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PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

Wednesday, 1 February 2017

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

Terms of Reference for the Inquiry:
To inquire into and report on:
Human rights
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Committee met at 09:00

CHAIR (Mr Goodenough): I declare open this public hearing of the Parliamentary Joint Committee on Human Rights. The committee is hearing evidence today on its inquiry into freedom of speech in Australia, and I welcome all here today. This is a public hearing and a Hansard transcript of the proceedings is being made. The hearing is also being broadcast via the Australian parliament's website.

Before the committee starts taking evidence, I advise all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as contempt. It is also a contempt to give false or misleading evidence to a committee.

The committee prefers all evidence to be given in public, but under the Senate resolutions witnesses have the right to request to be heard in private session. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will consider whether it will insist on an answer having regard to the ground which is claimed. If the committee determines to insist on an answer the witness may request that the answer be given in camera. Such a request may also of course be made at any other time. Welcome. Do you have any comments to make on the capacity in which you appear?

Prof. Rice: I am a professor of law at the Australian National University.
Dr O’Connell: I am a senior lecturer at the University of Technology Sydney.
Dr Allen: I am a senior lecturer at Monash University.
Ms Eastman: I prepared my submission with Mr Glover, who sends his apologies.
Prof. Appleby: I am an associate professor at the University of New South Wales.
Ms McKinnon: I am an associate lecturer at the University of New South Wales.

CHAIR: I invite you to make brief opening statements, and then members of the committee may ask questions. Could you please limit the length of your statements in the interests of time, thank you.

Prof. Rice: On behalf of the Discrimination Law Experts Group, I will make a brief opening statement. In doing so, I speak on behalf of those whose names are appended to our submission, but there is an omission—Professor Margaret Thornton should also be added to that. I say that for the record and apologise to her for that omission.

I will summarise our position for members of the committee. In essence, we advocate a conservative position. No change needs to be made to 18C and very little change, if any, needs to be made to the Australian Human Rights Commission's complaints procedures. I will briefly summarise why. We say that 18C and 18D and the related case law operate together to limit free speech only insomuch as is necessary to protect against racially discriminatory speech. At the same time—and this is an important point of policy—this balance protects the right to free speech of people who would otherwise be silenced by offensive language. So it operates notoriously to limit free speech to an extent, but it needs to be kept in mind the work that it does to enable free speech among those who would otherwise be oppressed.

On the Human Rights Commission complaint procedures, we make an overall point that the procedures operate for all complaints under the federal discrimination laws. Any discussion of a change to the procedures must take account of the way the procedure works for each of the complaints that can be made under four separate discrimination acts.

Specifically, we say these six things about the Australian Human Rights Commission Act. Firstly, the president has very extensive powers to terminate a complaint, and no wider grounds are reasonably possible. We became aware only last night, Mr Leeser, of your submission and we respectfully disagree with your analysis of 46PH and with the feasibility of the amendments you propose.
The second point is that the president, we say, must maintain a discretion to terminate. In dealing with a wide variety of complaints in many circumstances, current and unanticipated, the president ought not to have his or her conduct compelled by statute, which is proposed.

Thirdly, we say that the commission's delays would be addressed by a reinstatement of the funds that have been cut from its budget over the years. Fourthly, the commission has a duty to promote human rights that are protected by anti-discrimination legislation. That duty is enshrined in the act and there is no need to make any changes to that function. Fifthly, unmeritorious claims in all types of matters are common occurrences in courts. The Federal Court is already armed with sufficient procedural tools to deal with unmeritorious claims and no changes need to be made.

Finally, whether and how a respondent should be notified of a complaint, is, on our reflection, a very complex issue, having regard to the processes of the commission and the wide variety of complaints they receive. We would ask the committee to invite us to make a further written submission on some of the complex drafting that might surround notification of respondents. In short, there are circumstances where a respondent ought not be notified of a complaint, thereby avoiding cost and distress to the respondent when a complaint can be and is terminated at an early stage. So it is not a straightforward proposition, but it is one that we think we can navigate with a bit of time and reflection. That, in summary, is our submission.

Mr PERRETT: Thank you for taking the time to make a submission. The Gilbert + Tobin submission says preserving section 18C in a robust form not only provides important protections to racial minorities—and I note your comment about it facilitating their freedom of speech, which might otherwise be silenced—but you also say it is 'a matter of international legal obligation'. Could you please explain the importance of section 18C to our international legal obligations? I will throw that open to all of you, if you like.

Prof. Rice: Very briefly, we are a signatory to both the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination. Both of those carry with them an obligation on us to ensure that we act to prevent discrimination, and discrimination in both those acts is broadly defined to include race hate speech. I will leave it as simply as that. We have an international obligation under those conventions.

Mr PERRETT: Does anyone need to add to that, or is it as simple as that?

Senator McKIM: Sorry, Mr Perrett. Could I interrupt briefly? Chair, the panellists here have submitted a range of submissions and I wonder if any others would like to make an opening statement before we go into questions. We are dealing with a few submissions, so they are not always of the same view on every matter. I just wondered if you right throw it open for an opening statement from anyone else who wishes to make one.

CHAIR: Yes, certainly. That is valid point.

Mr PERRETT: I thought Professor Rice was speaking for all of you.

Prof. Rice: No. I am here with the two colleagues to my left, but then we are in three different groups.

Mr PERRETT: I beg your pardon. I am always in favour of collective organisations.

CHAIR: Ms Eastman, would you like to make an opening statement?

Ms Eastman: Yes. I prepared a submission with Mr Glover. I do not want to repeat the matters set out in the submission, but I thought I might say something briefly from the perspective of a practitioner who works with these laws on a fairly regular basis. A long time ago I was also a senior legal officer at the Australian Human Rights Commission, before it had its current name, and my role as a senior legal officer was to work with the commission at a time when the complaint-handling function was slightly different to the way in which the complaints are presently being dealt with. Back in those days, and it was really pre the High Court's decision in Brandy, the Human Rights Commission dealt with complaints through each of the specific subject matter commissioners. So they had the responsibility to investigate and conciliate complaints and then if the complaints could not be resolved or the commissioners formed a view that the complaint should be brought to an end because it was lacking in substance or the like, there was a procedure within the commission and that was exercised by the then president and the senior legal officers of the commission to review the decisions to decline complaints. But we also had a function of hearing and determining the complaints. That process ultimately was unconstitutional and the result now is a split between a role of the commission and the role of the courts in dealing with complaints of this kind. It is important to understand the complaint-handling function not only limited to the commission but also the role of the courts.

At the present time, it takes nothing to make a complaint to the commission. So step 1 is all that is required: a written allegation of unlawful discrimination. That goes to the commission. All the commission really does at that
stage is to 'determine'—and I use that word loosely—whether the person has standing to make a complaint. But the next step is the complaint is then referred to the president of the commission and she has the role of investigating and attempting to conciliate the complaint. She does not have any function in terms of determining the merits of the complaint, but she can form a view, for example, that a complaint may be lacking in substance or trivial and make a decision to terminate the complaint.

Once that complaint is terminated, that is the end of the commission's role. But the important issue then becomes what happens and it becomes entirely a matter for a complainant, and he/she can decide to commence a proceeding in the Federal Court or the Federal Circuit Court. The Federal Court is not bound by anything that the commission has done. The Federal Court does not have to take much notice of the grounds on which a complaint has been terminated. Often, I think, the difficulties coming out of some of the commentary around the complaint-handling function is not so much the frustration at the commission level but the fact that you have to face a complaint in the court, and the standard that the court has to dismiss a complaint is very high. The court is not going to dismiss a complaint simply because it is lacking in substance. The court has to be satisfied that the complaint is doomed to fail.

In cases where discrimination or vilification rely very much on people's perceptions of events but also the need to give evidence about what might have actually happened in an event, a court will be very slow to dismiss a complaint until everybody has had the opportunity to be heard. So I differ from my learned colleagues to the right of me because I do think that the Federal Court probably needs to have some mechanism to filter out unmeritorious complaints rather than in putting the onus on a respondent to have to initiate a strikeout application.

In our submission, we have highlighted a regime that now operates in New South Wales where if, for example, the president of the Anti-Discrimination Board—and here the same could be done with the president of the commission—decides to terminate a complaint as lacking in substance, then the person who wants to commence a proceeding in the court would have to have the court's leave to proceed. That would provide a degree of fairness both to complainants and to respondents.

The main point that I wanted to highlight is a technical point but it comes from 20-plus years experience in representing a wide range of people in the courts that there could be a stronger process for dealing with the management of complaints when they come to the court phase. We have picked up the observations you made, Mr Leeser, which were in a speech to the association and I have dealt with that in the submission in responding to some of your concerns.

Mr LEESER: I will come back to that later.

CHAIR: Further opening statements?

Ms McKinnon: Australia has obligations to protect vulnerable racial minority groups against hate speech under international law and as part of our broader commitment as a liberal democratic society that values and recognises multiculturalism and diversity. We also have a commitment to provide appropriate protections for free and fair speech on race related issues.

Our primary submission is that the current protection in 18C strikes an appropriate balance between these two commitments. We make this statement based on the understanding of the statutory context of section 18C and particularly the exemptions in section 18D for reporting, commentary and other forms of expression; the judicial interpretation of both of these sections; and the powers already bestowed on the Australian Human Rights Commission in section 46PH of the Australian Human Rights Commission Act.

We also claim, in our submission, that section 18C is unlikely to be in breach of the constitutional protection of political speech, because the provisions represent a proportionate response to the threat that racial hate speech poses to Australia's social commitment to diversity. However, we note that the seemingly widespread misperception of the scope of the protections afforded by section 18C and the ongoing public and political controversy that this has caused are having a detrimental effect and are undermining the capacity of the provision to achieve its objectives. The exaggerated effect of section 18C is undermining the capacity of the provisions to foster a sense of wider community belonging amongst vulnerable racial groups. It could also potentially have a chilling effect on legitimate political speech.

Prof. Appleby: It is based on these concerns that in our submission we have made a number of proposals for amendments to the Racial Discrimination Act and the Australian Human Rights Commission Act, should it be deemed necessary to clarify the intention and scope of the provisions. We do want to emphasise that any such reform needs to be accompanied by both clear political and public messaging, that it does not reflect a shift in community values and that the amendments are accompanied by a continued rejection of racial hate speech in our communities.
society and an ongoing public commitment to diversity and multiculturalism. In the submission itself, we make three proposals for reform and the details are in the submission, but I will briefly outline them.

The first is a formalistic reform. It is intended to increase public awareness of the existence of the exemptions, and the suggested reform is that sections 18C and 18D be brought together into the one provision.

The second proposed amendment is a recommendation that the words 'offend and insult' in section 18C be amended in one of two ways, which we have put forward, either by replacing these words with the words 'seriously offend or insult' or to replace these words with the words 'demean and degrade or promote hatred'. We say in the submission and we explain that these amendments have been crafted so that the face of the provision better reflects judicial interpretation of the current language and other international and domestic provisions prohibiting racial hate speech.

Finally, we recommend that some clarification could be added to the existing powers of the President of the Australian Human Rights Commission to dismiss complaints when satisfied they do not amount to unlawful discrimination.

These recommendations are made for a slightly different purpose. They are made to reduce the impact on those who are the subject of clearly unsubstantiated claims. Our suggested amendments would ensure that the power is exercised by reference to the scope of the exemptions to section 18C and section 18D and to propose an expedited process for having the President of the Australian Human Rights Commission consider the exercise of the discretion to terminate a complaint. Thank you for the opportunity to make the opening statement.

Mr PERRETT: I was asking about section 18C reflecting our international legal obligations. We got a great answer from Professor Rice saying, 'Yes, it did,' if I could paraphrase it. I was wondering if anyone else wanted to add to that answer.

Ms Eastman: I think I agreed with Professor Rice

Prof. Appleby: For the record, we also agreed with the response from Professor Rice.

Mr PERRETT: In some of your submissions, and certainly in your opening statements, there is an attempt to codify section 18C to reflect the judicial interpretation. Would anyone like to comment on whether you think that would change the protections that are currently in section 18C; and was that anyone's intent?

Dr O'Connell: Our submission does not address that directly, but we would have a concern with changing the language, where that language did not need changing. If it is to address public misunderstanding, it is better to address that misunderstanding through education rather than law reform that may not be warranted.

Mr PERRETT: So your position is that a public education campaign to give the judicial interpretations of the words that are in the legislation would achieve much the same as Associate Professor Gabrielle Appleby has outlined?

Dr O'Connell: Yes, because if you are adding words to a law, you cannot predict necessarily whether that will make a difference to the judicial interpretation of that section.

Ms Eastman: I agree with that approach. As a practitioner I think it is very—

Mr PERRETT: Sorry, which approach?

Ms Eastman: I agree with both approaches. You see, I am taking my usual lawyer's middle ground position: I act for all sides!

Mr PERRETT: You really are in the middle, aren't you!

Ms Eastman: I agree with this approach, that there probably is not a need for change at the present point in time if people understand the provisions. I agree with this approach to the extent that there is misunderstanding as to how the law operates. As a legal practitioner advising clients, I always think it is important that the law be stated clearly, so that ordinary people using the law understand their respective rights and obligations. Justice Lockhart once said, 'Discrimination law', of which this is a part, 'should not be the domain of experts, and there should not be a need for experts in this area of the law. The law should be clear and simple.'

I am an expert in the area, but I do agree that the law should be clear and simple, so if clarification to reflect the way the courts are interpreting the law would assist, then I would support that approach. But I am not sure it would need it if there were sufficient education about how these provisions are intended to operate and the impact they have on ordinary people.

Prof. Rice: And, may I say—how they have operated without remark for 15 years, until the recent excitement in the last couple of years.
**Prof. Appleby:** I would like to respond in relation to our particular submission in response to the comments from the table, which I am very sympathetic to. In our submission, we provide two options for reform. In the first option for reform we have tried to capture the judicial interpretation of the scope of section 18C, and we would argue that it is unlikely to change the scope if that reform were adopted. However, we have also put forward alternative language that does not exactly reflect the scope of the current judicial interpretation, but rather reflects the scope of international protections against racial hate speech and domestic protections for racial hate speech. That is a slightly narrower scope than it is currently on the face of section 18C, but whether it will be different from the judicial interpretation is something that is not known. Because we have put forward two options for reform, the question you ask actually depends on which option you would take.

In our submission, we also make the point that we agree that in an ideal world, a public education campaign about the traditionally interpreted scope of section 18C would be the best option. We have seen a concerted campaign by many experts and politicians regarding the correct scope of section 18C, yet seemingly widespread misconceptions about its scope continue to persist.

**Mr PERRETT:** The misunderstandings of section 18C seem to play out regularly.

**Prof. Appleby:** And I think this is exacerbated, because if you go back to the language of section 18C, it simply says 'insult or offend'. In order to understand the true scope, you would have to go either to the commentary and believe the experts or to the cases themselves. There is this rule of law ideal that the law should really reflect on its face what it is in its substance.

**Mr PERRETT:** Would any of you have any concerns if, despite the best intentions of educating and informing and stopping this misunderstanding of section 18C, any change to section 18C or 18D might send the wrong message about acceptable behaviour toward racial minorities?

**Prof. Rice:** That is what impels our submission.

**Prof. Appleby:** And we share those concerns, but we are also concerned that the current state of the public debate is such that section 18C is not being able to perform the role that it is intended to perform in society and that there needs to be some way forward from this impasse.

**Senator PATERSON:** Professor Rice, your submission is not unique in that it opposes change to 18C. There have been many people who have that point of view, but it is slightly unique in that it is also generally opposed to change to the Human Rights Commission. There have been many other submissions that whilst opposed to the change of 18C are supportive to changes to the Human Rights Commission process. I was particularly interested in your comment that you do not believe that the commission needs any wider powers to terminate cases. Would you expand on why you believe that?

**Prof. Rice:** Very briefly, and then I will hand to my colleague, Dr O'Connell, who was herself an officer of the commission. The terms of the section—and you would have heard from the commission itself—are in our submission very broad. In fact, we have said we cannot think that they could be reasonably broad, which is where we differ from Mr Leeser. The commission has powers to dispose of the matter at any stage on a very wide range of criteria, and perhaps for appearances some tinkering might be done so that one might say that one has done something, but in substance in our submission it works very well, but Dr O'Connell has done it.

**Dr O'Connell:** I largely agree with what Professor Rice has said. If you look at the language of the legislation and specifically section 46PH it is very broad. It is hard to think of anything that you could add there that would assist with the process. I do think sometimes there is a bit of a misunderstanding in terms of what the president needs to do. She needs to attempt to conciliate, not to make a legal determination, and in order to conciliate you have to understand the full circumstances for the complainant and the respondent. Obviously there will be complaints where it is immediately obvious that it does not fall within the law, but in order to have that fairness to respondents as well as complainants there needs to be some consideration rather than just having a very early rejection of a complaint.

**Senator PATERSON:** I will let Mr Leeser ask questions about his own proposal, but one of the reasons why many people suggested that the commission should have more power and, in some people's view, an obligation to terminate cases that are lacking in merit is because of the Queensland University of Technology case, in which a Federal Circuit Court judge certainly took the view that it did not have a great deal of merit, but Gillian Triggs herself has said that she did think it had 'a level of substance', I think were her words. So you do not think that the QUT case is evidence of a case that could have been resolved more quickly and more harmoniously if the commission had terminated it earlier?
Dr O'Connell: Yes, but in my view, and hopefully in the view of my colleagues, that complaint could have been terminated more quickly if there were the resources to consider it more quickly. The president of the Australian Human Rights Commission is not a judge, and it would concern me if—

Prof. Rice: By offer. I mean, constitutionally.

Dr O'Connell: Yes. That is what I mean, of course. Thank you, Professor Rice. And her role is to conciliate, so her or his position is not one where a full determination is appropriate. I think that is the role of the court. It is not the role of the Australian Human Rights Commission. They need to determine if a complaint can be conciliated within the broad terms of the legislation.

Prof. Rice: If I can just evoke the picture that Ms Eastman painted for you and disentangle some of the issues that, with respect, you have raised. There are different procedures, so the litigants in the QUT Federal Court case chose to be litigants after the commission proceedings finished. Whatever happened at the commission, they were free to commence—

Senator PATERSON: In what sense did they choose to be litigants?

Prof. Rice: The plaintiffs chose to be litigants.

Senator PATERSON: That is exactly it.

Prof. Rice: That is what I am saying.

Senator PATERSON: The respondents did not choose.

Prof. Rice: No, they did not. So as is the case with every single case that is happening across the road now in every court, people choose to go to court.

Senator PATERSON: I understand the point of view. The argument is, though: had the commission terminated the complaint, that may have discouraged the applicants from becoming litigants. They have may have been discouraged by that and thought, ‘Actually, this is not going anywhere.’ That is what has been suggested.

Prof. Rice: Two quick reflections on the QUT case. One is that it represents what happens in cases. That is why we have the system that allows people, with merit or not, to invoke the power of the courts. So it was unremarkable in that sense. It is, however, representative of something anomalous in the commission's procedure.

As you know from submissions, fewer than two per cent of vilification cases go to court. The QUT case does not represent the way things might go wrong in the commission processes with all the other complaints. It really does distort an understanding of how the commission exercises its powers.

Senator PATERSON: So if this committee forms the view that we did not like what happened in the QUT case and that we wanted to seek to prevent cases like that from proceeding in the future, what would your advice be as to how we could achieve that?

Prof. Rice: In our view, you so rarely get a QUT case that to hang public policy on it would be, with respect, a huge mistake because it does not represent a problem that needs to be addressed.

Senator PATERSON: I think it was a problem for the students!

Prof. Rice: As it is a problem for every respondent to a case, that they ultimately win and withstand. As defendants in commercial tax, environmental and sale-of-goods cases, when you run a case—

Senator PATERSON: These students were not running a business in a risky environmental area, they were expressing their views on Facebook at university.

Prof. Rice: No. People will lose a case, and that is the price we pay for having an accessible legal system. The QUT case, as I said, in some way represents what happens in court.

Dr O'Connell: Yes, I completely agree with Professor Rice. I think it is dangerous to look at one specific case, where there may be a natural feeling of sympathy, and then try to amend law motivated by that case. You can have all the sympathy in the world for people in individual cases, but the reason we support a rule of law is so that people can access legal remedies when that is appropriate.

Senator PATERSON: It is quite a utilitarian view of it, though; that as long as we get it right most of the time, if there is an instance where it is not quite right that is just the price we have to pay.

Prof. Rice: No—and if it were possible to refine the legislation to minimise that we certainly would. But in our submission it is not—

Senator PATERSON: You do not think there is any way we could refine it to protect the bulk of the cases that you think do have merit but eliminate cases like this, which do not have merit?
Prof. Rice: Not without treating, for some unspecified reason, racial vilification cases as warranting some special and harsher treatment categorising them differently. We do not accept that there is any reason for treating them differently from any other statutory right.

Senator PATerson: Fair enough. Just briefly, Ms Eastman: if I understand you correctly, you suggested a greater power for the Federal Court to dismiss cases. Could you just expand briefly on how that would work?

Ms Eastman: I will use the questions that you have just asked. If, for example, the Human Rights Commission had terminated, or the president had terminated, the complaint immediately when the complaint had been received then those respondents may never have known that a complaint had been made. They would then know about it for the first time when they were served with legal process, and the allegations put in an application to the court might be very slim. Unless those students, in that case, or a respondent says, 'I don't think there's a case against me,' the onus is then on those respondents to have to persuade the court that the matter should be summarily dismissed. If the respondents are unsuccessful in achieving a dismissal then the matter will run to trial. So the parties then have to put on their evidence, incur their costs and attend a hearing, and that is all done in a very public way.

My suggestion is that if the commission takes the time to attempt a conciliation, the respective parties will have a clearer understanding of the strengths and weaknesses of their own cases before the proceedings commence and respondents will not hear about it for the first time at the court application. If the president forms a view that the complaint is lacking in substance, she could terminate on that ground and the court could then have regard to the reasons why she terminated. In that case, an applicant could then seek leave from the court to be able to proceed. That is what happens in New South Wales.

If the president terminates the complaint because the matter cannot be conciliated, and expresses no view whatsoever on the substance of the complaint, then it is business as usual. But the court needs some filtering process to streamline complaints that would otherwise continue, because the test that is presently in the court on summary dismissal is a very difficult test and it requires the respondents to initiate that application. So my suggestion is that the onus rests on the person wanting to bring the proceeding to demonstrate that they should be allowed to proceed.

Senator PATerson: Thank you. I did have questions for other witnesses but, given time, I will put them—

Mr BROADBENT: I have one on exactly the same subject. It was reported in The Australian today and I am not pushing The Australian's point of view on this whole issue that the respondents did not know for a long time that there was an action being taken against them. And it was being dealt with by the body that happened to be a university at the time. How is it that someone could have a complaint against me, or anybody else, and me not know about it for a very long time?

Ms Eastman: I do not know the details of that particular complaint, but, in talking from general experience, it is possible for a couple of reasons. Firstly, a complaint may come into the commission and the commission needs time to clarify exactly who the complaint is being made about. Often complaints are just against a trading name or is a fairly diffuse type of complaint that does not identify a respondent. So the commission needs to take time to identify who the respondent is. Secondly, sometimes, in engaging with a complainant and taking more information, the complainant might say, 'I don't want to take it any further,' and withdraw their complaint at that time. In those circumstances there is no reason for a respondent to ever know that a complaint had been made about them. The process and one of the great benefits of the commission is it is all confidential. So no-one would ever need to know about that. But in some cases it is important for respondents to know about the complaints early because they need to protect their rights as well. They need to ensure that they have kept their relevant evidence and that they have kept track of the things that they need to keep track of to defend themselves as the matter goes on.

Mr PERRETT: Especially if their account has been hacked.

Ms Eastman: That is right. In this era of social media and fast-moving change respondents also need to have the opportunity to protect their rights and interests as well. That is very important. It is ultimately a question for the skill and the expertise of the investigators and conciliators at the Human Rights Commission to make a decision as to when they will notify a respondent. But in some cases the complaints are amended well into the process, and new respondents might be added. So there will be a whole range of practical reasons why a respondent might not know immediately. And, in some cases, that is a very good thing.

Dr Allen: I want to add something to that which we have not mentioned. This process is applying to all complaints being brought before the commission, and the vast majority of those are employment complaints. So, while this process is being undergone and the complaints are being investigated, it might be necessary to maintain
that confidentiality because the person bringing the complaint might still be in the workplace and needs to be protected in some way while they are formulating whether they have a complaint or not.

Mr LEESER: There is no reason why it has to apply to all the complaints brought before the commission. In my proposal, for instance, you could have a slightly different process just applying to part 2A complaints. I know you would say there is no public controversy here. I would strongly disagree with that. We have this inquiry because there is a public controversy and there is a lack of public confidence in both the operation of the section and the administration of the commission in relation to this. We need to consider a different process, potentially, for these sorts of complaints.

Senator McKIM: Ms Eastman, I would just like to address your opening comments in regards to your suggestion that amendments be made so the Federal Court has a greater capacity to dismiss unmeritorious complaints. I am sorry if I have paraphrased that inaccurately. Firstly, I just wanted to clarify: are you only suggesting that that change be made in relation to RDA?

Ms Eastman: No, across the board.

Senator McKIM: So you would argue that, on every matter that comes to the Federal Court, that amendment should be made.

Ms Eastman: No. What I am saying is: if the president terminates a complaint on the basis that it is trivial, misconceived or lacking in substance, or not unlawful—if those are the grounds on which the complaint is terminated then the complainant would need the court's leave to proceed. If she terminated because it could not be conciliated, no, I am not suggesting that be the case—but just an added filter for particular types of cases.

Senator McKIM: Thank you. I phrased my question poorly, so I will rephrase it. Are you suggesting that that change only apply to matters that come through the Human Rights Commission?

Ms Eastman: Yes—any complaint to the Human Rights Commission, but not limited to racial discrimination. For fairness, I think it has to be across the board.

Senator McKIM: I understand that. In that case, how would you respond to Professor Rice's and Dr O'Connell's view that they do not think there is an argument that the Federal Court has different capacity in different areas of law?

Ms Eastman: Mine comes from a practical perspective. I often appear for respondents in matters of that kind, and it is the respondent who has to incur the cost of taking the step to seek a strike out application. These can be very costly matters, and if a respondent is ultimately successful then they are not always able to recover all of their costs. There can be a lot of damage to people's reputations by the public nature of a hearing in the Federal Court, even with respect to a summary dismissal application, and it also takes a very long time. At the moment there are delays in the Federal Circuit Court. For example, I have one matter at the moment where the judge has reserved for 14 months on an interlocutory strike out application, and the clients I represent are not wealthy people. They are nervous and anxious as to what is going to happen to the claim. Likewise, on the other side, the complainant is probably feeling the same. If there was a streamlined approach where people could know where they stood in terms of the court process and that their costs would be contained, I would strongly recommend that from both the complainant's and respondent's perspective.

Senator McKIM: Thank you. That is clear. I am not trying to start an argument here between the panel, but could I give Professor Rice and Dr O'Connell an opportunity, perhaps, to respond to that.

Prof. Rice: I will just volunteer a consideration for the committee if it looks at this option in more detail, and that is the often unintended consequences of law reform. I spent some years as a judicial member of the New South Wales tribunal where this mechanism operates, although it did not come in until towards the end of my term. I sat on those matters and I sat on appeals from those matters, so I decided them. Can I say that an unintended consequence of the reform was that it operates as an opportunity for the inquiry body, in this case the New South Wales anti-discrimination commission but in your circumstance a commission, to give a very light touch to its complaints and to allow the matter to move on to the tribunal, who then makes the decision that the commission, or the board itself, could have made—that there was a shifting of the work because now the readily accessible means of dealing with the merits of the matter are available through the judicial office. An underresourced board was much more readily sending its files down the road to be dealt with, so we were often allowing matters to proceed because we found that they had merit that had not been properly identified in an investigation that was not done by an underresourced board. So it is part of a larger network of levers and buttons in the system, rather than a simple fix.

Senator McKIM: Thank you.
Mr LEESER: I would just like to say that I broadly support Professor Appleby's and Ms McKinnon's submissions here both in terms of what they have suggested for process clarification and also the codification, although my preference is as close to the language of the judgement as possible to avoid some of the unidentified consequences. I wondered if I might ask Ms Eastman and Professor Appleby a little bit about the precourt procedures of the commission and to what extent there might be some scope for the alteration of those, perhaps just to explain very briefly what I was trying to do with the part-time judicial officer determining matters.

My view was not that there be an additional person above the commission or below the commission but indeed that the part-time judicial member of the commission replace the president for the purpose of dealing with the matters that the act be amended. From time to time presidents of the commission have been judges or retired judges. There also have been periods, as is now the case, where they have not been. I thought that that might help in making some of the commission's terminations more appeal proof—that that was the purpose of that. To what extent is the president able, prior to making a decision about a termination on a matter, to assess both arguments from the complainant and also the respondent in a quick manner and able to make a determination as to whether the matter has any reasonable prospects of success?

Ms Eastman: It will depend on the particular circumstances, but what may happen is that the information that comes in the originating complaint is very thin on the ground, so there needs to be some clarification of that. Lawyers often call it 'asking for further particulars', so when, where and who. The commission might then ask the respondent to respond to those allegations and say: 'What's your side of the story? What do you want to say about that? Is there information that we need to consider?'

So the way in which the commission deals with the complaint is to try to get both sides of the story, which starts to look at the merits of the case, identify whether it is a very subjective response to the issues or whether there are some objective factors that should be taken into account. The commission uses that information in the process of conciliation to try to help the parties reach some sort of resolution—in effect, the usual testing that a mediator or said it does, which is to try to help the parties identify their respective strengths and weaknesses.

The commission has a firm view that the parties themselves should be resolving their matters, rather than the commission giving some advice along the way. If the matters cannot be conciliated, the process requires the president to take into account the recommendations and all of the work prepared by the conciliators so that the merits can be considered at that point, but the merits are only considered for the president to identify under what grounds she might terminate the complaint.

Mr LEESER: Obviously the president is considering the substance of the matters in some of the current grounds under which she can terminate matters.

Ms Eastman: Yes.

Mr LEESER: Would there be a problem with adding an additional ground of 'no reasonable prospect of success' and, if there is a problem, what problem would it be?

Ms Eastman: You could, but what you would need to do is say, 'What does "no reasonable prospect of success" mean?' because that is a phrase and language is that is much more familiar with a court process and it is the type of language that the Federal Court judges are looking at on a summary dismissal application. The matter that you would need to take into account there is: do you have sufficient material to form a view about the prospects of success from an evidentiary point of view? A very fundamental difference between the commission process and the court process is that the commission is not working on the rules of evidence—you can say whatever you like in whatever form. The court, though, will only make a determination by reference to evidence that is admissible and that complies with the Evidence Act, so an assessment of prospects of success against the Evidence Act is a very different thing from the president looking at the overall case and saying, 'This is a case that might be lacking in substance, trivial and not unlawful?' It is an entirely different exercise, and my concern would be importing a test that applies where rules of evidence apply into a process which has nothing to do with the rules of evidence or court documents being prepared in a particular formal way that the court requires.

Mr LEESER: If the complainant were to commence their complaint in the Federal Court or the Federal Circuit Court and then the court were to remit the matter for conciliation as a process, would change the nature of the way complaints were brought? Would it require complaints to be more specific? Would it perhaps help us match the conciliation process more clearly with the court process?

Ms Eastman: That already happens now. The Federal Court and the Federal Circuit Court have exceptionally good registrars who are exceptionally good mediators, and it is very common for a Federal Court judge to refer a matter to conciliation with the court registrars. That process often achieves some clarity.
Mr LEESER: But am I wrong in saying that if you commence a proceeding in the Federal Circuit Court or the Federal Court, particularly if you are a solicitor, you would need to certify that the matter had reasonable prospects of success?

Ms Eastman: Yes, you would.

Mr LEESER: Would not that be a better process in terms of perhaps clarifying issues for the parties? If we are to get all matters, for instance, to commence in the Federal Court or the Federal Circuit Court, would that not provide greater clarity and would that not see the commission’s actions be more aligned with the outcomes that could be achieved in court?

Ms Eastman: From a practical perspective and respectfully, no, because what it would do would be to move down to the commission process a very legalistic process where the burden on complainants and respondents to have legal representation to craft their claims from a very legal perspective would be very costly for people working with the commission process, and there is no guarantee that a Federal Court judge or Federal Circuit Court judge would take the advice, the suggestion or the recommendation of the president. They would not be bound by that in any way. It would end up being slower and far more costly and it would make it a very technical process which really should be for a court and not for the commission.

Ms MADELEINE KING: Thank you all for coming in today and thank you for your submissions. I would like to point out that I respectfully disagree with my colleague, Mr Leeser; I do not know if there is a lack of public confidence in the Racial Discrimination Act and 18C. I think there might be in some circles, and certainly the evidence before this committee is that people really value it. On that basis I want to talk about the conciliation process that the commission itself goes through. We have heard evidence from both the commission and other organisations that are supportive of it that it is quite successful in resolving complaints made to it. Across thousands of complaints, across all of the discrimination areas, so to speak, it manages an average of 3.8 months to resolve the vast majority of the cases that are before the commission. My understanding of the conciliation process, which is confidential and private, is there have been calls and submissions made to this committee that it should be a more open process from the beginning of complaints and, as I understand it, through the conciliation process. I would like your comments on how opening up that kind of process might affect the success of the commission resolving such complaints.

Dr O’Connell: That is not something that we considered in the submission.

Ms MADELEINE KING: No, I realise that. First thoughts, I suppose.

Dr O’Connell: Yes. The confidentiality of the conciliation process has enormous benefits. There are some concerns that we have as researchers because often it can be difficult to understand what is actually happening in that process and, therefore, it is difficult to see trends and see what is actually happening to people who are bringing complaints or responding to complaints. That aside, the confidentiality of that process does mean that people do not have to suffer the sorts of responses that people are clearly concerned about in the public, which includes having claims that are not yet substantiated, or maybe conciliated, aired in public. On balance, the confidentiality of that process has more benefits than drawbacks.

Dr Allen: I would like to add to that. I have done a lot of empirical work in Victoria where we have a very similar system about what takes place in these conciliations, and confidentiality is one of the things both sides value the most, particularly employers. They want to know that when they come to conciliation they are protected by that as well. Remember that this applies across the range of discrimination claims, including sexual harassment, sex discrimination—

Ms MADELEINE KING: Disability.

Dr Allen: Disability discrimination—which is the majority of them in employment.

Dr O’Connell: Could I add to that comment. Many discrimination complaints involve situations of intimacy and closeness and issues of a very personal nature. In order to retain relationships in the workplace, in public and in private, it can be very important that that not be messed with, especially at an early stage, in order to protect those.

Ms Eastman: I agree 100 per cent. Confidentiality is absolutely critical to the integrity of the commission’s process and the confidence that we as members of the public using the system have in the commission, but also for us as lawyers working with that process. It is invaluable for having the best prospect of getting some effective resolution of a complaint.

Prof. Appleby: I would simply add that I agree with the submissions. It is unlikely that individuals are going to come to that conciliation process in the good faith that is required if there is publicity accompanying it. I really
think it is an important point that Dr Allen made earlier about it applying across the board, particularly in employment contexts. I pick up the point that Mr Leeser made as well. Perhaps any changes could be directed to simply 18C complaints. We considered this option when we put our submission together and we ultimately rejected this as the best way forward because we thought that there would have to be a very good, strong public policy reason to limit any change in the procedure of the Human Rights Commission or the procedure as it goes through to the courts, otherwise it is going to send a message that these particular types of complaints have a higher procedural burden than other discrimination complaints, and we were not satisfied that there was a strong public policy reason that could justify that public message that would accompany just directing a complaint.

**Senator REYNOLDS:** Good morning, and thank you very much for your submissions. I want to pick up one point in relation to the process. There have been a number of discussions here and in other hearings about the process itself. Listening to you this morning, you were very much talking about the process as if it was executed as it was supposed to be in the legislation. What concerns me, amongst a number of things, is that clearly, with the QUT case and, I suspect, other cases, the procedure as it was supposed to be in the legislation was not followed, and we just discussed some of those issues about notifications and about that.

When we had a hearing in December, I asked the Human Rights Commission and the Attorney-General's Department about the detail of when 18D kicks in. The Human Rights Commission gave us a table, 101, and nowhere in there was where 18D is considered. At a hearing, they were unable to exactly explain how and when they take 18D into consideration, so I asked the Attorney-General's Department. Mr Walter from the Attorney-General's Department could not even answer me; he had to take it on notice. Mr Walter said:

"It has been a while since I looked at Bropho. I think the temporal element here is just slightly confusing. Essentially we have got two things happening. We have got a complaint procedure and then we have got to slot 18C and 18D into that. And then, at the end, as you are talking about this morning, 'therefore, in practice, it is unlikely that a complaint would be terminated prior to seeking submissions from the respondent to the complainant.'"

That greatly worried me: the two people whom you would expect could clearly articulate how the process should work in terms of protecting people under 18D could not do it. They had to take it on notice and still said it was a bit confusing—they were not really sure of how and when it is considered. I am wondering: being an expert in the process and understanding how it should work and having a look at the QUT case, where there are comprehensive failures about where the process as it should have worked did not work, do you have any thoughts about how we could improve, if we took your recommendations, the process for people like the QUT students? They were ordinary Australians who, as you said, we could have educated, but it would not have helped them, because they were not even notified. How do we protect them from nonapplication of the process?

**Mr PERRETT:** Professor Rice's opening comments did address some of these.

**Prof. Rice:** In relation to 18D, can I recommend to the committee the full federal court decision in Bropho, which is a very useful and readable account of how 18D works.

**Senator REYNOLDS:** I have read that and, in fact, I have discussed that at some length with the Attorney-General's Department. In fact, even the Attorney-General's Department said, 'It has been a while since I have looked at Bropho.' And the Human Rights Commission said the same thing. My point with that is that it took five years. Under the current processes in legislation, Dean Alston went through this for five years, and surely that is not fair. It is not right.

**Prof. Rice:** I think none of us would want to take that on notice. We all have a response for you. Bropho shows us how 18D works as a legal defence requiring evidence—it is matters that arise in court—which is where it happens in a temporal sense in a formal sense. But back in the commission's process, the commission will take account of a whole range of factors. If, for example, somebody comes along, as they have come to me, saying, 'I've been discriminated against because of the football team I support,' you say, 'Well, actually, that's not covered by the act.' So there is a range of factors that has to be taken into account in the president forming a view of the complaint—one of which will be the matters covered by 18D. The president is not making a judicial decision under 18D. I am surprised that the commission could not say to you in evidence that the factors that are covered by 18D are matters that the president weighs up along with a whole range of other matters in exercising her powers. That is when it comes in as far as the matters it addresses are concerned, but when it comes to matters of formal proof, it cannot come in until you get to the court.

**Senator REYNOLDS:** And, hence, my point is that you would have thought the Human Rights Commission could have actually explained the process that they are supposed to follow as articulately as you have just done then.

**Prof. Rice:** With respect, that is a different matter.
Senator REYNOLDS: It is actually not. I think it is quite on point—the fact that the organisation that is supposed to be delivering a process that you have so clearly articulated here today and in your submissions is not doing that. And you said the president should make those determinations through that process. With the QUT case, it never went to the president. You have a look at the testimony from that. The legislation was not followed even at that early point, so, if you have got a commission that is not consistently following the legislative procedure—

Prof. Rice: I think you might have heard us say before, Senator, that to hang policy change on what by consensus is an anomalous case—and I think you said in passing after mentioning QUT and I know there are other cases but I can say that I am unaware of any other case that has attracted concerns that the QUT case has attracted on following of process.

Senator REYNOLDS: What case do you mean though? It is one case too many.

CHAIR: In the interests of time, are the witnesses happy to submit their responses to Senator Reynolds' question in writing?

Ms Eastman: Certainly.

CHAIR: That would be great.

Prof. Appleby: I think, Senator Reynolds, in our submission that we made to suggested changes to the Human Rights Commission's procedures that we believe would address some of our concerns, and so we will not make a written submission but we draw your attention to those. Thank you.

Ms Eastman: I am happy to make a submission as well but I can say representing respondents in these matters, you can be sure that those who instruct me in my submissions always address 18D. So, if there is effective legal representation, and that may be where the gap was in this case to represent the students—I do not know; I was not involved in that at all—but those issues should be addressed by lawyers and those who represent parties properly identifying the issues. It should not just be up to the commission to have to do it.

Senator PATERSON: With respect, 18D was not the relevant consideration in the case. The judge did not even consider 18D.

Senator REYNOLDS: It wasn't a consideration at all.

Ms Eastman: No, it never got there.

Senator REYNOLDS: But it is a bit hard to have representation, if you have not actually been advised that the matter is ongoing—

Ms Eastman: That is true.

Senator REYNOLDS: and that you are being investigated.

Ms Eastman: I am happy to talk to you about that separately or to prepare a further submission.

CHAIR: I thank representatives for appearing on the panel today and for giving your time. Thank you.
EDRIES, Mr Zaahir, President, Muslim Legal Network (NSW)
RACHWANI, Mr Mostafa, President, Project Manager and Media Officer, Lebanese Muslim Association
SHELLY, Mrs Lydia, Legal Officer, Lebanese Muslim Association

[10:03]

CHAIR: Welcome. I note that Mr Edries is also appearing on behalf of the Grand Mufti of Australia Office. I invite you to make a brief opening statement and then members of the committee may ask some questions.

Mr Rachwani: Thank you for the opportunity to speak here today and to represent the LMA. Firstly, I would like to acknowledge the traditional owners of the land on which we are gathered here today and to pay my respects to elders past, present and future. I also acknowledge that the first nation's people are facing and have faced racial discrimination and vilification for over 229 years.

I want you to imagine for a moment that you receive a package at your workplace. You go down to open it, along with your colleague. Inside is a card that looks rather bulky. You open it and find there is a small machine and three wires sticking out. What do you do? Do you throw it away? Run for cover? Push your colleague away? What would you do in the split second you have in the moment you recognise that you are looking at a bomb? This is the reality for Australian Muslims now. The card was real, and the LMA did receive one like that last year. Fortunately, it was only a musical card with the face ripped off, but its intention was clear: our lives were, and are, in danger. To deny that would be folly.

The Lebanese Muslim Association, or the LMA, has been in operation since 1962 and is one of Australia's largest and most well established Islamic organisations. The LMA represents a diverse cohort of members and undertakes projects to build social capital, community resilience, cohesion and support, as well as highlighting the positive contribution that the Australian Muslim community has made, and continues to make, to Australian society. In this time the LMA, along with multiple community organisations and individuals, have faced a growing number of insults and death threats, with exponential growth in the past three years. I cannot emphasise enough just how vitriolic, how disgusting and how shocking these instances have become and, unfortunately, how common and unremarkable they have also become.

We have had men call the office and masturbate over the phone to our female secretary. We have had cards smeared with bacon and pig's fat sent to the office. We have had calls for massacres and genocide on our Facebook page. We have had emails from people insulting and demeaning us. We have had bomb threats, threats to protest and riot and threats of sexual violence. All of these moments, fleeting as they may be for the perpetrators, have lasting impacts on the staff and stakeholders of the LMA. I cannot count the times I have had to console shaken and traumatised staff who have had to face barrages of racial vilification. We have spent hours upon hours deleting threatening, disgusting comments on pictures of people praying on our Facebook page, having to read each and every single one.

All of these circumstances, all of these threats and messages, do not emerge out of a political and cultural vacuum. This is why I am here today—to shed some light on the experiences of the Muslim community in Australia and to draw a link between the rhetoric that we are exposed to and the violence in all its forms enacted against our community. There should be no doubt that what is said in the public space, as well as the framing of discussions, can have lasting impacts on the impressions people have of minority communities, and the same goes for this very discussion here today. In a sense we cannot have a discussion on the legal implications of section 18C without reference to the political context in which it exists. There are deep-seated implications that come with this inquiry, largely rooted in a fantasy of what the process and number of complaints made actually are, as well as the place that minority communities have in Australia.

Let us be real for a moment. There are Muslims in Australia who feel obliged to change their names on their resumes so that they can get a job. There are Muslims who feel obliged to remove their headscarves for fear of violent retribution. There are Muslims who actually feel the need to hide their ethnicity, their beliefs and their culture in a nation that supposedly upholds their freedoms. This reality is reflected in the latest Mapping Social Cohesion survey by the Scanlon Foundation that found that racial discrimination based on skin colour, ethnic origin or religion increased significantly, rising from 15 per cent to 20 per cent between 2015 and 2016. The report also found that verbal discrimination and being made to feel like they do not belong were the highest reported experiences of discrimination.

These are essential coordinates around which we must have this discussion. We must accept that racial discrimination and abuse is currently rife, underscoring much of public discourse on many issues. That, in turn, has grave consequences on the state of our freedom of speech. This abuse results in the silencing of the victims,
creating echo chambers around those who are yelling the loudest. There is an inherent denial of humanity that comes with these attacks. As per the submission made by the Executive Council of Australian Jewry, no community, no single person, should ever have to have their humanity questioned, to have their essence debased by abuse and vilification. But yet, here we are discussing whether or not people have the right to be bigots.

The effects of racism, the lasting impacts, reveal a danger that trauma becomes normalised amongst Australian communities. To propose watering down the Racial Discrimination Act would be to attack a key protection against hatred and violence. Our freedoms exist within our context, and their integrity is dependent on the platforms upon which they are expressed. Without adequate representation on these platforms, without a system that encourages diversity and promotes tolerance and acceptance and without a language that gives fair opportunities to all and does not inherently call into question our humanity, we cannot entertain a discussion on 18C without the promotion of bigotry. Thank you.

Mr Edries: I just wish to acknowledge the Gadigal people of the Eora nation, on whose land we meet today. I pay my respects to their elders past, present and future. Honourable members and senators, we are grateful for the opportunity to address you and to provide our written submissions, which you hold before you. The Muslim Legal Network of New South Wales consists of a group of legal practitioners practising secular Australian law. We identify with the Muslim faith. We are a group committed to the rule of law and the protection of civil liberties in this country. As an organisation, we appreciate and support the need for Australia to have effective measures in legislation to ensure protection from discrimination for all of our citizens. It follows that any such laws should be reasonable, effective, proportionate and consistent with our values as a society. Our submissions have addressed the first question raised in the terms of reference, being:

Whether the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) imposes unreasonable restrictions upon freedom of speech, and in particular whether, and if so how, ss. 18C and 18D should be reformed.

Australia is a richly diverse and vibrant society, with our Indigenous Australians at the core of our identity. We are a nation that has built itself from the many cultures and people that inhabit it. As a result, it is pluralism that defines who we are. Freedom of speech has been of particular media interest recently. It is also important to note that incidents of racial vilification and abuse have increased significantly. Racial vilification and abuse has, unfortunately, become an experience that Indigenous and multicultural Australians are very familiar with.

Considering this context, we did not support any weakening of part IIA of the RDA. We also stressed the need for government representatives to ensure that any language used discussing these groups is inclusive and not socially divisive, because such language directly impacts Indigenous and multicultural Australians. We support the need to protect freedom of speech, including the constitutionally implied freedom of political communication. However, it is a well-established principle that no right is absolute and it must be balanced with the protection of the community. We support the following aspects of the submission by the Victorian Multicultural, Faith and Community Organisations:

… any watering down or perceived dilution of the RDA would send the wrong message to potential offenders that hate speech was becoming more acceptable in our society …

Any watering down or perceived dilution of the RDA also sends the wrong message to potential victims—that the law does not protect their right to live free from racial vilification or abuse. The submission goes on:

Just as freedom of speech should be valued, so should the right of people to be part of a free and fair society without suffering the emotional and mental harm caused by hate speech …

… … …

This is not an issue specific to any one race or religion, but an issue for all members of society.

… … …

Our efforts to create an enriched society requires legislative protection, and our diverse communities should feel supported and guarded by the support of our Commonwealth Parliament.

We are also concerned at the limited scope of this inquiry, which is framed in terms of freedom of speech only. The issue of racial vilification and discrimination is a much broader concept, and such an inquiry should, in our view, consider whether the legislation fulfils its purpose in adequately protecting victims of such conduct. We consider that this narrow framing of freedom of speech under the RDA, in isolation from other laws that impact freedom of speech, such as defamation and counterterrorism laws, does not allow for a complete discussion of the issue of freedom of speech in Australia.

We hope that our submissions and appearance here today, along with submissions from Indigenous, multicultural and faith groups in respect of the inquiry, are given adequate consideration, as it is these groups that will be the most affected by the potential changes to RDA. Again, we thank you for your time and consideration.
in allowing us to appear today. We are ready to answer any questions you may have in relation to our submissions and acknowledge that the office of the Grand Mufti of Australia has requested we carry any questions you may have for them on notice to respond to when appropriate. Thank you.

CHAIR: We will now proceed to questions. Can you please keep your questions and answers brief, in the interests of time, so that everyone has a go.

Mr PERRETT: Thanks for appearing for today and thanks for the good work you do for your communities. No-one should be suffering that sort of abuse in their workplaces. We heard from some other people, in Tasmania, on Monday who had had some similar types of circumstances. The submission from the Lebanese Muslim Association says:

... from a community perspective, these efforts made to make alterations to the RDA are only exacerbating a debilitating distrust of Government and authorities amongst the Muslim community.

What message would it send to your communities if the protections in section 18C were watered down or repealed? How would it have an impact on individuals in your communities? Do you think that they would be more reluctant to engage in the community for fear of experiencing racism?

Mr Rachwani: From an experiential perspective, I stand by what the submission has said—that it would have an enormously exacerbating impact on the relationship that is currently falling apart between, especially, young Australian Muslims and the wider Australian society and, specifically, with the Australian government. In our personal experience as a community organisation, we have found it extremely difficult to engage with young people on these discussions, mainly due to some of the discrimination that they face in their workplaces, in their lives, personally, professionally—however you like to see it. And currently this discussion, mainly to my community, and to young people specifically, is not necessarily a discussion on processes or legal definitions and so on. This is a discussion on whether or not they should be protected from hatred, and this is how they see it, and they believe that a discussion on watering down 18C is an enablement of hatred against them; it would exacerbate the feelings of alienation that the Scanlon Foundation was speaking about that they feel from our wider society. So I think that currently we are on a course towards a relationship that is worsening. There is further marginalisation. There is further distance between these young people and wider Australian society, and so these discussions are only making it worse, let alone actually taking action and watering down the act.

Mr PERRETT: We had representatives from the Jewish community yesterday talking about this, and I think they used the term 'floodgates', so your comments are interesting. I want to go to the submission from the Muslim Legal Network. It says that they 'would support protections extending to religious minorities (subject to additional investigation and consultation)'. Can you detail what investigation and consultation you would expect the government to undertake before any consideration was given to extend the protection to religious minorities?

Mr Edries: I think this sort of discussion has been had over the last 10 to 15 years in multiple jurisdictions. I know in New South Wales there was some discussion about religious vilification laws that would protect people from suffering religious vilification specifically, and—I will just say where for one moment—that relates somewhat to the wording within the New South Wales act, which speaks about 'ethno-religious' origin, where in 1996 the Hansard record shows that it was actually originally supposed to cover religious vilification as well. For some reason, it—

Mr PERRETT: I know Muslims and Sikhs and Jews were mentioned.

Mr Edries: In the original Hansard, correct, yes. It has somewhat developed into a situation where that does not necessarily provide that protection, so the call for protection, be it quiet or ongoing, is something that is necessary. Back to your question about how we would do that, we say 'subject to additional investigation and consultation' is a kind of wording that obviously we need to be protective off. The last thing we want to do is put religious organisations in a position—for example, we do not want sermons to be the subject of calls for religious vilification. Education, things that should be subject to scrutiny are how we would go about this process. So an inquiry, not—

Mr PERRETT: Are you familiar with the Queensland legislation, where we have got religious discrimination?

Mr Edries: I am, and I have yet to see how it acts specifically.

Mr PERRETT: There is—

Mr Edries: Correct, yes, but—

Mr PERRETT: People can discriminate for religious institutions if it is within the tenets of the faith.
Mr Edries: Indeed. We allow that also in New South Wales with a number of different things. The ADA allows positive discrimination with respect to schooling and teaching and providing particular services. That is not something that is unusual to legislation generally. With respect to our submission, I think the important thing is to understand that, if we backtrack to the early part where we said this inquiry could be assisted by broadening the breadth of what the inquiry is actually looking for and not look at freedom of speech in a very isolated fashion, it is in this same vein that we say: if there were an inquiry or if it was minded that suggestions would be made that religious protections be provided, they would be provided subject to additional inquiries.

Senator REYNOLDS: First of all, thank you very much for your submission today and for sharing some of those horrendous stories and experiences that you now have. What I want to do a bit further at the moment is not so much explore 18C and 18D but just come back to the concept of freedom of speech, because they do sometimes get a bit conflated. Freedom of speech now seems to be synonymous in some people's minds with hate speech, but of course that is not the case.

Mr Perrett and I have just come back from a human rights meeting in London where a lot of Muslim countries were there with us sharing their experiences. One of the key messages I got from many nations is that freedom of speech is actually their greatest protection, particularly for minority groups and organisations—to preserve their ability to speak freely against hatred and potential suppression. I have had cause to reflect on that, particularly now in relation to your comments about the appalling behaviour that you are subject to. It just made me wonder how we can preserve freedom of speech for everybody here to have the robust discussions we need to have to get rid a lot of those hateful things that are going on underground. It is a challenging issue. I could not find any country where reducing freedom of speech looks after minority interests. Forgetting 18C and D for a minute, how do you see your freedom of speech and other democratic freedoms being preserved?

Mrs Shelly: I think that is a really an interesting question. In relation to your comment, 'Let's just forget about section 18C and 18D,' for me that is quite concerning in the split when we are talking about freedom of speech. There can be no doubt that freedom of speech is not absolute for starters. Secondly, we are at an inquiry where we are facing the watering down from the community perspective of the very limited protections. When you say that you are concerned about the lived everyday experiences of Australian Muslims, that is occurring in the context where we have section 18C.

Senator REYNOLDS: That is my point: 18C and 18D have been in place for nearly 20 years. If you look at some of the cases that have forward, they really do not address or deal with the situations that you are now facing. Listening to your story this morning, it makes me wonder whether 18C and 18D are providing you the protections that you rightly deserve in this country, and whether we should look at how we can better protect your freedoms.

Mrs Shelly: In our submission, we have made specific references to supporting the Muslim Legal Network's comments about having an investigation into broadening the protection for religious minorities in this country. It is staggering that when we talk about freedom of speech, we really forget about the issue of social cohesion. Social cohesion should always be in the public interest. It should always be at the forefront in our opinion. With respect to our submission, there seems to be a very big split in government policy. For example, when they talk to us or engage with us about, say, countering violent extremism, social cohesion seems to be at the heart of that, but when we talk about other areas that impact the lives of Australian Muslims such as protections under the RDA, everyone forgets about social cohesion. It really does concern me that 51 per cent of Muslims born in Australia have faced discrimination and feel like they do not belong.

Senator REYNOLDS: The awful acts that you have described here do not reflect social cohesion in society. You cannot mandate. You cannot just—

Mrs Shelly: It does for us, with all due respect.

Senator REYNOLDS: I agree with social cohesion but there are people who are doing all those horrible things to you who are not feeling very socially cohesive. How do we address that? Clearly, 18C and D do not create social cohesion in and of itself.

Mrs Shelly: It is a fallacy that we can engage with the racism as well. I think the Australian Jewish submissions have really hit the nail on the head in that respect.

Senator REYNOLDS: How do you defeat it then?

Mr Rachwani: If I could step in on that question you asked beforehand. I think the important factor here to consider is that, as I said in my opening statement, no conversation happens outside of a political vacuum. So although the legal realities or the realities of the processes around 18C would align with what you are saying, unfortunately the symbolism of that discussion amongst communities has that deteriorating impact. Although 18C does not play a part in the everyday lives of Muslims on the street, for example, or other people that are facing
this kind of racial vilification, it is about their comfort and their confidence in their government. Their government is there to protect them against such things. At the end of the day, if we consider social cohesion to be a factor in this discussion, which of course it should be—it is a discussion about dissolving hatred—then we must also consider the symbolism that comes with both this discussion and the watering-down, as well as what 18C represents to communities.

Senator REYNOLDS: Are you saying—I do not think you are saying this, but I just want to clarify—that all of these incidents and the attitudes you get, the horrible things that happen to you on a daily basis, are because of the public discussion on 18C and 18D and they were not evident before this discussion?

Mr Rachwani: Right.

Senator REYNOLDS: So you are saying having a public discussion about freedom of speech has caused this?

Mr Rachwani: Correct. There are two things. Firstly, it has exacerbated the situation, I would say. Secondly, the focus of our submission has been on the impacts on the community that is receiving the abuse and the impacts that this discussion has on that community, not necessarily on putting a halt to the abuse itself, because, as you mentioned, it is a much larger discussion about where minorities fit in Australia—that kind of conversation. I agree with you; it is a much larger discussion. But, at the same time, the lasting impacts on the receivers of the abuse need to be considered in this conversation.

Mrs Shelly: I hope I am wrong, but in a way you have implied that, just because we are having a robust discussion about freedom of speech, somehow we are not on board with that. That is not the case whatsoever. The Racial Discrimination Act, as well as a whole other body of legislation, exists. It has not dampened the criticism of religions in any way, shape or form. It has not called into line the Australian Muslim's place in this society. It has not called into line, for example, what food I serve my child at home. It has not called into line what I choose to wear as an Australian woman in this country. None of these things have been off the table for discussion by our political leadership, by the media or by anybody else. So, do I think that this will inhibit a discussion, a very frank discussion? No. I do not think that is the case whatsoever.

Senator REYNOLDS: Thank you.

CHAIR: Ms King.

Ms MADELEINE KING: Thank you all for coming in and for sharing your very personal, private, shocking and also quite depressing stories. I hope this will not always continue. This is to both groups: would you say members of your associations, and minority communities more widely, are aware of their rights under the Racial Discrimination Act and of the complaints process; and—this is a second part to the question—in your experience, do your communities exercise their right to live free from racial discrimination and seek the assistance of the Australian Human Rights Commission?

Mr Edries: I will address the first portion of your question. Being a legal body, most of our members obviously would be aware of those rights, whether or not that extends to their families being aware of it or actively seeking out those remedies available to them. This, to a degree, links back to the discussion around Senator Reynolds' question, and that was more about whether or not people feel empowered that they can trust the system—my colleague spoke about being able to trust the system—and whether or not it is going to work for you. That probably then delves into a whole other discussion about whether or not access to justice is equal with respect to all different communities, because we know minority communities' access to justice is a giant thing. This is a reason the commission exists in the structure that it does—one of the reasons. We know that, to enable someone to have access to justice, we need to make that justice system less daunting, less difficult to attend to and less costly. This is why we have conciliation processes. This is why the forms are really easy to read.

To come back to your question, yes, our community would be aware of it; from my experience, we would be aware of it. But again, within our community and within our organisation and its body, there are probably more middle-class Muslims who have access to these sorts of things already, and, had they not been lawyers, potentially they may have been able to engage lawyers.

Ms MADELEINE KING: [inaudible]

Mr Edries: Yes. From a broader perspective, the Muslim community is quite spread out in its demographics. It is a reasonably young community as well, in terms of age. We have a greater number of people within the age bracket of, I think it is, 15 to 40 than the rest of the country. What that means for us is that we are getting people who are not in the maturity of their lives, so they may not be willing to take on those sorts of things.
In my experience as a practitioner, we would get a number of people emailing us through our organisation or to me personally saying: 'I have been discriminated against, or I suspect I have been discriminated against. It's in this particular jurisdiction or it's in this state. What do I do?' In terms of do we get the questions and do we think they are accessing them, yes. The commission will probably have better statistics around who the people are who are accessing their services, but more than likely they will seek out information from community organisations like the Muslim Legal Network or LMA or the Grand Mufti's office even. They seek out where they would find that assistance. So whilst they are aware of it, it tends to be a communication or a seeking out that goes through a body that they trust. Unfortunately, I cannot say equivocally the Muslim community completely trusts how the legal system works.

Mr Rachwani: I think my colleague covered a majority of that, and we probably agree with him. We do come from another end of the spectrum, which is the coalface. Our experiences are that in most cases communities, especially young communities, do not actually know their rights. We have been working towards that [inaudible]. But, yes, unfortunately they do not. What is underscoring that discussion is that a lot of the discrimination, a lot of the vilification and the feeling of alienation, has largely become normalised amongst young Muslims, amongst young Muslim communities. So they are not necessarily things that they can actually do anything about because they feel like it is normal, it is the usual circumstance to feel that way or to face those kinds of vilification—all of the kinds of things that I was speaking about in my opening statement. In that sense, the discussion is twofold: (1) knowing your rights and understanding how to go about it; and (2) understanding that we do not necessarily live in a society that upholds that kind of hatred.

Mrs Shelly: I just want to make it clear though: a large part of the normalised behaviour that we are talking about is not actually covered anyway by section 18C, so that is also a concern. Just to put it into perspective: if an incident occurs either in Australia or overseas, the first thing I do as an educated Muslim woman is I modify—and I have just been conditioned to do it—my behaviour and modify where my children go; I modify my involvement in public life. That is automatic; I do not even have to think about it any more. So if I, as an educated Muslim woman, go through this automatically, then I am very concerned about that area of the community, that section of the community, that does not have the resources or the privilege that I have in order to make sense of it all.

Ms MADELEINE KING: This is just a comment: there has been a lot of evidence where minority groups, Indigenous and cultural and religious groups, are themselves silenced by the racism and not exercising either right—either the right to freedom of speech or the right to be free from discrimination—because they want to remain small targets and get on with their lives with a little dignity.

Mr Edries: I acknowledge the time, but what is important to understand from a marginalised community perspective is that we are born into this. This is a reality we face; this is our daily, lived experience—and I cannot emphasise that enough. When your daily, lived experience is to accept that you are going to be vilified, your measure—what your measure might be for racism or discrimination might be here. Mine is up here. I will let it get to here before I do anything about it. Like Lydia said, we are privileged, well-educated people. So in the context of how the RDA functions and whether or not it has enough protections and all of those sorts of things, we cannot forget that when you are talking about people who have been subject—and the reality is that many Muslim organisations will tell you that post 9/11 it has been difficult. It has been more difficult than any other community around the world, I do not think anyone will argue with that, to be able to just live peacefully. We had an example of that in Quebec just recently. You just cannot exist. As much as we would love to exist without that reality, it is very difficult to be able to live in an environment where you are not subject to that. It is really hard.

Mr LEESER: I have a very quick question, given the time. This is a question to Mr Edries: have you had any experience or are you aware of any Muslim lawyers, or people representing Muslims, having experience of bringing matters before the commission and the commission refusing to entertain them because they are brought by Muslims?

Mr Edries: No; I am not aware of that at all. The commission is very good at engaging with people. It is getting people to the door that is the difficult part.

Senator McKIM: Thank you for your submissions and particularly the powerful testimony that you have presented to the committee today. It is very much appreciated. My question is this: if section 18C were to be either weakened or abolished, as many submitters have called for, do you believe that the people you represent, your community, would experience an increase in racism?

Mr Edries: Yes.

Mr Rachwani: Yes, absolutely.
Mrs Shelly: Without a doubt. And there have been times with section 18C existing that I have been fearful of what is going to happen to me in public or fearful for my children. I have had to notify their school and say, 'This has happened,' or 'I have received this in the mail at my work and I'm just putting you on notice.' It is really concerning to me that if these laws are weakened down and if we as a minority group do not have the full protections it is going to put especially Muslim women in a very, very difficult and unsafe situation.

Senator McKIM: I would like to attempt to tease something out. You have all said yes in answer to that question. Therefore, will the freedom-of-speech capacity of the people you represent be further negatively impacted because of an increase in racism against them?

Mrs Shelly: Yes.

Mr Rachwani: What usually happens is that communities feel silenced when they face racism, whether it be through having to lay low to avoid some of the spotlight or because at times you do not want to poke the beast. I do want to mention one thing. What happens in governmental discussions and in discussions in these kinds of rooms have enormous impacts outside. You only need to look at the empowerment that Donald Trump has provided to racists around the world, not just in Australia and not just in America. It has been all over the planet. That is just from a president speaking, let alone a discussion on freedom of speech. I think an element of emboldenment has to be considered, as we said earlier, in terms of the symbolism of this discussion when discussing whether or not 18C needs to be watered down or not.

Mrs Shelly: The rising right has been acknowledged as a threat by our security agencies as well. I think that needs to be firmly put into focus.

Senator PATERSON: Just to clarify something from your opening statement, are you happy to take questions on the Grand Mufti's submission?

Mr Edries: I am.

Senator PATERSON: Great. I am interested in a proposal he has made—and I guess you have backed it in a more cautious way—to include religion as a protected attribute in 18C. Are you concerned, as some have said, that if we include religion in 18C that it would amount in some way in effect to a blasphemy law? That would mean that offending someone's religious beliefs or practices could be against the law.

Mr Edries: I think that is really a step too far. People who have made that comment are obviously not educated as to what blasphemy laws actually are and how they work. I think an educated assumption is that a protection around religious vilification will include tests that are not dissimilar to those which are included with racial discrimination and vilification. So what we are talking about is inciting someone to do something against another person. That is a test well established within our legal framework. We need to be able to work within that framework and understand how that might apply to a religious context. Again, I do not think the mufti's office provided any particular example of how this should be done. He is a theological body, for the most part, and he looks after the theological interests of the Muslim community in Australia, but he sees it as something that is a complaints ready position within our community. So I think caution needs to be had when making these potential inquiries into how we protect people's religious rights or their right to be a particular faith. I could not put it any further than that, to be honest.

Senator PATERSON: One of the people who made this comment is Jim Spigelman. He is the former Chief Justice of the Supreme Court of New South Wales. So I think it would be fair to say he is fairly educated about the law.

Mr Edries: I think if Mr Spigelman—and I am well aware of his abilities—were to say, 'It would be tantamount to a blasphemy law,' he would have to show the degree as to how that test would function. I doubt that he would be the kind of person who would say, 'Any piece of legislation would be a blasphemy law.'

Senator PATERSON: No, he just said it was a risk.

Mr Edries: Correct. I accept that there is a risk—

Senator PATERSON: That is what I was trying—

Mr Edries: if you take it to the nth degree. We have to accept that. We have to accept that there is risk in every piece of legislation. That is why in our submission—and I suspect, without speaking directly on his behalf, the Grand Mufti's office would agree—we have said that some investigations and tests need to be made to be able to make sure any protections are relevant and proportionate. I think that is a good way of putting it.

Senator PATERSON: Following the attacks on Charlie Hebdo in France, there was a debate in Australia about whether the publication of that magazine in Australia would be lawful or not. People had a range of different views on that. But some of the people who are defending the existing law in Australia said that Charlie
Hebdo could be published in Australia. One of the reasons that they mounted was that section 18C did not include a protection against religion. They said, given that a very big focus of Charlie Hebdo's offensive cartoons was religion, that the absence of a religious protection in 18C meant it would be fine to be published here. Again, do you think if we add a religious protection to 18C there is a risk that a publication like Charlie Hebdo would be unlawful to publish in Australia?

Mr Edries: I think, again, it would have to speak to the degree of the protection. It is difficult for me to speculate on a piece of legislation that we have not yet discussed, thoroughly vetted and drafted in accordance with what the intent is. This is the way, as I understand it, that legislation functions.

Senator PATerson: My understanding is the proposal is just to amend 18C by adding religion as a protected attribute. Currently it says:

… race, colour or national or ethnic origin …

You could add religion to that. It would not change it in any way except that.

Mr Edries: I think 18D would be able to obviate us of any of those frivolous claims. There is a reason we have 18D. It is for that reason. It protects and provides for political discussion, satire and artistic works.

Senator PATerson: When it comes to cartoons, though, it is a little bit untested. Obviously we have had the Bill Leak complaint. The complaint was withdrawn. We do not know whether 18D would have protected Bill Leak or not. It may have, but it is not clear.

Mr Edries: I think the protections of 18D have been well thrashed out in a couple of cases. We know that more recently with Mr Bolt's case the court spoke about the degrees and the manner in which protections were not available for particular reasons. I know that is a negative test, but we can only work backwards from what the court will not accept to be able to know what they will accept. Again, we are talking a little bit in the abstract here as to whether or not those cartoons would have been protected. I do not know the answer. I think 18D might work. But, again, with all legislation we need a test case and we need to be able to understand how it is going to function, how it is going to work and how the court is going to interpret it.

Senator PATerson: That is a fair summary. I think it is uncertain.

Mr BROADBENT: Mr Edries, are you saying that communities with a high racism pain threshold actually will not use this law anyway?

Mr Edries: No. I am saying that when you are subjected to extreme levels of racism for the existence of your life your ability to make complaints is heavily lowered. Then you couple that with marginalised communities traditionally having lower access to justice, not because there is no justice out there but because they cannot afford it. There have been some big reports about that and how that functions from the Australian Law Reform Commission. If you combine an ongoing feeling of racism, be it from individuals or perhaps institutionalised—this is why we had an inquiry into Indigenous deaths in custody in 1995—those combinations will invariably makes people feel they will not be treated fairly and therefore they may not seek out those remedies that are justly available to them.

Mrs Shelly: And once you get to that point we are still stuck with the fact that large parts of what would probably be the basis of their complaint does not fit into that neat box of what section 18C offers in terms of protection.

CHAIR: I thank representatives from the Muslim Legal Network and the Lebanese Muslim Association.

Proceedings suspended from 10:43 to 10:55
CHAIR: I now welcome Dr Sev Ozdowski. I invite you to make a brief opening statement, after which members of the committee may ask some questions.

Dr Ozdowski: Thank you. I would like to say a few words about my credentials. I am a former Australian Human Rights Commissioner and also Disability Discrimination Commissioner. I have a firsthand knowledge of the workings of the Human Rights Commission and of the Racial Discrimination Act. I have handled complaints, and I know the complaints procedures. I am also a sociologist by training, specialising in the impact of legislation on human behaviour and attitudes. My PhD was on the impact of the Family Law Act on marital stability. I have played and play a continuous role in advancement of Australian multicultural policies. Currently I am chair of the Australian Multicultural Council, but I am not representing the council here. I was also, on a personal level, born and educated in Communist Poland, so I would have a tendency to advocate for universal civil liberties and freedoms before advocating claims against others based on identity.

In terms of general comments, racism exists in Australia. I feel certain you are aware of Scanlon Foundation research and other research which indicates that, depending on the indicator used, between 13 and 17 per cent of Australians hold racist views. This pattern has been stable over the years, although one could say there was an increase in anti-Muslim attitudes in recent years.

There is no doubt in my mind that racism needs to be curtailed, but I am yet to see solid empirical evidence that the insertion of section 18C into the act in 1995 diminished racism. I believe it is a blunt instrument which has many unforeseen side effects. So I support changes to 18C to restore balance between freedom of expression and protection from racial vilification. In an ideal world, I would argue for the use of article 20(2) of the ICCPR, which states:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

So I am very much for banning hatred and incitement to violence, but I believe that 18C goes well beyond the quoted article from the ICCPR.

I also doubt that legislation is a proper and effective mechanism to regulate people's feelings. If we could do it, we could put into the Family Law Act that marriage is based on love, and we would not have divorces. Legislation is an instrument which, I believe, deals with certain behaviours that go under the threshold of tolerance and there is room for the law to interfere. With any act likely to offend, insult, humiliate or intimidate a person because of race, I believe the bar is high and we need to look at it. In particular, I believe this because I have seen the chilling effects of that legislation on the discussion of any cultural characteristics. Questions about cultural practices are risky to ask. It also builds resentment and distrust. It creates a 'them and us' attitude. In my view, it may put multiculturalism at risk. It also creates enormous repercussions that damage the respondent to a complaint, regardless of whether the allegation is proved or not. Being accused of racism is a similar thing to being accused of sexual violence. It is having a very negative impact on people who are accused of racism. It also uses a subjective group feeling as the standard, not a community standard. I certainly would prefer that community standards are used. Adding to it are the reversal of the onus of proof and procedural issues.

Allow me to say only a few things about procedural issues. I think the system and set up of complaint handling at the Human Rights Commission is biased in favour of the person making the complaint. There are a number of reasons for that. First, the Human Rights Commission staff are highly motivated and highly committed to certain ideals of social justice. They are in the vanguard of our society. They would like to enforce their vision of the world. They quite often see punishing the offender and using some complaints as having educational value in society. To summarise, maybe one would think the issue of complaint-handling procedures belongs to the President. Traditionally, the conciliation role was done by the President. The current President has moved more into an advocacy role. When I worked with Alice Tay or John von Doussa, there was no conflict. There was no idea that the legislation should be changed to adjust the procedures. At the moment, clearly there is a problem between the President as a conciliator and the President as an advocate, and the process is messy. Consequently, I believe the process needs to be changed as well.

In summary, I advocate for four things. The first thing is a better balance between freedom of expression and protection from racial vilification. Second, I believe the Racial Discrimination Act should continue to prohibit any calls to violence against Australians on the basis of race and racial vilification—and, I would add, religion. The third is that complaint-handling processes should be significantly reformed. Finally, we need to have more resources going to schools—in particular, high schools—to deal with issues of multicultural Australia and human rights. Thank you.


Mr PERRETT: Thank you for your submission, Dr Ozdowski. Your submission says:

... 18C deals only with a very subjective feeling of offence and there is no linkage established between such subjective feeling and emergence of hostility or violence.

We have heard significant evidence from many submitters who say they consider the meaning of section 18C to be now settled, as per Justice Kiefel’s interpretation in Creek v Cairns Post—that is, profound and serious effects not to be likened to mere slights. You disagree with that?

Dr Ozdowski: It is certainly not reflected in complaints which are received by the commission and what the commission does with it.

Mr PERRETT: But in terms of it being settled in law?

Dr Ozdowski: Most likely, the legal issues are a different level. I can agree that they are better defined.

Mr PERRETT: So simply offending someone on the basis of their race would be a slight, wouldn't it? Do you accept that it would not be caught under the section as it has been judicially interpreted?

Dr Ozdowski: I would agree, yes.

Mr PERRETT: And your submission calls for the removal of three of the words currently in section 18C, but until there has been sufficient judicial consideration of those changes there would be more uncertainty about the limits of the provision, wouldn't there?

Dr Ozdowski: I believe we need to have a change in legislation and in judicial interpretation of legislation.

Mr PERRETT: You also say, as I quoted at the start, that there is no linkage between feelings of offence from racial abuse and the emergence of hostility and violence. We have heard different evidence this morning.

Dr Ozdowski: I do not understand. Could you please repeat it, Mr Perrett?

Mr PERRETT: I can quote your words back again if you want. You say that there is no linkage between feelings of offence from racial abuse and the emergence of hostility and violence.

Dr Ozdowski: I am not sure in what context you are talking there.

Mr PERRETT: Your quote says:

Clearly, 18C deals only with a very subjective feeling of offence and there is no linkage established between such subjective feeling and emergence of hostility or violence.

I think that is an accurate quote of your submission.

Dr Ozdowski: Yes, that is correct. I do not see a linkage between section 18C and modification of behaviour in the broader population.

Mr PERRETT: I am not sure if you heard the evidence this morning from the Muslim legal representatives and other submissions. Would you accept that everyday racism provides a fertile ground for more extreme forms of racism? That once the door is opened it can be opened further?

Dr Ozdowski: It depends on what kind of legislation you have in place. If you have legislation which is prohibiting extreme forms of racism then of course it would be influential and it would stop the racist violence. If you have legislation dealing only with feelings I do not think it is having an impact.

Mr PERRETT: If 18C were amended as per your recommendations or in some other way by the parliament, what message do you think it would send to the community at large about currently prohibited behaviour no longer being prohibited?

Dr Ozdowski: Racism is a very serious issue which needs to be dealt with and the legislation deals with the most serious racial offences. It does not deal with allegations which are frivolous or not substantiated.

Senator PATTERSON: Dr Ozdowski, defenders of the existing law—some of whom acknowledge that the QUT case is a troubling case—have nonetheless said that we should not change the law based on just one case and that although it might be unfortunate for those students, it is only one case, and the law otherwise works well. I would be interested in your comment on that view.

Dr Ozdowski: Well, to start with, it is not unfortunate. You have several young people who have been accused of racism. It is a very serious accusation. Some of them had to change their career path. Some of them paid a significant amount of money to clear their names, if one could ever clear their name. I think it is a very significant issue. What are you trying to say? Okay, it is one of few cases which emerge. Since Bolt we did not have much for a long time, but it has started to happen now. It has started to happen now because the procedures of complaint handling became lax at the commission. It may change again with a change of personnel over there and we will return to a relative period of stability. But the fact that it could be used in the way it was used and that

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it created so much damage which is seen by a vast majority of Australians as unjust, I think is adding to the changing attitudes and adding also to negative attitudes towards multiculturalism, racial minorities and so on.

Senator PATERSON: If we made no change to the law and it stayed exactly as it is, do you think that there is a risk that there will be more cases like QUT?

Dr Ozdowski: I think so. There will be more cases coming.

Senator PATERSON: Thank you.

Ms MADELEINE KING: Thanks for coming in today and thanks for your current work and also the work you have done for the commission in the past. I just want to clear up a theme that was coming through in your submission to the committee. You mentioned in a few different sentences about the 'criminalisation' of—

Dr Ozdowski: I used the wrong word.

Ms MADELEINE KING: Right. I just wanted to make sure we are clear that there is no proposal to do that.

Dr Ozdowski: It was my mistake.

Ms MADELEINE KING: Okay. I am glad to have cleared that up. Just a moment ago you made an allegation about the current complaints handling process of the Australian Human Rights Commission. I am wondering: is that just what you have read in the papers, or do you have particular knowledge of the process?

Dr Ozdowski: As I said, I handled complaints before under two other presidents. I know how—after the change to the human rights legislation after the High Court case—the changes emerged and how presidents were handling the complaints. In a way, part of the job of John von Doussa or Alice Tay was to keep controversy out of advocacy, to remain an independent arbiter when complaints arose and to be able to chair the conciliation processes.

I did act in the first Human Rights Commission on a few complaints, including racial discrimination complaints. I travelled to Woolgoolga, for example, to deal with complaints by the Indian community, and to other places. I also handled some complaints in the commission when I was a commissioner. But I also spoke quite often with my staff, and the staff were quite open to the view: 'Let's go and find the complaint which would help us to change the system.'

Ms MADELEINE KING: The regulations.

Dr Ozdowski: Yes. I do not like to mention names and so on, but it is how the staff saw it. Maybe it was okay. Maybe, at that stage, I thought it was good because I also saw myself in the role of bringing about change and improving society. But even if we brought a complaint which could achieve what we wanted to achieve it was handled by an independent president. There was no linkage from the moment the complaint was lodged with me as a commissioner and through all the advocacy. It was handled independently.

The current president, in my view, got a bit confused between the roles of the president and the Human Rights Commissioner. As you know, she also called for the abolition of the function of the Human Rights Commissioner and, for some time, was using the title of Human Rights Commissioner. They are two very different roles.

What was also quite interesting for me, when the commission asked me to the various inquiries, was that I had to withdraw from an advocacy role because, as a commissioner doing an inquiry—for example, into children in immigration detention—I would be viewed by the department of immigration, service providers and the state ACM as a person who was biased, and rightfully so, and they would have challenged my appointment in a court. So, in a way, it is very important, if the commission is to handle the complaint, to ensure that it is handled by somebody who is neutral.

Ms MADELEINE KING: Certainly. We have heard evidence from the commission—I have mentioned this before, and my colleagues would be aware of this—and from other supporters of the commission's work that their complaints resolution process is, by and large, in the vast majority of cases, very successful, quite timely, and it generally deals with things well and there is a high level of satisfaction. That is detailed in their submissions, so I will not go into it. I wanted to let you know that, and you might reflect on that.

Dr Ozdowski: I think there is a problem with that statement—

Ms MADELEINE KING: But I also just want to ask you a quick question about the conciliation process, which is confidential, as you know. Others have called for it to be a bit more open. Do you have any comments to make on the value of a conciliation process remaining confidential, for both parties—complainant and respondent?

Dr Ozdowski: I think it should stay confidential, otherwise people will not be able to discuss various issues between themselves. We always, when we handle complaints, focus on ensuring that there is a balance of power
between the person who made the complaint and the respondent. I would say that sometimes it works to the advantage of the person who made the complaint, because usually the weaker people make the complaint through the commission. Overall, if it aims at conciliation, it could be a good process, providing most people are willing to participate in it.

**Senator REYNOLDS:** Yes, I agree. Thank you very much.

**Mr LEESER:** You made the comment that the commission's process for dealing with complaints needs to be improved. Do you have any recommendations as to how we might improve that process? Have you had a look at the recommendations I put together?

**Dr Ozdowski:** Yes, I read your paper, and congratulations. I do not have a problem with what you are proposing. I would possibly only add that it worked in the past under the current legislation. It stopped working for some reason over the last few years. Perhaps, as you are suggesting, some changes to legislation need to be made. To have a judge doing it, I am not sure. The president was usually a judge or a professor of law, jurisprudence and so on, and they have been able to handle it.

**Mr LEESER:** You have seen the operation of the complaints handling processes under President von Doussa, who was a federal court judge, and under Professor Tay, who was an academic.

**Dr Ozdowski:** Yes, and Dame Roma Mitchell.

**Mr LEESER:** And Dame Roma Mitchell as well, who was a judge. Do you feel that having a person who is or was a judge increases the standing of the commission, makes it less likely for people to appeal decisions and helps quieten the public controversy around some of the decisions? That was part of the purpose of my—

**Dr Ozdowski:** It could, but it puts the role of presidents very much in question if you remove it, because effectively you would be removing complaints from the president's responsibility. Then you would need to see what role you would give to the president. Maybe it would make sense to match the Human Rights Commissioner with the president's role, as it was under Labor some time ago, or maybe presidents should simply be chairs of the board part-time, because the other role the president has is to look after the commission's budget and staffing matters, but staffing matters and the budget are usually delegated to the chief executive officer. I do not have a problem with what you are proposing, but the question I will pose to you is: what do you do with the president's position?

**Mr LEESER:** One of the people who are appearing before us in Perth on Friday has made the suggestion that the conciliation should effectively be done by independent conciliators rather than by the commission. Do you have a view on that?

**Dr Ozdowski:** Technically conciliators in the commission are independent because they form the judgement. I have never heard of a commissioner or president interfering with the way things are handled. It is possibly a strengthening of the processes, so there are no process failures, as has happened with the university of technology students. There is never an independent body; they need to work to somebody. So I would leave it with the commission, but I would look seriously at changes to procedures.

**Mr LEESER:** Thanks, Dr Ozdowski.

**Senator McKIM:** Good morning, Dr Ozdowski, thank you for your submission and for your appearance here today. You said in your evidence that 18C only deals with very subjective feelings of offence, as Mr Perrett quoted to you. Your submission says that the legislation is not a proper or effective mechanism to regulate people's feelings. Do you accept that the way the courts have interpreted the Racial Discrimination Act actually sets a far higher bar than just someone feeling—

**Dr Ozdowski:** Yes, that is what I responded before.

**Senator McKIM:** I am sorry, I was out of the room. So you do accept that?

**Dr Ozdowski:** Yes, I do accept it.

**Senator McKIM:** Is your submission therefore that we should change the legislation in order to better reflect the position that the courts have taken so there is more consistency there?

**Dr Ozdowski:** Yes. I really do believe that the legislation should deal with real issues of substance. I think it will work better for everyone—and, believe me, I am very strongly opposed to any racial vilification. I believe that the cases that we see sometimes on Australian transport should be covered by it, and so on. But, at the moment, especially in the context of public debate about the Queensland University of Technology students and Bill Leak and so on, public opinions change, and I do not really believe that it is very helpful for the cause.

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**HUMAN RIGHTS COMMITTEE**
Senator McKIM: Thank you. I just make the point that neither of those cases were successful, ultimately—both QUT and Mr Leak's case. One was found against and the other was withdrawn. We have heard evidence from many people representing minority racial groups in Australia that they have no doubt that any perceived weakening of the protections in 18C would lead to an increase in racist behaviour towards those minority groups. Do you share that concern?

Dr Ozdowski: No, I do not. I did not see any evidence that the current legislation impacts on the levels of racism in Australia and I did not see any evidence that, with the removal of it, it may increase. I saw evidence that, for example, I think Andrew Jakubowicz provided, that various ethnic communities—and I am part of it—would like to protect the existing status quo, and if it is not protected all hell will break loose. I do not believe that.

Senator McKIM: Okay, that is very different from what we have heard from a number of other people. Your submission calls for a better balance between rights that at times conflict—the right to freedom of expression and the right to be free from racial abuse and vilification or racist behaviour. We have heard a lot of evidence that racist behaviour towards minority groups in Australia actually compromises their freedom of speech, because people feel afraid to fully express themselves because they are in fear of verbal or physical violence as a response. Do you accept that there are two sides to the freedom of speech argument here and that in fact many minority groups in Australia are scared to fully express themselves because of those well-founded fears?

Dr Ozdowski: The same goes for non-minority members who are afraid to express themselves. I can give you an example from my personal life. I had been managing staff for a long time and I had people who were of different ethnic or racial backgrounds. Believe me, it is much more difficult to discuss with them if there is non-performance than with any other staff, because you have the threat that you could be accused of racism, that you do not understand the person, that you do not understand motivation because you are a racist. In my case, if I would be accused of racism, it is a career change—I need to do something else. Consequently, I and a whole range of other people on the other side need to limit what they are saying, and sometimes it is to the detriment of people, for example, who work for us because we believe it is too high risk to manage it properly.

Senator McKIM: I hear that argument, but the question was: do you accept that there are two sides to freedom of speech argument here and that some members of minority groups in this country are currently afraid to speak out because they are in fear of verbal or physical violence as a result, and therefore their freedom of speech is compromised?

Dr Ozdowski: Of course, I do accept it and therefore I argue to set the bar a bit higher, at the level that all of us really well understand what can be done and what cannot be done.

CHAIR: Thank you, Dr Ozdowski.
CHAIR: I now welcome representatives from Amnesty International, the Australian Lawyers Alliance, the Public Interest Advocacy Centre, and the Refugee Council of Australia.

Mr Leeser: Chair, before we start, I should declare that prior to my election to parliament I was a board member of the Public Interest Advocacy Centre. But I have not met Mr Hunyor yet.

CHAIR: Thank you, Mr Leeser. Do any witnesses have comments to make on the capacity in which they appear?

Ms Moore: I am a Noongar woman.

CHAIR: I invite you all to make a brief opening statement. Given the time constraints, could you please keep it brief?

Ms Cousins: Absolutely. Thank you for the opportunity to give evidence to this inquiry. I would like to begin by acknowledging the traditional owners of the lands that we are meeting on today, the Eora nation, and paying respect to elders past, present and emerging. To make efficient use of time, I am making the opening statement on behalf of all of the organisations represented here today: Amnesty International, the Australian Lawyers Alliance, the Public Interest Advocacy Centre and the Refugee Council of Australia. Each of our organisations represents different stakeholders and we have each addressed the terms of reference of this inquiry in slightly different ways.

Several of our submissions note that there are serious threats to freedom of expression in Australia, but they do not come from the much debated sections 18C and 18D of the Racial Discrimination Act. Numerous laws in Australia criminalise speech that ought to be protected in the public interest. The Border Force Act, section 35P of the ASIO Act and several pieces of counterterror legislation curtail free speech in ways that are concerning and were highlighted as such by the Australian Law Reform Commission in its 'Freedom of speech' chapter in its final report of Traditional rights and freedoms, which is noted in the terms of reference. But it seems that these laws are conspicuous in their absence from the terms of reference of the inquiry. We have addressed a number of these laws in our submissions anyway and we welcome discussion of these matters today.

Our submissions all highlight the importance of balancing the right to freedom of expression in Australia with the right to be free from racial discrimination and racist hate speech. For over 20 years part IIA of the Racial Discrimination Act has struck this balance well, we believe. The courts have interpreted violations of section 18C to require a high threshold of harm, in light of the general presumption of freedom of expression. There are strong free speech protections contained in 18D. We are satisfied that the balance struck by the RDA is consistent with Australia's international human rights obligations and we do not see a reasonable justification for amending the legislation. Indeed, to do so could have profound and serious consequences for those in our community who experience racism. To embolden those who would seek to denigrate others on the basis of their race would be a reckless move for this parliament, in our view, and we urge the committee not to go down that road.

We are fully supportive of the Human Rights Commission's complaints-handling procedures and conciliation role. While we welcome questions on ways this process could be further improved, we note that, in 2015 and 2016, 98 per cent complainants and respondents surveyed by the commission after conciliation reported that they were satisfied with the process.

Racial discrimination or racist hate speech is not about hurt feelings. It can cause significant psychological and physical harm and flow-on effects in terms of poor employment and education outcomes, and it can hinder community participation. It can undermine settlement outcomes for new migrants and refugees, many of whom are all too familiar with racial vilification and had to flee in the first place because of their race. It can also open the door to more severe acts of intimidation and violence. So while 18C plays a vital role in protecting people in Australia from these negative impacts, it is not a panacea for addressing racism in our community, and nor should
it be. The Australian government and all parliamentarians have a critical role to play in leading by example to promote inclusion and denounce racism in all its forms.

I believe my colleague Burhan Zangana, representing the Refugee Council's Refugee Communities Advocacy Network, also wants to give a short introductory statement from his personal perspective.

**CHAIR:** Thank you. Please proceed.

**Mr Zangana:** Thank you for the opportunity to give evidence at this inquiry. I arrived in Australia as a Kurdish refugee from Iraq 22 years ago, the exact same year that part 2A of the Racial Discrimination Act was introduced.

Today I represent Refugee Communities Advocacy Network. I and many of my fellow community members have experienced racism and hate speech in Australia. We have been subjected to name-calling and racial slurs while we were waiting for the bus, while we were walking in the streets, in workplaces and in many other public places. We were told to go back to where we came from and labelled as terrorists. These incidents can shake you and are hard to forget. After 16 years I very clearly remember the racist behaviour directed at me by two men shortly after the September 11 attacks. I remember clearly another incident that happened a couple of years ago in another workplace where I was told I am black haired and a wog and was laughed at. Knowing that a law exists that supports you can act as a good psychological support. I always choose to let those incidents pass, but it is good for me to know that I am protected by the law, even if I may never consider using it to make a complaint.

I and many of my fellow community members have experienced years of discrimination in our home countries. As Kurdish persons, we are discriminated against in many countries. For example, we were unable to learn to read and write in our own language, and as a result we highly value the freedoms that Australia offers. We respect freedom of speech, but it should not be at the expense of protection from hate speech. Changing the law can lead to more serious incidents. It opens Pandora's box. In Iraq, Kurdish people did not know their rights and they did not know where they stood. In Australia, I know I can stand up for myself and my community, and this is what I am doing today. I am standing in front of the honourable members of this committee and the public asking you to recommend that this law, which provides safety and protection from racist speech, remains in its current form.

Whenever I arrive at the airport and see the 'Welcome to Australia' signs it gives me a sense of belonging and makes me proud. This is what I want our Australia to continue to be: welcoming to all and protecting all from racism. Thank you.

**CHAIR:** Thank you. We will proceed to questions.

**Mr PERRETT:** The Australian Lawyers Alliance submission says about the process of the AHRC:

Complaints were finalised within 12 months in 98 per cent of cases. This indicates that unreasonable delay is not a concern of either respondents or complainants in nearly every case.

And I think Ms Cousins said that 98 per cent of respondents and complainants were happy with the process?

**Ms Cousins:** Those who have been through conciliation and completed surveys afterwards, yes.

**Mr PERRETT:** With 98 per cent of cases being completed within 12 months, surely that is excellent compared to some other jurisdictions? I am not sure if you are familiar with other jurisdictions, such as applications to the Federal Circuit Court, for example. I just wondered if you would like to talk about the overall process, because we might hear from a senator from Victoria, who might talk about the QUT case in his questions.

**Ms Talbot:** From our point of view, the process that exists at the commission to conciliate complaints of discrimination on the basis of race and other bases is a really important process in terms of enhancing community cohesion.

A number of complaints that get to the commission might not meet the threshold that the court would impose, were those complaints to make it to court, and there is no finding at the commission as to whether there was a breach of the legislation or not. That is not the role the commission plays. Obviously, a number of the complaints that go to the commission would also reach the threshold of the courts, so there is no finding there either way.

But the important role the commission plays is to bring the parties together and allow them to learn from each other about what their experiences have been of feeling discriminated against and being accused of discrimination. Clearly, that is why the satisfaction rates are so high.

**Mr PERRETT:** So if there were an accept-or-reject power given to the Australian Human Rights Commission so that they could terminate complaints on the basis of no real prospect of success, would that extend the time frame of 12 months for some complaints—for example, where the complaint has been terminated but a party has sought judicial review?
Ms Talbot: I am not in a position to respond to that. I think that one of the main concerns from the point of view of the commission—I cannot speak for the commission, obviously, but from things that I have read—is resourcing of the commission. Without the resources that they detail in their submission it is hard for them to deal with things more quickly.

Mr PERRETT: Would anyone else like to talk about judicial review?

Mr Hunyor: From PIAC's perspective, we think that there is some merit in the idea that having implemented a statutory conciliation process as something of a filtering mechanism prior to having to go to court, then if a complaint is terminated as being, for example, vexatious or lacking in substance, that would be a basis upon which someone would need leave to then take the case to court. We have addressed that in our submission. We think the Human Rights Commission's submission there makes sense, but we are careful to make sure that the bar is set at the right place. So our submission is slightly different, but for technical reasons I will not take the committee to what is in our submission. Effectively, where a complaint is vexatious or lacking in substance, we think the better mechanism is for someone to have to seek leave to get access to court. That is a much simpler process.

I know that Mr Leeser has dealt with a different mechanism to achieve a similar result. With respect, our position on that would be that that is somewhat more complicated and likely to raise its own issues, and to be more costly. We think the process of leave probably achieves that purpose in a much simpler way. We think the appropriate balance is that there is a reasonably low threshold to get the complaint into the commission to allow that educative process to take place. But then obviously there needs to be a higher bar and there needs to be a way to filter out cases that are unmeritorious to get that balance right.

Mr PERRETT: Mr Hunyor, I was going to ask you about the impacts that racism has on individuals in your community, but I think, Mr Zangana, that your statement as a Kurdish Australian speaks loudly and clearly so I will not ask that question.

Senator PATERSON: Well, I was not going to raise it, but since Mr Perrett is inviting me to, I might direct my questions to you, Ms Cousins. If others want to add to these, please feel free.

You spoke about a significant number of people who had been through the conciliation process and who had expressed satisfaction with it. Obviously, students in the QUT case were not satisfied with it, and we actually heard very strong evidence from Dr Sev Ozdowski, a former Human Rights Commissioner, which was pretty damning about how the commission handled that case. I should say that I suspect, without having spoken to them, that the applicant in that case might not be very satisfied with the 3½-year process and where it has got to. Do you think that that is a cause for concern, the QUT case and how it was handled?

Ms Cousins: I will hand that question to my colleague, Roxanne, who is working on this.

Ms Moore: Thanks for your question. I think it is pretty clear that the QUT case was an outlier in the range of cases that the Human Rights Commission deals with. As the Human Rights Commission submitted to this inquiry, on average, complaints are finalised within 3.8 months. It seems that in this QUT case they made efforts to conciliate the complaint for between 12 and 14 months, which is obviously outside of that usual time frame. And as—

Senator PATERSON: Just on that, sorry, just before we get any further—I think that is a relevant point. I do not think it is fair to say that they made efforts to conciliate the case for that period because the students did not find out about the complaint until the end of the period. So they could not have been participating in a conciliation process; they actually found out at the end of that 12-month limit that there was a complaint against them.

Ms Moore: Most cases, as I mentioned, actually dealt with the complaint in 3.8 months on average, and 98 per cent, as the ALA has pointed out, are completed within one year. Of course when a case goes to court, which is a choice that people in that process make, that takes longer to resolve. But as people have mentioned already, the high satisfaction rate of people surveyed who have completed conciliation in the Human Rights Commission goes against this one particular high-profile case.

I would also make the point that Cindy Prior was not a vexatious litigant; that is not what the court found in that case. The court considered that case on its merits and actually found that some of the statements that were made, the content—the idea of white supremacy, for example—are quite offensive ideas to the reasonable person. I just wanted to make the point that although those statements did not reach the threshold of section 18C, it is clear that they do have a broader impact of racism on the community.

In terms of timing, coming back to that point, it was clearly an outlier and it does not seem justifiable to amend an entire system which has been working well for 20 years on the basis of one case that, for reasons which are not clear to us because it is a confidential process, took a longer time.
Senator PATERSON: I hear all that you say and many others have said it, that this is an outlier and it is unusual, but I have not heard you express an opinion on whether or not this unusual outlier case is troublesome.

Ms Moore: We believe that, according to our international rights obligations, it is very important that people who have potentially had their rights violated by racial discrimination have access to a cost-effective, timely process. On the most part, that is what the Human Rights Commission is providing through its conciliation process. Conciliation in this form to deal with specifically racial discrimination matters is something that has been recommended by the Royal Commission into Aboriginal Deaths in Custody. It is part of the Paris Principles, which is a part of Australia's international obligation.

Senator PATERSON: So is your evidence: as long as we get it right generally and as long as there are not many cases like QT, where we did not quite get it right, it is okay?

Ms Moore: It seems that if the process is working well for 98 per cent of people who are going through that process, it is an effective alternative dispute mechanism.

Senator PATERSON: So is there any other area of human rights law—let's say, the ban on torture—where if you said in 98 per cent of cases torture does not take place but in two per cent of two per cent of cases it does take place so therefore you think it is generally getting the balance right and it is not affecting anyone's human rights?

Ms Moore: This is only a framework that is set up to deal with these cases. How individuals are dealing in that process will differ case to case. All we can say is that it seems that almost all people who are going through this process are very satisfied with the process, with the outcomes. It is clearly cost-effective, it is timely, it is in line with our international obligations; and we think that, just on the basis of a couple of high-profile cases which took longer than the others, it is not necessarily reasonable.

Senator PATERSON: I hear you and completely understand that. I will try one more time. Is there any other area of human rights law where if we generally got it right but sometimes got it wrong you would be satisfied? Apply it to any other area that Amnesty works on—let's say, refugee rights. If we got it right 98 per cent of the time but two per cent of the time we did not, would that be okay?

Ms Cousins: If we got it right in 98 per cent of the time in Australia, I would be very excited. Our submission is not actually not that the Human Rights Commission's complaints process is perfect in every respect and in every case. As I said in the opening statement, we welcome questions on how the process could be tweaked, improved in some ways. The Human Rights Commission has already made recommendations to this committee that we think have merit. PIAC also talked about potential ways regarding leave that the process could be streamlined. So, no, it is not perfect and it could be improved. But I think there has been so much focus on what is wrong with 18C and what is wrong with the Australian Human Rights Commission from only one case that went to court. Last year the complaints that did result in conciliation had a 98 per cent success rate, not just for the complainants but for the respondents. This is not a system that is broken; this is a system that could be slightly tweaked and improved. We just have to have a reasonable expectation of what change is required and not throw the baby out with the bathwater with the changes to the act.

Mr Hunyor: If we look at something like what happened to Lindy Chamberlain, that was a gross miscarriage of justice yet our criminal justice system continues—we have not taken murder off the books. We have to recognise that any legal system sometimes gets it wrong—that is why we have appeals. We would like it to be right all the time. Let us accept that what happened in the Prior case was the system not working well. I am not saying I do accept that, but if we accept that for the purposes of the argument then we still have a system that is working overwhelmingly well, and in fact in that case the complaint was unsuccessful.

Senator PATERSON: So that is just the price that we have to pay to have a system?

Mr Hunyor: With any law you are always going to have cases where it does not work. That is the price you pay for having any law on our books at all.

Mr PERRETT: We do not want to put appeal judges out of a job, do we!

Mr Hunyor: Indeed.

Senator McKIM: I want to address my first question to the representatives of the Refugee Council. Thank you, Mr Zangana, for your opening statement. We have heard about some of your lived experiences of racism in Australia. Based on any personal experiences you have had or the experiences of the people you represent, refugees in Australia, in your view would watering down or abolishing section 18C lead to an increase in racism towards the people you represent?

Mr Zangana: I believe yes.
Mr O'Connor: The Refugee Council has 180 organisational members across the country who work with refugees and asylum seekers day in day out, all the way from service delivery to advocacy and legal work. What we are hearing from our members and the people they work with is that there is great concern in the community about the signal that this does send to people who are prone to racist comments. We have regular contact from refugees and former refugees in the community, and asylum seekers, raising specific issues with us around the sorts of abuse they receive, often on a daily basis. I think the Scanlon Foundation found the majority of people on a monthly basis who came here as refugees were receiving racist abuse, were being vilified. I think Burhan in his opening statement today pointed out the very important psychological aspect this law has for people who come here as refugees and people who come seeking asylum. For them it is a bulwark against what they do face every day and, as Burhan also pointed out, they rarely bring it to attention but they know that it is there and the confidence that gives them is incredibly important.

CHAIR: If any other panellists would like to respond I am happy for them to do so.

Mr Zangana: I do not have anything to add.

CHAIR: Can you outline for the committee some of the lived experiences of racism faced by refugees and people seeking asylum in Australia. We have heard lots of evidence already, even in the relatively early stages of this committee, that many people from minority racial groups in Australia feel that their freedom of speech is being compromised because they are basically afraid to speak out and make themselves targets for what they believe will be the likelihood of verbal or physical violence towards them.

Ms Okhovat: Definitely I want to echo what our colleagues have said—for many people we spoke to the impact of racist speech was quite profound. It impacted on their mental health and social participation, on settlement outcomes and on employment outcomes, and in our national consultations many examples were shared with us. We have some examples here, and I can read some of them. That also sheds some light on what you said about the freedom of speech and people not being able to speak after they are subjected to racist speech. We spoke to a young gentleman from Iran last year, and he shared this with us: 'One day I was on a train from Sydney to Newcastle and the guy I was sitting next to started asking me questions like "Where are you from?" I told him "I'm from Iran."

He asked me, "How did you come here?" I said, "I came here by boat." He said, "You are a refugee! You are refugee!" and then started yelling, "Go away!" I was really shocked. I didn't know what to do. I was by myself. People were looking at me. I felt very embarrassed. Since that day, every time I board a train that incident replays in my head. I think the way they are showing the refugees influences people, so you just have to lie: just say, "I came here to study," and then everything is fine.'

That was one example. Another example is: 'I was in an elevator with my parents, then this guy came in and started asking my dad where he was from. My dad doesn't live in Australia, so it looked like he was thinking for a few seconds. Then he said where he was from, and the man started laughing and saying, "So you were embarrassed to tell me because you are all terrorists." We all felt so shocked and couldn't answer. The confined space of the elevator made us all very unsafe, and then he left. It was more than six years ago, and I still think about it and feel angry at myself. Why I didn't say anything back? Why I didn't call out his racism? This is stuff that can stay with you forever.'

They were just two of the examples that they shared with us in the context now that we have the law in its current form. As Tim mentioned, we are more worried about the impact of watering down and the escalation in the racists' speech or the escalation in terms of the violence that could occur as a result of that speech.

Mr O'Connor: Fundamentally, what we are hearing back from refugee communities is that they want to integrate. They need those social supports, such as 18C, that exist to be able to allow them to do that—to ensure that they are not discriminated against at work or on public transport or in an elevator. Those things are crucial for integration. We take a very conservative view, like many of our members, on this that 18C at the moment should be kept as it is.

Mr LEESER: I want to put a question to Mr Hunyor, Ms Talbot and Ms Cousins. While, I think in response to Senator Paterson, you were saying hard cases make bad law effectively, there seems to be, on the basis of the submissions that have been put to us and the evidence that has been given to us, at least among the ethnic communities across Australia, a sense that while they want to preserve section 18C in its current form there is a desire to change the process. That is quite common among many of the submissions we had from ethnic communities because of a need to restore public confidence in the commission's handling of these cases following QUT and following some of the public controversy that has arisen around the Bill Leak matter.
I want to go to Mr Hunyor's submission on page 4, where he talks about the nature of the recommendation that has come forward from the commission and says that he thinks that leave is enough, from a matter where the commission has effectively terminated it, if you were going to apply to the Federal Court after that. Given that when you go to court, unlike in the commission, costs usually follow the event—indeed, some complainants in this area who have taken matters to court have actually used costs in order to effectively be the punishment when they have been successful—would not a provision that provided security for costs for a complainant taking the matter to court, having had that matter being terminated, be a reasonable thing to put in place in addition to the recommendation that you and the commission have made?

**Mr Hunyor:** The concern that I have in relation to security for costs is just that that places a significant barrier in people's way that does not exist in other jurisdictions. Security for costs against individuals is very, very rare, whereas in relation to organisations it is more common. I think it depends on where the bar is placed. If you were going to have a security for costs situation, I think in principal PIAC would say that is not the appropriate mechanism. You are much, much better to have a process of seeking leave, which would be an appropriate and reasonably cost-effective filter. But you would need to make sure, if you are going to have security for costs, that it has already been through a reasonably robust process to get there; otherwise, you may have the commission getting it wrong—as any commission will—and then someone has to risk not only having to pay their own costs but having to provide the security for the other side to be able to get off the ground. I think that gets the balance wrong. I think PIAC's position is that we agree that there is a case for doing something there as a filtering mechanism, but it is a matter of getting the balance right so that people's rights are accessible to them.

**Mr Leeser:** What about extending the range of reasons for which a president can terminate matters or, as I suggested, having a part-time judicial member of the commission who would replace the president's functions and can terminate matters to include no reasonable prospects of success? Do you have a view on that?

**Mr Hunyor:** That probably sets the bar, but I am not sure if it is too low or too high. I think that that probably does not get it quite right in that the lacking in substance test is probably better than it needs to be, even less than lacking in merit with no reasonable prospects of success, which I think is a much higher bar for the person to have to clear. Having said that, again, it comes down to how we want to structure it. If it is going to be harder to get through that initial gate but easier to get leave then that may work better. Alternatively, it has to be vexatious, and not even lacking in substance, to be chucked out at that early stage. That means that a stronger mechanism to filter at the other end might be appropriate. But, as I said, our preferred model—and I accept it is a matter of getting the balance right—is that it is simply a matter that being vexatious and lacking in substance is the termination ground, and then leave is required after that stage. But if the commission, for example, decides that a complaint is not unlawful discrimination then we would say that that in itself should not be a bar because that is really getting much too close to what the court should determine. I think that is really where we would draw the line.

**Ms Talbot:** Just briefly, I think ALA would echo those comments. I do not think it is appropriate to be putting a barrier to accessing justice, in terms of security of costs, in as an automatic or even a presumption. If, for any reason, it seems that this is a particularly vexatious matter that a litigant wants to pursue on an exceptional circumstance it might be appropriate, but it would not be appropriate to have a presumption that that be the case. You have to ensure that justice is accessible for people who feel like they have been discriminated against.

**Mr Leeser:** What about justice for the respondents? I am taking Senator Paterson's example that he put to you of the QUT case. It may be that the complainant is unable to pay the costs. The students in that case were being represented pro bono, but, in a situation where that is not the case, that is not particularly fair for the respondents.

**Ms Talbot:** I certainly agree it is a balancing exercise. Given the experiences that we have heard about today that are not even reaching the commission because people choose not to raise those complaints for their own personal reasons, I think it is really important that we ensure that people who are feeling discriminated against feel like they have access to help when they feel like they need it. If we start putting barriers in place then that support that was heard about earlier—that the law provides—will be reduced.

**Ms Cousins:** I might just add to that. From Amnesty International Australia's perspective, and looking at the international best practice around national human rights institutions, the Paris principles that Australia is signed up to around national human rights institutions does set out that all national human rights institutions should have a complaints process that is essentially geared towards reaching amicable settlement of a complaint. It is not an adversarial process. It is about trying to reach settlement—reach resolution of the issue. It can be called 'remedy', but it is also just about negotiating and saying, 'This is what happens, this is what you said and this is the impact it had on me.' It is providing a space where people can come together, see the hurt in each other's eyes and resolve...
it. That really goes to the purpose of this act, which is to ultimately reduce and, in the long term, eradicate racial discrimination. So that process of conciliation, getting people around the table, is very important.

It is very difficult to get a really good outcome out of an adversarial process, I would suggest, and that is where increasing the bar and tipping the emphasis of the Human Rights Commission towards actually adjudicating whether a complaint reaches that threshold, rather than just getting people in the room trying to work it out in a confidential manner, which is what the process is set up to do, potentially takes the emphasis and the purpose away from the object of the act.

Mr LEESER: Do you support an amendment to, effectively, codify the case law on 18C to make it clear that offend and insult means a substantial offence and not mere slights?

Ms Cousins: Our view is that the courts in Australia—we have heard this many times in the hearings so far—have struck the balance correctly. They have maintained a high threshold for 18C cases and the free-speech protections offered by 18D are appropriate and are consistent with Australia's international human rights obligations. We have stipulated in our submission that, if the parliament does decide to make any amendments to 18C, it should merely be to codify what is the current standard. That is a legal position. That said, we completely agree with others on this panel about the signal that changing 18C would send to the community. One thing is a pure legal technical argument. To be honest, given the way the courts have been managing this balancing act, we do not really gain anything by changing the law.

Mr LEESER: As Professor Stone pointed out to us yesterday, there is a real rule of law problem that we have where the public interprets it as meaning one thing, given its natural and ordinary meeting, and the courts are determining it is something else, and that is undermining confidence in the law, as she put it to us. Her view had at least some weight with me.

Ms Cousins: I think part of that as well is about leadership—leadership amongst political leaders, amongst the Human Rights Commission itself, amongst the community sector. The Racial Discrimination Act and the Human Rights Commission Act are not a panacea for resolving all of these issues, and we do need leadership to call-out racism, say its racism, denounce it, say it is not acceptable. I think perhaps we cannot resolve all these issues through just 18C and the wording of that.

Mr Hunyor: It is obviously a good point made by Professor Stone about the disconnect between the statutory language and the case law, but I think, with respect, your submission, Mr Leeser, makes the point very well that those terms—offend, insult and so on—are used in a variety of legislation and there are many cases where that rule of law exists.

Mr LEESER: No-one is arguing about insulting behaviour, for instance, towards commissioners of the Fair Work Commission. Public controversy is about this particular—

Mr Hunyor: There are reams of case law on what offensive language means and how that needs to be read, and the principle of legality requires courts to do exactly this sort of work all the time. I accept that there is an issue there, and there is one compelling reason why you would say, 'Let's line up the legislation with the case law', but there is also very compelling counterargument that we do know what it means, that the courts have said what it means, that we are debating at length what it means and that there is a significant cost that the community says it will have to pay if we make that change.

Ms Moore: I think also, Mr Leeser, going to your point about the community not understanding what the courts have interpreted, it comes back to this idea of human rights education and the very important role that organisations like the Human Rights Commission have to educate people about their rights and about when they can access remedies under the Racial Discrimination Act. Also, organisations like Aboriginal legal services, for example—whose funding has been cut in recent years—provide important advocacy services to Aboriginal and Torres Strait Islander people, many of whom do not understand their rights and remedies available under the Racial Discrimination Act. I think that human rights education element goes to both making sure that people who have had their rights violated know about the process to begin with and then also that they are able to access it as well.

Ms Talbot: Going back to what Ms Cousins was saying, it is very much a matter of leadership. These issues are not coming to the fore because your average member of the population is reading through the Racial Discrimination Act or any other piece of legislation. There has been, in some quarters, a clear misrepresentation—whether it was deliberate or accidental—as to what these sections actually mean. There have been representations that these sections relate to people's feelings being hurt. It is very clear that that is not the case. That has never been the case. So it goes back to leadership—making sure that people who are in positions of leadership are being accurate in the way that they represent what is the law in the country.
Ms MADELEINE KING: Thank you all for coming in and for your statements and submissions and also to Mr Zangana for your personal story earlier today. I just wanted to state my rare agreement with Senator Paterson that—

Mr PERRETT: Hansard will take note.

Ms MADELEINE KING: Yes. I agree that the complaints process in our legal system should aspire to a 100 per cent satisfaction and success rate, however you judge success. But I do have to acknowledge that the difficulty is that humans are involved and therefore I would contest that is never going to happen no matter what complaints process we are in; nonetheless, we should strive to do better at all times. I know the Human Rights Commission itself has learned from the situation that emerged in the Queensland university case and I commend them for it and I hope the processes will work better in the future.

My original question was to codification but I think you have answered that so I will not rehash it. I want to instead reflect on what Mr Zangana said in your opening statement. You mentioned that—and I am paraphrasing—'It is good to know that 18C is there. It is a show of support from the Australian community to minorities and a protection from racist behaviour even though you might choose not to make a complaint under it.' You said you have been subject to racism. Do you think, firstly, it is a widespread feeling amongst minority communities? I do not mind who wants to answer this. And secondly, do you think minority communities are necessarily aware of their rights to live free from rational discrimination which is embodied in 18C?

Mr Zangana: I believe so. Multicultural communities may not know the legal terms of section 18C or 18D, but they know that there is a law protecting them. I have an example. A few years ago I was in Iraq and I was sitting among my siblings and my cousins and my neighbours, and I told them I did not understand this. I do know what my rights are here. I was born in Iraq mean, but do you know what are your rights? I do not understand it. I do not know. In Australia, in the morning when I open my eyes I know that I am protected. I know I have a right. At the same time I have a duty and a responsibility. I know that no-one can hurt me, can hurt my feelings, physically or racially or in any way. At the same time, I know my limits as well. I know that there is a law. I do not know the terms and the words that are in the law, but I believe that the multicultural communities and the minorities know that. It is the feeling that they get. It is the warmth that they get from the people. Not everyone is racist out there, but they know that there is a law protecting them. I have an example. A few years ago I was in Iraq and I was

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look at the evidence,' and overwhelmingly the evidence is that this regime has worked very successfully and very effectively. However, the studies on it also show that it has not achieved quite the results that we might have liked. I do not think that means that it is not something that has been worthwhile or made a contribution. But it reflects, as we have heard, the fact that there is a need for leadership and there is a need for us all to recognise the values that are set out in legislation; and, to come back to the point that Burhan made, the importance of having a normative statement.

That is something that PIAC touches on in our submission: in the American context, Mari Matsuda writes of the aloneness of being subject to racism and how that aloneness comes not only from the racist message but also from a government response of tolerance. We think it is important that there is no message of tolerance from government and the parliament through part IIA that this is not okay. Obviously, there is always going to be a legitimate discussion about where we draw the line and how we balance those rights, but to have that strong, normative statement that racial hatred is not something that can be expressed in a public place, we think, remains a very important thing and does play a role in social cohesion, if not necessarily creating exactly the world we might all hope for.

Senator REYNOLDS: So is that a yes or a no in answer to my question!

Mr Hunyor: I do not accept that it has been a monumental failure. I completely accept that it has not fixed the problem.

Senator REYNOLDS: So it is a yes and a no?

Mr Hunyor: Yes.

Ms Cousins: I would add that I really do agree that political leadership is absolutely vital. Any act like the Racial Discrimination Act cannot fix racism. It is just not going to, when there are so many components to that, and a very big part of it is political leadership. And a very big part of building confidence in the law is political backing for the law, so those two things are connected.

But I wanted to point out to you that the primary recommendation Amnesty made to this inquiry was that, given there are questions about where the balance sits between freedom of speech and other rights—particularly the right to be free from racial discrimination and racist hate speech—parliament needs to re-engage in this discussion about a human rights act for Australia. That is because looking at individual rights and trying to develop legislation around individual rights, not looking at how they sit alongside other rights, is actually part of the problem here and has led to issues around confidence in, say, the Racial Discrimination Act, because we do not have, for example, a complementary act on freedom of speech. We have an implied right to political communication in the Constitution and we have a number of elements of protection of free speech in this country, but they are not in the form of an act that sits alongside and demonstrates how that right is balanced with other rights that it potentially does come into conflict with.

So, to answer your question in terms of the efficacy of the Racial Discrimination Act and this particular bill, we think one of the ways it could be made more effective in the future is actually to have a better overarching framework for human rights legislation in Australia.

Ms Talbot: I would support those statements as well. I think a human rights act would be a really valuable tool to balance the different rights that clearly conflict from time to time. I would also agree with PIAC—not to put words in your mouth—that the Racial Discrimination Act is not a failure. I think it is a really important tool in the toolbox that is available to help to eradicate racial discrimination, with other tools being education and leadership. But I would point to what we said at the beginning about the satisfaction rates with the commission, to say that actually it really has enhanced community cohesion. Those statistics show that people are being informed about experiences of racism and people have a space to air their grievances about having experienced racism and that means that the community are able to learn from one another about what racism means, in a safe space that is confidential. Unless people choose to break confidentiality, nobody actually has to hear about it. It is helping our community to understand what racism is and eradicate it.

Senator REYNOLDS: That is great theory, and I understand the theory of it, but again to me it is directly contradictory to some of the evidence that we have heard even here today from the Muslim community, for example, where they cite a whole range of issues where they are subject to terrible racial discrimination, if not vilification, and none of that has been dealt with by the Human Rights Commission. In fact they are saying it is getting worse, not better.

Mr PERRETT: We do not get rid of murder laws because people get killed.

Senator REYNOLDS: So on the one hand we have a rosy picture for the few people who do go through that process, but what are 18C or 18D doing for those people who do not have access to it?
Ms Talbot: I am not sure that you can blame 18C for that. As I just said, there is a toolbox here. Part of it is the legislation, part of it is the public commentary and part of it is leadership. To put all of those experiences down to two sections of legislation is not reflective of the circumstance.

Senator Reynolds: Coming back to my original question: if you go back and look at the intent—the explanatory memorandum, the cabinet documents—those changes plus the Criminal Code amendments were designed to create social cohesion and eliminate, as much as possible, racial violence and discrimination and vilification.

Mr O'Connor: It is certainly an admirable aspiration and I think it is something we all should be aspiring to as a community. But, as my colleagues have said, there are many elements associated with social cohesion. It is a very rich tapestry. We see 18C as a very important element of that. Of course we need strong political leadership, we need a welcoming community, we need a strong education system and we need a good health system. As we have heard from Burhan today, though, the psychological impact that is provided by 18C is a huge boon to the community coming into Australia and beginning to integrate, beginning to resettle successfully, as many of our constituents do at the Refugee Council.

Mr Broadbent: I am not speaking on behalf of all of the committee, but the presentation we have had from just about all of the representatives the committee has seen has been most impressive. You are very good. Burhan, when you have been attacked racially, did they know you are a Kurd—or were you a Frenchman, an Englishman, an American, an Italian or a Greek? Who did they think you were? You are likely to get attacked for being a Greek more than a Kurd, I dare say.

Mr Zangana: Racism is racism, no matter where you are from. I feel for someone out there being attacked, not just myself, because I grew up in a country where we did not have any rights. When I came to Australia and I experienced all the rights that I have—as I said before, I do not need more rights, but I do not want less anymore, because I have got used to it now in Australia. But for anyone out there, because of my looks, my accent and maybe my hairstyle—sometimes I dye my hair black and I have curly hair—

Mr Broadbent: So you are French!

Mr Zangana: You can tell that I am not, let's say, from Europe. I am a migrant or a refugee. You see people out there who look like me, and they can become a target. I feel for them too. I feel for everyone out there because I lived the experience in the past, and I do not want that experience to happen in the future for other people.

Chair: I thank representatives from Amnesty International Australia, the Australian Lawyers Alliance, the Public Interest Advocacy Centre and the Refugee Council of Australia.
SINGH, Dr Yadu, President, Federation of Indian Associations of NSW

[12:20]

CHAIR: Welcome. I invite you to make a brief opening statement—in the interests of time, could it be kept fairly short?—and then members of the committee may ask some questions.

Dr Singh: Thank you. Freedom of speech is an important concept, but it is never an absolute right. There are always some restrictions. Australia has been a successful example of a multicultural nation, where people are allowed and encouraged to be proud of and celebrate their heritage within the overall ethos, values and principles of Australia. One of the main reasons for the Australian success story is the general freedom from racial abuse which people enjoy with the help of the Racial Discrimination Act. Section 18C is the key mechanism to facilitate freedom from racial abuse. It does not infringe on freedom of speech because section 18D provides the grounds for exemptions from application of 18C. People who oppose 18C, particularly those who want to change the 'insult and offend' components, tend to forget that in the 18C cases which have gone to court, judges have been very clear that it applies to only the very serious component of the offence, not just feelings.

The complaint cases which have gone to the court have been very few. Most of them have been managed by the Human Rights Commission, but there are, of course, some cases which have been frivolous and vexatious, and the classic example of that was the QUT case. I have no doubt that that really should not have gone to court. We want a strong Racial Discrimination Act, but at the same time we do not want vexatious cases to go to court. How do we manage it? We should change the complaint-handling process by amending the act which governs the Australian Human Rights Commission dealing with 18C complaints. That would deal with that issue of vexatious complaints. At the same time I do not want to have the Human Rights Commissions staff soliciting complaints either, because that is politics and that is not their job. So I have some views about this. I am not against freedom of speech, but it cannot be absolute, because if it is allowed, it will lead to damaging the cohesion of this great country. With that, I am open to any questions, esteemed members of the committee.

Mr PERRETT: Thank you, Dr Singh. You do not have to answer this question, but are you a Sikh?

Dr Singh: No. I am not a Sikh. I am of the Rajput background Indian community, and the Singh surname is basically the majority in my community. Sikhs are only a minority.

Mr PERRETT: The reason I ask is that I was going to ask about religion. Your submission said that you are very much aware of the harms of racist speech. Could you give concrete examples of the harm from racism suffered by those in the Indian-Australian community?

Dr Singh: Sure. I take the example of the Sikh community. I am very close to that community. My value system is similar to their value system. Many of my Sikh friends have been abused, called terrorists, called all sorts of names, and many of them have complained that it is affecting their standing, affecting their mental wellbeing. So racism is here. There is no doubt about that.

Mr PERRETT: Because of their headaddress?

Dr Singh: They have the special turban, which is their religious dress, and they have been abused many times. Somewhere they have had their turban removed on public transport. So it does affect them. I must admit that I also have been subjected to racist treatment, but I have a very important principle that guides my life, and that is to never allow anyone to make you a victim. So I give it back to them. For example, somebody asked me in a train, 'Where are you from?' and I said, 'It does not matter,' so he got more aggro and he started abusing me. But, to my pleasure, 30 people in the compartment of the train—I was going to Caringbah—stood up for me, and they told the guy: 'You are getting out at Mortdale. You are not going on this train.' So, I had a choice to make: should I become a victim or should I not become a victim? I chose not to become a victim, and that is very important. But there is, of course, serious racial abuse—there is no doubt about that; we see that every day. The Racial Discrimination Act does prevent that to a large extent.

Mr PERRETT: Obviously you are a confident leader in your community, but not everyone in your community would have the backbone, resources and education that you have, so they might have a different experience. I notice that your submission says that the very establishment of this inquiry, with such terms of reference, irrespective of the outcome, gives unfortunate negative messages. What message would it give to your community if the parliament decided to water down or repeal section 18C?

Dr Singh: Let there be no doubt that the general impression in the community, not only in my community but in many other communities, is that this is some agenda driven by extreme right-wing politicians trying to dilute or remove 18C. This is the message in the community, and let there be no doubt about that. I do not believe in theory that people have a right to be bigots—you know what I am talking about. People do have a negative view about
Mr LEESER: Dr Singh, you like many other ethnic community leaders have indicated your ongoing support for section 18C as it currently stands, but you have also noted that the process of the commission needs to be improved, and in your submission you have largely endorsed the proposals that I put forward.

Dr Singh: Absolutely. As pointed out in the beginning, the courts have been very clear about when to allow an 18C complaint to go ahead or when to say, 'This is the right complaint.' They have always gone for serious and substantial offence, not just a feeling. Yes, 18C does not say that, and I do not think it is a bad idea to codify it. If you codify it I think it would be very helpful because the complaint handling process will then apply that code and appeal some of the complaints that should not be going to court anyway. Abuse of the process needs to be fixed. It is not 18C itself—though 18D does give exemption. It is the abuse. There is a small number but there is abuse nevertheless. Those are the things that need to be fixed by codifying or by doing whatever we have to do. The Human Rights Commission may have a person whose job is basically to review those things and not only that, but the vexatious, frivolous and the lacking substance type of complaints should not be going anywhere beyond the Human Rights Commission. That is where, rather than having the mandatory conciliation, they should have the power to actually terminate those complaints. I think I read somewhere—and I am not sure whether it was in your submission or somewhere else—that the Human Rights Commission may be given finances to employ a part-time judge or a legally trained person to make that decision. We want a cohesive community; we do not want a dogma on free speech. We want restrictions on free speech as well. It cannot be an absolute right. That is why I believe the Australian Human Rights Commission Act should be amended so that the complaint-handling process could be streamlined.

Mr LEESER: I have one final question, Dr Singh. Over the course of this inquiry, it has appeared to me that it might help quell public controversy on this topic if there were a clarification in section 18C, by the codification of the current law, that indicates that it is not just mere slights but that it has to be a serious and substantial offence. I just wanted to hear you on that point.

Dr Singh: I have no doubt that it would increase racist abuse. I have no doubt about that. I have zero doubt about that. If you remove 18C or dilute it, it will have only one outcome, and that would be more racist abuse, and that would not be healthy for the psychological, physical or any health of the multicultural community. We would be the victims. So I do not recommend 18C being diluted or repealed in any way, shape or manner.
Senator McKIM: Thank you. I completely agree. Secondly, I want to go to your comments around providing the commission with the power to terminate certain complaints. I should say that we have evidence that the power already exists for the commission, or that a satisfactory power already exists. But, leaving that to the side, if there were changes made to increase or provide that power to the commission, are you suggesting that people should not then be able to go to court and have their complaints tested in court, or do you think they still ought to have access to the Federal Court in order to have their complaints tested even if the commission has terminated that complaint?

Dr Singh: If the president of the commission or the person with the delegated power terminates the complaint as frivolous, vexatious and lacking substance, that means that the decision can only be changed on jurisdictional grounds, not then challenging the decision itself because then there is no difference to what is happening now. In the last two or three years only five per cent of complaints have been terminated by the Human Rights Commission, compared to 30 per cent about 10 years ago. So you can see that there is a problem here. People have the right to go to court, but they can challenge the decision only on jurisdictional grounds.

I know that Mr Leeser has said that they have to have the money for the costs, but I do not believe that is the right thing, because that is a barrier. No, they can challenge on the ground of jurisdiction but they should not be required to put a guarantee, warranty or some sort of mortgage to cover the costs, because that is a barrier. The cost will come from the Human Rights Commission, not from the other party. So I do not believe that that should be applied.

Senator McKIM: I have a follow-up question. I agree with the point about the costs being a significant barrier. So I am in furious agreement with you there. If the Human Rights Commission in the circumstances you have outlined did terminate a case and someone did not have the right to go to the court on a merits argument, aren't you denying the right of any review from the Human Rights Commission decision to terminate?

Dr Singh: We do not live in the ideal or utopian world. We have to have some limitations on everything. Did I have the right to drive without following traffic rules when I came here? No, I did not.

Senator PATERSON: Did you?

Mr BROADBENT: You don't have to answer!

Dr Singh: No, I followed all the rules.

Mr PERRETT: You've got parliamentary privilege!

Dr Singh: My point, though, is that everything has some limitation. Nothing is absolute. If the complaint has been just by the right person—the president of the commission—or somebody with a legal background like a judge or part-time judge, I do not believe it should go to the court. Again, I said nothing in this world is absolute. I want to have a billion dollars. Will I have it? No, I will not. I am saying that we have to accept the limitations in everything to have a cohesive, fair system. We do not unfairness. Today you are a parliamentarian and have a lot of money, but, if you complain against me tomorrow, I have to put up money for the lawyer. It has to be a right complaint. It has to be a real complaint.

Senator McKIM: I'm pleased that I've got a lot of money; I wasn't aware of that previously!

Mr GOODENOUGH: Thank you for your time today.

Mr BROADBENT: Drive carefully!

Dr Singh: I will.
SACKVILLE, Justice Ronald, AO, Private capacity

[12:36]

CHAIR: Welcome. Is there anything you wish to add about the capacity in which you appear today?

Justice Sackville: I do not speak on behalf of the judiciary or any section of the judiciary.

CHAIR: Justice Sackville is tabling a copy of his opening statement. May I have a member of the committee move that it be accepted.

Mr BROADBENT: So moved.

CHAIR: Are there any objections? There being none, it is approved for tabling.

Justice Sackville: Thank you. Can I just add very briefly that I have received an invitation but actually received it only very shortly before this meeting, so I would have provided a statement a little earlier. The statement summarises what is in a much longer article of which I have provided copies, and I assume that the reason that I was invited to come before the committee is that in that article I attempted to set out my views on issues that happen to be before the committee.

The background to that paper is that it was prepared not for the purposes of enlivening or informing any political debate about the operation of part 2A; it was in fact in its origins a presentation to an audience at the Jewish Museum in Sydney. Because of the views that I expressed, it should not be assumed that the audience at the Jewish Museum was necessarily wholly in favour of what I had to say. Indeed, you would have already heard from the Executive Council of Australian Jewry, whose views on many of the issues are somewhat different. But I think it is important to stress, because I do propose some changes to the operation of the legislation, that anybody who has lived as a Jewish person in this country for as long as I have, which is now into its eighth decade, cannot have avoided experiencing anti-Semitism in one form or another—and the consequences of anti-Semitism will have been outlined to you by the Executive Council of Australian Jewry, if not by other groups, and of course the consequences that flow from anti-Semitism have been experienced by many other groups in the community, as the committee has heard. But I do want to make it clear that, although I favour changes in the legislation and I attempt to explain in that article and I summarise the issues in this statement, I do think it is of profound importance that Australia has a national law that provides protection not only against anti-Semitic speech but against other forms of hate speech that are directed at vulnerable groups and individuals. In the article, I attempt to provide what might be described as a philosophical or policy justification for taking that approach. Other submissions that this committee has received make the same point and, if I may say so, some of them seem to me to be of very high quality indeed.

The only other point that I would add is that I think you have heard or will hear today from the Gilbert + Tobin Centre of Public Law. That, I think, is a particularly valuable submission, and I think you will find that there is a surprising degree of common ground among submissions that on their face seem to take a different view as to whether there should be changes made to the legislation.

Thank you for that opportunity.

Mr GOODENOUGH: We will go to Mr Perrett first.

Mr PERRETT: Thank you for appearing. At the moment, you could argue, we have heard suggestions saying the law is settled.

Justice Sackville: Yes, I am not sure that is right.

Mr PERRETT: Would you like to expand on that?

Justice Sackville: People often say that, and they are not often right, actually.

Mr PERRETT: So you do not believe that in Australia at the moment it is settled as the current Chief Justice of the High Court has indicated in her comments earlier.

Justice Sackville: No. She was not a justice of the High Court when she made those comments.

Mr PERRETT: I understand. She has got a little bit of weight behind her at the moment.

Justice Sackville: Yes, she has a little weight behind her, and so do six other members of the High Court. The Executive Council of Australian Jewry's submission is predicated on the basis, for example, that the interpretation is settled, that 18C incorporates an objective test. I do not believe that is correct—at least not entirely correct. The language of section 18C incorporates subjective elements. The courts, including the decision of Justice Kiefel, have been at some pains to try and introduce objective elements into the interpretation which in fact do not sit very well with the language. If that language were to be interpreted by the High Court afresh, bearing in mind that
the High Court in recent years has taken a somewhat literalist approach to statutory interpretation, I would not be at all surprised if there were a somewhat different approach taken to the interpretation of the legislation. One of the problems with the legislation in its present drafting is a lack of coherence, because there are inconsistent concepts embodied within the legislation that I think do need to be clarified and made consistent.

**Mr PERRETT:** My second question goes to your opening statement in a way. Taking off your judicial hat—

**Justice Sackville:** I haven't got it on!

**Mr PERRETT:** Sorry; putting aside your judicial expertise, as a Jewish Australian—and I am not sure you were here for the questioning of the panel before you—

**Justice Sackville:** I was here for part of it.

**Mr PERRETT:** Senator Reynolds stated that the amendments to the Racial Discrimination Act have failed, because there is ongoing racism—in fact, we heard, there has been an escalation of ongoing racism. Could you, as a Jewish Australian—

**Justice Sackville:** I did hear that exchange, yes.

**Mr PERRETT:** comment on your own experience of pre-'96 or even growing up and how things have changed? Are we becoming a more tolerant Australia?

**Justice Sackville:** If I may say so, I think it is a very considerable mistake to say that, because things are not perfect, they have not improved by legislation.

**Senator Reynolds interjecting**—

**Mr PERRETT:** I could no remember your exact words.

**Senator REYNOLDS:** It is not what I said.

**Justice Sackville:** That, I think, is my characterisation of my understanding of what you said. The interaction between legislation and social change and attitude is a complex one. I have in fact written about it in the past. The exemplar is Brown and the board of education in the United States—the school desegregation case. Was that case a product of changing social attitudes in the United States or did it introduce major changes in social attitudes towards race relations? The answer, I think, is both. I think that you only have to consider attitudes towards women, towards integration of groups in this country that are not Caucasian. I grew up at a time when I was 13 years old before I saw a black person, because there was a White Australia policy. There have been profound changes in Australian society, some of which are very recent. In many cases they have been influenced—not necessarily entirely caused—by legislation, because, of course, you cannot have legislation until a democratically elected parliament introduces the legislation, so there has to be a certain degree of public support for it. But, speaking for myself, I have no doubt that, as far as race relations or toleration of minority groups, as examples, are concerned, this country has been astonishingly successful. It has problems, and there are serious pockets of racism in this country still, but legislation has played a major role, and I would include in that part 2A of the Racial Discrimination Act, because norms, as somebody said in that session, are enormously important in shaping social attitudes.

**Mr PERRETT:** Thank you. I am sorry, Senator Reynolds, if I misrepresented what you said. That was my understanding of the line of questioning.

**Mr LEESER:** I would like to test your two propositions if I may, particularly in the context of the law as it stands. First, you suggested that 'offend, insult, humiliate or intimidate' be replaced with 'degrade, intimidate or incite hatred or contempt'. Effectively, what you are trying to do, if I am not wrong here, is to substitute a different form of words that perhaps better reflects the judicial interpretation thus far. I wondered: given the strong support for the maintenance of section 18C of the Racial Discrimination Act with the current language, would it not be better to codify Justice Kiefel's words in the Creek and Cairns Post case about 'profound and serious effects, not to be likened to mere slights' on the basis that, although it is fair to say no law is potentially ever settled, there has been reasonably consistent application of that test since 2001?

**Justice Sackville:** I do not think it is quite as simple as that, if I may say so. The reason is that the subjective element in 18C introduces the opportunity for evidence from people or groups that have been affected and in practice the evidences to subjective reactions to the hate speech has been of very great importance in determining whether there has been a contravention of 18C and, indeed, whether the exemption in 18D applies. I think that there are difficulties in just incorporating a particular interpretation of language. In my view—and it is, of course, a respectful view—I think there are difficulties in reconciling what Justice Kiefel said in that case with the actual language that is there at present.
Mr LEESER: I do not disagree with that, and that is perhaps why I would be more in favour, at least, of codifying the language. I worry that, if we put in a new set of language of this sort, we actually increase the level of uncertainty rather than decrease the level of uncertainty. 'Degrade' is a new word in this context.

Justice Sackville: There will always be uncertainty with any legislation, and there will be a process of interpretation until one can say that the principles are finally settled as far as they can be. Often that requires the High Court to have a say in how they will be interpreted. But I think the difficulties actually go a little further than just incorporating the interpretation of Justice Kiefel, because one has to address whether it is really genuinely an objective test that you are applying or whether you are just saying, 'Subjectively, was this really, really serious?'

Mr LEESER: I want to come to that because you mentioned it in the earlier answer. The question as to whether it should be an objective test, and it is an objective test based on a smaller group—in other words, a reasonable member of the relevant group that is affected—or it should be an objective test relating to the broader Australian community is one that you spent quite some time talking about. Yesterday we had Professor Adrienne Stone speak to us and give us her submission, and I tested this particular proposition with her. She said that one of the key objects of this piece of legislation—part of the legislation—is actually the protection of minority groups and minority groups are likely to be affected by these sorts of matters differently from the broader Australian community. I see the logic, if I may say, in what you propose, but I worry that it might actually undermine the efficacy of the legislation if we were to adopt a broader test. You can think of examples—for instance, during the Second World War, Japanese and German Australians may have been held in a lower level by the rest of the population. Attacks on them on the basis of their national origin would have had a different import for the ordinary Australian than it would for the German or the Japanese Australian.

Justice Sackville: I do not think that a test that focuses upon what a reasonable member of the community would think requires you to consider how would that reasonable member of the community react to the particular slight. The test would be: how would a reasonable member of the community view this particular attack on this particular minority group, having regard to the characteristics of that minority group and the nature of the speech or even actions that are directed towards that group? I think that distinction is actually quite important.

I do not think that there is as much difficulty as many people consider in interposing that kind of objective test. What it does is to move away from regarding the subjective impact upon the group as more or less determinative of the outcome at least where the subjective impact can be regarded as serious or some other adjective being satisfied. So I think that the objective test, in the sense that I have put it, would not undermine the objectives of the legislation—not at all.

Mr LEESER: Like you, I am a member of the Jewish community. A reasonable member of the Jewish community might have a different reaction to holocaust denial than—

Justice Sackville: They would.

Mr LEESER: say, an ordinary member of the Australian community.

Justice Sackville: Yes, and one of the problems, as I try and outline in the paper, is that you get to a point which can almost be regarded as improbable, difficult to apply, as when Justice Branson in Jones and Toben said that she was applying a test of what a reasonable member of a particularly vulnerable subgroup, which happened to be young impressionable Jewish people faced with holocaust denial. Once you get to that kind of level, I think you are dealing with concepts that are in fact extraordinarily difficult to apply and will not work. The reason they will not work is that you cannot impose bounds or limitations. Of course people will feel very strongly about a whole range of issues. Some people in the Jewish community react extremely strongly and with great fervour to any attack on Israel or to the policies of the current government of Israel, but that does not mean that section 18C or part II A of the Racial Discrimination Act should be invoked to curtail that kind of criticism.

Mr LEESER: You have 18D there to help you out.

Justice Sackville: I am not even sure about that.

Ms MADELEINE KING: Thanks very much for appearing today, Justice, and for your contributions over many years. Many groups have come before this committee expressing their concern. It is also in the submissions that any changes at all to this act will send a negative message out to the wider community and perhaps—this is their contention—encourage different forms of racist behaviour or there will be more. Regardless of what anyone on this committee thinks of that and that it might be stating the case too far, we have to take seriously the very real emotion behind what these people who are coming to this committee are saying to us. It appears to be quite genuine concern. So while we are speaking about a codification of certain parts of the case law and your suggestions that we are seeking to perfect a law, this law, I wonder—and I would like your comments on this—
whether there might be groups and communities that will pay a heavy price for a perfection of the Racial Discrimination Act. That is a high burden for these communities to bear for us to have a more perfect law. I would just like your comments on that.

**Justice Sackville:** You are turning back. Perfection is the enemy of the good on me. I think there is something in that and I think it is a legitimate consideration to take into account. However, I also think that what encourages racism, hate speech, is very much more complicated and deep-seated than amendments to the Racial Discrimination Act.

**Ms MADELEINE KING:** I entirely agree.

**Justice Sackville:** The election of Donald Trump in the United States and the reaction to that is a very good example. I think we are only beginning to see the consequences of that, and those consequences may well be felt in Australia. There are all sorts of things that affect whether we have racism or hate speech. It would depend on a considerable extent upon how the changes were presented—and I go back to the Gilbert + Tobin submission, which I think sets this out very well. It explains, in a way that I have not, how important it is that the legislation actually reflect what it is intended to do. If there is a disparity, as I discussed with Mr Leeser, between the way in which the legislation is interpreted and the language, which ordinary people ought to be able to read and have a fair grasp of, that is a very legitimate reason for changing the legislation so that the interpretation accords with the statutory language. In other words, I think this is a problem that is manageable, but I recognise that it would require careful management, as does any area of the law where reform is involved.

**Ms MADELEINE KING:** You point out that part of the problem is the times that we are living in as well. Another witness, I think yesterday, said that there is a rise of xenophobia in Europe and America at the moment and different things are happening, so it might not necessarily be the best time to be re-examining this in the greater context.

**Justice Sackville:** That, if I may say so, is why we have an elected parliament and democratic principles.

**Ms MADELEINE KING:** Indeed. Thank you so much.

**Mr BROADBENT:** Thank you for your faith!

**Justice Sackville:** I did not say that!

**Senator PATERSON:** Thank you for your contribution to this debate. I particularly appreciate the way in which you are trying to find the path that better protects freedom of speech than the status quo but still has robust protections against hate speech. Despite what is said about advocates of change, I completely share your objective in that. I would like to ascertain exactly what your proposal seeks to achieve. By that I mean: are you seeking to bring the application of the law as it is today in line with the legislation as it is read? Or do you believe that the law as applied also needs the bar to be lifted? Does that make sense?

**Justice Sackville:** Yes, it does and the answer is the latter. I think that the changes that I am suggesting would involve a higher bar before the law becomes involved. I do not think that would undercut the fundamental objectives of the legislation—in other words, the philosophy that underlies it. I think that there is a great danger that, if the bar is set too low, the legislation comes into discredit, and that is exactly what has happened. Of course, that discredit has been exacerbated by consistent and, to some extent, powerful criticisms in the media that have taken a particular line and, therefore, shed a certain light upon the legislation. One way you can make the legislation more immune to that kind of criticism, some of which, in my opinion, is ill-founded, is to ensure that the bar is at a level that can be justified on philosophical grounds and on policy grounds and can be consistently applied in a manner that members of the community who are interested enough to understand what is going on can follow and sympathise with.

**Senator PATERSON:** As you may be aware, a number of our witnesses have said, yes, on a plain-English reading of the legislation, it seems too broad but the application of the law by the courts has lifted the bar a bit and that is why it is okay. So that is not your view. Why is it that you think there is a problem with the law as applied? Why is the bar too low, in your view?

**Justice Sackville:** Because it brings within the net too many cases. Remember—and this goes back to the question I was asked about Senator Reynolds's comments—the law operates not just as a mechanism for resolving disputes, whether in litigation or in procedures undertaken before the Human Rights Commission, which, of course, is not a court and constitutionally cannot be a court; legislation is important because it sets normative standards. It explains to people, in a way, what is permissible and what is not permissible. It also acts as a disincentive. I have no doubt that the controversy concerning part IIA has had a chilling effect in some quarters—not, I think, perhaps as much as has been portrayed in some quarters, but nonetheless a chilling effect because some people would be deterred from saying things that otherwise they might by the possibility of being embroiled

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**HUMAN RIGHTS COMMITTEE**
in a complaint or even in litigation, or because they feel that what they might otherwise wish to say would fall foul of the normative principles that have been embodied. So I think we do have to understand that legislation has a much greater force and effect than simply as a dispute-resolving mechanism.

**Senator PATerson:** If the parliament makes no changes to this law and it proceeds as it is, are you concerned that there will be more cases that will bring the law into disrepute and that there may be a call for even greater changes further down the track?

**Justice Sackville:** I think there is a risk of that. I think that that, too, is probably manageable. I am a proponent of early termination of cases that are without merit. I am a proponent of that within the courts and, unfortunately, in my view, courts are hampered in the extent to which they can terminate unworthy cases at an early stage. There are technical reasons for that that I do not need to go into. But, if the mechanisms within the Human Rights Commission, for example, were changed so as to allow early termination much more readily or to compel it much more readily, that would mitigate the risk, but there would still be some risk of that, yes.

If I can mention something that I think you raised in an earlier session—perhaps it was your colleague—you cannot keep the courts out of it. If the Human Rights Commission determines that a complaint is ill founded because the High Court has said that the jurisdiction to correct what is called jurisdictional error cannot be excluded by legislation, there is no way you can prevent a well-resourced litigant from pursuing his or her or its claim in the court.

**Senator PATerson:** In fact, that is not my view and I do agree with you, and that is why I think changes to process alone are not sufficient; changes to law are also necessary.

**Justice Sackville:** I do not mean to say that that would happen as of course, but there cannot be a complete barrier to litigation.

**Senator PATerson:** Agreed.

**Mr BROADBENT:** And so there should not be.

**Justice Sackville:** That is a different issue. You could have legislation which says, if a matter is resolved by the commission on the basis that it is without merit, there can be no claim in the court. That would then leave open a challenge to the commission's decision on the basis that it had committed a jurisdictional error. That is not the same as merits review in the court.

**Senator McKIM:** Thank you for coming in, Your Honour. Just because I have copped a mention in passing from you, I will just be clear that my line of questioning should not be taken to suggest that it is my position that such barriers should be erected. It was simply to draw out—

**Justice Sackville:** No, I did not—

**Senator McKIM:** the opinion of the witness. I want to firstly go to the point Ms King raised with you about, I guess, the symbolism and the messaging and the signals that law sends out into our community. Ms King is right: we have heard a lot of evidence of people who have said that they think it is likely that weakening or watering down the legislation, even if it was just a perceived weakening or watering down, could lead to an increase in racism. In fact, the evidence we have had is probably understated. Some people have said they have no doubt that in fact we would see an increase in racism. You have said that you think any change would require careful management. If you will indulge me, I am just going to go on a flight of fancy here. What will happen if we, even in perceived terms, water down 18C? You will get a range of politicians coming out and saying, 'This is a great victory for freedom of speech in Australia and we can now say more than we were previously able to,' and people in Australia will take that as a green light for more racist behaviour. Are you suggesting that this matter can be carefully managed by the broad body politic in this country? I am deeply pessimistic about that.

**Justice Sackville:** I am not as pessimistic as you are. Of course there can always be an exacerbation of racism, and as a Jew I am deeply conscious of that. I have seen, of course, what has happened in Europe recently, and we know how easily that can happen. Nonetheless, there are ways in which change can be presented that make it abundantly clear that the elected representatives are not doing this in order to allow racism and hate speech; they are doing it in order to achieve a balance and, as I tried to stress in that paper, to reinforce the fundamental values of dignity, of respect and of avoidance of harm to people that underlie the legislation. It is just designed to achieve a better balance and is not an opening of the door to racism. I think that that is, again, if I may say so, what politics is meant to be about.

**Senator McKIM:** No disagreement there.

**Justice Sackville:** Judges are not very good at it.

**Senator McKIM:** Neither are many politicians.
CHAIR: One final question.

Senator McKIM: Sorry, I know we are just running a little bit late, but I do want to ask you this, considering that you have raised the balance between potentially conflicting rights. We are talking here, obviously, about the right to freedom of expression and also the right to live free from racial vilification and racism. We have heard a lot of evidence that, for people who experience racism, one of the effects of that is to make them more scared to speak out and share their views. Do you accept that there are two sides to the freedom of speech argument here, and the side that we often do not hear about—but we have heard significant evidence at this committee—is that, for people who experience racism, the effect of that is that they withdraw, they do not speak out as loudly as they previously did, because they are afraid of verbal or physical violence towards them?

Justice Sackville: I am not sure I have expertise to say how widespread that is. You have heard the evidence and I have not. I do not doubt that that is a response on some occasions. One of the justifications for free speech is of course that the free interchange of ideas leads to the truth coming out. That is one of the fundamental principles that is used in the First Amendment jurisprudence in the United States. I think that benefit is overstated, in fact, because we know that free speech, particularly in the age of the internet and instant communications, post truth and all that, puts the lie to some of that. So, yes, I think there is a risk of that, but, equally, part of the process is to provide the opportunity to people, and the education and everything else that goes with it, to exercise their rights and to respond in the vigorous way that critics do. It is not just racist speech that might discourage people. Concerted attacks, whether in the media or whatever, even well within the bounds of the law, may discourage people. There is nothing, I think, unique about the issue that you are raising.

Mr PERRETT: This is resubmitting a question that I do not think my colleagues asked. I know you have covered it in your speech and in your submission. The Castan Centre for Human Rights Law submission says, about removing 'offend' and 'insult':

… the removal of those words could send a much more dangerous message than it would actually convey in law. The political context and impact of the debate cannot be ignored.

The rolling back of a law sends a message, as does the passage of one. It can send the message that it is acceptable to offend and insult another person on the basis of their race.

I just want you to reconsider that. Would this change be worthy of doing, with all of the inherent dangers associated with it?

Justice Sackville: I think that is a consideration to take into account. My own assessment of it is that, although there would be some quarters that would see that as a victory for the opportunity to engage in offensive speech, that is not something that would outweigh the advantages of setting up the legislation on a sound basis for the reasons that I have put. It could be mitigated readily—well, perhaps not readily, but it could be mitigated—by the way in which the legislation is presented and by the way in which it is enforced, which would make it clear that any serious acts of hate speech and racism are well and truly covered by the legislation, with the consequences that follow.

Mr PERRETT: With an education campaign—

Justice Sackville: All of it.

Mr PERRETT: which is part of the commission's duties as well.

Justice Sackville: All of that, yes.

Senator PATTERSON: I have one very quick final question. Comparing your proposal to remove 'offend' and 'insult', why do you feel that your proposal better achieves these balancing aims than removing 'offend' and 'insult' and leaving 'humiliate' and 'intimidate'?

Justice Sackville: It is a matter of judgement as to the wording. Parliamentary drafting parliamentary counsel have a very simple job, and there is always an issue as to the precise language. What I have suggested, I think, is language that makes sense and is consistent within its own terms. If you just simply remove 'offend' or 'insult', I am not sure you quite capture the barrier that ought to be imposed, which is slightly different from what would result from the removal simply of 'offend' and 'insult'. What you need is language that is consistent in itself and capable of application. So, if you are going to amend, you may as well do it in a way that produces legislation that is consistent, coherent and readily understandable.

Senator PATTERSON: Thank you.

CHAIR: Thank you, Justice Sackville, for appearing before us today and for your time.

Justice Sackville: Thank you very much for listening to me.

Proceedings suspended from 13:09 to 13:41
CODY, Professor Anna, Director, Kingsford Legal Centre; and Member, National Association of Community Legal Centres

LEVIN, Mr Anthony, Senior Solicitor, Human Rights Group, Legal Aid NSW

NAWAZ, Ms Maria, Law Reform Solicitor, Kingsford Legal Centre

TUCKER, Dr Linda, Solicitor, Redfern Legal Centre; and Chairperson, Community Legal Centres NSW

CHAIR: Welcome. Before we go any further, would any of you like to make any comments about the capacity in which you appear here today?

Dr Tucker: I am the employment and discrimination solicitor at Redfern Legal Centre.

CHAIR: I invite you to make a brief opening statement, and then members of the committee may ask some questions. In the interests of time could you please limit the length of the statement.

Prof. Cody: Kingsford Legal Centre is a community legal centre with a specialist discrimination law service, with coverage New South Wales wide, and also a specialist employment law service and an Aboriginal access program. We are also representing the National Association of Community Legal Centres, which is the peak body of community legal centres in Australia. In 2016 Kingsford Legal Centre gave 214 advices on discrimination and ran 33 cases in that area of law. Nineteen per cent of those advices were on race discrimination.

Our first point is around the issue of how rarely section 18C is actually used. In our experience, section 18C is rarely used by people who have experienced racial vilification because section 18C already sets a high threshold and places significant limits on the type of speech that is actually actionable. We submit that section 18C should be expanded to include vilification on the basis of presumed race, which currently is not covered, and also religious vilification.

We believe that the racial vilification provisions strike the right balance between freedom of speech and freedom from racial vilification. It has not been heavily litigated, with fewer than 100 cases going to court, and the courts have consistently interpreted the protections in section 18C from a public interest perspective, in line with the objects of the Racial Discrimination Act. The courts have held that, to amount to racial vilification, the conduct complained of must have profound and serious effects and not to be likened to mere slights.

Amending or repealing the racial vilification provisions will not guarantee the right to freedom of speech in Australia, and, if the government wants to better protect freedom of speech, we would recommend enshrining the right to freedom of speech in the Australian Constitution or in a national human rights act.

Ms Nawaz: I will just cover the issue of the impact of racial vilification on our client group. Our clients come from disadvantaged backgrounds, often experiencing significant harm from racist speech, and to weaken the provisions would disadvantage our clients further. Arguments that section 18C needs to be amended or repealed fails to recognise the prevalence of racial vilification and racism in Australia and the impact of this abuse on minority groups. We note that the Challenging Racism Project found that over one in five Australian surveyed had experienced race hate speech and one in 20 had been attacked because of their race.

The other issue I want to cover is the commission's role in the complaints process. Kingsford Legal Centre has significant experience dealing with the commission in representing applicants in discrimination matters. In our experience, the commission does an excellent job of dealing with complaints in an open and transparent manner and affords parties natural justice.

Last year, we understand, the average length of time between a complaint being lodged and the complaint being finalised was 3.7 months, which is a relatively quick resolution in several jurisdictions. We recommend the commission retain the power to educate the public about human rights and the commission's complaint processes.

Mr PERRETT: Could you give some concrete examples of the harm people you have represented have suffered as a result of racial abuse?

Dr Tucker: At Redfern Legal Centre, I acted for a client who had been racially vilified with someone yelling abuse. She is Aboriginal and was called a black 'insert various epithets', and made a complaint. We acted for the human rights commission in relation to that.

Mr PERRETT: Was it in public or in a workplace?

Dr Tucker: It was public abuse, as she was outside her house. However, she was so traumatised by the whole process that every time we would be speaking to her it would actually entrench the abuse, in a way. So it is so incredibly difficult and brave for an individual such as this. She was from a stolen generation background; she had been homeless; she had finally got into public housing in Redfern; and she had an incredibly difficult life. So
to turn around and take on institutions and to be in that complaints process is not done lightly. It is not like this free for all that is out there trying to prevent freedom of speech; it was horrendous abuse suffered by an incredibly vulnerable person. And that process itself is extremely difficult. The conciliation itself is undertaken well and thoughtfully and in a neutral manner, but the whole process can be difficult. In fact, she ended up withdrawing the complaint because it was too difficult to go on. So it is very unusual, as has already been noted, for people to make the complaints. I think it should be seen as it is an educative process—when does robust debate trip over into what is unacceptable? Of course, we all know about the likely consequences of what speech can lead to. Just in one case we could see many of the issues that are being undertaken by this inquiry.

Ms Nawaz: As my colleague, Anna, earlier mentioned, we do see a lot of clients subject to racial vilification or religious vilification. I would like to give you an example of a client who came to Kingsford Legal Centre for advice. The case study is in our submission on page 7. Zeinab is a muslim and wears the hijab. One day, while waiting in line at a cafe, a fellow customer started yelling at her. The customer said, ‘Go back to your country, Terrorist.’ When Zeinab went back to the cafe the following week, the same customer was there and yelled at her again saying, ‘If you love Islam, I’ll show you.’ He used a number of swear words, called her a murderer and said, ‘Maybe you’ll kill me, because Muslims kill people.’ Zeinab was very intimidated and shaken by this incident and reported it to the police. We advised Zeinab that she was unable to take action under section 18C, as it does not protect Muslims against religious vilification. I will just add that this client did tell us she was very afraid after this incident. She had worked up the courage to go to the cafe the second time but did not feel comfortable. I note that racial vilification often has the effect, we see, of silencing victims and causing them to withdraw from the community.

Mr PERRETT: Those two examples that have just been given are probably not great ones for my next question but could you tell me what level of understanding complainants that you have dealt with have had about the RDA when they first come to see you more generally—it does not have to be those two.

Prof. Cody: Generally, I think the level of understanding is quite low in the community. People will have a sense of outrage at having being treated unfairly but are not aware what specific rights they have to bring any sort of complaint or action that in any way. So it really is a sense of grievance and of having being treated unfairly and wanting to do something about it, which, at community legal centres, we would see a lot of clients in that situation. But the level of knowledge and certainly the detail of what is possible, most clients do not have that.

Mr PERRETT: But they have a gut feeling that that is wrong?

Prof. Cody: Yes, that that is wrong and that they should be able to do something about it.

Mr Levin: As you might be aware, we have not made a specific submission about the first part of the inquiry in relation to 18C so we are not into position to make extensive comment on questions directed at that part of the inquiry. We are really just disposed to assist the inquiry in the second part, in the complaints handling process of the commission.

Dr Tucker: I simply confirm what Anna is saying there, that generally there is a sense of grievance. We are always excited that people realise that they can come and see someone for legal advice. We think that is a win that people know they can come in and get advice. The Human Rights Commission often does refer people to our organisations as well when they need a bit extra bit of help, so we do get a lot of referrals that way, where clearly there does need to be a bit of extra understanding and assistance through the process. But, unfortunately, that can be sometimes to say that yes this is wrong but it is not something that the law actually deals with. That can be unfortunate but at least they can be heard. We would say that there are clearly limits in the law that do not go to a lot of the issues that are being faced by our clients.

Mr PERRETT: With that referral from the HRC, are they being triaged through that and someone has said—

Dr Tucker: Someone would have made a complaint and they will have identified that there is a need for further assistance there. It happens quite regularly. They would then call us and ask is if we can advise the client of the appropriate legal centre for where they may be living.

Mr PERRETT: Are you geographically confined?

Dr Tucker: Kingsford is state wide and for Redfern we have a specific catchment.

Mr PERRETT: You are not a million miles from each other, are you?

Prof. Cody: No, we relatively close but Kingsford Legal Centre is state wide and would cover anyone. A lot of our clients are actually from rural and regional areas where there is less coverage—particularly in this area of law, which is a specialist area. A lot of community legal centres would not feel comfortable advising on this area.
so in fact a lot of clients would get referred by the Human Rights Commission and by Law Access, for example, to Redfern Legal Centre, to Kingsford Legal Centre and to legal aid.

Mr BROADBENT: On the same subject, did the police take any action on that? Linda, is there any law where the police could take action with regards to the incident we heard?

Ms Nawaz: Sorry, I am not aware if the police took any further action. It was just one-off advice.

Dr Tucker: Depending on the situation—

Mr BROADBENT: Is there any law of public disturbance that the police could act on?

Dr Tucker: There could be. It is a question for legal aid here.

Mr Levin: I am not a criminal lawyer, I should probably disclaim from the beginning. There may well be laws of public disturbance or public disorder. The one that comes to mind is more about an imminent breach of the peace but the key word there is 'imminent'. If a matter is not imminently about to happen to cause harm either to a person or to property, for example, then it is unlikely that the police are going to rely on that common law power to take action—if that answers your question.

Prof. Cody: In our experience, it would be very unlikely that there would be a criminal offence involved. It would also be unlikely that the police would act that as well because they have got a huge workload in other areas. Assault would be the only other offence but mostly assault involves physical violence rather than threats or words.

Dr Tucker: Clearly there are threats and statements such that there could be apprehension of violence, and that may be the case. But I think we are talking here about how we have provisions. We have a regime that has been set up to have conciliation, to try to have education, to try to involve both parties. And it would be unfortunate if there was a new reference to criminal law and the relatively blunt instrument of criminal law and overworked police when instead we should be looking at—

Mr PERRETT: And the legal system.

Dr Tucker: Yes. And instead of shoring up a valuable, conciliatory educative system that we have via the Human Rights Commission and the provisions we are looking at today, we are really trying to take a systemic and broader view to say, 'We know there is this problem in Australia, in our society, in many societies, and we have this system in place, so why don't we just make sure it works as effectively as possible to try to nip in the bud these issues of violent statements'—which may in fact be criminal in some cases, but massively offensive statements that are not made in good faith that would clearly breach our understood norms of how a society should operate. It is out there for us. That is what we should be working on to make sure that this is strong and robust and that the Human Rights Commission is allowed to do its job and is funded well to do that job and that we do not then rely on these individuals to bring these complaints.

Going back to that individual I was talking about and that we all see: could you imagine, if you are already vulnerable, you have that slur on you and you are frightened to go out the door and you are now going to go and make a complaint? So, we are relying on the most vulnerable individuals to prosecute really on behalf of society to deal with societal issues. And we think that they should receive as much support as possible and the commission should receive as much support as possible so that we do not get to that point in the first place. And I think we should be appealing to the better angels of our nature in dealing with these issues throughout our society, rather than always depending on the individual. I will just get off my soapbox!

Mr BROADBENT: I know how unsettling it is when I am verbally attacked in public, and I pretend that I am unaffected by it.

Dr Tucker: Good point.

Mr BROADBENT: And for a 26-year-old—look at me!

Mr LEESER: I wanted to take you to one of the suggestions that I had made in my submission, and I hope you have been presented with a copy of the submission. I think some of this is covered in each of your submissions, in a slightly different way, and I might put to you the parts of your submission where it is covered, but it all covers the similar question, and that is the question of 'no reasonable prospects of success' test. In the Kingsford Legal Centre's submission, on page 17, you commented that the 'no reasonable prospects of success' test is a determination for the courts to make. Isn't the commission already terminating complaints on similar grounds, such as trivial, vexatious, lacking in substance, not unlawful? Does the view change at all if a part-time judicial member is exercising that function rather than the president, as it currently is constituted?

To the Legal Aid Commission, you note that there is a difference between unmeritorious complaints and those ultimately unlikely to succeed. I wondered whether you would expand on that particular point. And to the Redfern
Legal Centre, at page 7 you state that the commission providing a report with determination of a complaint is a sufficient safeguard against previous respondents in matters which may be misconceived, trivial, vexatious or lacking in substance. And you then go on to recommend that there might be grounds to consider the introduction of a requirement to seek the leave of the court when the complaint is being terminated on the ground that it was trivial, vexatious et cetera. Doesn't this suggest that the commission processes are in fact not currently sufficient to prevent such cases from proceeding to litigation? And would a 'reasonable prospects of success' assessment early on in the complaints process be useful in deterring applicants to the court?

Prof. Cody: We would submit that having that test is too onerous and it is too heavy a burden that a complainant would have to meet and that the current test of frivolous, vexatious or lacking in substance is the appropriate test. And it would also require the commission to exercise judicial power, as you are recognising, in that, which would really take us back to years ago, before the—

Mr LEESER: Why does it require the commission to exercise judicial power? Could they not just offer it as an opinion? That is effectively—

Prof. Cody: Because I think 'reasonable prospects of success' is much more a legal test that is properly addressed by a court when it is weighing up the merits of the case when it is actually looking at some of the evidence in front of it. And I think that with the sorts of clients we see, who are quite disadvantaged and, as Linda has talked about, find it hard enough to actually make a complaint, to present it in a way that is going to ensure that it meets that sort of test would be very onerous on a complainant and would then disadvantage them, whereas the legislation is supposed to be beneficial and to try to reduce racial discrimination.

Mr LEESER: There are surely legal tests that examine what in effect is vexatious, what is trivial, what is lacking in substance. So, why is it substantially different?

Prof. Cody: I think the practice of the commission has been to exercise that carefully when they are dismissing complaints as frivolous, vexatious or lacking in substance, because of the aims of the legislation. And I think having that test of reasonable prospects of success would change it. The way in which they have approached the interpretation of it, it is true that there are legal understandings and reasonings around each of those three areas, definitions of each of those. But the 'reasonable prospects of success' I think is much more a legal test.

Mr Levin: In relation to your question, if I understood it correctly, you were wondering whether we could elaborate on the tension, if you will, between unmeritorious claims and those which are perhaps unlikely to succeed but still arguable. The view of Legal Aid New South Wales is that the best approach is early advice—quality legal advice at the earliest possible stage. And we say that that approach is borne out by the findings of the Productivity Commission report into access to justice arrangements in that there were positive findings about the way in which early intervention can benefit disadvantaged people who are the people we work for across the state in remote and regional areas and in metropolitan centres. And they are the people who need the most help, because they are vulnerable, they often lack the skills required to run a case on their own, they lack the psychological readiness to be able to run cases.

The most effective check on a system is when unmeritorious cases can be properly diverted away from the court or tribunal system. We do this in practice in New South Wales, because we run two let's call them duty roster services, one at the Anti-Discrimination Board, which is in a pilot phase, and one at the New South Wales Civil and Administrative Tribunal. We see each year hundreds—thousands—of clients who require advice about discrimination matters or make inquiries about them. And in the course of that, some of that volume comes from these duty services. What those duty services enable us to do is to give frank, confidential advice about the merits of a claim and to divert them, if appropriate, from the proceedings, depending on where they come. If they have come at the ADB stage it is much easier to prevent the costly litigation than it is if they are halfway through a matter. That process operates as a kind of reality check for those clients. The other—

Mr LEESER: Do you know whether your Commonwealth equivalent does the same at the Human Rights Commission?

Mr Levin: As far as I am aware there is no equivalent service at the Commonwealth level. Linda adverted earlier to the way in which referrals can come through as a result of a phone call on an ad hoc basis. We would say that that is not necessarily the most efficient or desirable way for those clients to get in contact with quality legal services. A better approach is if we are funded to do so, if they have the opportunity to provide that advice at an early stage. There is a particular case where this is borne out. We have had the benefit of reading the submission of Kate Eastman, Senior Counsel, and Trent Glover. In that submission they refer to a case of Ekermawi. That has a particularly long and complex procedural and legal history, which I will not go into. But the points to take away from that case are illustrative in response to your question, and that is a case that Legal Aid...
was representing Mr Ekermawi in, but only at a late stage of proceedings. Mr Ekermawi was unrepresented at the ADB stage. That was the point at which his complaint, which did relate to racial vilification under state legislation, was declined. After it was declined he sought leave from the state tribunal, NCAT, for his matter to be heard, and he was unsuccessful. But he was unrepresented there as well.

That then resulted in a long process of hearings and appeals that ended up in the Court of Appeal on judicial review grounds that he had been denied procedural fairness. He had fundamentally misunderstood the directions given by the tribunal, and he therefore had not had the opportunity to make submissions on key points raised by the respondent. He was successful on appeal in the Court of Appeal. It was remitted to the tribunal, and part of his claim was substantiated. What we would say about that case is that it illustrates that if a person receives assistance, in particular from Legal Aid, at an early enough stage a lot of cost could be saved. In fact, that matter may never have needed to go to the Court of Appeal had advice been available at that time from Legal Aid or another service at the ADB stage.

Mr LEESER: Although legal advice in and of itself is not necessarily curative of controversy. For instance, in the QUT case the complainant had a very experienced discrimination lawyer representing her, yet that is a case that the Federal Circuit Court, as it now is, found had no reasonable prospects of success.

Mr Levin: I would agree with that statement, because discrimination law is an area of law that is incredibly technical, incredibly complex, and often they are matters about which reasonable minds may differ. So ultimately the distinction between a matter that is unmeritorious and a matter that is perhaps clouded in doubt—a phrase used in our submission—or unlikely to succeed on one view but that would perhaps succeed on another, those are the arguable cases. And we would say that arguable cases should not be prevented from having an opportunity to properly garner and test evidence in a judicial context by virtue of an amendment that stymies that possibility at a much earlier stage.

Senator McKIM: Thank you all for your submissions, which, although I will not speak on behalf of the committee, I found very informative and helpful. Many of your submissions have canvassed issues that have been raised in a number of other submissions, so, in the interests of time, I just wanted to go to a couple of matters that were not broadly canvassed. Just to start with the Kingsford Legal Centre's submission and the case study of Sally that you have provided, in your commentary on that you said that a vilification complaint cannot be made if the offender incorrectly assumes the race or national or ethnic origin of the person. Has that been tested in the courts?

Ms Nawaz: I am unaware of whether it has been tested in the courts, but I could take that on notice. But my understanding is that given that the Racial Discrimination Act prevents vilification on the basis of race, national or ethnic origin, if someone in the position of Sally was to be vilified on the basis of assumed race then that protection does not exist and Sally could not bring such a complaint under the law.

Prof. Cody: And in other legislation relating to race discrimination or in other types of discrimination it actually states 'presumed or assumed'—for example, around disability. That would imply that it did have to be included explicitly within the legislation rather than—

Senator McKIM: Yes, and I certainly accept that and take that on board. If you are able to, I would appreciate your taking that question on notice, and perhaps you can answer this one here: has it been tested in the Human Rights Commission? Has that opinion been tested in the Human Rights Commission? In other words, has the matter been taken to the Human Rights Commission where there has been an inaccurate assumption of the race of the person involved?

Ms Nawaz: I would say that due to the confidential nature of the complaints handling processes of the Human Rights Commission we are not in a position to answer that, unfortunately.

Senator McKIM: I know that we are already over time, so I will leave it there.

Senator PATERSO: This question is directed mostly to Legal Aid New South Wales, but if others feel that they could assist then I would appreciate that. A submission to the inquiry was made by Calum Thwaites, one of the students in the QUT case, one of the respondents. He approached some legal aid organisations in Queensland to receive representation because he was of limited means and could not afford to pay to be represented. He described a couple of things: one, he described being treated dismissively because he was a respondent in a racial discrimination case; and, two, he was turned away immediately, he believes, because of the nature of his complaint. So I am just wondering if you have any examples of a respondent in a racial discrimination case that you have represented.
Mr Levin: I may have to take that question on notice because none come to mind and it is not in the usual course of the work that legal aid does.

Senator PATERSON: Why is that?

Mr Levin: I do not think I am in a position to answer that comprehensively here today, but it might assist if I, indeed, check.

Senator PATERSON: If you take it on notice, that would be helpful.

Mr Levin: Yes.

Prof. Cody: Could I respond to that?

Senator PATERSON: Yes, please.

Prof. Cody: The Kingsford Legal Centre would advise both respondents and complainants in discrimination cases, including race vilification. We have advised, for example, Anglo-Saxon Australians about their ability to bring complaints of discrimination. Our guidelines are that we are there to assist disadvantaged people. If the respondent is an employer or an organisation that has means, for that reason we obviously would not be representing them. It is most likely, therefore, that we would represent complainants rather than respondents, but we have represented respondents. One of the cases that we represented a respondent in was around the Coogee women’s pool. It was attempted some years ago to have that open to men and women.

Mr Levin: Could I add to that response briefly? Similarly, we provide advice services to respondents on occasion. It is unusual for respondents to be referred to Legal Aid on a duty roster service, for example, at NCAT, but it does happen. It has happened over the course of the years. We obviously provide that advice when it happens. Similarly to Kingsford Legal Centre and other legal centres, Legal Aid has very stringent means and merit tests and we also have internal policies about priority clients. That means that we are working for the most disadvantaged and vulnerable people socioeconomically across the state. Almost as a matter of self-selection, those people tend to be complainants rather than respondents. I will still take the question on notice because it is within the realm of possibility.

Senator PATERSON: Thank you. I would appreciate that. Could you also take on notice to provide any instances where people have asked you as a respondent for representation and you have declined and, if so, what the reasons for declining were.

Mr Levin: Okay.

CHAIR: I thank representatives from the Kingsford Legal Centre, Legal Aid New South Wales and the Redfern Legal Centre for their appearance today. Thank you.
CHAIR: I welcome representatives from the National Congress of Australia's First Peoples. I invite you to make a brief opening statement and then members of the committee will ask some questions.

Mr Little: Thank you very much. First of all, I acknowledge the support of the congress people and also the alliance whom we have been working with in terms of our resistance, I guess, to changes to the Racial Discrimination Act.

As an Aboriginal person who has suffered from racial discrimination pretty much most of my life I will draw from personal experience—and even as recently as in the last few weeks being addressed like this. Could I just, in my opening, highlight the few points that we think are most important in our contribution today. The three most prominent cases today involve Aboriginal people, and it is of grave concern for us that an inquiry be instigated to address things predominantly against Aboriginal people. You know very well the three cases that I mean, and they are Bolt, QUT and Bill Leak's cartoon. We are here to be a voice for those people who are unable to speak for themselves, who are more vulnerable, and are the most likely victims of racial hatred. We are also here on the basis of our key points about human rights. We acknowledge there are freedoms of speech but there is also freedom from racial vilification. We want to make those points very clear.

We also want to raise the point that the exemptions contained in 18C are broad enough and more than adequate to protect freedom of speech. Obviously, particularly with the adversarial legal system as a cornerstone of our society, the system has several advantages, particularly for a process to enable the disadvantaged to have the courage and grow the confidence to be able to make complaints. I think I will leave it with those few key points.

CHAIR: We will start with Mr Perrett.

Mr PERRETT: Thank you, Chair. I have a question to Dr Huggins. I think last year on Remembrance Day you spoke at the Australian War Memorial.

Dr Huggins: I did.

Mr PERRETT: It was a very good speech. You talked about your dad and how things have changed for Indigenous Australians. So I have a question about racism. Could you give some concrete examples of the harm that racism causes in your community or among the people you represent here as the national congress, but also could you talk perhaps about how things have changed, because 18C has been around for 20 or 21 years. In your speech about your dad you talked about his service—he was treated after coming back from the war and things like that. Could you talk particularly about how 18C has perhaps changed things or not changed things.

Dr Huggins: Thanks very much, Mr Perrett. And thank you as well to the committee for being here. Yes, I did do the Remembrance Day speech in 2015 and spoke about my father's and my grandfather's war service as not yet citizens of their own country. They came back very shattered, as most soldiers did. Of course, post-traumatic stress was never diagnosed at that time. My father died when he was 38 and left a very young family.

Racism is still endemic in our communities. Every day we will hear of a family member or a member of our community being subjected to racism. In terms of how it has changed, I think that it has—

Mr PERRETT: If we think of '67 and then the Racial Discrimination Act and then 18C, I am hoping there is a better place being crafted, but it is obviously not perfect from what you are saying.

Dr Huggins: One would hope so, but it is still very much in communities and individuals to hurt and denounce Aboriginal and Torres Strait Islander peoples. Even my own family is subjected to it every day. Nineteen sixty-seven, of course, was the referendum that—

Mr PERRETT: I should declare that I think I taught some of your nephews.

Dr Huggins: You did indeed, at a school in Brisbane. We would have liked to have seen the racism factor dissipate for my nephews and for my son, children and grandchildren but, unfortunately, it is still very much in the minds of people who prefer to slight us and to hurt us. It is a pain, I guess, that you cannot acknowledge or know unless you are of that heritage.

Particularly for Aboriginal people since the 1967 referendum right through to the Racial Discrimination Act, there have been some protections around the call out of racism. We have felt very much that section 18C should not be changed or tampered with, because it is very much speech and beliefs and opinions that are quite hateful.
and unfounded, and it does hurt very deeply. It can scar people for the rest of their lives, and sometimes Aboriginal people just wear it as a second skin because we are so used to it—so used to the call out and what we are being subjected to. Unfortunately, it is just one of those things we live with, like chronic diseases and dying 10 years earlier than other Australians et cetera. But, for a very small minority group, we still believe that we are here and we have survived, and we just live every day with racism.

Mr LEESER: Mr Little, in your opening remarks you noted that some of the more controversial cases of recent times have involved Indigenous complainants, particularly the QUT case and the Bill Leak case. To what extent is there an understanding in Indigenous communities of the limited nature of the right in section 18C, and to what extent are bodies in Indigenous communities that are providing legal advice to potential complainants making people aware that the right is pretty limited? There has obviously been a number of highly successful cases for Indigenous plaintiffs in this particular area; I think of Campbell and Kirstenfeldt as probably being one of the high-water marks for that. I want to explore that question of the understanding of the more limited nature of the right.

Mr Little: Predominantly, the National Congress is an organisation that has been established for the pursuit of the status and the rights of First Peoples in the nation. Through our almost 9,000 individual members and our 180 organisations, we have an educational role where we educate and inform people that there is this legislation. If I reflect back on those 20 years of its existence, Aboriginal people were not complaining then but, since then, there has been an opportunity for them to take advantage of a process that is afforded to all Australians, particularly multicultural communities that experience racial discrimination and so on. Certainly we have an obligation to our membership and our communities to inform people; that is why we see more and more of our peoples using the process of 18C and being more informed about the legislation. But through reports like the Reconciliation Barometer we also see there are Aboriginal people who declare that they have been discriminated against but have not necessarily taken the approach of using 18C or the processes with lodging a complaint. There are many reasons why that has happened. One might be that they do not have confidence in the system, or they are confronted with the burden of following through a process when they just want to be able to verbally make these complaints.

It has taken a long time for people to have the confidence, particularly when you have been abused or other things are happening in your life. Making a formal complaint may be the last thing on your mind where survival might be the priority.

I think that we all in our society have an obligation to inform our brothers and sisters and our families. I also think that all Australians have that obligation to inform all Australians of the process that is available to all Australians when they feel as though they have been discriminated against or they have been hurt—and of the views of some that may be called the 'privileged' against others who are different.

Mr LEESER: I suppose I asked the question, in part, because you had raised it—those issues of the controversial cases—but also because we have had plenty of evidence in the last three days from Indigenous bodies of the level of racial discrimination and racial vilification against Indigenous peoples. There seems to be a large amount of that, and yet this right is a very limited, narrow right too. I just wanted to ask about the understanding of that.

In your submission, you note that the commission's power to dismiss complaints, with hindsight, should have been exercised in the QUT case. I wonder whether you would support a proposal to amend the Human Rights Commission Act to change discretionary powers to terminate cases, where the act says that the president 'may' terminate, to an obligation on the president to terminate cases that are trivial, frivolous, vexatious or misconceived? And I have added the idea of cases that have no reasonable prospect of success.

Mr Little: I think the idea, or the description or the determination, of what those kinds of vexatious or unreasoned sorts of things actually mean needs some consistency to enable one to dismiss a case because, as you go to the next step, it is virtually the same place for an individual to make an interpretation about whether they are vexatious or reasonable. I think it is probably worth exploring that, but I do not think so—we certainly object to the changes as they are because we see that many cases get through to a point of conciliation before they go to the next stage.

If I were to look at a balance between those which are determined as vexatious or whatever compared with those that get through conciliation, it is far greater and there is resolve in those things. So I think it might be worth it if we turn our minds to it, but we certainly would say that there should not be any action taken in this step.

Ms MADELEINE KING: Thank you for your submission and for coming in today, and for the service to your communities. It is a great service to the country and to your peoples.
Dr Huggins mentioned about a second skin that you develop, given the nature of your experience. Other groups have come here to this committee in the last few days, and I am also thinking of Mr Zaahir Edries from the Muslim Legal Network, who explained that for him as an individual and also for his community members, that because of the systemic racism they suffer there is a self-imposed higher bar that as individuals they have to overcome before they will complain—not only under 18C, but anyway. That second skin is water off a duck's back—which it should not be, but it is, because that is their everyday lived experience.

Given that that is the case—and I know that I am asking you to speak on behalf of your communities—what do you think of 18C and the Racial Discrimination Act and its effectiveness? Has it been worth it, if this is still the case?

Mr Little: I certainly believe that it is. It is a sign of a changing nation, when we know we are an evolving nation, that there is consideration for the people who make up society and what hurts them—what enables them to participate in society freely and without harm just because of their difference. I think it has been useful; it has served this nation quite well. I think the nation has been served and that serving has been internationally recognised. I think that it provides, particularly, for the first peoples of this nation to be duly recognised because we know what the history has been like. We have suffered those hard things from day one in this nation. As I said, I still continue to say, and Jackie has said also, that family today still feel that discrimination. We feel as though this has gone on long enough.

Where there is something that has served us, and will continue to grow, it is not because it is to do something different to others who have assumed privilege whereas the less privileged have an opportunity to participate equally in society. I think it has served us well. It probably will demonstrate much higher levels of complaints. Once people get used to the system and the procedures, from my perspective, that is a good thing.

Ms MADELEINE KING: Personally, it has been very revealing for me—I am a relatively new parliamentarian—in a committee like this to hear stories such as yours, and the young women and men that have appeared before us. I shudder to think what our country might be like without provisions like 18C if this is what it is like with it. Thank you very much for your answers.

Mr BROADBENT: Your organisation is also part of a broader coalition. Would you like to explain why you are part of that broader coalition and what brought you together over this issue, particularly?

Mr Little: The broader coalition—some of the members are here and you will probably hear from them today—

Mr BROADBENT: I noticed there are a few faces in the room.

Mr Little: We formed the alliance last time. We support one another because we feel the same sorts of hurts as each other when these kinds of things happen to us in terms of racial vilification and so on. A level of acceptance by a certain segment of society, or several segments of society, is pretty much what we all strive for in this nation: getting on and the freedom to enjoy what each other has—the equality. We have had similar experiences, as we have mentioned to you. Many of the different societies have felt and have lived experiences that are different to others. We support one another and that is the beauty of these guys that sit here with me today. You heard from them when we came to see you. It is pleasing that you have that kind of support from fellow Australians, and that you are able to stand with one another when you believe that there is inequality and there is freedom in this country that enables us to enjoy the same as others. We felt that that is really what this nation should be about: us joining together and supporting one another.

Mr BROADBENT: Yes, there is a place for us all. If 18C and 18D as they stand were removed or altered substantially would you feel, and would your alliance feel, like something is being removed from you that is a benefit to your organisation and to your people?

Mr Little: We feel that if it is removed it will take us back to square one where we may not have had the opportunities. Previously, the opportunities were there but maybe people did not have the confidence or the knowledge or were not educated about the process. We have to understand that people are more educated these days. I think I made that point earlier. We are more educated these days. Using my own personal example, I recall my teacher slapping me with a great big blackboard ruler and saying, 'You're a little black B, you'll never amount to anything so I don't know why you bother coming to school.'

Mr BROADBENT: I think I had the same teacher.

Mr Little: I do not think he said, 'You little black—.'

Mr BROADBENT: No, but similar.
Mr Little: That has helped me from 1967 through to where we are now, with my own children growing up and my grandchildren experiencing racism on a daily basis. All my children now are going through a schooling system. It inspired me to stand up, be strong and speak up. But, as I said, today I still experience racism. It is one of those things. You all know the experiences—the good and the bad—that you have, and you feel quite nervous about going into an environment where you may be hurt, so you try to manage your risks in those certain circumstances. It is so difficult if you have a range of other things going on in your life, whether it is that you cannot get a job, you have a disability or alcohol or drug issues or a whole range of things. How difficult it is for someone who is being abused or who is not being provided or afforded equal service or equal opportunity. It makes it extremely difficult for people to live normal lives. That is the sort of impact.

If those sections of the act are removed it limits or shortens the numbers of educative processes that I can inform people of or that national congress can inform people of. The more knowledgeable and the more educated people are about processes—I think that is what has happened with RDA. When it came about 20 years ago people became educated and said, 'Okay, this is for me and I will use this because I feel strong enough that I have been discriminated against.' As I pointed out, with Reconciliation Australia's barometer, there are a huge number of people who have made statements or responded to surveys to say that they have been discriminated against but that they have not used the process or that they think that they may not, for various reasons, have confidence in the process.

Senator McKIM: Thank you very much for your very comprehensive submission to this inquiry and also for coming here today. You have spoken a little bit about your lived experience of racism. I have no doubt that you could sit here for weeks and go through, on behalf of your people, the lived experience of your people with regard to the impacts of racist behaviour on them. I wanted to ask you this: if section 18C were to be either weakened or removed from the Racial Discrimination Act, do you believe that incidents of racism against Aboriginal and Torres Strait Islander people in Australia would increase?

Mr Little: The short answer is yes.

Senator McKIM: Thank you. Dr Huggins, do you?

Dr Huggins: Yes, I do. We see it as a protection and as something we can go to in terms of receiving justice when we are discriminated against. If it is taken away from us I fear that the very massive under-reporting that goes on presently around racial discrimination will increase and we will have no recourse to be able to have any protections.

Ms Sauerman: If I could just add something to that, at the congress we are very concerned about the symbolic effect that weakening or removing 18C would have because we think that will send a message to the community that it is okay to be racist publicly, and that is what our communities have reported back to us.

Senator McKIM: That has been a consistent response right through all of the multicultural groups we have heard from. This is my last question because we are very short of time. We have heard evidence from a number of people representing minority groups in Australia that there are actually two sides to the freedom of speech argument here. I wanted to put to you the second side and just ask for your response. Would that be an accurate statement coming from you? Would you just like to respond to that, in terms of freedom of speech of your people?

Mr Little: Yes. In our submission, I think we talked about the intent of those comments and whether those comments are well informed and accurate and are to stimulate a discussion. There are many different means to have a discussion or a public debate. Certainly, when people know that the national congress is around—or many other organisations—there are opportunities to have a reasonable discussion about raising a matter to be explored and/or to be brought to the attention of people who might need to be involved to change things in this process. But I think that, fundamentally, it comes down to the interpretation of the person making the statements or the comments, the assumptions they make of the environment, and the intent of what the comments are meant to do. Certainly, if it has an intention to harm somebody then, in all reasonableness, they should not say that.

CHAIR: Thank you for appearing before the hearing today.

Mr Little: Thank you for your questions.
HOLMES, Mr Jonathan, Private capacity

[14:42]

CHAIR: I now welcome Mr Jonathan Holmes. Do you have anything to say about the capacity in which you appear today?

Mr Holmes: I appear for myself alone; I do not represent anyone else. I was invited to make a submission, and I did so. Thank you very much for inviting me here.

CHAIR: I invite you to make an opening statement, after which the committee may ask some questions.

Mr Holmes: Good afternoon. As I say, thanks for inviting me to make a submission and for asking me to testify in person. I do not speak for anyone else. I do not represent anyone else. I do not have any legal qualifications. I am an old white male who has not been subjected to offence or insult on account of my ethnicity, but I did spend more than 40 years as a practising journalist, and my remarks come from the perspective of someone for whom freedom of speech and freedom of the press are inextricably entwined.

My thoughts on sections 18C and 18D of the Racial Discrimination Act are laid out in my submission, and I am happy to elaborate if the committee wishes, but I would like to emphasise briefly here, just in case no-one asks me about it later, the points I make in the last part of my submission: that there are far more serious threats to freedom of speech in Australia. The Australian Law Reform Commission, in its final report on Traditional rights and freedoms—encroachments by Commonwealth laws—which your terms of reference ask you to consider—lists a great many of these threats, most of which arise from recent antiterrorist legislation and from, for example, the draconian secrecy provisions of the Australian Border Force Act.

Some problematic laws are much older than that. The commission pointed out that in 2009 it recommended the repeal of sections 70 and 79 of the Crimes Act, which criminalise the unauthorised disclosure of virtually any official information by a Commonwealth public servant. That recommendation by the ALRC, almost eight years old, has been ignored by successive governments. In fact, as I detail in my submission, just last year the Australian Federal Police used both those sections in its pursuit of the disclosure of business information by someone at nbn co. The AFP alleged in its application for a search warrant that it suspected the unknown leaker of breaching section 70 and, even more alarmingly, that it suspected the recipient of the information, who was a political aide to a sitting federal senator, of breaching section 79, which carries a maximum penalty of two years imprisonment. Section 79 of the Crimes Act is 100 years old, is headed 'official secrets' and is clearly intended to protect Australia's defence and security information. Yet the AFP used it successfully to obtain a search warrant in pursuit of a person who leaked information about how a government enterprise is doing its job—nothing whatever to do with national security, but manifestly a matter of public interest. If the mere receipt of unauthorised Commonwealth information is to be prosecuted as a crime, all investigative journalism is threatened. Yet not a peep was heard from any member of parliament, that I am aware of, about this absurd overreach by the Australian Federal Police.

Mr PERRETT: I think Senator Conroy might have spoken up.

Mr Holmes: These are the sort of issues, it seems to me, that need to be examined by an inquiry into free speech in Australia—which this purports to be—more urgently than the wording of section 18C of the Racial Discrimination Act.

Mr PERRETT: We have heard evidence from many submitters that they consider the meaning of section 18C to be settled, or relatively settled, as per Justice Kiefel’s interpretation in Creek v Cairns Post: ‘... profound and serious effects, not to be likened to mere slights.’ Do you consider that to be correct—that it is relatively settled?

Mr Holmes: I am sure that it is settled in law and by the courts. The issue is whether the public understand that. It is a question of whether it is in the public interest—and I think Professor Twomey will make this point later on this afternoon; she certainly does in her submission—for laws to be interpreted by the public in the way that the courts are interpreting them. I think there is a discrepancy there. When I read those words and wrote my first column on this issue some years ago, I took them to mean what they said in normal English, and I said that clearly the bar is too low. In fact, I now learn, over subsequent discussions, that the courts have raised the bar quite high. Therefore, I do not think that, in practice, the law is a serious threat to freedom of speech in the way that I used to. But I think there is certainly an argument that it would discourage vexatious complaints and those sorts of things if the law were changed just to the point of making the words match what the courts already find.

Mr PERRETT: So codified, in effect?

Mr Holmes: That is right.
**Mr PERRETT:** Do you consider that any changes to the wording to the provisions would then mean it is less certain until there has been sufficient judicial consideration of any amendments?

**Mr Holmes:** Of course that is true. The process then has to be gone through again, I guess, and lawyers would probably say we have to settle meaning. I really do not think I am qualified to go down that route, to be honest. You need to talk to barristers and other people. I am concerned about those words 'insult and offend'. Just as one example, the IPA sponsored a recent poll and people were asked, 'What you think about these words?' When you hear those words you think, 'That is ridiculous; we should be allowed to insult people or offend people without risking being taken to court about it.' It does not actually mean what it says.

**Mr PERRETT:** Would it not be better—and you can comment on this, because you are very familiar with educating people through the media—to have an education campaign about what the law actually is, rather than this process of changing judicial consideration? Why not cut out the middle men and women and educate the public?

**Mr Holmes:** That is certainly arguable, just as it is arguable that a lot of the problems that have brought this committee together have been caused not so much by the wording of the act as by the way in which the Human Rights Commission is, arguably, forced to deal with complaints at the moment. I have not commented on that because I do not feel that I have any particular expertise in it, but clearly that is a matter that is very much engaging the committee. I do not disagree that it may very well be that if you simply change the way in which the Human Rights Commission deals with complaints, a lot of the problems that Mr Bill Leak and others have suffered would simply be dealt with that way. I think there are many ways of skinning this particular cat, one of which might be to amend the wording of 18C slightly.

**Mr BROADBENT:** Mr Holmes, we want to hear from everybody, not just academics.

**Mr Holmes:** Good.

**Mr BROADBENT:** We want to hear from everybody. It is extremely important we hear from a range of people. I would like you to flesh out something. In the summary of your piece, you talk about an amendment to allow 'fair comment'. Are you talking about 18D?

**Mr Holmes:** Yes.

**Mr BROADBENT:** Could you tell me what you mean by 'fair comment', or can you give me an example?

**Mr Holmes:** Yes, I will try to. It is a little bit technical. Anyone who is a practising journalist is very familiar with the defamation laws in this country; you have to be. The Defamation Act as interpreted is a major constraint on our free speech. I do not say that it is wrong. We should be constrained to making sure that, when we defame people, we only do so by telling the truth about them—that is our major defence—or by making a comment about a person in the light of facts that are widely known or that we state in that same publication. That is the fair comment defence. But importantly, the courts have found over many years that the fair comment does not have to be fair in the terms that that word might have in its plain meaning. A fair comment is a comment that you honestly believe to be true or a view that you honestly hold based on true facts. But your opinion can be pretty wild, and the courts—

**Mr BROADBENT:** It can be very unfair.

**Mr Holmes:** Yes, indeed.

**Mr BROADBENT:** We know.

**Mr Holmes:** Certainly, it can be extreme and still regarded as a fair comment. In the Racial Discrimination Act, there is an additional gloss, which came to the fore in the case of Eatock v Bolt. In the case of Andrew Bolt's columns, I do not think that the fair comment defence would have succeeded in a defamation court, if they had sued him for defamation, because he got his facts wrong, and he got them significantly wrong. Therefore, it is not a fair comment; it is based on false facts. I think it would have very likely failed in a defamation court. But what concerned me was that the judge went on to say that, even if Andrew Bolt had got his facts right, he would not have convinced him that he had been acting reasonably and in good faith. That is the other phrase in section 18D; you have to act reasonably and in good faith to get the protection of that part of the act. The judge said he was too, ,

**Mr Holmes:** I have the exact words in my submission. I really do worry when judges are given the discretion to decide whether they like the tone of what you write, the fact that you are a bit sarcastic or the fact that you are attempting to be funny at somebody else's expense. Of course those articles were highly offensive to people. Frankly, I cannot imagine ever writing such things myself, but free speech is free speech. It worries me when a judge says that it does not get past the taste test, that it was in bad taste or that it was too snarky. That is not a good basis, it seems to me, for finding somebody's action unlawful. Does that answer your question?
Mr BROADBENT: Are you suggesting that there be some additional words in 18D to allow for the two words you just gave us then?

Mr Holmes: It a little bit complicated. I tried to make the point about amending 18C in such a way as to raise the bar of what is unlawful. For example, the draft bill a couple of years ago suggested using the word 'vilify' instead of 'insult, offend and humiliate'. The draft bill said that 'vilify' meant 'to incite racial hatred'. The Attorney-General himself said that inciting racial hatred is no part of normal discourse; it is no part of civilised discourse. Therefore, we do not have to defend it. We do not have to make excuses for it. He said that it is not part of freedom of speech to vilify. Yet, in that draft bill, 18D was made much, much softer. It said 'any public discussion of any matter—political, artistic', whatever. If you are taking part in any discussion then the previous part of the law does not apply. When you think about it, that actually says that it is perfectly lawful to vilify or intimidate people as long as it is part of a public discussion of just about anything. I think that is completely unacceptable.

So, yes, I think currently if you leave 18C as it is, where 'insult' and 'offend' are the words, it is easy to insult or give offence to people in the part of a robust discussion on matters of public interest. If you can show that you did it as a fair comment on facts truly stated, just as in the defamation law, I personally think that that should be enough to gain you the protection of the freedom of speech part of the act. You should not have to prove that you have also done it reasonably, in good faith. I do not see why you need that extra test when you do not have it in the Defamation Act. I do not see why this particular area of our public discussion should have completely different criteria to just about anything else that we talk about. For all that, I acknowledge how much people do feel that it does protect them. This is for you to decide.

Senator McKIM: Thank you, Mr Holmes, for your submission and for appearing here today. As a preamble, I completely agree with you that there are more important freedom of speech issues in Australia, and I listed about a dozen for the Institute of Public Affairs yesterday, just to put them on the record. You have submitted that we ought to change the words in 18C. I wanted to ask you this. We live in what I guess we would call very interesting times at the moment, and exhibit A is the new President of the United States—and there are plenty of other examples. Do you have any concerns that, if 18C were changed, the risk is that there would be a perception that it has been weakened and you would have—I confidently make this prediction—members of the Commonwealth parliament saying, 'This is a great victory for freedom of speech,' and the dog-whistle tones there, of course, are that racists in Australia—there are plenty of them, unfortunately—would think they have been given the green light to say things that previously they were not able to say? I basically wanted to ask you to respond to that. Is this the right time to make a change, and do you not think that is a significant risk that, in the public interest, we ought to consider before we recommend any changes to 18C?

Mr Holmes: Of course it is a danger. I accept that. I started writing about this issue several years ago, and the climate has changed, and what is happening in the United States is relevant. That is really why we elect people. It is a difficult decision, but it is your decision; it is not my decision. I think it is a danger. I do not think it is a matter of burning importance, in a funny kind of way. The people who do think it is a matter of burning importance, in a sense, have the onus of proof on them, it seems to me. I think that, when I first read it, the act shocked me. I thought, 'Are we really saying that insulting or offending somebody is unlawful?' I now understand we are not actually saying that, and I think there might be some virtue in making that clear. That is really as far as I am going. But, if we do that, we have to be very careful not, at the same time, to make it easier to gain the protection of 18D. I think that has to be reciprocal.

Senator McKIM: The reason I am interested in your views on this is that, almost uniquely in the witnesses we have had, you have a level of expertise on this because you have studied it for so long and in such detail, but you are also professionally a communicator. I do not mean to insult you, but politicians are the same—we have an expertise in legislating but we are also, hopefully, communicators.

Mr PERRETT: Even senators!

Senator McKIM: Even senators—some of us, Mr Perrett. I will not push you any harder than just asking this again. By the way, I agree with you, as a matter of legislative and legal theory, about codification—which is what you basically say—bringing the terms of the legislation more in line with the way the courts have interpreted. There is no argument from me there. Thinking about that risk, don't you think this is not the right time to tamper with 18C and don't you think the risk of that is a greater downside than the upside of bringing the legislation in line with case law.

Mr Holmes: I think it is very unfortunate that this particular issue, like so many others in our polity at the moment, has become a matter of left/right polarisation. I mean, I could say the same about climate change. It is ridiculous that whether we 'believe' in climate change science defines us as left or right. It is ridiculous that we cannot have a sensible discussion about this issue without those who support some kind of change being labelled
right or left. I think that it is undoubtedly true, and the way that News Ltd papers have been pushing this issue confirms my belief that there is a political aspect, clearly, to the push to have this legislation changed. Now, I am not, generally speaking, regarded as being on the right of the political spectrum and that might be why I have been invited, rather unusually, to give evidence here. That is for you to decide. If the consequence of changing it were to make people feel that, okay, it is all right to be racist now, especially if that led to vilification being more common, that would, of course, be very unfortunate. I do not really feel that that is likely to happen, because I think there has been enough airing of all of this now that people are conscious that they have to be fairly spoken to get into danger.

Senator PATERSON: Mr Holmes, I was going to ask you about 18D and, particularly, the Bolt case and tone, but I think you have answered that in Mr Broadbent's question. Instead, I want to ask you, as a journalist, to explain to the committee what the chilling effect is and how it affects your work. I will be completely transparent about why I am asking that. There have been some witnesses who have come before the inquiry who said they do not believe there is a chilling effect to worry about and they do not see any evidence that people are not saying things that they might like to say. From your experience as a journalist, how does a chilling effect affect what you say or do?

Mr Holmes: The chilling effect of this is absolutely minor compared with the Defamation Act, for example. On Media Watch, every Monday morning the lawyers would come in and we would go through the script word by word, because we are out there insulting, offending and humiliating people on the grounds of their lack of professional expertise—in my view. Ninety per cent of what I said had to be based on very solid factual evidence that we very carefully researched, and it was then my fair comment on those facts. We never got sued while I was in that chair. But that, you can call it a chilling effect, I do not think was unhealthy. I think it is actually quite a good thing. I do not remember ever being in the least concerned about the Racial Discrimination Act in the work that I was doing.

So, again, I think that, in principle, in a free society which believes in free speech, we should not, ideally, have on the statute books an act that says that to insult or offend somebody on the grounds of their race, their religion or anything else is unlawful. That is the rock sort of prejudice that I have, if you like. But I am a white guy, you know. I do not go through this stuff, and you have had heaps of people telling you that, yes, they do need this act to protect them. So that is for you to decide, but that is where I am coming from. To be honest, Senator, I do not know of any particular instance that I could point to, with the exception of Andrew Bolt and Bill Leak, where people have been constrained in what they say. I suspect the Bill Leak thing might—

Senator PATERSON: Or the students at the Queensland University of Technology.

Mr Holmes: Well, yes. But, you see, they were not professional journalists. I think that was pretty outrageous, but I certainly think that there is an issue—especially with the way that that was dealt with—and I know you are all looking at that and the Human Rights Commission and the processes and so on. Yes, I think that was very disturbing. But Bill Leak's cartoon was bound to cause offence—bound to. I am a little bit impatient, to be frank with you, with the sort of 'injured hurt' of both Mr Leak and Mr Bolt on these matters. They dish it out. They should not be quite so surprised when there is a bit of comeback.

Senator PATERSON: Well, there are different types of comeback. I think they would expect to be subject to equally vociferous criticism in return but perhaps not legal action that takes them through the courts.

Mr Holmes: Perhaps not. They were not dragged through the courts—at least Mr Leak was not—but it did take a long time. Of course, Bolt was dragged through the courts and, as I say, if they had chosen to sue him for defamation I think he would have lost as well.

Senator McKIM: If I can ask a quick follow-up question, Mr Holmes, you said that Mr Bolt was constrained. I am not sure if you are aware, but the relevant article is actually still on the News Corp websites. It is still being published every day by virtue of its existence on the News Corp websites. All we have is a little caveat underneath it saying it has been subject to an adverse finding.

Senator PATERSON: It is also banned from republication.

Senator McKIM: Well, it is being published and republished every day by virtue of the fact—

Senator PATERSON: The court order says it is unlawful to republish—

Senator McKIM: You can go there right now, Senator Paterson. I can do it right now, if you like. I will find it for you on the News Corp website right now.

CHAIR: Thank you, Mr Holmes, for your appearance here today.

Mr Holmes: Thank you very much.
WERTHEIM, Mr Peter, Executive Director, Executive Council of Australian Jewry

[15:06]

CHAIR: I now welcome Mr Peter Wertheim from the Executive Council of Australian Jewry.

Mr LEESER: Mr Chair, I should note that prior to my election to parliament I was a councillor of the Executive Council of Australian Jewry.

CHAIR: Thank you. Mr Wertheim, I invite you to make a brief opening statement, after which members of the committee may ask some questions.

Mr Wertheim: Thank you. I would also like to acknowledge the presence in the audience of my colleagues, who are leaders of organisations representing the Indigenous, Greek, Chinese, Armenian, Vietnamese, Lebanese and Indian communities. Despite our very diverse backgrounds, we are all proud Australians and want what is best for Australia. We do not approach this issue from a narrow sectional viewpoint or from the perspective of partisan politics. Many of these organisations have made their own submissions to this inquiry and have appeared or are due to appear before it.

At the outset, let me say that the ECAJ would welcome any reforms to the Australian Human Rights Act 1986 (Commonwealth) or to the practices and procedures of the Australian Human Rights Commission which would help to screen out manifestly unmeritorious complaints in a timely manner before conciliation occurs and which would strongly discourage such complaints from proceeding to court.

But any deficiencies in the process should not be relied upon to alter the existing important substantive protections under part IIA of the Racial Discrimination Act—the RDA. All of the community organisations represented here today believe that the provisions of part IIA of the RDA should at the very least be left in their current form or, if anything, should be strengthened to include protections in addition to those already provided, especially during troubled times like now, when political developments in Europe and the US are fanning the flames of extremism in Australia.

The contentions about political theory which are put forward by critics of part IIA, and of section 18C in particular, do not resonate with the lived experience of most members of communities like ours. From the Jewish people's own long and painful historical experience, we have learned that acts of racially motivated violence invariably begin with racist words. As Professor Greg Barton, a counterterrorism expert at Deakin University, was recently quoted as saying:

One of the things you want Australians to pay attention to is recognising that hateful speech and incitement to hatred in the political field is not just something that remains a political play. It has the potential to give people a sense of a green light to be more outrageous in their opinions and eventually those individuals have some sort of social licence to try some sort of attack.

That is from Rachel Olding's article 'White supremacist threatened to shoot up Central Coast shopping centre', from The Sydney Morning Herald of 28 January 2017.

Even when Australia had no state or federal anti-racism laws at all, fully one quarter of all complaints received by the then Human Rights Commission under the RDA concerned racist statements, according to a report it published in 1983. Nothing could better illustrate the need for a peaceful legal mechanism to deal with such complaints and the danger that would be posed to social cohesion if such a mechanism and the laws that support it did not exist.

The demonstrated ineffectiveness of federal and state criminal provisions which are intended to proscribe the urging of violence on the basis of race further underlines the need for strong and effective civil remedies. Despite repeated assertions in the media that the words offend and insult in section 18C set the bar too low, the courts have consistently found that section 18C applies only if the offence and insult occurs because of the complaint's racial, ethnic or national background and only if it has 'profound and serious effects, not to be likened to trivial slights'.

The harms against which section 18C are directed involve a profoundly and seriously adverse impact on the complainant's quality of life. Even then, the conduct might be exempted under section 18D—something which critics of section 18C frequently overlook or downplay. Finally, we are not aware of any evidence whatsoever that the percentage of vexatious or manifestly unmeritorious complaints under section 18C of the RDA is higher than under any other statutory regime for relief such as the laws of defamation, copyright, consumer protection and trade practices.

Mr PERRETT: Thank you for your submission and for the good work you do for your community. Your submission mentions some of the harms that people targeted by racism experience. This is not a new question—I
think you have heard me ask it already today. Could you expand on that and give me some concrete examples of
the harm experienced by your community? What message would a change to the current provisions send to the
community about the way racial minorities are treated in Australia?

Mr Wertheim: Some of the harms have been outlined in the annexure to our submission, and I will give you
some examples of quite virulent anti-Semitic hate speech which appeared in the media and social media. The
effect that it has on our community is or should be obvious. The Australian Jewish community has the highest
proportion, in percentage terms, of Holocaust survivors of any Jewish community in the world outside of Israel,
so, typically, when something of a virulently anti-Semitic nature appears prominently in the media, I receive calls
from members of my community, including Holocaust survivors or their descendants, complaining about it. It is
hard to put this into words, but the general sentiment conveyed is: 'We thought we had left all of this behind in
Europe. Australia has always been such a benign and tolerant country, and we have standards against racism.
How can this happen? It has made us feel—'

Mr PERRETT: I have had it put to me once that suicide rates for Holocaust survivors and their children is
significantly higher than the rest of the Australian community. I do not know where that data came from, but
could I extrapolate then and say that if people were making racist comments about the Jewish community there
could be more serious consequences?

Mr Wertheim: I have not heard that statistic before, to be honest—I do not know. I think that Holocaust
survivors responded to their experiences in a variety of ways, but overwhelmingly in Australia they responded by
starting new lives and making successes of their lives and relatively few of them lapsed into antisocial conduct,
although one could hardly blame them if they did. I could not answer your question directly; I had not heard that
statistic before.

Mr PERRETT: I think it was in the context of an article about Primo Levi, from memory, but my memory is
not great.

Mr Wertheim: It is certainly not unknown in our community, as it is in other communities. To come back to
your original question about the effect, you do get complaints of that nature and very emotional appeals to the
ECAJ to do something about it, because people are hurting and they have an overwhelming recollection of some
nasty experiences that occurred and that they experienced in their youth and which should really be no part of life
in a free and just society like Australia. There was a second question you had?

Mr PERRETT: What message, then, would it be for your community? You have already covered it.

Mr Wertheim: It has already been canvassed in abundant detail.

Mr LEESER: For the benefit of the committee, your organisation is the peak federal representative body of
the Jewish community in Australia and it is effectively elected, either directly or indirectly, by all the state bodies,
which comprise every communal organisation in that state plus additional members of the community. That is fair
to say, isn't it?

Mr Wertheim: That is correct and I should also say that the largest communities of Jews are in Sydney and
Melbourne, so the New South Wales and Victorian state bodies are our biggest constituents. Each of those bodies
between them would account for all of the major organisations in those states. That would be about 115 major
Jewish organisations such as synagogues, Jewish schools, women's organisations, sporting organisations and
cultural organisations. They all come under their umbrella and in turn come under the umbrella of the ECAJ. All
of them have passed unanimous resolutions to say that section 18C and 18D should be left intact.

Mr LEESER: Although you appear here today as a communal leader, your background is as a lawyer who
specialises in discrimination law among other things, isn't it?

Mr Wertheim: Discrimination law was certainly one of the areas in which I practised.

Mr LEESER: It is true to say as well that you appeared in many of the successful cases involving 18C as the
solicitor on record?

Mr Wertheim: Yes, I was the instructing solicitor on behalf of the complainant in the case of Jones v Scully
and Jones v Toben. I acted for Mr Jones.

Mr LEESER: And cases in the commission when the commission used to determine matters as well?

Mr Wertheim: I had a number of cases which were successfully conciliated in the commission and also in the
New South Wales Anti-Discrimination Board under equivalent state legislation.

Mr LEESER: Can I ask you about proposals, therefore, to remove the words 'offend' and 'insult' from section
18C and the effect that they would have on dealing with issues like holocaust denial and racist statements that
have been the subject of those cases like Jones v Toben and Jones v Scully?
Mr Wertheim: It would basically mean that we would have to relitigate those cases or cases very similar to them. It took us years of legal action in the court to establish the legal parameters for the interpretation and application of sections 18C and 18D in those cases. Both of them were landmark cases: they are frequently cited in discussion about this whole area of the law and a great deal of time, effort and resources had to be put into pursuing those cases. Part of it was due to the fact that the initial cases had to be heard in the Australian Human Rights Commission at a time when it was thought to have jurisdiction to hear such cases and then had to be relitigated in the Federal Court when it turned out, due to a High Court decision, that the Australian Human Rights Commission did not have such jurisdiction after all. So that accounts for part of the delay, but these two cases where in many ways exceptional in our experience. Most of the time when we need to resort to part IIA of the RDA, it is in direct discussions with publishers or in rare cases it will be elevated to the status of a complaint to the Australian Human Rights Commission. Our experience has been that when there have been conciliations of that sort we have been successful and we have got a successful outcome, which has actually been a win-win for both parties.

Mr LEESER: Prior to the enactment of part IIA of the Racial Discrimination Act, what did your organisation do if it had complaints about matters like holocaust denial or racial vilification? What was available to it?

Mr Wertheim: All that could be done would be to approach the publishers of those statements, cap in hand as it were, and explain to them why what they had published was racist, why it was wrong and appeal to them to do the right thing. Now, in many cases that was effective but obviously in many other cases it was not, and it was done from a point of view where the balance of bargaining power, as it were, was very much against us and in favour of the publisher.

That is still the case, by the way, even with section 18C in place. Contrary to public perception, the balance of power is not with the complainant at all. In most cases complainants are just individuals who are motivated to act against racist conduct that has affected them. The respondents are not always but very often well-resourced media corporations, social media companies and so on. That was certainly my experience in the most recent conciliation that we concluded for a complaint against a major global social media platform company. Again, it was successfully concluded, but they had batteries of lawyers and we just had us.

Mr LEESER: Despite being a proponent of section 18C as it currently stands, I want to ask you a couple of things about some suggestions about the section 18D tests that have been made by witnesses who were here earlier today, some of which I think you were in the room for. I wondered if you had a view about former Justice Sackville's view about the test of the reasonable person—the reasonable Australian test as opposed to the reasonable subgroup test—and also Jonathan Holmes's view about the test being reasonable and in good faith and not the test that was applied in Bolt.

Mr Wertheim: As I understood them both, they were saying that there should be some truth type defence for a section 18C complaint and that that should be incorporated somewhere in section 18D. I think what they fail to appreciate is that, if you make truth a prerequisite for a defence under section 18D, you would be setting the bar impossibly high for the respondent.

Mr LEESER: I think their idea was more to do with fair comment as it applies in defamation more than truth.

Mr Wertheim: I think there is very little difference. I am not fully across all the technicalities of the fair comment defence but, if something would pass a fair-comment test, generally my understanding is that that would go a long way towards satisfying the 'reasonable and in good faith' test as well. The elements of honesty and honest belief that are part of the fair-comment test are also incorporated in the jurisprudence about what 'reasonable and in good faith' means. There is both a subjective and an objective element to the 'reasonable and in good faith' requirement. I think there is a fair balance. The fact that somebody subjectively believes, for example, that Jews control the media and the banks—say they genuinely believe that out of paranoia or for any other reason—does not necessarily mean that they hold that belief reasonably and in good faith. There has to be an objective element as well.

Mr LEESER: What about the application of the test—whether it should be the reasonable person in the Australian community or whether it should be the reasonable person in the relevant community affected by the particular act?

Mr Wertheim: I have to confess my own thinking on this has evolved over time. I am concerned that having a more general test is not justified by the decided cases, firstly. I do not think there has been any decided case that would have been decided differently if there had been a more general standard as compared to the standard that has been applied. But, more generally, I am concerned that a general community standard test might inadvertently import prevailing prejudices in the community into the test so that one of the protective functions of 18C would
be abrogated. One of those protective functions is to protect vulnerable and, in particular, unpopular minorities. So if there is prevailing prejudice against a minority community which happens at the time to be unpopular—and many of our communities that I mentioned earlier have been, at various stages of Australian history, in that category—then there is a danger that the application of a more general community standard test will undermine the basic protective function of the legislation.

Mr LEESER: In the submission you have endorsed the proposals that I put forward in my speech to the Chinese Australian Services Society around security for costs for people taking the decision of the commission to terminate a matter to court and having a ‘no reasonable prospect of success’ test. A number of witnesses who have appeared before us have made comments about those things and have been questioning some of those things. I wondered if you might explain why you support those particular measures.

Mr Wertheim: I think the test should be whether the complaint is manifestly unmeritorious. Reasonable minds can differ about whether any kind of legal complaint is meritorious or unmeritorious, but if it is manifestly unmeritorious and there is a considered legal opinion to that effect then I think that should be grounds for terminating the complaint before the commission. Obviously, as has been pointed out by other witnesses, that cannot stop a determined complainant from proceeding to court nonetheless because any measure purported to do that would probably amount to an exercise of judicial power and therefore be unconstitutional.

However, if there was a procedure in place whereby a complainant with a manifestly unmeritorious complaint was advised early on in the process that that was the case—that it did not meet the stringent legal requirements set out by Justice Kiefel in Creek v Cairns Post, for example—I think that, in the vast majority of cases where you have a complainant with limited resources, that would be a deterrent to proceeding further with the claim. If they were nonetheless determined to do so, one could then invest the Federal Court or the Federal Circuit Court with a discretion to order security for costs in those circumstances to protect respondents, such as the students in the QUT case, from being left in the position where they are being unfairly pursued in the courts and have no remedy.

Ms MADELEINE KING: Thank you, Mr Wertheim. Thank you for your service to your community and to the Australian community at large. We met Mr Jeremy Jones yesterday, who I think you have acted for, and it was very good to hear from him and Dr Colin Rubenstein. I would reiterate your point that you made following Mr Leeser’s question about codification—that when we change the law it means we start again, and this is exactly what Mr Jones said yesterday. I imagine that that is one of the very real risks of codification. Would you agree with that?

Mr Wertheim: I do. I would add this point: codification is usually used when there is an ambiguity or a gap in the law or some conflict in the judicial opinions. That is not the case with regard to part IIA. The judicial decisions are remarkably consistent, so I do not see the need for codification. The other danger I see in proceeding down that path is that what may begin as an intention to codify existing case law does not actually get translated as such by the parliamentary drafts person and you end up with a de facto amendment with unintended consequences. So I would voice those two additional caveats.

Ms MADELEINE KING: I know my concern is that if we put in a definition of ‘offend’ and ‘insult’, and include the words ‘mere slights’, we would be no doubt having competitions over how to define ‘mere slights’ and ‘profound’. It goes on and on. My other question is much more general. This came up in 2014—the bill that the Attorney-General put forward. I know that Joseph Camilleri in Victoria expressed quite strident surprise that this debate over 18C and the Racial Discrimination Act has come up yet again. Could you provide an insight into the effect that that debate in 2014 and this debate now has had on the community in which you live?

Mr Wertheim: We are surprised that we have to have this debate at this time. Australia has evolved very much for the better in most ways as a community over the last 20 or 30 years. There are not only legal standards against racism that are enshrined in legislation but also, I think more importantly, a better understanding in the community, particularly in younger age groups, about the very real harms—the demonstrable harms—that have been supported by solid evidence, that flow from racist speech. So it is a disappointment to a lot of us that we yet again have to go through this exercise and explain why these laws are necessary, why they are not an unreasonable impingement on free speech and what effect they really have.

Nonetheless, one of the benefits of those debates, I think, has been that the public has become a little bit more aware not only of the laws themselves but of just how reasonable and moderate they are and that the balance between 18C and 18D is probably as good a balance as has been achieved anywhere in the world. I think that process of education is the one bright spot in the whole thing. But it is a shame that this has become—and I agree with the previous witness when he says that this has become—a partisan issue. This is far too important an issue for the future of Australia to be the subject of base party political rivalry.
Ms MADELEINE KING: Thank you very much.

Senator PATERSON: Thank you, Mr Wertheim. I completely understand why, even in as you say a quite harmonious, tolerant society in Australia, given the unique history of the Jewish people, many Jews feel that they need the protections of a law like 18C. What I am interested in exploring though is that, after Israel, the country in the world that more Jews have gone to and feel most safe in is the United States. Between five million and six million have done so, depending on which measure you take—and the United States, by virtue of the first amendment, has no laws like 18C. Indeed, any law like 18C, were it proposed in America, would very likely be unconstitutional. Why is the United States able to be such a safe haven for Jews without a law like that while Australia is not and requires a law like this?

Mr Wertheim: The United States has, I think, a very large Jewish population. At the last count, it was something between 5½ million and six million people, which is about three per cent of the population, or very close to it. In Australia, the Jewish community amounts to 0.5 per cent of the overall population. That is one aspect. I guess the other is that in the United States most of the Jews who arrived there in the late 19th century or early 20th century have now produced children and grandchildren and great-grandchildren and so on, so they are now into their fifth or sixth post-immigrant generation, whereas here in Australia we are still in our first or second, with maybe the third coming along. So it is a very different milieu, a very different political climate. In the United States the civic culture against certain forms of racism is very, very strong. For example, if you say the 'n' word over there, that is universally regarded as almost provocative of a criminal response. Of course, it is also viewed in a very negative light in Australia now, but that has only just recently started to develop.

I cannot explain to you in detail why the difference in political cultures results in different feelings of security or different levels of hate speech. All I can say is that the Jewish community in the United States is much more powerful, more well organised, better resourced and better able to defend itself in other ways than the Jewish community in Australia. We are not completely defenceless in Australia, and we do have some levels of organisation—

Mr PERRETT: You are doing okay with political representation.

Mr Wertheim: Yes, we do okay sometimes, and we are generally, as a community, regarded as well established. There have been Jews in Australia since 26 January 1788, so I cannot complain about that. We have had two Jewish governors-general, an Australian overall military commander in World War I who was Jewish and many other—

Senator PATERSON: And a High Court justice, and the only other country which is—

Mr Wertheim: Yes, we now have a High Court judge—

Senator PATERSON: I believe that is rare in itself.

Mr Wertheim: for the first time since Sir Isaac Isaacs. So, overall, the Australian Jewish community is well integrated and does regard Australia as a very benign environment and a very good country to live in. We are very grateful for that and we try to give back as much as we can. Overall, however, there is no comparison between us and the Jewish community in the United States, and I think that is probably the answer to your question.

Senator PATERSON: I really appreciate you making the point about civil censure, and the role it plays in shutting down these kinds of attitudes and values. Do you think the combination of civil censure in Australia and an amended 18C, which would still go far beyond any protection that exists in the United States, would be sufficient?

Mr Wertheim: No, I do not. And the evidence of that is the fact that we still have to sometimes take on even mainstream media organisations and explain to them not only that what they have published is anti-Semitic but why it is, and sometimes they are very slow to understand that. In the United States, I think the understanding would be there all along. It would be almost instantaneous.

A few years ago, during the last hostilities in the Middle East, there was a cartoon published by Le Lievre in *The Sydney Morning Herald* which—putting to one side the political message of the cartoon, which I will not go into—portrayed one of the characters in a stereotypically anti-Jewish, anti-Semitic fashion. It took 10 days for the senior editorial writers and journalists at the Herald to finally acknowledge that this had crossed the line. So I do not believe our civic culture is mature enough to automatically say that you can always rely on people to do the right thing.

Senator PATERSON: You have my entire agreement and sympathy on those issues. I think another very good example is the Leunig cartoon that compared the Holocaust to what happens in the West Bank and the Gaza Strip in Israel. Nonetheless, there was social censure on those things and they were withdrawn and apologies were
made. I appreciate your perspective that we are not as advanced as the United States yet in that area. Do you think we could become so?

Mr Wertheim: Hopefully in time that will happen, but I can tell you in the case of that cartoon I referred to earlier it was not just social censure. There was the threat of litigation, and it was racial vilification litigation that was being threatened.

Senator McKIM: Under 18C?

Mr Wertheim: It was actually under the equivalent state legislation, the New South Wales Anti-Discrimination Act, section 22.

Senator McKIM: Thank you, Mr Wertheim, for your very comprehensive and well thought out submission. I want to go to a very small part of it, and I think Mr Leeser referenced this. I want to go to your views around providing, in certain circumstances, for the provision of security for costs. I will paraphrase your submission, as I understand it. You are suggesting that there be an extra step inserted into the process, where if a judicial member—who presumably would have to be a judge under the Constitution, rather than the way the commission is currently structured—were to make certain findings, the court would have discretion to order a complainant to provide for security for costs.

I am sure you have thought about barriers to accessing justice in arriving at this position, and I am assuming you have landed there because you think that is a reasonable balance between the rights of someone defending a matter here and barriers to accessing justice for someone who wants to avail themselves of those opportunities. Are you concerned that the barriers to accessing justice, even in the limited circumstances you have allowed for here, is still too high?

Mr Wertheim: It might be, but I think that the number of cases in which that kind of sanction would apply would be very, very small. A respondent would have to go through several hoops before it came to getting an order for security for costs against the complainant. One would be: there would have to be initially an advisory opinion from the president of the Australian Human Rights Commission to the effect that this is a manifestly unmeritorious complaint. The effect of that would then be to terminate the complaint before the commission. There would then be an option by the complainant to proceed with the complaint nonetheless, which would then have to go to a judicial member. That process would then result in the judicial member, if he or she agreed with the president's opinion, publishing an opinion to that effect, and that would be after a more exhaustive process of inquiry than the first opinion. And only then if the respondent is successful in having those two independent inquirers come to a conclusion that the complaint is manifestly unmeritorious would it be possible for the respondent to apply to the court, if the matter then proceeded to court, for an order for security for costs, and even then it would be subject to the court's discretion.

Senator McKIM: Would that middle step only be at the initiation of the respondent or, in your view, in those circumstances would that be an automatic—

Mr Wertheim: No, it would have to be at the initiation of the complainant. If the initial complaint was terminated before the commission by an opinion of the president, it would have to then be at the option of the complainant—

Senator McKIM: The respondent.

Mr Wertheim: No, the complainant to proceed with the complaint.

Senator McKIM: Yes. So the complainant decides they want to proceed, but would the middle step only be initiated by an action of the respondent to have it tested in that middle step? The complainant is not going to go to that middle step voluntarily; they are just going to want to get straight into action.

Mr Wertheim: No. What we envisaged was that the complainant, by notifying the commission that the complainant would opt to continue the complaint, notwithstanding that it had been terminated before the commission, would trigger the step. So the respondent would not have to actually do anything; it would just happen automatically.

Senator McKIM: Thank you, I understand.

CHAIR: Thank you, Mr Wertheim, for your appearance before the committee today.
CHEAH, Mr Kenrick, President, Chinese Australian Forum
O’DONNELL, Mr Chesney, Secretary, Chinese Australian Forum
PANG, Mr Anthony, Vice President, Chinese Australian Forum
VOON, Mr Patrick, Immediate Past President, Chinese Australian Forum

[15:41]

CHAIR: Welcome.

Mr LEESER: Chair, I should also say that I have been a member of the Chinese Australian Forum from time to time.

Senator McKIM: [inaudible]

Mr LEESER: This is what happens in the Liberal Party in New South Wales; they choose good people who are well-embedded in the community. Their former president, Mr Voon, told me I am the first member of the forum ever to be elected to the federal parliament, which would surprise people.

Senator McKIM: Congratulations!

CHAIR: I invite members of the forum to make an opening statement, after which members of the committee may ask some questions.

Mr Cheah: Thank you. We also make an acknowledgement of country and pay our respects to the Aboriginal elders on the land on which we sit here today. We would like to thank the committee for its invitation to speak today on this very important matter and also thank those of you who are not from Sydney and have come from as far away as Western Australia and Queensland, and Berowra!

Senator McKIM: Tasmania.

Mr Cheah: And Tasmania—who could forget Tasmania. I will give you a short introduction to our organisation. The Chinese Australian Forum is a non-partisan body established in 1985 to give a voice to the Chinese community in the political process. We are here to advocate for the Chinese Australian community on an issues basis, particularly on things like multiculturalism, and to raise political awareness amongst the Chinese Australian community. From the 2011 census data, 833,000 Asian Australian residents live in New South Wales—almost 20 per cent—and that number can have only grown larger since then. As the committee may have noticed, CAF and the UIA, whom you met earlier today, are the only bodies here representing Asian Australians. We would like the committee to take note that our experiences and views match those of other Asian Australian communities such as the Korean, Vietnamese, Filipino, Malaysian, Singaporean, Thai, Laos, Cambodian, Indonesian and many more. We are a united front. Asia is Australia's closest neighbour with countless social, familial and economic ties, so we hope you take what we have to say very seriously. The Chinese community is also one of the oldest in Australia in terms of migrant communities. As well as that, we have also been the target of racial discrimination over the years.

Our main reason for being here is to advocate for no change to the wording of section 18C. At a time of global instability, a time when both social media and terrorism are changing the world around us in different ways, a time when two young girls wearing burqas promoting Australia Day were met with insulting social commentary, and when, three days ago, the Sunday newspapers in New South Wales carried front page news of a possible neo-Nazi-style gun massacre in a suburban Westfield in Sydney, the Chinese Australian community strongly feels there is no need to weaken racial discrimination law. Racism should not be encouraged. We should be doing our best to eliminate it. My colleagues will continue the opening statement.

Mr O'Donnell: Again, thanks very much for having us, and we welcome you to our lovely state. There are a few issues that we want to bring up. There are probably four issues that Kendrick, our president, has already mentioned in passing. We believe that section 18C is already a good protector of free speech. We can probably talk about that a bit later. I am sure you have heard all the arguments. We believe that there are legal safeguards implemented already in our justice system—that actually helps out with civil litigation issues—and that the changes should be more procedural rather than legislative. We have put a position in our paper with respect to that as well. We looked at the Canadian example, too. Mr Leeser presented some interesting positions that we are quite open to. The whole Australian Human Rights Commission is more designed to conciliate rather than punish. It is designed to educate rather than to place individuals into an uncompromising position. We can appreciate that as well.
With respect to what Mr Cheah, our president, mentioned, in terms of a welcome to country, one of the historical aspects of sections 18C and 18D is that one of the inspirations for it has been the royal commission into Aboriginal deaths in custody and the report that came out in 1991. I think this historical fact has been missing. So not only to we want to pay our respects to elders past and present; we also want to pay our respects to those who died in custody under those awful conditions. I think the inspiration for sections 18C and 18D may have stemmed from that. That report may have been a catalyst. Obviously we are not experts on the report itself. We are here to talk more about what is occurring in our community.

Mr Pang: In terms of the report in The Australian, which highlighted that there should be a change because of the survey they had done, I personally get involved in settlement services—aged care, disability—and my contact with the Asian community is very strong. I understand how they feel. That conclusion is wrong. They took a sample of a thousand people online. There are two issues: have they included non-English-speaking Australians? People like myself are a minority. I am sure I was not included. What about the Indigenous people? I think the accuracy of that survey is totally wrong.

The other question is, in relation to the non-Anglo community, which is a high percentage—30 per cent or more are born overseas—are they included in the survey of a thousand? I personally think it is wrong.

The other question is that, interestingly, in the survey it states that the age group between 18 and 24 do not want a change. They are the future prime ministers, ministers and leaders of this country. They do not want a change. If we do change now, they will go back and change it back to the original again. So please consider that I do not think the survey is accurate.

Secondly, Amnesty International reported that 98 per cent of the cases referred through the Human Rights Commission were successful; they are very pleased with it so things are working well. We have a lot of cases in the Asian community of racial abuse, which I will table later on.

Mr PERRETT: Gong Xi Fa Cai.

Mr Pang: Thank you.

Mr PERRETT: I hope you have a good year. You have heard this question; I think some of you were here earlier. I was wondering if you could give some examples of the harm experienced by individuals in the Chinese-Australian community due to racism.

Mr Cheah: I will lead off with some general examples and then go into some specifics. This one is from your own state: a Gold Coast bus driver was obviously vilified and physically attacked by two young girls on his bus. Closer to home, Chinese students on the train to Rockdale were racially attacked and physically attacked. The Cronulla riots are well known for being seen as a white Australia versus Arabic Australia problem but at the same time many Asian Australians were also attacked during the Cronulla riots and that affected our community as well.

Mr PERRETT: I was not aware of that.

Mr Cheah: A lot of Asian families or young Asian groups would go down to the beaches around Cronulla for barbecues et cetera. They were also attacked and told to go back to their own country, back to their own area.

Mr PERRETT: Even though there have been Chinese in Australia since the 1860s?

Mr Cheah: That is right; they probably date back further than the people who were abusing them. There are various YouTube videos of a mixed couple being abused on a train to the Central Coast. There was a Korean cafe owner who was attacked on the Central Coast last year by two teenagers and ended up with heavy—

Mr PERRETT: Was it because of his or her race?

Mr Cheah: Yes, and told to go back to their own country and words to that effect. And also, for the record, we would like to state that it is well-known in criminal procedural stuff that the Asian community are very strong under reporters when something goes wrong. They do not like to cause a stir. They do not like to report, especially when small things like this happen. So what you see and the statistics that may be in front of you may not be indicative of the true picture of what may be happening.

Mr PERRETT: Would there be a significant awareness? I know you are not lawyers for the Chinese-Australian community but would there be a significant awareness of the avenues available under the Racial Discrimination Act, the section 18C opportunities that are available should they be racially abused?

Mr Cheah: I would say that is a difficult question to answer because our community—

Mr PERRETT: Would there be articles in Chinese newspapers? Would it be something that you would discuss around the water cooler, around the barbecue or that sort of thing?
Mr Cheah: On 18C, yes—now—because it has become a topical issue. But in terms of the community itself, you have your new migrants and you have your old migrants who have been here for 50 years. The ones who have been here longer obviously would have a better understanding of how the system works and of how they can get help. For the newer migrants obviously it would be less likely that they would know where they could get assistance from. The others have more detailed cases of discrimination against Chinese Australians.

Mr Voon: I could possibly add a bit to that. The Chinese Australian Forum is the only body in Sydney New South Wales or even in Australia probably that deals with political discrimination and racism issues. The hundreds of other community bodies do not like to get involved in issues like this, which is why the Chinese Australian Forum is one of the very few bodies that will stand up.

In fact, we had an issue four years ago where we lodged a complaint with the HRC against broadcaster John Laws. He, in 2011, was actually sexist and he was racist. He mocked a female Asian driver in his morning program and we eventually complained. We took him to the Australian Human Rights Commission and we conciliated, but he was dodging me. He never once spoke to me. He dealt with me through a consultant, although I did speak to the boss of 2SM, Bill Caralis. He was apologetic, although he did not apologise. After weeks of running around, I got a phone call from his consultant saying that tomorrow he would apologise on his radio program, so we all thought, 'Okay, we'll listen to that.' Come the next day, he was frivolous. He did not apologise. He pleaded bad memory and that he could not recall saying anything like it. But if you dial up the online internet right now you can still hear it on ABC Media Watch. Anyone can listen to it, but he professed that he did not remember saying things like that, so he gave me the run-around. The process of dealing with complaints like this can be improved because the matter was not satisfactorily resolved in the end. We decided not to go to court with him for various reasons. I think that the complaint itself has done us good because we have been monitoring him and he has not again mocked Asians. So at least there is a process here, and we like it.

We are rock-solid with our community groups—the alliance they are talking about. The Aboriginal first peoples, the Jewish community, the Arabic community, the Armenian community and the Greek community are all rock-solid in saying, 'Please do not repeal or change the wording of section 18C because section 18D contains more than enough exemptions to make it work'. There are so many submissions received by the committee that say it is well-balanced and that there is no need to change it. If you change it, you will upset the balance, as my good friend Mr Peter Wertheim propounded. He explained that, and we do not believe there is a need and the case has not been made by the critics for a change, other than the fact that Mr Andrew Bolt was not happy about it. But two paragraphs of his comments were found to contain the wrong facts. It was overly aggressive, so section 18D did not apply to two paragraphs, and the two paragraphs are still available on the internet. That is not a very severe punishment. But we do not want to see anyone punished; we simply want to say, 'Hey, be reasonable. Do not racially abuse and vilify and mock other communities.' That is our message. Thank you.

Mr Pang: I deal with aged care and settlement services, and I do get verbal reports coming through that people have been humiliated and insulted, so in terms of 18C I believe the four words should stay because many reports I get are not reported in the press. For example, at the height of Pauline Hanson 20 years ago, we, with one of the main Chinese newspapers, Sing Tao, did a survey around Australia—it is the biggest Chinese newspaper in Australia—and we got thousands of complaints coming through from Queensland that they had been abused. The mud had been thrown at them at the height of Pauline Hanson's speech against Asians. Obviously, now it is against Muslims, so things have changed a bit. Nevertheless, I think there is that silent majority up there being abused on racial grounds, and it is not being reported. In dealing with settlement services, we do get that feedback. The main press does not report that issue, but we know about it.

In terms of other cases, we had Excelsior school in Castle Hill, where there were children being abused—things like 'I'll kill you'. We took it up with the New South Wales government and they said, 'Okay, we will increase the staff and start a counselling service.' That has happened, but right now I am not sure whether the counselling service is still going on. I know the Jewish community has run anti-bullying cases in school, and they are doing very successfully. I congratulate them for doing that. Other cases involve the Korean community in terms of experience in school, also the same thing.

In fact, during Pauline Hanson's time the Singapore military personnel in Townsville were spat on. At that time Winston Choo was the ambassador. I spoke to him. He said, 'Look, I'll take it up with viewers and the press.' I said finally, 'You've got to wake up, Winston; you've got to lodge a complaint.' He finally lodged a complaint—this is 20 years ago. This was in Townsville at the height of the Pauline Hanson situation.

As I have explained, personally I have experienced physical and verbal abuse. I have been here for 50 years. I put up with it. I respond to it. My English vocabulary is a lot better now; I can respond a bit better. I am more outspoken. It is just a matter of time.
Mr PERRETT: Some of the words that maybe aren't in the dictionary?

Mr Pang: Yes. There are a lot of cases of Asian students—you mentioned two. The other one is at the public school that was mentioned earlier. So there are a lot of cases that we can actually document, but I think it is important to retain section 18C and also emphasise 18D. We support Julian's—I call it 'Julian's law'—

CHAIR: I will now go to Senator Paterson.

Senator PATERSON: Mr Cheah, I was listening to your opening statement. You were going through some of the Asian communities in Australia that share your views on this one. This prompted my memory, when you mentioned the Korean community, because the Korean community in Sydney is actually a co-respondent in an upcoming 18C complaint, along with the Uniting Church in Ashfield, because they have erected a statue in memory of comfort women in World War II. The complaint was made by a Japanese-Australian community organisation. I am interested in your comment on that case, and if you have any thoughts about that case.

Mr Cheah: Tony is the expert on that because he is actually quite heavily involved in it; however, that case goes back, historically, through things like war. We are not talking about public comment that ridicules or offends or humiliates; it is something totally different, in my understanding of it. We are talking about people dying; we are talking about people being used as sex slaves et cetera. That is a whole different sphere of argument than this law.

Senator PATERSON: I am interested in Mr Pang's comments, but just to clarify: the complaint is under 18C. They are using 18C.

Mr Cheah: That is neither here nor there.

Senator PATERSON: It is kind of relevant, because we are considering whether 18C is well targeted enough.

Mr Cheah: If 18C deals with it, if it is adjudicated by the powers that be that that 18C is meant to deal with it, then that is the law. If it is not, then it is not. So it is neither here nor there where they bring the complaint from—do you understand what I am trying to say to you?

Senator PATERSON: I do, but what we have to try to decide is this: is the law effective? You are right; if 18C deals with it then that is the law. But we have to decide, as parliamentarians, whether we like the law, whether we think the law is a good idea. If it caught a case like that, I am interested in your view about whether that would have any ramifications on your view on the law.

Mr Cheah: Whether I think that the Koreans should bring the law under 18C?

Senator PATERSON: Not so much whether they should, but whether anybody should be able to resolve an historical dispute through a legal process like this.

Mr Cheah: If I was in a similar situation—I cannot not comment for them because I have never been through what they have been through. Right?

Senator PATERSON: Sure.

Mr Cheah: If I had something similar to that, depending on the case, I may think that 18C might be the way to go. I could be thoroughly mistaken, by the same token though. Do you know what I am saying? That is what the law is for, isn't it—to be tested?

Senator PATERSON: Yes. And we might find out something about the law in getting it tested.

Mr Cheah: That is correct. That is why we would not pre-empt it.

Mr Pang: I understand that the complaint was lodged by the Japanese group, not the Korean group—is that correct?

Senator PATERSON: That is right, yes. The Korean group is a co-respondent.

Mr Pang: Getting involved with the Korean community, that was a human rights issue that they actually put up.

Senator PATERSON: I agree.

Mr Pang: They tried to erect a monument through Strathfield council, which, according to the policy of the council, it did not allow. So they approached Bill Crews. Bill Crews said, 'Yes; fantastic', because Bill Crews is a human rights fighter. He has said, 'Look, you can have the statute in my church—a private property.' The Japanese community object to it. I think it is a very small group that might gather, about 50 people in that group. Any protestor that would come from overseas would object to it. I think it is a very simple case—one of those simple cases that you deal with in accordance with what the rule is. Is it a judicious, small complaint which could just be knocked off? That is my understanding of it—my interpretation of it: I am not a lawyer.
Senator PATERSON: No, understood. So one of the reasons that you are supportive of Mr Leeser’s recommended changes is to deal with cases like this—

Mr Pang: Yes.

Senator PATERSON: It sounds like that in your view it is trivial or vexatious. Is that a fair summary?

Mr Pang: Yes, I think so. And the other thing is that it is important that the three cases that are sitting here today belong to Indigenous people. I do not know how we got in there, but the three cases—the Andrew Bolt case, the QUT case and the Leak case—are all to do with Indigenous people. Are they being treated unfairly? That is a question. I ask myself, ‘Why have they been targeted?’

Mr O’Donnell: Could I just add something? Senator Paterson, I think is a fair comment that you have just made, because this is part of the whole process. So often, when we deal with these types of cases there is always going to be an emotive element. It is hard to veer away from it. But the whole nature of having this hearing is to try to look at it as—I do not know that ‘objectively’ is the quite the right word because I do not want to delve into the objective test—

Senator PATERSON: Yes.

Mr O’Donnell: but to look at it in a way where we can maybe bring it back again and look at the procedural aspect of it. It might be a good point to make that in our submission we actually made a reference to the Canadian Human Rights Tribunal, which is a special administration tribunal that was established in ’77. This is just an example, but it kind of fits into what Mr Leeser has suggested. Prior to these cases going to a court, maybe the issue is not so much legislative—again, if we can just emphasise that point—it is more procedural up to the point whereby these sorts of matters can be led into a court. That can be quite extensive.

Having said that, though, this whole debate is quite interesting. What I have noticed in our community and in the community at large—as you can see, I have an Irish name and a Chinese face so I am actually quite mixed, like our Chair—is that there is a certain confusion by the public about exactly what the problem is with sections 18C and 18D. The argument is predominantly about 18C offence and insult; that is fair enough, but we see 18C in companionship with 18D.

I understand that there is also the issue with respect to the outlier case—well, we think it is a bit of an outlier case—but the important case to recognise is the Prior v QUT case of 2016 and the length of time it actually took for Ms Prior and QUT to take that case on board. That time also includes the time it took for conciliation. But I might also add that it brings up some interesting questions about the statute of limitation, broadly speaking. For example—and we mentioned this in our submission—the Limitation Act in New South Wales has a variety of time frames for civil-related matters. I believe that sections 18C and 18D have been proven in court in the case of Qantas v Gama. It effectively said that there is no third balance of proof; discrimination law is under sections 140 of the Evidence Act, which is on the balance of probability.

So that has been established in our common law system. There is this confusion from our end; it is like, ‘Okay, well, we have a common law system that really backs up these sorts of remedies and cases, and provides civil procedural rules in terms of no reasonable prospect of success.’ This is why we thought the Circuit Court judge threw it out of the court. That was our impression; we thought, ‘Well, the law seems to be working.’ But listening to you and also, with respect, to Senator Reynolds, I can understand where you are coming from. You are trying to figure out if there is a problem with the law because it takes so long for a particular case to continue.

CHAIR: Sorry—in the interests of time, there are still a couple of people—

Senator PATERSON: Just one final, quick observation: thank you for that, I appreciate that perspective. You mentioned Canada a couple of times and so for your information you might be interested to know that Canada had a law that is almost exactly the same as section 18C. It is called section 13 of their Human Rights Act, and it was used against a conservative newspaper columnist called Mark Steyn—very much like our law was used against Andrew Bolt. Canada's parliament repealed the law as a result of that case, so it is certainly an example of a very similar law being repealed.

Ms MADELEINE KING: I will be brief—and it is more of a comment because some of the questions I had intended to ask have been asked. I had not thought of this particular person's history until your forum, the Chinese Australia Forum, came before us.

It was in the eighties in Western Australia that a particularly odious group emerged—the Australian Nationalist Movement—which was able to distribute, without restriction, propaganda leaflets that targeted Asians and were designed to intimidate Asians and Asian business owners and individuals. In fact, it ended up with the firebombing of Chinese restaurants and other Asian restaurants and businesses. I think the proponent of it, who I
am not going to name, also, ultimately, committed murder. That was in the eighties. Since then, the Racial Discrimination Act as a whole, but also 18C, has been introduced, and I suspect we have not seen anything like that in Western Australia since then, thank goodness.

As I said, I had not even thought about it until you came before us. I do not really have a question; I just have a statement of my own reflection on the effectiveness of the act in that state. That kind of propaganda and horrible racist information is not allowed to be disseminated through newspapers and on car windows and things like that. It is more of a comment. If you want to follow up, you are welcome to.

Mr Pang: I am well aware of what happened because I was involved with it 20 years ago. Certainly the state legislation you talked about is tough. I think it prevents racism. I think it is good legislation. In fact I would encourage the New South Wales government to adopt that legislation wholeheartedly—the penalty clauses in that. Personally I think the New South Wales law is a bit weak compared to Western Australia's. I would say, yes, I agree with that legislation. It is probably one of the best in Australia, because—

Ms MADELEINE KING: It has got a reaction.

Mr Pang: Yes.

Mr LEESER: In view of the time, I will take your endorsement of that law and quit while I am ahead!

Mr BROADBENT: Please say hello to him. I am one of his fans.

Mr O'Donnell: Can I just also add—and this is more for Hansard and for the record—that when we were conducting our research, especially with respect to section 18D, we came up with a few cases that demonstrated the effectiveness of 18D. One, which was unreported, was, quite ironically, Walsh v Hanson in 2000. In short, that case was more to do with copyright—did Pauline Hanson own the copyright to a particular book that the applicants found quite offensive in terms of its content? The copyright issue was an issue that Commissioner Nader took on—this was during a time when the commissioner was conducting tribunals. Pauline Hanson was actually absolved of it.

But Commissioner Nader said, 'Having said that, if this was an issue with respect to 18D, Pauline Hanson and the book that she has written'—I do not necessarily want to promote it, and it is probably out of print now; it was 'The Truth', I think—'would have fitted under 18D.' Her freedom of speech would have been protected under that particular provision because they had demonstrated 'good faith', 'in the public interest' and ensured an attempt to conduct research, which was what, in my understanding, Mr Bolt did not quite do in terms of conducting research when he came to analysing the so-called mixed-race Aborigines.

My respected colleague Mr Pang mentioned the Bill Leak case. I will be interested to hear Mr Leak later on. There was another case called Bropho v Human Rights and Equal Opportunity Commission, which dealt with a particular cartoon called 'Alas Poor Yagan', printed in the West Australian in 1997. Again, this is another case where section 18D protected the rights of the cartoonist, because it fell under the premise that this was a satirical work—

Senator REYNOLDS: I have to point out that it did take five years, so he went through five years of hell and an enormous amount of expense to end up being exonerated. This is one of the issues we have raised—that is an awful long time to be dragged through the courts to ultimately be exonerated, and it is a lot of money.

Mr O'Donnell: I totally respect what you are saying, Senator Reynolds. It is an awful process through the courts. We are looking at interesting issues here. Maybe there is a broader issue, with the Limitation Act. We are looking at statutory limitation issues to do with civil court issues that we mention on page 5—

Mr BROADBENT: If you want to have further input you might like to write further to the committee.

Mr O'Donnell: Not a problem.

CHAIR: We can take that in writing. Senator McKim, would you like to submit that question on notice?

Senator McKIM: Yes, please. I am keen to make a response to Senator Reynolds but in the interests of time I will not.

Senator REYNOLDS: If you went through that for five years, Senator McKim, you might have a different point of view.
CHAIR:  I note that we are very behind.

Senator McKIM:  I just make the point that most people who are found not guilty of serious criminal offences are put through years of hell as well and no-one is talking about repealing the crime of murder or rape. It is a ridiculous argument. Gentlemen, thank you for your presentation. We have had submissions from legal experts that there is no reasonable possibility of expanding the grounds on which the Human Rights Commission could terminate proceedings in the Human Rights Commission, and you would all be well aware of the existing grounds, which we have had evidence are quite broad. Are you suggesting that if that reform was made and the commission did exercise its new right to terminate something, there is no reasonable prospect of success, if that is the right phrase? You are not suggesting that someone should be barred from entering into the judicial system in the federal court—or are you?—as a result of the commission making that decision? I understand your position, Julian, I just want to test it with everyone else.

Mr Pang:  No, we are not.

CHAIR:  We thank representatives from the Chinese Australian Forum for their attendance here today.
WILLIAMS, Prof. George, Private capacity

TWOMEY, Prof. Anne, Private capacity

[16.18]

CHAIR: I welcome Professor Williams and Professor Twomey. I invite you to make a brief opening statement, after which members of the committee will ask questions. In the interests of time could you please limit the length of your statement.

Prof. Williams: I understand; I will certainly be brief. Thank you for the opportunity of making a submission to this process. My view is that section 18C as currently worded is over-broad. I think Mr Leeser's submission is correct in saying that one of the main problems with the provision is in fact that people perceive it to have a much broader application because of its wording than it actually has. I think it would be wise to bring the section into line with the actual impact that is had in the courts, that is of a higher threshold than the words 'offend' and 'insult' might suggest. It is important wherever possible that the law accurately reflect its operation, which is not strictly the case here.

The second thing I would say is that even though I do see an issue with section 18C I think it is a very weak example of a much larger problem—that is, that there are many, many laws on the statute book which seriously infringe freedom of speech in Australia. I think this committee should be looking at those broader examples which, rather than this section, actually impose very significant criminal penalties, including on journalists, in circumstances where they might be gaoled for transmitting information that is clearly in the public interest. My view, having looked at over 350 laws on the statute book, is that there is a very broad problem in Australia about free speech protection, and personally I would like to see action which addresses the larger problem in addition to section 18C.

The third point I make goes to how to address that larger problem. It is almost impossible to deal with an endemic free speech problem of the kind we have here through ad hoc changes to individual statutes. We only have to look at the effort put into amending section 18C to realise how difficult it is to amend any one statute of this kind. The proposal I put forward in the submission is that just as we have statutes protecting people from discrimination, indeed a range of statutes protecting people in respect of specific rights, so too should we have a countervailing statute which very clearly and generally provides protection for freedom of speech. That would act as a counterweight to not only section 18C but a range of other statutes and unable a holistic solution to a much larger problem than section 18C presents.

Prof. Twomey: I would like to start by saying that I agree with George in that the act should say what it is actually taken to mean by the courts. There is currently a chasm between what it is says and how it actually needs to be interpreted by the courts to maintain its constitutional validity. The second point is that the exclusions in section 18D are important but sometimes ineffective, and that is because of the interpretation of the word 'reasonably'. If the word 'reasonably' is taken to exclude 'insult' or 'offense' then the exemptions in 18D are ineffective and something needs to be done about that. My final point is that care needs to be taken that any change that does occur in the law is not taken as a licence for people to abuse, intimidate or threaten other people. There are many other laws that are addressed to such actions, and those laws continue to apply. People should be educated to make sure that they understand that any changes that are made are not a licence to behave in that way.

Mr PERRETT: It is reasonably settled, as per Kiefel's comments. Are both of your positions?

Prof. Williams: Do you mean in terms of the interpretation of section 8? I think, as Anne has indicated, it is clear that section 18C has been interpreted only to apply to serious forms of speech, not mere slights. That is because not only is that the statutory provision, as it has been interpreted, but, constitutionally, if the courts went further than that, as Anne's submission makes clear, it could well be struck down. So the courts are constrained as to what they can do in this space in any event.

Mr PERRETT: So if it was codified it would make the meaning of the section clear—I think that is your submission, Professor—

Prof. Twomey: Yes.

Mr PERRETT: Do you agree with that?

Prof. Williams: I do. I strongly believe that where a law is an operation it should clearly state its actual operation without requiring us to work through court decisions to understand what it actually means in practice.

Mr PERRETT: We would then have to wait for the judicial consideration of these changes to get rid of the uncertainty, wouldn't we?
Prof. Williams: I do not think so. I think what is being suggested is: you would, essentially, codify what the courts have said it means. You have Justice Sackville's suggestion which sets a high threshold, I think, consistent with what courts are saying, and other suggestions as well. I think, as often happens with statutes, if, essentially, you are trying to build more accurately into the law how it actually operates then that should achieve a reasonable degree of certainty from that point.

Prof. Twomey: The other point to make there is that it is an educational exercise. In the end, it is not really the courts that you are trying to convince here. The courts have already held it to mean those sorts of things. What you are trying to explain is for the people who are bringing these sorts of complaints so that they know what they can bring a complaint about. So it is affecting at the very beginning point. It is also affecting the Human Rights Commission as well in terms of the way that it deals with the complaints. So it is directed at the front end rather than at the judicial end.

Mr PERRETT: So we have the parliament, the government sending out a committee to every city to hear from witnesses all around Australia—you know, hotel costs, plane trips and all this—when, really, we should be putting money into an educational campaign about what the law actually is as interpreted by the judges. Is that what you are saying, Professor Twomey?

Prof. Twomey: Not necessarily. I think the education comes from the law itself. The problem is: if someone picks up the law and reads it, it says, 'Oh, if I'm insulted I can bring these section 18C proceedings,' whereas, in fact, it does not really mean that at all, and the courts have interpreted it differently. But, if you are a person off the street, how are you supposed to know that? You cannot. So the law itself in its terms provides an educational function. And, so, changing the law can affect the way people deal with initiating these complaints, because then their expectations at the beginning are met by the way the law actually operates.

Mr PERRETT: You are both very well respected constitutional experts and political commentators. I put to you a quote from the Castan Centre for Human Rights' submission, with a comment on removing 'offend' and 'insult'. It says:

... the removal of those words could send a much more dangerous message than it would actually convey in law. The political context and impact of the debate cannot be ignored.

The rolling back of a law sends a message, as does the passage of one. It can send the message that it is acceptable to offend and insult another person on the basis of their race.

Are you concerned about what might happen to communities? I know you have not been here all day, but we have heard from many groups, particularly ethnic minorities, about the implications of changes to 18C.

Prof. Twomey: As I said in my opening statement, I am concerned about that. I think that is a real issue and I think it needs to be made clear that there are many other laws that exist. When I went looking for these, I found a law—I think it was a regulation—in New South Wales about offensive behaviour on buses, on public transport. Some of the most offensive things are the people screaming and hurling abuse at people on buses. Well, that is actually a criminal offence under the New South Wales law anyway, regardless of whether you are hurling abuse on the basis of race or numerous other things. What people need to be aware of is the fact that 18C is not the be-all and the end-all in this; there are lots and lots of other laws that deal with offensive and abusive behaviour. What we really need to be trying to balance here on the one hand is the sorts of behaviour that involve abuse, intimidation, feelings of threats or encouragement towards violence—those sorts of things which I think everybody can accept should be made criminal—and on the other hand things that are said that may be regarded as insulting or offensive or whatever but fall more broadly within that sphere of political communication or communication of ideas and debate in society. They are two different things, and the difficulty with this law is trying to get the balance right between them.

Senator PATERSON: I am interested in both of your responses to these questions, particularly about the Sackville proposal on one hand versus codification on the other. I do not think either of you were here when he was here. He was open to both ideas but my sense of his answer was that he preferred his own proposal rather than codification because it would both help clarify what the courts have done and raise the bar at the same time. And it was those two things he was seeking to do. I am interested in each of your views. What is more important, or where do you lean? Is it to just codification for clarification purposes or do you also want to raise the bar at the same time and that is why you have each lent some support to the Sackville proposal?

Prof. Williams: My view is that the starting point is clearly that it should say what it means, and that gives rise to codification as the starting point. But I am someone who perhaps gives greater weight to freedom of speech in this context than some others might, so I am comfortable with his proposal. I put it in my submission because personally I do think that it would be appropriate to raise the bar a little in this context. I think also that, as Anne...
has indicated, that is with the knowledge there are many other laws that actually have a more direct impact in this area and, frankly, are much more useful in this area, because of their targeted nature. It is appropriate that we have those laws. I think if we did that hopefully we would move beyond a debate that has so fixated on a provision with so many years of attention to it yet it actually is not that significant a provision in many ways, compared to what others are actually achieving in this space.

Senator PATERSON: Agreed. Thank you.

Prof. Twomey: I also think that codification and raising the bar are effectively the same thing. One of the problems is that the courts, in interpreting it, have set the level higher, and you have to set it higher for the purposes of the Constitution, because, if you do not, then the provision is going to be invalid. So what you need to do is have it set higher and made clear that it is set higher, if you know what I mean.

Senator PATERSON: Agreed. This is a fine distinction, I appreciate, but codification would not raise the bar in terms of the application of the law, only how the law appears to people. So, if all we are doing is importing the standard that the courts have applied into the legislation, then the next court case presumably would be the same as the last court case; it would apply in the same way. So what I am interested in your view on is: is that what you are seeking to do or do you also at the same time want to raise the bar of how the law is applied?

Prof. Twomey: I just need to get clarification. When you say 'codification', you mean no slights—that sort of thing—

Senator PATERSON: Exactly, taking the Kiefel—

Prof. Twomey: and when you say 'raising the bar', you mean removing altogether 'offend' and 'insult' and having—

Senator PATERSON: Not necessarily, but just requiring a slightly higher standard to prove a claim. To explain: Justice Sackville said that his proposal would make it slightly more difficult to have a successful 18C claim.

Prof. Williams: Because you are moving from a subjective to a more objective test.

Senator PATERSON: Yes. That was one of the reasons, but he also thought that the four words that he had chosen over the four words that exist currently better target that kind of racial abuse and vilification, rather than what the current law as applied has done.

Mr LEESER: I am quoting from former Justice Sackville's submission to us today: 'The legislation should be confined by substituting for the current language—"to offend, insult, humiliate or intimidate"—a more demanding standard, which could be "to degrade, intimidate or incite hatred or contempt", and 'The legislation should incorporate an objective test for determining whether the hate speech is likely to have the prohibited effect, thus requiring the courts to have reference to the standards of a reasonable member of the community at large.' They are Justice Sackville's proposals.

Senator PATERSON: Professor Twomey?

Prof. Twomey: I am happy with the objective test over the subjective test. I think that would be an improvement. I am also happy with Justice Sackville's wording. In fact, I think I quoted it in my submission. I should add, by the way, that George and I did these completely independently and picked up on the same thing, which is an interesting coincidence. Having said that, I am not completely wedded to it. I think there are other words that you could use as well. I do not have a preferred set of words of my own. I think I am reasonably flexible on that.

Senator PATERSON: Thank you. Professor Williams, could I get your view on the objective versus subjective test?

Prof. Williams: I would prefer to move to an objective test in this area again because I would like to see stronger protection for free speech in this context while still preserving this for serious cases that are serious as they relate to general community standards.

Senator PATERSON: Thank you very much.

Senator McKIM: I should place on the record that Professor Williams has provided me with constitutional legal advice in the past. I just wanted to put that on the record. It was in regard to marriage equality.

I want to go to the issue you have just been discussing with Senator Paterson. It goes to codifying the way the courts have applied 'offend' and 'insult' to date and codifying that, or raising the bar in the legislation. I think, Professor Williams, you have said that you favour raising the bar slightly because—I am paraphrasing here—you would like to prioritise freedom of speech.
Prof. Williams: More than it is, while still recognising the other values are important, so you would certainly not remove the provision itself.

Senator McKIM: I understand that. Professor Twomey, in terms of the balance between competing rights here—rights to freedom of expression and rights to be free of racial vilification, if I can summarise it like that—are you of the same view as Professor Williams in that the balance is not quite right and should be shifted a little bit more towards freedom of speech?

Prof. Twomey: I am inclined to that direction, although I cannot say that I am firmly positioned. The thing that keeps coming back to my mind is the concern about the abusive, intimidatory behaviour. I have no trouble with the notion of banning that. But, on the other hand, with respect to the political communication that may involve perceptions of insult and offensiveness from some quarters, I think that greater freedom of speech needs to be allowed there. So it is trying to work out where the line is between those—which is, of course, phenomenally difficult.

Senator McKIM: It is, and I think it is fair to say that, collectively, the committee is grappling with that as one of the central questions that we are considering. Professor Williams, you said that you think we need to shift the balance a little bit towards freedom of expression. It is almost a philosophical question, really, but why is it that you think freedom of expression ought to be prioritised a little bit more? I know you have not been here, but we have heard horror stories from racial minority groups about the impacts of racism on their members, and that is lived experience for many Australians at the moment. Are you able to respond almost in philosophical terms, or in any terms you like, really—

Prof. Williams: I will do my best. I understand, sympathise and believe that the law needs to accurately and properly respond to those concerns. But, equally, as a lawyer I am sceptical about the ability of something like section 18C to always solve those sorts of problems. In fact, it is often quite ill-directed, I think. You see that in the success rate, indeed, of some of these matters in court. It is invested with this status that it is able to deal with a range of things that, frankly, it is not. It is because it actually does not mean what it says, because it does not have the operation that some of those opening words would suggest. It also provides a process that does not always provide the outcomes that people looking for.

I also believe, on the free speech side, that there are many examples in our system where there has become a permissiveness in parliaments to undermine free speech in many, many areas. It says a bit to me that, just behind this building, in the Domain, the Speakers' Corner—which has long been a hotbed of oratory—is subject to an 18C-like offence. You can be fined there for insulting someone or offending someone. This is one example of a generic problem, I think. I think it is important to address that because, whether it be freedom of the press or other areas, I think it is important to be consistent. Even though I acknowledge those concerns, I think we ought to be giving due weight to free speech in a way that we are not currently doing with the laws that we are passing through our parliaments.

Senator McKIM: Could that be achieved by changes to 18D rather than changes to 18C?

Prof. Williams: Not sufficiently, no. I think one of the problems here is an educative one. If you were reading a section, you fix up on the words 'offend' and 'insult'. As a lawyer I can see how it is interpreted; I can work through the cases, but I think there is a problem when a law is on the statute books that suggests a particular operation which is not borne out in practice. Again, I think it gives false hope and expectations to people, as well. Having looked at some of the submissions in this inquiry, I think they perhaps do not fully understand just how limited an operation this has. You can maintain what is a bit of a fiction about how far it extends, that the media has successfully fuelled, by giving a sense of grievance to a provision that suggests an operation beyond its actual operation—or, much better, to have the operation reflect what it does. As I say, it should say what it means, and it does not do that at the moment.

Senator McKIM: I have no argument in terms of legal and legislative theory. I would lay the blame more with wilful misrepresentation by some elements in the media and some commentators rather than with the law itself. My last question goes to Mr Perrett's point: the world is a very interesting place at the moment. There is no doubt that racism and xenophobia is on the rise in many Western democracies around the world. We have to balance the public interest and the public good here; that is almost our central role as legislators. Don't you think this is not the right time?

Just indulge me—I will tell you what will happen if we do what you are suggesting. Some high-profile politicians will come out and go, 'This is a magnificent victory for freedom of speech, and it means that we can now say things that we weren't allowed to say before.' That is a dog whistle to racists—and, unfortunately, there are many racists in this country. They will feel empowered to cross the line that they believe exists now, and they
will think that they can be more racist. I am sorry to put it so bluntly, but that is my assessment. Don't you think that in the broader public good there is an argument that now is not the right time to change anything in 18C?

Prof. Williams: It is a tough question. I can understand exactly where you are coming from, but I think you also invest in that question a particular status for section 18C in this debate which has been wrongly built up as well and, indeed, if you do not amend, you are equally giving credence to certain forms of debates on ongoing problems that simply will not go away. I think there is legitimate grievance that people have on free speech grounds with this provision, given its over-breadth and its statement, and if it is not properly dealt with you are giving life to another set of concerns and debates which create another set of problems.

There is no easy way out of this. What should have been a minor legislative fix has become, as you say, invested with a much larger significance. From my point of view, I would like to see this debate end satisfactorily so we can move on to more important debates. Unless we do, we could be caught in the situation you are talking about in five years or 10 years, because the pressures you are talking about do not seem likely to go away in the short term.

Prof. Twomey: There is also a risk that it is counterproductive. There is a concern that, if you are seen to be supressing certain forms of speech, then in fact they tend to fester and greater senses of grievance tend to arise. That is also one of the factors in the balance.

Senator McKIM: I hear you. Thank you.

Mr LEESER: I have two short things. One is to put to you that, if you were to adopt the Sackville proposals as opposed to effectively legislating Justice Kiefel's test, because there are so many new words there—degrade, incite, hatred or contempt are all completely new words—surely you would create more uncertainty than leaving the words as they were and adding or, as the Gilbert and Tobin Centre has tried to do this morning in their submission, effectively using one word to bring out the Kiefel test. By adopting the Sackville proposals, aren't you actually creating the potential for more controversy, rather than less?

Prof. Williams: I think you have a good point there, and I have given you an argument as to why I would like to see a higher threshold, but I accept that, if the committee took the view that you are not seeking to disturb things but simply to better reflect the state of the law, then the people test would be the more appropriate way—or the Gilbert and Tobin submission with the addition of that one word. That is essentially a policy test for the committee. But, if you took the point that Senator McKim was making, that would push you towards the more modest approach than what I am suggesting. I accept that.

Mr LEESER: In relation what Justice Sackville calls the objective test of the reasonable member of the community at large, as opposed to the currently misdescribed subjective test, which is actually an objective test for a smaller community group, we had Mr Wertheim from the Executive Council of Australian Jewry and we had Professor Stone yesterday putting arguments to us about why the nature of the law, as it is designed to protect certain minority groups, perhaps needs a more narrow lens, as it were—still a reasonable person but a reasonable person of that group, in that from time to time there are different groups that are less popular in our community and view particular acts differently to the community at large—and that there is some benefit in maintaining the narrower objective test rather than the broader objective test.

Prof. Williams: I accept the arguments, and for me it comes down to how you balance these things up. Perhaps this is an instance where I might give more weight to freedom of speech. There are good arguments, but it is a matter of proportionality, balancing and other things. Consistently, I tend to favour a system where, unless there are extremely clear reasons for something to be made unlawful or proscribed, incitement of violence or the like, my preference is for it not to be the subject of the law, because I think often the law can complicate and make things worse in these areas.

Mr LEESER: Finally, I have had an attempt, as you may or may not have seen, to address the processes of the Human Rights Commission, in order to try and address the argument that the process is the punishment in this space. It is an attempt, and it is an option of moving the debate on to quell the controversy. I do not know if, in view of time, you might be able to provide us with some written response to those or if you would very quickly make a response as a witness.

Prof. Williams: I can give a quick response. Yes, I have read it. When I look at the commission's powers, on their face they do appear to give the commission the necessary power to terminate complaints. It says quite clearly that if they do not see it as unlawful discrimination they can terminate. I think it may be—

Mr LEESER: They may terminate rather than are compelled to terminate.

Prof. Williams: You are right. On that point I was going to say that the insertion of 'must' may be one way of dealing with that issue. Remove a discretion, and that may give comfort to people in those circumstances. I can
see justification in moving down that path. I can also see some argument, as has been put in one of the submissions, for giving someone a fast-track capacity to get a commission determination so you are not simply dependent upon whether or not they want to make a decision, and perhaps even a time limit for the making of that as well. Again, it is reasonable, in the light of public concern, to go down that path.

I am less attracted to your notion of inserting something for having little prospect of success because, as we know, 'little prospect of success' might mean a 20 per cent chance versus an 80 per cent chance of losing, and in that category you have got a reasonable argument; it is just that you may not win. I do not think it is appropriate to be preventing cases of that kind, because of course, until it has got to court, it is very hard to determine whether 'little prospect of success' really could, ultimately, be a winning argument.

Mr LEESER: Does it matter if it were no reasonable prospect of success?

Prof. Williams: Well, there we are getting into things that are trivial and vexatious. That is why I think the wording there is not really that problematic, because, if it is something that really has no reasonable prospect of success, the commission then would determine that they do not see it is unlawful discrimination anyway. You can argue as to whether you think the commission have made right discretions or not; you can argue that we should have a mandatory, but by and large they do seem to have the powers needed beyond those two points that I made.

The other point that I would make is that, if you close the commission down too much, I question whether there is any capacity to go straight to a court. I note in the legislation structure that it is assumed you would go via the commission to the court. But section 18C independently sets up an unlawfulness criterion. A smart lawyer might find a way of going directly to court and so simply bypassing the commission if you lock it down to such an extent, which will quickly get you into the uncomfortable terrain that of course some people have found themselves in here.

Mr LEESER: Professor Twomey, do you have a comment?

Prof. Twomey: Yes. I think that the commission has all the powers it needs, but I think the difficulty is getting those powers actually exercised and exercised within a period of time that is sufficiently short to cut out the pain of the process for the people where those sorts of complaints should not be dealt with. So I very much think there should be some kind of obligation on the commission to make an initial assessment, and to make that decision up-front, about whether or not the proceedings need to go ahead, rather than just simply having a discretion that maybe they will or maybe they will not exercise—some kind of obligation to make an initial assessment within a period of time to get rid of the ones that should not be there.

Prof. Williams: Maybe you could insert the words 'as quickly as possible'. There are a range of devices used in other legislation to that effect where there is thought to be a public interest in a quick resolution. There are also resourcing issues. The government could provide resources to the commission to ensure that it has the capacity to expedite matters of this kind, again, if there is a public interest in doing so.

CHAIR: Thank you, Professor Williams and Professor Twomey, for your appearance here before the committee today.
ANDREWS, Mr Timothy, Executive Director, Australian Taxpayers' Alliance

MARAR, Mr Satyajeet, Research Associate, Australian Taxpayers' Alliance

[16:45]

CHAIR: I now welcome representatives from the Australian Taxpayers' Alliance.

Mr LEESER: I should just note that prior to my election to the parliament I was on the advisory board of the Australian Taxpayers' Alliance, although I think I disagree with their submission.

Senator PATERSON: I think you are a serial joiner of things, Julian.

Mr LEESER: No, I am just popular—what can I say!

Mr PERRETT: If we find out you are Bill Leak's cousin!

CHAIR: Do either of the witnesses have any additional comment to make on the capacity in which they appear today?

Mr Marar: I am a part-time employee of the Taxpayers' Alliance and I am the principal author of the submission before you today.

CHAIR: I invite you to make a brief opening statement, after which the committee members may ask some questions. In the interests of time, could you keep the opening statement fairly brief.

Mr Andrews: Thank you for the opportunity for us to appear before the committee. While primarily a taxpayer protection organisation, the ATA is concerned also with what we consider to be undue restrictions by the government on individual liberties. Like many other restrictions on freedom of speech which we have campaigned upon—for instance, we ran a large campaign against the metadata retention policies, which we considered an imposition on privacy—this is a concern for our members, to the extent that close to 8,000 of our members wrote formal petitions to the committee. We also note that a lot of non-traditional groups such as AiG have also joined in writing to this committee, which is why we feel that, due to the large cost of the human rights apparatus in Australia to taxpayers as well as—one of the things that we note—the large number of taxpayer funding attempts going to groups in support of retaining the current protections that are in section 18C.

Mr Marar: We would like to see a repeal of section 18C for three main reasons: firstly, because it contradicts freedom of speech, which is a crucial value to our Western liberal democracy; secondly, because it unfairly punishes those who hold divisive political opinions, even if they are not ultimately convicted of an offence under this section, rather than doing what it is intended to, which is to protect minorities from racial abuse; and, thirdly, it is largely redundant because it operates alongside other laws we do have at a federal and state level that pertain to harassment, intimidation and abuse—even offensive language laws—which operate fairly effectively. The central problem with the section is in its very wording, which is: 'likely … to offend, insult or 'humiliate'. These are highly subjective terms. The problem is that what this does is force parties to be at the mercy of a judge to convince them that their speech is legitimate even if it is plainly evident to our community that this is not an example of racist speech but just divisive opinion. As a result, it creates a distraction and diversion from actual racial issues and issues of racism and turns people who hold racist or divisive views into martyrs and victims, and that ultimately benefits no-one and no legitimate cause.

It is also our submission that a word like ‘vilify’ will not ultimately be beneficial—it will simply replace the word 'offend' with 'vilify'—because that word can be used interchangeably in common speech with 'offend'. We also do not know how the court will interpret that word because of its subjectivity. It is our belief that the problem with the law is not so much in how the Human Rights Commission operates in limiting complaints but in its very wording. From my personal experience, having come to this country as an immigrant, I can honestly say that none of the racists whose abuse I have taken have ever thought about section 18 C or had it in the back of their heads at all. What they are afraid of are the police and the criminal sanctions that will ultimately restrict them, and how we change their minds is through public engagement and education. I think those are the things we need to focus on when we talk about racism. Section 18C does not operate the way it is meant to operate. It defeats community expectations, it harms freedom of speech, it has failed to achieve what is meant to achieve and, therefore, should be repealed.

Mr PERRETT: We have had evidence and submissions that talk about the impact of racism on communities. There was mention of the fact that once racism is experienced it ripples through communities and people then become reluctant to engage outside of their own community for fear of again been targeted by racist comments. What do you say in relation to such people's freedom of speech and how it would be impacted by removing the current protections that are in section 18C?
Mr Marar: What I would say to that is that there has been an issue of narratives been distorted essentially here, whereby a link has been drawn between the specific section, being 18C, and that sort of racism and its effects on people in making them not engage with their communities and the wider world. What we see happen in practice, though, is that when that sort of racism is called out and actively attacked it actually becomes a rallying call for the community and shows ethnic minorities that the community is behind them and that society is behind them. When you have a particular law, like section 18C, rather than those other protections that exist in law, what this law does is to draw the focus away from the kinds of cases where someone is yelling abuse at someone else on the bus and interfering with their self-esteem and towards the cases where someone has a divisive or controversial view on a racially charged issue. We spend time debating that sort of thing and whether that is problematic rather than whether racism itself is problematic and whether racism itself is a huge issue for our society. So ultimately minorities are best empowered to deal with racism when they see that they can have that self-determination, when the government does not send them the message that racism is inevitable and the only thing we can do is force people who are racist to shut up. That is actually the wrong message. I believe that if you repeal the section you actually start on the path towards solving that problem and having ethnic minorities engage more in the public discourse and stand up against racism.

Mr PERRETT: Earlier today people sat in the chair that you are sitting in, Mr Marar, and said the complete opposite of that—from the Indian community's experience, from the Chinese community's experience, from the Indigenous community's experience and from the Jewish community. They were saying that the protection of 18C empowered their community because they were able to work towards shutting down racist comments.

Mr Marar: Sure, and they are important stakeholders and I can accept that completely. But at the end of the day ethnic communities are not homogenous and single associations cannot speak for entire communities or ethnic communities in general. I certainly do not claim to speak on their behalf either but what I would say—

Mr PERRETT: But you speak on behalf of Australian taxpayers?

Mr Marar: Yes. Certainly.

Senator McKIM: Who are not homogenous either.

Mr Marar: Who have certain common interests.

Mr PERRETT: But in terms of balancing their right to be free from discrimination and freedom of speech, you are saying that 18C goes too far?

Mr Marar: Certainly. I do not think that 18C is the most important protection that there is in instances of racism. We can see that in the current debate being focused on the kind of thing which 18C and 18D are supposed to prevent, which is people being taken to court for divisive political opinions. What we have seen happen in cases like the Bill Leak cartoon, for example, is that that cartoon coming out was a reflection of attitudes that certain people did in fact hold. What that cartoon did was that it started a debate about those attitudes and why those sorts of generalisations might be problematic or unfair. I cannot speak for every ethnic minority here, but I would rather that sort of discussion happen and we actually dismantle and tear apart these negative viewpoints than simply have the government say, 'You cannot say that.'

Mr PERRETT: But isn't that exactly what happened? The people in Australia debated the merits, the humour, the intent of that cartoon. Mr Leak drew the cartoon. The world turned on. Mr Leak did not end up in court. There was a process. So you are actually saying that we were not able to have a civilised debate?

Mr Marar: That is not what I am saying. What I am saying is that we had a civilised debate but that debate would have happened one way or the other. What else happened was that there were a lot of news stories and there was a lot of press about Bill Leak being threatened with a lawsuit for saying what he had said. A lot of people—

Mr PERRETT: A civil process might be the first step in that.

Mr Marar: Certainly a civil process, but, indeed, there is the very threat of a lawsuit for having these views. This does send the message that you are not allowed to have certain views and that you are some sort of martyr for holding or expressing those views. Luckily in that case the complaint was dismissed fairly quickly.

Senator PATERSON: Withdrawn, actually, rather than dismissed.

Mr Marar: Withdrawn—my apologies. But the fact of the matter is there was still that diversion. We believe that the focus should be on the debate and not on the diversion.

Mr PERRETT: Are you concerned that any change would send a dangerous message to the community about the type of behaviour that is acceptable and could result in an increase in racist behaviour? You might have heard this question earlier today.
Mr Marar: I have heard the question and I certainly appreciate the sentiment, but, at the end of the day, we are weighing up freedom of speech and a person's right to have a certain opinion and have their opinion critiqued and dismantled, which is a long-term process rather than something where you see an immediate effect. There is the potential for some people to feel that a legislative change somewhat empowers them, which it actually does not, because we still have all those other protections against offensive speech which still exist within the law. Perhaps parliament can help with that problem by making it clear that we have these other laws and the community should be empowered to rely upon the other laws, as they do, and—

Mr PERRETT: But not this law?

Mr Marar: Not this particular law, no.

Mr PERRETT: They should be empowered by relying on other laws, but not this law because this law does not empower them. I cannot quite see the logic. I might leave it there.

Senator PATERSON: Would you like to finish that answer, Mr Marar?

Mr Marar: Yes, sure. The problem with this particular law is the kinds of cases that you see litigated are those that involve often divisive opinions rather than the racial abuse that you say will be emboldened. Suddenly it is a political inconvenience issue, certainly, and I can understand how some people might interpret that message. But I believe, based on priority, we should give freedom of speech and free intercourse and free discourse, and this committee should err on the side of favouring that right.

Mr PERRETT: I just want to be clear. Only about 96 cases in 20 years have actually been litigated. There are significant numbers that are never litigated and never publicised, and we have heard today that 98 per cent of people involved, whether they are accused or fronting the commission, are happy with the process. I just want to make sure that you are using the right word. You were talking about the 96 cases, not everyone involved with the Human Rights Commission process?

Mr Marar: I am not ultimately saying that the entire process is completely flawed, but the issue here is that the process has been abused. When we talk about freedom of speech—

Mr PERRETT: In the litigated cases, do you mean?

Mr Andrews: There have also been people who have been forced to settle and in later cases have regretted this, which was one of the instances, for instance, in the QUT cases. So to simply say that there were cases that did not go to litigation—

Mr PERRETT: So they were coerced into settling, do you mean?

Mr Andrews: Pressured into settling. At least one respondent was pressured into settling, I believe, in the QUT case. They essentially felt that they were coerced into doing so. So, simply to use the argument that, because some cases did not go through to fruition, it was a valid use of section 18C. I do not think is necessarily an accurate use.

Senator PATERSON: Mr Marar, you will be relieved to know that Professor Anne Twomey shares your view that there are other laws more effective than 18C addressing these issues. Mr Andrews, in your opening statement you made a reference to a number of organisations in this debate being taxpayer funded. Could you expand a little bit on that comment?

Mr Andrews: One of the interesting things that we have been looking at is the people who have been funding submissions to this inquiry. This is still a very preliminary assessment, particularly given the batch of submissions that were uploaded yesterday and also the length of research needed to do this. For organisations that are in favour of retaining the current wording of 18C, we have identified net taxpayer funding of slightly over $150 million for last financial year, whereas organisations that have come out for reforming or repealing section 18C have received zero dollars in taxpayer funding over the past financial year, which we would consider is a relatively interesting use of—

Mr PERRETT: Charity status does not count?

Mr Andrews: Of course not. That is not taxpayer funding. We are talking about taxpayer funding of an organisation. We think that is a very interesting use of bargaining power and that it also raises questions, as we have raised in the past, about essentially—due to the fungibility of funding—taxpayer-funded lobbying. We believe that it is an immoral use of taxpayer dollars for taxpayer dollars to go into lobbying the government. This is still, I stress, very preliminary in our assessment, and we are still looking into this further—and not necessarily everything falls into this and we are not even including things like the government of Victoria lobbying the Commonwealth government—but we consider that this raises some relatively serious questions.
Senator PATERSON: Thank you. I will not name them, but there was one organisation who came to us in Hobart on Monday that sent four people along and I think in the view of many committee members we could not quite establish the connection between their organisation and this issue.

Ms MADELEINE KING: Was that Family Planning?

Senator PATERSON: I was not going to name them, but you are welcome to. Mr Marar, one of the features of this debate has been an accusation by some people that you would only be in favour of changing this law if you are an Anglo-Saxon white male. In fact, there was a member of parliament who said that it was white males I think of a certain age who are in favour. I am not sure you would qualify in that category—certainly not by your ethnicity or your age, but you are man so you do have that to answer for. I am interested in your reflection on why, as someone who is an immigrant to this country and who has experienced racism yourself, nonetheless—given those characteristics—you are still in favour of reforming the law.

Mr Marar: I think the problem with that sort of characterisation of, 'You have to be an Anglo-Saxon white male to propose the change,' firstly, is patently false and, secondly, it feeds into a narrative of the other side. It is an attempt to shut down debate based on stereotyping the other side, which is ironic here because we are dealing with racism, which is based on making certain assumptions and stereotypes about people. Like I mentioned before, that just creates a big distraction away from actual debates on controversial issues and more towards debates about what you can and cannot say, which does absolutely nothing, quite frankly, to stop racism. These sorts of laws did not stop me from copping abuse in the schoolyard; what stopped that abuse was me standing up for myself and me having the backing of the teachers and the education system behind me, should I have needed that. I think that is where the focus needs to be—not so much, 'You can't say that, because that is really problematic,' and that is my view on this issue.

Senator PATERSON: Thank you.

Ms MADELEINE KING: I wonder if I might ask you about your research and also ask—the committee might discuss it later—if you are willing to table that research. In that, how many of the submissions you have gone through, accepting that there is a lot to do and there are a lot of submissions to go through, how many did you figure support no changes to the Racial Discrimination Act?

Mr Andrews: If you count individual submissions, I think the 8,000 that our members submitted would show that the vast majority supported them, but in terms of organisations I would consider that the majority of organisations—virtually all of whom are taxpayer funded to some degree—did support the current form.

Ms MADELEINE KING: Have you in your research gone through and assessed how much of their funding is taxpayer funding? Is it two per cent, 10 per cent, 100 per cent?

Mr Andrews: We have not gone to that level.

Ms MADELEINE KING: Would you propose to do that to make it a fair—?

Mr Andrews: We would certainly love to have the resources to be able to go through the financial documents of every single organisation, but that is not something which I think we would realistically be able to go into.

Ms MADELEINE KING: It is a big job.

Mr Andrews: It is a huge job.

Ms MADELEINE KING: I just wonder how you are getting the figures that you have already.

Mr Andrews: The ones that we have been those who, in their annual reports, have said, 'This is the amount of taxpayer funding we received.'

Ms MADELEINE KING: In the last year, or—?

Mr Andrews: In the financial year. Not all organisations have done this.

Ms MADELEINE KING: Are there any cases that you are aware of before the 2011 case of Bolt, Eatock and others that you consider an abuse of process of the Federal Court and the Racial Discrimination Act?

Mr Andrews: None that come to mind for me.

Ms MADELEINE KING: So it is post-2011 and basically the cases we have talked about already.

Mr Andrews: However, in the years before that I was living overseas and prior to that I was a student, so I do not necessarily—

Ms MADELEINE KING: I do not if that is an excuse for coming to a committee and alleging an abuse of process on different cases and not looking before a certain time.
Mr Marar: I think one of the problems with the section is that it is so subject to change over time. Indeed, even the reforms to change it often make reference to what a reasonable member of the community might be offended by. The problem with that is that it operates today very differently to how it might have been intended to operate originally. Indeed, if you look at the second reading speech for the 1994 law, I forgot the name of the MP but he makes reference to, 'This is designed to protect people from racist abuse'. Since that period we now have so many other laws which do that more effectively. In fact, he probably did not foresee the fact that the law could be used in the way it has been used some 15 years later.

Mr Andrews: Even the case for protections like bullying legislation, stalking legislation—all of these new laws at a state level which have developed now—were to provide protections that did not necessarily exist.

Ms MADELEINE KING: Certainly. Could I seek to clarify paragraph 28 of your submission: The ATA further wishes to submit that the inclusion of 'racial vilification' is an unacceptable intrusion upon freedom of speech, as it is a term of imprecise definition capable of subjective value judgement including based on the idea of subjective offensiveness. As such, the ATA considers any "compromise" which includes this term unacceptable. So the inclusion of racial vilification is unacceptable. I want to ask you about competing rights, given we have two rights competing here—the right to freedom of speech, which you agree with, and also the right to live a life free from discrimination and racism. Do you believe both of those rights exist, and how do you think they interact?

Mr Marar: I certainly believe that there is, to an extent, the right to be free from discrimination. For example, I would not want to be denied an economic opportunity simply because of the colour of my skin, my accent or whatever other reason. But, when you make the threshold a lot lower and you include things like someone's hateful words, the fact of the matter is people are going to be yelling racist abuse 100 years from now. It is going to still exist.

Ms MADELEINE KING: I get what you are saying, but by the same token you would agree there is a right to live a life free from discrimination?

Mr Marar: I would agree with the general principle, but we would probably have issues with how exactly it should be applied, because—

Ms MADELEINE KING: It is incorporated into Australian law. Governments over many years have done this and it is part of our law now.

Mr Andrews: One of the issues, and I think Senator McKim very correctly raised it previously, is that we are seeing a resurgence of xenophobia and nationalism around the world. I do not think anyone here can deny that or the troubling nature of what we are seeing now. What we would argue, though, on the basis of the evidence, is that factors such as restrictions on freedom of speech such as 18C, despite perhaps being well intentioned, do not have the effect of enabling us to solve this problem. They have the counter-effect of suppressing and pushing underground negative thoughts and racist views. You cannot necessarily identify a racist and publicly shame them or educate them. So you see the festering of these vile views occurring. We could have a debate about positive rights and negative rights, whether or not there is a right not to be offended or a right not to be discriminated against, but we all agree that discrimination is bad. The question is: what is the way to stop it? We would say that changing cultural norms rather than this rule-based approach is the way to combat it. We see in Europe, for instance, a rise in nasty incidents of anti-Semitism. Holocaust denial is illegal, and yet we are seeing large swathes of the community believe in it. Why? Because by suppressing it you do not get an opportunity to identify and attack it. So it really should not be a question of competing rights but a question of being able to use freedom of speech as the sunlight, as the best disinfectant, to best defeat these sorts of views.

Ms MADELEINE KING: I will wrap up with a point of clarification. No-one is suggesting that there is a right not to be offended or a right not to be discriminated against, but we all agree that discrimination is bad. The question is: what is the way to stop it? We would say that changing cultural norms rather than this rule-based approach is the way to combat it. We see in Europe, for instance, a rise in nasty incidents of anti-Semitism. Holocaust denial is illegal, and yet we are seeing large swathes of the community believe in it. Why? Because by suppressing it you do not get an opportunity to identify and attack it. So it really should not be a question of competing rights but a question of being able to use freedom of speech as the sunlight, as the best disinfectant, to best defeat these sorts of views.

Ms MADELEINE KING: I will wrap up with a point of clarification. No-one is suggesting that there is a right not to be offended, although a lot of people have put in submissions saying that somehow people supporting 18C think there is a right not to be offended. That is not the case. But there is a right to live a life free from discrimination, as there is a right to freedom of speech. I will leave it at that.

CHAIR: Mr Marar and Mr Andrews, thank you very much for appearing before the committee today.

Mr Andrews: Thank you.

Mr Marar: Thank you.
LEAK, Mr Bill, Private capacity

[17:09]

CHAIR: I now welcome Mr Bill Leak. Do you have any comments to make on the capacity in which you appear?

Mr Leak: I am the Daily Editorial Cartoonist at The Australian Newspaper, but I appear as a private citizen.

CHAIR: I invite you to make a brief opening statement.

Mr Leak: I was a bit impressed by the last two opening statements that I heard, given that I have not had time to write one. I read Mr Leeser's submission late last night and wrote a few notes down early this morning, all of which got very wet in the train. Maybe that would be a good point at which to start. Mr Leeser, you provided quite a lot of very interesting quotes from Robert Menzies, all of which I thought when reading them were the sorts of things you really could not argue with at all. Well chosen! What disturbed me about it was that I thought: 'Well, wait a minute. When Sir Robert Menzies wrote all of these things, he could not have possibly foreseen the phenomenon that we call political correctness.' It did not exist when he wrote those things. He could not have possibly foreseen that there would one day be an Australian Human Rights Commission. The last thing that he ever would have been able to imagine is this weird thing that we call political correctness and that this Human Rights Commission would have seen it as its duty to somehow impose that. That is what has been happening.

The law that they have been using as a kind of blunt instrument with which to persecute private citizens for not adhering to the laws of political correctness is the law known as 18C of the Racial Discrimination Act. I am quite sure that, when it was drafted, it was drafted for all of the best possible reasons. But now we are seeing that it has fallen into the hands of a body that is being very reckless with it. They have recognised that they have got a weapon there. This is a weapon that they are using against citizens like me, not for having abused somebody or for trying in any way to offend or insult somebody on the basis of their race, their ethnic origin, their religious beliefs or whatever, but for telling the truth. If you have a law in place that enables an agency of the state to haul someone over the coals—as they did me—for having told the truth, there is obviously something wrong with the law.

I noticed, Mr Leeser, that you suggested that a judge could be appointed to the Australian Human Rights Commission on a part-time basis, basically to do the job that the commissioner herself is supposed to do, which is to weed out the frivolous, vexatious and trivial complaints from the serious ones so that the trivial, vexatious and frivolous ones—call them what you like—do not get acted upon. Obviously, that is the job of the commission. What we have here is a lawyers' picnic, and your suggestion, with respect, is to invite another lawyer to join in. If the case that I have just been through was not, quite obviously, a frivolous complaint, I'll go heave. The name of the person who made the complaint was Ms Melissa Dinnison. I have seen the form that she filled out, albeit redacted to an enormous extent. It was something that would have taken her a couple of minutes to fill out online. She ticked a few boxes. I cannot remember all the wording, but I can remember the wording of one part of that document. The question was: 'How would you like to see this issue resolved?' Her answer was 'yes'. I am saying this because I believe that the Human Rights Commission would have seen it as its duty to somehow impose that. That is what has been happening.

I do not know how many of you know this, but at the beginning of 2015 I got myself into strife because I did a cartoon that featured an image of the Prophet Mohammed. Within three days I was advised by the counterterrorism police to get out of my home. I had to move house. I had to have massive security provisions—all sorts of provisions. It was a nightmare. I have got a wife. I have got 14-year-old stepdaughter, and, at the time, of course, she had not even turned 12—she was 11 years of age. I could not tell her why we were moving house because she would have been terrorised. That was their objective. Well, they terrorised me all right. I had to get out of my home because I had done that cartoon. Now I cannot remember why have gone back to that—sorry, I should have written this down.
Then, 18 months later, I do a cartoon. All my intention for that cartoon was to draw attention to the fact that one of the underlying reasons why 97 per cent of the children in the Don Dale detention centre are Aboriginal—97 per cent of the children in that juvenile detention centre are Aboriginal—is that they come from shocking circumstances, the sort of circumstances that none of us would put up with, none of us could even endure. It is perfectly obvious that that is the case. I say that in my cartoon and I finish up being charged under section 18C. What for? For telling the truth. Not for maligning anybody.

I have got to tell you, that morning, the day that cartoon was published, which was 4 August last year, I received a call at 11 o'clock in the morning from Colin Dillon. Colin Dillon is the father of a very close friend of mine, Anthony Dillon. Colin was Australia's first Aboriginal policeman. He gave pivotal evidence at the Fitzgerald inquiry. He is one of the finest men you are ever likely to meet. Colin Dillon rang me, personally, at 11 o'clock that morning to thank me for doing that cartoon and to congratulate me on it. He said, 'Mate, that was such a great cartoon. What you have said in that cartoon is something that has to be said.' He said, 'But, I tell you what, there are a lot of people out there that just don't want to know about it.' He said, 'They don't want it said to them.' Well, I discovered that he was right. I do not tweet and I do not face—I do not do any of that stuff because I am quite busy enough without it—but, at 11 o'clock that morning I had Colin Dillon personally ringing me and thanking me for what I had tried to draw attention to in that cartoon. Then, by the time I went to bed that night, I was Australia's leading racist.

CHAIR: Mr Leak, I might open up for questions.

Mr Leak: Thanks very much.

Mr PERRETT: Thank you for appearing before us, Mr Leak. For the cartoon you talked about that came out in August last year, the complaint against you was discontinued, so there was no finding one way or the other whether it offended section 18C or whether any of the defences that no doubt your lawyers told you about were available to you for that cartoon.

Mr Leak: They did not have to tell me. I could read it. But clearly that is my point about why the Human Rights Commission upheld the complaint, because they are lawyers. If you go through section 18D you go tick, tick, tick, tick, tick.

Mr PERRETT: Mr Leak, I just want to be clear: the complaint was never upheld because it was discontinued. Is that a fact?

Mr Leak: It was withdrawn.

Senator REYNOLDS: What date was it withdrawn?

Mr Leak: I do not know. Sometime in December. But they actually went out and found two more complainants.

Mr PERRETT: Are you able to talk about the advice you got from the lawyers? Were they pretty certain that the 18D defences would be available to you and—

Mr Leak: Yes—rock-solid. As I said before, I read them myself. I just went through: tick, tick, tick, tick, tick. That made me even more puzzled as to why they had upheld the complaint. They knew it would be thrown out.

Mr PERRETT: Do you think there should be any limits to what you—or other cartoonists, for that matter—can lawfully express in cartoons?

Mr Leak: No, I do not. I think you either have freedom of speech or you do not.

Mr PERRETT: I asked another witness—I cannot remember which one—what is political correctness? I think you almost gave us a definition in that melding of Menzies and the words of section 18C. I ask for your definition of political correctness.

Mr Leak: It is a very difficult one to answer.

Mr PERRETT: Would it be: 'not offending, not insulting, not humiliating or not intimidating'? Is that what you are suggesting?

Mr Leak: Not really. I do not think that quite defines political correctness, but it is an interesting question. If you want to know about racism, try this on the size: my wife is Thai; as a Thai woman, she gets very subtle and sometimes more overt racism directed towards her all the time. I cop it too. As a white man of a certain age with a Thai wife, it is immediately assumed that I went to Thailand on some sort of sex-tour and went shopping for a new wife. Nothing, of course, could be further from the truth, but try and tell it to most people. That is the assumption that is always taken. I copped this stuff all the time. But I cannot regulate—and I do not expect legislators to be able to legislate—to change the way people think. This is what I think the objective of section
18C is. They talk about eliminating racism. Restricting freedom of speech to the point where you are not allowed to go around abusing people racially on the bus—but you are not allowed to do that anyway.

Mr PERRETT: Why are you not allowed to?

Mr Leak: That is just making a public nuisance, isn't it? Surely there are lots—

Senator PATTERSON: It is against the law. As Professor Twomey was talking about earlier, it is in fact a crime.

Mr PERRETT: I do not think that is the bus rule in Queensland.

Senator PATTERSON: It is here in New South Wales.

Mr Leak: I read a quote from Tanya Plibersek today where she used words very similar to what Mark Dreyfus used late last year and Bill Shorten used in the parliament late last year, where they basically said, 'What sort of vile things do these horrible people who want to get rid of section 18C want to be allowed to say that they are not allowed to say now?' I think this assumes that the people out there who they are talking to, or who they want to hear their comments, do not actually know what freedom of speech is. Put it this way: if I believed freedom of speech was a legal right to abuse people on the bus, I would think, 'Gee, you would have to do something about that, wouldn't you?' Take Mr Shorten, for example. He is a person who fancies himself as the next Prime Minister. I am a cartoonist. I am not even a very well educated person; I never went to university. I studied painting. But at least I have read my John Stuart Mill, because I want to know about it. I comment on society; I want to know what society is all about. I want to know where our society came from. I have taken the trouble to find out what freedom of speech means—that concept—and why it is so important not only to the maintenance of our society but for the development of it. We have freedom of speech to thank for the fact that we are sitting here in nice, comfortable chairs in nice, comfortable Sydney and nice, comfortable Australia. I cannot believe that our politicians would stoop so low as to characterise freedom of speech as the legal right to go around abusing people. It has nothing to do with that.

Senator PATTERSON: Thank you, Mr Leak. I appreciate you making the time to be here today and share your experiences. You point out that, although you are unfortunate to have gone through this, in some ways you are fortunate because you had the backing of a large media company that could help provide lawyers for you. Are you aware of what the cost was to News Corp for acting in your case?

Mr Leak: No, I do not. I wish I did—no, I wish I were able to help you. That is what I mean. But, no, I cannot.

Senator PATTERSON: How do you think people in your circumstance—say, a freelance cartoonist or a cartoonist who operates online or on social media who does not have the backing of a company like News Corp—would feel having watched the experience that you have been through?

Mr Leak: You have raised what I think is one of the most important points about this. I think that that hypothetical person working for some magazine that might be online—goodness knows—or whatever but does not have the backing of an organisation like News Corp is going to look at what happened to me and say: 'That bloke really got into a lot of trouble for telling the truth. I better not tell it myself.' If that is not a dampener on freedom of expression and freedom of speech, I do not know what is. To me, I think it is extremely sinister. I think it is downright sinister what the AHRC did in my case because that is precisely the message that it sent out to everyone: do not tell the truth; do not take a risk; speech is not free in this country.

Senator PATTERSON: Sometimes we call that the chilling effect—

Mr Leak: Well, that is what it is.

Senator PATTERSON: and we have been asking people about this this week, none of whom who have been subject to a complaint like you have. They say they are unconvinced that a chilling effect exists or that if it does it is pretty small. Do you agree with that view?

Mr Leak: No, I do not, because it might be for a whole lot of people for whom this is not a matter of immediate interest. And, let's face it, that is probably 99 per cent of people. Most people do not go around thinking about these sorts of things. Similarly, they do not think about the wording of section 18C of the Racial Discrimination Act if they want to use racist slurs. Changing the wording of it is not going to make any difference. It simply has to go. If you look at the Human Rights Commission and the Race Discrimination Commissioner, you might think, 'Are they supposed to be protecting human rights?' I was concerned with the human rights of Aboriginal children. I am concerned about the human rights of Aboriginal women. They suffer from the most appalling levels of violence. They are 34 times more likely to finish up in hospital than white people in our community, but to mention that makes me a racist! For mentioning the shocking statistics that go
along with sexual and physical abuse of children within Aboriginal communities, I get labelled a racist. It is absolutely absurd. It has nothing to do with racism at all. It is trying to stamp out truth.

**Senator PATERSON:** One of the virtues that advocates of the current system talk about is that it is quite a harmonious system and that it results in both the respondent and the applicant being happy with the outcome. It does not sound like that is how you feel.

**Mr Leak:** No, it is not. It is simply not. I drew that cartoon on 3 August. I know that in late September and up until about 10 October I was on a holiday with my family, so that was a couple of months. I can actually give you the sequence of events that happened when I came back. My wife's dog died three days before we left America to come home, I got hit with the 18C complaint the day after we got home and the next day the Thai King died. It was a series of catastrophes in the Leak household! I had no idea that the AHRC even had a complaint in their hands. The first time I found out about it was when they decided to do something about it. And I know that in the case of the QUT students the AHRC actually had that in their hands for—what was it? Fourteen months?

**Senator PATERSON:** That is right.

**Mr Leak:** They had it for 14 months, and then they notified all of the people who had been complained against and gave them something like three working days to prepare themselves to front the commission. They gave themselves 14 months to prepare a case against them. This is a rogue outfit. It is a totalitarian outfit. They have found this law and they are using it as a weapon.

**Senator REYNOLDS:** Thank you very much, Mr Leak. One of the things that dismayed me about your treatment by the Human Rights Commission, notwithstanding the flimsy nature and that it was not bumped out in the first place, is that you were clearly, as you said, commenting on an important social issue. The police commissioner in WA came out pretty much on the next day on the front page saying: 'This is the truth. This is the reality that my police officers work with every single day.' And then we had Marcia Langton, Jacinta Price and Josephine Cashman—three amazing Indigenous women—who came out and supported what you said and actually called it, I think, not political incorrectness but reverse discrimination because the inability for people like yourself to raise these issues meant that the discrimination and the human rights abuses that they and their children suffer are left unaddressed and silent. And yet the Human Rights Commission still did not act to withdraw your complaint. Clearly people have come out and said that it is actually the truth. That Western Australian police commissioner was not hauled before the commission. Certainly, these three Indigenous ladies were not hauled before the commission. You say it took you four months—is that right?

**Mr Leak:** Before they contacted me—in August, September or October, so it was maybe two months and one week or something before they contacted me and I realised I was in strife—it took about two months or about nine weeks, I suppose. And then it took up until Christmas before the whole thing was resolved.

I also must mention that at a certain stage—I am not terribly good with dates; sorry about that—which must have been in November or October, there were two lawyers from the Western Australian legal service who happened to be in Fitzroy Crossing because of some kind of a problem or complaint that had come from local Aborigines in Fitzroy Crossing who were being breathalysed upon entry to the pub. They went up there to resolve that. These two lawyers from the Western Australian legal service went up there to resolve that issue. They took it upon themselves to go to a home where two men lived and show them my cartoon. This is at least three months after it had been published. These blokes had no idea what the cartoon was about. They had never seen it before. They went in there and presented it to two Aboriginal men and said, 'Do you think that's racist?' 'Yeah, I do,' they said. They said, 'Righto, sign here.' They provided them with already made complaints and asked them to sign them. These two poor men were being, in my view, really shabbily treated by these people who claimed to be standing against racism as expressed in my cartoon.

**Senator REYNOLDS:** Mr Leak, just on that, in terms of what you do as a cartoonist—to shine a light sometimes on very uncomfortable truths in society—from your experience of the issue you were talking about there, do you sometimes need to offend and insult people to get people to shine a light on things that we do not want to look at?

**Mr Leak:** Senator Reynolds, put it this way: I work as a cartoonist. You could almost say I am a humourist. I think of my job as having to sit down and amuse the nation. It is not easy. Ask any comedian and that comedian will tell you that every time they tell a joke there is a possibility that someone somewhere will take offence at what that person said. Of course I understand that someone somewhere might be offended by one of my cartoons. Frankly, if I did a cartoon and I could safely say with 100 per cent surety that no-one would be offended by it I would throw it away and start again because the point of a cartoon—the point of satire—is to point to something that is true and do it in such a way. First of all, there is the effect that humour has. When you see something and it
is funny there is a sort of slight cathartic release and that release sort of drops all your defences and the message goes straight through. It is a way of conveying a message. And, if a work of satire does not have a kernel of truth, the satirist is wasting his time.

So, yes, I understand that people are going to say, 'I'm offended.' But what I would say to you is that a lot of people rather enjoy being offended. It is actually rather cool to be offended these days. In my work as a cartoonist—I have also worked as a painter most of my life—and when people sit down or commence work as painters, as artists, the objective is to do something that is uplifting, something that is inspiring, something that rises above petty concerns like whether somebody over there is offended by a joke or not. Great art rises above everything. Well, it doesn't anymore, because these days the orthodoxy is conceptual art, and conceptual art is by definition indistinguishable from illustration. It is a visual means of conveying an idea or concept, which is what illustration is. So people look at my cartoons and, instead of looking at them knowing that there is a cartoon which is a bit of fun—or it might be an illustration; and then there is art, great art, uplifting, transcendent art: it is all the same now. You have to understand this. It is something that took a long time to get my own head around, and suddenly I realised that people are not looking at my cartoons with the intention of being amused; they want to be offended.

Senator REYNOLDS: In relation to your comment about the truth, it appears to me that, in your case and also that of Dean Alston, even though it was a cartoon satire social commentary, the truth was actually irrelevant. In Dean Alston's case, it took five years to go through the 18D process; and, in your case, the truth, even though it was self-evident right at the beginning that what you were saying was demonstrably true, did not matter.

Mr Leak: It did not matter. But it was not only that. My big problem here is with the Human Rights Commission, because right from the word go, if you looked at the provisions of 18D, they meant that any action would not be successful. I think there are five points in 18D, four or five. If you just go through them and say, 'Okay, I tick that one, I tick that one, I tick that one,' I tick the lot. And all I can say is: what is wrong with the Race Discrimination Commissioner? How come he did not just tick the lot and say, 'There is no way that this would ever be successful, so we'll throw that one in the bin'? No, he did not, because it gave him the possibility of publicly persecuting someone who has a reasonably high profile and works for News Corp—namely, me.

Mr LEESER: Mr Leak, I think you have hit upon the key point there, which is that the process of the commission here failed massively. I do not know if you were alerted by your lawyers to a case called Bropho and the Human Rights Commission in 2001.

Senator REYNOLDS: That is the Dean Alston one.

Mr LEESER: It is the Dean Alston one.

Mr Leak: Was that Dean?

Senator REYNOLDS: It was Dean's case, yes.

Mr LEESER: It is almost the same fact set, and it seems to me to be very strange that the commission's processes, and the commission itself in the exercise of its powers, did not move it on, particularly with such a strong precedent.

Mr Leak: That is right.

Senator REYNOLDS: But, even when they did, it took four years in the courts—five years in the courts.

Mr LEESER: You have that now as a very clear precedent.

Mr Leak: But, Mr Leeser, it took five years in Dean Alston's case—but your suggestion about putting another judge in there—

Mr LEESER: Well, no, it is not another judge. With respect, Mr Leak, it is actually replacing the president—

Mr Leak: I see.

Mr LEESER: with a part-time judicial commissioner, because it is not the Race Discrimination Commissioner who deals with the conciliation or the complaints; it is actually the president of the commission who deals with complaints.

Mr Leak: I would have thought it was the president's job to decide whether things were frivolous or not.

Senator PATERSON: It is their job.

Mr Leak: Well, clearly, what we have here then is a rogue president, and what is to say that there is not going to be another rogue president? And, if you put in a judge, who is to say that we are not going to one of these days finish up with a rogue judge? The problem is obviously the wording of this law. It is entirely subjective. Even this whole nonsense idea of what a reasonable person would expect—I am a reasonable person. I do not sound like a
very reasonable person, but I had to file a cartoon by two o'clock this afternoon to be here! It is art. There is obviously something wrong with this law. How do you define 'insult' or 'offend'? Why does it apply to some people but not to others?

I told you before that I do not do social media—I do not have the time for it—but a lot of people sent me links to things and said, 'You better look at this, you better look at that'. There was one mob called VICE. It is very hip, very edgy. With a name like VICE, you know it is going to be very cool. They invited Australian artists to draw cartoons or artistic representations of me. There they were, one after the other, each one trying to be more offensive than the last. The very first one, who tried to emulate the style of Robert Crumb, had gone to all the trouble of drawing me with my brains falling out—because I had a bad accident about eight years ago and bumped my head—and there was blood and guts everywhere. There were other ones full of the foulest language and the most violent imagery. Then I was directed to a whole lot of the stuff that was going up on Twitter, and it was one person after another trying to outdo the previous person for pure offensiveness, all directed straight at me. I looked at some of these things and thought: 'Do I care? No. Does it hurt me? Am I supposed to be offended? Yeah, that's a bit offensive—so what?'

Senator PATERSON: You did not go to the Human Rights Commission, Mr Leak?

Mr Leak: I did not go to the Human Rights Commission. I could spend the rest of my life doing that; I have enough of them there.

Chair: Thank you, Mr Leak. We have to conclude the proceedings there—

Mr Leak: Thank you, Ian.

Chair: but I have one final question. Throughout this process, were any monetary demands made of the newspaper in return for dropping the case?

Mr Leak: Not that I know of, and I do not think there were.

Chair: Thank you. I want to thank all the witnesses who have appeared before the committee today for giving their evidence and time. Thank you to the Hansard and broadcasting team and the secretariat.

Committee adjourned at 17:41