

HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

RACIAL DISCRIMINATION ACT 1975 (CTH)

No. H97/120

Between:

JEREMY JONES AND MEMBERS OF THE COMMITTEE OF MANAGEMENT OF THE EXECUTIVE COUNCIL OF AUSTRALIAN JEWRY ON BEHALF OF THOSE MEMBERS OF THE JEWISH COMMUNITY OF AUSTRALIA WHO ARE MEMBERS OF ORGANISATIONS AFFILIATED TO THE EXECUTIVE COUNCIL OF AUSTRALIAN JEWRY Complainant

and

FREDRICK TOBEN ON BEHALF OF THE ADELAIDE INSTITUTE Respondent

REASONS FOR DECISION OF MS KATHLEEN McEVROY INQUIRY COMMISSIONER

Hearing: Sydney

Date of hearing: 2 November 1998

Date of Decision: 5 October 2000

Appearances: Complainant: Mr Stephen Rothman SC

Respondent: In person

1. INTRODUCTION

1.1 The Complaint

This inquiry arises out of a complaint made on 31 May 1996 to the Race Discrimination Commissioner ("the Commissioner") of the Human Rights & Equal Opportunity Commission ("the Commission") by Jeremy Jones, the Executive Vice President of the Executive Council of Australian Jewry ("ECAJ"), against the Adelaide Institute. The complaint alleged the Adelaide Institute had published material on its World Wide Website "which constitutes malicious anti-Jewish propaganda". The complaint alleged the material published on the website was contrary to section 18C of the Racial Discrimination Act 1975 (Cth) ("the Act"). The Commissioner enquired into this complaint but considered it was not amenable to conciliation and referred it to a public inquiry pursuant to section 24E(1)(a) of the Act on 10 April 1997. The reference was accompanied by a report from the Commissioner which included the downloaded contents of the website as at 31 May 1996. The matter did proceed to a public hearing which was conducted by me in Sydney on 2 November 1998 pursuant to section 25A of the Act. However, the process of the conduct of the inquiry of this matter was protracted and complex, and in some respects relevant to the substantive consideration of this complaint. Accordingly, I shall set out in some detail the processes of this inquiry as well as its substance.

1.2 Pre-hearing Procedures

Prior to the public hearing into this matter I endeavoured to identify and clarify the matters the subject of this inquiry; the process by which the inquiry would be held, including the location of the inquiry, the evidence to be presented and the identity of the parties; and generally to ensure the matter was ready for the public hearing once this occurred. To this end I convened a number of directions conferences for the parties, both by telephone and in person. I received numerous written submissions in particular from the respondent, and in particular a large number of witness statements relating to the evidence which he wished to place before me at the inquiry. On 24 October 1997 I published a preliminary decision which dealt with a number of these matters. The complaint was originally listed for a public hearing for 15-19 December 1997, but shortly before this date, Dr Fredrick Toben, on behalf of the respondent, indicated the respondent was withdrawing from the proceedings, and the inquiry did not proceed and the hearing dates were vacated. The hearing was re-listed for 2 and 3 November 1998, and Dr Toben advised he would not attend. However, on the day of the hearing Dr Toben did attend at the inquiry. The first directions conference was held by telephone on 18 June 1997. Dr Fredrick Toben, the Director of the Adelaide Institute, appeared on behalf of the Adelaide Institute, and Mr Jones for himself. At that hearing I made directions that the hearing, when it was held, would be in public, and would be in Sydney as the place where the website had been accessed and the complaint made. Dr Toben objected to the hearing being in Sydney as it presented difficulties for himself

as he is located in Adelaide. However he indicated a number of witnesses whom he wished to call were from elsewhere in Australia or overseas, and he might require evidence to be given by telephone or video link. At that conference there was some discussion as to the precise identity for the purposes of the legislation of both the complainant and the respondent, and I invited written submissions on these matters to be made. Such written submissions were received by me from the complainant on 9 July 1997 and the respondent on 1 August 1997. In the complainant's written submission of 9 July 1997, Mr Jones identified the specific acts of which he complained by referring to specific aspects of material contained in the respondent's website. He also made submissions on the appropriate identification of the complainant. Dr Toben responded to that submission and also provided to the Commission a witness list identifying 36 witnesses whom he proposed to call in the course of the inquiry. He subsequently added two more witnesses to this list. He also formally sought leave to video record any further proceedings. A further directions conference was convened for 30 September 1997. This conference was in person, but at that time I directed, pursuant to section 25H(2) of the Act, that the directions conference be held in private. This direction was made against the objection of Dr Toben, but my view was that it is normal to hold a directions conference in private as its purpose is to deal with procedural issues in the preparation of the matter for public inquiry. I made it clear that direction did not affect the earlier direction I had made that the hearing into the substance of Mr Jones' complaint would be held in public. At that directions conference I gave leave to both parties to be legally represented pursuant to section 25G of the Act. Mr Jones was represented at that conference by Mr Stephen Rothman SC. Dr Toben continued to represent the Adelaide Institute. At the commencement of that conference I rejected Dr Toben's request to video record the proceedings as the matter was already being transcribed by an accredited and pre-arranged court reporting service, and I regarded that as the appropriate formal record of the proceedings. There were also a number of other persons present in the hearing room at that conference, and it was my view each person individually would have to consent to the video recording should I have permitted it to proceed. I note Dr Toben had not raised this issue prior to the listing of the matter for the directions conference. At that conference Dr Toben sought a direction from me that the matter be returned to the Commissioner for conciliation processes to be put in place. I rejected that request as the Act makes it clear that once a matter is referred to the Commission for inquiry the Hearing Commissioner is bound to conduct that inquiry: see section 25A(1) which directs "the Commission shall hold an inquiry into each complaint or matter referred to it" (my emphasis). I noted I am empowered in the course of an inquiry to attempt to resolve a complaint by conciliation (see section 25Q). However, it was clear at the directions conference Mr Jones was not prepared to engage in any conciliation processes at this stage of the inquiry in the absence of any new basis for conciliation being offered by Dr Toben. I took the view that where one party was not willing to engage in conciliation and no basis has been proposed for resolution of the complaint, to direct a further conciliation process would not constitute a reasonable step "to effect an amicable settlement" of the complaint. When I made that direction Dr Toben left the hearing room and refused to further participate in that directions conference. It continued in his absence. I made some directions following that conference, having considered the written and oral submissions of the complainant, and the written submissions of the respondent received prior to the conference. I published the reasons for some of those directions in a preliminary decision dated 24 October 1997. In that determination I dealt with the following matters: that the complaint was to be classified as a representative complaint pursuant to section 25L of the Act; that the complainant was properly therefore identified as "Jeremy Jones and members of the Committee of Management of the Executive Council of Australian Jewry, on behalf of those members of the Jewish Community of Australia who are members of organisations affiliated to the Executive Council of Australian Jewry", and that the respondent was appropriately identified as "Fredrick Toben on behalf of the Adelaide Institute". The dates for the public inquiry were set for 15-19 December 1997 to be held in Sydney. Two other matters were clarified in the course of that directions conference. Prior to leaving the conference, Dr Toben confirmed he was responsible for placing the material which appears on the Adelaide Institute website, and that he took responsibility generally for any acts which could be said to be ascribed to the Adelaide Institute, an unincorporated association of which he is Director. The complainant also identified the relief sought from this Commission in the written submission filed prior to the conference and confirmed at the conference. Mr Jones stated no financial compensation was sought as a consequence of the establishment of the complaint, but the complainant sought three directions from the Commission: the withdrawal of the allegedly offending material from the Internet site; a direction that the material was not to be published or re-published elsewhere; and an apology from Dr Toben on behalf of the Adelaide Institute, as well as a statement to be included on the website concerning any finding of unlawful behaviour by this Commission. I also directed Dr Toben to file witness statements in relation to the witnesses whom he proposed to call by 7 November 1997. Dr Toben did file witness statements in relation to 42 proposed witnesses. A further directions hearing (via telephone) was convened for 25 November 1997 in order to determine which witnesses would be called by Dr Toben in response to the complainant's case to be presented at the inquiry.

At the outset of that directions conference I advised Dr Toben the evidence to be presented at the inquiry must be relevant to the matter in issue before me as referred for inquiry. In particular I advised that the evidence must be relevant to a determination of whether the publication of the material contravened section 18C of the Act, and whether the exemption contained in section 18D of the Act was available to the respondent. Dr Toben's response to this direction was that the witnesses whom he proposed to call could all give evidence which would establish that the assertions in the material contained on the website were true, and his basic case in response to the complaint was that "truth is the defence". At that conference there was a very lengthy discussion concerning Dr Toben's proposed witnesses. It was apparent at that conference Dr Toben had not made formal arrangements for these witnesses to give evidence before the inquiry, and most of the "witness statements" provided were accounts by Dr Toben of the position of these witnesses in relation to "Holocaust Revisionism". Some of the witness statements indicated the witnesses were at present unavailable or uncontactable, or were in relation to persons whom Dr Toben had contacted as possible witnesses but who had made no response to him: 15 of the statements are identified as falling into this category. A large number of the proposed witnesses were based in Europe or the United States. Dr Toben's primary contention was that the purpose of the inquiry was to "prove" whether the events known as "the Holocaust" in fact occurred. Dr Toben's argument was that his website and his own research was concerned with the extent to which the events and circumstances relating to Jewish people in Europe in the 1930s and 40s had been "mythologised": his proposition was that all credible evidence pointed to the fact that although the German State regarded Jewish people as enemies of the State and took steps to exclude them from the German State by, among other things, placing them in labour camps where many died, there was no process of State sanctioned mass extermination of Jewish people, and in particular there were no gas chambers at the various labour camps such as Auschwitz. Dr Toben also asserted there was significant evidence which now established significantly fewer than 6 million Jewish people perished during this period of time: possibly, he asserted, as few as 1.8 million. Dr Toben's argument which is asserted in the material on his website as well as at this and other directions hearings conducted in relation to this inquiry, is that implications concerning the political position of the Jewish Community can be derived from the fact that it takes a variety of significant steps (such as the making of this and other complaints to this Commission) to prevent or impede the conduct of research and investigations such as his into the truth of the events relating to what Dr Toben refers to as "the alleged Holocaust". Dr Toben also asserted there were issues I should consider about his right to freedom of speech, as well as his freedom to engage in free academic research into matters such as this. I shall deal with the issue of freedom of speech below, but it was when I indicated in the course of this directions hearing that I was bound by the terms of the legislation to conduct this inquiry, and if I were satisfied on the basis of the evidence which the inquiry demonstrated that Dr Toben had engaged in acts contrary to section 18C of the Act it was my duty to make appropriate determinations, that Dr Toben indicated I was an immoral person who had no interest in the truth, and it would be immoral for the inquiry to proceed on that basis, and that he would have no further dealings with the inquiry. Despite that assertion the directions conference of 7 November 1997 did continue. At the end of that conference I directed evidence would be heard from six witnesses, including Dr Toben: the other witnesses whom I directed could give evidence if called by Dr Toben, were Olga Scully an Associate of the Adelaide Institute and the respondent to another complaint by Mr Jones of a similar nature to that before this present inquiry; Professor Brian Martin, a social scientist; Ronald Conway; John Bennett, member of the Victorian Council for Civil Liberties; and Geoffrey Muirden, Deputy Director of the Adelaide Institute. I indicated I was not prepared to hear evidence from a number of other witnesses, including all of those from whom no response had been received by Dr Toben, but also in relation to some whose evidence appeared to have no clear relevance to the matter. I reserved my decision in relation to seven of the other witnesses proposed by Dr Toben, and requested Dr Toben to provide further information concerning those proposed witnesses so I could make a ruling concerning the admissibility of their evidence in the sense of its general relevance. Dr Toben did not provide that further information at any time. One of the witnesses whom Dr Toben proposed to call was David Irving. At the time of this conference Dr Irving, a widely published writer on this period of European history, and in particular on the activities of the German government under Adolf Hitler and the circumstances of the European Jewish community at that time, was appealing against a decision of the Australian government not to grant him an entry visa into Australia. I indicated to Dr Toben it was possible that evidence from witnesses who were not able to attend a hearing could be received by telephone link, but he would have to make the arrangements himself, although in the conduct of the proceedings the cost would be borne by the Commission. I note Dr Irving has since been unsuccessful in proceedings in the High Court, Queen's Bench Division (UK), in which he presented a similar argument to that sought to be presented by Dr Toben in this matter: *Irving v Penguin Books Limited and Deborah Lipstadt*, unreported, 11 April 2000, decision of Gray J (Dr Lipstadt was another of the witnesses whom

Dr Toben indicated he wished to call, but who did not respond to his request). At a further directions conference on 27 November 1997 Dr Toben indicated he wished to make submissions on the general validity of the legislation. I declined to hear these submissions. I shall refer to this further below. Subsequent to that conference Dr Toben indicated he wished to withdraw from the proceedings altogether. The hearing dates which had been set for mid December 1997 were then vacated. Throughout 1998 there were considerable further discussions and although Dr Toben had indicated he had withdrawn from the proceedings he continued to send documentation to me and the Commission. Further dates for the public hearing were then set for 2 and 3 November 1998: Dr Toben was advised of the dates but continued to indicate he would not be attending the hearing nor calling any witnesses. However, on 28 October 1998 Dr Toben forwarded to the Commission a copy of a lengthy document (390 pages) by J S A Hayward, submitted to the University of Canterbury in part satisfaction of the requirements for a Master of Arts degree. The thesis is entitled "The Fate of the Jews in German Hands: An Historical Enquiry into the Development and Significance of Holocaust Revisionism". The thesis appears to be unpublished and is dated 1993. Dr Toben at this time indicated he wished to provide to the Commission two other books which he indicated would be provided at the hearing. When the public hearing of this inquiry commenced on 2 November 1998 Dr Toben did attend at the inquiry. He represented himself. The complainant was represented by Mr Rothman SC.

2. ISSUES FOR THE INQUIRY

2.1 The Legislation

The complaint made by Mr Jones was that the material contained in the Adelaide Institute website was contrary to section 18C of the Act. Section 18C is contained within Part IIA - "PROHIBITION OF BEHAVIOUR BASED ON RACIAL HATRED". This Part of the Act came into operation on 13 October 1995. The relevant sections of that Part to this inquiry are sections 18B, 18C, and 18D. 18B If:

(a) an act is done for 2 or more reasons; and

(b) one of the reasons is the race, colour or national or ethnic origin of a person (whether or not it is a dominant reason or a substantial reason for doing the act); then, for the purposes of this Part, the act is taken to be done because of the person's race, colour or national or ethnic origin.

18C(1) It is unlawful for a person to do an act, otherwise than in private, if: the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and the act is 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.

18C(2) For the purposes of subsection (1), an act is taken not to be done in private if it: causes words, sounds, images or writing to be communicated to the public; or is done in a public place; or is done in the sight or hearing of people who are in a public place.

18C(3) In this section: "public place" includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for the admission to the place.

18D Section 18C does not render unlawful anything said or done reasonably and in good faith: in the performance, exhibition or distribution of an artistic work; or in the course of any statement, publication, discussion or debate made or held for any general academic, artistic or scientific purpose or any other genuine purpose in the public interest; or in making or publishing: a fair and accurate report of any event or matter of public interest; or 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 statement."

2.2 Issues Raised by the Respondent

In the directions conferences prior to the public hearing of this matter, Dr Toben raised two particular matters which he claimed were central to his response to the complaint. Both were related, although they raised different issues as matters of law. The first was raised somewhat tangentially by Dr Toben on a number of occasions, but specifically at the directions conference on 27 November 1997. On this occasion Dr Toben indicated he wished to make submissions on the validity of the legislation contained in Part IIA of the Act. At that directions conference I indicated to Dr Toben that as an Inquiry Commissioner I was not empowered to determine any question as to the validity of Commonwealth legislation, as the Commission does not constitute a court for such a purpose. The second issue which permeated Dr Toben's response, both in terms of the evidence which he wished to adduce before the inquiry and his objection to the process and direction which I adopted in the course of the inquiry, was that "truth is a defence".

2.2.1 Validity of the legislation

The issue of the constitutional validity of Part IIA of the Act might be raised by the development in the High Court of Australia of the constitutionally entrenched freedom of political communication, implied from terms of the Australian Constitution: (see in particular, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, and other related cases). It is my view it is clear that as a Commissioner exercising power under an Act which does not entail any investment of the judicial power of the Commonwealth as set out in Chapter III of the Constitution, I am unable to comment in any meaningful way on the validity of this legislation. It is appropriate that I assume the constitutional validity of the legislation which I am required to apply: (see *Re Adams and the Taxation Agents Board* (1976) 12 ALR 239, per Brennan P). This is a well established principle and one which, with respect, I accept. It was pursuant to this principle I advised Dr Toben I would not entertain his submissions on the validity of the legislation, as in my view such submissions are misplaced and must be made more appropriately before a court exercising the judicial power of the Commonwealth. As I understand it, no such challenge to the validity of Part IIA has been made before a court of appropriate authority. Nevertheless, it is appropriate to give some consideration to the principles relating to the implied freedom of political communication, as I take the view Parliament would not have enacted legislation which was intended to operate contrary to the constitutional principles limiting the exercise of its power. Those principles are usefully summarised by the High Court in *Lange's* case at pages 567-8, where the Court set out the relevant questions to be considered in determining whether the principle had been infringed: "First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s.128 for submitting a proposed amendment of the Constitution to the informed decision of the people... If the first question is answered "yes" and the second is answered "no", the law is invalid." The relevant consideration to my mind is whether the restrictions imposed by Part IIA of the Act do effectively burden freedom of political communication in a way which is not reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with representative and responsible government in Australia. I note section 18D (set out above) sets out a number of exemptions which apply in relation to material which would otherwise come within the proscribed behaviour defined in section 18C: it would appear these exemptions are included in the Part for the purpose of addressing the issue of making the law reasonably appropriate and adapted to serve the legitimate ends of preventing the form of racial discrimination sought to be proscribed by this Part. Without making any determination (as I am unable to do) on the issue of validity, I do accept Parliament in passing this legislation addressed its mind to the issue of what Dr Toben described as "freedom of speech", and which the High Court describes as freedom of political communication guaranteed under the Australian Constitution. In considering whether the complaint before me comes within the scope of Part IIA of the Act, it is appropriate I interpret the relevant provisions (sections 18C and 18D) in the light of these constitutional limitations on the assumption Parliament intended them to be read and applied in that context.

2.2.2 Truth as a Defence

Dr Toben raised on a number of occasions the issue of whether "truth is a defence". He did so both in the context of the material which he wished to present before this inquiry and in a criticism of my conduct of the inquiry and of the Commission and its processes generally. Dr Toben wished to adduce evidence before this inquiry as to "the truth" of "the alleged Holocaust" (his expression). I indicated to Dr Toben that was not the issue before me or the issue I had to determine under the Act. My view is that I am required to determine whether a public act has been carried out by Dr Toben which "is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people", and further whether if that is the case, that act has been done because of the "race, colour or national or ethnic origin of the other person or some or all of the people in the group". The "truth" of an assertion made is not the only factor which the legislation requires to be taken into account in making this determination. It may well be the case that even if an assertion is "true", it might still bring section 18C into operation. The "truth" may be more relevant to the operation of section 18D, which provides an exemption from the unlawfulness established by section 18C. I shall address this issue and in particular section 18D below.

3. THE PUBLIC HEARING OF THIS INQUIRY

3.1 The Conduct of the Inquiry

Following the pre-hearing procedures set out above, the public hearing of this complaint was conducted by me in Sydney on 2 November 1998. Dr Toben had indicated for some months he did not intend to participate in any further aspect of the inquiry, but shortly before the date of hearing he provided substantial

documentation to the Commission and indicated he wished to place other material before the inquiry. However, he did not advise whether he would attend the inquiry to make submissions or give evidence, or whether he would be calling any of the witnesses whom he had indicated earlier he wished to give evidence in support of his own response to the complaint. Dr Toben did attend the inquiry on 2 November 1998. Mr Jones also attended, and he was represented at the inquiry by Mr Rothman. Dr Toben was unrepresented, and indicated he would not be calling any witnesses. Mr Rothman indicated only Mr Jones would be giving evidence for the complainant. Dr Toben was advised the complainant would present his case and Dr Toben would have an opportunity to cross-examine Mr Jones. If he gave evidence, he would be subject to cross-examination by the complainant. Subsequent to evidence being given, submissions would be sought on issues of law. Dr Toben indicated he wished to provide as evidence before the inquiry the thesis by Mr Hayward which he had forwarded to the Commission shortly before the hearing, and two other books. I indicated to him the complainant needed an opportunity to examine the documentation he proposed placing before me and it was very late in the conduct of the inquiry to be placing documentary information before the Commission, particularly in light of the very extensive pre-hearing processes which had occurred. Dr Toben made some complaints concerning a recent publication in The Australian Jewish News of 30 October 1998, which he asserted involved some defamatory statements concerning him, and placed before me a large bundle of documentation which he invited me to look through and on which he commenced to comment. Dr Toben then advised the inquiry that he had a "moral problem", and made the following comments: "If the truth is no defence before this Commission, then the lie must obviously prevail, and that is a moral problem I have." "Because our behaviour, if we have no truth as a defence, is immoral. We cannot proceed with these proceedings if we are moral persons, because truth is no defence." Dr Toben then described the inquiry as "an inquisition", and said he had come to the hearing because he wanted to continue in placing his arguments but "I can't if you can't give me that assurance". He described the inquiry as "an immoral outfit" and concluded: "It's immoral what you're doing. The Commissioner: Okay Dr Toben: Highly immoral and improper. Truth is no defence. Truth is therefore relegated nowhere except the lie flourishes. We can't go on and yet you will. The Commissioner: Mr Jones will have to establish his complaints to my satisfaction. Dr Toben: I shall leave it to you, Commissioner. I beg to be excused. The Commissioner: That's your choice, Dr Toben. Dr Toben: As I said, if truth is no defence, the lie must prevail. Goodbye gentlemen. Mr Jones and Mr Wertheim, they didn't even say good morning to me - or they didn't even shake hands. What rudeness. Right? The Commissioner: I'm sorry if they have been discourteous to you, Dr Toben, that you may feel that. Dr Toben: Thank you." Dr Toben then left the inquiry and did not return. After Dr Toben left the inquiry proceeded in his absence. Mr Rothman made certain submissions concerning the complaint and the requirements of the legislative provisions. He then tendered a number of documents as evidence before me. This included the contents of the website of the Adelaide Institute as at 31 May 1996: <http://www.adam.com.au/fredadin/adins.html>. He also tendered a witness statement from the complainant, Jeremy Sean Jones, and two articles: Michael Shermer Proving the Holocaust. The Refutation of Revisionism & the Restoration of History (Skeptic, 1994, Vol 2, No 4) and Jeremy Jones Holocaust Denial: "Clear and Present" Racial Vilification ((1994) 1 Australian Journal of Human Rights 169). Mr Jones also gave sworn evidence at the inquiry. At the conclusion of Mr Rothman's oral submissions and the presentation of the complainant's evidence, a timetable was set for the provision of written submissions on the law. It was agreed the complainant would make written submissions on the law to be filed with the Commission and provided to the respondent by 6 November, with a response from the respondent to be filed with the Commission and provided to the complainant by 13 November. It was understood further arrangements could be made, if appropriate, for a further reply and for any further conference necessary to address the submissions. The complainant did provide written submissions but not until 2 March 1999. Dr Toben was provided with a copy of these written submissions and asked for any response by 12 March 1999. He did not provide any response. However in the week immediately following the hearing, Dr Toben wrote to the Commission seeking leave to tender the two books to which he had referred in his opening remarks at the hearing but which he had not tendered. Dr Toben has given no indication of the relevance of this documentation and it had not previously been provided to the complainant. The complainant opposed the acceptance into evidence of this documentation after the public inquiry had ended. I did not accept as evidence the two books Dr Toben wished to tender. In my view Dr Toben had every opportunity in the twelve months of the adjournment of the matter subsequent to the vacating of the previous dates for hearing to advise of any material he wished to have before the inquiry, but he did not provide this material to either the Commission or the complainant until either very shortly before or at the hearing. It was when this issue was discussed with both parties at the hearing Dr Toben announced he would no longer participate in the hearing process and withdrew from the hearing without tendering the documentation on which he wished to base his response. In the absence of any submission from Dr Toben at the hearing as to the relevance of this documentation, the complainant is unable to make any response to it, and nor am I in a position to adduce its relevance.

Further, it would be inappropriate to accept evidence at this stage. My view was if the books were accepted into evidence it would be necessary to re-convene the hearing to hear submissions from Dr Toben on their relevance: Dr Toben had already abruptly left two hearings, refusing to address the matters for which those hearings had been convened, and had on numerous occasions expressed the view that he would not participate in the inquiry. Under those circumstances the material was not accepted as evidence. Subsequent to these events, Dr Toben wrote to me at the Commission as follows:
`12 March 1999

Dear Ms McEvoy

You should perhaps get a grant for a travel tour of Poland and Ukraine to then more effectively assess what our conflict is all about. I mentioned my HREOC conflict to a number of people from all walks of life - and they laugh because it reminds them of the Stalinist show trials and its aftermath - until the ideology crumbled. Now Poland and Ukraine suffer from exploitative capitalism. Jeremy Jones' aim - ``to stop them from functioning" meaning to silence his critics by using words such as ``anti-semite" ``hater" ``racist" and ``anti-Jewish" - is in the true Leninist-Stalinist tradition, and has no place in Australia! Jones tells lies about the Auschwitz concentration camp - and any judgment from you in his favour would support such lies. Do you want to be known as a supporter of liars? Regards Fredrick Toben" I include the text of this letter from Dr Toben not as evidence before me in this matter but rather to indicate his ongoing though spasmodic contact with the Commission and because it illustrates the general tenor with which Dr Toben conducted these contacts during the course of this inquiry. It is dated on the date on which his response to the complainant's submission was due, so I take it as constituting his response.

3.2 The Evidence

At the inquiry I had before me as evidence the material to which I have referred above. In addition Jeremy Sean Jones gave sworn evidence in support of his witness statement and to address certain issues raised by me and in questions from Mr Rothman. I also had before me material provided by Dr Toben on 4 November 1997. This material constituted 41 pages of commentary and explanation. It was not tendered by Dr Toben, but at the hearing I indicated I would regard it as a submission made by him for me to take into account. However, it is difficult to regard it as constituting evidence other than in a broad sense. Dr Toben also provided large numbers of other documents but tendered none to the inquiry.

3.2.1 The Evidence of the Complainant

At the hearing Mr Jones tendered a witness statement setting out the matters which he wished me to take into account in support of the complaint. Mr Jones had provided this witness statement in October 1997, and he gave sworn evidence in support of this witness statement. Mr Jones attests that because of his elected position within the ECAJ and his circumstances within the Jewish community, he receives numerous unsolicited communications from Jewish Australians when they believe they have encountered anti-Semitism. He states he received complaints about the Adelaide Institute website and that it contained anti-Semitic material which was grossly offensive, insulting and derogatory from 1 May 1996. His first complaint had been from ``a distressed child of a Holocaust survivor". At the request of members of the Jewish community in Sydney, Melbourne and Adelaide, ``the matter of the offence and distress caused by the Adelaide Institute web-site was listed for discussion at a meeting" of the ECAJ on 16 May 1996, and ``it was the unanimous view of that meeting that the web-site contained offensive material", and the organisation determined to make a representative complaint to this Commission. Much of the witness statement represents a submission on legal issues which were raised before the inquiry orally and later in writing by Mr Rothman. In his sworn evidence Mr Jones told the inquiry that when he became aware the matter was proceeding to a hearing, he made enquiries over the Internet as to the possible academic standing of research such as that engaged in and promoted by Dr Toben on the Adelaide Institute website. Mr Jones said he sent Internet messages out on a series of academic Internet lists and estimated he reached up to 1,000 researchers and academics in different institutions around the world. The question he asked was, ``Was anybody aware of any academic or other educational institution in the world where a Holocaust denial or Holocaust revision was considered genuine academic research?". Mr Jones said of those answers he received, there was consistently a rejection that such an area of academic research existed. The institutions he approached included United States, Canada, Spain, Belgium, Germany, France, United Kingdom, Australia and New Zealand. Mr Jones referred to the academic lists as ``a very commonly used instrument" for seeking information from academic institutions. Mr Jones also told the inquiry he had originally been alerted to the Adelaide Institute site by very distressed members of the Australian Jewish community. He said those who made complaints to him ``were having difficulty in expressing their feelings

of pain and hurt at seeing this material emanating from an Australian Internet site". Mr Jones said he personally was not unused to seeing such material because of the work which he undertook, but he considered the organised and extensive way in which the Adelaide Institute site collected and disseminated the material through the Internet had a different impact from individual or isolated examples of anti-Semitism. The material on the Internet "was material which was going to the world, in effect, which was saying, 'You are part of a conspiracy because you're a Jew, that if anyone committed an evil act and they happened to be Jewish it's because of their Jewishness that they committed that evil act', and it was saying that 'you are now confronting someone who is going to challenge your right to live your life in this country and elsewhere free of harassment'." Mr Jones said, "that's what it said to me". Mr Jones believed the material published by Dr Toben on the Adelaide Institute website had an effect on the quality of life of many Jewish people in Australia. He considered the material to be not only insulting and offensive, but likely to cause many people to act negatively towards Jewish people in Australia. He said he believed it particularly affected many young Jewish people in Australia, and made many Jewish Australians feel profoundly anxious about the way in which other non-Jewish Australians viewed them and might treat them.

3.3 Submissions

Mr Rothman made submissions on both the facts before me in the material presented as part of this inquiry (which includes the content of the Adelaide Institute website as at 31 May 1996), and on the issues of law raised by the complaint. He preceded his initial submissions by rejecting Dr Toben's assertion the matter was concerned with the question of freedom of speech. He submitted Australian law, including the provisions of the Act, is predicated on a general right and liberty of freedom of speech, but subject to such restrictions as may be placed on it by the various Parliaments within Australia. One such restriction is contained in the Act in Part IIA. Mr Rothman pointed out these legislative proscriptions make exceptions in relation to academic, scientific and artistic debate, and other genuine debate in the public interest, and fair comment. He further submitted as a preliminary point that the "truth" of the history of Jewish people in Europe in the twentieth century was not the matter before this Commission. He submitted the complaint was not about the Holocaust or about how many people died at Auschwitz or elsewhere. Rather, the complaint before me is a complaint relating to offensive behaviour based on the race, colour, national or ethnic origin of a group of people, that is, those represented by the complainant. Mr Rothman submitted the crux of the material on the Adelaide Institute website is that Jewish people as a group "have embarked on a giant conspiracy and hoax relating to the Holocaust". Mr Rothman submitted that to say such an allegation entailed discussion of the Holocaust was "nonsense": "akin to saying that the allegation made in the Middle Ages that Jews poisoned water wells was about water quality". Mr Rothman submitted the subject matter of the complaint is not the issue of historical inaccuracy: rather it is a complaint that the presentation of Jewish people on the website is that they as a group have been involved in conduct which on any reasonable basis is reprehensible. In a document filed with the Commission dated 9 July 1997, Mr Jones in response to a direction from me, detailed in relation to the material on the website each specific "act" which he alleged breached section 18C of the Act. Mr Rothman made submissions on each of these. The first act complained of is that "the material generally on the website seeks to present the Nazi genocide not as a matter of fact but as an opinion held by a group of individuals acting with malicious intent, who are opposed by persons fighting to establish the 'truth'. ...A secondary claim which appears a number of times on the website is that the claims of Stalin and the Soviet Union in general are 'Jewish'." Mr Jones in his written submission of 9 July and later Mr Rothman submitted that "the Nazi Genocide is the subject of major ongoing historical investigation and continuing debate as to matters of detail. What is not a matter of historical debate is that a campaign of Nazi Genocide existed and that millions of non-combatant Jews were put to death at the hands of Nazis and their collaborators". The final submission concerning the general content of the website is that: "The Adelaide Institute website should be considered as a single document which seeks to further the "cause" of Holocaust Denial."(2) Mr Jones refers to the first sub-directory of the website (titled "About Adelaide Institute") as containing the claims that (a) the perceived knowledge of the Nazi Holocaust is nothing more than an "allegation" levelled by "defamers and libellers"; (b) there was a "Jewish-Bolshevik Holocaust", which is not referred to as "alleged", which shows that "Jews" are "murderers". The material in this sub-directory refers to the Holocaust as "an allegation", and refers further to the "alleged homicidal gas chamber story" and "alleged homicidal gassings", and that "those who level the homicidal gassing allegations at the Germans" are "defamers and libellers of the Germans". It concludes "there is no evidence that millions of people were killed in homicidal gas chambers". It was submitted that to describe the Holocaust as "an allegation" is to put in issue that it occurred. Mr Rothman submitted that although Dr Toben denied at a directions hearing that he was a "Holocaust Denier" and said rather he was a "Holocaust Revisionist", this was disingenuous, as he publicly aligns himself with Robert Faurisson, a French Holocaust Revisionist, whose summary of the Holocaust is adopted by Dr Toben: "No holes, no Holocaust!", referring to Mr Faurisson's assertion there were no holes in the ceiling of the alleged

gas chamber at Auschwitz, and therefore no ingress for gas. Mr Faurisson's conclusion is that without such holes, there could have been no gassings, and therefore "no Holocaust". Mr Jones' submission in his written document is that, "in context, the material ... seeks to maintain the vile argument that Jews have foisted on the world the myth that there was Nazi Holocaust and that a "Holocaust" was committed by Jews. The clear implication is that, in addition to being collectively guilty of fraud and extortion, Jews are also "murderers".

Mr Rothman referred to references by Mr Jones to specific newsletters contained on the Adelaide Institute website, in particular newsletters No 50, 56, 53, 54 and 57. In newsletter No 50 the Holocaust is described as an "evil lie" used to exploit "moral sensibility", promote "feelings of guilt" and extort money from the US Government and "German taxpayers". In newsletter No 56, among other things, the commentary refers to some Jews as "AshkeNazis", and makes direct comparisons between Jews and Nazis, and refers to the "Mezuzah-Monitored Machine-Gunfire of the American media". Mr Rothman explained at the inquiry the Ashkenazis constitute a group within Jewish culture, being generally that group which originally emanated from Central Europe. The use of the term AshkeNazis, spelt as in the Adelaide Institute Newsletter is, Mr Rothman submitted, a deliberate attempt to insult a significant part of the Jewish ethnic group. Mr Rothman also explained the Mezuzah is a Jewish religious symbol, and he submitted the article clearly identified Jews as deserving of contempt and hatred. In newsletter No 57, an Adelaide Institute Associate, David Brockschmidt, refers to "the idea of the Holocaust" as an "attempt to create a guilt complex for Christians". The writer also refers to "the Bolshevik Regime" which was responsible for persecutions of non-Jews, but which was "created and sustained by Jews". The material, in Mr Jones' written submission, "invokes anti-Jewish stereotypes, misrepresents Judaism and concludes with the implicit threat, 'if you can not come to terms with the dark side of your own history, then you will be history'."

Mr Rothman submitted the material in the context of the website argued that individuals who maintain that the perceived history of the Nazi genocide is not a myth are racketeers and maniacs. Mr Rothman also referred to material in newsletter No 50 where the Associate Director of the Adelaide Institute, Geoffrey Muriden, describes the Holocaust offensively as "the big H". In newsletter No 53, another article by Mr Brockschmidt, presented as an open letter to Mr Jones, makes similar statements. Further material in that newsletter includes a statement by Mr Jack King that "It appears in reality that God has 'chosen' Jews to demonstrate how people should not behave", and refers to a "Talmudic habit of deceit and manipulation". Mr King in this document further claims that "the Talmud condones lies, deceit, perjury, brutality, greed, vile obscenities, sodomy, paedophilia, bestiality, hatred of gentiles, Christians in particular, and sadistic killings of Christians simply because they are Christians". Mr Rothman submitted this material refers to Jews as a group, referring to people behaving in a particular way because of their character as Jews, and repeats accusations and libels against Jews as a group, which he submitted "could only be quintessentially that which racial vilification legislation is aimed at". In newsletter No 54 a letter from a contributor refers to "the pseudo-religious dogma of the 'Shmolocaust'", and, although it concedes it as "a fake", refers to "the Protocols of the Elders of Zion" as "a faithful documentation of the Judo-Communist methods of political subversion". Mr Rothman submitted that again this referred to Jews as a particular ethnic group, and by virtue of their membership in that sense of engagement in political subversion. He submitted the use of the word "Shmolocaust" is an offensive and intimidating remark, and clearly is intended to be such. Further material in this newsletter includes a comment that "Jews brought forth the homicidal ideology which enveloped half the planet like a cloud of poison gas and killed off a hundred times more than a lousy 6,000,000", and reprints two extracts from Mein Kampf. Mr Rothman submitted this minimised the obvious feelings of distress and hurt at the Holocaust and the "lousy 6,000,000". Mr Rothman's final submission in relation to the material contained on the site is that essentially the material "speaks for itself". He described the material as quintessentially the sort of material which the legislation is designed to proscribe. Mr Rothman also made submissions on the application of the legislative provisions to these facts and I deal with these below.

4. FINDINGS

4.1 Findings of Facts

The facts of this matter were essentially not in issue. Dr Toben acknowledged and indeed asserted he was responsible for the material which was placed on the Adelaide Institute website, and said he was responsible for all actions of the Adelaide Institute. Dr Toben proudly asserted the Adelaide Institute represented independent and international research into an important historical and sociological issue. It was this which formed the basis of his argument that the complaint by Mr Jones was one which threatened his right to freedom of speech, and which I understand forms the basis of a claim (which he did not articulate at the inquiry either in writing or orally) that if any of the material were caught by section 18C, of the Act it should come within the exemptions provided for in section 18D. I shall address this below. Taking this into account, as well as the other evidence before me, I make the following findings of fact: Dr Toben is the

Director of an unincorporated association the Adelaide Institute based in Adelaide. Dr Toben administers a website at <http://www.adam.com.au/fredadin-adins.html> and is responsible for the material and its content which appears on that website. The website is not password protected and is publicly available to any person who has access to the Internet. The website is easily accessible by any search engine under "Jews", "Holocaust", "Nazi" and other search words. Complaints were made to Mr Jones in both his personal and professional capacity by members of the Jewish community in Australia who had accessed the website and been offended, insulted and hurt by the material contained therein. Mr Jones was also offended, insulted, humiliated and intimidated by the material contained on the website, and he brought an action on his own behalf and on behalf of other members of the Jewish community represented by his and affiliated organisations. No recognised academic or educational institution within Australia or elsewhere recognises Holocaust denial or revisionism as genuine academic research, although it is not denied by the complainants that investigating any aspect relating thereto can constitute genuine academic research. The material contained on the Internet site is material which consistently presents Jews as a group of people who are engaged in a manipulation of the truth or an attempt to conceal or pervert the truth in order to obtain political, economic and other power. It consistently presents Jewish people as at the heart of "Stalinist crimes", and "Bolshevism". It suggests that sensitivity about matters relating to what is known as the Holocaust is an attempt to impose guilt on non-Jews, in particular Christians. It presents the circumstances known as the Holocaust as allegations or assertions, made and held by persons acting maliciously, dishonestly and manipulatively. Those persons so acting are unmistakably identified on the website as Jews, and further they are represented as so acting because they are Jews. The material has at its heart the proposition that the events of "the Holocaust" have been constructed, distorted and manipulated to create a myth for the promotion of the social, political and economic interests of the Jewish people, and suggests there is no evidence to support the existence of this interpretation of events. Material on the website also contains insulting and offensive expressions in relation to Jewish people and "the Holocaust" which are intended to be offensive and intimidating, and indeed have caused offense and anxiety. I accept Mr Jones' evidence concerning the effect of the contents of this website on the persons who made complaints to him, and indeed the effect it had on himself. I accept this ranged from extreme anxiety and distress and intimidation, to a more fundamental sense of social dislocation and unhappiness. Dr Toben did not challenge this evidence in any way other than to suggest that if Mr Jones were "hurt" by material "he should seek counselling". I also accept the submissions made in relation to the characterisation of the material on the website. There are many aspects of that material which are quite explicit in their denigration of Jewish people, and many other aspects of the material which make this clear by imputation. The central theme of the website is the assertion that the Holocaust is, in the terms in which it is generally understood, "a myth": Dr Toben's statement was that he was not a Holocaust denier but merely a revisionist seeking the truth. He told the inquiry at an earlier directions hearing that his concern was to make available on the website research which indicated far fewer Jewish people died in labour and concentration camps than had previously been understood (1.8 million, not 6 million), and that they largely died of natural causes and the types of disasters that often befell people in labour camps during war time. However, his central assertion is that there was no plan for the extermination of Jews, and certainly no action put in place to systematically eradicate them in the way which is presented as "the Holocaust". None of the material contained on Dr Toben's Adelaide Institute website is of an historical intellectual or scientific standard which is persuasive on these issues, and is largely expressed in highly tendentious and often offensive and insulting language about Jewish people which makes it difficult to give serious consideration to the propositions contained in it. It is this language which characterises the website and its material, and leads me to be satisfied that the material contained on the website has a consistent theme of the vilification of Jewish people.

4.2 Section 18C

Section 18C is set out above. For material or behaviour to be brought within the terms of section 18C, a number of factors must be established: there must be "an act" done by the respondent; it must be done "otherwise than in private"; it must be "reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or a group of people"; and it must be done "because of the race, colour or national or ethnic origin of the other person or some or all of the people in the group". The people in this group are Australians of Jewish origin. It was not contested in this matter that Australian Jews should be regarded as a group with common ethnic origins for the purposes of Part IIA of the Act: indeed, Dr Toben conceded this was the case early in the proceedings. I am satisfied to direct an act towards Jewish people in Australia is to direct that act towards people on the basis of their "ethnic origin" as Jews. I am satisfied this aspect of section 18C is therefore fulfilled. I am also satisfied "the act" of placing material on the Internet on the Adelaide Institute site and maintaining it there was an act undertaken by Dr Toben on behalf of the Adelaide Institute. Indeed, Dr Toben acknowledged this was the case. I am satisfied placing material on an Internet site which is not password protected and is generally available to any who can access an

Internet connection, is doing an act "otherwise than in private": it is my view the provision of material on a non-password protected Internet site is equivalent to publishing material in a newspaper. This is a public act. The two central provisions of section 18C relate to the nature of the act and its likely effect and its purpose. I am satisfied that placing the material of the type described above in Mr Jones' and Mr Rothman's written and oral submissions, was an act which was reasonably likely in all the circumstances to offend, insult, humiliate or intimidate persons of Jewish origin in Australia (and indeed beyond). I am satisfied it did have that effect on many Jewish people in Australia. I note the submission made by Mr Rothman that a very high proportion of Jewish people in Australia (approximately 40%) are Holocaust survivors or their direct descendants. Mr Rothman told the inquiry Australia has the highest proportion per capita of Holocaust survivors among its Jewish population outside Israel. He submitted that meant it was extremely likely the material placed on the Internet by Dr Toben would cause particular offense, insult, humiliation or intimidation among members of the Jewish community in Australia, and he submitted Dr Toben had to take the Jewish community as he found them, even if they were particularly sensitive to such an issue. He submitted the nature of the Jewish community in Australia was such that it was likely to be very sensitive to material which proposed that Jews as a group had perpetuated an evil lie about the occurrence of the Holocaust, and/or occasioned a Holocaust in the Soviet Union. He submitted these circumstances were such that it was reasonably likely that such material would be found to be offensive, insulting, humiliating or intimidating. I accept this submission: however, in my view, it is reasonably likely to be regarded as offensive, insulting, humiliating or intimidating, even without such a proportion of "Holocaust survivors" in the Jewish population. I do not think the issue of any particular sensitivity of Australian Jews is of relevance, given the extreme and offensive nature of the material. Section 18C(1)(b) requires the act to be done "because of" the national or ethnic origin of the group of people (in this case Australian Jews).

Section 18B must be read in conjunction with this requirement: I have set out section 18B above, but it provides that where an act is done for more than one reason, it is sufficient for the purposes of Part IIA that one of the reasons is the race, colour, or national or ethnic origin of the person, even if this is not the dominant or substantial reason for the doing of the act. The issue which arises in relation to section 18C(1)(b) is the meaning of the phrase "because of". While it is enough that ethnic origin is one reason for the act complained of and found substantiated, there must be a causative relationship between the ethnic origin of the persons offended, and the doing of the act. I am quite satisfied in this case that causative relationship is present: this material published by Dr Toben is material which vilifies a group of persons expressly by reference to their ethnic origin. I note in a matter recently decided by another Commissioner on a similar matter (*Hobart Hebrew Congregation and Jeremy Jones v Olga Scully*, 21 September 2000 Commissioner Cavanough), the Commissioner made the following comment on this issue: "In the present case, the relevant act is the distribution of material which vilifies certain persons (done repeatedly as part of a public campaign). The Jewishness of the persons vilified is not a mere "background factor"... . It brought about the vilification. The authors of the documents (and Mrs Scully is amongst them to the extent of her annotations and highlighting on the documents) disparaged the persons referred to in them because those persons were Jews. Further by distributing, selling and offering to sell the documents, Mrs Scully became responsible for their contents. She became a party to the disparaging of certain persons and groups of persons because they are Jews." Precisely the same comment is applicable to the contents of the Adelaide Institute website and Dr Toben's role here. The relevant act in this case is the placing of the material which vilifies a group of persons (Jews) on the Adelaide Institute website. The Jewishness of the group of persons vilified is not a mere "background factor". As in the Scully case, "it brought about the vilification". Dr Toben was an author of many of the documents, and he expressly took responsibility for the placing of all of the documents on the website. Dr Toben and the other authors "disparaged the persons referred to in them [the documents placed on the website] because those persons were Jews". Dr Toben, as did Mrs Scully, became responsible for the content of documents written by others by placing and publishing them on his Adelaide Institute website. Under those circumstances, Dr Toben was responsible for the content of the material, and a party to the disparaging of particular persons and groups of persons because they are Jews. Under these circumstances I am quite satisfied the publication of the material on the Adelaide Institute website for which Dr Toben is responsible is unlawful behaviour contrary to section 18C of the Act.

4.3 Section 18D

In directions hearings held prior to the public hearing of this matter, I invited Dr Toben to consider the application of section 18D in relation to his response to the complaint. He agreed he would do so but did not present any submissions or information which I was clearly able to take into account in this respect. However, in the presentation, in particular of the Hayward thesis (not tendered in evidence), and in his assertion that he was concerned to promote freedom of speech for himself and generally within the Australian community and on the Internet, I assume Dr Toben was raising the exemption contained within

section 18D of the Act. Section 18D provides that section 18C "does not render unlawful anything said or done reasonably and in good faith" in particular "in the course of any statement, publication, discussion or debate made or held for any genuine academic...or any other genuine academic purpose in the public interest", or in making or publishing a fair and accurate report of any event or matter of public interest, or 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. To establish that material which has been brought within section 18C (as has the material contained on the Adelaide Institute website) can come within this exemption, requires a number of factors to be established. The material (otherwise unlawful) must have been said or done reasonably and in good faith: this is the overarching requirement which applies to all aspects of the exemption set out in section 18D. Further, the material (to come within section 18D(b)) must be for a genuine academic purpose, in the public interest (my italics). To come within section 18D(c), a report must be "fair and accurate on a matter of public interest", or "a fair comment" on a matter "of public interest", and in circumstances where there is "an expression of a genuine belief held by the person making the comment". Section 18D presents a very difficult range of hurdles to be overcome by a person asserting that material otherwise unlawful as racially vilificatory contrary to section 18C, is nevertheless exempted from that determination of unlawfulness. Section 18D sets up a range of requirements based on reasonableness, good faith, genuine academic or other purpose, fairness, public interest, and a genuine belief in the opinion. Dr Toben faces two other hurdles in establishing section 18D applies in relation to the material he publishes on the Adelaide Institute website. In the first place, as an exemption to established unlawful circumstances, the onus is on Dr Toben as respondent to establish that the requirements of section 18D are made out. The onus of course is on the complainant to make out the terms of the complaint, but once the terms of the complaint are made out, as I am satisfied they are in this case, the onus to establish the exemption switches to the respondent. Dr Toben has taken no steps to discharge that onus, as he has presented no evidence. This brings me to the second issue. The second hurdle faced by Dr Toben is presented in section 25W of the Act: "In determining whether an act is unlawful by reason of a provision of Part II or Part IIA, the Commission is not required to have regard to any exception or exemption provided for in those Parts unless there is evidence before the Commission that the exception or exemption is or may be applicable to that act." The application of section 25W raises the issue of what evidence there is before me which may enable section 18D to become relevant. Dr Toben did not present any evidence at the inquiry: he insisted on leaving the hearing before the presentation of evidence commenced. Subsequent to the hearing he sought leave to tender two books which he had brought with him at the hearing but did not tender them. I subsequently declined leave to receive that evidence after the hearing had been completed, for reasons set out above. Although this Commission is not bound by the rules of evidence and may inform itself on any matter in such manner as it thinks fit (see section 25V of the Act), I am satisfied the material to which section 25W refers is material which must be presented in such a way that it can be examined at the inquiry and responded to by the other party. The Commission is of course bound by the rules of natural justice. Dr Toben did not present evidence of this form in any sense at all. Under these circumstances it is clear section 18D of the Act, which provides for the establishment of an exemption in relation to section 18C, formally need not come into operation at all, as there is no evidence relating to the exemption. Accordingly I do not need to consider whether the content of Dr Toben's website could fall within the exemption of section 18D. I am quite satisfied Dr Toben had every opportunity to present his case.

From the time of referral until the time final submissions were required, was a period of two years. The Commission maintained frequent contact with Dr Toben in that time, providing him with copies of all documentation provided by the complainant and all directions made by me.

Further, throughout that time it received various documentation from Dr Toben and others on his behalf. The matter was adjourned for a period of twelve months once Dr Toben had indicated he had "withdrawn" from the matter, although he continued to send material to the Commission. There were numerous telephone conferences and directions extending time for Dr Toben to provide material. Dr Toben was aware when the matter came on for public hearing in November 1998 that I would not hear evidence concerning what he chose to call "the truth of the matter", and in particular that I would not permit him to call certain witnesses whose evidence I had ruled was not relevant to the matters referred to the inquiry. He was aware of the issues which were to be addressed at the hearing and in the documents to be provided prior to the hearing, and which he agreed to provide. Dr Toben refused to continue to engage in any way on the two occasions when there was an in person hearing: the directions conference on 30 September 1997, and the public hearing on 2 November 1998, and he was not prepared to call any witnesses to that public inquiry. He was aware of the issues which had been clearly set out in both written material from the complainant and the Commission and in the oral discussions and subsequent directions made by me in the course of directions conferences held prior to the public hearing. Under these circumstances I am satisfied Dr Toben

had ample opportunity to present his case including the presentation of any evidence or submissions he may have wished to make in relation to the application of section 18D of the Act. Nevertheless I will consider the application of section 18D as far as I am able. As I have set out above, section 18D has an overarching requirement in relation to all of its operation that the act sought to be brought within it must have been "said or done reasonably and in good faith". I would have very great difficulty in determining any of the material placed on the Adelaide Institute website by Dr Toben was put there "reasonably and in good faith". I note Dr Toben's reiterated assertions that he believed he was engaged in proper and open research and intellectual inquiry, and that this represented his genuine belief. However, part of my difficulty stems from Dr Toben's own behaviour before this Commission in the course of its inquiry, and subsequent to it (I refer in particular to the letter Dr Toben sent to me which I have quoted in full above). Dr Toben did not present as a person engaged in reasonable behaviour or in good faith in his conduct before this Commission, and in particular in his withdrawal from both the in person hearings. It is difficult to regard him as acting in good faith with his very late (even after the inquiry had concluded) provision of information. It is also difficult, whatever his subjective belief, to accept he has behaved reasonably and in good faith in considering the inflammatory and highly offensive nature of some of the material placed directly on his website, and further on the links Dr Toben has established between his website and other "hate sites" and "white supremacist" sites. It seems to me these links (which must have been placed there by Dr Toben) indicate a lack of reasonableness within the intention of the Act. Under those circumstances, it seems to me Dr Toben would have had to present a significant amount of evidence and in a different manner in which he dealt with the Commission and the inquiry in order to establish he had placed the offending material on the Adelaide Institute website reasonably and in good faith. I assume Dr Toben would not suggest the material on his website came within the scope of section 18D(a), but rather would have directed my attention to section 18D(b), which refers to statement, publication, discussion or debate "for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest". I am satisfied on the basis of evidence put before me by Mr Jones that the material contained on Dr Toben's website does not form part of any publication, discussion or debate in the context of any genuine academic purpose in the public interest. It is the case Dr Toben provided (although it was not in evidence before me) the Hayward thesis submitted at the University of Canterbury in part fulfilment of an MA degree: however, there is no information before me as to the circumstances in which this occurred, nor its outcome. Nor am I satisfied, in the absence of submissions in evidence from Dr Toben and any other witnesses, that the Hayward thesis falls clearly within this category. It may be Dr Toben may have presented an argument or even evidence that material dealing with the issues in which he has an interest is excluded by some way or means from mainstream academic debate for the reasons of which he has complained in this inquiry and on his website. He has not presented that argument or any evidence for it before me or in the materials he has provided. Moreover, the quality, nature and expression of much of the material placed on his website suggests that regardless of its content, it is unlikely to form part of any academic discussion or debate. Section 18D(c) refers to the making of fair and accurate reports, and fair comment. Again, the nature of much of the material contained on the Adelaide Institute website makes it very difficult to regard it as "fair and accurate report": indeed, most of it is not expressed in terms of "a report" of any kind, but rather as polemic and assertion. Dr Toben asserted he indeed held "a genuine belief" in the comments he made and the material he published on the website: however, Dr Toben's subjective genuine belief is not in itself sufficient. Not only must he hold a genuine belief (on which I make no comment), but the material must itself constitute "a fair comment" as well as be said or done reasonably and in good faith. I am satisfied the material is not said or done reasonably or in good faith, but in any event, most of it does not constitute "fair comment" in the sense understood by the law at all.

Again I refer to Commissioner Cavanough's conclusion on this issue in the Scully case: (at page 31) he concluded: "I do not think that a racial vilifier can be heard to say that he or she is acting "in good faith" for the purposes of s.18D merely because he or she honestly or sincerely believes that persons of the race (or ethnic group) concerned are inferior or evil by nature and that they should be made to suffer for that reason". I am satisfied the same considerations apply here. In reaching this conclusion I am also mindful of Parliament's apparent intent in passing the Part of the Act with which this inquiry is concerned. Section 18D refers not only to reasonableness, good faith and genuineness, but also, in (b) and (c), to "public interest". The behaviour proscribed in section 18C, and the provision in section 25W that the exemption of section 18D is not activated, so to speak, unless evidence is presented in its support, indicate that on any proper interpretation of the Act I should be slow indeed to accept that any racially vilificatory material, such as I have found the content of the Adelaide Institute website to be is in the public interest. I have indicated above it is my view section 18D is not applicable because of the lack of evidence placed before me by Dr Toben in support of it.

Further however, I have considered the possible material and submissions Dr Toben may have put before me had he remained for the course of the inquiry and presented his response to the complaint, and I am nevertheless satisfied that such arguments and material as I can discern would not be able to establish the exemption of section 18D would be available to him.

5. CONCLUSION

I am satisfied the complaint the subject matter of this inquiry has been substantiated and that the content of the website of the Adelaide Institute, both in the specific instances referred to in the complaint and in general, are unlawful as contrary to section 18C of the Act, as constituting offensive behaviour based on racial hatred. Further, I am satisfied the material contained on the Adelaide Institute website does not come within any of the exemptions set out in section 18D of the Act.

6. DETERMINATIONS

The complainant set out very specifically the determinations which were sought from this Commission. This was articulated as early as in documents filed with the Commission on 13 October 1997. The complainant sought determinations that the respondent has breached section 18C of the Act; that the material be removed from the Adelaide Institute website and any other website published by the respondent where it is accessible to members of the public; that the respondent be restrained from publishing or re-publishing the offending material; that any website published by the respondent permanently bear on its homepage an apology in terms set out by the complainant; that the respondent apologise to the complainant in terms specified by the complainant; and that the respondent undertake a course of counselling by a conciliation officer of this Commission.

I have given careful consideration to the appropriate determinations to make in this matter. In doing so I bear in mind the unusual nature of these proceedings and the relatively novel aspect of considering the publication of material contained on the Internet. I further bear in mind that determinations of this Commission are not of course enforceable, as this Commission is not a court (this is further acknowledged in section 25Z(2) of the Act). I am also influenced by the fact the complainant has not sought any monetary compensation for the hurt, humiliation and anxiety which I am satisfied the complainant and those whom he represented have suffered as a consequence of Dr Toben's unlawful act. In the context of enforceability, I am also conscious of the difficulties presented by the presentation of materials as in this case on the Internet, and the ease of placing such materials on the Internet outside the jurisdiction.

Under those circumstances, the material nevertheless remains available and accessible within Australia. However, I am quite satisfied the material published publicly by Dr Toben is quintessentially the type of material proscribed by section 18C of the Act. Dr Toben spoke in the course of this inquiry of freedom of speech, but it must be acknowledged that the freedom which he seeks in the material which he has published, deprives others of their freedom of speech, if they are so humiliated and intimidated they are no longer able to access that freedom. I am satisfied that is one of the consequences of the vilificatory, bullying, insulting, and offensive material contained on Dr Toben's Adelaide Institute website. Dr Toben also referred to freedoms in Australia: it is my view one of the freedoms promoted by the Racial Discrimination Act is that of diversity and tolerance. Dr Toben sought support for this diversity and tolerance for the promotion of his views and interests: however the form in which he has chosen to promote his views and interests are such that they do not accord tolerance and respect for the interests, rights, and freedoms of others. Under these circumstances, it seems to me appropriate to make a determination that Dr Toben cease the unlawful dissemination of this material on the Adelaide Institute website. In order to do this, the material must be removed from the website and not re-published elsewhere by Dr Toben. I am also of the view that, bearing in mind the very public nature of the publication of this material and the public way in which Dr Toben conducted his engagement in the inquiry process, it is appropriate that a public apology be provided to the complainant. This is particularly the case as no financial compensation is sought by the complainant. I also consider it appropriate that the apology should appear on the respondent's website, should this be maintained. The complainant also sought a determination that the respondent should at his own expense undertake a course of counselling by a conciliation officer of the Commission. I understand no such course of counselling is available and I shall not make any direction along those lines. Pursuant to section 25Z(1)(b) I make the following determinations: I find the complaint substantiated; I declare that the respondent Dr Fredrick Toben, representing the Adelaide Institute, has engaged in conduct rendered unlawful by section 18C of this Act in the publication of material racially vilificatory of Jewish people, on the Adelaide Institute's Internet site. This conduct is rendered unlawful by Part IIA of the Act; I declare that the respondent Dr Fredrick Toben, representing the Adelaide Institute, should remove the contents of the Adelaide Institute website from the World Wide Web and not re-publish the content of that website in

public elsewhere; I declare that the respondent Dr Fredrick Toben, representing the Adelaide Institute, should make a statement of apology to Mr Jeremy Jones and those members of the Jewish community of Australia whom he represented in this complaint. That apology should be made in writing to Mr Jones, and further should appear on the home page of the Adelaide Institute website. The terms of the apology are to be as follows: "I hereby unreservedly and unconditionally apologise to you and to the Australian Jewish community for having published materials inciting hatred against the Jewish people in contravention of the Racial Discrimination Act. I undertake that neither I nor any employee or agent of mine (actual or ostensible) will publish any such material in the future and that all such material which is presently published by me, or by any employee or agent of mine (actual or ostensible) in any print or electronic media (including the Internet) will forthwith be withdrawn from publication".

I certify that this and the preceding thirty-eight pages is a true copy of the Reasons for Decision of Ms Kathleen McEvoy, Inquiry Commissioner. Hearing Solicitor:
Date: 5 October, 2000