Chapter 2

Prior v QUT & Ors [2016]

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In November 2016, the Federal Circuit Court of Australia threw out an application by Cynthia Prior to sue four students at Queensland University of Technology (QUT) under section 18C of the *Racial Discrimination Act* 1975 (RDA) for comments made on a Facebook group after one of those students, Alex Wood, was ejected from an indigenous-only computer lab. Prior's application to sue two employees of QUT and the University itself for breaching section 9 of the RDA, for failing to respond to her concerns about the comments and allegedly failing to take action related to the Facebook comments was withdrawn in March 2017.

It is often said of freedom of speech cases that "the process is the punishment" – regardless of whether the QUT students are found to have breached section 18C, the draining experience of litigation, lawyers and court dates is its own penalty.

This article is about that process. It is about how section 18C of the RDA operates in the real world. It provides an account of a three-and-a-half-year legal saga over a series of innocuous social media comments. While the case against the students was dismissed, their experience tells us a great deal about the dangers of anti-discrimination law in Australia – how it magnifies personal slights and perceived grievances into high stakes legal battles, and how they turn over what ought to be resolved in the realm of political debate to the courts.

The incident

Around lunch-time on 28 May 2013, a 20-year-old engineering student, Alex Wood, and two fellow students were searching for computer terminals to conduct their studies at the Gardens Point campus of the Queensland University of Technology. Having failed to locate available computers at labs Wood usually used, they recalled that two new buildings – P Block and Y Block – had recently been constructed at that campus and were thought to house computer labs.

Wood and the other students entered the Y Block building and located what they thought to be a computer lab for the general use of QUT students. The students attempted to log on and begin their study.

Unbeknownst to the students, the computer lab was housed within a facility of the Oodgeroo Unit, a university program that offers academic, cultural and personal support to Aboriginal and Torres Strait Islanders at QUT. Another student in the lab saw Wood and the others enter the lab, and told Naomi Franks, the Learning Support Officer of the Oodgeroo Unit, something to the effect that "there are some people in the computer lab and I don't think they're indigenous". Cynthia Prior, an Administration Officer of the Oodgeroo Unit, was present to hear what the student told Franks, and was told by Franks to resolve the situation.

What happened next was contested. Prior told the Federal Circuit Court that she approached the students, asked whether they were Indigenous, and informed them, "Ah, this is . . . an Indigenous space for Indigenous students at QUT". However, she "didn't ask them to leave

because [she] didn't want to embarrass them in a black space." She advised the students that there were computers in other buildings that they could use.

Wood recalls it differently. In his recollection, Ms Prior's conduct was "aggressive and unpleasant", and that Prior "demanded" he and his fellow students leave.

Wood eventually found another place to study. Approximately 45 minutes later, he posted onto an unofficial Facebook group for QUT students, *QUT Stalker Space*: "Just got kicked out of the unsigned indigenous computer room. QUT stopping segregation with segregation . . .?"

What followed was a debate between those students extolling the virtues of indigenous "safe spaces", and those who saw that as an inappropriate program for the University to operate.

One of the latter was an engineering student, Jackson Powell. He wrote a series of satirical and sarcastic comments over the course of the next 30 minutes. In one comment he said: "I support the idea of an alcoholic's room consisting of a beerpong table, cocktail bar and eight large bean bag chairs. Purely for study." In another comment, he posted a link to an image of a machine sorting beans or lollies into separate piles according to their colour.

The comments that later made Powell subject of Prior's section 18C complaint are, in context, obviously sarcastic. He first posted: "I wonder where the white supremacist computer lab is". In response to a post that mentioned the Ku Klux Klan, Powell wrote, "it's white supremacist, get it right. We don't like to affiliate with those hill-billies". After another student proposed "a room strictly for white males," Powell responded, "today's your lucky day, join the white supremacist group and we'll take care of your every need".

Another student, Chris Lee, was alleged to have written, "Whatever, im pierce (sic) I've got so much casual racism I need to let out of my system," in another comment thread that appeared on *QUT Stalker Space*. And an account bearing the name "Calum Thwaites" posted a comment: "ITT Niggers". (The acronym ITT is internet lingo meaning "in this thread.")

Positively matching Lee and Thwaites to their comments has, however, been a fraught process. Thwaites, an education student at QUT at the time, argued that a different person falsely using his name made the comment. When evidence for this was brought to the attention of Prior's solicitors in December 2015, it was apparently ignored and the case against Thwaites proceeded. Prior's legal team was unable to identify the person commenting under the name "Chris Lee". Nor was any direct evidence provided to the Federal Circuit Court that such a comment existed. For his part, Alex Wood's first post was the only public comment he made about the incident.

Wood, Thwaites and Powell all deny knowing one another (or any other students originally listed in the complaint), and deny having had any interactions with each other (or any other students originally listed in the complaint) aside from comments made on this Facebook comment thread.

QUT responds

The comment thread set QUT's student bureaucracy into overdrive. Within hours, a student familiar to the Oodgeroo Unit approached Franks and Prior and informed them of the comments. With the help of another student, Prior took screenshots of the comments, printed them off, scanned the print outs and attached them in an e-mail to Professor Anita Lee Hong, the Director of the Oodgeroo Unit. That e-mail, sent at 2:37 pm, advised Lee Hong of the comments that she described as "racist and derogatory", made clear that she was upset about the

comments, notified Lee Hong she would be making a formal complaint to the University, and that she "would like the matter taken further and those students who participated and 'liked' this conversation to be reprimanded in some way."

Prior and Franks also approached Mary Kelly, the Director of Equity at QUT. Her office was next door to the Oodgeroo Unit facilities at the Garden Points Campus. Kelly said she would ask the students to take down the comments.

Kelly ultimately sent e-mails to Alex Wood, Calum Thwaites and another student, Anthony Canning, who had also participated in the comment thread. The e-mail to Wood, sent at 5:21 pm on the day of the incident, told him that the comment allegedly fell "below the standards outlined in the Student Code of Conduct". It asked that he remove the entire thread of comments. She sent similar e-mails to Thwaites and Canning asking them to remove their comments. Only Thwaites responded later that evening, writing that he "did not post any such comment", and providing evidence that his Facebook profile was not a member of the *QUT Stalker Space* page.

The final piece of correspondence on the evening of 28 May was an e-mail from Kelly to Prior and Franks, requesting the two Oodgeroo Unit staffers to see her the following morning to determine if they could identify the students involved in the incident by looking at student photographs kept by the University.

Prior and Franks visited Kelly's office the next morning. They were not able to determine whether the students posting the comments on Facebook were the same as the students who had accompanied Wood the previous day.

Kelly found Canning's telephone number and called the student. Answering the call, Canning responded that he had thought the page was private and that he would delete his comment immediately. Kelly informed Prior and Franks in an e-mail sent at 10:52 am that, among other things, "the most offensive posts . . . have been removed from the Stalkerspace page":

> the name of the student who administers the Stalkerspace page – not a student – and will continue to try and get the whole post removed through that channel, as the person who started the string – Alex Wood – has not yet responded to my email, and does not have a listed phone number.

Wood attempted to log onto Facebook and remove his post. Wood responded to Kelly's e-mail at 2:13 pm, where he said:

> Yes it is deleted. I didn't mean to spark such a debate, Stalkerspace seems to be a place where sarcasm and humour reign supreme. The intention of the post was never to have racist overtones.

In other words, 24 hours after the original post, the offending Facebook comment thread had been deleted, and each identified student had expressed regret at their participation in their conversation about "QUT stopping segregation with segregation".

Escalation

Prior interpreted Kelly's previous e-mail as "very bad news", however. She felt the situation had "slipped completely beyond her control" and that she was at risk of "imminent but unpredictable physical or verbal assault". Prior e-mailed Lee Hong asking to leave work. In response, Lee Hong

instructed Prior that any absence would have to be on sick leave. Prior left work immediately.

The day after leaving work abruptly, Prior sent an e-mail to Kelly informing her that Prior "left campus yesterday due to this stress", referring to the saga as a "workplace safety issue" and saying she did "not feel safe attending my workplace at present." Prior added that, until she had been informed that the "matter had been dealt with effectively", she would not return. Prior also added that she wished to "lodge a formal complaint against the students involved once the university had identified them."

Prior alleges that Kelly's and Lee Hong's failure to respond to her safety concerns, and their failure to respond to Prior's formal complaint against the students, was, itself, a violation of the *Racial Discrimination Act*. Section 9(1) of the RDA makes unlawful a distinction, exclusion, restriction or preference based on a person's race, colour, descent or national or ethnic origin, and that the conduct had the purpose and effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of a human right or fundamental freedom in the political, economic, social, cultural or other field of public life.

In other words, under section 9(1) of the RDA, a university with a dedicated Indigenous-only computer lab, from which non-indigenous students could be excluded, that specifically provided employment to Indigenous people, faces a claim that they had unlawfully discriminated against one of those Indigenous workers.

June 2013 to May 2014

Early in June 2013, QUT began taking action to reinforce support for the Oodgeroo Unit. The Vice-Chancellor released a statement in response to the initial incident which was published on the student gateway on the QUT website. He also incorporated an explanation of the importance of the Oodgeroo Unit into his Campus Briefings, an annual address to hundreds of staff members. Prior characterised this response as bureaucratic.

Kelly organised with faculty heads to send official letters to Messrs Wood, Canning and Thwaites, to invite them to discuss the incident, and to bring to their attention the Student Code of Conduct. On 17 June 2013, the head of the engineering faculty, Professor Martin Betts, allegedly sent one such letter to each of Wood and Canning. The letters were not identical: Wood's letter did not refer to a breach in the Student Code of Conduct, because the University did not believe he had actually breached the code, but nonetheless aimed to make him aware his comments could have consequences. A letter similar to that which Canning received was sent by the head of the education faculty, Professor Ann Farrell, to Thwaites on 20 June 2013.

Yet the students assert that no such letter was received, and no proof of response was submitted to the court. The only piece of correspondence referring to the letters being sent occurs in an e-mail from Professor Betts on 18 June 2013, where he says equivocally, "letters sent yesterday I believe".

At a return-to-work meeting on 1 August 2013, Prior requested, among other things, a security guard to patrol the Oodgeroo Unit at least once per day. Lee Hong refused this. Prior said she would seek temporary work in a different position. Lee Hong offered Prior a place at the University's Caboolture Campus. Ms Prior refused this due to her "caring responsibilities" and the travel required, and alleged that Lee Hong was or should have been aware of this, and that, because of Lee Hong's conduct at the meeting, her condition was worsened and she became unfit

for work. Prior obtained legal representation and filed an internal complaint to the University in December 2013.

The complaints go to the Australian Human Rights Commission

On 27 May 2014 – almost a full year since Wood was evicted from the Oodgeroo Unit computer lab – Prior advised QUT that she would be taking the issue to the Australian Human Rights Commission. Prior lodged complaints against QUT, Lee Hong and Kelly for breaching section 9 of the RDA, and complaints against seven QUT students for breaching section 18C of the RDA.

Prior was clearly aggrieved by her experience with the students and her experience with the University. But these complaints were clearly vexatious. All issues had been resolved. The students had been removed from the Oodgeroo Unit computer lab. The Facebook thread and posts had been taken down. The students had been counselled by the University and had expressed remorse and understanding for any offence they may have caused.

A close reading of the course of events makes it hard not to conclude that the complaints under the RDA were a workplace disagreement between Prior and Lee Hong being waged through anti-discrimination law. The policy question is this: did the existence of section 18C and section 9 of the RDA help relieve those tensions or exacerbate them?

What can be concluded is that the Australian Human Rights Commission, once it received Prior's complaints, clearly exacerbated those tensions. There are four primary failings of the law and of the Commission.

The first failure was simple: the Commission should have immediately rejected Prior's complaint. This is also a failure of the law. The Commission's statutory regime stacks the process in favour of those making complaints. When a person makes a complaint to the AHRC, they do so under section 46P of the *Australian Human Rights Commission Act* 1986 (Cth). It provides that the Commission *must* refer the complaint to the AHRC president (section 46PD), who in turn *must inquire* into the complaint (section 46PF(1)). According to the statute, only after making enquiries and attempting to conciliate a complaint can the Commission "terminate" a complaint, including for being "trivial, vexatious, misconceived or lacking in substance".

On the facts, Prior's complaint was either trivial, vexatious, misconceived or lacking in substance. But the Commission can only persuade the parties to agree to a settlement or "terminate" the complaint, which means that it can advance to the federal courts. In the former, the party making a frivolous complaint is potentially able to profit from making the complaint by settling for a monetary sum to discontinue the complaint. In the latter, complainants who are determined to take a complaint to court face little in the way of obstacles. In each scenario, there is no aspect of the legislation which discourages frivolous complaints, and this is why several QUT students were involved in Federal Circuit Court proceedings for more than a year for an event that happened in May.

Since the QUT judgment, AHRC president Gillian Triggs has argued that the commission needs more power to rule out vexatious complaints. Yet this is a rhetorical sleight of hand. In fact, such powers that she proposes would have done nothing for the QUT case. As she told the *7:30 Report* after the ruling, the case had a "level of substance" and deserved to proceed. In other words, in the view of the AHRC president, what is clearly trivial and vexatious on the face of it, is

in fact a significant discriminatory harm which needs either to be conciliated or adjudicated in court.

The second major failure of the Australian Human Rights Commission is that the students were not informed of the complaint that Prior had made against them. Correspondence filed with the court in 2016 between Anthony Morris, QC, (counsel for Powell and Thwaites) and Dan Williams of Minter Ellison (representing QUT) possibly explains why this occurred. In that correspondence, Williams wrote that on 2 June 2014, less than a week after the complaint was lodged with the Commission, the solicitors who were at the time representing Prior wrote to the AHRC and "requested that no action be taken by the AHRC to serve the complaint on the [student] respondents". The letter is also alleged to have requested the Commission not to "list the complaint for conciliation until such time as settlement discussions between [Prior] and [QUT] had taken place."

Those settlement discussions did, indeed, take place during the next 12 months. Those discussions did not produce a satisfactory outcome for Prior. Those discussions also did not include the students at any time. If the Commission acquiesced in Prior's request not to inform the students of the complaint, then the Commission was evidently still complying with that request more than 12 months later.

In late June 2015, the Commission asked Ms Prior to "advise whether she still wished to pursue her complaint against the student respondents", something Ms Prior confirmed the next day. A "conciliation conference" between Prior and the students was booked by the Commission for 3 August 2015. Yet it was not until 28 July – less than a week before that conference was scheduled to take place – that the Commission e-mailed a letter to the Queensland University of Technology informing the students of the conciliation. That letter was forwarded by QUT to the students' university student e-mail accounts.

This was the Australian Human Rights Commission's third significant failure: having been the subject of a section 18C complaint for 14 months, the students were given notice of just six days that they were to appear before the Commission.

A conciliation conference is an informal dispute resolution process run by the AHRC to "assist the parties to consider different options to resolve the complaint and provide information about possible terms of settlement." A template Conciliation Conference Agenda obtained by the Institute of Public Affairs under the *Freedom of Information Act* in May 2016 reveals that the AHRC does not manage the process, but instead it appears to be led by the parties. But it grinds to a halt if one party is making unreasonable demands and shows an unwillingness to compromise.

With such late notice, only two of the seven students originally listed on the complaint were even able to attend. Jackson Powell and two other students were abroad at the time, and Powell himself was not aware of the complaint or the conference until after it took place. Alex Wood read the e-mail on 31 July 2015, and was told that attendance was "strictly optional". By the time he learned of the conciliation conference he already had work commitments. He had "no idea that the conference would actually conclude that day" and did not attend. Calum Thwaites and Anthony Canning attended.

The conciliation process began and finished on the same day. With only two of the original seven students present, Triggs' delegate to the conciliation, Adam Dunkel, was "satisfied that there [was] no reasonable prospect of the matter being settled by conciliation." On 25 August

2015, the Commission informed QUT of this decision, and QUT again forwarded that notification to the students.

This is the fourth significant failure of the Commission. It is not clear how this conclusion was reached when most of the students listed on the complaint were not actually present to participate in the conciliation process. This is what passes for alternative dispute resolution at the Australian Human Rights Commission.

The Federal Circuit Court ends the circus

When the complaint was terminated, Prior was permitted to make an application to the federal courts to have the complaint heard by a court. Three of the students reportedly paid Prior $5,000 to be removed from proceedings. As Hedley Thomas reported in *The Australian* in February 2016, the students settled "as they could not afford the legal costs to defend themselves in the case" and they "did not want to be unfairly linked to racism, which would damage their reputations and job prospects." It is no wonder that Liberal Democratic Senator David Leyonhjelm labelled the whole case "an attempt at legal blackmail."

The other students spent nearly a year in the Federal Circuit Court system before the case was dismissed in November 2016. The court's decision was a vindication of the students' choice to fight the claims. Justice Michael Jarrett found that there was no evidence to connect the posts under Calum Thwaites' name to the real Calum Thwaites. For Wood, Jarrett concluded that the statement "QUT stopping segregation with segregation" was targeted at a QUT policy, not Prior or Indigenous people more generally. In Powell's case, Jarrett decided that his posts (such as "I wonder where the white supremacist computer lab is") were a "poor attempt at humour" and that "tasteless jokes" did not inherently violate section 18C. Neither Wood's nor Jarrett's posts were sufficiently profound or serious to be seen as a violation of section 18C.

It is important to note that Justice Jarrett did not come to his decision on the basis that they, the students, were protected by section 18D, which purports to protect speech that is "made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest" and "done reasonably and in good faith". Supporters of section 18C have in recent months tried to deflect attention to section 18D.

A week after the complaint was dismissed by Justice Jarrett in November 2016, Labor's shadow attorney-general claimed in the *Australian Financial Review* that "Those who attack section 18C usually fail to mention section 18D." This is untrue. The uselessness of section 18D has been evident ever since Justice Bromberg found in the Andrew Bolt case in 2011 that the use of sarcasm indicated that arguments were not made in good faith.

But the QUT decision should drive a nail through the claims that section 18D protects freedom of speech. At the end of his judgment, Jarrett wrote that he was not able to conclude whether section 18D would protect the students: "The submissions for each of the parties reveal that there is a conflict in the authorities about the way in which section 18D might operate. The conflict is significant." If a statement such as "QUT stopping segregation with segregation" is not, as a matter of law, a clear good faith commentary in the public interest, then it is absurd to suggest that section 18D provides any protection of freedom of speech whatsoever.

Conclusion

As this suggests, the now widespread calls to reform the Australian Human Rights Commission would be a step in the right direction, but would not be a major advance in freedom of speech. Even if the Commission was given the power to *reject* frivolous complaints earlier in the process, the QUT case would have gone ahead. Prior's complaint was not even terminated for being "trivial, vexatious, misconceived or lacking in substance". A provision in the legislation requiring the Commission to inform people listed in a complaint directly of their part in a complaint is helpful in a small sense, but misses the key underlying problem.

The Australian Human Rights Commission is a poor administrator. But first and foremost, it is administering a bad law. It is not the fault of the Commission that they received the complaint. Despite the poorly run conciliation process, it is not even the fault of the Commission that the complaint was allowed to progress to the Federal Circuit Court.

By prohibiting offensive and insulting language, section 18C creates the sort of low threshold that enables especially sensitive university staff members to launch a three-year legal campaign against students. The only reason the students were taken to court in 2016 for innocuous Facebook comments made in 2013 is that section 18C of the *Racial Discrimination Act* 1975 remains on the statute books.

Postscript

(November 2017)

The legal battle over legal costs continued into 2017. On 9 December, Judge Jarrett in the Federal Court ordered that Cynthia Prior pay the costs of Alex Wood, Jackson Powell and Calum Thwaites, reportedly amounting to approximately $200,000. Also rejected was an application by Wood for Ms Moriarty to bear costs personally for an alleged "absence of scrutiny" in advising Prior of the realistic prospects of taking the complaint to the Federal Court. In February, *The Australian* reported that Wood had been billed $41,336 to fund lawyers for Moriarty in relation to that application.

On 17 March 2017, Prior filed a notice of discontinuance with the Federal Court, ending litigation against the Queensland University of Technology. No cost orders were made.

On 3 March 2017, Federal Court judge John Dowsett denied Cindy Prior leave to appeal the Court's decision to dismiss her case, and was ordered to pay the legal costs of the student respondents, amounting to $10,780. Thwaites and Powell applied to the Federal Court in May for a bankruptcy order against Prior for unpaid costs. The Federal Court heard on 26 July that Prior had paid the debt and avoided bankruptcy.

In response to the QUT case – as well as the complaints that were made against cartoonist Bill Leak and a major inquiry into section 18C by the Parliamentary Joint Committee on Human Rights – the Federal Government proposed the Human Rights Legislation Amendment Bill 2017. It was introduced into Parliament on 22 March 2017 and passed both Houses on 31 March. Aside from the procedural changes that successfully passed, the Bill originally included the deletion of the words "offend", "insult", and "humiliate" from section 18C to be replaced by the word 'harass'. The resulting formulation would have made it unlawful for a person to "harass or intimidate" another person because of their race.

This was an important first step towards restoring freedom of speech in Australia – but only a first step. The definitions of words like "harass" are mired in uncertainty, and problems

would inevitably have emerged under the Government's proposal. After all, Cindy Prior included in her claim that she was "intimidated" by the social media comments on the basis of her race. The proposed amendments to section 18C were lost in the course of parliamentary debate.

Section 18C in any form is a restriction on freedom of speech that chills public debate and damages social cohesion. That is why 18C has become such an iconic issue for such a broad group of Australians, and why its continuing existence as an Australian law is unsustainable. And that is why section 18C will inevitably be repealed in full.