My impression was that he was putting more of the responsibility on the commission than he was on the university.

Prof. Triggs: Before I say any more about that, I would really like to check the record. I can only repeat what I know to be true, and that is the series of events and the frequency with which the university repeated that it wished to carry that responsibility and the frequency with which the commission persisted in asking whether notification had actually taken place. So let us see how the *Hansard* record—

Senator PATERSON: Sure. One thing that I am very confident about because I took detailed notes about it was that, in essence, Mr Williams was saying that the university took responsibility for the failure to notify the students after May 2015 when it was clear to them that this matter was going to proceed. In effect, they took responsibility for the final six weeks of failing to notify the students or not doing so in a timely way. But the 12 months prior to that he felt was the Human Rights Commission's responsibility. Do you have any comment on that?

Prof. Triggs: I will get Mr Edgerton to respond.

Mr Edgerton: I think that it is the case that QUT had said, 'If and when Ms Prior decides to proceed against the students then the university wants to be responsible for notifying them.' That happened around about May 2015. Prior to that Ms Prior had asked the commission not to notify the students, and I understand that QUT had accepted that that was the position. I think that is consistent with the evidence that you heard this morning.

Senator PATERSON: I heard in your opening statement, Professor Triggs, that you said that it is typical or it is normal for the commission to 'take direction from the parties' in how these matters proceed. Is that a fair quotation of what you said in your opening statement?

Prof. Triggs: Well, broadly: that it is a voluntary process where, if the parties put forward a proposal for settlement, however that might be—a telephone conference or discussions amongst their lawyers at a private level—and if we believe in good faith that that is what they want to do, we would give them a margin of discretion, if you like, to conduct those negotiations as they see fit, because it is a voluntary process that brings the parties together in order to reach a solution that works for both of them, or for all parties.

Senator PATERSON: And I understood from your statement that that was a partial explanation as to why I guess not a lot of progress was made in the initial period of the complaint, because the parties had indicated to you that they were trying to resolve it, separate from the commission, and so I guess the commission took the view: 'We'll leave it up to them in the meantime to resolve this, and we won't intervene.' Is that a fair summary?

Prof. Triggs: Perhaps I could first repeat what I have said, and that is that we felt they were making progress—

Senator PATERSON: Yes, of course; sorry; yes.

Prof. Triggs: because they had agreed, in principle, on a deed of settlement. We thought that the matter was going to be resolved—and, I believe, so, presumably, did the parties. For a period, we monitored this, to see how they were going, and we regularly monitored it. But we had to accept the good-faith word of the parties that they were continuing negotiations. We would not interfere with that if we felt that there was an opportunity to resolve the matter.

Senator PATERSON: In this case there were effectively, I guess, three groups of parties: there was Ms Prior, there was the university, and there were the students. You said you took direction from the parties, but in reality you only took direction from two of the parties and not that third group because you were not in contact with the students.

Prof. Triggs: The fourth group, of course, were the employees—

Senator PATERSON: Yes.

Prof. Triggs: of the university. So it was complex. But, as I have said—and my dating is something like 29 May 2014—we had received a clear statement from Ms Prior, with the agreement of the university, that the commission should not take any action to serve the complaint on the students or to list the matter for conciliation. So we were undeniably conducting this through the complainant and what we might describe as the main respondent. Perhaps others would say, 'Well, that's not true; the main respondent was in fact the students.' But we had, as I have described in my opening statement, reasons to believe that Ms Prior's primary concern was about the university's treatment of her and her complaint, through their internal processes. So I think it was reasonable to say that, so long as the major players in our view were still discussing, working in good faith together to reach an agreement, that was something that we would support and promote.

Senator PATERSON: Isn't identifying the university and Ms Prior as the major players privileging them, in a way, over the other respondents in the case? I mean, they were all parties to the case. I do not see why you would put a different weight on different participants.

Prof. Triggs: Well, I think, firstly, it was not clear, until two years after the incident, one year after the complaint was made, that the students would be made a party. So I think that is the first point to understand.

Senator PATERSON: Aren't they a party just by the fact that they are listed in the complaint?

Prof. Triggs: Not necessarily, when we could not get confirmation—and I do not think that even the university could get confirmation—that the students would be ultimately proceeded against in relation to the matter. Mr Edgerton would just like to add a little to what I have just said.

Mr Edgerton: I think some of the evidence that you heard this morning was that Ms Prior, when she came to the commission for the first time, expanded on the dispute that she had currently had with QUT as part of their internal grievance process and had listed the students who had not previously been involved in that process. And I think some of the evidence—and I hope I am not misquoting it—was that the lawyers for Ms Prior wanted to preserve their position in relation to all aspects of the complaint but that it was still pretty clear, as between Ms Prior and QUT, that her main complaint was in relation to QUT.

One of the first steps that the commission took was to say, 'Do you really need to have these students as parties to the complaint at all?'

I think that there probably was a miscommunication in the sense that we were saying, 'Maybe the students don't even need to be respondents,' and the response had come back from Ms Prior: 'Don't provide them with copies of the material at the moment, because we think we can still sort it out without the students being involved.' So they are two slightly different things. I think if we were dealing with this again, if we had got that response, we would say, 'Well, if you're not taking them out of the case then we require them to be notified.'

Senator PATERSON: So I guess that is one of the reflections that you have had about this case—that it was not appropriate to accept the request by Ms Prior and the university that the students not be notified.

Mr Edgerton: I think it was a reasonable step for the commission to take given that there seemed to be a reasonable prospect of the matter being resolved against all of the parties, including the students. But I think that you are right. We have reflected on this case and others, and we always trying to improve our processes, and I think that we would deal with that situation differently now.

Senator PATERSON: So, if a complaint were made against multiple parties in the future and either the complainant or some of the respondents did not want the other respondents to be notified, you would not accept that request?

Mr Edgerton: That is right—well, can I make one qualification to that. Sometimes we will get a complaint that comes in—it may well be a sexual harassment complaint—and, as part of the material that comes in in the course of that complaint, it may be clear that there are criminal proceedings on foot already.

Senator PATERSON: Sure. I understand how a criminal proceeding would be different.

Mr Edgerton: All right.

Senator PATERSON: I understand that under section 46PD of the Human Rights Commission Act the complaint needs to be referred to or handled by the president. Is that a fair summary of what that section of the act requires?

Prof. Triggs: I do not believe so. I might ask for a response to that, but I would rather not paraphrase what the section says; I would rather repeat what it actually says.

Senator PATERSON: Please.

Mr Edgerton: I think you are referring to section 46PD, which is the requirement that complaints be referred to the president.

Senator PATERSON: Yes.

Mr Edgerton: The president is responsible for all complaints within the commission. In practice, though, the president has given a delegation to the director and the deputy director of the Investigation and Conciliation Section to carry out the president's functions under section 46PF, which is the function of inquiring into and attempting to conciliate complaints. So, in practice, the deputy director and the director of the Investigation and Conciliation Section do the work of inquiring into and attempting to conciliate. Ultimately they are responsible to the president, and the importance of section 46PD is that the president is responsible for that function and not the other commissioners.

Senator PATERSON: Yes, I see.

Mr Edgerton: The delegation that the president is able to give in relation to her conciliation function is limited, in the sense that it can be delegated to staff of the commission and, on occasion, people who are not part of the commission, but it cannot be delegated to the other commissioners who have responsibilities for advocacy in those areas.

Senator PATERSON: Thank you. Professor Triggs, did you want to add any comment on that?

Prof. Triggs: No, I would prefer to read out the provisions rather than have a paraphrase.

Senator PATERSON: Yes, please treat us to it.

Prof. Triggs: It is perhaps a little bit different from what you said:

> If a complaint is made to the Commission under section 46P, the Commission must refer the complaint to the President.

But then other provisions go on to talk about delegation powers, and I am sure you will understand that with, on average, 22,000 matters a year, and 2,300 formal complaints a year, it would be clearly impractical, on any interpretation of these provisions, to require the president personally to handle each of these matters.

Senator PATERSON: Sure. I would just like to provide you and the committee with another document that goes to this matter. You may be familiar with it. It is a statement by Jodie Ball, and it goes into a little bit of detail about the process.

Mr Edgerton: I have seen a copy of that statement before, and it is covered by a nonpublication order that has made by a delegate of the president.

Senator PATERSON: Yes, I understand that, but I suspect parliamentary privilege would trump that.

Senator McKIM: Chair, on a point of order, I have no idea what we are talking about. We do not have the document in front of us. I, in good faith, think it is reasonable for all committee members to have the document in front of them before this line of questioning is proceeded with, so I am happy for Senator Paterson to resume it.

Senator PATERSON: Sure. I am happy to proceed to other matters and return to this while copies are made by the secretariat.

Mr PERRETT: And distributed to Ms King and me, please.

Senator PATERSON: Sorry, Mr Edgerton.

Mr Edgerton: The only reason I flag the nonpublication order is that it may mean that we may need to think about whether it would be appropriate for the commission to make a public interest immunity claim in relation to this document. We potentially need a bit of time to think about that.

Senator PATERSON: Thank you. I am happy to proceed with other questions in the meantime. Professor Triggs, is there any other case you are aware of—without going into the details of the case—where notification of a party to the case has been outsourced to a third party? I am obviously referring to the university here. Has the commission ever relied on a third party like a university to notify some other respondents in a case?

Prof. Triggs: Earlier I answered a very similar question. It is quite usual when we are dealing with a large organisation where the particular incident that has led to the complaint is usually carried out by an employee or a government official. It would be quite acceptable for us—we have certainly done this in the past—to allow the organisation to contact and work directly with those employees rather than to do it directly with us.

Senator PATERSON: But I think you might see there is a difference between employees and students at a university. Clearly, the university has a much greater responsibility for its own employees than it does for its students.

Prof. Triggs: I do not know that I necessarily agree with that, but I think that there is a critical point and that is that the students are particularly vulnerable, they have rights to privacy and there are particular reasons in addition to the usual tolerance that we have for allowing an employer or government department to deal directly with a matter rather than the individuals. The case is even stronger, if you like, in relation to a university and its students. You would interfere with that relationship with great caution.

Senator PATERSON: So you think it could be an appropriate practice in the future to rely on a third party that is not an employer of people subject to a complaint to be responsible for notifying them?

Prof. Triggs: I think that is getting into too high a level of detail. Obviously, legislation has to apply to all of those cases. But I think one could have a provision that it would lie in the discretion of the president to permit the respondent to deal on behalf of employees or university students. I think it is always wise to have some level of flexibility.

Senator PATERSON: But if you were giving that discretion in the future couldn't another situation arise where some parties to a complaint are not notified for a period of time about the fact that a complaint exists against them?

Prof. Triggs: That is exactly why we have adopted in our current practice and made the recommendation to you for legislative change that we have a clear provision that all respondents should be notified contemporaneously. That seems to us to be a way of resolving it, and that is what we have proposed.

Senator PATERSON: I agree. That is exactly what I am trying to get to. It would seem, then, that your previous answer should have said, 'We would be required, if our recommendations are followed, to notify all respondents anyway.'

Prof. Triggs: If that recommendation is accepted, yes. That is not the case at the moment.

Senator PATERSON: What I am seeking is your recommendation.

Prof. Triggs: We have made the recommendation and we do so seriously. We hope it is accepted.

Senator PATERSON: Just to clarify, did the commission at any point attempt to contact the students?

Prof. Triggs: I do not believe so, partly because we did not have the details of all of them and partly because we had been so expressly requested not to do so.

Senator PATERSON: You did have the contact details for five out of seven of them.

Prof. Triggs: That is true. Whether they were accurate details I cannot speak to.

Senator PATERSON: You might have discovered that if you had tried to contact them.

Prof. Triggs: We could have done, but again, we were expressly and repeatedly asked not to do so.

Senator PATERSON: Why should those requests override your own judgement about whether it is appropriate that respondents be notified?

Prof. Triggs: My own judgement would be in that kind of case of the university acting, as I believe they were, in good faith, protecting the interests of the students, I would have agreed with it. It seemed to me to be a rational thing to do when the crux of the matter could be resolved and was in the process, we thought, of being resolved. There was no need to engage the students immediately if the matter could be resolved. With hindsight, we know that did not work. Of course I wish we had rejected the university's suggestion that they handle the matter of notification, but that is only with the benefit of hindsight. If it came up again in the future I suspect that anybody in my position or in the delegate's position or any of the officers of the commission dealing with the matter would say: 'The request is made in good faith. It is done for what appear to be good reasons—to protect the privacy of the students. We have a great deal of care and responsibility for them.' We would allow that measure of discretion to be exercised by the university.

CHAIR: We will suspend proceedings for a short break, after which we will recommence with another round of questioning.

Proceedings suspended from 15:15 to 15:33

CHAIR: I will hand to Senator Paterson and then we will make a start.

Senator PATERSON: For the benefit of Hansard and for the record, Mr Edgerton and I had a conversation in the break. The questions that I have to ask about the document that I have provided to the committee and to the commission only relate to section 10 of the document.

Senator MOORE: Can you clarify which document you mean?

Senator PATERSON: The document I am referring to is a statement by Jodie Ball, which is the numbered document that I have provided to committee members and the commission. Mr Edgerton has some concerns about making the entire document public, which I understand and respect. My questions only relate to section 10 of the document, and I will ask Mr Edgerton to confirm that he is happy, or the commission is happy, to answer questions on that and happy for that section of the document to be public.

Mr Edgerton: Yes, that is right.

Senator McKIM: To be clear, is the commission entirely comfortable with section 10 being a matter of public record?

Mr Edgerton: That is right. If paragraph 10 is extracted out and effectively as a document by itself with none of the other context of that document, we are happy for just that paragraph to be a public document.

Senator MOORE: Can we confirm that both Ms King and Mr Perrett have that document?

CHAIR: Do you have copies of this document, Mr Perrett and Ms King?

Ms MADELEINE KING: No, I just explained that I cannot download it. Is it particularly long or something? I can see the attachment but cannot get to it.

Senator PATERSON: There are two different documents we are referring to, Madeleine. The first one is the FOI document, which we are not dealing with at the moment, and the second—

Ms MADELEINE KING: Sorry, I have been sent just one PDF, about 15 minutes ago. It is a 17.5 megabyte document.

Senator PATERSON: That is likely to be the first one.

Ms MADELEINE KING: That is the only one I have, and I cannot get it to open.

Senator McKIM: That would be the Liberals' NBN.

Senator PATERSON: I understand, Madeleine, that the secretary is working on providing that to you right now.

Ms MADELEINE KING: That is fine. I am just letting you know. I do not know if Graham has it. Is he on the line?

Mr PERRETT: I am. I have the FOI from Mr Thomas, but I have not read it, obviously. I have not seen the other one, which I think someone referred to as Jodie or something?

Secretary: If you scroll down, is the statement from me towards the end of that document?

Mr PERRETT: Sorry, my office just brought in a document from Michelle Lindley. That is the last page of the one I have, unless I am misreading it. It is a 20-page document.

Ms MADELEINE KING: Can we ask these questions on notice, perhaps?

Mr Edgerton: We are happy to take the questions on notice if that is easier.

Senator PATERSON: I would prefer to ask the questions and have them answered here if they can be; if not, I understand if they need to be taken on notice. I have two lines of questioning about this and then I will yield to my colleagues, because I have taken up a bit of time. If there is time at the end, I have other matters I want to return to, but I will let them go first.

Ms MADELEINE KING: Sorry, before we go on—I do not mind if you continue—I just want to register that, because we cannot see what the question is being asked about, it is hard for us to do follow-up questions at the same time. Everything is out of context. It is one of the problems with tabling things at a meeting rather than giving it to us beforehand. We could have figured this out yesterday in parliament before we knew we were not going to be there in person. Anyway, I will let it go, but I just want to register that.

Senator PATERSON: My understanding is that it is on its way to you, Madeleine, if it is not there already.

Ms MADELEINE KING: It has come to me once, and I cannot open it.

Senator PATERSON: I think they are attempting to provide it to you again.

I have two lines of questioning on this matter. For the benefit of Hansard and anyone who is listening, section 10 sets out 'the usual procedure followed when a complaint alleging unlawful discrimination was received.' I have two issues to raise here. The first is that the five steps outlined make no reference to the role of the president, even though section 46PD requires by law that complaints be referred to the president. I want to invite you to comment on that and whether it is an omission from the procedure.

Mr Edgerton: It is not an omission from the procedure. As I was trying to explain before, section 46PD allocates to the president the responsibility for complaint-handling, but the president does that by acting through delegates, and part of this process involves a complaint, when it comes in, going to the director or deputy director of the Investigation and Conciliation Service, who have a delegation of powers under section 46PF to inquire into and attempt to conciliate complaints. I know that this issue has been raised with us in one complaint previously, but I think that the commission's position on this is consistent with existing case law. There is a case in the Federal Court, Reynolds v JP Morgan Administrative Services Australia Limited (No. 2) [2011] FCA 489, where Justice Rares says:

> The scheme of Div 2 of Pt IIB of the *Australian Human Rights Commission Act* envisages that once a complaint alleging unlawful discrimination is lodged under s 46P it will be referred to the President (or her delegate) who must inquire into and attempt to conciliate the complaint (ss 46PD, 46PF(1)).

Senator PATERSON: What I am seeking to establish, though, is that the commission is satisfied that that is an appropriate delegation of authority, and comfortable with that.

Mr Edgerton: Yes.

Senator PATERSON: Nonetheless, I hope and expect the president still takes responsibility for how conciliations or investigations are conducted, even though that authority is delegated to junior officers.

Prof. Triggs: I can categorically say that, as president, I take total responsibility for the handling and management throughout all of the inquiries and complaints that come to the commission.

Senator PATERSON: Good. Thank you. One thing which the procedure does not set out is: what steps are required to investigate a matter. I am interested in how in the QUT case the matter was investigated by the commission.

Mr Edgerton: Maybe I can provide a response to that as well.

Senator PATERSON: Please.

Mr Edgerton: The function is to investigate and attempt to conciliate the complaint. So the investigations that the commission does are directed towards the end of attempting to conciliate complaints. With the QUT case, unlike a lot of other cases QUT and Ms Prior had come to the commission having already engaged in a substantial amount of correspondence over a number of months. They already knew as between themselves the scope of that complaint. Ordinarily, in a lot of cases if we had received a written complaint we would get in contact with the respondents, usually by phone first. If it is a detailed complaint, we might ask for a written response. In this case, that was not necessary as between Ms Prior and QUT because they already had a full appreciation of what the issues were as between them. And you may well want to ask me about the students, but I will—

Senator PATERSON: Yes, that is what I want to ask you. It may have been adequate in the view of Ms Prior and the university and in your view between those two parties, but I think, clearly, it was not adequate when it comes to the students, particularly given that we now subsequently know that one of the key facts of the following case was that one of the students did not post the statement which was attributed to him and that, had that been investigated by the commission, a different course of action might have followed.

Mr Edgerton: It is possible. That is as high as I can put it. The particular student was one of the two students who attended the conciliation conference. He has said to the commission that he does not consider what he said during that conciliation conference to be confidential. As part of that conciliation conference, he said to a conciliator in advance in a pre-conciliation meeting, and then also to Ms Prior during a joint session that involved all of the parties, that he was not the author of that comment. He said that he thought that the comment had been posted by somebody else using a false Facebook account in his name. He expressed his sympathy for Ms Prior for the distress that the comments had caused to her while saying that he was not ultimately responsible for that. So during the course of that process he had the chance and took that opportunity to say to Ms Prior all of the things that he says he wanted to say. Nevertheless, the matter was still not able to be conciliated on that basis.

Senator PATERSON: Yes. But that was incredibly late in the process, and, clearly, that information was not able to be used by the commission at an earlier stage in the process to make a decision about whether the complaint should be terminated, because the commission did not seek that information because it did not contact the students.

Mr Edgerton: I agree with your comments about delay and I think the president has already made a statement about that.

Senator PATERSON: So, Professor Triggs, just on this issue: do you agree that you should have investigated more thoroughly—in fact, in my words I would say 'actually investigated this'—by seeking a response from the students earlier in the process?

Prof. Triggs: I think in the circumstances where the university was so clear that they wanted to manage the matter by way of negotiation with Ms Prior in good faith and in protecting the students' interest I would, through the delegate, have made exactly the same decision—that, on the face of it, these matters were of some substance, apparently, and I would have allowed the parties to continue their negotiations in the hope that they would be successful.

Senator PATERSON: That is exactly the point, though, Professor Triggs: on the face of it without having conducted any investigation, without having sought any information from the students. Wouldn't it have been better for you to have had that information?

Prof. Triggs: You are talking about one student who challenged the accuracy, but it appeared on the face of it that the Facebook posts were by the other students. I think the overwhelming evidence in front of the commission was that at least the matter had sufficient substance to warrant the next stage of the process.

Senator PATERSON: With a kind of wafer-thin investigation without going into any efforts to establish—I mean, are there any other students that could have been impersonated that you did not know about?

Prof. Triggs: Well, we could only deal with the ones that the complainant had nominated in her complaint, so—

Senator PATERSON: Who were not contacted and never had an opportunity to make their case to you—until the very end of the process, and then only two out of the seven students—of their side of the story. You did not investigate their side of the story.

Senator McKIM: That was the choice of—

Mr Edgerton: I do not think that there was any dispute amongst any of the other students that they were responsible for the posts in their names.

Senator PATERSON: I know; I am not saying that there was. But I am saying that you had made a decision that the case had a level of substance, in your words, Professor Triggs, and that it should proceed, because of information received from Prior and QUT, but you did not seek information from the students, so how could you know?

Prof. Triggs: Again, we did not seek information from the students because we accepted the request by the university that it appeared likely to be able to be resolved, and therefore it would not be necessary—

Senator PATERSON: And now, with hindsight, you yourself have said that that was not an appropriate decision.

Senator McKIM: A point of order, Chair: I do think that Professor Triggs should be allowed to finish her sentences before being interrupted by Senator Paterson.

CHAIR: On that point we will—

Senator PATERSON: I just want to finish on this matter—

Senator McKIM: First, before you do, I think Professor Triggs should be allowed to finish her answer.

Senator PATERSON: Sure.

Prof. Triggs: I just want to repeat what I have said, now, several times: from our perspective—and we knew, as a matter of fact, that at least six of the students had not questioned the accuracy of and responsibility for the posts—

Senator PATERSON: Sorry—how did you know that? You had not contacted them.

Senator McKIM: Sorry—a point of order, Chair: look, at the opening of the Human Rights Commission's appearance, you urged members to treat everyone with courtesy. Now that is twice in a row that Senator Paterson has interrupted, mid-sentence, Professor Triggs, and I would just ask you—

Senator PATERSON: Senator McKim, you have interrupted witnesses during this hearing as well.

CHAIR: Okay—order.

Senator McKIM: Senator Paterson, you are entitled to take points of order against me—

Senator PATERSON: Well, maybe I should. I haven't, though.

Senator McKIM: Go for your life, mate! But I am taking one against you now.

CHAIR: Order! Could we please hear the answer to that, and then we will move on.

Prof. Triggs: My answer is that we worked with the university and Ms Prior's lawyers in the good-faith belief that they were moving towards a resolution of this matter, and that was the strategy which, as we now know, was not successful. But I believe we had good objective grounds for believing that a resolution would be achieved, and that is why we took the steps that we took.

Senator PATERSON: Chair, I will not revisit this particular matter if we can just resolve this issue here. Professor Triggs, you had said just before that you knew that, in six out of the seven cases, the students were not claiming to have been misrepresented on social media. How did you know that?

Prof. Triggs: I will have to take that on notice. I believe that that was an accepted fact. But I would have to go back over the file and see at what stage and how that was clear. But my understanding is that that is true and that—

Senator PATERSON: But—

CHAIR: Okay—

Prof. Triggs: it was understood to be the case at the time.

Senator PATERSON: It is true, but how did you know, given you had not contacted them? How would it be possible for you to know, given that you had not contacted the students?

Prof. Triggs: Again, I will have to look at the file and see the basis on which that view was reached, but we, critically, know that that was in fact a true statement.

Senator PATERSON: As a matter of logic, how is it possible for anyone to know—

CHAIR: Okay. Now—

Senator PATERSON: what a student's position is without having contacted them?

CHAIR: We might just move on to Senator McKim and then come back.

Mr Edgerton: Chair, could I raise one comment, just about the statement: we are happy to prepare a document that just reflects that paragraph 10, if it is intended that the document is going to be a document that will ultimately be tabled by the committee. Could I also, on indulgence, ask whether the two documents that we have already handed up have in fact been tabled by the committee?

CHAIR: We will seek a resolution—

Senator McKIM: Mr Edgerton, are you asking about the two documents that were handed up just post the President's opening statement?

Mr Edgerton: Yes.

Senator McKIM: I am happy to move that those be tabled, Chair.

CHAIR: Shall we do that now?

Senator McKIM: I am happy to move that those two documents be tabled.

CHAIR: It is moved that they be tabled—and authorised for publication?

Senator McKIM: Yes, I understand that that is the intent of the commission.

Prof. Triggs: Yes, indeed.

CHAIR: Are there any objections? There being none, I declare it carried. Senator McKim.

Senator McKIM: Professor Triggs and your fellow commissioners, and Mr Edgerton, thanks very much for both of your submissions to the committee and your appearances before the committee, and my apologies that I was not able to be at your previous appearance last year. I wanted to ask my first ever question about the details of the QUT case, because I have always regarded it as an outlier case. But, just so that I understand: your evidence today and the time line that you have provided to the committee make it clear that the substantive work that the commission did on this case was over a period from May 2015 to August 2015—is that correct?

Prof. Triggs: That is correct.

Senator McKIM: Are you able to inform the committee what date in May the commission made the decision to intervene and set the matter for conciliation? You do not have a date there; it is just down as May 2015. I am happy for you to take it on notice if you do not have—

Prof. Triggs: Yes, that is a fact that we did not include. I will make sure that we do include it, and it can be added to your chronology.

Senator McKIM: Thank you. I appreciate that. On the basis that it was sometime in May—and I am sure it was—you are looking at somewhere about a four-month process there. That would be very close to your average length of time taken to resolve matters, would it not?

Prof. Triggs: That is true. The average is 3.8, and the amount of time we actually spent in this matter, outside the private negotiations between the parties, was about four months.

Senator McKIM: Thank you. That is clear to me. I just want to take you, if I might, to a couple of your recommendations that you have made. They are, in the main, in your supplementary submission to the committee—firstly, recommendation 6, which is effectively that grounds for termination in section 46PH(1) be expanded. You have suggested there that the test will be:

… the President is satisfied that an inquiry, or further inquiry, into the matter is not warranted.

So I have two questions there. Firstly, strongly implied in that is that the test is able to be applied before an inquiry commences.

Prof. Triggs: Yes, it would be a really all-encompassing, very wide basis of discretion in the president to make this determination. We do so because it is actually used by a number of other agencies, particularly in New South Wales. It provides the head of that organisation with that breadth of discretion. Some might argue you do not want to give a president that much discretion and you want to stick to the close-to-mandatory nature of acceptance of the complaint. That is a matter for you, if I may say so.

Senator McKIM: Yes.

Prof. Triggs: But we are trying to provide ways that would help to deal with perceptions of difficulty. It certainly would make it easier for the president very early on to say, 'This matter does not warrant further attention.' That is an extremely wide discretion.

Senator McKIM: Yes.

Prof. Triggs: But it may be seen as worthwhile.

Senator McKIM: Thank you. Just so that I am clear, your recommendation, if it were ultimately adopted by the parliament, would mean that the president could take that step of termination effectively at any time after the complaint is received.

Prof. Triggs: Yes.

Senator McKIM: So you would not have to investigate at all.

Prof. Triggs: We would not spend any more time on the matter.

Senator McKIM: You could just have a look at the complaint, decide it was not warranted and dismiss it.

Prof. Triggs: You know, for example, that some matters that come are where there are quite different and ulterior motives that become very clear. I cannot as president—no president would want to—see the processes abused in those ways. If there were any suggestion that this was the case, even though on the face of it there might be other issues, you might want that discretion to be able to say, 'In all the circumstances, this doesn't warrant taking the matter any further.'

Perhaps I should say—and I think it is an important thing for the committee to understand—that that proposal would not necessarily have prevented the cases that have attracted so much publicity, so these are not going to deal with what are seen as the shortcomings in those matters. They are simply not systemic problems, and they are not going to be resolved that way.

Senator McKIM: I understand. Thank you. The second question I had in relation to that recommendation was whether you could assist the committee to understand what criteria the president might apply to determine whether or not further inquiry, or an inquiry, would or would not be warranted.

Prof. Triggs: As I have said, this is a very wide level of discretion. I think that, were parliament to agree to provide that power, I would want to look at the determinations of the New South Wales and other bodies that have a similar power to see where they have exercised it and in what circumstances. In other words, we will probably try to set some guidelines, because it is so wide that it could actually undermine the entire processes of the Human Rights Commission Act. So there are precautions one would have to adopt. We have also made suggestions, for example, with regard to the basic guiding principles that might be adopted that could also help to guide this, and similarly you could have some principles that would tease out what something warranted or not warranted amounts to. But I think that we have made it clear that the threshold is low, for good public policy reasons, but there are reasons for, I think, keeping the threshold low but giving the president the power not to go forward with matters that, for any number of reasons, are not warranted.

Senator McKIM: Thank you. In your view, would any criteria or considerations that the president had to go through be better off in guidelines internally generated by the commission, or would they be better off in the legislation?

Prof. Triggs: That is an important question. I think, probably, guidelines would be the better way of doing it. You can over legislate, and it might be that it would be more satisfactory to allow that discretion to go forward, but almost certainly within the commission we would establish guidelines as we do for all our processes. If I could perhaps make this point in parentheses: you will see, from our legislation, that there are very few steps legislated. It is a very open process, and it has evolved over 30 years with various ups and downs, including the Brandy case, the question as to judicial power and so on. It has been genuinely a work in progress and continues to be so, and we have developed very comprehensive guidelines.

Whether you legislate something like that is going to be a matter of policy, really, for parliament. Were I not in this position, I perhaps might say it is always wise to ensure that the discretions are not too wide. But I think, in light of the concerns that have been expressed, this is one way to resolve the problem based, of course, on the good faith of the commission and that we would exercise that power properly. Indeed, if we did not then I think it would be subject, ultimately, to some form of judicial review had it been exercised improperly. There is always, and always should be, the power of the courts to intervene if the President of the Human Rights Commission were to exercise that power in a way that was manifestly unreasonable.

Senator McKIM: I could not agree more.

Mr Edgerton: Building on what the President just said about judicial review, obviously all of our powers have to be exercised conformably with administrative law principles, so we have to have a process that is procedurally fair. Even if we were going to utilise this new, broader discretionary ground to terminate, our first step would still be to write to the complainant and say, 'We're considering exercising this power for these reasons,' to give them a chance to comment on why the matter should not be terminated.

Senator McKIM: And, as you point out, the AAT would be an avenue for someone should they believe that the commission had made the wrong decision? So there would be a merits and a process appeal avenue for people?

Prof. Triggs: If there had been a failure to exercise natural justice and proper process in any part of that decision than it would be possible to challenge it. That is a rule of law approach, and you would expect that.

Mr Edgerton: It may not be the AAT. It may be judicial review through the federal courts.

Senator McKIM: I understand. Thanks, Mr Edgerton, and thank you Professor Triggs. Because we are running a bit short of time—and I know other members wish to ask questions and, in some cases, further questions—I just want to be clear about your position on 18C. As you said in your introductory statement, Professor Triggs, the commission has previously offered suggestions should the committee form a view that 18C should be changed. Can I be clear though that what I did take from your opening statement is that the committee's position should be that 18C should not be changed, but—

Prof. Triggs: Yes, that is our position. I will ask Mr Soutphommasane to answer this more fully, but our clear and consistent position is that the jurisprudence of the court has been clear for 20 years and it has been applied in the appropriate way. We do not see that any case has been made for change. But, because you have a mandate to propose some changes if you choose to do so, we obviously want to be of as much assistance as we can in dealing with that. It is not our prerogative to stand against those kinds of recommendations—of course it is not—so we have made some suggestions. Our position as a commission is very much that there is no case yet made for amendment to that provision, but I will pass to Mr Soutphommasane.

Dr Soutphommasane: As President Triggs said, we have not recommended any amendment to the act. We do acknowledge that the act would benefit, and indeed our public debate would benefit, from better understanding and explanation of the judicial interpretation and practical operation of sections 18C and 18D. This can be achieved through various ways. One of the ways that you can do it is through more concerted effort to educate people about such matters. I know Mr Perrett raised a question along these lines earlier. There would be no objection, I believe, from the commission to action of that kind, but clearly there is a great deal of misunderstanding and misapprehension about how section 18C operates. It is not always appreciated that it is accompanied by section 18D, which does provide protections for freedom of speech. It is not always understood well that the law does not involve a subjective hurt feelings test. It is also not always understood that the law has been interpreted to apply only—this is with respect to contraventions of 18C—to acts which cause profound and serious effects which are not to be likened to mere slights.

Senator McKIM: Thank you. Maybe this question is one for Professor Triggs and either of the other commissioners. I will just refer to a statement that Mr Soutphommasane made earlier. You spoke about the message that the law can send and the risk, and I am paraphrasing you here, so please correct me if I am wrong, of changing 18C—that it might embolden people to speak in such a way that would have more profound effects on people. You said—I wrote it down—that that should be a consideration for the committee. I want to ask you, Mr Soutphommasane, whether you would like to share a view with the committee on whether there would be any likely increase in racism in Australia should there be a change to section 18C? In other words, is it your view in your role—and no doubt you have engaged with a lot of people who suffer from racism in this country—that the likely effect of changing 18C would be to increase racist behaviour in Australia?

Dr Soutphommasane: I would have a concern about that eventuating. That concern would be based on the anxiety that I detect among many communities that I have spoken to about this issue, including a range of multicultural and Indigenous representative organisations who certainly have that very significant fear that, if there were to be a change concerning section 18C, that would, in effect, weaken the protections currently afforded. That may well then have the effects of emboldening some elements in our community to inflict racist speech more freely. It is difficult to predict what exactly the effect of legislative change would be. Legislative operations can be offset, to some degree, by political debates, so the effect of legislative change may be influenced by the political debate that accompanies that legislative change.

Senator McKIM: That is one of my concerns.

Dr Soutphommasane: If there were, for example, to be a message sent within the political debate concerning a potential change which heralds legislative amendment as, 'I am shackling speech in this country,' or if that were to be interpreted by some who wish to vent racial hostility, then of course there is a significant and real risk of a rise in racial discrimination and hatred taking place. That could be offset if you were to have a more mature political debate, but that is, of course, conjecture on my part and it would be difficult to predict what would happen.

Senator McKIM: Thank you. I just want to take you one step further, and that is by asking about the political debate that has occurred around 18C and, in fact, the fact that we are having this inquiry and that the matter has been opened for potential change by the attorney referring these matters to the human rights committee for examination. Have you detected any, through your discussions with peak groups representing racial or cultural minorities in Australia, concern about the way that this matter has been debated politically, both by politicians and, I might add, by some media outlets and some opinion makers in the country? So, have you detected any concern about that leading to an increase in racism? I also ask the same question with regard to just the simple fact that we are having this inquiry.

Dr Soutphommasane: Let me make it clear at the outset that I believe there is no question that should be off limits in our democracy. It is entirely appropriate for there to be questions asked about different pieces of legislation and for there to be debates about racial discrimination, freedom of speech and where we draw the line. But the manner in which we conduct those debates matters a great deal. Ideally, the debate should be proportionate and should be measured, and there is a responsibility, I believe, to ensure that basic facts about the law are communicated within that debate.

Clearly we have fallen short of that standard, and by 'we' I mean the public debate at large has fallen short of that standard because the Racial Discrimination Act is misrepresented in some of the debates we have. For example, people speak about convictions under the Racial Discrimination Act or about people being prosecuted under the Racial Discrimination Act, which is something which simply cannot occur because there is no criminal force or sanction involved in the Racial Discrimination Act. I have already noted some of the other misconceptions. The parliament has an important role to play in leading this debate and setting the right tone. I would hope that we can have respectful, civil and reasonable debates about these issues and staying true to the facts.

Senator McKIM: Thank you. This is my last question. I am not sure if you want to take it on notice because you may not have the data. I am just interested in whether you would have data around what percentage of cases that are terminated by the commission end up in court. Is that something that you would capture through your—

Prof. Triggs: Yes, we do have statistics, and it is broadly around three per cent.

Senator McKIM: Okay. Thank you.

Prof. Triggs: It is small, but there are some who simply feel that the matter could not be resolved and they feel that they have a good case to make. They go to the Federal Court or the Federal Circuit Court for resolution, but it is a small number.

Dr Soutphommasane: With respect to part IIA of the Racial Discrimination Act, in 2015-16, I believe, the commission finalised 86 matters and one proceeded to court.

Senator McKIM: You made the suggestion to the committee, Professor Triggs, that there should be a 'seeking leave' process in the event that the commission dismisses or terminates a case or a complaint. Did you hear the MinterEllison evidence earlier, where there was a slightly different submission, where they said there would be capacity for a change that gave the capacity for courts to make, in effect, a pre-emptive order for costs? I guess there are two different approaches to trying to address the same issue. Can I offer the opportunity for you to reflect on the MinterEllison suggestion in terms of access to justice? This may be slightly outside your role but not your professional expertise, in my view.

Prof. Triggs: Can I say firstly that I thought the evidence given by Mr Williams, I believe, was really extremely helpful.

Senator McKIM: Yes, I do too.

Prof. Triggs: That is not a particular approach that we have taken, but, when you have reasoned discussion and understanding about this issue, it is possible to come up with some sensible proposals. What I would like to do, if I may, is, with the commission staff, to examine that in a little bit more detail and perhaps come back to you with that one. I think all we are really trying to do is to put some ideas up to this committee that might meet what are perceived to be some of the problems. That may be a solution—it is not one that I think we promoted—but, on consideration, we will look at it and perhaps come back to you. Could we do that in the next day or so?

Senator McKIM: Absolutely.

Prof. Triggs: I know you are reporting very soon.

Senator McKIM: Thank you.

CHAIR: There is 20 minutes left for questions, so I propose that we allocate 10 minutes to government members and 10 minutes to opposition members.

Senator PATERSON: I think we have a bit more time because our next witness is not due until 5 pm—if it is possible for the commission to be available.

Mr LEESER: I think it should be investigated until 5 pm, given the interest in these questions.

Senator PATERSON: Perhaps we should go to Claire or Madeleine, who have not had a chance to ask questions yet, rather than anyone who has already asked questions.

Senator MOORE: I have one lot of questions, but Madeleine you have been on the phone——

Ms MADELEINE KING: I do not mind waiting, but what I do not want to happen is at the end of this we have a whole lot of controversial questions, we run out of time and we cannot come back and try and give a right of reply on them. I am slightly concerned about that. Senator Paterson has had a long time asking questions and I really think other things need to be addressed on the single QUT case.

Senator PATERSON: Madeleine, I just suggested that you get to ask questions.

Ms MADELEINE KING: I know, but it is 10 minutes. You had a lot longer than 10 minutes.

CHAIR: We might go to Mr Leeser and then perhaps Ms King.

Mr LEESER: Following the last hearing that the commission appeared at, I accepted the commission's invitation to discuss some of the issues that I raised in the speech at the Chinese Australian Services Society, and I thank the commission for consideration of those matters. I want to go back to those suggestions and to an answer that you gave Senator McKim about the recommendations that the commission has made in this submission. I think I have you right, Professor Triggs, in saying that, despite the improvements that will be made by these recommendations, they will not prevent matters of the sort of controversy that we have been dealing with with QUT or Bill Leak occurring again. Some of the suggestions that I made the commission appreciated but maybe did not agree with. Some other suggestions might help us in that regard. What concerns me is that, if the committee reports and does not make recommendations to change section 18C or 18D, if another controversial matter happens we will be back again and it will be harder to resist making changes, as it were. Does that makes sense? My question is: are there some things that we can do further to address the prospect of matters like QUT happening, particularly around putting in some further bars to accessing courts after you have terminated matters?

Prof. Triggs: We have made a series of suggestions that I think could encourage earlier intervention. We will have learnt from this experience. There is no question of that. We will be notifying all respondents at the same time and at the appropriate time. That will make a big difference in the sense that in a QUT type of case they would be aware of it earlier. Whether it will make any difference to any of the outcomes remains to be seen, and

the evidence suggests in the QUT case that it would not have done. That is a supposition. What are the things we could suggest? I really think that we have made as many suggestions as we feel we can at the moment. I notice that my colleagues will be very happy to sit down with all who have knowledge of this matter and concerns to simply brainstorm some other ideas. We are not the repository of all the best suggestions. There are various ways: you could lift the threshold; you could give the president more discretion not to go forward with a matter; you could have broad time limits, subject to discretion and flexibility; you could have rules about immediate advice to respondents. All of those together would help to solve the problem. If a QUT type case were to arise again, you would hope that those additional safeguards in place would resolve them.

I was dealing with the question about the wider discretion to the president not to go forward with a matter that did not warrant it, but that would not have solved the QUT case on its face because it clearly, in the view of the commission at that time, did warrant it. It would be very hard for a president to take a different view of the matter. That was as far as my comment was intended to go. With regard to other suggestions we have made and others that QUT through its lawyers might choose to make and others with an interest in this matter, there are various things that could be done to tighten the processes up, but we would be very loath to see the public policy principle of access to justice be diminished in any significant way. All we would be doing, in fact, by closing things off earlier and too quickly, if that is what happened, is forcing people to pay the court fees and go to court.

Mr LEESER: Could I ask a question about the codification of the Justice Kiefel test, which we have talked a lot about in this inquiry? There are three things I want to know about. Firstly, to what extent does the commission actually apply that test when it is dealing with matters that come in? That is not clear and some say that is not the test that you apply. The second question is: would you support the codification?

The third question—and I think this is more to Dr Soutphommasane—is: if we codified the test and that was all we did in relation to changing section 18C, would that have an effect of sending a negative signal about people's protections from racial harassment, as it were?

Prof. Triggs: Can I suggest that Mr Edgerton answer the first question—in other words, what do we actually do as a matter of practice? Then we can move to Dr Soutphommasane for the questions on codification.

Mr Edgerton: The first question was about the tests that the commission applies in relation to 18C. We do not make determinations about whether or not there has been a breach of 18C, so we do not apply a test in the sense of making a finding. But in the advice that we give a complainant we absolutely tell them what the current state of the law is. When we are doing a reality check with a complainant about whether or not there is value in their complaint going forward, we will tell them what the current state of the law is and then the facts can be assessed against that law.

Mr LEESER: Just to clarify, if somebody says, 'I am offended,' what do you say to them? Do you say, 'Just being offended is not enough for the purposes of this'? Tell me what exactly you say to people.

Mr Edgerton: I am not a complaints and investigations officer, so I would not be involved in those conversations myself. But yes, they would be told that their hurt feelings are not sufficient for them to succeed on a section 18C case. I think in our supplementary submission we have given some data about the results of that feedback. In a lot of cases, on hearing an assessment from the commission, people decide they will withdraw their complaint. They accept what the commission says about the law, they realise that their case does not stack up and they do not want to go forward. Alternatively, sometimes complainants just disengage with the commission and we can terminate that on the basis that we are satisfied that they do not want to pursue the case. Sometimes, though, we will terminate on a substance ground.

Mr LEESER: If a person comes in with a complaint that is not of the highest standard and the respondent is happy to conciliate, would you still say to them, 'Look, it has to be a higher standard to meet the test here'?

Mr Edgerton: If the respondent is happy to conciliate, that may well be an acknowledgement by the respondent that they think there is some substance to the complaint. The commission's process is about reaching conciliated outcomes. If both parties want to voluntarily participate in a conciliation process after a complaint has been made and it is a valid complaint, then we would probably proceed to a conciliation process.

Prof. Triggs: But we certainly do advise that the matter must be serious and we would fairly quickly refer the prospective complainant to some of the examples—which complaints have been successful and which have not? That gives a prospective complainant some sense of where the law is placing the line between what is within the provision and what is not. So we do try to provide them with that kind of information.

Dr Soutphommasane: Thank you, Mr Leeser, for your questions. We certainly have been following the exchanges around the question of codification with some interest. We understand the desire behind proposals for codifying the case law. The proposition of codification seems most compelling when there is uncertainty or a lack

of clarity by the courts in their interpretation of the law. In the case of part IIA, the law appears settled and there is consistency and clarity. We know what the law says; we know how the courts have interpreted the law.

If I may offer some general reflections on some of the considerations that may need to be had around codification—and naturally they are general because there is no specific bill put forward around this matter—

Mr LEESER: And regular drafting can be done.

Dr Soutphommasane: Yes, but there can be unintended consequences from codifying the case law. It may have the effect of narrowing or expanding the scope of the law and how it operates, despite the original intentions. There is also the risk that it may create immediate uncertainty and lead to members of the community seeking judicial consideration of the codification. For example, if you look at what happened when part IIA was introduced in 1995, we saw a series of complaints and a number of cases litigated in a two-, three- or four-year window because there was a desire from the community to have judicial consideration. So I think that is one—

Mr LEESER: But, despite that, it seems practitioners still do not really understand, as we have seen in some of the cases that are the matters of controversy in front of us, which were brought by legally assisted people. Perhaps the legal community does not really understand.

Dr Soutphommasane: I think that is a fair comment to make in light of the debate that we have had. I will pass very briefly to Mr Santow, but before I do I would add that there is a signalling effect that should be considered in codifying it—namely, if there were to be codification, the explanation of that in the public information that must accompany it would be crucial. If codification were presented as a change to the Racial Discrimination Act, that may be accompanied by a certain signal that may have the very opposite effect to what codification would seek to achieve.

Codification is not the only way that you can achieve better public understanding of the act. There is, of course, scope for guidance of a non-legislative kind to promote better understanding and knowledge of the legislation. Reiterating what I said to Senator McKim earlier, I believe the parliament has an important role in promoting understanding of the act. The effectiveness of the Racial Discrimination Act depends on the support of parliament. That is clear from its 40-year history. Ideally, I would hope that matters of racial harmony would be matters on which you could get multipartisan agreement and some sense that we are dealing here with matters of national unity which should stand above partisan considerations. But I will turn to Mr Santow, who I think has some thoughts.

Mr Santow: Just a very brief thought: the commission is very alive to what seems to be the most common concern about section 18C, and that is a misunderstanding about the legal meaning of those words. That confusion is what we are seeking to address through educative and related means. We do not want to solve the problem of sugar cane by creating a new problem with cane toads. But if I can draw your attention to—

Mr LEESER: I hardly think codification is a cane toad.

Mr Santow: If I can draw your attention to paragraph 23 of our original submission, we adverted specifically to the fact that no government bill to amend part IIA has been introduced. Nor is it part of the committee's terms of reference. But if a specific amendment were drawn to our attention in a formal process then of course we would, as we always have, respond very constructively to that. It is just that we see a solution that is perhaps a simpler solution that carries fewer risks of unintended consequences.

Ms MADELEINE KING: I would like to thank the commission for the response to my question on notice from the original hearing some time ago. I asked about the impact of the racist speech and acts that 18C tries to prevent. Your written and referenced response corresponds to the evidence many Indigenous groups and multicultural groups have given to this inquiry: that racism has very serious effects on the mental and physical health of the victims. A number of groups have said to us that members of their communities—and it includes multicultural but particularly Indigenous communities—are not necessarily aware of their rights under the Racial Discrimination Act, or they are vaguely aware but do not really trust the system to be able to help them. In respect of Indigenous people, this relates to their multigenerational sustained interaction with the justice system. So they tend to wear the burden of racism quite heavily and without complaint.

You might have seen the transcript of Dr Jackie Huggins, one of the co-chairs of the National Congress of Australia's First Peoples, who stood with the Prime Minister earlier this week. She said she hoped that as more Indigenous people became aware of their rights they might be empowered to take more complaints to the commission. But, given that such groups are perhaps not as well advised and that sometimes—or probably all the time—they are outside of the commission's remit, because the commission is not necessarily able to advise people in regional and remote communities, I want to know how the commission uses its educative role to help people in

those communities understand their rights, the limitations of 18C and how they are able to help these communities exercise their rights under the Racial Discrimination Act.

Prof. Triggs: Thank you, Ms King. That is an enormously important question. As you may know, as Mick Gooda has been appointed to the royal commission in the Northern Territory, I am currently the acting Social Justice Commissioner and I have been working rather more in these areas than I customarily have done. I think you have raised an important question about how one gets the impact and value of this law and our procedures out to remote and rural Australia. I know through previous commissioners, Mick Gooda in particular—I am obviously more familiar with his work than most—that we do quite a lot of work in connecting with rural communities. But the emphasis of our relationships with Indigenous communities is at a more positive level, if I might put it that way—of consulting with communities about initiatives, and working with them. Education is enormously important to the commission, but we do not have the resources for the kind of educational outreach that we would like. I think it is critically important that Indigenous communities understand their rights . You may know that the national education curriculum now includes elements of human rights and the rights of Indigenous peoples, and we are finding—working, for example, through teachers groups—that we are able to get some of this information out, and the teaching community has been very receptive to that, but we are still in relatively early stages. But I think your point is an important one, Ms King. We certainly take it very seriously, in the hope that we can develop more opportunities to work in rural areas.

Ms MADELEINE KING: As we have spoken to the groups that have come before us, one of the matters that has struck me is that there are basically two rights we are talking about: one is the right to freedom of expression or freedom of speech, and the other is the right to live a life free from discrimination. We are trying to balance these two in the Racial Discrimination Act. But it seems to me that, by these certain groups choosing not to enforce their right to be free from discrimination—and I will mention Dr Jackie Huggens again; I do not want to overquote her, but she mentioned the idea of a second skin that develops so you do not complain, because no-one is going to listen to you anyway, and what is the point? And then there is this other notion that people in these minority groups want to remain a small target and that, by doing so, they also fail to exercise their freedom of speech. Thousands of Australian are, effectively, not exercising either of the rights we are trying to balance. Do you have anything to say about that? That is my perception of what I have learned over the course of the last couple of months of this inquiry.

Dr Soutphommasane: We have conducted regular consultations with members of the community about these very questions, including in 2015 to coincide with the 40th anniversary of the Racial Discrimination Act. It is true that those on the receiving end of racism can have their freedom diminished. It can make them more inhibited. It can make them feel less likely to participate in national life, as you might expect. It can have a silencing effect and undermine people's freedom of speech, as you have highlighted. These are very real harms of racism which members of communities vulnerable to racism understand well, but which others in our community may not necessarily appreciate if they have not been on the receiving end of racism. Very often, I hear in public debate this exhortation for those on the receiving end of racism simply to speak up and exercise their own freedom of speech if they experience vilification. Now for some, there may well be the wherewithal or the strength to be able to do that effectively. But for many others who endure racism, they may not feel that they have the power to speak back. And here is where legislation of this kind can play a part: it can give people a means of holding racist speech to account, and that can sit side by side with the civil or social forms of censure that people may also undertake when they witness or experience racism. The law here can help to give voice to people who otherwise may not have the power, privilege or platform to respond to those who may be dishing out racial abuse or racism.

Prof. Triggs: I will just add, Ms King, the very important decision of a Federal Court judge in the decision concerning Palm Island and the racial behaviour of the police and special forces on the island against Aboriginal and Torres Strait Islanders. I think that is a very important decision that could help to make it clear to the original Torres Strait Islander communities that the law will recognise when race discrimination has occurred, and will act in their interests.

Ms MADELEINE KING: Are you concerned that the recent cases that have brought this hearing on—but have also exercised the pens of many in the commission—have all concerned racism towards Indigenous Australians?

Dr Soutphommasane: It has been a constant characteristic of the Racial Discrimination Act—that when it has attracted most public attention it has tended to involve matters relating to Aboriginal people and Indigenous affairs. If you were to look at the case law concerning part IIA, that is certainly the case. If you were to look at the Racial Discrimination Act more broadly—I know this is not in the committee's terms of reference, but that would

also be true . So yes, it is not surprising to find that this dynamic is playing out in the debate, if we look at the historical nature of debates about the Racial Discrimination Act.

Ms MADELEINE KING: It has been mentioned in these hearings—by members of the committee and some others—that there is a lack of public confidence in the operation of the Racial Discrimination Act. That is not my experience. Those of us in the House of Representatives have around 95,000 to 100,000 constituents, and I think I have only had one constituent raise this directly with me, and that was mainly to say: 'Why are you spending so much time on this Racial Discrimination Act rather than trying to work out plans for more jobs for Australians?' So I want to ask: do you have any impression that there is a lack of public confidence in the Racial Discrimination Act?

Dr Soutphommasane: There is certainly a great deal of public debate about the Racial Discrimination Act. But I would not draw the conclusion from that that there is a systemic diminution of public confidence in the act. I referred earlier to a recent survey done by academics at Western Sydney University and the University of Technology Sydney; namely, Professors Andrew Jakubowicz and Kevin Dunn, which found that there was robust public support for legal protections against racial vilification. There are other findings which indicate a high level of support for protections against racial vilification. For example, Nielsen in 2014 conducted a poll for Fairfax which found that 88 per cent of respondents believed it should remain unlawful to offend, insult or humiliate people because of their race. So there is evidence, particularly evidence which involves weighted national samples, which indicates strong support for the Racial Discrimination Act, and which is consistent with other survey evidence we have indicating a high level of support for multiculturalism in Australia.

Ms MADELEINE KING: I have one more question that relates to the codification questions that others have asked. Iain Anderson from the Attorney-General's Department spoke to the committee this morning. He said there is currently clear jurisprudence around section 18, and that any time you change legislation you create incentives to re-litigate, which could create uncertainty and more litigation. Professor Triggs, do you have any comment to make on Mr Anderson's comments?

Prof. Triggs: I am pleased to hear him say that. It is very much our view at the commission. Were the jurisprudence of the Federal Court equivocal, or where you have different results in like cases, I think one could have a stronger argument for legislative clarification. But the courts have been very clear and consistent in repeating then Justice Kiefel's formula, essentially saying: 'This is more than mere slights; it is a matter of substantial and serious insults.' So I think, in light of that fact, there are more dangers in changing the current formulation, and then risking a raft of legislation to determine exactly what it means and what the difference would be, as a matter of jurisprudence, between what was the case in the past and what would be the case in relation to new words. That is a significant danger. And when we do have clear law, and it has been applied very carefully and conservatively by the courts, I would think you need a strong case to argue for legislative change.

Ms MADELEINE KING: I note the comments of one of the members of the Jewish community that submitted to this inquiry. He put it in these terms: that if you change the words, it would be a matter of having to start all over again with the litigation of this section.

Prof. Triggs: That puts it very strongly. It may not be quite that dramatic. But at the same time, I think the real risk is destabilising a position which is actually quite clear at the moment.

Ms MADELEINE KING: Thank you very much for your time, and for sitting and answering our questions for so long!

Prof. Triggs: Thank you very much, Ms King.

Senator MOORE: I have one question about something we have not heard a lot of evidence on, which is term of reference No. 4. That relates to the wider area of free speech and to whether, from the commission's point of view, there is anything that could be reformed to better protect freedom of speech in a wider sense. I think sometimes in this inquiry we have been focused on process and not on this element, so I thought we should get something on the record about term of reference No. 4. Your original submission went to a great deal of effort to show the wide range of legal activities and educational activities in which the commission is involved, and also included a recommendation from the commission relating to this term of reference. I will not read it out, but it says that, as we have had this discussion around free speech, if there is an issue about human rights in this area in the future, then perhaps that could be a job of work that the commission could be involved in. I thought you might want to put something on record to reaffirm that position.

Prof. Triggs: Thank you very much. We have, as you know, made a very comprehensive submission in relation to this. Were the wider question of the right to freedom of speech in Australia to be explored, we would, of course, want to use the depth of work that has been developed by the commission over many, many years to be

resourced—but also to work creatively, and hopefully helpfully, in order to come up with some solutions, because—as we have made plain in this submission—there are very many aspects of legislation which impinges on the right to freedom of speech that we would very much like to see reconsidered. But if I may, again, I will pass to my colleague, Ed Santow.

Mr Santow: I endorse everything that the president has just said. When we were drafting part 10 of our original submission, we were conscious that it would be perhaps beyond heroic for this particular committee to be able to look at the full breadth of free speech issues that the terms of reference would certainly allow you to look at. So we have particularly drawn the committee's attention to a number of issues, such as access to the internet and child protection; data retention by telecommunications companies; terrorism; national security; copyright, and intellectual property more generally; privacy and so on—all areas where issues of free speech have been matters of controversy; indeed, matters of strong community concern. As the president has pointed out, the commission has done a good deal of work in those areas over a number of years. As our recommendation makes clear, we would be happy if it were something that the committee, or indeed the government, wished us to do—to undertake a broader inquiry looking at some of those issues.

Senator MOORE: It seems to me, having attended some of the hearings and having looked at all the evidence, that there is a genuine interest in this space. It would be a shame to let it stop at this level.

Mr Santow: That is right. I note that a number of the contributors to this inquiry have made submissions, or indeed proposals, that go much broader than just looking at 18C. For example, some of the academic submissions have talked about strengthening the general protection of free speech in our ordinary legislation.

Senator PATERSON: Thank you to my fellow committee members for the fact you have let me continue my questions. I would like to focus on the conciliation—

Mr Perrett: They didn't ask me!

Ms Madeleine King: They didn't ask me either, but anyway.

Senator PATERSON: I just presume your consent, Graham.

Senator PATERSON: Turning to the conciliation—just up front, Professor Triggs, do you think the commission tried in good faith to conduct a genuine conciliation?

Prof. Triggs: In the particular conciliation conference that we held in the QUT case—is that what you are interested in?

Senator PATERSON: Yes. Sorry, I should have said that I was continuing those questions about the QUT case.

Prof. Triggs: I can say categorically that conciliation was conducted in good faith by the commission. Our role is to facilitate to bring the parties together to encourage them to find a resolution. That is the role of our accredited conciliation officers. I believe that all of those skills were brought to bear on this matter but, as you well know, they failed on the day.

Senator PATERSON: Do you think it was genuine, though, in the light of the fact that only two of the seven students who a claim had been made against were able to attend?

Prof. Triggs: Oh, yes—partly because we had understood that all students had been contacted, and because we understood that only two had chosen to take up the opportunity to go to that conference. That would be quite normal in conciliation proceedings—that if there are many parties, some might choose not to attend.

Senator PATERSON: Did you think it was genuine, even given the fact that those students who did attend had three business days notice to attend?

Prof. Triggs: We were not aware quite of the shortness of that period. We would have preferred that they had much greater notice than they did, but we also offered other opportunities for conciliation which might be the sort of shuttle process that we can adopt where we are a sort of middle man or where we could have done something by telephone. There is no question at all that it was genuine but, in relation to students choosing not to come, we would, of course, respect that judgement.

Senator PATERSON: Do you think it is genuine, given the fact that there were at least two students who were not even aware that it was taking place?

Prof. Triggs: We were not aware that they were not aware.

Senator PATERSON: But with the benefit of hindsight?

Prof. Triggs: We have accepted assurances from the university that the notifications had gone. We accepted that. In the light of what we know now—that two of those students do not appear to have been notified—that is

obviously not satisfactory. We are very open about recognising that. Of course it is not ideal; in fact, it is a long way from ideal. It is the exact opposite of what we would hope, but that is not something of which we were aware at the time. Looking back, of course failing to be at that conference was, in our understanding, based on the fact that they chose not to come. If they were not there because they did not know anything about it, that is obviously of deep concern to us.

Senator PATERSON: You were here before when I talked about this file note from Ting Lim, and I will provide a copy to the secretariat to provide to you. In this file note, after having spoken to Minter Ellison, he—sorry, I am not sure if it is he or she—Ting Lim was aware of the fact that some students were not yet aware, and yet you still decided to proceed. At the same time, I will provide an email from Kate Hurst to Ting Lim later on the same day which said that: 'the letters have been sent by registered post'; and that 'one student had been spoken to by telephone, but the university cannot be sure that the contact details are up-to-date for the other students.' Given those facts, did you think it was appropriate that the conciliation continued?

Prof. Triggs: We had tried for a very long time to see this matter through. When we were faced with the prospect that the university was requesting that the matter be postponed, we were not presented with that as a reason. We really felt that it was time to draw this to an end. Either they were going to reach agreement or they were not. There are times when, as a matter of judgement, one pushes things along, and this, as I think everybody admits, had gone on for far too long. The state of knowledge on our part, as far as I am aware, is that we believe that the students had been notified properly by the university as they had undertaken to do.

Senator PATERSON: Ting Lim says in that file note:

If a student is notified and wants to attend next week, they will have to make time.

That seems to indicate that he was aware that students had not been notified and it seems pretty unsympathetic about being flexible to the needs of the students to attend the conciliation. Would you agree with that?

Prof. Triggs: No. I think that we have made it very clear—and it is clear on the file note, which tend to be rather succinct, I might add—that it would also be possible to have a phone conference or what we call a shuffle. We were offering an alternative and we would have been more than happy to have embarked on that process if we had been asked to do so. In all the circumstances, we really felt that it was time to bring this matter to a head. If there were others who, for one reason or another, did not want to come or had not known about it, then we would offer further opportunities for a telephone conference or a shuffle process. Again, at the time, more than a year after this matter had started and well outside the usual time frames for commission work, there was a strong sense that it was time to strongly encourage the parties to come together at the conference and reach an agreement.

Senator PATERSON: The university was certainly notified that there were other options available, but were the students notified that there were other options available?

Mr Edgerton: I think that the commission's understanding was that the students were notified of the conciliation conference. We were not in direct communication with the students, as we discussed earlier today and as we heard from QUT lawyers earlier today.

Senator PATERSON: So how would the students know that there were other options available other than this conciliation?

Mr Edgerton: QUT was aware of that. This was one of the things that was raised by the officer at the time. The suggestion was that the conciliation conference be postponed and the response from the officer was, 'We've got this conciliation conference that's been booked in for six weeks.' Part of the background to that is that the commission is based in Sydney and it travels to different centres around Australia to conduct conciliation conferences. What it tries to do is combine conciliation conferences together for reasons of efficiency, so this officer was going up to conduct conciliation conferences on 3 and 4 August. There was a block of four that was booked in. The QUT conference was one of those four. The question was: do we take this out of the schedule and then next time we are in Brisbane, in a months time, try to book it in? I think the judgement of the officer was: 'The parties have been on notice of this for a long period of time. We want to press ahead and have the conciliation conference, but, if QUT thinks that the conciliation conference should not go ahead—for example, because the students have not been appropriately notified—then other options for conciliation are available, for example, a phone conference or a shuttle conciliation.'

Senator PATERSON: Sure, but you knew at that point that the students did not have appropriate notice, unless you think that three days is an appropriate level of notice.

Mr Edgerton: The commission was pressing for the students to be notified much earlier than that. We do acknowledge that, ideally, they would have had more.

Senator PATERSON: But at that point in time you knew that they had not had the notice that you would have thought they should have had and yet you still decided to proceed?

Mr Edgerton: We said that the two options are that we would proceed with the conciliation conference the following week or, if it were taken out of the schedule, we proceed with the conciliation in a different way.

Senator PATERSON: Again, that is an option that you provided to the university but not to the students.

Mr Edgerton: That is right.

Senator PATERSON: Do you think that was a failing?

Mr Edgerton: The university had undertaken to contact the students. We are talking about hypotheticals here, but, had the students been contacted and decided that they would prefer to have a phone conference or a shuttle conciliation instead, we would have absolutely taken that up on notice and—

Senator PATERSON: With respect, Mr Edgerton, we should not be talking about hypotheticals because the students should have been notified.

Mr Edgerton: You are putting a hypothetical to me in the sense that, if the students had been told by the commission the same thing that was in the file note here, would they have taken the option of having some other form of conciliation instead of a face-to-face conciliation?

Senator PATERSON: My concern is more—and I think we agree—that three days is not sufficient notice and it is not desirable that they did not know that there were other options available to them.

Mr Edgerton: I think three days is not ideal notice. Whether it is not sufficient notice, I am not going to make a judgement about.

Senator PATERSON: So the commission needs six weeks notice to plan a conciliation, but, for a student who is discovering about a complaint which has existed against them for 14 months, three days might be a sufficient time to notify them?

Mr Edgerton: It depends what the students are going to put to the other parties during the course of the conciliation conference. I have described to you what one of the students said. It is not clear to me what else that student would or could have said had he been given more notice than he was actually given.

Senator PATERSON: Who knows what they would have prepared if they had more than three days notice and if all the students had been notified and if all the students had been able to attend. I think clearly we can all agree they would have been in a better position to respond if they had all been notified and if they have been given more time.

Mr Edgerton: As you have said, who knows what the position is.

Senator PATERSON: I want to return to a matter we discussed last time, Professor Triggs, which is your interview on *7.30*, particularly the comment you made when you were asked a question by Leigh Sales. You had said:

And in good faith we tried for 13 or 14 months.

Leigh Sales asked:

And why did it take so long?

You gave a couple of explanations, and I will quote you directly for the record. You first said:

Well, I think this one was difficult because the parties took different points of view.

Secondly, you said:

There were a number of students that had said different things and so the issues in relation to each of them was different.

No. 3:

There were complaints not only about the university but the university staff.

No. 4:

Some students had gone away on holidays, were difficult to connect and so on.

I am interested in particular in your comment about the fact that students were on holidays and were difficult to connect. Which student was on holidays which caused this to take so long?

Prof. Triggs: I am not sure which one that applied to, but I was advised that that was the case. Whether it ultimately was or not, I really do not know, but that was certainly the advice that I had received.

Senator PATERSON: Who provided that advice to you?

Prof. Triggs: I do not recall now.

Senator PATERSON: Could you take on notice who provided that advice?

Prof. Triggs: I am certainly happy to take it, yes.

Senator PATERSON: Do you remember if it was in the form of an email or phone call or a verbal—

Prof. Triggs: I think it was a verbal advice.

Senator PATERSON: And was it from within the commission or outside the commission?

Prof. Triggs: I will take that on notice.

Senator PATERSON: Thank you.

Mr Edgerton: Senator Patterson, I might be able to provide clarification—and I am not sure if this refreshes your memory—but one of the students was not able to attend the conciliation conference because he was in the United Kingdom. My understanding is that he was not on holidays, that he was there pursuing business opportunities. The notification went to his address in Australia and was signed for there but ultimately did not reach him. I am not sure whether that is what the president had in mind when she was thinking about people being away and not being able to be contacted.

Senator PATERSON: That would certainly explain why he was not able to attend, but I am not sure how it would explain why the investigation process took 13 to 14 months.

Mr Edgerton: No, and I think the president has provided some explanation as to why it took 13 to 14 months—I think maybe 15 months all up, from end to end.

Senator PATERSON: But in this interview it was listed as a factor as the reason it took 13 or 14 months. Do you want to reconsider that now you have the opportunity, Professor Triggs?

Prof. Triggs: I think this was obviously an interview where it had been very clear before I engaged in the interview that I would not be answering questions on this, and then on live television you are in fact—

Senator PATERSON: Of course.

Prof. Triggs: contrary to that understanding, you are then asked questions. I think I have answered many of your questions in relation to this and I do not think I have anything more to add to what I have said.

Senator PATERSON: I have been in your shoes before as well in an interview, so I know how that can happen, and that is one of the reasons why I want to provide you an opportunity now to clarify that the fact that a student was on holidays was not one of the reasons why it took 13 or 14 months. You certainly, in your opening statement, did not repeat that.

Prof. Triggs: While I was advised that that was the case initially, it certainly has not been subsequently substantiated. So I am more than happy to say that I have not subsequently been advised about what the basis for that was. But that was certainly my understanding at the time.

Senator PATERSON: Okay, I understand, and that is reasonable—understandings do change over time. The other part of that sentence was, 'were difficult to connect and so on'. Given that we have heard today that the commission made no attempt to contact the students during the 13 or 14 months, why was a difficulty to connect them a reason for the delay?

Prof. Triggs: I really cannot accept your premise. It was not that we did not make any attempt to contact them; it was that we had the repeated request of the university—and, in fact, of Ms Prior initially—not to contact the students. That was the reason. So your question implies something that is simply not the case.

Senator PATERSON: Okay, you are right. That is a different emphasis. But you did not contact the students in that 13 to 14 months, did you?

Prof. Triggs: We did not.

Senator PATERSON: Why was it a relevant factor, then—that the students were difficult to connect—in it taking 13 to 14 months?

Prof. Triggs: Again, I think that is a precise question, and I was doing my best in dealing with those questions not to deal specifically. I was really trying to make the point that it was not always easy, and this was confirmed by the university itself—their own data could be out of date. I think that was subsequently demonstrated: a number of those students had not kept their data up to date. So it was difficult for the university, which is essentially what I was saying, because we were not making contact with the students for the very reason that we had agreed not to.

Senator PATERSON: Okay. I think we should probably just set aside the *7.30* transcript; it is not that illuminative on why—

Prof. Triggs: It is not very illuminative, except that I did try to make it clear in my comments that the processes of the commission were to bring the parties together to facilitate agreement and to stop the matters going to the court. That was a point I made over and over and over again, and that was the essence of the interview.

Senator PATERSON: Professor Triggs, you have acknowledged today that the commission could have handled this matter better. Is that a fair summary?

Prof. Triggs: With the benefit of hindsight, and knowing that all the efforts at negotiations failed—if I had known that, or my delegate had known that—then of course we would have moved earlier. But nobody does—that is not the real world. So, in saying that there are things we would change, I think the aspect in particular that we not only would change but have changed—and have recommended to you for a legislative change—is that respondents will now be advised at the appropriate time together. We will never, I do not think, ever do this again.

Senator PATERSON: I welcome that. I think that is a very sensible initiative for you to take—whatever this committee decides, whatever we recommend and whatever legislative changes we make. Given that reflection, have you offered an apology to the students for how their case was handled?

Prof. Triggs: As I say, I do not believe that we owe an apology, because every step of the way—and I have been through this over and over again, looking at what we should do that was different, because it is true: the students have suffered from this, and that matters to the commission; we care about human rights. Many of your questions are premised on that notion, and I fully support you in asking these questions, but I cannot concede—when I look back at the file and look at each step of that file—that the commission did anything that was wrong. With the benefit of hindsight, I wish we had pushed the university and Ms Prior sooner and earlier—that we had been a little tougher on them and said it was time to reach an agreement. But, with the greatest respect for your questions—which I think are entirely appropriate and good questions—nonetheless, I do not believe that an apology is due. But I do feel for the students. This is a phenomenon of all accusation systems: whenever you make accusations against people it is hard, and we have to have a proper rule-of-law basis and principles of natural justice to deal with it. This one went badly wrong, partly, if I may say so, because the parties themselves chose to progress it—as they thought—within the media.

Senator PATERSON: Professor Triggs, I have to respectfully disagree. I think that the way you handled this case has had a real, tangible impact on people's lives, and you yourself have acknowledged that you would handle these cases differently in the future.

Prof. Triggs: I have not said we would handle them differently, other than with respect to the fact that the respondents would be notified contemporaneously.

Senator PATERSON: I think that is one pretty substantial change.

Prof. Triggs: And that single element—

Senator PATERSON: And I know from having had the students before the committee that they would have really appreciated it, had that process been in place in this case.

Prof. Triggs: Yes, so—

Senator PATERSON: So even if that is the only thing that you would change in the next case—and you recognise that it should have happened, ideally, in this case—do you not think, at least on those grounds alone, that the students deserve an apology? They have had their lives seriously disrupted by this case.

Prof. Triggs: We will take our own counsel on dealing with and talking to the students. It may be something that we would usefully do when this inquiry is over. I think it would be appropriate for us to reach out to them and to talk to them. I do not want to say more off the cuff than that, but I think it may be appropriate, when we have received your report, to make some approach to the students. I hope that that would be received in good faith by them.

CHAIR: We have a couple of procedural motions that we need to deal with. In relation to section 10 of the individual statement subject to questions earlier, does the committee accept the document as tabled and agree to its publication?

Senator MOORE: Only section 10?

CHAIR: Yes. Moved Senator Moore?

Mr Edgerton: I think in relation to that document, we are undertaking to provide a fresh document rather than tabling that particular document. If we could do that as an alternative, we would prefer to do so.

CHAIR: That is right; a fresh document. Are there any objections? There being none, that is carried.

Senator Paterson, are you seeking to table the file note of Ting Lim in the Freedom of Information letter relating to Hedley Thomas?

Senator PATERSON: Only the file note from Ting Lim.

CHAIR: Does the committee agree to accept that document—the file note—as tabled?

Senator MOORE: That has been approved by MinterEllison?

Mr PERRETT: No, I have not had a chance to read it and I would like to have it. We have a meeting in Darwin on Monday—

Senator PATERSON: For Graham's benefit, can I clarify if the commission has any objection to that document being made public?

Mr Edgerton: No, we do not.

Senator PATERSON: Graham, they said that they do not have any objection, for your information.

Mr PERRETT: Okay.

Senator MOORE: In terms of the process, I am happy to agree to the tabling because I can see the evidence, but it is very difficult when you have people on the phone trying to accept tabling documents. Graham, it has been agreed by the committee.

Mr PERRETT: Thank you.

CHAIR: Is it also the wish of the committee to approve the document for publication? There being no objections, that is resolved in the affirmative.

I thank the representatives from the Australian Human Rights Commission. Thank you Mr Edgerton, Professor Triggs, Dr Soutphommasane and Mr Santow for appearing before the committee and giving evidence today.

Complaint by Ms Prior against Queensland University of Technology & ors

Chronology

Key events

May 2013:	Facebook posts that Ms Prior complains about are published.
May 2014:	One year later, Ms Prior makes a complaint to the Australian Human Rights Commission. The Commission suggests that it may be appropriate for Ms Prior to only pursue her complaint against QUT and not against the students.
June 2014:	Ms Prior's lawyers say that they are in negotiations with QUT about a possible resolution of the complaint against all respondents. They ask the Commission not to provide her application to the students or to list the matter for conciliation until those discussions have concluded. QUT agrees with this course.
May 2015:	While the parties are negotiating in good faith, negotiations have slowed and the Commission decides to intervene and set the matter down for a conciliation conference.
June 2015:	Ms Prior confirms for the first time that she intends to pursue her complaint against the individual students. The Commission requires the students to be notified. QUT says that it wants to be responsible for notifying the students. A conciliation conference is set in six weeks' time.
July 2015:	QUT tells the Commission that it is in the process of notifying the students. On 28 July 2015 QUT sends copies of Ms Prior's complaint to each of the students by email and registered post.
3 August 2015:	A conciliation conference is held. Two of the students attend. The matter cannot be resolved by conciliation.
25 August 2015:	The Commission's inquiry is terminated on the basis that there is no reasonable prospect of the matter being settled by conciliation.
October 2015:	Ms Prior commences proceedings in the Federal Circuit Court.
March 2016:	The Federal Circuit Court hears an application to strike out the proceedings against three remaining students. Judgment is reserved.
November 2016:	The Federal Circuit Court dismisses the proceedings against the three students.

Detailed chronology

Date	Event
28 May 2013	Three non-indigenous men enter the computer lab in the Oodgeroo Unit at the Garden Point campus of the Queensland University of Technology. Ms Cindy Prior, the administration officer of the unit, asks the men whether they are indigenous. The men say they are not. Ms Prior asks them to leave the unit. Later that day, a number of messages are posted on a Facebook page called 'QUT Stalker Space' in relation to this incident. The messages include: • 'Just got kicked out of the unsigned Indigenous computer room. QUT stopping segregation with segregation…?' • 'That is more retarded than a Women's Collective.' • 'Equality for Indigenous students, for example, would not be giving them a room away from everyone else. That implies two things: They need extra resources because they have special needs; and they can't study around people who are not like them. It's not exactly flattering.' • 'I wonder where the white supremacist computer lab is.' • '… today's your lucky day, join the white supremacist group and we'll take care of your every need.' • 'ITT niggers' • 'By [that] logic it's also fine to start a KKK Klub.' • '… it's white supremacist, get it right. We don't like to be affiliated with those hill-billies.' • 'How did the aboriginal gentleman gain entry to university? … Through the window. Sorry I had to say it.' Ms Prior emails her supervisor and expresses her concern about these posts.
29 May 2013	QUT contacts the students apparently responsible for the posts and asks them to take them down. QUT says that all but one agreed to do so and the other denied being the author of the comments posted under his name. This post was also subsequently removed, although QUT does not know who removed it.

Date	Event
30 May 2013	Ms Prior emails QUT and says that the Facebook posts described above and other posts since then have caused her stress, and that she has safety concerns about returning to work.
June 2013	Ms Prior and QUT discuss the way in which her concerns had been handled by QUT. These matters are still the subject of proceedings in the Federal Circuit Court.
23 December 2013	Ms Prior makes a complaint to QUT through her lawyers Slater & Gordon, pursuant to QUT's Grievance Resolution Procedures.
27 May 2014	A year after the Facebook posts, Ms Prior makes a complaint to the Commission through her lawyers Slater & Gordon. The Commission may terminate complaints alleging unlawful discrimination if they are lodged more than 12 months after the conduct took place. Ms Prior's complaint is made against QUT, two staff members of QUT and seven students of QUT. Address details are provided for only five out of seven of the students.
30 May 2014	The Commission calls Slater & Gordon. Slater & Gordon confirm that they have already provided a copy of the complaint to QUT and the two staff members. The Commission notes that Ms Prior has not provided it with address details for all of the students and suggests that it may be appropriate for Ms Prior to only pursue her complaint against QUT and not against the students. The Commission then emails Slater & Gordon and asks whether Ms Prior wants to pursue her complaint against the students.

Date	Event
2 June 2014	Slater & Gordon writes to the AHRC and says that: • they have provided a copy of Ms Prior's application to QUT • they are presently in discussions with the lawyers for QUT in relation to a possible resolution of Ms Prior's complaint • they therefore request that no action be taken by the Commission to serve the application on the students or to list the matter for conciliation until those discussions have concluded • QUT agrees with this course. QUT has subsequently said that Ms Prior's 'focus in the AHRC complaint [when it was made] and up until June 2015 appeared to be primarily with QUT, not the students'.
June 2014 – March 2015	Private negotiations take place between the lawyers for Ms Prior and Minter Ellison, the lawyers for QUT. They exchange a number of settlement proposals which, if accepted, would resolve the matter for all parties including QUT staff and the students. On 30 January 2015, the lawyers for Ms Prior say that QUT had accepted a settlement proposal from Ms Prior, but subject to a deed proposed by QUT. That deed would have entirely resolved the complaint, including against the students. Ultimately the terms of this deed could not be agreed.
March 2015	Ms Prior terminates her retainer with Slater & Gordon and engages Susan Moriarty & Associates.
5 May 2015	Based on discussions with the lawyers for QUT, it appears that the private negotiations are not progressing. The Commission calls the lawyers for each of Ms Prior and QUT to try to move the matter forward. The Commission seeks confirmation from Ms Prior about whether she wants to pursue her complaint against the students. QUT tells the Commission that if Ms Prior wants to pursue her complaint against the students, QUT would like to manage the process by which the students are notified of the complaint.

Date	Event
23 June 2015	The Commission calls QUT and says that it will set the matter down for a conciliation conference in August in Brisbane. QUT again says that if Ms Prior decides to pursue her complaint against the students then QUT would like to manage the process by which the students are notified of the complaint. The Commission sends emails to the lawyers for Ms Prior and QUT seeking confirmation that they and their clients are available to attend a conciliation conference in Brisbane on 3 August 2015, in six weeks' time. The email to Ms Prior's lawyers seeks confirmation about whether she still wishes to pursue her complaint against the individual students.
24 June 2015	Ms Prior confirms for the first time that she wishes to pursue her complaint against the students. She also confirms that she will attend the conciliation conference on 3 August 2015. The Commission confirms with QUT that Ms Prior wants to pursue her complaint against the students. The Commission says that the parties are free to try to resolve the matter prior to the conciliation conference, but that if the conciliation conference is to proceed the Commission requires the students to be notified.
7 July 2015	QUT tells the Commission that it is in the process of notifying the students. QUT confirms that it is available to attend the conciliation conference on 3 August 2015.
21 July 2015	Ms Prior sends a settlement proposal to QUT.
21 July 2015	QUT again tells the Commission that it is in the process of notifying the students of the conciliation conference, 'but would like to confirm the date it will go ahead before we do so'.
22 July 2015	The Commission calls QUT and QUT confirms participation in the conciliation conference scheduled for 3 August 2015.

Date	Event
28 July 2015	QUT asks the Commission to postpone the conciliation conference. The Commission advises that it is not possible to postpone the conference and says that if the face to face conciliation conference is taken out of the Commission's visit to Brisbane the next week then conciliation would have to take place by way of a phone conference or a shuttle conciliation instead. QUT sends emails and letters by registered post to each of the students enclosing a copy of Ms Prior's complaint, a cover letter from QUT and a guide from the Commission dealing with understanding and preparing for conciliation. QUT tells the Commission that it will pass on information, as soon as it comes to hand, about whether each of the students will be attending the conference.
29 July 2015	QUT confirms that two of the students have responded to say that they will be attending the conference. QUT says that it is attempting to arrange a further discussion with each of them in advance.
3 August 2015	A conciliation conference takes place in Brisbane. Two of the students attend along with Ms Prior and her lawyer and representatives of QUT and their lawyers. The matter cannot be resolved at the conciliation conference.
25 August 2015	The Commission terminates Ms Prior's complaint on the ground that it was satisfied that there was no reasonable prospect of the matter being settled by conciliation. If Ms Prior wants to make an application to the Federal Circuit Court or the Federal Court she has 60 days to do so.
20 October 2015	Ms Prior makes an application to the Federal Circuit Court alleging unlawful discrimination. The Commission has no involvement in this decision or in the subsequent proceedings. Ms Prior privately negotiates settlements with three of the students. The Commission is not involved in any of these negotiations. Ms Prior does not serve the proceedings on one of the students.

Date	Event
11 March 2016	The Federal Circuit Court hears an application to strike out the proceedings against the remaining three students. Judgment is reserved.
5 April 2016	Ms Prior, QUT and the three remaining students are required to participate in court ordered mediation in front of a Registrar of the Federal Circuit Court. The proceedings are unable to be resolved in the course of this mediation.
4 November 2016	The Federal Circuit Court dismisses the proceedings against the remaining three students. *Prior v Queensland University of Technology & Ors (No 2)* [2016] FCCA 2853 The proceedings against QUT and two QUT employees continue.
29 November 2016	Ms Prior files applications for an extension of time to appeal, and for leave to appeal against the decision to dismiss her claim against the three students.
9 December 2016	The Federal Circuit Court finds that the proceedings against the students were not 'hopeless and bound to fail' in refusing to order costs against Ms Prior's lawyer. *Prior v Queensland University of Technology & Ors (No 3)* [2016] FCCA 3399 at [15]-[19].
16 December 2016	Justice Dowsett in the Federal Court hears the applications by Ms Prior for an extension of time to appeal, and for leave to appeal against the decision to dismiss her claim against the three students. Judgment is reserved.

The contents of this chronology have been prepared based on:

- documents made public during the course of Federal Circuit Court proceedings
- documents released by the Commission pursuant to freedom of information requests
- public statements made by parties involved in the complaint before the Commission and the Federal Circuit Court proceedings.