

*Rainbow Territory aims to develop a safer, fairer and a more inclusive Northern Territory.*

Committee Secretary  
Parliamentary Joint Committee on Human Rights  
PO Box 6100  
Parliament House  
Canberra ACT 2600



**By email: [18Cinquiry@aph.gov.au](mailto:18Cinquiry@aph.gov.au)**

23 December 2016

Dear Committee Secretary

**INQUIRY INTO FREEDOM OF SPEECH IN AUSTRALIA  
CLOSING DATE: FRIDAY, 23 DECEMBER 2016**

**Introduction**

We write on behalf of Rainbow Territory, a community group formed in September 2014 to advocate for the human rights of Northern Territorians who identify as Lesbian, Gay, Bisexual, Trans, Queer and Intersex ('LGBTQI').

**1. Background**

We note the terms of reference of this inquiry, as set out in the body of this position.

**2. Summary**

Rainbow Territory is of the position that the status quo should prevail, and that changes should not be made to 'dilute' the *Racial Discrimination Act*.

However, if it is decided by this government that the RDA should be amended, we would recommend strengthening the prohibitions on racial vilification in 18C and narrowing the exemptions in section 18D which, in our view, are too broad.

**3. Position Statement**

3.1 We regard this current inquiry as lacking in public support. We are very much aware of the harms of racist speech (extrapolated further below) and believe that the establishment of an inquiry with such antithetic terms of reference – whatever its outcome – gives the unfortunate negative messages that this government:

- (a) wishes to protect those who engage in racist hate speech or at the very least to protect speech that amounts to race hate speech;
- (b) does not support the protection of vulnerable minorities from the effects of hate speech, including with our own LGBTI community wherein members can experience intersectional discrimination (for example, on the basis of their sexual orientation and race);
- (c) wishes to give people the right to vilify vulnerable minorities, not for anything they have done, but solely on the basis of the target's supposed race or ethnicity;
- (d) wishes to give politicians the right to use racist hate speech not only within parliament but also outside of the protections conferred by parliamentary privilege;

- (e) sees hate speech as more important to protect than other restricted speech such as whistleblower speech;
- (f) sees personal freedom of speech as superior to other human rights including freedom from discrimination, the individual and collective right to the enjoyment of social and cultural rights and the right to be free from fear;
- (g) is happy to encourage racial vilification in any context including trade, commerce, investment and international affairs; and
- (h) does not wish to see the RDA enforced in the same way as other legislation against discriminatory activity.

Kiefel J held in *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 that s 18C requires the harm to involve '*profound and serious effects not to be likened to mere slights*' (at 16). Similarly, in *Eatock v Bolt* (2011) 197 FCR 261 at 263 Bromberg J held that s 18C is '*concerned with consequences it regards as more serious than mere personal hurt, harm or fear,*' being:

[M]ischief that extends to the public dimension. A mischief that is not merely injurious to the individual, but is injurious to the public interest and relevantly, the public's interest in a socially cohesive society.

- 3.7 It is important for the Committee to note the difference identified by the ALRC between the way in which the RDA is interpreted in practice by the courts, as opposed to the popular media (and political) misconceptions about the effect of section 18C (including the unfortunately common misconception that any subjectively perceived slight will establish an offence under the RDA).
- 3.8 It should also be remembered that Australia is alone amongst global democracies in not constitutionally protecting free speech as one of many competing human rights. Comments that the Australian RDA is overbroad (see for example par 4.193 of the ALRC Report) must therefore be seen against this lack of constitutional underpinning and balancing.
- 3.9 While an individual occurrence of racial vilification might not on its own appear to be dangerous or an incitement to violence, the Committee should be aware that racial hatred, and the violence to which it gives life, are built on the basis of multiple acts of racial vilification which have a combined or compounding effect. It is therefore important, as a form of social regulation in a multicultural society like Australia's, not to set the bar too high in opposing racist vilification.
- 3.10 We cannot emphasise strongly enough that racial vilification causes harm at many levels. Protecting people from that harm is an appropriate object of government legislation, as recognised by the *International Covenant on Civil and Political Rights* and the *International Convention on the Elimination of All Forms of Racial Discrimination*. Freedom of expression is not an absolute right and preventing the harm caused by racist speech is of sufficient importance to warrant appropriate restrictions on freedom of speech as in sections 18C and 18D of the RDA.

#### 4. Racial Discrimination Act

*Whether the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) imposes unreasonable restrictions upon freedom of speech [as defined], and in particular whether, and if so how, ss. 18C and 18D should be reformed*

- 4.1 We do not believe that the operation of Part IIA of the RDA imposes unreasonable restrictions upon freedom of speech (in the sense suggested by the terms of reference).
- 4.2 We do not believe that ss 18C and 18D need reform but, if those sections are reformed:
  - (a) redrafting should strengthen s 18C and reduce the exemptions in s 18D. In

particular, the defence of “genuine belief” in s 18D(c)(ii) should be removed, particularly because of the internal tension in that sub-clause with the concept of a ‘fair comment’; and

- (b) the two sections should be combined so that politicians and commentators can no longer talk about the offence of racial vilification without referencing the extensive exemptions available in the current s 18D.

## 5. The complaints-handling procedures of the Australian Human Rights Commission: conciliation, not litigation

*Whether the handling of complaints made to the Australian Human Rights Commission (“the Commission”) under the Australian Human Rights Commission Act 1986 (Cth) should be reformed*

- 5.1 We see no reason why the complaints-handling procedures of the Commission should be reformed. To the best of our knowledge the Commission’s procedures generally work satisfactorily and with minimum cost and inconvenience to all parties. Indeed, the most recent case concerning s 18C, *Prior v Queensland University of Technology & Ors (No.2)* [2016] FCCA 2853, did not involve the Commission “bringing” the proceedings against the respondents (as erroneously suggested by the Prime Minister) but was a typical result of the failure of parties to a dispute to resolve their differences.
- 5.2 Should the Commission itself propose any clarificatory changes to the legislation, we would be likely to support those changes – as the Commission is in the best position to know what changes, if any, would assist in streamlining its procedures.

*in particular, in relation to: the appropriate treatment of:*  
 (i) *trivial or vexatious complaints; and*  
 (ii) *complaints which have no reasonable prospect of ultimate success;*

- 5.3 Trivial and vexatious complaints appear to be already covered under sections 20(2)(c)(ii) and 46PH (1)(c).
- 5.4 The two questions “*Whether the handling of complaints made to the Australian Human Rights Commission (“the Commission”) under the Australian Human Rights Commission Act 1986 (Cth) should be reformed, in relation to:*

- *... complaints which have no reasonable prospect of ultimate success [or]*
- *.... the relationship between the Commission’s complaint handling processes and applications to the Court arising from the same facts ”*

appear to entirely misunderstand the aim of the legislation.

- 5.5 The aim of the legislation is to encourage conciliation. For example, conciliation could involve assisting the perpetrator to understand how their words are capable of causing harm not just to the direct victims, but to the fabric of our society.
- 5.6 The aim of the legislation is not to facilitate “successful” court cases by victims of racial vilification. Indeed, the likelihood or otherwise of the victim being able to prosecute a successful court case against the perpetrator is irrelevant to the Commission’s educative and conciliatory role. The answer to each of these questions can only – so long as the Commission, through its President – holds the role of conciliator, be: “No”.
- 5.7 We do not believe there is any need to reform the legislation in order to ensure that:
- (a) persons who are the subject of complaints are afforded natural justice;

- (b) complaints are dealt with in an open and transparent manner;
- (c) complaints are dealt with without unreasonable delay;
- (d) complaints are dealt with fairly and without unreasonable cost being incurred either by the Commission or by persons who are the subject of such complaints,

because the legislation and the statutory role of the Commission ensures the above are given effect.

## 6. 'Soliciting' complaints

***Whether the practice of soliciting complaints to the Commission (whether by officers of the Commission or by third parties) has had an adverse impact upon freedom of speech or constituted an abuse of the powers and functions of the Commission, and whether any such practice should be prohibited or limited.***

- 6.1 It is unclear to us what is meant by "soliciting complaints to the Commission". If soliciting means people speaking about the Commission's functions and encouraging those who believe their relevant rights have been infringed to seek the Commission's assistance, then we would support retention of soliciting complaints. A vital function of the Commission is informing and educating people of their rights and responsibilities in relation to human rights.

***Whether the practice of soliciting complaints to the Commission (whether by officers of the Commission or by third parties) has had an adverse impact upon freedom of speech or constituted an abuse of the powers and functions of the Commission, and whether any such practice should be prohibited or limited***

- 6.2 It is not clear to us how encouraging victims of racist speech to seek the remedies to which they are entitled at law has an adverse impact upon freedom of speech. We submit that the terms of reference maintain an implicit argument that free speech is a superior human right, which we believe it is not. One can only assume that it would be the speech of persons who don't want the Commission to exist or succeed in its conciliatory tasks, and/or persons who want to use speech which amounts to an offence under the law who claim that free speech is being adversely affected by the RDA and the Commission.

***Whether the practice of soliciting complaints to the Commission (whether by officer of the Commission or by third parties) has had an adverse impact upon freedom of speech or constituted an abuse of the powers and functions of the Commission, and whether any such practice should be prohibited or limited***

- 6.4 We are concerned that the terms of reference appear to suggest that there should be any kind of prohibition or limitation in Australia upon any person - in any capacity - who encourages a person to pursue avenues of redress which are legally open to them. That would indeed be to restrict free speech. It would also be to undermine the rule of law.
- 6.5 The reference to "officers of the Commission" appears entirely inappropriate. It is clearly the role of the Commissioners, given their tasks of education, inquiry and promoting conciliation, to engage in public conversations about the work of the Commission and about human rights generally. In doing so they are not in any way abusing their powers or functions. It would be completely inappropriate to limit the speech of officers of the Commission in the manner suggested.
- 6.6 It is not clear what third parties are contemplated in the terms of reference or why third parties should be prevented from exercising their free speech rights and enforcing the RDA. Regardless, we would not wish to prohibit or limit the ability of third parties to solicit complaints to the Commission.
- 6.7 In the context of the RDA, the Commission's role is to educate perpetrators of racist

speech and conciliate disputes in a way that promotes social harmony and removes racist speech from Australian society. Such speech is harmful both directly to the recipients and indirectly hurtful to Australians. Racist speech is not just offensive. It is well known that racist speech has many undesirable effects. It chills the free speech of victim groups. It disempowers their members. It makes them fearful and reluctant to fully engage in our democratic political system. It encourages others to act against minority groups, and ultimately to use violence against them. It undermines our democracy. By discouraging this speech, the existing legislation, and the Commission, fulfill an enormously important social function.

## **7. Conclusion**

In conclusion we wish to express our very profound concerns that the terms of reference for this inquiry appear to suggest that the right to freedom of speech is superior to the right to freedom from discrimination, in particular in the form of racist vilification.

Freedom of expression is not an absolute right and preventing the serious harm caused by racist speech is of sufficient importance to warrant appropriate restrictions on freedom of speech as currently contained in sections 18C and 18D of the RDA. We thank the Australian Lawyers for Human Rights for their considered and eloquent submission, which we have relied upon as a precedent for our own.

We also encourage consideration of creating provisions such as 18C and 18D in other anti-discrimination legislation to protect other groups from vilification, including the LGBTI community. Please email us at [lgbtqi2014nt@gmail.com](mailto:lgbtqi2014nt@gmail.com)

Yours faithfully,

*Rainbow Territory Committee*