Submission to the Freedom of Speech in Australia Inquiry

December, 2016

NATSILS

NATIONAL ABORIGINAL & TORRES STRAIT ISLANDER LEGAL SERVICES

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1. Introduction

The NATSILS make this submission to the Parliamentary Inquiry to Freedom of Speech in Australia to express our opposition to any proposed changes to Part IIA of the *Racial Discrimination Act 1975* (Cth) (RDA). Racial discrimination and racial hatred is a matter of critical importance to the Australian public, and in particular Aboriginal and Torres Strait Islander people. Racial discrimination against Aboriginal and Torres Strait Islander people is considered one of the most prevalent forms of discrimination in Australia.[1] Discrimination that manifests in legislation, policies and attitudes, coupled with underreporting of racial discrimination and hate speech in our communities has led to a traumatic and sustained experience of racism for Aboriginal and Torres Strait Islander people. As such, we raise concern over any reduction to the safeguards afforded by Part IIA of the RDA.

Racial discrimination and hate speech cause real and serious damage to our society. Racism hurts, fundamentally. The NATSILS, condemn racism in all forms and oppose changes to the RDA that weaken available safeguards against acts of racial discrimination and hate speech.

The current law strikes an appropriate balance between two competing rights: freedom from racial discrimination and vilification and freedom of expression. Section 18C prohibits conduct "injurious to the public's interest in a socially cohesive society".[2] For conduct to fall under section 18C it must have had profound and serious effects on a victim.[3] Section 18D of the RDA further protects acts done or said reasonably and in good faith in a broad range of situations, including in the course of any statement, publication, discussion or debate for any genuine purpose in the public interest. Reported cases highlight that more complaints under s18C have been dismissed than upheld.[4]

NATSILS identifies the current protections as a promise to Australians that the Government is pursuing a society that is peaceful and respectful of all cultures.

2. About the NATSILS

The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) is the peak national body for Aboriginal and Torres Strait Islander Legal Services (ATSILS) in Australia. NATSILS brings together over 40 years' experience in the provision of legal advice, assistance, representation, community legal education, advocacy, law reform activities and prisoner

[1] Beyond Blue 'Discrimination against Indigenous Australians: A snapshot of the views of non-Indigenous people aged 25-44' (Report, Beyond Blue, 2014) pp.2-3.
[2] *Eatock* v *Bolt* (2011) 283 ALR 505 [263].
[3] *Creek v Cairns Post Pty Ltd (2001) 112 FCR 352 at* [16] (Kiefel J); *Bropho v Human Rights and Equal Opportunity Commission (2004) 135 FCR 105*at [70] (French J); *Jones v Scully (2002) 120 FCR 243*at [102] (Hely J); *Jones v Toben [2002] FCA 1150* at [92] (Branson J); *Eatock* v *Bolt* [2011] FCA 1103 at [268] (Bromberg J).
[4] Professor Gillian Triggs, 'Freedom of Speech and Racial vilification: one man's freedom ends where another's starts' (Speech delivered to The Sydney Institute, Sydney, 26 November 2013).

through-care to Aboriginal and Torres Strait Islander peoples in contact with the justice system. NATSILS are the experts on the delivery of effective and culturally competent legal assistance services to Aboriginal and Torres Strait Islander peoples. This role also gives us a unique insight into access to justice issues affecting Aboriginal and Torres Strait Islander peoples. The NATSILS represent the following ATSILS:

- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS Qld);
- Aboriginal Legal Rights Movement Inc. (ALRM);
- Aboriginal Legal Service (NSW/ACT) (ALS NSW/ACT);
- Aboriginal Legal Service of Western Australia (Inc.) (ALSWA);
- Central Australian Aboriginal Legal Aid Service (CAALAS);
- North Australian Aboriginal Justice Agency (NAAJA);
- Tasmanian Aboriginal Community Legal Service (TACLS); and
- Victorian Aboriginal Legal Service Co-operative Limited (VALS).

3. Why we need laws in Australia to safeguard against racial discrimination and hate speech

Sections 18C and 18D were introduced to the RDA in 1995 in response to recommendations made by the *National Inquiry into Racist Violence*, the *Royal Commission into Aboriginal Deaths in Custody* (1991), and the *Australian Law Reform Commission's Multiculturalism and the Law report*.

These inquiries found that victims of race based violence and harassment had little recourse to civil remedies under common law. The introduction of racial vilification provisions reflected a recognition that racial abuse and harassment could escalate to racial violence.

The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) Report of 1991 identified race relations between Aboriginal and Torres Strait Islander people and non-Aboriginal and Torres Strait Islander people to be a central cause of the over-representation and deaths in custody of Aboriginal and Torres Strait Islander people.[5] These issues can only be understood in the context of the radically unequal relations that operate between Aboriginal and Torres Strait Islander communities and the dominant non-Aboriginal Australian society. Historically, these unequal relations were brought about by the dispossession of Aboriginal people from their land and thus from their economy, and the policies of control and assimilation.

The RCIADIC Report contained 339 recommendations. Recommendation 213 of the Royal Commission included:

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

This recommendation was made as part of a suite of recommendations for what the Royal Commission called "Accommodating difference: relations between Aboriginal and non-Aboriginal people".[6] Sections 18C and 18D of the RDA implement recommendation 213 and recognise that there exists a need for safeguards and protections against racial discrimination and hate speech. In light of the continued over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system and in prison, and the growing incarceration rate of Aboriginal and Torres Strait Islander women in particular, the recommendations of the RCIADIC are just as important today as they were 25 years ago.

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[5] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 2, 12.1.2.
[6] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 2, Recommendation 205-213.

Today, racism is a serious, continuing problem in Australia. Beyond the well-publicised recent examples of racial abuse on the sporting field and public transport, research by VicHealth, the Scanlon Foundation and others have documented widespread racial discrimination. Racism is an issue of particular importance to Aboriginal and Torres Strait Islander peoples, with 54 per cent of all RDA related complaints received by the Australian Human Rights Commission in 2015-2016 being from Aboriginal and Torres Strait Islander peoples.[7] However, we know that there is huge underreporting of discrimination and racial hate speech within our communities and we should be doing more not less to encourage and safeguard Aboriginal and Torres Strait Islander peoples and their families against these harmful acts.

Research confirms that racial discrimination and hate speech can cause serious mental health impacts and other social harm. There are a number of ways in which racism can impact upon health and wellbeing, including:

- Inequitable and reduced access to societal resources required for health and wellbeing (e.g. employment, education, housing, medical care);
- Inequitable exposure to risk factors associated with ill health;
- Stress and negative emotional/cognitive reactions which have negative impacts on mental health as well as affecting the immune, endocrine, cardiovascular and other physiological systems;
- Engagement in unhealthy activities (e.g. smoking, alcohol and drug use);
- Disengagement from healthy activities (e.g. sleep, exercise and taking medications); and
- Physical injury via racially motivated assault.

The most consistent finding is the association between racism and mental health conditions such as psychological distress, depression and anxiety. Racism is also consistently associated with health risk behaviours such as smoking, alcohol and substance misuse. These associations commonly remain after adjustment for a range of confounders and occur within longitudinal as well as cross-sectional studies, suggesting that racism precedes ill health rather than vice versa.[8]

Racism is harmful. It destroys the confidence, self-esteem and health of individuals, undermines efforts to create fair and inclusive communities, breaks down relationships and erodes trust. Racism perpetuates inequalities and can directly or indirectly exclude people from accessing services and opportunities.[9] Racism remains a major barrier to achieving our vision for a just, equitable and reconciled Australia. Given the high rate at which Aboriginal and Torres Strait Islander peoples experience racism, it remains a barrier to governments seeking to close the gap on health outcomes, to improve economic participation through

[7] Australian Human Rights Commission, *Annual Report 2012-2013, No. 1 (2013),* 131.
[8] Ferdinand, A., Paradies, Y. & Kelaher, M., 'Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities' (Research Report, The Lowitja Institute, Melbourne, 2013)
[9] ibid

employment and education, and to addressing the high incarceration rates of Aboriginal and Torres Strait Islander peoples.

We must acknowledge that Aboriginal and Torres Strait Islander people live with inter-generational experiences of dispossession and trauma and continue to experience overt and institutional racism every day. Institutionalised forms of discrimination manifest within the subconscious of those charged with delivering a service – a policy which is not intended to be discriminatory can become discriminatory when interpreted by an official based on their own levels of awareness, assumptions and subconscious prejudices about Aboriginal and Torres Strait Islander people.

We are at risk in Australia of seeing race relations plummet - acknowledging, for example, recent horrific events in the United States of America. Alarming research by Samuel Sommers and Michael Norton from 2011[10] suggested that the average 'white person' in America felt that anti-white bias was a bigger problem than other forms of racial discrimination. These attitudes are worrying and in the aftermath of the mass shooting of police officers in Dallas and the high-profile police shooting deaths of two black men, in Baton Rouge and suburban St. Paul, Minnesota, in 2016, it is evident that race relations in America are anything but stable. This is not a path that Australia wants to follow.

Motivations behind any changes to the safeguards in the RDA must be carefully considered and we must truthfully consider if this is an objective analysis about freedom of speech in Australia or if the motivations are more complex and may include, in light of the Sommers and Norton research for example, certain attitudes about race based affirmative action.

Our national laws are not only about legal protections and remedies, they also play an educative and standard setting role that sends a message of what is acceptable in our society. The law is never going to protect each and every victim of racial abuse, vilification and discrimination. However, what it can do is set norms for us all, which encourage us to speak out and speak up to stop racism.

[10] Whites See Racism as a Zero-Sum Game That They Are Now Losing, Michael I. Norton and Samuel R. Sommers, Perspectives on Psychological Science 2011 6: 215.

4. Current safeguards under Part IIA

4.1 Brief overview

The RDA provides that it is against the law to treat someone unfairly because of their race, colour, descent, national or ethnic origin or immigrant status. The RDA also makes vilification unlawful.

The racial vilification protections are set in sections 18C and 18D of Part IIA of the RDA.

Currently, a person's conduct will breach section 18C where it is:

- *done otherwise than in private;*
- *reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people; and*
- *done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.*

Section 18C has been interpreted sensibly by the courts to require an objective standard as to whether conduct is unlawful. This requires an assessment of the conduct from the perspective of a hypothetical reasonable or ordinary person from the relevant racial group. The impact of racial vilification is best assessed from the perspective of the groups who are the targets of that vilification as opposed to the broader community.

Section 18D contains free speech exemptions and thus the RDA says that the following things are not against the law if they are "done reasonably and in good faith" in:

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

In other words, section 18D allows some racially offensive, insulting, humiliating or intimidating conduct if it is done reasonably and in good faith in fair reporting, fair comment, artistic works or discussion in the public interest.

5. Our views on the current framework under Part IIA

5.1 Balancing rights

As a current serving member of the United Nations Security Council and with its candidacy for a seat on the Human Rights Council, Australia has a strong impetus and obligation to respect and protect human rights. International human rights law protects three key human rights which are relevant to the RDA. The *International Covenant on Civil and Political Rights* (ICCPR), which Australia is a party to, enshrines the following rights:

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

Freedom of expression is a fundamental human right.[11] Both international and Australian law recognise, however, that freedom of expression is not absolute and can be limited in certain circumstances, including as a reasonable, necessary and proportionate means for pursuit of a legitimate objective, including where necessary to respect the rights and reputations of others.[12]

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

Examples of limits on freedom of expression in Australian law include consumer protection laws, defamation, copyright, contempt of court and parliament, censorship, blasphemy, child pornography, incitement to genocide or to discrimination, hostility or violence and sexual harassment laws.[13] Part IIA of the RDA is therefore only one of many limits on free speech under Australian law. The right to freedom of expression must therefore be balanced against other rights.

Freedom from racial discrimination is also a fundamental human right. One protection against racial discrimination is the international law prohibition of behaviour that incites racial

[11] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171, Article 19, (entered into force 23 March 1976).
[12] ICCPR, Article 19(3).
[13] Professor Gillian Triggs, 'Freedom of Speech and Racial vilification: one man's freedom ends where another's starts' (Speech delivered to The Sydney Institute, Sydney, 26 November 2013).

discrimination, hostility or violence.[14] Australia implemented this international law prohibition in domestic law through the introduction of Part IIA to the RDA.[15] Part IIA prohibits certain racially offensive behaviour under civil,[16] not criminal, law and creates an avenue for civil redress initially by complaint to the Australian Human Rights Commission.[17] French J noted in *Bropho*[18] that "*the Convention which underpins Pt IIA of the Racial Discrimination Act allows States to strike a balance between the need to prohibit the evil of racial vilification and hatred and the need to protect freedom of speech and association within their reasonable limits*".[19]

Further, as Bromberg J pointed out in the *Bolt*,[20] the exclusionary effects of unchecked racial vilification have an adverse impact on the freedom of speech of members of racially vilified communities at [225]:

> *The essence of racial vilification is that it encourages disrespect of others because of their association with the racial group to whom they belong. That kind of stigmatisation and its insidious potential to spread and grow from prejudice to discrimination, from prejudice to violence, or from prejudice to social exclusion, is at the fundamental core of racial vilification.*

Thus, Part IIA is an important mechanism in protecting individuals' freedom of speech against the chilling effect of racial vilification.

A number of statements have been made from within elements of the Australian Government to the effect that the RDA places too great a restriction on the right to freedom of expression. Conversely, the RDA is one of the few legislative instruments in Australian law that contains an explicit protection of free speech. The RDA provides strong protections of this right, as evidenced by the associated case law.

Part IIA was inserted by the *Racial Hatred Act* 1995 (Cth). An extract from the Second Reading Speech of the *Racial Hatred Act* highlights that:

> *The bill places no new limits on genuine public debate. Australians must be free to speak their minds, to criticise actions and policies of others and to share a joke. The bill does not prohibit people from expressing ideas or having beliefs, no matter how unpopular the views may be to many other people. The law has no application to private conversations. Nothing which is said or done reasonably and in good faith in the course of any statement, publication, discussion or debate made or held for an*

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[14] *International Convention on the Elimination of All Forms of Racial Discrimination,* opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 Article 4.
[15] *Koowarta v Bjelke Petersen* (1982) 153 CLR 168, [211]-[221] (Stephen J), [222]-[235] (Mason J), [237]-[242] (Murphy J), [253]-[261](Brennan J).
Racial Discrimination Act 1975 (Cth), s26.
[17] *Australian Human Rights Commission Act* 1986 (Cth), s46P.
[18] *Bropho v Human Rights and Equal Opportunity Commission (2004) 135 FCR 105* at [70].
[19] *Bropho v Human Rights and Equal Opportunity Commission (2004) 135 FCR 105* at [62].
[20] *Eatock* v *Bolt* (2011) 283 ALR 505 [263].

academic, artistic or scientific purpose or any other purpose in the public interest will be prohibited by the law.[21]

The case law in this area demonstrates that the legislative intent expressed in the second reading speech has been closely adhered to.

5.2 There is no case for change

Part IIA has operated for over 20 years with little controversy. Case law on Part IIA demonstrates that the courts have interpreted ss18C and 18D as a reasonable, necessary and proportionate limit on free speech for the purpose of promoting racial tolerance and reasonable safeguards against the dissemination of racial prejudice.[22] Examples of the court's approach to balancing rights to free speech and freedom from racial discrimination in claims under s18C include:

- the words or conduct must be of a serious nature – s18C applies only to 'profound and serious effects not to be likened to mere slights';[23]
- whether conduct is reasonably likely to offend a group of people is to be objectively assessed on the reasonable victim test assessed by reference to community standards – so that relevant context is taken into account;[24] and
- s18D applies to protect conduct and words that would otherwise breach s18C, where the requirements of that provision are met (including that the act was done reasonably and in good faith).

Current case law establishes that conduct under section 18C must have 'profound and serious effects, not to be likened to mere slights'.[25] The exemptions found under 18D allows some racially offensive, insulting, humiliating or intimidating conduct if it is done reasonably and in good faith. See for example, *Kelly-Country v Beers* (2004) 207 ALR 421 in which a 'comedy' performance involving a 'blacked-up' performer was found not to breach the RDA as it fell under the current list of exemptions within section 18D despite containing content that was considered offensive by the Aboriginal complainant. Similarly, in a 2000 complaint under the RDA, *Walsh v Hanson*, politician Pauline Hanson's published comments that Aboriginal people received preferential treatment from Governments were found not to have contravened the RDA Section 18D as the views expressed were genuinely held and formed part of a genuine political debate.

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[21] Commonwealth, *Second Reading Speech to the Racial Hatred Bill 1994,* House of Representatives, 15 November 1994 (Michael Lavarch).
[22] *Jones v Toben* [2002] FCA 1150.
[23] *Eatock* v *Bolt* (2011) 283 ALR 505 [263].
[24] *Bropho* [66] (French J); *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615at [15] (Drummond J); *Creek* at [12] (Kiefel J); *Scully* at [99] (Hely J); *McGlade v Lightfoot* (2002) 124 FCR 106 at[42]-[45] and [47] (Carr J).
25 *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356-7 [16].

Courts have also stated that conduct must be assessed against an *objective* standard, judged from the perspective of a hypothetical reasonable or ordinary person from the relevant racial group. Courts have said that extreme, atypical or intolerant reactions are not relevant. Even if someone is personally offended or insulted by conduct, there won't be a breach of racial vilification laws unless the conduct meets the *objective* standard.

The objective standard was met in *Eatock* v *Bolt* [2011] FCA 1103 (the Bolt case)[26] in which the columnist, Andrew Bolt, and his publisher were found to have breached the racial vilification provisions of the RDA by writing and publishing articles that suggested that a number of fair-skinned Aboriginal people weren't genuinely Aboriginal and only claimed to be so to access certain benefits and entitlements. Central to this case was that Andrew Bolt had not acted reasonably and in good faith. He was found to have made multiple errors of fact and distortions of the truth within these articles. Had he acted reasonably and in good faith, he would have been protected by the section 18D free speech exemptions. As such, we do not accept that the Court went too far in this case or that one case should sufficiently justify a radical winding back of the RDA.

The best available research suggests that the laws have been considered in less than 100 finalised court cases since 1995. An analysis of these cases shows that the laws have been applied sensibly by the courts and are operating reasonably effectively. There is no evidence that the current provisions are too broad.

Furthermore, there are high levels of support amongst the community for the maintenance of the current provisions. In 2011 the 'Challenging Racism Research Project', headed by the University of Western Sydney, asked 2100 survey respondents whether it should be unlawful to humiliate, insult, offend or intimidate someone according to their race, and found that:[27]

- 66% of participants agreed or strongly agreed it should be unlawful to 'offend'
- 72% of participants agreed or strongly agreed it should be unlawful to 'insult'
- 74% of participants agreed or strongly agreed it should be unlawful to 'humiliate'
- 79% of participants agreed or strongly agreed it should be unlawful to 'intimidate'

Strong support amongst the public to retain the protections under Part IIA provide further evidence that there is no compelling case for change.

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[26] George Brandis, 'Section 18C has no place in a society that values freedom of expression,' First that values freedom of expression,' *The Australian*, 30 September 2011, http://www.theaustralian.com.au/national-affairs/opinion/section-18c-has-no-place-in-a-society-that-values-freedom-of-expression/story-e6frgd0x-1226152196836.

[27] Dunn, K. M., Forrest, J., Babacan, H., Paradies, Y., & Pedersen, A. 'Challenging Racism: the Anti-racism Research Project: National Level Findings.' (Research Paper, Penrith, N.S.W: University of Western Sydney, 2011).

6. Handling of complaints made to the Australian Human Rights Commission

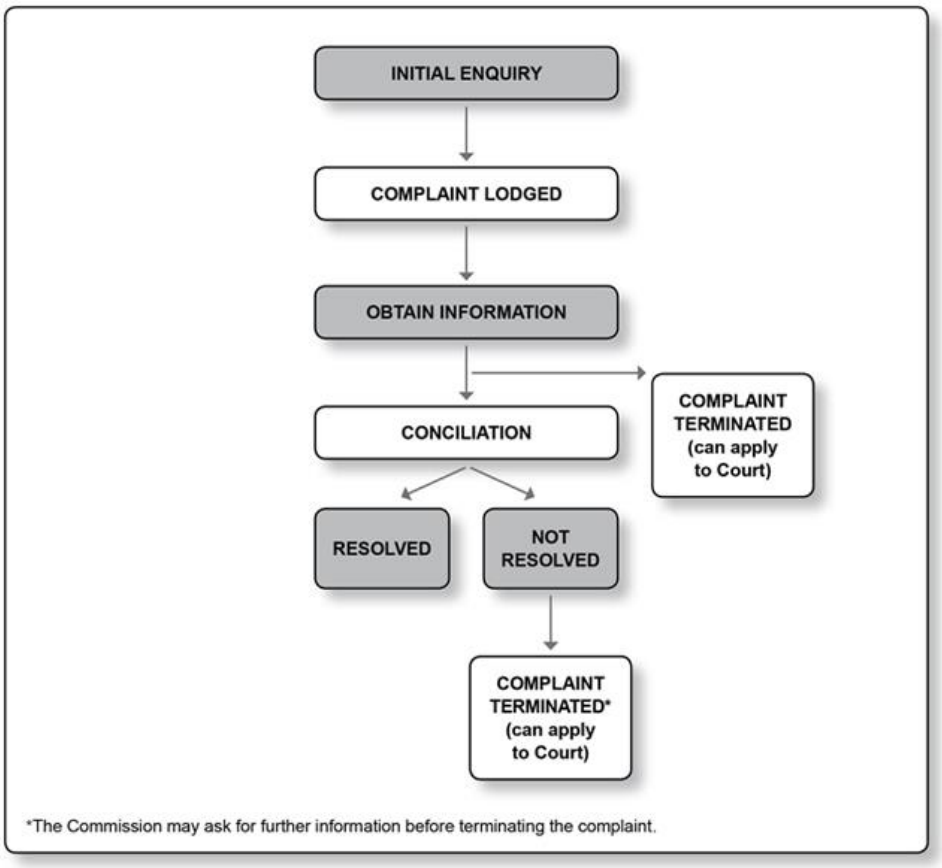
6.1 Making a complaint

The Australian Human Rights Commission (AHRC) is an independent body which investigates and resolves complaints about unlawful sex, disability, age discrimination and race, including complaints alleging a breach of s18C of the RDA.

A complaint must be made in writing by filling in a complaint form and posting or faxing it back to the AHRC or the complaint may be lodged online at the Commission's website. Complaints may be made in language and the Commission can assist complainants to write down their complaint if necessary.

See Figure 1 for a diagram of the Commission's complaint process.

Figure 1: The Australian Human Rights Commission Complaint Process[28]



[28] Australian Human Rights Commission, *The complaint process for complaints about sex, race, disability and age discrimination,* (2016), Australian Human Rights Commission, <http://www.humanrights.gov.au/complaint-process-complaints-about-sex-race-disability-and-age-discrimination#Heading26>.

There needs to be adequate resources for parties and the AHRC to access linguistic support and interpreters throughout the entire complaints handling process.

Apart from language barriers, many clients do not understand the guidelines for determining whether an incident falls within the ambit of the legislation. For example, complainants cannot understand that the adverse action/experience they have suffered needs to be related to (or caused by) one of the reasons that are covered by the legislation. It is critical that the ATSILS and the AHRC conduct community legal education to ensure there is a greater understanding of racial vilification laws and safeguards.

Many complainants cannot translate the experiences they have suffered into the terms of the legislation or feel that their full story is often misunderstood. Many complainants regularly need assistance because of their poor literacy levels and greater resources should be provided to ensure that Aboriginal and Torres Strait Islander people experiencing racial discrimination and hate speech are afforded access to the supports they require to ensure their rights are upheld.

There are occasions when the President of the Australian Human Rights Commission will terminate complaints that the President believes are trivial, misconceived or lacking in substance. This was the situation in the recent Queensland University of Technology 'Computer Lab' case.[29] President Triggs terminated the complaint lodged with the Australian Human Rights Commission. The complainant then sought to bring the matter to court, independent of the Australian Human Rights Commission. The Federal Court subsequently dismissed the matter for lacking reasonable prospect of success. The decision of the Federal Court reiterated President Triggs' original determination.[30]

There does, however, need to be an option to proceed to the Federal Court when the AHRC terminates a complaint prior to or following conciliation.

CASE STUDY

An Aboriginal leader read some offensive and discriminatory material in The Sunday Times newspaper. The comments, which were made within an advertisement for the sale of used cars, were derogatory in nature and directed at Aboriginal leaders and people of the Aboriginal race regarding their capacity to be responsible for their lives and the lives of their children. The Aboriginal leader commenced proceedings in the Federal Court of Australia against the advertiser pursuant to s18C after the conciliation of his complaint against the advertiser and The Sunday Times was unsuccessful in the Australian Human Rights Commission.

The matter was resolved by the advertiser agreeing to publish an apology in the newspaper and pay the sum of $2500.00 to a charity.

[29] *Prior v Queensland University of Technology & Ors (No.2)* [2016] FCCA 2853.
[30] Gabrielle Chan, *QUT computer lab racial discrimination law suit thrown out,* (4 November, 2016) The Guardian, < https://www.theguardian.com/australia-news/2016/nov/04/qut-computer-lab-racial-discrimination-lawsuit-thrown-out>.

CASE STUDY

An influential community member of a regional Western Australian community made highly discriminatory comments in the media and on the public record. The matter was brought to ALSWA's attention by a member of the Aboriginal community. A complaint was made under s18C to the Australian Human Rights Commission against both the public organisation and the individual who made the offensive comments. The matter was not conciliated successfully and was taken to the Federal Circuit Court. The matter was settled favourably through negotiation between the parties' lawyers. A monetary payment was paid for the purpose of reducing the overrepresentation of Aboriginal children in custody, an apology was published in the local paper and on the public organisation's website, and the public organisation is due to hold an event to discourage racism in their community.

6.2 Processes generally effective

We recognise that the majority of complaints processed by AHRC are successfully resolved though conciliation. During the 2015-2016 financial year 76 per cent of complaints where conciliation was attempted were successfully resolved. In the same year, of the 86 complaints the AHRC finalised about racial hatred, only one complaint in relation to section 18C proceeded to court.[31] The statistics show that the current processes employed by AHRC are reflective of observations made by the Royal Commissions into Aboriginal Deaths in Custody that 'voluntary settlement of a complaint through conciliation may hold the best promise of altering personal attitudes.[32]

For example, in the past 6 years NAAJA has lodged fewer than 10 complaints with the AHRC. The AHRC accepted and attempted to conciliate all complaints that NAAJA lodged. In NAAJA's experience the quality of complaints handling was very high. The conciliators were professional in their approach, and clearly communicated about the process to be followed, the timeframes for the handling of the complaint and were proactive in guiding the complaint towards a possible resolution.

NATSILS supports processes employed by the AHRC to adhere to the current framework of Part IIA of the RDA. In particular, we support processes employed by AHRC that focus on alternative dispute resolution.

CASE STUDY

An Aboriginal woman was involved in an incident with a male authority figure in regional Western Australia. The male said to her and her friends, amongst other things, 'I am sick and tired of you fucking hairy monkeys always coming into my town and behaving the way you do.' The woman was extremely upset and traumatised by the incident. The matter went to conciliation and this gave the woman and the male an opportunity to discuss each of their

[31] Australian Human Rights Commission, 'Racial Discrimination Complaints' e-news, 8 November 2016.
[32] Royal Commission into Aboriginal Deaths in Custody (1991) Vol 4 [28.3.7].

points of view and feelings. They both empathised with the other's position and had an emotional discussion. They resolved the matter and both parties left with newfound respect for the other.

In general terms the AHRC processes are effective in that trivial or vexatious complaints are avoided. Trivial or unrealistic complaints are generally only lodged by complainants acting on their own. Lawyers typically avoid representing clients when a complaint is trivial or unrealistic or does not fall within scope of legislation.

Generally matters are dealt with in an open, transparent and timely manner once accepted by the AHRC. In our experience, delays usually relate to investigating the complaint and trying to conciliate with limited resourcing.

Processes are generally fair, though there are examples of some lack of fairness. For example, ATSILS Qld noted one example where one party was allowed legal representation while the other party could not afford representation. As a result, case managers can compensate during the process by stressing the rules and guidelines for conciliation repeatedly rather than once.

Costs are generally not an issue until the matter proceeds to the Federal Court of Australia. Legally represented complainants rarely proceed to the Federal Court unless there is some merit in the complaint one of the reasons being potentially adverse costs orders.

Most complaints made under s18C are resolved with: a personal apology; an agreement to remove material; an agreement to publish corrective material and/or an apology; education such as training for staff; a change to policies and procedures; payment of money to a third party such as a charitable organisation or for education programs; and/or payment of compensation for pain and suffering.

NATSILS encourages processes of the AHRC that promote outcomes of conciliation that extend beyond the individual complainant.

6.3 Barriers affecting resolutions at the AHRC

The AHRC and the ATSILS must be resourced adequately

In our experience, the main barriers which affect the resolution of complaints arise out of geographical factors and inadequate resourcing. The AHRC must be adequately resourced to be able to handle complaints fairly, expeditiously and to ensure that all Aboriginal and Torres Strait Islander people, regardless of where they live in Australia, are afforded natural justice as the complainant or indeed as the subject of the complaint if that were the case.

For example, AHRC staff were able to attend conciliations in Darwin up to two years ago but recently have only offered conciliations by phone. This is difficult for many NAAJA and CAALAS clients who live remotely and who do not speak English. NAAJA described their experience of conciliations involving a conference call including the client and interpreter – who may or may not be in the same location, a NAAJA solicitor in Darwin or Katherine, the conciliator in another location and the other party – most likely a public servant also in Darwin or Katherine. Any

delays in resolving the complaint arose out of the difficulty of NAAJA being able to contact and get instructions from remote clients (who may not have phones and whose community we visit only every two months due to resource implications) or the other party not providing a response in a timely way and seeking for extensions to do so.

The following case study from a number of years ago is presented to indicate that the complaints procedures under the RDA need to be better resourced so as to enable an independent and fair investigation process to take place.

CASE STUDY

Some years ago ALRM was instructed by prisoners in Port Augusta prison that Anangu prisoners were subject to racial discrimination by prison officers on the basis of their lack of comprehension of English and the officer's lack of understanding of cultural issues. The Anangu prisoners were derided mocked, sworn at and treated less favourably than other Aboriginal prisoners and specific examples became the subject of the complaint. Pursuant to the legislation ALRM requested the then Human Rights and Equal Opportunity Commission (HREOC) to investigate the complaint prior to conciliation. At that time the legislation specifically required this. HREOC indicated that they were unable to do this due to a lack of resources and ultimately they delegated the task of investigation to the investigations unit of the Department for Correctional Services SA.

ALRM specifically complained that this body was not independent and was not able to provide a dispassionate and fair investigation. The departmental investigation unit found that there had been no instances of Anangu prisoners being subject to discrimination within the meaning of the Racial Discrimination Act but that there had been instances of such prisoners being sworn at by officers. The complaint went nowhere and ultimately attempts were made to withdraw it.

Parties do not always participate in good faith

The ATSILS have experienced a number of conciliations where the other party did not always participate in the conciliation process in good faith.

NAAJA, for example, observed that in some of the complaints, mainly where the other party is from the Northern Territory Government – Police or Department of Housing, for example – it appeared that the other party did not engage in the conciliation process in good faith.

CASE STUDY

NAAJA was involved in a matter which proceeded to the Federal Circuit Court in order to be resolved. Their client made a disability discrimination complaint against the police which did not settle in conciliation. However the police made an offer of settlement before the first directions hearing. That offer included financial compensation and input into policy – both of which NAAJA had been requesting in the conciliation.

CASE STUDY

This matter involved a race discrimination complaint against the NT Police which proceeded to hearing[33]. The applicant was awarded compensation of $3500 for offensive behaviour motivated by his race, interest of $881.99 and $1000 witness fees. In that matter Raphael J accepted Mr B's evidence (which was consistently stated and supported by his son, over that of the police officer) and stated at para 4:

"The alleged discriminatory act which took place in September 2010, was said by the applicant to be the driving past of his house by the second respondent in his private white Nissan motor vehicle mouthing offensive language at him that the applicant could not hear but could lip read and the trading of one offensive remark between them. Mr Barnes is an Aboriginal person who asserts that the actions of the second respondent, a Constable of Police in the Tennant Creek command of the first respondent, was racially motivated and thus fell within the provisions of s.18C."[34]

Dispute resolution processes can be intimidating and politicised

There are many reasons as to why Aboriginal and Torres Strait Islander peoples do not use formal racial vilification protection processes to resolve disputes including fear, distrust and intimidation. We must ensure that Aboriginal and Torres Strait Islander people are afforded access to culturally competent and community controlled legal assistance and support.

CASE STUDY

An Aboriginal woman and her young family were asked to prepay for petrol at a petrol station. The other people refuelling their cars at the petrol station at the time were able to pay after they had put the petrol in their cars. The attendant told the woman that she had to prepay because they had a high rate of Aboriginal people driving off without paying. The matter was not resolved at conciliation and proceeded to a court hearing. During the court proceedings the attendant denied saying the woman had to prepay because they had a high rate of Aboriginal people driving off without paying and that he required prepayment for a different reason in accordance with the station's policy. The applicant did not have any other evidence to prove the attendant said this and therefore, given the applicant bore the burden of proof, her action was unsuccessful.

The woman was severely traumatised by the incident and found the legal process intimidating. She felt uncomfortable going in to the court building and found it hard giving evidence while being the only Aboriginal person in the court room. Despite the difficulties, the applicant felt empowered that she had a forum in which to voice her complaint.

[33] Barnes v Northern Territory Police & Anor [2013] FCCA 30

[34] Ibid at 2 para 4.

For Aboriginal and Torres Strait Islander people, reporting racial discrimination and racial hatred does not just impact upon the individual complainant. For our clients, reporting racial discrimination and racial hatred often means that their families and communities will be unwillingly dragged into the political debate that so often surrounds the complaint. As such, decisions to voice concerns, make complaints and uphold rights can be intimidating and difficult to make and thus impact upon the freedom of speech and expression of Ab.

CASE STUDY

An Aboriginal woman, Natalie Clarke, was the subject of highly offensive and discriminatory press coverage after three of her children (young males, aged 10, 11 and 15) were killed when the vehicle they were travelling in hit a lamp post. The car was being driven by another young Aboriginal male.

The case concerned the publication of highly offensive 'Readers' comments' on The Sunday Times' perthnow.com.au website following the report in the newspaper about the motor vehicle accident.

The comments inferred that Ms Clark did not provide parental supervision, that Aboriginal parents do not supervise their children, that a lot of Aboriginal children get involved in theft and burglary because of lack of adult supervision and that Aboriginal people give their children free reign.

Ms Clark initially made a complaint to the Australian Human Rights Commission against The Sunday Times and The West Australian. The AHRC subsequently terminated the complaints by notice on the grounds that there was no prospect of settling the matter with conciliation.

Ms Clark then commenced proceedings against both The West and The Sunday Times, in the Federal Magistrates Court in 2010 and shortly thereafter transferred the proceedings to the Federal Court of Australia. The proceedings alleged that The West and The Sunday Times' publication of various comments by their readers contravened s18C of the RDA.

Following mediation by a Federal Court Registrar, Ms Clark withdrew her claim against The West and proceeded only against the Sunday Times.

On 27 March 2012, Justice Barker found that four of the comments published had contravened s18C and ordered the Sunday Times to pay Ms Clark $12,000 in damages and pay her legal costs and to remove the comments immediately.

6.4 Current provisions provide a low cost, non-litigious avenue to seek redress for racially offensive behaviour

The AHRC President Professor Gillian Triggs has noted that civil actions have been successful only in the most egregious or extreme cases, at the high end of the spectrum. An SBS article suggests that less than five per cent of complaints made under the RDA make it to court, where the majority of them fail.[35] Last year the Commission received 16,836 enquiries and 2,013 complaints. 1,308 conciliation processes were conducted and 76% of these complaints successfully resolved.[36] The vast majority of these complaints related to employment and access to goods and services.

Most of the complaints resolved by the Commission result in remedies that include an apology, an agreement to remove material, systemic outcomes such as training and changes to policies and compensation – generally not exceeding $20,000.[37]

CASE STUDY

Aboriginal patrons in a regional Western Australian community were required to be breathalysed before they were allowed to enter a particular licensed premises. The breathalyser had to read 0.00%. Non-Aboriginal patrons were not asked to be breathalysed before entering the same premises. In addition, the non-Aboriginal patrons were allowed to enter through a back entry, while the Aboriginal patrons had to enter at the front gate where the breathalyser was located. A complaint was made under s18C to the Australian Human Rights Commission against the licensed premises. The matter was successfully resolved at conciliation and the licensed premises erected signage relating to entry requirements and breathalysing patrons, and about access to the back entry. The business also implemented cultural awareness training for all staff.

Remedies available under the RDA can be contrasted to those available in defamation, where arguably similar damage can be sustained.[38] In defamation cases, damage to reputation is presumed to be the natural or probable consequence of a defamatory publication. Damages

[35]Professor Gillian Triggs, 'Freedom of Speech and Racial vilification: one man's freedom ends where another's starts' (Speech delivered to The Sydney Institute, Sydney, 26 November 2013); Dr Tim Soutphommasane 'Two Freedoms: Freedom of expression and freedom from racial vilification' (Speech delivered at Australian National University, Canberra, 3 March 2014)

[36] Australian Human Rights Commission, 2015 - 2016 Complaint Statistics (2016) 2.

[37]See the Australian Human Rights Commission's Racial Discrimination Act conciliated outcomes summaries at http://103.7.165.98/site-navigation;http://103.7.165.98/complaints/conciliation-register/racial-discrimination-act-1975-complaints-conciliated-period. For a recent Court award see *Clarke v Nationwide News Pty Ltd* (2012) 289 ALR 345: award of $12,000 for offence, insult and humiliation.

[38] *Eatock* v *Bolt* (2011) 283 ALR 505 at [390].

can often total hundreds of thousands of dollars (including consolation for hurt, humiliation and distress, reparation for damage to reputation and vindication of reputation).[39]

Further, it is entirely consistent with the Paris Principles – the global standards relating to National Human Rights Institutions - for the Commission to have conciliatory or non-judicial complaints handling role on top of the monitoring, reporting, education functions.

It is critical that the Commission provide an accessible, fair and effective complaints resolution process for the thousands who experience discrimination on the basis of sex, gender, disability, age and race, including colour or national or ethnic origin.

[39] *Crampton v Nugawela* (1996) 41 NSWLR 176 (award of $600,000 upheld on appeal; matter involved racially insulting comments); *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 (awards of $200,000, $250,000 and $50,000 respectively for three defamatory imputations); *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183 (damages reassessed at $275,000).

7. Promoting anti-racism mechanisms and the Commission's role to protect freedom of expression

7.1 Strategies to encourage and enable Aboriginal and Torres Strait Islander people to utilise anti-discrimination mechanisms

Underreporting of racism is a common phenomenon experienced by our communities. This is of particular concern, given that racial discrimination against Aboriginal and Torres Strait Islander people is considered one of the most prevalent forms of discrimination in Australia.[40]

The RCIADIC Report of 1991 highlighted that:

> *The experience of racism, although common to most Aboriginal [and Torres Strait Islander] people, is the outcome of particular historical and social events and processes that have locked Aboriginal [and Torres Strait Islander] people into a position of subordination within the broader Australian society. The crucial events are the colonising of the country and the enshrinement of the relations between colonisers and colonised in law and policy.*[41]

The individual cases investigated in RCIADIC clearly demonstrate the central role played by government policy in the lives of Aboriginal people. In formalising and institutionalising the domination of the colonising power, these policies have entrenched the unequal relations that are the basis and conditions of ongoing racial discrimination in Australia.

The Indigenous Legal Needs Project in Western Australia identified discrimination as one of five priority areas.[42] Forty percent of participants identified at least one experience of discrimination in the past two years. However, only 16% of these individuals sought legal assistance or other support. The report stated that '[b]arriers inhibiting responses include a lack of awareness of rights, difficulties identified with the legal complaints process itself and poor access to legal and other support'.[43]

Allison, Shwartz and Cunneen, who conducted a study into the civil and family law needs of Indigenous Australians in the Northern Territory, identified discrimination as a priority legal need due to the prevalence of underreporting.[44] The study, which conducted fieldwork across eight focus communities, revealed that nearly a quarter of all Indigenous participants reported directly experiencing discrimination (22.6 per cent), with racially based, direct discrimination the most prevalent form. Despite this almost 80 per cent of those participants did not seek

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[40] Beyond Blue ' Discrimination against Indigenous Australians: A snapshot of the vies of non-Indigenous people aged 25-44' (Report, Beyond Blue, 2014) pp.2-3.
[41] Royal Commission into Aboriginal Deaths in Custody National Report 1991, Volume 2, at [12.1.13].
[42] Allison F, Schwartz M & Cunneen C, The Civil and Family Law Needs of Indigenous People in WA (A report of the Australian Indigenous Legal Needs Project (2014) 11.
[43] Ibid.
[44] 'That's discrimination!' Indigenous peoples' experiences of discrimination in the Northern Territory, Allison F, Schwartz M & Cunneen C

legal assistance. The study highlights a number of reasons why Aboriginal people may not complaint about racial discrimination and seek legal redress. These include:

(i) *Lack of awareness or knowledge of legal rights*. Indigenous people struggled to identify discrimination as an actionable legal event, largely because of a lack of understanding of their rights. Similarly, Indigenous people lacked knowledge of the relevant law and their respective rights with regard to indirect discrimination.

(ii) *Inability to particularise instances of discrimination*. A lack of awareness of indirect and cumulative cases of discrimination often dilutes the significance of the discrimination to Indigenous people, who may not be able to appreciate the significance of the discrimination and the right to address the problem legally.

(iii) *Competing problems and priorities*. Competing problems such as housing eviction, welfare and incarceration are prevalent among Indigenous communities and may take priority over issues such as discrimination.

(iv) *Gaps in knowledge about relevant agencies to complain to*. Participants revealed that, even if they were aware of their right to take legal action, they were unaware of the relevant course to make a complaint and the appropriate agencies in their community. For example, in Wadeye only one participant knew of the NT Anti-Discrimination Commission.

(v) *Gaps in anti-discrimination law in the NT*. For example, racial vilification and indirect discrimination are not specifically prohibited under the *Anti-Discrimination Act 1992* (NT). In addition, legal service providers suggested that genuine and perceived problems regarding the difficulty of proving discrimination cases may reduce the extent to which legal action is pursued.

(vi) *"Rebadging"* discrimination. Due to the difficulties of legal proof in discrimination cases, lawyers reported a tendency to frame cases on other grounds, thereby concealing the prevalence of discrimination as a legal issue. The study suggested that only straightforward cases of discrimination were brought before the Commission.

To have any chance at leveling the unequal relations we must develop strategies to encourage and enable Aboriginal people to utilise anti-discrimination mechanisms more effectively, particularly in the area of indirect discrimination through a range of programs and practices including community legal education. Recommendations 211 and 212 of the RCIADIC Report directly reference the necessary role of the then Human Rights and Equal Opportunity Commission (renamed to the Australian Human Rights Commission in 2008) and Aboriginal organisations and Aboriginal and Torres Strait Islander Legal Services to ensure that there are safeguards against racial vilification and that these safeguards are accessible to Aboriginal and Torres Strait Islander peoples.

7.2 Strategies to protect freedom of expression

As part of their funding arrangements, ATSILS are expected to conduct community legal education and outreach services to regional and remote Aboriginal and Torres Strait Islander communities. In this regard, NATSILS highlights that the RCIADIC recommended:

> *211. That the Human Rights and Equal Opportunity Commission and State Equal Opportunity Commissions should be encouraged to further pursue their programs designed to inform the Aboriginal community regarding anti-discrimination legislation, particularly by way of* ***Aboriginal staff members attending at communities and organisations to ensure the effective dissemination of information as to the legislation and ways and means of taking advantage of it.***[45]
>
> *212. That the Human Rights and Equal Opportunity Commission and State Equal Opportunity Commissions should be encouraged to consult with appropriate Aboriginal organisations and* ***Aboriginal Legal Services with a view to developing strategies to encourage and enable Aboriginal people to utilise anti-discrimination mechanisms more effectively****, particularly in the area of indirect discrimination and representative actions.*[46]

NATSILS considers that ATSILS have an obligation to provide legal education to members of Aboriginal and Torres Strait Islander communities in regard to anti-discrimination legislation and the legal remedies available to them. It is NATSILS view that this obligation extends to education and awareness about specific instances of racial discrimination and racial vilification and the provision of legal assistance to individuals and communities in relation to specific instances.

It is critical that the ATSILS have the ability to implement RCIADIC recommendations 211 and 212, and other recommendations, without hindrance, and without fear of interference of the media or other public figures which can severely impact on individuals and their communities seeking protection and to uphold their rights to be free from racial discrimination and hate speech. Also of fundamental importance is that Aboriginal and Torres Strait Islander people are empowered to take advantage of racial discrimination and racial hate speech protections and thus feel free to impart and receive information.

NATSILS welcomes the opportunity to work with the Government and the AHRC to develop additional strategies for the ATSILS to conduct community legal education and to assist Aboriginal and Torres Strait Islander people to uphold their rights and protections in relation to racial discrimination and racial hate speech.

[45] Royal Commission into Aboriginal Deaths in Custody (1991) Recommendation 211.
[46] Royal Commission into Aboriginal Deaths in Custody (1991) Recommendation 212.

8. Conclusion

Racism causes real harm and widespread damage to Australian society. The impetus for the introduction of Part IIA came from the recommendations of the *Royal Commission into Aboriginal Deaths in Custody* and from a related desire to limit the very tangible harm that racial discrimination and hate speech causes Aboriginal and Torres Strait Islander peoples as well as members of other minority communities. From mental health impacts to physical injury via racially motivated assault, the effects of racial discrimination and hate speech are all too immediate for clients of our member organisations. Our laws must provide safeguards against racial discrimination and hate speech and send a clear message to Australia and the rest of the world that hate speech is unacceptable and has no place within our communities.

International Human Rights law anticipates the need to balance competing rights with the right to freedom of expression. Similarly, our own laws have long accepted restrictions on the right to freedom of expression in a number of areas for important public policy reasons. The RDA in its current form strikes the right balance between the right to freedom of expression and the right to be free from racial discrimination and vilification. There is no case for change to sections 18C and 18D of the RDA. Part IIA has operated well over its lifetime and has been appropriately interpreted by the courts – exemplified by the decisions in *Bropho*[47] and the *Bolt*[48] case. The current wording of Part IIA has strong public support; indeed, in many ways Part IIA stands as an important mechanism in *safeguarding* freedom of speech.

Access to fair and effective complaint mechanisms is critical to Aboriginal and Torres Strait Islander peoples experiencing racial vilification. Conciliation of Part IIA matters via the Australian Human Rights Commission complaints process provides a cost effective, non-litigious avenue to seek redress. Furthermore, it facilitates the broader goal of changing attitudes and promoting a society free from racism and hate speech.

9. Contact

If you have any questions or require further information, please contact NATSILS Executive Officer, Karly Warner via email: kwarner@vals.org.au or phone on 0423 610 587.

Yours sincerely,

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[47] *Bropho v Human Rights and Equal Opportunity Commission (2004) 135 FCR 105* at [62].
[48] *Eatock* v *Bolt* (2011) 283 ALR 505 [263].