



Racial vilification and the Australian Human Rights
Commission

Submission to the Joint Parliamentary Committee on Human
Rights

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1. Introduction

1.1 Background

1. On 8 November 2016, the Attorney-General, George Brandis QC, referred the following matters to the Joint Parliamentary Committee on Human Rights (**Committee**):
 - (a) whether the racial vilification protections in Part IIA of the *Racial Discrimination Act 1975* (Cth) (**RDA**) impose unreasonable restrictions on freedom of speech (referred to as 'freedom of expression' in international law); and
 - (b) whether the complaints-handling procedures of the Australian Human Rights Commission (**AHRC**) should be reformed.
2. Thank you for the opportunity to contribute to the Committee's inquiry.
3. While the Committee's inquiry is described as an inquiry into freedom of speech in Australia, the terms of reference require the Committee to examine matters beyond free speech and report on the complaints handling procedures of the AHRC. This aspect of the inquiry is not limited to the handling of complaints about racial vilification but extends to all complaints processed by the AHRC.

1.2 Executive Summary

4. Most Australian's are proud of our cultural diversity and believe multiculturalism has been good for Australia.¹ Australia is home to the oldest continuing culture in the world, our Aboriginal and Torres Strait Islander population is growing, one in four Australians were born overseas and around half of the population has at least one parent born overseas.²
5. It must be acknowledged however, that racist laws and policies have played a key role in the shaping of Australia, including laws that enabled the oppression and dispossession of Aboriginal and Torres Strait Islander peoples and the White Australia Policy. Racism continues to be a serious and ongoing problem, which significantly impacts on the lives of those who experience racism. Research shows that racism can have significant health impacts on individuals, as well as broader social harms.

¹ Professor Andrew Markus, *Mapping Social Cohesion, Scanlon Foundation Surveys 2016* (2016), <<http://scanlonfoundation.org.au/wp-content/uploads/2016/11/2016-Mapping-Social-Cohesion-Report-FINAL-with-covers.pdf>>.

² Australian Bureau of Statistics, 'Experimental Estimates and Projections, Aboriginal and Torres Strait Islander Australians, 1991 to 2021' (8 September 2009) <<http://www.abs.gov.au/ausstats/>>; Australian Bureau of Statistics, '2011 Census Quickstats' (28 March 2013) <http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/0>.

6. Significantly, most Australian's support action to combat racism in Australia.³ Beyond evidence-based laws, policies and programs, tackling racism requires strong political leadership that communicates pride in Australia's cultural diversity and a commitment to tolerance, respect and social inclusion.

(a) Racial vilification

7. The racial vilification provisions in Part IIA of the RDA were introduced following three major national inquiries on Aboriginal deaths in custody, racist violence and multiculturalism. The laws were considered necessary in order to 'indicate a commitment to tolerance, help prevent the harm caused by the spread of racism and foster harmonious social relations'.⁴

8. The provisions in Part IIA of the RDA are being interpreted sensibly by the courts and are operating reasonably effectively. The laws strike an appropriate balance between the right to freedom of expression and the right to freedom from racial discrimination and vilification.

9. Through the AHRC's conciliation process, the laws provide important access to remedies for victims of racial discrimination. Most complaints of discrimination, including racial vilification, are resolved successfully through the AHRC's low cost, efficient and informal conciliation process.

10. The racial vilification provisions of the RDA set standards of conduct, which complement education and other anti-racism strategies that aim to promote a culture of inclusion, tolerance and non-discrimination.

11. Part IIA of the RDA does not require reform.

(b) Australian Human Rights Commission

12. Data collected by the AHRC reveals that its complaints handling process is generally effective, low cost and quick. 76 per cent of complaints that are conciliated are successfully resolved and most complaints are finalised within 3.8 months.

13. The AHRC's complaints handling and educative functions play a vital role in raising community awareness of human rights and responsibilities and ensuring that victims of discrimination, vilification and harassment have an avenue to pursue an effective remedy. The HRLC recommends that recent budget cuts be reversed so that the AHRC is properly resourced to fulfil its important functions.

14. The Committee should not make any recommendations in relation to terms of reference three and four.

³ Australian Human Rights Commission, *Face the Facts: Cultural Diversity*, <<https://www.humanrights.gov.au/face-facts-cultural-diversity#fn13>> (citing University of Western Sydney, *Challenging Racism Project: National Level Findings* (2008)).

⁴ Australian Law Reform Commission, *Multiculturalism and the Law* (Report 57, 1992) [7.44].

1.3 Summary of recommendations

Recommendation 1:

Part IIA of the *Racial Discrimination Act 1975* (Cth) should be retained as currently worded.

Recommendation 2:

Funding cuts to the Australian Human Rights Commission, announced in 2014, should be reversed so that the Commission is properly resourced to fulfil its important statutory functions.

2. Federal racial vilification laws – sections 18C and 18D of the Racial Discrimination Act

2.1 Why we need racial vilification laws

(a) Racism in Australia

15. Racially discriminatory laws and policies have played a key role in the shaping of Australia, including laws that oppressed and dispossessed Aboriginal and Torres Strait Islander peoples, and the White Australia Policy.
16. While today most Australian's are supportive of multiculturalism, racism is a continuing problem in Australia. There is evidence of a 'disturbing reality of everyday racist abuse'.⁵ The latest Scanlon Foundation Social Cohesion Survey revealed an increase in reported experiences of discrimination based on skin colour, ethnicity or religion (20 per cent of respondents).⁶ 27 per cent of those of a non-English speaking background reported experiences of discrimination. 55 per cent of all those who reported experiences of discrimination were verbally abused and 18 per cent either had property damaged or were physically attacked.⁷ A report published by VicHealth in 2012 revealed that 97 per cent of Aboriginal and Torres Strait Islander people surveyed had experienced racism in the previous year and two thirds had experienced eight or more incidents.⁸

⁵Australian Capital Territory Human Rights Office, *Racial and Religious Vilification in the ACT: Investigating the effectiveness of Part 6 of the ACT Discrimination Act 1991* (Issues Paper, 2006) 3.

⁶ Professor Andrew Markus, *Mapping Social Cohesion, Scanlon Foundation Surveys 2016* (2016), <<http://scanlonfoundation.org.au/wp-content/uploads/2016/11/2016-Mapping-Social-Cohesion-Report-FINAL-with-covers.pdf>>.

⁷ *Ibid.*, 26.

⁸ VicHealth et al, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities. Experiences of Racisms: A Summary* (2012), 2.

17. There are also growing problems with cyber-racism and the significant potential for material published on the internet to promote racial hatred, as recently seen in Kalgoorlie in the lead-up and aftermath of the death of Elijah Doughty.⁹
18. Racism and racial vilification cause harm to individuals, to groups and society as a whole.¹⁰ VicHealth has conducted extensive research into the negative physical and mental health effects of race-based discrimination. For example, a 2010-11 survey found that high levels of racism towards Aboriginal communities in Victoria was associated with poorer mental health and reduced life chances for Aboriginal Victorians.¹¹ The report noted that:
- Racist attacks can cause injury and psychological distress. More subtle forms of racial discrimination, such as bias or exclusion, can be very stressful. They can restrict people's access to resources required for good health, such as information, employment and housing. People who become worried about being racially discriminated against may become anxious and socially isolated – conditions that can contribute to more serious mental disorders.¹²
19. A report published by the Lowitja Institute concluded that reducing exposure to interpersonal racism is an important aspect of improving Aboriginal and Torres Strait Islander peoples' health and that effective anti-racism measures were needed to reduce racism.¹³
- (b) The law is an important tool to combat racial discrimination and vilification**
20. The law has a critical role to play in addressing the harm caused by racial discrimination and racial vilification. The law is an important tool that complements education and other anti-racism strategies that aim to promote a culture of inclusion, tolerance and non-discrimination. Promoting inclusion and mutual respect in a multicultural Australia are critical, not only to the fight against racism, but, as noted by Prime Minister Malcolm Turnbull this year, to the challenges posed by terrorism.¹⁴
21. The law sets standards of conduct that discourage people from racially vilifying others, constraining the spread of racial hatred in society, and encouraging people to speak out publicly against racism.

⁹ See eg. James Purtill, 'Racism. Violent. Deleted: The Facebook Posts Dividing Kalgoorlie' (*Australian Broadcasting Corporation*, 1 September 2016) < <http://www.abc.net.au/triplej/programs/hack/the-facebook-posts-dividing-kalgoorlie/7805346>>.

¹⁰ Professor Chesterman cited in Rees, Lindsay and Rice, *Australian Anti-discrimination Law: Text, Cases and Materials* (Federation Press, 2008), 532.

¹¹ VicHealth et al, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities. Experiences of Racisms: A Summary* (2012). See also VicHealth et al, *Building on Our Strengths: A Framework to Reduce Race-based Discrimination and Support Diversity in Victoria* (2011).

¹² VicHealth et al, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities. Experiences of Racisms: A Summary* (2012).

¹³ Angeline Ferdinand et al, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: The Localities Embracing and Accepting Diversity (LEAD) Experiences of Racism Survey* (2012, Lowitja Institute).

¹⁴ Lenore Taylor, 'Malcolm Turnbull: Multiculturalism and Tolerance will Combat Terrorism' (*The Guardian*, 23 March 2016) <https://www.theguardian.com/australia-news/2016/mar/23/malcolm-turnbull-multiculturalism-and-tolerance-will-combat-terrorism>.

22. To be effective in inhibiting racial vilification, the law needs to provide access to legal remedies for victims of racial vilification.

23. Groups that experience racial vilification are often unable to participate in the public debate on an equal footing with others. Racial vilification can have the perverse impact of causing affected people and groups to retreat from public participation.¹⁵ Racial vilification cases like the Andrew Bolt and Alan Jones cases¹⁶ involved prominent media personalities racially vilifying minority groups. In both of those cases, the law provided an important tool to address this behaviour in a way that public debate could not, given the power and prominence of the media personalities involved.

2.2 Protecting against the harm of racial vilification is a legitimate limit on free speech

(a) Freedom of opinion, freedom of expression and freedom from discrimination

24. International human rights law protects three key human rights which are relevant to the Committee's inquiry.

25. *Freedom of opinion* is the right to hold opinions. *Freedom of expression* includes the freedom to impart and receive information and ideas of all kinds, whether orally, in writing, in print, through art or another medium. Freedom of speech is a concept that falls within the ambit of freedom of expression, as speech is one way of conveying opinion or expression. *Freedom from discrimination* is the right not to be subjected to unfavourable treatment because of your race, religion, sex and a range of other grounds.

26. These rights are enshrined in the *International Covenant on Civil and Political Rights (ICCPR)*. Australia is a party to the ICCPR.

27. The right to freedom of opinion is absolute. It cannot be subject to any exception or restriction. In other words, the government cannot tell people what to think.

28. The right to freedom of expression is a 'foundation stone for every free and democratic society'.¹⁷ It extends not only to information and ideas that are favourably received or seen as 'inoffensive' but also to ideas that may 'offend, shock or disturb'. The freedom to hold and express unpopular views is essential to the 'demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.¹⁸

¹⁵ Angelina Ferdinand et al, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: The Localities Embracing and Accepting Diversity (LEAD) Experiences of Racism Survey* (2012, Lowitja Institute) 24.

¹⁶ *Eatock v Bolt* (2011) 197 FCR 261; *Trad v Jones* (No. 3) (EOD) [2012] NSWADT 33 (in relation to NSW racial vilification laws).

¹⁷ United Nations Human Rights Committee, *General Comment 34. Article 19: Freedoms of Opinion and Expression*, UN Doc CCPR/C/GC/34, 12 September 2011.

¹⁸ *Handyside v United Kingdom* [1976] 1 EHRR 737.

29. The right to freedom of expression is not, however, absolute. Article 19(3) of the ICCPR recognises that the exercise of the right to freedom of expression may be subject to restrictions in certain circumstances, including where necessary to respect the rights and reputations of others. The right to freedom of expression must therefore be balanced against other rights.

30. In practice, freedom of expression in Australia is limited by law in a number of areas, such as sexual harassment laws, offensive and insulting conduct offences, defamation laws, confidentiality laws, contempt of court, misleading and deceptive conduct offences and offshore immigration secrecy laws. Each of these laws restrict freedom of expression.

(b) Racial vilification is not protected expression

31. International human rights law specifically recognises the need to limit freedom of expression to protect against the harm of racial vilification. Article 20(2) of the ICCPR specifically provides that states must prohibit by law any advocacy of racial hatred that constitutes incitement to discrimination, hostility or violence.

32. Australia is also a party to the *International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD)*, which requires Australia to take steps to eliminate the promotion and incitement of racial discrimination and hatred.

33. Article 4 of ICERD imposes a positive obligation on State parties to eliminate harmful hate speech. It provides:

States Parties [...] 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;

[...]

34. Article 4 imposes four distinct obligations on state parties. Those obligations are to prohibit:

- dissemination of ideas based on racial superiority;
- dissemination of ideas based on racial hatred;
- incitement to racial discrimination; and
- incitement to acts of racially motivated violence.

The Committee on the Elimination of Racial Discrimination has stated that Article 4(a) requires legislation to be in place that criminalises serious acts of racial hatred, incitement to such acts and incitement to racial hatred.

(c) Reservations to ICERD and the ICCPR

35. Australia has a reservation regarding article 4(a) of ICERD which states:

The Government of Australia ... declares that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4 (a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4(a).

36. Australia also has a reservation regarding article 20(2) of the ICCPR which provides in broad terms that Australia has laws dealing with public order matters covered by article 20(2) and reserves its right not to introduce further legislation on the matters covered by the article.
37. These reservations limit Australia's international law obligations to implement legislation in accordance with these specific articles.

2.3 The Australian Law Reform Commission's review of traditional rights and freedoms

38. The Committee's terms of reference require it to consider the Australian Law Reform Commission's (**ALRC**) report, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*. This report included an examination of federal laws that might impinge on freedom of speech, including criminal laws, secrecy laws and anti-discrimination laws.
39. While the ALRC observed that section 18C may be broader than that required by Article 20 of the ICCPR, section 18C does not fully comply with Article 4 of ICERD. Specifically, section 18C does not criminalise the 'dissemination of ideas based on racial superiority or hatred'¹⁹ nor 'propaganda activities, which promote and incite racial discrimination'.²⁰
40. The ALRC noted concerns about the lack of clarity in the drafting of section 18C and the potential breadth of the term 'offend'. It suggested that Part IIA of the RDA would benefit from a thorough review, which could include consideration of whether anti-vilification laws could be extended to other grounds, and the effectiveness of current criminal laws in stopping more serious hate speech.²¹ The present review is much narrower than the ALRC suggested.
41. It is important to note that the ALRC did not establish whether Part IIA of the RDA has in practice caused unjustifiable restrictions on freedom of speech.²² However, the Federal Court has found section 18C to be consistent with Australia's obligations under international law and therefore constitutionally valid.²³ In *Bropho v Human Rights and Equal Opportunity Commission*, Chief Justice French (then Chief Justice of the Federal Court of Australia) stated:

¹⁹ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 4(a).

²⁰ *Ibid*, art 4(b).

²¹ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (2016) [4.207]-[4.215]. The suggestion that a particular law should be reviewed 'does not imply that the ALRC has concluded the law is unjustified': [1.18].

²² *Ibid* [4.207].

²³ *Toben v Jones* (2003) 129 FCR 515.

The Convention article which underpins Pt IIA of the Racial Discrimination Act allows states to strike a balance between the need to prohibit the evil of racial vilification and hatred and the need to protect freedom of speech and association within their reasonable limits. Part IIA reflects a like balance in the prohibitions imposed by s 18C and the exemptions it allows by s 18D.²⁴

2.4 The current federal racial vilification laws

(a) **Background to the laws**

42. The RDA makes discrimination against people on the basis of their race, colour, descent or national or ethnic origin unlawful and aims to ensure that people of all backgrounds are treated equally and have the same opportunities.
43. In 1995, the RDA was amended to insert new protections against racial vilification as Part IIA of the RDA. These protections were introduced in response to the recommendations of three major national inquiries that considered some of the most significant forms of systemic racial discrimination in the country: the Human Rights and Equal Opportunity Commission's Inquiry into Racist Violence, the Australian Law Reform Commission's Inquiry into Multiculturalism and the Law, and the Royal Commission into Aboriginal Deaths in Custody.²⁵ The reports of these inquiries recognised the significant harm that racial hatred and vilification can have, both on people's health and in reinforcing other forms of discrimination and exclusion.
44. When introduced, the racial vilification provisions were described as supporting and strengthening social cohesion in Australia²⁶, providing protection to those at risk of racial vilification and sending a clear message of tolerance to those who might racially vilify.²⁷ They were intended to provide 'a safety net for racial harmony in Australia'.²⁸

(b) **Overview of the key racial vilification provisions**

45. The key racial vilification protections are set out in sections 18C and 18D of the RDA.
46. Section 18C of the RDA makes it unlawful to engage in *public* conduct that is reasonably likely to offend, insult, humiliate or intimidate another person or group of people on the basis of their race, colour, or national or ethnic origin. Section 18C does not apply to private conduct.
47. A person's conduct will breach section 18C where it is:
 - (a) done in public;

²⁴ *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 (French CJ) [62].

²⁵ Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (1991) 298-9; Royal Commission into Aboriginal Deaths in Custody, *National Report Volume 5* (1991), recommendation 213; Australian Law Reform Commission, *Multiculturalism and the Law* (Report 57, 1992) [7.47].

²⁶ Racial Hatred Bill 1994, Explanatory Memorandum, 1.

²⁷ Australia, Parliamentary Debates, House of Representatives, 15 November 1994, 3342 (Lavarch).

²⁸ *Ibid.*

- (b) reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people; and
 - (c) done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.
48. Section 18D contains free speech exemptions that provide that section 18C does not make it unlawful to say or do something reasonably and in good faith:
- (a) in the performance or distribution of an artistic work;
 - (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;
 - (c) in the making or publishing of a fair and accurate report of any event or matter of public interest;
 - (d) in the making or publishing of 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.
49. In other words, section 18D allows some racially offensive, insulting, humiliating or intimidating conduct, if it is done reasonably and in good faith in fair reporting, fair comment, artistic works or discussion in the public interest.
50. Section 18C does not create a criminal offence. A person can't be fined or jailed for breaching section 18C. Rather, a person who claims to have been a victim of racial vilification can complain to the AHRC. The AHRC will normally attempt to conciliate the complaint, unless, for example, it thinks the complaint is trivial or misconceived. If conciliation is not successful, the Commission's complaints handling process is terminated and the individual who lodged the complaint then has a right to apply to the Federal Court or Federal Circuit Court.²⁹ If the court finds that a person's conduct is unlawful under section 18C, it can make orders including:
- (a) a declaration that the person has committed unlawful conduct and should not repeat this behaviour;
 - (b) an order to remove any offensive publication;
 - (c) an order to redress any loss or damage suffered; and/or
 - (d) the payment of compensation.

²⁹ *Australian Human Rights Commission Act 1986* (Cth) s 46PO.

2.5 The laws have been applied sensibly by the courts and are operating effectively

51. The federal racial vilification laws have been operating for over 20 years. The laws have been considered in around 100 finalised court cases since 1995. An analysis of these cases shows that the laws have been applied sensibly by the courts and are operating reasonably effectively.

52. In particular, courts have stated that to be unlawful under section 18C, the conduct must have 'profound and serious effects, not to be likened to mere slights'.³⁰ In *Eatock v Bolt*, Bromberg J held that section 18C is 'concerned with consequences it regards as more serious than mere personal hurt, harm or fear'. It 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.³¹

53. Speech or conduct that merely hurts a person's feelings is not prohibited by the RDA.

54. Further, courts have also stated that the conduct must be assessed against an *objective* standard, judged from the perspective of a hypothetical reasonable or ordinary person from the relevant racial group. Courts have said that extreme, atypical or intolerant reactions are not relevant.³² In other words, conduct won't be unlawful if it racially offends an overly sensitive person, but not a reasonable member of the relevant racial group.

55. Acts which have been held to breach section 18C include:

- (a) a website that was deliberately provocative and inflammatory and that doubted the Holocaust and stated that some Jewish people, for improper purposes, including financial gain, have exaggerated the number of Jews killed during World War II, using references which were contrived to smear Jews;³³
- (b) a worker who racially abused another worker from Uganda including by calling him a 'fucking black lazy bastard', and 'fucking black cunt', to the point where the man became suicidal and had to be hospitalised;³⁴ and
- (c) a comment in a meeting by a Perth councillor that a local Aboriginal group should be shot.³⁵

³⁰ *Creek v Cairns Post* (2001) 112 FCR 352 at 356 [16]. See also French J in *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at 124 [70]

³¹ *Eatock v Bolt* (2011) 197 FCR 261 [263].

³² See eg *Eatock v Bolt* (2011) 197 FCR 261 [251].

³³ *Toben v Jones* (2003) 129 FCR 515.

³⁴ *Rugema v Gadsten Pty Ltd & Derkes* [1997] HREOCA 34.

³⁵ *Jacobs v Fardig* [1999] HREOCA 9.

56. Acts which have been found to be offensive to members of a particular racial group, but nonetheless lawful as a result of the section 18D free speech exemptions include:
- (a) a cartoon depicting attempts by a group of Aboriginal elders to recover the remains of the Aboriginal leader, Yagan, from England;³⁶
 - (b) a comedy routine that involved a non-Indigenous person purporting to be an Aboriginal person;³⁷ and
 - (c) a play and a book about Pauline Hanson's policies that argued that Aboriginal people were unfairly favoured by social security policies.³⁸
57. In the high profile case of *Eatock v Bolt*, Andrew Bolt was unable to rely on the section 18D exemptions because the court found he did not act reasonably or in good faith. The court found his articles contained multiple errors of material fact, distortions of the truth and inflammatory and provocative language. The following extract from the court's decision provides one example:

Mr Bolt said of Wayne and Graham Atkinson that they were "Aboriginal because their Indian great-grandfather married a part-Aboriginal woman" (1A-33). In the second article Mr Bolt wrote of Graham Atkinson that "his right to call himself Aboriginal rests on little more than the fact that his Indian great-grandfather married a part-Aboriginal woman" (A2-28). The facts given by Mr Bolt and the comment made upon them are grossly incorrect. The Atkinsons' parents are both Aboriginal as are all four of their grandparents and all of their great grandparents other than one who is the Indian great grandfather that Mr Bolt referred to in the article.³⁹

58. The court in the *Bolt* case made it clear that it is not unlawful to publish articles that deal with racial identity or challenge the genuineness of someone's racial identity, however in Bolt's case, he failed to act reasonably and in good faith.⁴⁰

2.6 Conclusion – Part IIA of the RDA does not require reform

59. The current racial vilification laws provide important protection against racist hate speech. The laws are being interpreted sensibly by the courts and are operating reasonably effectively. The laws generally strike an appropriate balance between the right to freedom of expression and the right to freedom from racial discrimination and vilification. The HRLC does not consider that sections 18C and 18D unreasonably restrict freedom of speech, nor that reform is required.
60. If the Committee does recommend changes to sections 18C and 18D of the RDA, these should be limited to codifying the sensible way that section 18C has been interpreted by the

³⁶ *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105.

³⁷ *Kelly-Country v Beers & Anor* [2004] FMCA 336.

³⁸ *Walsh v Hanson* [2000] HREOCA 8.

³⁹ *Eatock v Bolt* (2011) 197 FCR 261 [406].

⁴⁰ *Eatock v Bolt* (2011) 197 FCR 261.

courts. For example, the HRLC would consider supporting amendments to section 18C to confirm that:

- (a) it applies only to conduct that has a profound and serious effect, not to conduct that has a minor or slight effect;
- (b) the conduct should be judged by an objective standard of a reasonable member of the affected racial, ethnic or national group.

61. If any amendments are proposed, broad public consultation should be undertaken in relation to those amendments, particularly with those communities and organisations whose members are most at risk of experiencing racial discrimination.

3. The Australian Human Rights Commission

62. The AHRC is Australia's National Human Rights Institution (**NHRI**). The internationally agreed *Principles relating to the Status and Functioning of National Institutions (the Paris Principles)*, adopted by the United Nations General Assembly in 1993, provide standards that guide the work of NHRIs around the world.⁴¹ The AHRC is recognised as an 'A status' institution because of its compliance with the Paris Principles.⁴²

63. Promoting NHRIs is a key pillar in the Australian Government's bid for a seat on the UN Human Rights Council in 2018.

64. It is entirely consistent with the Paris Principles for the AHRC as an institution to conciliate complaints and for its Commissioners to raise public awareness of human rights, including the existence of such complaints mechanisms. The Paris Principles emphasise the importance of increasing public awareness of efforts to combat discrimination, particularly racial discrimination, including through the use of media.⁴³

3.1 The AHRC's complaints handling function

65. Complaints of racial vilification under section 18C of the RDA must first be lodged with the AHRC, within one year. The complaints process is regulated by the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**).

⁴¹ *Principles relating to the Status and Functioning of National Institutions (The Paris Principles)*, GA Resolution 48/134, 20 December 1993.

⁴² Australian Human Rights Commission, *Inquiry into Freedom of Speech: Australian Human Rights Commission Submission to the Parliamentary Joint Committee on Human Rights* (2016) [155].

⁴³ *Principles relating to the Status and Functioning of National Institutions (The Paris Principles)*, GA Resolution 48/134, 20 December 1993, principle 3(g).

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66. Other complaints of discrimination under the RDA, as well as complaints of discrimination under the *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth) are also lodged with the AHRC.
67. Thus, any change to the AHRC's complaints handling process recommended by the Committee will impact on all complaints, not just those made under section 18C of the RDA.
68. It should be noted that court proceedings can only be commenced if the AHRC terminates a complaint.⁴⁴ A complaint can be terminated for a number of reasons, including because it is 'trivial, vexatious, misconceived or lacking in substance', or because the complaint does not relate to unlawful discrimination.⁴⁵ The AHRC has no role in decisions by individuals to commence court proceedings.

(a) Complaints handling data

69. Over the past five years, an average of 2,282 complaints were lodged with the AHRC each year. On average, only 117 (five per cent) were made under section 18C, and less than four of these complaints proceeded to court.⁴⁶
70. The AHRC received 2,013 complaints in 2015-16, only 77 (four per cent) of which related to section 18C.⁴⁷ 52 per cent of complaints received under section 18C in 2015-16 were resolved at conciliation. 12 per cent were withdrawn and only one complainant commenced court proceedings.⁴⁸
71. The AHRC's complaints resolution process is free, informal and accessible. Of complaints that proceeded to conciliation in 2015-16, 76 per cent were resolved successfully and resort to formal court proceedings avoided.⁴⁹ 88 per cent of surveyed complainants and 98 per cent of respondents reported satisfaction with the service provided by the AHRC.
72. The complaint resolution process is also a relatively quick one, with the average time from complaint to resolution approximately 3.8 months.⁵⁰ We note that cuts to the AHRC's budget have impacted significantly on the number of staff available to perform the AHRC's investigation and conciliation functions.⁵¹
73. The AHRC's complaints handling process appears to have benefits beyond the individuals involved. For example, the AHRC estimated that 34 per cent of agreements reached at

⁴⁴ *Australian Human Rights Commission Act 1986* (Cth) s 46PO.

⁴⁵ *Ibid* s 46PH.

⁴⁶ Australian Human Rights Commission, *Inquiry into Freedom of Speech: Australian Human Rights Commission Submission to the Parliamentary Joint Committee on Human Rights* (2016) [28].

⁴⁷ Australian Human Rights Commission, *2015 – 2016 Complaints Statistics* (2016).

⁴⁸ Australian Human Rights Commission, *Race Hate and the RDA* (2016)

<https://www.humanrights.gov.au/sites/default/files/AHRC_RDA_Explainer_2016.pdf>.

⁴⁹ Australian Human Rights Commission, *2015 – 2016 Complaints Statistics* (2016).

⁵⁰ *Ibid*.

⁵¹ Australian Human Rights Commission, *Inquiry into Freedom of Speech: Australian Human Rights Commission Submission to the Parliamentary Joint Committee on Human Rights* (2016) [167].

conciliation included terms that will have benefits beyond the individuals involved in the complaints, such as agreements to conduct anti-discrimination training or to introduce anti-discrimination policies. Participation in the AHRC's conciliation process itself carries broader benefits in terms of the individuals involved gaining a better understanding of their rights and responsibilities under anti-discrimination and human rights law.⁵²

74. For individuals who are the victim of discrimination, vilification or sexual harassment, the AHRC's low cost, efficient and informal conciliation process provides an essential avenue for access to justice.

(b) The impact of funding cuts on the AHRC's operations

75. In May 2014, the Federal Government announced funding cuts of \$1.7 million to the AHRC over four years. Subsequently, in December 2014, the Government announced further cuts of around 30 per cent over three years.
76. The decision to further cut the AHRC's funding in December 2014 came at a time when its President was subject to unprecedented pressure from senior government ministers to resign following the AHRC's decision to investigate and report on the treatment of children in immigration detention.
77. A practical impact of these politically motivated funding cuts is a backlog in processing complaints of discrimination and an increase in the average time to finalise complaints.⁵³
78. It is critical that the AHRC is sufficiently funded if it is to fulfil its vital statutory functions effectively. The HRLC recommends the restoration of funding to the AHRC that was cut in 2014-15.

3.2 The AHRC's education and awareness raising function

79. The third term of reference asks whether 'the practice of soliciting complaints to the Commission' adversely impacts on freedom of expression or constitutes an abuse of power. The HRLC is not aware of AHRC officers or third parties having ever solicited complaints. The term of reference may have been included in response to the unfounded accusation that the Race Discrimination Commissioner solicited complaints in response to the cartoon by Bill Leak published in *The Australian* on 4 August 2016.
80. The Race Discrimination Commissioner's comments in the aftermath of the Leak cartoon, details of which can be found in the AHRC's submission, did not solicit any complaints.⁵⁴ Rather, he provided information, in response to a question from a journalist, about the AHRC

⁵² 72 per cent of surveyed participants said that participation in conciliation improved their understanding. See Australian Human Rights Commission, *2015 – 2016 Complaints Statistics* (2016).

⁵³ Australian Human Rights Commission, *Inquiry into Freedom of Speech: Australian Human Rights Commission Submission to the Parliamentary Joint Committee on Human Rights* (2016) [289].

⁵⁴ *Ibid* [317]-[325].

as an avenue for complaint for anyone racially offended, insulted, humiliated or intimidated by the cartoon.

81. As noted above, such an educative function is entirely consistent with the Paris Principles. The Commissioner's conduct was also consistent with the AHRC's functions under the RDA – to promote an understanding and acceptance of, and compliance with, the RDA.⁵⁵
82. It should be noted that the Race Discrimination Commissioner, like the other Commissioners, does not have a role in investigating or conciliating complaints of discrimination. The law deliberately delineates between the AHRC's function in impartially conciliating complaints and the role of Commissioners 'in promoting the protection of human rights'.⁵⁶
83. The Committee should not make any recommendations under this term of reference.

3.3 The AHRC's operations and freedom of speech

84. The fourth term of reference invites comment on whether the operations of the AHRC generally need reformed to better protect freedom of speech.
85. One of the Commission's functions is to promote an understanding and acceptance of, and compliance with, human rights. This includes promoting freedom of speech. The AHRC's submission to the Committee details its extensive work in promoting and protecting freedom of speech.⁵⁷ The HRLC supports the AHRC, as our national human rights institution, being properly resourced to continue to protect and promote freedom of speech in Australia.

4. Concerns about the origins of the Committee's inquiry

(a) Origins of this inquiry

86. It is entirely appropriate to review the operation of the racial vilification provisions of the RDA and the functions of the AHRC from time to time, however it is important to acknowledge that this inquiry has come about only two years after a proposal to repeal section 18C of the RDA was abandoned by the Abbott Government due to strong community support for section 18C.
87. At that time, the Federal Government's attempt to amend the racial vilification provisions of the RDA was driven by a strong ideological view that the outcome in the *Eatock v Bolt* case was wrong and should be prevented from happening again.

⁵⁵ *Racial Discrimination Act 1975* (Cth) s 20.

⁵⁶ Commonwealth, Parliamentary Debates, House of Representatives (3 December 1998), p 1276 (the Hon Daryl Williams MP, Attorney-General), second reading speech for the Human Rights Legislation Amendment Bill 1998 (Cth).

⁵⁷ Australian Human Rights Commission, *Inquiry into Freedom of Speech: Australian Human Rights Commission Submission to the Parliamentary Joint Committee on Human Rights* (2016) [338]-[344].

88. The Attorney-General's decision to refer this inquiry to the Committee appears to have been driven by a reaction to:
- (a) The filing of complaints under section 18C of the RDA by three Aboriginal people against *The Australian* and Bill Leak in relation to a cartoon drawn by Leak and published by *The Australian* on 4 August 2016; and
 - (b) The decision of Judge Michael Jarrett of the Federal Circuit Court of Australia to dismiss an application by an Aboriginal woman alleging unlawful discrimination pursuant to section 18C against three students at Queensland University of Technology.
89. The complainants in the former have withdrawn or not proceeded with their complaints after an extraordinary level of pressure and negative media coverage, particularly by *The Australian*.
90. Together, the above cases have seen extraordinary and misinformed attacks, including by the Prime Minister and senior government ministers, on the AHRC's functions and its President, Professor Gillian Triggs.⁵⁸ These attacks follow the unprecedented personal attacks on Professor Triggs in 2014 after the AHRC's report into the treatment of children in immigration detention. As the HRLC noted in its report, *Safeguarding Democracy*, these attacks undermine a vital institution that provides an important check on government power.⁵⁹
91. Much of the public debate about section 18C has been reactive and based on a misunderstanding of the law and the AHRC's functions. As the ALRC noted in its 2016 report about traditional rights and freedoms, '[t]hose with concerns about the potential scope of s 18C often place little emphasis on how the provision has been interpreted in practice by the courts'.⁶⁰
92. The Committee needs to be mindful of the impact of the highly politicised public debate and inaccurate reporting about Australia's federal racial vilification laws on multicultural communities. The importance of the Committee conducting this inquiry in an objective and evidence-based manner, as it has with other inquiries, cannot be understated.

⁵⁸ See eg Michael Gordon, 'Gillian Triggs Hits Back at 'Deeply Misleading' Malcolm Turnbull Over 18C Claims' (*Sydney Morning Herald*, 7 November 2016) <http://www.smh.com.au/federal-politics/political-news/gillian-triggs-hits-back-at-deeply-misleading-malcolm-turnbull-over-18c-claims-20161107-gsjun8.html>.

⁵⁹ Human Rights Law Centre, *Safeguarding Democracy* (2016) 32.

⁶⁰ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (2016) [4.189].