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Full Court of the Federal Court of Australia
Registry: New South Wales
Division: General

No. NSD1698/2024

On appeal from the Federal Court

Pauline Hanson
Appellant

Mehreen Faruqi & Anor
First Respondent

SUBMISSIONS OF THE RACE DISCRIMINATION COMMISSIONER

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A. INTRODUCTION

1. By orders made on 15 September 2025, the Race Discrimination Commissioner (**Commissioner**) was granted leave to appear as amicus curiae in this appeal, pursuant to s 46PV of the *Australian Human Rights Commission Act 1986* (Cth).

2. The Commissioner makes these submissions to assist the Court in the interpretation and application of Part IIA of the *Racial Discrimination Act 1975* (Cth) (**RDA**), including s 18C, to offensive acts that target individuals and groups because of a combination of their race, colour or national or ethnic origin and other attributes, in this case religion, that comprise their identity. The Commissioner's submissions are relevant to grounds 6(b) and 6(c) of the Further Amended Notice of Appeal. Those grounds are addressed at paragraphs 34 to 45 of the Appellant's Submissions (**AS**).

3. The RDA gives effect to and annexes the International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**) (660 UNTS 195 (adopted 21 December 1965, entered into force 4 January 1969)): RDA, preamble and Schedule. In accordance with long-standing principle, statutory provisions which seek to give effect to matters of international law should be interpreted so far as possible to be consistent with international law: *R v Jacobs Group (Australia) Pty Ltd* (2023) 280 CLR 170 at 180 [22] (Kiefel CJ, Gageler, Gordon, Steward, Gleeson and Jagot JJ), citing *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* (2023) 275 CLR 292 at 307 [16] (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

4. In addressing how and to what extent Muslim identity is relevant to the interpretation of s 18C of the RDA, the Commissioner submits therefore that it is appropriate to draw on the concept of intersectionality as it has been understood and applied in international law on the ICERD. The concept of intersectionality, when applied with s 18B of the RDA, supports the proposition that a person or group is protected by s 18C where intersecting attributes (for example, Muslim identity and ethnic origin) comprising the person's or group's identity are intertwined such that they cannot be separated, and one of the reasons for doing the relevant act was the race, colour or national or ethnic origin of the person or group.

5. Such an approach to the construction of s 18C of the RDA is also consistent with the history of the introduction of Part IIA of the RDA.

B. PART IIA OF THE RACIAL DISCRIMINATION ACT 1975 (CTH)

6. By s 18C of the RDA, it is unlawful to do an act, otherwise than in private, that is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another

person or group of people, where the act is done because of the race, colour or national or ethnic origin of the other person or group. Section 18D provides for exemptions to s 18C.

7. The race, colour or national or ethnic origin of a person or group must be 'a' reason for the conduct; an act may have been done for more than one reason: RDA, s 18B; *Kaplan v Victoria (No 8)* [2023] FCA 1092 at [526]; *Toben v Jones* (2003) 129 FCR 515 at [37].

8. The terms 'race', 'colour' and 'national or ethnic origin' are not defined in the RDA. Relevantly, as noted by the primary judge at PJ [263] to [272], the term 'ethnic origin' has been interpreted broadly in a number of jurisdictions to extend to groups whose ethnicity is defined by shared customs, beliefs, traditions and characteristics, including religious beliefs.

9. It has been accepted that Jews in Australia are a recognised group of people with an 'ethnic origin' that is afforded protection under Part IIA of the RDA: *Miller v Wertheim* [2002] FCAFC 156 at [14]; *Jones v Scully* (2002) 120 FCR 243 at [110]-[113]. Similar findings have also been made in respect of Sikhs: *Mandla v Dowell Lee* [1983] 2 AC 548 at 565 (Lord Fraser of Tullybelton, Lords Edmund-Davis, Roskill and Brandon of Oakbrook agreeing); 569 (Lord Templeman) (HL).

10. However, Australian courts have not to date held that Muslims are a group with a common 'ethnic origin' for the purposes of Part IIA of the RDA.

C. THE CONCEPT OF INTERSECTIONALITY AND THE PRIMARY JUDGE'S CONCLUSIONS

11. There has long been recognition of the complex and interconnected nature of identity and intersectional discrimination. For example, at the international level, in 1978, the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted a '**Declaration** of Race and Racial Prejudice', with article 3 stating (emphasis added):

> 'Any distinction, exclusion, restriction or preference based on race, colour, ethnic or national origin or **religious intolerance motivated by racist considerations** ... is incompatible with the requirements of an international order which is just and guarantees respect for human rights.'

12. The Declaration used similar terms as those attributes protected in article 1(1) of the ICERD (and later adopted in the RDA) (being 'distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin'), recognising that discrimination on these grounds could manifest through religious intolerance motivated by racist considerations.

13. In 2000, the United Nations Special Rapporteur on religious intolerance, Abdelfattah Amor, observed:

> 'In some cases, it is very difficult to distinguish between religious and racial or ethnic discrimination or intolerance. … the two forms of discrimination may even become confused in the mind of both the perpetrator and the victim of the discrimination. … religion shares something of the definition of ethnicity, just as ethnicity is basic to religious identity': 'Racial Discrimination and Religious Discrimination: Identification and Measures' for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Preparatory Commission (First Session, Geneva, 1–5 May 2000, A/CONF.189/PC.1/7), [122].

14. The concept of intersectionality is more than an abstract or theoretical construct. The tangible experience of intersectionality was reflected in the evidence from autobiographical witnesses before the primary judge. Ms Ali, for example, recounted 'various instances of racism or other abuse based on her colour, ethnic origin or religion', including, on occasion, being 'scared to wear her hijab in public': PJ [74], [78]. Intersectional discrimination reflects an experience of discrimination that is more than the sum of its parts, in which intersecting aspects of selfhood are attacked.

15. At PJ [280], the primary judge stated that he did not read the requirements of s 18C(1)(b) of the RDA to (emphasis in original):

> *'necessarily* be met if it is established that the relevant act was done because a person or a group of people is Muslim. However, … in a particular case, it may be established that by the act being done because a person (or a group of people) is Muslim, the act was also done because of the race or colour or ethnic origin of the person (or group). That will depend on the intersectionality between their identity as Muslim and their identity with reference to race, colour or national or ethnic origin.'

16. At PJ [290], the primary judge acknowledged the intersection of race, ethnicity and religion and the way that two or more attributes of identity may be interconnected and mutually reinforcing, leading to multiple intertwined layers of discrimination. This proposition was accepted by the Appellant in her submissions at [41]. His Honour recognised that the considerable overlap of these attributes 'means that they are inseparable, and it would generally not be possible to identify that particular conduct was responsive to or motivated by one category and not others'. His Honour concluded that while 'the role played by a person or a group of people's Muslim identity will be fact dependent in each case', in the

Australian context, 'to be Islamophobic is almost invariably also to be racist': PJ [280], [290].

17. At AS [42], the Appellant submits that this conclusion is 'an enormously broad and contestable generalisation' and the 'only basis for the proposition was a quote from a single journal article, which discussed the tenets of the "*intersectionality theory*"' (emphasis in original). At AS [43], the Appellant contends that the 'result is that the operation of s 18C has been engorged well beyond Parliament's intention'. As will be shown below, the approach taken by the primary judge is supported by the concept of intersectional identity and discrimination in international law and is consistent with the legislative history of the introduction of Part IIA of the RDA.

D. INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

18. In interpreting the provisions of the RDA, extrinsic material may be considered to confirm that the meaning of the provision is the ordinary meaning of the text, having regard to the context and purpose or object of the Act, or to determine the meaning of the provision where a provision is ambiguous or obscure or where the ordinary meaning leads to a result that is manifestly absurd or unreasonable: ***Acts Interpretation Act*** *1901* (Cth), s 15AB(1). Extrinsic material that may be referred to for the purposes of statutory interpretation includes any treaty or other international agreement that is referred to in the Act: *Acts Interpretation Act*, s 15AB(2)(d).

19. The RDA was enacted to give effect to Australia's international obligations under the ICERD. As noted earlier, the language of the RDA is drawn from the ICERD, which uses the concepts of 'race, colour, descent, or national or ethnic origin': ICERD, art 1(1).

20. As the primary judge observed at PJ [15], the preamble to the RDA provides that 'it is desirable … to make the provisions contained in this Act for the prohibition of racial discrimination and certain other forms of discrimination and, in particular, to make provision for giving effect to [ICERD]'. Further, s 7 of the RDA provides that '[a]pproval is given to ratification by Australia of [ICERD]'. The full text of the ICERD is included as a schedule to the RDA.

D.1. International guidance on the interpretation of the ICERD

21. In interpreting international laws, considerable weight should be given to the interpretations adopted by an independent body established to supervise the application of the treaty: *CRI026 v Republic of Nauru* (2018) 92 ALJR 529 at 535-536 [22], citing

Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) [2010] ICJ Rep 639 at 664 [66].

22. In the case of the ICERD, the relevant independent body is the Committee on the Elimination of Racial Discrimination (**CERD**). The CERD is established under article 8 of the Convention and is empowered with specific functions, including to:

    a. make 'general recommendations' and provide what are known as 'concluding observations' based on its examination of reports of States Parties on the legislative, judicial, administrative or other measures adopted to give effect to the ICERD: ICERD, art 9(1)-(2); and

    b. receive and consider communications from individuals or groups claiming to be victims of a violation of rights within the ICERD, where a State Party has declared its recognition of the CERD's competence to do so. Australia made such a declaration on 28 January 1993: ICERD, art 14; <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-2&chapter=4&clang=_en>.

General recommendations by the CERD

23. General recommendations issued by the CERD confirm that the grounds of discrimination in the ICERD, being race, colour, descent, and national or ethnic origin, 'are extended in practice by the notion of "intersectionality" whereby the [CERD] addresses situations of double or multiple discrimination – such as discrimination on grounds of gender or religion – when discrimination on such a ground appears to exist in combination with a ground or grounds listed in article 1 of [ICERD]': CERD, 'General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination', CERD/C/GC/32 (24 September 2009) (**General Recommendation 32**) at [7].

24. In applying the concept of 'intersectionality' to racist hate speech, the CERD stated in 'General Recommendation No. 35: Combating racist hate speech', CERD/C/GC/35 (26 September 2013) at [6] (footnotes omitted) that:

> 'Racist hate speech addressed in [CERD] practice has included all the specific speech forms referred to in article 4 directed against groups recognized in article 1 of [ICERD] … In the light of the principle of intersectionality, and bearing in mind that "criticism of religious leaders or commentary on religious doctrine or tenets of faith" should not be prohibited or punished, the [CERD's] attention has also been

engaged by hate speech targeting persons belonging to certain ethnic groups who profess or practice a religion different from the majority, including expressions of Islamophobia, anti-Semitism and other similar manifestations of hatred against ethno-religious groups, as well as extreme manifestations of hatred such as incitement to genocide and to terrorism.'

25. In 'General Recommendation No. 37 (2024) on equality and freedom from racial discrimination in the enjoyment of the right to health', CERD/C/GC/37 (21 February 2025) at [12], the CERD referred with approval to the United Nations network on racial discrimination and protection of minorities 'Guidance Note on Intersectionality, Racial Discrimination and Protection of Minorities' (2022) <https://www.ohchr.org/en/minorities/un-network-racial-discrimination-and-protection-minorities> (**UN Guidance Note**), which describes intersectionality as 'a concept and a theoretical framework that facilitate comprehension of the ways in which social identities overlap and create compounding experiences of discrimination and concurrent forms of oppression based on two or more grounds'.

26. The UN Guidance Note states at p 11 that 'far from representing a simple addition of social identities — for example, ethnicity in addition to gender — the intersectionality framework asserts that these two or more grounds are interdependent and mutually constitutive'.

CERD jurisprudence

27. In early jurisprudence prior to General Recommendation 32, the CERD found that it did not have jurisdiction to examine claims made *exclusively* on the basis of religion. In making these determinations, the CERD referred to the travaux préparatoires of ICERD, noting that the Third Committee of the General Assembly rejected the proposal to include racial discrimination and religious intolerance in a single instrument, and decided ICERD should, instead, focus exclusively on racial discrimination: *A.W.R.A.P. v Denmark*, Communication No. 37/2006, UN Doc CERD/C/71/D/37/2006, 8 August 2007 at [6.2]-[6.5]; *P.S.N. v Denmark*, Communication No. 36/2006, UN Doc CERD/C/71/D/36/2006, 8 August 2007) at [6.2]-[6.5].

28. However, the CERD recognised the admissibility of intersectional claims. In *A.W.R.A.P. v Denmark,* the CERD held that complaints about hate speech directed to Muslims which exclusively related to discrimination on religious grounds, 'without any reference

whatsoever to any race, colour, descent, or national or ethnic origin' were inadmissible under ICERD (at [6.2]). It nonetheless stated at [6.3] that it:

> 'recognises the importance of the interface between race and religion and considers that it would be competent to consider a claim of "double" discrimination on the basis of religion and another ground specifically provided for in article 1 of [ICERD], including national or ethnic origin'.

CERD Concluding Observations

29. In its 'Concluding Observations on the eighteenth to twentieth periodic reports of Australia', CERD/C/AUS/CO/18-20 (26 December 2017), the CERD referred to intersectionality and acknowledged racism directed towards Muslim migrants in Australia. At [13], the CERD expressed concern that 'expressions of racism, racial discrimination and xenophobia, including in the public sphere, in political debates and in the media are on the rise … and that migrants, notably Arabs **and Muslims**, asylum seekers and refugees, as well as Africans and people of African descent, South Asians and indigenous peoples, are particularly affected by racist hate speech and violence' (emphasis added).

D.2 Conclusion on interpretative guidance from international law

30. The intersectional approach recognised by the CERD acknowledges the interface between race and other attributes, such as religion, and the intersectionality of racial discrimination with other forms of discrimination, such as religious discrimination. This approach is reflected in and supported by the operation of s 18B of the RDA. Thus, where a person engages in offensive behaviour towards a person or group for multiple reasons (including, for example, because of their religious beliefs), the act is, for the purposes of Part IIA, taken to be done because of their race, colour or national or ethnic origin if one of the reasons for the act (whether or not it is the dominant or substantial reason) was the race, colour or national or ethnic origin of the person or group. As the primary judge concluded at PJ [280] and [290]-[291], an offensive act directed at a Muslim person (or group) may fall within the scope of s 18C if the act was also done because of the race, colour or national or ethnic origin of the person (or group). This construction of the scope of s 18C is supported by the concept of intersectional identity and discrimination in international law.

E. PARLIAMENT INTENDED FOR PART IIA TO APPLY TO PARTICULAR RELIGIOUS GROUPS

31. The legislative history of Part IIA of the RDA provides further support for the approach adopted by the primary judge to the construction of s 18C.

32. The Australian Human Rights Commission, formerly the Human Rights and Equal Opportunity Commission, (**AHRC**) has long recognised the intersection of religion with race and ethnic origin, and the compounding impacts of discrimination on these intersecting attributes. Its 1991 report, 'Racist Violence: Report of the National Inquiry into Racist Violence in Australia' (Parliamentary Paper No. 100, tabled 18 April 1991) (**National Inquiry**), was one of three reports that led to the introduction of Part IIA into the RDA in 1995. The Explanatory Memorandum to the Racial Hatred Bill 1994 (Cth) (**EM**), which became the *Racial Hatred Act 1995* (Cth) and introduced Part IIA of the RDA, states that the Bill was introduced to address concerns highlighted by the findings of this and other reports: EM, 1. The report may be referred to for the purposes of statutory interpretation of Part IIA of the RDA: *Acts Interpretation Act*, s 15AB(2)(b). The primary judge referred to this report at PJ [19], [245], [365], [370].

33. The National Inquiry described violence against 'Arab and Muslim Australians' in the chapter addressing 'Racist Violence on the Basis of Ethnic Identity', suggesting a recognition of intersectional identities, and referred to reports of incidents of 'Muslim women having their hijabs pulled off in the street' and attacks on mosques and Muslim primary schools (National Inquiry, pp 145-146). The National Inquiry stated at p 175 that:

> 'Evidence to the Inquiry has shown that the victims of racist intimidation, harassment and violence on the basis of ethnic identity are the most likely to be Asian or Arab Australians.'

34. The National Inquiry recognised that fear of racist violence and harassment can have an impact on fundamental choices, including how people engage in their religious observances. The AHRC noted at p 262 that:

> 'Jewish and Muslim people are often attacked because their dress identified them as belonging to a particular religion. For the victims of these attacks the harm inflicted is particularly severe because their religion is an integral part of their culture and ethnic identity. As the Islamic Council of New South Wales submitted:
>
> > "… Discrimination and violence along religious and racial lines do not occur in a vacuum. They occur under certain conditions. One of those conditions is a pervading stereotype and adverse image of the group being discriminated. The stereotype of Islam and Muslims has been demonstrated to be highly evocative of fear and threat."
>
> Such behaviour is a direct contravention of [ICERD], and has no place in the Australian community.'

35. In discussing the law at the time, the AHRC stated at p 274 (footnotes omitted) that:

> 'The definition of race in the *Racial Discrimination Act* is based on that in [ICERD] and is deliberately broad and inclusive. It is similar to that used in overseas legislation also based on [ICERD], notably that in the United Kingdom and New Zealand. Judicial decisions in the House of Lords and the NZ Court of Appeal have held that Sikhs and Jews were covered respectively by the terms ethnic group and ethnic origin. The House of Lords pointed out that a common religion might be one indicator of an ethnic group along with common literature, common geographic origins etc. These Court decisions have been useful in emphasising the breadth of the term 'ethnic' and providing some tests for determining whether a group comes within the definition.'

36. The AHRC recommended the introduction of a clear prohibition on 'conduct which is so abusive, threatening or intimidatory as to constitute harassment on the ground of race, colour, descent or national or ethnic origin' (National Inquiry, pp 298-299). It also recognised the intersection of racial discrimination and religious discrimination and made the following recommendation at p 301:

> 'The Inquiry recommends that discrimination against or harassment of a person on account of that person's religious belief be prohibited where the religious belief is commonly associated with persons of a particular race or races or a particular ethnic group or groups and is used as a surrogate for discrimination on the basis of race or ethnicity. As discussed earlier, if a reference to the Islamic religion or a Muslim observance, for example, is taken to be synonymous with being a member of a particular ethnic group then it would probably be held by a court to come within the scope of ethnicity or race for the purposes of the Racial Discrimination Act. The ambiguity, however, needs to be addressed by amending the legislation.'

37. It is clear from the EM (also relevant to statutory construction pursuant to s 15AB(2)(e) of the *Acts Interpretation Act*) that Parliament intended for s 18C to apply to certain groups identified by their religion. The EM specifically refers to an intention for the terms 'ethnic origin' and 'race' to have a broad meaning, and to extend to Sikhs, Jews and Muslims: EM, 2-3.

38. As noted by the primary judge at PJ [263], the EM states (at 2-3) that:

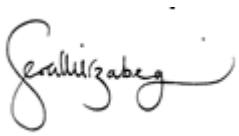
> 'The terms "ethnic origin" and "race" are complementary and are intended to be given a broad meaning.

> The term "ethnic origin" has been broadly interpreted in comparable overseas common law jurisdictions. … This would provide the broadest basis for protection of people such as Sikhs, Jews and Muslims.
>
> The term "race" would include ideas of ethnicity so ensuring that many people of, for example, Jewish origin would be covered. While that term connotes the idea of a common descent, it is not necessarily limited to one nationality and would therefore extend also to other groups of people such as Muslims'.

39. While a broad interpretation of these terms is one way in which Muslims could be covered by the RDA, the Commissioner submits that a further way, consistent with the parliamentary intention to implement the recommendations of the National Inquiry, would be through consideration of claims of intersectional discrimination. For example, where the facts of a particular case demonstrate that discrimination on the basis of religion is 'used as a surrogate for discrimination on the basis of race or ethnicity' (to use the language of the National Inquiry), it will be appropriate to find that race was the 'true reason or true ground' for the act (*Toben v Jones* (2003) 129 FCR 515 at [63] per Kiefel J) and, at least, 'one of the reasons' for the purposes of s 18B of the RDA.

F. CONCLUSION

40. The Commissioner submits that on its proper construction, s 18C of the RDA protects Muslims in circumstances where the Muslim identity of a person or group is closely intertwined with, and cannot be separated from, their race, colour, or national or ethnic origin. Such an approach is consistent with the terms of s 18B of the RDA and the concept of intersectionality as explained in the international jurisprudence on the ICERD and as recognised in the legislative history of Part IIA of the RDA.



Sera Mirzabegian SC
Omnia Chambers



Emma Dunlop
Omnia Chambers

Date: 23 October 2025