



Equal Opportunity



Tasmania

Parliamentary Joint Committee on Human Rights Inquiry into Freedom of Speech

Response of the Anti-Discrimination Commissioner (Tas)

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Introduction

Thank you for the opportunity to make a submission to the Parliamentary Joint Committee on Human Rights (PJCHR) Inquiry into freedom of speech.

The following provides my views on the issues identified by the Federal Attorney-General for inquiry, including whether the *Racial Discrimination Act 1975* (Cth) (RDA) imposes unreasonable restrictions upon freedom of speech and/or whether processes for considering complaints under the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) require reform.

These are important issues and the outcome of the Inquiry has potential to significantly impact on protections against racism, as well as other forms of discrimination, available in Australia.

Governments play a critical role in setting standards of conduct and behaviour within the community. They do so by establishing laws to deter actions that cause harm to others; and setting relevant sanctions where the legislated standards are not adhered to.

Australian discrimination law is a significant legal expression of such standards. Thus, any proposed changes must be carefully considered to ensure that the rights and freedoms of all in Australia are properly recognised and met. It is an important mechanism for ensuring the rights and freedoms are enjoyed equally, to the greatest extent possible. Discrimination laws support the capacity of all people in Australia to live fully and meaningful lives free from the negative and harmful effects of prejudice and discrimination.

Freedom of speech encompasses the freedom to have full, frank and robust discussions on public matters. This is a right well recognised under international law and one that governments at all levels have a responsibility to promote, protect and fulfil.

The rights to equality and non-discrimination are similarly rights well recognised under international law and, again, governments at all levels have a responsibility to promote, protect and fulfil these rights.

It is necessary for governments to ensure rights and freedoms for all are carefully balanced as the unrestrained exercise of some rights and freedoms can, in some circumstances, impair the rights and freedoms of others.

Where the right to freedom of expression and the right to equality and non-discrimination compete well-understood approaches are available to determine when and in what way the right can be limited. The PJCHR will be familiar with the criteria used to determine whether and in what it is appropriate to consider limits on rights and freedoms:¹

- I. Is the limitation **prescribed by law** and does it have a clear legal basis.
- II. Does the proposed limitation meet a **legitimate objective**;
- III. Is the proposed limitation reasonable and **rationaly connected to the limitation** (the

¹ Parliamentary Joint Committee on Human Rights, *Guidance No. 1: Drafting statements of compatibility* (December 2014)

limitation must not be arbitrary, irrational or ineffective)

- IV. Is the proposed limitation **proportionate** to the objective being sought (least restrictive)
- V. Is the proposed limitation **retrogressive** (rights should be progressively realised and any limitation should not take a deliberate step backward in a way which negatively affect the enjoyment of established rights)

These criteria reflect principles that are well understood in international law and should be used to assess the relevant provisions of the RDA.

Measured against these criteria, I believe that the way is open for the Committee to reach the view that discrimination law does not unduly fetter freedom of expression nor have a chilling effect on public debate.

I do not believe that those who wish to amend the RDA have made any case for why the longstanding protections afforded under the RDA should be removed.

There is little evidence, for example, that public discourse has been curtailed by the existence of discrimination law and indeed the level of complaint to my office and other discrimination authorities in Australia indicates that, overall, even the most contested of debates rarely attract complaint.

No current statute precludes people from holding beliefs about others within our community, even if those beliefs may be considered by some to be 'bigoted'. Nor does it prevent the expression of those views in private.

What is regulated, however, is the way in which every person, including those with prejudiced views, are able to express those views in public and the public impact of those views being expressed. Discrimination law supports and enables public discussion that is a rational, respectful and reasoned. It also supports discussion associated with legitimate academic or research pursuits. What it does make unlawful, through the RDA, is public discussion that amounts to hate speech or has the effect of diminishing the rights of others because of their race or colour or national or ethnic origin. Further, it seeks to ensure that those who are subjected to prejudice are not themselves silenced—that is, their freedoms are not impaired—by the views of others being expressed in ways that further marginalise and exclude their legitimate voices.

This approach is consistent with other types of laws at federal, state and territory level that impose limits on what may be publicly expressed, including laws dealing with defamation, the use of postal and telecommunication services, copyright, sedition, obscenity, secrecy and censorship.

It is also consistent with other initiatives at state, territory and federal level to address other harmful behaviour such as bullying in the workplace and family violence; or to seek to remove sexist material from public places, such as some of the slogans appearing on Wicked Campers.

The current Tasmanian campaign to prevent family violence, for example, places considerable emphasis on reducing sexist attitudes including through the expression of sexism in, for example, sexist jokes and language that excuse and perpetuate gender stereotyping and discrimination against women.

A similar message is being strongly promoted about bullying and respectful behaviour in schools.

A common theme running through these campaigns is that language can and does shape what society regards as acceptable behaviour towards and treatment of women and other groups. What people say can and does have a significant impact, and can be inextricably linked to more serious acts of aggression and violence against their target.

Reducing protections under discrimination law and suggesting that freedom of speech is an unfettered right, at least in so far as it pertains to speaking about marginalised groups, gives license to a view that it is permissible to publicly express views that can cause harm. The current protections in the RDA only limit the expression of such views where a reasonable person would recognise that such expression would cause harm to another person through offence, insult, humiliation or intimidation because of the link between the views expressed and the person's race or ethnic origin.

There is no evidence that this imposes an unjustifiable limit on freedom of speech and changes to reduce this protection should not be supported.

Protections available under the *Racial Discrimination Act 1975* (Cth) (the RDA) provide a fundamental underpinning for the maintenance of the diverse community that is modern Australia and this is why I urge that the current provisions of Part IIA of the RDA be retained.

I would be happy to elaborate on these matters should you wish me to do so.

Robin Banks
ANTI-DISCRIMINATION COMMISSIONER

Operation of Part IIA of the *Racial Discrimination Act 1975* (Cth)

Term of Reference 1: Whether the operation of Part IIA of the *Racial Discrimination Act 1975* (Cth) imposes unreasonable restrictions on freedom of speech, and in particular whether, and if so how, sections 18C and 18D should be reformed.

I do not consider that section 18C of the *Racial Discrimination Act 1975* (Cth) (the RDA) imposes unreasonable restrictions on freedom of speech. To the contrary, I am concerned that to make changes to sections 18C and 18D of the RDA risks lessening protections available against racist behaviours, including core human rights such as the rights to equality and to freedom from discrimination. It also ensures that the right to freedom of speech is not disproportionately available to members of majority groups or those with political or economic power.

Experiences of discrimination and racism are a key barrier to social inclusion. They diminish a person's sense of connection and belonging to the community, create a strong sense of marginalisation and isolation, and impact on willingness to participate in education, employment and recreational activities. Importantly they can also directly affect the health and well-being of those who are targeted.² All of these have flow-on effects to our community in both social and economic terms.

Subtle forms of racism, including name-calling, racial slurs, racist jokes and verbal abuse are the everyday reality for many people in Australia. The most recent Scanlon Foundation survey, for example, suggests that levels of discrimination within the Australian community have increased significantly, particularly among those of non-English speaking background³:

- Twenty-seven per cent of Australians from non-English speaking backgrounds report experiences of racism compared to 17% of those born in Australia and 19% of those born overseas in English speaking countries.
- While reported discrimination for people from a number of European countries was in the range of 11%–15%, reported discrimination for those born in India reached 39%; those born in China 39%; those born in South Korea 55%, Kenya 67%, Zimbabwe 75% and South Sudan 77%.⁴
- Of those reporting discrimination, 14% said that it occurred often (most weeks in the year).
- Of those reporting discrimination, the most frequent experience was to be made to feel like they did not belong (56%); verbal abuse (55%) and not being offered work or being treated

² Fethi Mansouri, Louise Jenkins, Les Morgan and Mona Taouk, *The Impact of Racism on the Health and Wellbeing of Young Australians* (Institute for Citizenship and Globalisation, Deakin University, 2009).

³ Andrew Markus, *Mapping Social Cohesion: The Scanlon Foundation surveys 2016* (Scanlon Foundation, Australian Multicultural Foundation, Monash University, 2016) 25–26.

⁴ It may be relevant that those who reported higher levels of discrimination are more likely to be members of visible minority groups.

unfairly at work (17%). At the same time, 10% reported having had their property damaged and 8% were physically assaulted.

This data suggests that, rather than needing to be weakened, protections against racism, including racist speech need strengthening.

For those who wish to give paramount protection to free speech, the harms associated with racist offence and insult may be dismissed as superficial. Evidence suggests otherwise. Racist speech can indeed cause profound damage to those who are the targets or within the target group.

A 2013 survey of people from culturally and linguistically diverse backgrounds conducted on behalf of the Victorian Health Promotion Foundation, for example, found that nearly two-thirds of those surveyed had reported at least one racist experience in the previous 12 months.⁵ Of these around 40% reported six or more experiences in the preceding 12 months. Over half of the incidents reported (55.3%) included being called racist names, being the target of racist jokes or teasing and/or comments that relied on racial, ethnic, cultural or religious stereotypes of one form or another.⁶ Those surveyed reported that racism most commonly occurred in public spaces, followed by employment and in shops and public transport. Over 92% of perpetrators were those of a different race, ethnic, cultural or religious background and, in only 19% of cases, were they known to victim.⁷ Importantly, those surveyed exhibited poorer mental health and higher levels of psychological stress compared with those who had not experienced racism; and the levels of distress increased for those who had repeatedly been subjected to racist behaviour.⁸ It is noteworthy that levels of psychological distress were associated with the volume of racist experiences and not necessarily the type. This suggests that experiences of everyday racism may be just as harmful to mental health as other more severe episodes.

Each of these incidents have the effect of restricting the rights and freedoms of those who are the victims or targets.

The persistence of discriminatory attitudes within the Australian community requires a comprehensive response at all levels within the community, including the capacity to make complaint under federal discrimination law.

International Convention on the Elimination of all forms of Racial Discrimination

The RDA provides the primary legal framework at the federal level to give effect to the *International Convention on the Elimination of all Forms of Racial Discrimination* (ICERD).

⁵ A Ferdinand, M Kelaher and Y Paradies, *Mental health impacts of racial discrimination in Victorian culturally and linguistically diverse communities: Full Report* (Victorian Health Promotion Foundation, Melbourne, 2013) 17.

⁶ Ibid.

⁷ Ibid 19.

⁸ Ibid 39.

ICERD was ratified by Australia on 30 September 1975.

As a State Party to ICERD⁹, Australia has undertaken to prohibit racial discrimination in the Australian community. The following articles are of particular relevance in the context of this Inquiry. I quote them in full below, as I am of the view that that any changes to the RDA must be considered in the context of Australia's obligations arising from the ICERD and related human rights treaties.

Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
 - (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
 - (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;
 - (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
 - (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;
 - (e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.
2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

⁹ *International Convention on the Elimination of all Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 United Nations Treaty Series 195, Australian Treaty Series 1975 No 40 (entered into force 4 January 1969, entered into force for Australia 30 October 1975, except Article 14, which entered into force for Australia on 28 January 1993).

Article 4

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

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
- (c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- (d) Other civil rights, in particular:
 - (i) The right to freedom of movement and residence within the border of the State;
 - (ii) The right to leave any country, including one's own, and to return to one's country;
 - (iii) The right to nationality;
 - (iv) The right to marriage and choice of spouse;
 - (v) The right to own property alone as well as in association with others;

- (vi) The right to inherit;
 - (vii) The right to freedom of thought, conscience and religion;
 - (viii) The right to freedom of opinion and expression;
 - (ix) The right to freedom of peaceful assembly and association;
- (e) Economic, social and cultural rights, in particular:
- (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
 - (ii) The right to form and join trade unions;
 - (iii) The right to housing;
 - (iv) The right to public health, medical care, social security and social services;
 - (v) The right to education and training;
 - (vi) The right to equal participation in cultural activities;
- (f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 7

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the *Charter of the United Nations*, the *Universal Declaration of Human Rights*, the *United Nations Declaration on the Elimination of All Forms of Racial Discrimination*, and this Convention.

Other international treaties to which Australia is a party, most notably the *International Covenant on Civil and Political Rights* (ICCPR)¹⁰, provide that everyone has the right to freedom of thought, conscience and religion.¹¹ This right is limited to the extent necessary to protect, among other

¹⁰ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, GA Res 2200A (XXI), 999 United Nations Treaty Series 171, Australian Treaty Series 1980 No 23, UN Doc A/6316 (1966) (entered into force 23 March 1976, entered into force for Australia 13 November 1980, except Article 41 which entered into force on 29 January 1993).

¹¹ *Ibid* Art 18.

things, the fundamental rights and freedoms of others.¹² To this end, States that are party to the ICCPR must ensure that laws provide adequate protections against breaches of rights and freedoms, including breaches caused by unrestrained speech or expression.

Article 19 of the ICCPR provides for the right to hold opinions without interference¹³ and the right to freedom of expression.¹⁴ Article 19(3) of the ICCPR states:

The exercise of the rights ... carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health and morals.

Article 20(2) of the ICCPR also expressly prohibits 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence', and Article 26 states:¹⁵

All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Taken together, the commitments contained within the ICERD and the ICCPR provide the basis on which to establish a balancing in Australian law of the need to protect Australians from racial vilification and hatred and the need to ensure freedom of belief, conscience and expression as protected. It is a balance that I believe has been applied in a considered manner since the provisions of Part IIA of the RDA were enacted.

History and purpose of protections available under section 18C

The RDA was enacted by the Federal Parliament in 1975. The preamble to the RDA states:

WHEREAS a Convention entitled the "International Convention on the Elimination of all Forms of Racial Discrimination" (being the Convention a copy of the English text of which is set out in the Schedule) was opened for signature on 21 December 1965:

AND WHEREAS the Convention entered into force on 2 January 1969:

¹² Ibid Art 18(3).

¹³ Ibid Art 19(1).

¹⁴ Ibid Art 19(2).

¹⁵ Ibid Art 26.

AND WHEREAS it is desirable, in pursuance of all relevant powers of the Parliament, including, but not limited to, its power to make laws with respect to external affairs, with respect to the people of any race for whom it is deemed necessary to make special laws and with respect to immigration, to make the provisions contained in this Act **for the prohibition of racial discrimination and certain other forms of discrimination and, in particular, to make provision for giving effect to the Convention**.¹⁶

Part II of the RDA makes racial discrimination unlawful in a range of circumstances and protects the equal enjoyment or exercise of human rights in public life and the right to equality before the law.

Part IIA, which contains sections 18B–18F, was added some twenty years after the RDA was first enacted because gaps had been identified in the protections provided against offensive behaviour based on racial hatred.

Several factors gave rise to the decision to expand the protections available in the RDA. Among them were a number of national reports that found gaps existed in the RDA to address racial vilification. Recommendation 213 of the Royal Commission into Aboriginal Deaths in Custody (RCADC), for example, recommended the introduction of civil procedures to address acts of racial vilification, including the ability to make representative complaints.¹⁷

Governments which have not already done so legislate to proscribe racial vilification and to provide a conciliation mechanism for dealing with complaints of racial vilification. The penalties for racial vilification should not involve criminal sanctions. In addition to enabling individuals to lodge complaints, the legislation should empower organisations which can demonstrate a special interest in opposing racial vilification to complain on behalf of any individual or group represented by that organisation.

This recommendation of the RCADC echoed those made in 1991 by the (then) Human Rights and Equal Opportunity Commission (HREOC) in its report of the National Inquiry into Racist Violence in Australia. Addressing the need to combat racist violence and harassment, HREOC recommended a mix of both civil and criminal remedies to address racist violence and harassment, including:¹⁸

That the Federal Parliament enact in the Federal *Crimes Act 1914* a new criminal offence of racist violence and intimidation;

That the Federal *Crimes Act* be amended to create a clearly identified offence of incitement to racist violence and racial hatred which is likely to lead to violence;

¹⁶ *Racial Discrimination Act 1975* (Cth) Long Title (**emphasis** added).

¹⁷ Royal Commission into Aboriginal Deaths in Custody, *National Report*, Vol 1–5 (AGPS Canberra, 1988–1991) rec 213.

¹⁸ Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (AGPS, Canberra, 1991) 301.

That the Federal *Racial Discrimination Act 1975* be amended to prohibit racist harassment;

That the Federal *Racial Discrimination Act 1975* be amended to prohibit incitement to racial hostility, with civil remedies similar to those already provided for racial discrimination;

That the Federal and State Crimes Acts be amended to enable courts to impose higher penalties where there is a racist motivation or element in the commission of an offence.

In making these recommendations, HREOC emphasised that its recommendations were not intended to protect ‘hurt feelings’ or ‘injured sensibilities’; nor were the proposed changes aimed at preventing private opinion or trivial actions. Further, it identified that it was important to maintain a two-tiered approach involving both criminal and civil penalties. This would include enactment of criminal offence provisions to deal with more serious conduct involving racist violence or incitement to racial violence. It would also include making a civil remedy available that set a lower (although significant) threshold for addressing actions that might be considered racial harassment.

There is no doubt that acts ‘reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate’ captures a broader range of behaviours than those requiring criminal sanction. This is consistent with the view that discrimination law is an important instrument for achieving freedom from racial abuse and humiliation.

This is a matter given some consideration by Carr J in *Toben v Jones* in which His Honour links the provisions of section 18C to the objective of ‘detering public expressions of offensive racial prejudice which might lead to acts of racial hatred and discrimination’.¹⁹ In outlining his reasons, Carr J drew particular attention to the distinction between criminal offences of racial hatred and civil protection against racially motivated offensive conduct.²⁰

In my opinion it is clearly consistent with the provisions of the [International] Convention [on the Elimination of all Forms of Racial Discrimination] and the ICCPR that a State Party should legislate to ‘nip in the bud’ the doing of offensive, insulting, humiliating or intimidating public acts which are done because of race, colour or national or ethnic origin **before such acts can grow into** incitement or promotion of racial hatred or discrimination...²¹

HREOC referred to the kind of behaviour that involved words or conduct that is ‘so abusive, threatening or intimidatory as to constitute harassment on the ground of race, colour, descent or national or ethnic origin.’²² The purpose of addressing harassment through the provisions of the RDA was to enable the types of behaviours that constituted harassment to be addressed through conciliation and education, with possible redress for the complainant, rather than punishment of the offender under criminal law.

¹⁹ *Toben v Jones* [2003] FCAFC 137 (27 June 2003) [19].

²⁰ *Ibid* [18].

²¹ *Ibid* [20] (emphasis added).

²² Human Rights and Equal Opportunity Commission, above n18, 299.

The Australian Law Reform Commission (ALRC) also considered this in its report, *Multiculturalism and the Law*, in 1992.²³ The ALRC recommended the introduction of a new federal offence of racist violence; with racist violence being a particularly offensive form of discrimination based on race or ethnic origin.²⁴

Consistent with the views of the HREOC, the ALRC preferred the use of conciliation, backed up by civil remedies to address behaviour characterised as racist hatred and hostility.²⁵ The ALRC also considered the need for appropriate sanctions on those who broadcast material that is likely to incite hatred and hostilities against particular race or ethnic communities. It recommended that 'legislation regulating broadcasting should include a provision prohibiting the broadcast of material that is likely to incite hatred or hostility against, or gratuitously vilify, any person or group of persons on the basis of, at least, colour, race, religion or national or ethnic origin'.²⁶

The Racial Hatred Bill introduced into Federal Parliament in 1994 provided for both civil and criminal penalties. However, in August 1995 the Senate passed the Bill with amendments that deleted the criminal offence provisions. As a consequence, the RDA was amended to insert sections 18A to 18F and these remained the primary mechanism for addressing damaging behaviour based on racial hatred.

It is my view that the absence of a criminal offence for racial vilification remains a serious omission in the protection afforded at the federal level and in those jurisdictions that have not incorporated similar provisions within their criminal code, including Tasmania. It is an omission that my office has consistently sought to have addressed.

I do not believe, however, that the failure to introduce criminal penalties for racial vilification is best addressed by amending section 18C as it currently stands or by restricting the types of conduct that are capable of being captured under this provision.

The intention in providing a civil process and remedy for dealing with and addressing discrimination and offensive behaviour is to enable human rights bodies to address and provide the parties with a supported opportunity to resolve complaints through conciliation, with a determination being made by a court only in circumstances where an outcome agreed by the parties cannot be achieved. Civil procedures of this nature provide effective dispute resolution approaches for dealing with complaints. They avoid unnecessary and costly recourse to court processes and have a strong educative function. They have become a standard component of most civil legal processes in Australia.

I believe that the success of this approach has been borne out by the rate of complaint resolution achieved by the AHRC. Of the 1,982 complaints of discrimination finalised by the AHRC in 2015–16, 1,308 conciliation processes were conducted and 989 (76%) of conciliations resulted in the

²³ Australian Law Reform Commission, *Multiculturalism and the Law* (ALRC Report 57, 1992).

²⁴ *Ibid* [7.33].

²⁵ *Ibid* [7.46].

²⁶ *Ibid* [7.49].

complaint being resolved.²⁷ It is not possible from the available data to identify how many complaints were terminated by the Commission with the complainant then electing to proceed to the Federal Court or Federal Circuit Court.

The application of section 18C

The protections available under section 18C are designed to deal with serious incidents. They are judged against objective criteria of what is reasonably likely, in all the circumstances, to give rise to harm and are limited and targeted through the application of the exemptions specified in section 18D.

Complaints received under section 18C require consideration be given to:

- whether the act was a public act; that is an act that was not done in private;
- whether the act has a connection to the relevant attribute: that is whether the act was done because of race, colour or national or ethnic origin of the other person or some or all of the people in the group;
- whether the person was offended or insulted or humiliated or intimidated by the alleged conduct (the subjective element);
- whether in all the circumstances the act was reasonably likely to have that impact (the objective element); and
- whether the exemptions found in section 18D apply.

Taken together this approach provides an appropriate balance between the rights of both complainants and respondents.

Section 18C does not have scope to deal with all offensive behaviour.

In the first instance, section 18C does not apply to private actions. It applies only to public acts.

Secondly, the acts must have been done because of the race, colour or national or ethnic origin of the complainant or members of the group she/he represents. It is not enough that they are simply offensive, insulting, humiliating or intimidating.

Thirdly, the impact of the act must be such that it can be objectively sustained that the act was capable of having significant effect on those toward whom it was directed.

Finally, the exemptions found in section 18D must not apply.

Should the harm threshold in section 18C be amended?

Public debate around section 18C of the RDA centres on the level of harm that is required to enliven the protections available under the AHRC Act; in particular, whether the use of the term 'offends' or 'insults' creates too low a threshold for complaint.

Some commentators have suggested that section 18C should be aligned with defamation law by replacing reference to 'offend, insult, humiliate and intimidate' with the terms such as 'hatred,

²⁷ Australian Human Rights Commission, *Annual Report 2015-16* (AHRC, 2016).

serious contempt or severe ridicule'.²⁸ This, it is argued, would remove the capacity of section 18C to capture actions that amount to 'low-end' racism. It is argued that this would more properly reflect the intention of the Racial Hatred Bill 1994 (Cth) in its original form.²⁹

There are, however, several difficulties with this approach. As outlined earlier, the intention of those who sponsored the insertion of sections 18C and 18D into the RDA—as indicated in the Second Reading Speech—was to develop a system of both criminal and civil sanctions related to offensive behavior based on racial hatred. Criminal sanctions were preferred for dealing with serious instances of racial hatred, but clearly the intention was also to enable the AHRC (or HREOC as it was then known) to conciliate complaints of **racial abuse**.³⁰

Whilst criminal provisions were aimed at establishing criminal penalty for acts that incited racial hatred and made threats to persons or property because of race, colour or national or ethnic origin, the intention of the Bill was to also provide for a civil regime to make it unlawful to undertake an act, other than in private, that is reasonably likely in the circumstances to offend, insult, humiliate or intimidate another person or group of people if that act is done because of the race, colour or national or ethnic origin of the other person or some or all of the people in the group.³¹ The latter are actions that clearly would not involve police investigation and would be the subject of private and confidential conciliation. The provisions were clearly modeled on the sexual harassment provisions contained in the *Sex Discrimination Act 1983* (Cth). This clear distinction between and desire to achieve both civil and criminal prohibitions was advanced through the Bill, but, as described earlier, ultimately the criminal provisions were not adopted.

To suggest an approach that attempts to import a higher threshold that would be more appropriate to criminal provisions and sanctions is, I believe, antithetical to the intention of the Government at that time and to the nature of the harm being encompassed and would exclude a broad range of behavior that would otherwise be caught by the Act.

Secondly, concepts such as the proposed 'hatred, serious contempt or severe ridicule' may be less definitive than section 18C in its current form. The landmark freedom of expression decision of the Canadian Supreme Court in *R v Keegstra* canvassed the difficulties associated with seeking to define the word 'hatred', indicating that it is 'capable of denoting a range of diverse emotions and is highly subjective, making it difficult to ensure that only cases meriting prosecution are pursued and that only those whose conduct is calculated to dissolve the social bonds of

²⁸ Dan Meagher, 'So Far So Good? A Critical Evaluation of Racial Vilification Laws in Australia' (2004) 32 *Federal Law Review* 252.

²⁹ *Ibid* 231.

³⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1994, 3336–42 (Michael Lavarch).

³¹ *Ibid*.

society are convicted'.³² Where there are competing interests and rights the decision on where you draw the line will always be a matter requiring the exercise of considerable judgment.

Further, to the extent that there is a lack of legal certainty in discrimination law it is not unique.³³ Meagher, for example, points to the laws of obscenity, blasphemy, the scope of the implied constitutional right to freedom of political communication, laws of incitement and sedition and even the concept of the 'reasonable' person. These are all areas where vagueness in the law is unavoidable and requires the exercise of judicial or administrative judgement.³⁴

A considerable body of case law has now been established to guide the interpretation of behaviours currently encompassed in section 18C. Judicial guidance has clearly established that the test of a whether a particular act is offensive, insulting, humiliating or intimidating is not one which captures mere hurt feelings. It is directed at behaviour that Kiefel J held in *Creek v Cairns Post Pty Ltd* has 'profound and serious effects not to be likened to mere slights'.³⁵ It is also behaviour 'reasonably likely in all the circumstances' to have caused that impact.

In *Monis v Queen*, the High Court considering criminal provisions relating to use of the postal service to cause offence. The Court was unanimous that 'offensive' covered only actions with serious impacts 'calculated or likely to arouse significant anger, significant outrage, disgust or hatred in the mind of a reasonable person in all the circumstances' (French CJ, Hayne J) or that constitute very seriously or significantly offensive uses of the post (Crennan J, Kiefel J and Bell J).³⁶

This is consistent with the intention outlined in the Second Reading Speech made at the time of the introduction of the Racial Hatred Bill 1994 in which the intention of the civil provisions of the Bill was to address serious incidents.

Reference in section 18C(1)(a) to 'reasonably likely, in all the circumstances' has been consistently interpreted by the courts as an objective test of the effect of the conduct. It is not related to how the complainant feels. Nor is it determined by the perspective of all members of a particular community.

The perspective of the 'reasonable person' does not involve the assessment of the particular effect of the offence on the individual or individuals bringing the claim; it requires consideration of the effect on members of a class or group in general: a hypothetical individual who is adopted as a representative member of that group.

³² *R v Keegstra* [1990] 3 SCR 697.

³³ Meagher, above n28, 228.

³⁴ *Ibid.*

³⁵ *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 (31 July 2001) [16].

³⁶ *Monis v Queen* [2013] HCA 4 [43].

Section 18D defences

Section 18D provides the following defence for:

... anything said or done reasonably and in good faith:

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (c) in making or publishing:
 - (i) a fair and accurate report of any event or matter of public interest; or
 - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

It is my view that the defences currently available under section 18D are well understood and permit an appropriate balancing of the proper exercise of the right to freedom of speech and the right to be protected from racist speech and behaviour provided by section 18C. This view is supported by the considerable body of case law now available to provide guidance on how section 18D is to be understood and applied.

The key to enabling an evaluation of the appropriateness of the balance struck is the inclusion of the words ‘reasonably and in good faith’ in section 18D. Together they establish a requirement that the exercise of freedom of speech be conducted in such a way that minimises the harm rendered unlawful by the operation of section 18C.

This is a view expressed by Carr J in *Toben v Jones* [2003] FCAFC 137 (27 June 2003) in which His Honour states ‘... a reasonable person acting in good faith would have made every effort to express ... his views with as much restraint as was consistent with the communication of those views’.³⁷ This is a view that has received support in subsequent cases.

In *Bropho v Human Rights and Equal Opportunity Commission*, for example, French J held that the test of whether an act was undertaken ‘reasonably and in good faith’ contained both an objective and subjective component. The act is required to be proportionate for the purposes it was intended and the harm that may be caused to be considered and minimised to the extent possible. In considering how this approach might operate, French J was of the view that:³⁸

It requires a recognition that the law condemns racial vilification of the defined kind but protects freedom of speech and expression ... The good faith exercise of that freedom will, so far as practicable, seek to be faithful to the norms implicit in its protection and to the negative obligations implied by s 18C. It will honestly and conscientiously endeavour to have regard to

³⁷ *Toben v Jones* [2003] FCAFC 137 (27 June 2003) [44].

³⁸ *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16 (16 February 2004) [95].

and minimise the harm it will, by definition, inflict. It will not use those freedoms as a 'cover' to offend, insult, humiliate or intimidate people by reason of their colour or ethnic or national origin.

The requirement to act 'reasonably and in good faith' forms an important part of the test of whether an act represents an appropriate application of the right to freedom of expression. It has the effect of permitting a very broad range of activity under the guise of legitimate public debate or discussion.

Freedom of expression in Australian law

Freedom of expression, freedom of speech and freedom of political communication are all concepts that have various, and often contested, meaning in Australian law. It is important therefore that the Committee forms a clear understanding of the behaviours that it seeks to protect—and in some cases limit—and the legal foundation on which those decisions are based.

Sections 7, 24, 64, 128 and related sections of the Australian *Constitution* underpin the implied right to freedom of communication on matters of government and politics.³⁹ It is important, however, that the nuances of this right are understood. As expressed by majority in the High Court decision of *Lange v the Australian Broadcasting Commission*⁴⁰:

Moreover, although it is true that the requirement of freedom of communication is a consequence of the Constitution's system of representative and responsible government, it is the requirement and not a right of communication that is to be found in the Constitution. Unlike the First Amendment to the United States Constitution, which has been interpreted to confer private rights, our Constitution contains no express right of freedom of communication or expression. Within our legal system, communications are free only to the extent that they are left unburdened by laws that comply with the Constitution.

To the extent that the requirement of freedom of communication is an implication drawn from ss 7, 24, 64, 128 and related sections of the Constitution, the implication can validly extend only so far as is necessary to give effect to these sections. Although some statements in the earlier cases might be thought to suggest otherwise, when they are properly understood, they should be seen as purporting to give effect only to what is inherent in the text and structure of the Constitution.

...

When a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the Constitution, two questions must be answered before the validity of the law can be determined. **First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end**

³⁹ *Lange v Australian Broadcasting Corporation* [1997] HCA 25; 189 CLR 520.

⁴⁰ *Ibid* (emphasis added) (citations omitted).

the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people (hereafter collectively "the system of government prescribed by the Constitution"). If the first question is answered "yes" and the second is answered "no", the law is invalid. In *ACTV*, for example, a majority of this Court held that a law seriously impeding discussion during the course of a federal election was invalid because there were other less drastic means by which the objectives of the law could be achieved. And the common law rules, as they have traditionally been understood, must be examined by reference to the same considerations. If it is necessary, they must be developed to ensure that the protection given to personal reputation does not unnecessarily or unreasonably impair the freedom of communication about government and political matters which the Constitution requires.

There are a number of factors to consider in applying the approach outlined by their Honours in this case to considerations about a purported general and inalienable right to freedom of speech in Australia.

Firstly and most obviously, in the absence of a comprehensive law protecting human rights in Australia, the right to freedom of political communication is implied rather expressed. In itself this gives rise to a level of uncertainty and leaves the way open to further interpretation.⁴¹

Further, although the Court has interpreted the concepts broadly, the right to freedom of political communication relates to political expression and not to expression in general.

Moreover, as outlined in the text above, the courts clearly consider there can be reasonable limits placed on political communication.

The details of these matters are beyond the scope of this submission. It is sufficient to say, however, that the High Court has developed a nuanced understanding of the competing interests in this area. In relation to its position on defamation law, for example, their Honours were clear⁴²:

The law of defamation does not contain any rule that prohibits an elector from communicating with other electors concerning government or political matters relating to the Commonwealth. Nevertheless, in so far as the law of defamation requires electors and others to pay damages for the publication of communications concerning those matters or leads to the grant of injunctions against such publications, it effectively burdens the freedom of communication about those matters. That being so, the critical question in the present case is whether the common law of defamation as it has traditionally been understood, and the New South Wales law of defamation in its statutory form, are reasonably appropriate and adapted to serving the legitimate end of protecting personal reputation without unnecessarily or unreasonably

⁴¹ Adrienne Stone, 'Australia's Constitutional Rights and the Problems of Interpretative Disagreement' [2005] *Sydney Law Review* 29.

⁴² *Ibid* (citations omitted).

impairing the freedom of communication about government and political matters protected by the Constitution.

The purpose of the law of defamation is to strike a balance between the right to reputation and freedom of speech. It is not to be supposed that the protection of reputation is a purpose that is incompatible with the requirement of freedom of communication imposed by the Constitution. The protection of the reputations of those who take part in the government and political life of this country from false and defamatory statements is conducive to the public good. The constitutionally prescribed system of government does not require - to the contrary, it would be adversely affected by - an unqualified freedom to publish defamatory matter damaging the reputations of individuals involved in government or politics. The question then is whether the common law of defamation, as it has traditionally been understood, and the statute law regulating the publication of defamatory matter are reasonably appropriate and adapted to the protection of reputation having regard to the requirement of freedom of communication about government and political matters required by the Constitution.

Freedom of expression is also recognised in common law. Again, in *Lange v Australian Broadcasting Corporation*, the High Court stated⁴³:

Under a legal system based on the common law, "everybody is free to do anything, subject only to the provisions of the law", so that one proceeds "upon an assumption of freedom of speech" and turns to the law "to discover the established exceptions to it".

Expressed also by Bromberg J in *Eatock v Bolt*.⁴⁴

Liberty is not merely what remains when the meaning of statutes and the scope of executive powers have been settled authoritatively by the courts. The traditional civil and political liberties, like liberty of the person and freedom of speech, have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction. The common law, then, has its own set of constitutional rights, even if these are not formally entrenched against legislative repeal.

Again, however, so-called common law rights to freedom of speech are not unfettered. They are 'to be exercised without impediment, so long as no wrongful act is done'.⁴⁵

Restrictions to freedom of expression were identified by the Australian Law Reform Commission in its recent report on the reference on traditional rights and freedoms:⁴⁶

⁴³ Ibid (citations omitted).

⁴⁴ *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) 232.

⁴⁵ *Bonnard v Perryman* [1891] 2 Ch 269 per Coleridge LJ at 284, cited in *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) 233.

⁴⁶ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws: Final Report* (ALRC Report 129, December 2015) 78.

In Australia, legislation prohibits, or renders unlawful speech or expression in many different contexts. Some limitations on speech have long been recognised by the common law itself, such as obscenity and sedition, defamation, blasphemy, incitement, and passing off.

Add to this various secrecy laws, regulations governing broadcasting and corporate dealings, intellectual property and advertising regulations all of which impinge on freedom of speech.

As expressed by Bromberg J:⁴⁷

The right of freedom of expression at common law is, by definition, qualified by those exceptions otherwise provided by law. The law of defamation imposes significant limitations on freedom of expression. Other laws imposing limitations include laws dealing with blasphemy, contempt of court and of Parliament, confidential information, the torts of negligent misstatement, deceit and injurious falsehood. Further, a wide range of legislative provisions dealing with obscenity, public order, copyright, censorship and consumer protection place restrictions on the exercise of the right to freedom of expression. These laws recognise that there are legitimate countervailing interests which require the imposition of limitations upon freedom of expression.

The right to freedom of expression is also well recognised under international law. Article 19 of the *International Covenant on Civil and Political Rights* provides:

Article 19

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

As is clear from Article 19(3) above, the internationally recognised right to freedom of expression is not absolute.

Articles 18(3) and 19(3) of the ICCPR provide that States that are parties to the Convention can legitimately limit the right in specific circumstances, consistent with the underpinning principle that

⁴⁷ *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) 238.

we are not permitted to exercise our rights in ways that infringe or interfere with the enjoyment of rights of others.

Relevant to consideration the issue is an understanding of why freedom of expression is an internationally recognised right and the context in which it developed. The right to freedom of expression is found alongside other civil and political rights in the ICCPR. These are rights related to our capacity to be active in decision making, including representative democracy, that affects us and to be protected from unnecessary interference from governments. We do not have the right to freedom of expression for the sake of expression itself, but rather as a means to ensure we are able to exercise other rights and freedoms related to representative democracy and to challenge infringements on our other rights and freedoms.

It is recognised that the unfettered exercise of freedom of expression by the powerful can even have the impact of limiting or excluding the right of less powerful and more marginalised people to exercise their freedom of expression and other rights and freedoms. The right to freedom of expression developed during the age of enlightenment to counter the suppression or censorship by governments and powerful institutions (including monarchies and dominant religious bodies) of views that challenged their power. It was a means to challenge oppressive rule and marginalisation of minority groups and voices.

Freedom of speech and section 18C

If we accept, as outlined above, that certain restrictions on freedom of expression are unlikely to be found by the courts:

- to be constitutionally invalid;
- to transgress the right to freedom of expression at common law; or
- to be inconsistent with rights as expressed under international law;

the test then becomes whether restrictions on freedom of expression caused by section 18C are proportional to the legitimate objective the interference with the freedom of speech aims to achieve.

In other words, whether limitations of freedom of speech raised by provisions such as section 18C are proportionate to their legitimate objective and whether they represent the least restrictive approach possible to achieve that objective.

Firstly, it is necessary to consider the impact that the words ‘offend, insult, humiliate and intimidate’ aim to address.

Again, as reasoned by Bromberg J in *Eatock v Bolt*, to give these words their dictionary meaning would in effect capture a very broad range of behaviours. This is not, however, how they have been interpreted in law. Regarding the word offensive, Bromberg J concludes the following.⁴⁸

To “offend” can mean to hurt or irritate the feelings of another person. If the concern of the provision was to fully protect people against exposure to personal hurt, insult or fear, it might

⁴⁸ *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) 263–64.

have been expected that the private domain would not have been excluded by the phrase “otherwise than in private” found in the opening words of s 18C(1). The fact that it is, suggests that the section is at least primarily directed to serve public and not private purposes: *Coleman* at [179]. It seems to me that s 18C is concerned with mischief that extends to the public dimension. A mischief that is not merely injurious to the individual, but is injurious to the public interest and relevantly, the public’s interest in a socially cohesive society.

That is not to say that protecting the public good may not be coextensive with protecting private interests. Proscribing offensive conduct in a public place not only preserves public order but protects against personal offence. The wounding of a person’s feelings, the lowering of their pride, self-image and dignity can have an important public dimension in the context of an Act which seeks to promote tolerance and social cohesion. Proscribing conduct with such consequences will clearly serve a public purpose. Where racially based disparagement is communicated publicly it has the capacity to hurt more than the private interests of those targeted. That capacity includes injury to the standing or social acceptance of the person or group of people attacked. Social cohesion is dependent upon harmonious interactions between members of a society. As earlier explained, harmonious social interactions are fostered by respectful interpersonal relations in which citizens accord each other the assurance of dignity.

Bromberg J then goes on to examine the concepts of ‘insult’ and ‘humiliate’, both of which he links to a ‘loss of or lowering of dignity’ and cites Lee J in *Bropho v Human Rights and Equal Opportunity Commission* in relation to the concepts of humiliation and intimidation:⁴⁹

Humiliation or intimidation involves more than destruction of self-perception or self-esteem of a person. It affects others in the community by lowering their regard for, and demeaning the worthiness of, the person, or persons, subjected to that conduct. It stimulates contempt or hostility between groups of people within the community and it is the intent of the [*Racial Discrimination Act 1975*] that such socially corrosive conduct be controlled

Based on his examination of these concepts, Bromberg J confirms the conclusions reached by other judges across a range of cases that the ‘conduct caught by s 18C(1)(a) will be conduct which has “profound and serious effects, not likened to mere slights”’.⁵⁰

As recognised by these precedents, the types of behaviours that section 18C aims to protect individuals against are serious transgressions with significant impact. As outlined in the case studies from my own jurisdiction provided elsewhere in this submission, the provisions of section 18C are legitimately extended to curtail actions that have significant impact on the target.

⁴⁹ *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16 (16 February 2004) 138.

⁵⁰ *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) 268, citing *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 (31 July 2001) at [16] (Kiefel J); *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16 (16 February 2004) at [70] (French J); and *Jones v Scully* [2002] FCA 1080 (2 September 2002) at [102] (Hely J).

Do section 18C and the way in which the RDA is applied overreach that intention? In my submission, it does not.

A law that encroached on the rights to express an opinion or a view would, in my view, arguably disproportionately burden free speech. Section 18C does not prevent the expression of an opinion or view so long as it is done in a respectful manner that does not target a person or group based on their 'race, colour or national or ethnic origin'. Similarly, defences that are limited in scope or act to prevent a fair and accurate report of an event or public matter may be seen as overreach. Section 18C does not prevent that occurring.

A level of sanction or consequence of transgression beyond the nature of the prohibited behaviour could arguably be considered overreach as would the imposition of sanction in the absence of demonstrated harm arising from the speech. On each of these criteria, however, it is my view that the way in which the RDA is currently constructed does not exceed its legitimate aim:

- section 18C does not prevent the expression of a view or opinion: it prevents expressing a view in a way that is insulting or derogatory or offensive on the basis of race, colour or national or ethnic origin;
- section 18D provides a broad range of exceptions which legitimately balance the protections available under section 18C;
- the reasonable person test requires an objective assessment of harm;
- the RDA is a civil jurisdiction, it does not criminalise the behaviour.

It is my view, therefore, that taken together sections 18C and 18D of the RDA provide an appropriate balance between the internationally recognised and protected rights to equality and protection from discrimination and to the implied constitutional protection of freedom of expression.

It meets the proportionality test adopted by the High Court in *Lange v Australian Broadcasting Corporation* for the validity of laws that encroach on implied freedom of political communication:⁵¹ It is, in accordance with that decision, 'reasonably appropriate and adapted to service a legitimate end' compatible with the maintenance of constitutionally prescribed system of representative and responsible government.

This approach has been repeatedly affirmed in case law related to the provisions of the RDA.

In *Jones v Scully*, Hely J held that the racial hatred provisions of the RDA did not unreasonably limit the right to freedom of communication and that the provisions were 'reasonably appropriate and adapted' to the legitimate purpose of eliminating racial discrimination, including the fulfilment of Australia's obligations under ICERD.⁵²

Further, Hely J found that section 18D 'does not render unlawful anything that is said or done "reasonably and in good faith", ' and that the exemptions provided in section 18D 'provide an

⁵¹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

⁵² *Jones v Scully* [2002] FCA 1080 (2 September 2002) [240].

appropriate balance between the legitimate end of eliminating racial discrimination and the requirement of freedom of communication about government and political matters required by the Constitution'.⁵³

Comparable offences

It is not unusual for offensive conduct to be unlawful. Public order offences involve personal conduct that may lead to a breach of public order or decency including, for example, offensive language.

By way of illustration, Tasmania's *Police Offences Act 1935* makes it unlawful to engage in prohibited language and behaviour in the following terms

12. Prohibited language and behaviour

- (1) A person shall not, in any public place, or within the hearing of any person in that place –
 - (a) curse or swear;
 - (b) sing any profane or obscene song;
 - (c) use any profane, indecent, obscene, **offensive**, or blasphemous language; or
 - (d) use any threatening, abusive, or **insulting** words or behaviour calculated to provoke a breach of the peace or whereby a breach of the peace may be occasioned.
- (1A) A person who contravenes a provision of subsection (1) is guilty of an offence and is liable on summary conviction to a penalty not exceeding 3 penalty units or to imprisonment for a term not exceeding 3 months.
- (2) A person convicted in respect of an offence under this section committed within 6 months after he has been convicted of that or any other offence thereunder is liable to double the penalty prescribed in subsection (1) in respect of the offence in respect of which he is so convicted. [**emphasis** added]

Similarly, provisions governing public annoyance make the following unlawful:

13. Public annoyance⁵⁴

- (1) A person shall not, in a public place –
 - (a) behave in a violent, riotous, **offensive**, or indecent manner;
 - (b) disturb the public peace;

⁵³ Ibid.

⁵⁴ *Police Offences Act 1935* (Tas) (**emphasis** added). This provision carries the same penalties as section 12.

- (c) engage in disorderly conduct;
- (d) jostle, **insult**, or annoy any person;
- (e) commit any nuisance; or
- (f) throw, let off, or set fire to any firework

Unlike discrimination laws, these offences **are** prosecuted by the State.

Public order offences, including offensive conduct, form a significant proportion of proceedings by police in Tasmania.

In 2014–15, for example, public order offences accounted for 4,367 proceedings by Tasmania Police amounting to 28.0% of all proceedings.⁵⁵

Nationally, public order offences were the third most prevalent principle offence category, accounting for 69,465 offenders or 17% of offences.⁵⁶

It is clear that in many cases offences prosecuted under criminal summary offence provisions are aimed at addressing offensive language:⁵⁷

In one NSW case, a man pleaded guilty to an offence under the *Summary Offences Act 1988*, for yelling, ‘Annisca Widders I love you. Annisca Widdes I f***in’ love you.’ One man in Queensland was convicted under the public nuisance offence provision of the then *Vagrants, Gaming and Other Offences Act 1931* for calling a police officer ‘You f***ing c***t’. In one South Australian case, a man was convicted under the *Summary Offences Act 1953* (SA) for saying to a police officer, ‘F***ing leave him alone’ and ‘F***ing crap’.

This month, the media reported a driver in Victoria being fined over \$600 for offensive behaviour by watching pornography while driving and over \$400 for using a mobile phone while driving.⁵⁸ This indicates that the offensive element of his offending was considered more of a public harm than the potentially unsafe driving element. The report does not indicate whether anyone else was exposed to or affected by the display of the pornography.

At the same time, defamation laws are often used to address what might be considered trivial transgressions.

⁵⁵ Australian Bureau of Statistics, *4519.0 Recorded Crime – Offenders, 2014-15* (released 24/02/2016) Table 30 Police Proceedings, Principal offence by method of proceeding – Tasmania - 2008–09-2014–15.

⁵⁶ Australian Bureau of Statistics, *4519.0 Recorded Crime – Offenders, 2014-15* (released 24/02/2016) Summary.

⁵⁷ Examples quoted from a speech by Dr Tim Soutphommasane, ‘Two Freedoms: Freedom of expression and freedom from racial vilification’ (Alice Tay Lecture in Law and Human Rights 2014, Herbert and Valmae Freilich Foundation, Australian National University, 3 March 2014).

⁵⁸ ‘Police nab porn-prone driver watching movies at the wheel’, *The New Daily* (online) 19 December 2016.

One recent defamation case resulted in \$280,000 damages to a woman who was described as a ‘grub’, ‘you silly silly woman’ on the 2GB radio station. Another recent case involved \$160 000 damages for each of the three plaintiffs – a total of \$480 000 – in relation to a restaurant review in a newspaper, where the reviewer described a number of dishes as ‘simply unpalatable’ and restaurant as ‘a bleak spot on the culinary landscape’.⁵⁹

As expressed by the Race Discrimination Commissioner:

It could just be me, but if, as a society, we accept that our parliaments should refrain from offensive language, that our laws that can result in six figure damages and criminal sanctions for even trivially offensive language, that there can be six figure damages for calling someone ‘silly’ or for saying that a restaurant was not especially good, why should we also not hold people accountable for racial vilification that causes profound harm to individuals and families? I think we are entitled to ask why it is, exactly, that laws concerning racial vilification have been singled out for such disproportionate attention.⁶⁰

It is a viewpoint that I wholly endorse. I note, in addition, that some of the laws referred to above impose fines and/or imprisonment as a penalty if found guilty of offence.

To focus attention on section 18C in a manner that implies that no other law seeks to prevent people engaging in similar levels of behaviour is disingenuous at best; untruthful at worst. It also fails to take account of the approach in discrimination law compared to those other laws. Discrimination laws provide for a low cost and accessible means to resolve the dispute arising from the alleged conduct. It is only where the dispute cannot be resolved that it could, potentially, proceed to a court or tribunal determination. Unlike criminal provisions dealing with offense, there is no prospect of imprisonment or a fine payable to the State if the court finds the alleged conduct proven and in breach of the relevant law.

Across many areas, we have laws aimed at establishing standards of civility and appropriate conduct. The RDA does not take away the ability to express a viewpoint that differs from others within the community, nor does it prevent someone from having bigoted or racist views. It does, however, provide parameters on the way in which those views can be expressed in circumstances where the way they are expressed may affect others.

Protection from offensive conduct under Tasmanian law

Within my own jurisdiction, the *Anti-Discrimination Act 1998* (Tas) (the Tasmanian Act) includes very similar wording to that currently contained in section 18C. I do not believe that these provisions have been used frivolously, nor do I consider that there is evidence to suggest that they have operated to impede the proper exercise of the right to freedom of expression in this State.

⁵⁹ Soutphommasane, above n 57.

⁶⁰ Ibid.

Tasmanian discrimination law provides for a civil process for complaining of and addressing discrimination and offensive conduct that is within jurisdiction. It operates concurrently with federal discrimination law, including the RDA.

Section 17(1) of the Tasmanian Act prohibits a person (or organisation) from engaging in conduct that that offends, humiliates, intimidates, insults or ridicules another person on the basis of the following attributes:

- race;
- age;
- disability;
- sexual orientation;
- lawful sexual activity;
- gender;
- gender identity;
- intersex;
- marital status;
- relationship status;
- pregnancy;
- breastfeeding;
- parental status; and/or
- family responsibilities.

Complaints made under section 17(1) of the Tasmanian Act are subject to the requirements of section 22. Section 22 restricts the reach of certain prohibited conduct under the Tasmanian Act to specified areas of public activity. These areas include employment; education and training; the provision of facilities, goods and services; accommodation; membership and activities of clubs; administration of any law of the State or State program; awards, and/or enterprise agreements or industrial agreements.

There are two requirements to prove conduct in breach of section 17(1):

- there must be conduct that offended, humiliated, intimidated, insulted or ridiculed a person on the basis of one or more of the attributes listed; and
- the conduct must be such that a reasonable person would have anticipated that the other person would feel offended, humiliated, intimidated, insulted or ridiculed in all the circumstances.

Section 17(1) does not simply provide for an individual to complain because they were offended. It is a prohibition on conduct that offends, humiliates, intimidates, insults or ridicules another person in circumstances that ‘a reasonable person, having regard to all the circumstances, would anticipate that the other person would be offended, humiliated, intimidated, insulted or ridiculed’. This test creates a significant threshold to the application of the section and provides an objective test of the impact of the action.

A complaint alleging a breach of section 17(1) will be dealt with by the Commissioner if it is within jurisdiction and the alleged conduct discloses a *prima facie* case (that is, if the conduct alleged were to be proven it would meet the test set out in section 17(1) and relevant case law). The

question of whether or not the alleged conduct is proven is not a matter for the Commissioner, but for the Tribunal in the event the complaint cannot be resolved.

Table 1 provides information on the total number of complaints received by my office in 2014–15 and 2015–16 in which allegations of offensive, insulting, intimidating, humiliating or ridiculing conduct have been made.⁶¹ You will note that in 2015–16 allegations of such conduct based on race represented 12.0% of all complaints.⁶²

Table 1: Allegations of offensive, insulting, intimidating, humiliating or ridiculing conduct

	2014–15	% of all complaints	2015–16	% of all complaints
Total complaints	142		150	
Complaints in which offensive conduct alleged or identified	88	62.0%	87	58.0%
Disability	46	32.4%	50	33.3%
Gender	13	9.2%	18	12.0%
Race	11	7.7%	18	12.0%
Age	12	8.5%	12	8.0%
Family responsibilities	12	8.5%	7	4.7%
Sexual orientation	11	7.7%	7	4.7%
Relationship status	14	9.9%	6	4.0%
Marital status	8	5.6%	5	3.3%
Gender identity	6	4.2%	2	1.3%
Parental status	3	2.1%	2	1.3%
Lawful sexual activity	3	2.1%	2	1.3%
Pregnancy	2	1.4%	2	1.3%
Breastfeeding	0	0.0%	1	0.7%
Intersex	0	0.0%	0	0.0%

Section 19 of the Tasmanian Act prohibits a person, by public act, from inciting hatred toward, serious contempt for, or severe ridicule of, a person or group of persons on the grounds of a range of attributes, including race.

Section 19 is not subject to the requirement that the conduct occur in an area of activity listed in section 22 and is applicable to any public act.

⁶¹ Anti-Discrimination Commissioner, Tasmania, *Annual Report 2015–16* (2016) 71.

⁶² *Ibid.*

Table 2 provides information on the total number of complaints received by my office in 2014–15 and 2015–16 in which allegations of incitement have been made.⁶³ You will note that incitement based on race was identified or alleged in 7.3% of complaints received by my office in 2015–16.

Table 2: Allegations of incitement by attribute

	2014–15	% of all complaints	2015–16	% of all complaints
Total complaints	142		150	
Complaints alleging incitement	53	37.3%	43	28.7%
Disability	35	24.6%	24	16.0%
Sexual orientation/lawful sexual activity	9	6.3%	9	6.0%
Religious belief, affiliation or activity	5	3.5%	10	6.7%
Race	4	2.8%	11	7.3%

By virtue of section 55, the provisions of both section 17(1) and section 19 do not apply if the conduct is:

- (a) a fair report of a public act; or
- (b) a communication or dissemination of a matter that is subject to a defence of absolute privilege in proceedings for defamation; or
- (c) a public act done in good faith for –
 - (i) academic, artistic, scientific or research purposes; or
 - (ii) any purpose in the public interest.

The effect of section 55 is to provide a defence against conduct within the scope of sections 17(1) or 19 when reporting public acts or if an act is undertaken in good faith for professional reasons or for public purposes. It is important, however, to recognise that section 55 can only be enlivened in respect of sub-section (a) if the report is ‘fair’ and, in relation to sub-section (c) if the act is done in ‘good faith’. In all circumstances, it is up to the respondent to make the case for the exception.

Further, just as with section 18D of the RDA, the question of whether or not the defence applies is a matter for decision by the Tribunal rather than the Commissioner as it requires consideration of competing evidence and determination of facts and interpretation and application of law to those determined facts.

It is my view that section 55 provides the appropriate balance of the right to equality before the law and the right to freedom of expression.

It is my experience that complaints made under the Tasmanian Act—or discrimination law more generally—are not made lightly or about insignificant matters. This is borne out by the data in Tables 1 and 2 above and by the following summaries. To the contrary, in many cases, the complainant alleges abusive and threatening behaviour for some time before taking the step of

⁶³ Anti-Discrimination Commissioner, Tasmania *Annual Report 2015-16* (2016) 71

lodging a formal complaint under discrimination law and it is relatively common for allegations to involve descriptions of repeat or ongoing offending by the same person.

The following provides de-identified summaries of the nature of reports and complaints received by my Office which involve allegations of offensive conduct on the basis of race.

O made a complaint on behalf of a local football club of racism during matches involving racist comments from both players and spectators. This included being called 'niggers', 'fucking Africans' and 'black cunts'.

P and his family are newly arrived migrants from Bhutan. After moving into rental accommodation, P and his family have been subjected to verbal abuse; they have had a bag of rotten meat left on their doorstep; water balloons have been thrown at the house including through an open window; ice cream, beer bottles, whole fish, fish heads and soiled nappies have also been thrown at the house. Most recently four of the alleged respondents entered P's yard. They banged on his door and windows and yelled at his daughter in the bathroom, asking her for sexual favours including saying 'come and suck my dick you bitch'. P's request to his real estate agent to move out of the property has been denied. P and his family endured this behaviour for over three months prior to making a complaint under the Tasmanian Act.

L, who is of east Asian background, was subject to racially insulting behaviour and abuse at a bus mall by two young women and a man. One girl bowed to him with her hand clasped together and then pulled her skin outwards from her eyes in a manner L took to be ridiculing his racial background. When L reacted, he was screamed and sworn at by the man in a severe, aggressive manner including racist comments and abuse.

T was verbally abused on the basis of race whilst getting petrol from a petrol station. The respondent allegedly yelled 'hurry up you fucking whore' and 'go back to where you came from you big fat fucking whore'. T was very shaken by the abuse and has suffered ongoing distress. She would like to feel safe in public and for people to live free of racial and sexual abuse.

M is Aboriginal and complained that he was playing football and a player from the opposition team said to him 'I would like to knock your head off, you black cunt'. When M got angry he was sent off, but the player who made the comment was allowed to stay on the field.

S is Fijian Indian. She and her family have experienced insults and other offensive behaviour by their neighbours. This includes being called a 'f..' black bitch. One of the S's daughters has been subject to racial taunting on the bus home from school. This has included being called a 'black whore, a black mole, a fat black bitch and a black nigger'. Her daughter's friends have also been told that if they married her they would have 'ugly feral black children'. The taunts take place on most school days on the bus home.

G made a complaint on her own behalf and on behalf of her grandchildren. She alleged that her grandchildren were being called names, picked on every day and have been told that 'black children should not have been born'. She alleges that her grandson is scared to go to school.

V was fishing. Three people—two men and one woman—arrived and V asked them not to smoke near him or throw their cigarette butts into the water as it was littering and they were toxic to the fish.

The younger of the two men said that V was 'a stupid fucking nigger' and 'should fuck off back to Africa'.

A long verbal exchange took place in which the younger man continued to assault and abuse V. He made numerous threats of physical violence before punching V in the head. V attempted to push the man away and then the older man grabbed V from behind. V managed to break free of both attackers. V was followed to his car and they continued to threaten V with physical harm and racially abuse him.

S and his girlfriend were involved in an incident outside a greengrocer's shop. After buying some basic goods S and his girlfriend were confronted by a group of eight to ten young kids who called him a 'Chinese cunt'. The young people then proceeded to assault S, smashing his glasses. This continued until he was bleeding badly. S's girlfriend begged them to stop but they ignored her.

Two people came up behind H's wife and swore at her and shook her violently saying words like 'fuck you'. They did not ask for money; just yelled and attacked. H believes that the incident occurred because of his nationality or skin colour. H got his wife free and then they tried to catch him. The attackers managed to head butt H. A car stopped for a while then drove off. H and his wife then managed to cross the road and get away. H and his wife are still terrified and don't feel safe. His wife cannot sleep at night.

M and two friends were walking home from the bus stop. It was dark and there were few street lights. There were lots of celebrations happening that night. As they came to an alley way they were confronted by a group of teenagers. M and her friends were frightened and expected that they would do something. M told us that she had been subject to racial abuse that many times she had lost count. The teenagers started shouting at M and her friends, spitting out vulgar words. No physical threats were made.

N and her son G were leaving a shopping centre and were confronted by three young men on the other side of the road. One threw a rock at them that nearly hit G in the face. The young men stared at them so they fled back to their house and reported feeling terrified.

Z advised that the previous evening she had been approached by a young woman employed in door-to-door sales. The sales person had been the victim of a racist attack a few doors down. This included being abused and threatened because of her skin colour. She was particularly frightened by the sight of Ku Klux Klan and white supremacist images 'decorating' the house.

W made a complaint about her neighbours who have swastikas and a white power sign displayed on their property.

In these summaries, race and sex discrimination across a spectrum of seriousness are clearly demonstrated.

In some circumstances, making a complaint under the Tasmanian Act is viewed as an avenue of last resort after attempts have been made to follow up matters through internal complaints mechanisms or finding that the behaviour has continued after doing so. In the case of P cited

above, four reports were made to Police prior to them providing advice on ways in which P could act to stop what were clearly distressing actions by his neighbours.

In other cases, I have received complaints from people who were simply going about their daily business and were abused or harassed in a way that was unacceptable by today's standards. L, for example, was walking through a bus mall. T was simply filling her car at the petrol station. It is often the random and unprovoked actions of this kind which leave a lasting legacy with individuals and which can impact on their confidence, their feeling part of a shared community and their freedoms.

Taken together, I consider that the provisions contained within the Tasmanian Act making specified conduct unlawful send a strong message that racism is unacceptable in this State.

It sets a community benchmark for acceptable public behaviour and provides guidance on appropriate public conduct.

Complaint procedures

Terms of Reference 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;**
 - (ii) **complaints which have no reasonable prospect of 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.**

There are a number of factors that warrant consideration in relation to the matters raised by this term of reference. Firstly, and most critically, is the need to ensure that the processes engaged in by the Australian Human Rights Commission, and indeed other human rights authorities across Australia, are fair to all parties and reflect the nature of the Commission's role. This encompasses the rights of both those who believe they have suffered discrimination or some other form of prohibited conduct (complainants) and those who are subject of such complaints (respondents).

Secondly, it is critical that the Committee acknowledge that any changes to the way in which complaints made under section 18C are handled by the Australian Human Rights Commission will affect the way in which all complaints are dealt with by the Commission. The AHRC has the power to investigate and resolve complaints of human rights breaches, discrimination, harassment and bullying under the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and/or the *Age Discrimination Act 2004* (Cth) as well as the RDA. This covers complaints including:

- sex discrimination arising from pregnancy, marital status, breastfeeding, family responsibilities;
- sexual harassment;
- disability discrimination including a broad range of disability types, physical, psychiatric, permanent or temporary, including association with a person with disability;
- disability harassment;

- race discrimination including actions related to a person’s colour, descent, national or ethnic origin, immigration status or racial hatred;
- age discrimination; and
- employment discrimination relating to sexual preference, criminal record, trade union activity, political opinion or social origin.

It is important, therefore, that any impact on complaints made under any of the federal discrimination laws be considered carefully by the Committee.

Thirdly, in considering whether the procedures adopted by Australian Human Rights Commission (and state and territory authorities) should be amended (and, if so, how), regard must be had to the purpose of the legislative scheme established by the relevant legislation and the effect that changes to those procedures may have on both complainants and respondents in the process.

Complaint functions under discrimination law

The *Australian Human Rights Commission Act 1986* (Cth) (the AHRC Act) sets up informal, specialist, low-cost arrangements that are broadly accessible to those who consider they have been discriminated against or otherwise experience related prohibited behaviour.⁶⁴

By their very nature, discrimination disputes often involve individuals or groups who have a history of vulnerability or who are treated unfairly because of their race, age, gender, disability or sexual orientation. It is critical, therefore, that the means of making a complaint to the AHRC and other human rights authorities and participating in the complaint process are as simple, straightforward and accessible as possible.

The function of the AHRC as set out in section 11(aa) of the AHRC Act is to ‘inquire into, and attempt to conciliate, complaints of unlawful discrimination’.

Consistent with the approach adopted in all state and territory jurisdictions, the AHRC seeks to resolve complaints through confidential conciliation processes. If these procedures are unsuccessful or the complaint is otherwise terminated, the complainant has the capacity to take their complaint to the Federal Court or the Federal Circuit Court which has jurisdiction to make enforceable orders of the type set out in 46PO(4)(a)–(f) of the AHRC Act. This cannot be prevented by the AHRC and it generally plays no role in such proceedings.

Complaint procedures

Section 46P of the AHRC Act provides arrangements for making a formal complaint alleging unlawful discrimination (including related unlawful conduct).

Section 46P(1) provides that a ‘written complaint may be lodged with the Commission alleging unlawful discrimination’.

⁶⁴ See Beth Gaze and Rosemary Hunter, *Enforcing Human Rights: an evaluation of the new regime* (1st ed, Monash University, 2010).

Nothing in section 46P requires the AHRC to make a decision whether to accept or reject a complaint at this stage. The complaint is to be dealt with. This approach is consistent with bringing and pursuing claims in other civil law jurisdictions. There is, for example, no threshold for common law claims for negligence or defamation or for statutory claims under industrial laws.

The Commission's powers to terminate a complaint occur after investigation, that is after further discussion with the complainant and, generally, after receiving comment and other relevant information from the respondent.

Section 46PH provides that the President may terminate a complaint on the following basis:

46PH Termination of complaint

- (1) The President may terminate a complaint on any of the following grounds:
 - (a) the President is satisfied that the alleged unlawful discrimination is not unlawful discrimination;
 - (b) the complaint was lodged more than 12 months after the alleged unlawful discrimination took place;
 - (c) the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance;
 - (d) in a case where some other remedy has been sought in relation to the subject matter of the complaint—the President is satisfied that the subject matter of the complaint has been adequately dealt with;
 - (e) the President is satisfied that some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to each affected person;
 - (f) in a case where the subject matter of the complaint has already been dealt with by the Commission or by another statutory authority—the President is satisfied that the subject matter of the complaint has been adequately dealt with;
 - (g) the President is satisfied that the subject matter of the complaint could be more effectively or conveniently dealt with by another statutory authority;
 - (h) the President is satisfied that the subject matter of the complaint involves an issue of public importance that should be considered by the Federal Court or the Federal Circuit Court;
 - (i) the President is satisfied that there is no reasonable prospect of the matter being settled by conciliation.

Section 46PH provides both subjective and objective bases on which the President may terminate a complaint. Some of the grounds outlined in Section 46PH require the President to form an opinion and, if it is assessed that those circumstances exist, she or he may terminate the complaint.

The Commission does not have the power to determine that unlawful discrimination has occurred. It only has the capacity to attempt to resolve the matter through conciliation. If the complaint is not resolved or is discontinued for some other reason, the complainant may make an application to the Federal Magistrates Court or the Federal Court of Australia to have the matter considered.

The Commission does not take the matter to the Court on the complainant's behalf, nor does it help the complainant present the case to the Court. The responsibility in this regard rests solely with the complainant.

As outlined in earlier sections of this document, a significant proportion of complaints made to the Australian Human Rights Commission are resolved through conciliation.

Of the complaints finalised by the AHRC in 2015–16, 52% were conciliated; 19% were terminated or declined; 17% were withdrawn; and 9% were discontinued.

In relation to the 396 complaints under the RDA finalised in 2015–16, 55 or 13% were terminated (including 50 on the basis that there was not reasonable prospect of conciliation); 30 (8%) were withdrawn; 29 (8%) were discontinued and 268 (70%) were conciliated.

No figures are publicly available on the number of complaints terminated by the AHRC that were then the subject of judicial consideration. It would appear, however, that only a very small number of cases ever make it to the court system. A review of case law databases, for example, identified 31 times the Federal Court of Australia has considered matters related to section 18C of the RDA since the provisions were included in 1995. This is 31 cases in over 20 years. Of these: 6 decisions were made by the Federal Court of Australia – Full Court; 17 decisions by the Federal Circuit Court of Australia; and 27 decisions by its predecessor, the Federal Magistrates Court of Australia.⁶⁵ It is likely there were a number of complaints that the complainant took to one or other of the courts that were either subsequently withdrawn or resolved before hearing and determination by that court.

Of those complaints that are resolved through conciliation, outcomes agreed by the parties through the dispute resolution processes commonly include a respondent:

- apologising or making a statement of regret or giving an acknowledgement that the person who made the complaint (the complainant) felt aggrieved as a result of the alleged discrimination or prohibited conduct;
- paying financial compensation to the complainant;
- reinstating the complainant to a job or position;
- undertaking training or education about discrimination law obligations (including for employees of the respondent);
- making changes to policies and procedures to better reflect obligations under discrimination law;
- reviewing policies and procedures to improve compliance with discrimination law; and/or
- making adjustments to address the complainant's needs.

⁶⁵ Australasian Legal Information Institute database.

In particular, the use of alternative dispute resolution approaches enables early and low-cost resolution of discrimination complaints with outcomes that suit the parties, and avoids more costly and time-consuming recourse to the Courts.

This is of particular importance because individuals who allege discrimination are highly likely to face economic, social and educational disadvantage that would significantly affect their ability to pursue claims through formal legal processes. As such, the current processes are an important access to justice measure.

Tasmanian complaint procedures

Consistent with the provisions of the AHRC Act, section 74 of the Tasmanian *Anti-Discrimination Act 1998* requires the Anti-Discrimination Commissioner to attempt to 'resolve by conciliation or in any other way' any complaint that the Commissioner believes can be resolved in this manner. This can be done through conducting resolution processes at any stage after the complaint is received.

In 2015–16, 81 conciliation meetings were held shortly after the complaint was accepted⁶⁶ under the Tasmanian Act and of these 43 (53%) resulted in resolution of the complaint at or following the meeting.⁶⁷ A further three complaints were resolved during the investigation stage through facilitated negotiation.⁶⁸ The average time from receipt to finalisation for complaints finalised in 2015–16 was just over 7 months.⁶⁹

Where a complaint has not resolved through the dispute-resolution processes or the Commissioner forms the view that the complaint should be subject to a formal hearing that involves presentation and full testing of evidence, the Commissioner has responsibility under the Tasmanian Act to refer the complaint to the Anti-Discrimination Tribunal (the Tribunal). In 2015–16, 12 complaints were referred to the Tribunal.⁷⁰

Part 6, Division 4 of the Tasmanian Act provides the Tribunal with the authority to resolve a complaint by conciliation or conduct an inquiry (a formal hearing) into the complaint. If the Tribunal finds, after completing its inquiry, that the complaint is substantiated it may make one or more orders, including an order that the respondent not repeat or continue the discrimination or

⁶⁶ Unlike the federal law, the Tasmanian Act does require a decision to be made about whether to accept or reject a complaint. This gives rise to the complainant having right of review by the Anti-Discrimination Tribunal of the Commissioner's decision if the complaint is rejected.

⁶⁷ Anti-Discrimination Commissioner, Tasmania, *Annual Report 2015–16* (2016) 52.

⁶⁸ Ibid.

⁶⁹ Ibid 53.

⁷⁰ Ibid 76.

prohibited conduct; an order to redress any loss or injury or humiliation; an order to re-employ; or make a payment to the complainant.⁷¹ Orders are enforceable by the Supreme Court.⁷²

Of the complaints that the Tribunal finalised in 2015–16, 14 were resolved before the formal hearing; two were dismissed before the formal hearing; three were dismissed following hearing; nine were withdrawn; and two were upheld.⁷³

As with the approach adopted by the AHRC in relation to complaints made under the RDA, I am strongly of the view that the approach under Tasmanian discrimination law provides a largely effective way of addressing the harm caused to individuals by prejudice and discrimination.⁷⁴ The emphasis in the approach is on education and the promotion of fair treatment of both complainants and respondents.

Early termination of complaints

Under the terms of reference, the Committee has been asked to consider whether reforms to the process for considering complaints should be considered: in particular, whether amendment to the AHRC processes enables early elimination of vexatious or trivial complaints or complaints that have no reasonable prospect of success.

The issue of the current threshold for acceptance of a complaint has been the subject of consideration in relation to the *Anti-Discrimination Act 1998 (Tas)*.

The following examines the issue as it applies to Tasmanian legislation and, in doing so, flags issues that I consider the Committee should take into account when considering these matters under the federal laws.

Unlike other jurisdictions (including that provided under the AHRC Act), section 65 of the *Anti-Discrimination Act 1998 (Tas)* provides that a decision to reject a complaint is a reviewable decision. To this extent, the provisions of the Tasmanian Act operate differently to the *Australian Human Rights Commission Act 1986 (Cth)* which does not require the AHRC to make a decision whether to ‘accept’ or ‘reject’ a complaint.

When a complaint is received by the Tasmanian Anti-Discrimination Commissioner, she or he must firstly consider whether or not the complaint falls within the jurisdiction of the Act and satisfies the requirements of a valid complaint. The assessment must be completed within 42 calendar days of receipt of the complaint.

⁷¹ *Anti-Discrimination Act 1998 (Tas)* s 89.

⁷² *Anti-Discrimination Act 1998 (Tas)* s 90.

⁷³ Anti-Discrimination Commissioner, Tasmania, *Annual Report 2015–16 (2016)* 57.

⁷⁴ If anything, these approaches suffer from being too dependent on individuals affected by the prejudice and discrimination and fail to enable effective processes for the relevant authority to challenge systemic discriminatory practices.

The decision to accept or reject a complaint is made on the basis of the complaint received. The questions the Commissioner needs to consider in making a decision include:

- whether the complaint alleges conduct that took place in the 12 months before the complaint was received;
- whether the complaint alleges conduct that, if true, would disclose a breach of the Act in the form of discrimination and/or one or more forms of prohibited conduct (does it disclose a *prima facie* case);
- whether an exception (which is a defence to a complaint) so clearly applies that the complaint will inevitably fail; and/or
- whether immunity applies.

In relation to an alleged breach of the prohibited conduct provision found in section 17(1) of the Tasmanian Act, for example, in order than an allegation be accepted for investigation and dispute resolution under the Act, the Commissioner must consider the alleged conduct and be satisfied that:

- the complainant felt humiliated, intimidated, insulted, ridiculed or offended by the alleged conduct; and
- this was related to one or more of the attributes listed in that section; and
- a reasonable person would have anticipated, in all the circumstances, the complainant would feel humiliated, intimidated, insulted, ridiculed or offended as a result of the alleged conduct; and
- that no exception so clearly applies that the complaint is hopeless.

If the Commissioner is not satisfied that all of the above elements are present the complaint will be rejected.

In 2015–16, 31% of complaints received under the *Anti-Discrimination Act 1998* (Tas) were rejected. For allegations of a breach of section 17(1) of the Act the rate of rejection was significantly higher at 41%.

It is important to understand, however, the limitations on the capacity of the Commissioner to reject a complaint at this stage of the process.

Firstly and importantly, complaints are accepted or rejected on the basis of the information available to the Commissioner during the assessment stage. The well-established test to be applied at this stage is whether the conduct is capable of amounting to a breach of the Act on the basis of the information provided by the complainant. No information as to the position of the respondent or whether they will seek to rely on any exceptions or defences provided under the Act is available at this stage of the complaints process as the respondent is not notified of the complaint until after the accept/reject decision is made.

Second, it is also important to understand the way in which defences (such as those provided in section 18D) work under discrimination law. Defences—however named in legislation⁷⁵—provide

⁷⁵ Defences are referred to as ‘exceptions’ in the *Anti-Discrimination Act 1998* (Tas) and as ‘exemptions’ in federal discrimination law.

that conduct that would otherwise be unlawful is not unlawful. To prove a defence applies, the respondent must establish, on the balance of probabilities, the circumstances are such that all of the elements of the defence are present. Just as in criminal law, defences do not automatically exclude entities or particular conduct from the reach of the discrimination law. For the exception to apply, the case for the application of a defence to particular circumstances must be made by the person or organisation alleged to have breached the Act, and be capable of being objectively sustained when tested through a judicial or quasi-judicial hearing process.

This point is made clear by the reasoning of the Tasmanian Anti-Discrimination Tribunal in *Mohring re Break O'Day Council* in which the Tribunal states:⁷⁶

... I note that the onus of establishing such an exemption [referring to the exception found in section 48 of the Act] falls on the Respondent and accordingly the applicability of those sections is not, in my view, an appropriate matter to consider in deciding whether or not to accept a complaint for investigation.

The exception to this principle is where 'the application of an exception under the Act is so clear that the complaint is hopeless'.⁷⁷ In all other circumstances, it is not open to the Commissioner to reject a complaint prior to investigation because of the possible application of an exception (defence).

Where there is dispute between the parties about facts relevant to proving or disproving a breach of the Act, or the application of an exception, the decision about whether the complaint is proven or an exception applies (for example whether the act was 'done reasonably and in good faith') can only properly be made by the relevant judicial or quasi-judicial decision maker. In the case of federal discrimination complaints, this is the Federal Court or Federal Circuit Court. In the case of Tasmanian discrimination complaints, this is the Anti-Discrimination Tribunal of Tasmania.

It is not open to an administrative decision maker to dismiss a complaint because they draw conclusions about whether a defence applies in circumstances, for example, where the respondent's true purpose is unclear.

The effect of this approach, therefore, is to limit the basis on which the Commissioner can reject a complaint at the early stages of proceedings.

Given the right of review under the Tasmanian Act⁷⁸, the inclusion of an accept/reject stage early in the complaints process does not expedite proceedings. Rather, it opens up the preliminary stages of the complaints process to more costly review procedures and delays the capacity to engage in dispute-resolution processes as early as possible in the life of the complaint.

⁷⁶ *Mohring v Break O'Day Council* (Unreported, Anti-Discrimination Tribunal of Tasmania, Brett TM, 27 January 2004) [6].

⁷⁷ *Delaney v Liberal Party of Australia* (Tas) [2008] TASADT 2 (27 February 2008) [29].

⁷⁸ Review under the *Anti-Discrimination Act 1998* by the Anti-Discrimination Tribunal of a decision by the Commissioner to reject a complaint; and judicial review by the Supreme Court of a decision by the Commissioner to accept a complaint.

Provisions that enable the rejection of complaints at early stages in the complaints process, remove the capacity to effectively engage those provisions of the Act that allow for early resolution of a complaint and shifts the emphasis toward more costly and litigious approaches.

Judicial review

In the absence of dedicated review mechanisms, the insertion of an accept/reject phase would mean that a decision to terminate a complaint based on information supplied by the complainant would enliven the potential for an application to a single Judge for judicial review. There would also be the potential of appeals to the Full Court and, with special leave, to the High Court.

Further, a decision to accept a complaint may also be subject to judicial review on application by the respondent.

I believe this approach is antithetical to the approach reflected in discrimination law across Australia, which has been to establish a preliminary process whereby a complaint can be dealt with by a statutory administrative decision maker with a focus on early and low-cost dispute resolution with limited need for involvement by legal practitioners. Where the complaint cannot be resolved in this way, it then proceeds to a formal hearing stage where a tribunal or court is empowered to conduct a hearing, receive and test evidence, and determine the complaint.

Enabling judicial review of decisions at preliminary stages of the complaint process (including a decision to accept or reject a complaint) risks interfering with the potential for low-cost approaches to dispute resolution. It also requires much more extensive legal analysis of a complaint on first receipt and thereby delays engaging with parties on the complaint.

It risks creating conflicting obligations on the administrative decision maker, particularly with regard to the possible application of exemptions (defences) such as those provided under section 18D of the RDA. Under current arrangements, the administrative decision maker is required not to reject a complaint if it discloses, on its face, possible discrimination or prohibited conduct. In the case of the Tasmanian jurisdiction, the Tribunal has made it clear that a decision by the Commissioner that involves consideration of the merits of the complaint or the application of exceptions (defences) that rely on findings of fact or law is beyond the scope of the Commissioner's powers and proper authority, and is straying into the substantive determinative role of the Tribunal.

Further, given the imbalance of legal representation between complainants and respondents, there is a risk that a change of this nature will benefit respondents, as they are more likely to have the funds and capacity to pursue challenges through the courts.⁷⁹

⁷⁹ Anti-Discrimination Commissioner (Tasmania), *Annual Report 2015–16* (2016) 44: in 2015–16, only 6% of complainants had a lawyer at some stage during the complaints process, compared with 48% of respondents.

Soliciting complaints

Terms of Reference 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.

Section 11(1)(g) of the *Australian Human Rights Commission Act 1986* (Cth) requires that the AHRC promote an understanding and acceptance, and the public discussion, of human rights in Australia.

This objective is reflected in other discrimination laws at state and territory level.⁸⁰

Central to fulfilling this objective is an obligation to ensure that members of the public are aware of their right to make a complaint under respective discrimination laws. I do not believe that any action aimed at making people aware of their rights amounts to an ‘abuse of the powers and functions’ of the Commission or any other human rights agency in Australia as inferred by the terms of reference.

Equal Opportunity Tasmania, for example, has instituted a program—Report it!—that encourages the reporting of incidents where a person has been abused or harassed or has witnessed this happening to another person.

The Report it! program was established in 2009 to increase the awareness by international students and people from culturally and linguistically diverse (CALD) backgrounds about actions they can take to report incidents of racially-motivated discrimination and harassment, particularly in public places. The program was established, in part, because of an escalation of incidents of violence and aggressive or abusive behaviour toward international students and other members of visible minorities who had recently arrived in Tasmania.

Working with the Federal Department of Immigration and Border Control, the Tasmanian Department of Premier and Cabinet and the Tasmanian Settlement Network, the Office of the Anti-Discrimination Commissioner (as Equal Opportunity Tasmania was then known) introduced the incident reporting process to allow both victims and witnesses of race-based discrimination or harassment to report public incidents. In many cases, these reports have formed the basis of a subsequent formal complaint.

In 2012, Equal Opportunity Tasmania enhanced the incident reporting process and commenced a drive to roll it out more broadly within the community.

The Report it! process has enabled Equal Opportunity Tasmania to get a better picture of patterns of racial abuse and the profile of both victims and perpetrators and to work with others to develop more informed and targeted preventative interventions. It also represents an important

⁸⁰ See, for example, *Anti-Discrimination Act 1998* (Tas) s 6.

mechanism for more increasing awareness of rights, enables safe bystander action and action particularly by those who may be afraid to make a formal complaint.

Report it! seeks to engage the broader community in promoting tolerance and respectful relationships within the Tasmanian community and allows my office to take preventive and responsive action to address anti-social behaviour based on race and other attributes protected under discrimination law.

A report can be made by anyone: those who are the subject of harassment or abuse and those who witness it. Those making the report can remain anonymous if they wish.

**Been abused or harassed?
Seen abuse or harassment?**

Report it!

We want to know.

Help others by telling us about your experience or what you saw.

SCAN with a QR code reader to go direct to the online reporting form



Enquiry Line 1300 305 062 or 03 6233 4841
E-mail antidiscrimination@justice.tas.gov.au
Web antidiscrimination.tas.gov.au
Web SMS 0409 401 083
NRS TTY 133 677 & ask for 1300 305 062
NRS Speak & Listen 1300 555 727 & ask for 1300 305 062

Office of the Anti-Discrimination Commissioner

Many of the situations reported to me involve insults or other offensive conduct in public places. In some cases this was a precursor to physical violence. In others, no physical violence was involved. In all cases, however, the victims felt sufficiently concerned about the behaviour to report it to my office. Where it was possible to identify respondents (using CCTV or other footage) the report proceeded to a formal complaint.

The following are typical elements of the reports I have received:

- Newly arrived migrants or humanitarian entrants being abused or physically threatened on public streets, bus malls or from passing cars by unknown people. The abuse has commonly involved racist name calling and/or being told to 'go back to where you come from'. In one case, the people reporting had been in Australia for only 2 days.
- Abuse of those who have come here on work visas.
- Racial taunting of long-term Australian residents. For example, I have received a number of reports from an Australian of Indian heritage who had been subjected to months of racially motivated threats and abuse by his neighbour.

In some cases, those who have been the subject of racist abuse are referred to my office by other State authorities on the basis that a complaint made under the Tasmanian Act is the only effective avenue of redress or resolution. Tasmania Police, for example, advised H and his wife N to make a report to Equal Opportunity Tasmania about verbal abuse endured by a woman on a bus who apparently objected to N's headscarf. This and incidents like it are not prosecuted summarily by police; nor is it possible to proceed with a complaint where the alleged offenders is unable to be identified. Therefore, the only avenue available to those who have been abused or harassed in this manner is to make a report using the Report it! process.

It is entirely consistent with the objectives of discrimination law in my view, therefore, to encourage individuals who have been the subject of racially motivated behaviour to make a complaint. Failing to inform people of their rights under discrimination laws leaves them feeling that they are not valued members of our community and that no one cares if they are treated as second-class citizens. They are left feeling that the law is not there to protect them against harm, only others. Further, failing to inform the public of what is potentially unlawful under discrimination law would leave people at risk of behaving in ways that were unlawful. Finally, failing to inform the public of rights and obligations under discrimination laws diminishes the important capacity of discrimination laws to promote healthier and more inclusive communities in which everyone can contribute to the community's economic and social well-being.

A further example in Tasmania is of the action that has been taken to address discriminatory and sexist language displayed on Wicked Campers. Following increasing concern at the nature of the language used on Wicked Camper vans, the Tasmanian Transport Minister, The Hon Rene Hidding, and I met to discuss options to ensure that signs on the vehicles met appropriate community standards. I advised the Transport Minister that much of the signage would be considered offensive, humiliating and insulting under Tasmanian discrimination law and, in some circumstances, may meet the test for incitement. Following that discussion, the Minister and I have on many occasions publicly encouraged anyone who is offended by the signage to make a complaint under the Tasmanian Act.

I consider this approach entirely consistent with my role as Anti-Discrimination Commissioner.

Across a wide range of areas, public officials encourage people to understand rights and obligations and to speak up and report wrongdoing or abuse including: people with disability in institutional settings, children subject to child protection orders; issues relating to consumer protection and workplace safety; women subject to family violence; or elderly people subject to abuse in their own homes. To assert that this should not form part of the role of the Australian Human Rights Commission in relation to racial prejudice and discrimination would be entirely inconsistent with the human rights underpinning of that organisation.

Other reforms

Terms of Reference 4: Whether the operation of the Commission should be otherwise reformed in order to better protect freedom of speech and, if so, what those reforms should be.

Common law and the implied Constitutional protection for freedom of political communication provide the foundation for the assumption of freedom of speech. The presumption is, therefore, that laws that affect these legal principles should do so only to the extent that is reasonable and appropriate to achieve a legitimate end.

As I have argued elsewhere in this submission, I consider that the way in which the RDA is currently drafted is reasonably adapted to the purpose of protecting individuals within the Australian community from communications that are damaging to them and treat them in an offensive or insulting manner because of their race or nationality.

So long as people speak respectfully and on the issues rather than attacking or making demeaning comments about individuals or groups because they have a particular attribute, they are unlikely to fall foul of section 18C. Where a complaint is made, the parties have an opportunity to try to resolve the complaint through conciliation at which they can gain an understanding of the other parties' perspectives. If resolution is not possible, the complaint can be tested through a court process, as is generally the case with legal actions claiming breaches of laws.

Public education

Whilst ensuring that this balance is met in respect of complaints received by the AHRC, I believe that the Commission also has a role in providing guidance and assistance to the broader Australian community on their rights and responsibilities in this area.

The AHRC is currently responsible for public education on human rights, including international human rights obligations. Preparation and publication of guidelines on forms of public expression that meet obligations under sections 18C and 18D of the RDA would assist in increasing community understanding of the rights and freedoms recognised in international human rights obligations and how to exercise and enjoy those rights.

Criminal sanctions

As I have outlined elsewhere in my submission, sections 18B–E of the RDA were introduced in response to the reports of a range of national inquiries including the Australian Law Reform Commission's report, *Multiculturalism and the Law*⁸¹; the Human Rights and Equal Opportunity Commission's *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*⁸²;

⁸¹ Australian Law Reform Commission, *Multiculturalism and the Law* (ALRC Report 57, 1992).

⁸² Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (AGPS, Canberra, 1991).

and the findings of the Royal Commission into Aboriginal Deaths in Custody.⁸³ Each of these inquiries found major gaps in the protections provided by the RDA and recommended that incitement to racial hatred and hostility should be unlawful, including through the introduction of criminal offence provisions.

The Human Rights and Equal Opportunities Commission recommended criminal remedies to address racist violence and harassment, including a new criminal offence of racist violence and intimidation and an offence of incitement to racist violence and racial hatred which is likely to lead to violence. HREOC also recommended that the courts be able to impose higher penalties where there is a racist motivation or element in the commission of an offence.⁸⁴

I am supportive of strengthening protections against racial hatred by adding new provisions to the RDA and/or including criminal sanctions in the federal *Criminal Code* to enable the prosecution of such behaviours or for that behaviour to be identified as an aggravating factor in related offences.

Legislative protection of the human rights to freedom of expression

I note that the Federal Parliament could enact legislative protection of the human right to freedom of expression through an Australian human rights law setting out all of the internationally recognised human rights and freedoms. This would be consistent with Australia's obligations under international law as a State Party to a range of international human rights treaties. It would also be consistent with the recommendations of the 2009 National Human Rights Consultation chaired by Father Frank Brennan SJ AO.

A human rights law of this sort would provide a clearer and better-understood basis for the testing of laws that infringe rights, while fully protecting all of the rights Australia has accepted should be protected, promoted and fulfilled under international law.

⁸³ Royal Commission into Aboriginal Deaths in Custody, *National Report*, Vol 1–5 (AGPS, Canberra, 1988–91).

⁸⁴ Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (AGPS, Canberra, 1991) 301.