**Parliamentary Joint Committee on Human Rights**

**Inquiry into Freedom of Speech**

Public hearing 17 February 2017

Canberra

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**Opening statement**

The commission has been following the proceedings of this committee.

We have listened to the public hearings and reviewed most of the nearly 400 written submissions published on the committee's website.

The committee has received submissions from many organisations with direct and regular experience of the commission's conciliation processes.

These organisations, law firms, legal advisers and NGOs, among others, have confirmed that the commission's accredited conciliators are neutral and impartial, ensure both complainants and respondents have a fair opportunity to take part in the complaints process and facilitate discussions between the parties to encourage resolution.

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

In brief, our additional recommendations are: firstly, to allow the President of the Australian Human Rights Commission to terminate a complaint on the additional and wider ground that she is satisfied an inquiry into the matter is not warranted; secondly, to adopt guiding principles for early resolution of disputes and to ensure fairness to all the parties; and, thirdly, to require notification of a complaint to each respondent at or about the same time.

As these recommendations are explored in some detail in our supplementary submission, I will not repeat them here. But, of course, I am very happy to answer questions in relation to them.

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

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

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

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

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

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

Over the following months, the commission monitored the progress of discussions between QUT and Ms Prior. Eight months later, on 30 January 2015, the lawyers for Ms Prior wrote to the commission to say that the university had accepted Ms Prior's proposal for resolution, including in respect of the students. This in-principle agreement was subject to a deed of settlement to be drafted by the university.

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

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

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

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

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

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

That is the chronology and we will provide that to you now or as soon as I finish the statement, if I may. But what I would like to do now, very briefly, is to address some of the criticisms that have been made about the commission's handling of this matter and to take them on the basis of main themes, the first being the timing. From the time that Ms Prior's complaint was lodged with the matter until it was terminated, the complaint was with the commission for 15 months. That is an exceptionally long time for a complaint to be on foot and even a rare period. As I previously advised this inquiry, most complaints are resolved under four months, the average being 3.8 months, and 98 per cent are resolved within a year. In very unusual cases, they may take longer. Of the 15-month period the commission dealt with the Prior matter, it is notable that, at the request of both Queensland University of Technology and Ms Prior, negotiations between them were private at their request for over 11 months of that time. While the commission regularly monitored progress, the discussions were driven voluntarily by those two parties. From the information given to the commission by QUT and Ms Prior, it appeared likely that the negotiations would resolve the matter, including with respect to the students. Indeed, at one stage, as I have described, there was an in-principle agreement subject to settling the terms of a deed of settlement. When these private negotiations broke down, the commission proposed a conciliation conference. The commission's engagement with the process thus lasted fewer than four months before the complaint was terminated. I suggest to the committee that the QUT's case does not demonstrate any systemic problem with time frames in the commission's complaint handling processes.

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

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

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

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

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

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

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

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

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

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

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

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

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