

r e c o n c i l i a t i o n



v i c t o r i a

Level 2, 112 Langridge Street
Collingwood VIC 3066

5 December, 2012

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

By email: 18Cinquiry@aph.gov.au

Dear Committee Secretary

INQUIRY INTO FREEDOM OF SPEECH IN AUSTRALIA

Introduction

Reconciliation Victoria was established in 2002 as a result of a people's movement in Victoria to continue the unfinished business of reconciliation. We are the statewide body promoting reconciliation and act as a focal point for advancing deeper understanding, respect and justice for and with Aboriginal and Torres Strait Islander peoples.

We support a network of 27 Local Reconciliation Groups and also cooperate with other State Reconciliation Councils and Reconciliation Australia as the Australian Reconciliation Network, sharing information and ideas and working together on issues of joint advocacy.

Reconciliation Victoria believes that all Australians should be able to live their lives free from discrimination, and as an organisation will continue to fight to address issues of racial discrimination. Freedom from discrimination will help support efforts to close the gaps in health, education and other outcomes between Aboriginal and Torres Strait Islander peoples and other Australians.

1. Background

We refer to the terms of reference of this inquiry, being as follows:

1. Whether the operation of Part IIA of the *Racial Discrimination Act 1975* (Cth) (the "**RDA**") imposes unreasonable restrictions upon freedom of speech [*taking into account the meaning given to that phrase below in the Terms of Reference*], and, in particular whether, and if so how, ss 18C and 18D should be reformed.
2. Whether the handling of complaints made to the Australian Human Rights Commission ("the **Commission**") under the *Australian Human Rights Commission Act 1986* (Cth) (the "**HRC Act**") should be reformed, in particular, in relation to:

- a. the appropriate treatment of:
 - i trivial or vexatious complaints; and
 - ii complaints which have no reasonable prospect of ultimate success,
 - b. ensuring that persons who are the subject of such complaints are afforded natural justice;
 - c. ensuring that such complaints are dealt with in an open and transparent manner;
 - d. ensuring that such complaints are dealt with without unreasonable delay;
 - e. ensuring that such 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;
 - f. the relationship between the Commission's complaint handling processes and applications to the Court arising from the same facts.
3. 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.
 4. Whether the operation of the Commission should be otherwise reformed in order better to protect freedom of speech and, if so, what those reforms should be.

The Committee is asked, in particular, to consider the recommendations of the Australian Law Reform Commission (the "ALRC") in its *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* [ALRC Report 129 – December 2015], in particular Chapter 4 – "Freedom of Speech" [in this submission, "the Report"].

"Freedom of speech" is stated to include, but not be limited to, freedom of public discussion, freedom of conscience, academic freedom, artistic freedom, freedom of religious worship and freedom of the press.

2. Summary

Reconciliation Victoria's reply is 'no' to all of the questions in the terms of reference.

However, if it is decided by this government that the Racial Discrimination Action (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 overbroad.

3. Position Statement

- 3.1 We do not support the Attorney-General's referral of the above questions to the Joint Committee. Australians made their support for legislation against racial vilification very clear two years ago in response to the proposed *Freedom of Speech (Repeal of s. 18C) Bill 2014* which proposed major changes to section 18C of the RDA. Moreover, we find the terms of reference extraordinary in that they appear to oppose the proper enforcement of the RDA and thereby appear to seek to undermine the rule of law and the statutory role of the Commission.
- 3.2 We therefore regard this current inquiry as unnecessary, misconceived and lacking in public support. We are very much aware of the harm caused by racist speech (extrapolated further below) and believe that amendments to the RDA:
 - (a) could protect those who engage in racist hate speech or at the very least to protect speech that amounts to race hate speech;
 - (b) would no longer support the protection of vulnerable minorities from the effects of hate speech;
 - (c) 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) give politicians the right to use racist hate speech not only within parliament but also outside of the protections conferred by parliamentary privilege;
 - (e) position hate speech as more important to protect than other restricted speech such as whistleblower speech;
 - (f) position 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) encourage racial vilification in any context including trade, commerce, investment and international affairs;
 - (h) affect enforcement of the RDA in the same way as other legislation against discriminatory activity.
- 3.3 We do not believe that it is appropriate for the inquiry to focus only upon the RDA and the HRC Act when there are innumerable other federal laws which seriously impinge upon freedom of speech. Racist speech is undesirable and not worthy of protection. If any reform is needed it should be of federal laws which limit speech that is *not* intrinsically harmful. In its Report, the ALRC identifies a number of secrecy laws which it suggests be reviewed in this regard. The ALRC also stresses that any consideration of s 18C “should not take place in isolation” (4.209 and following), which appears to be the problem with this inquiry.
- 3.4 We deplore the constant attacks on Australian Human Rights Commissioners, particularly Professor Triggs, by members of the Australian Government and call on the Turnbull Government to cease these attacks forthwith. We regard the terms of reference as exposing an implicit and unjustified attack upon the Commissioners as explained further below.
- 3.5 We have considered Chapter 4 “Freedom of Speech” of the Report and nothing in the recommendations in that Chapter or flowing from it is inconsistent with our views.
- 3.6 The Report focuses on how the RDA is interpreted by the courts in the context of a reasonably high objective standard of harm (4.189 and following). The ALRC notes that 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:
- persons who are the subject of complaints are afforded natural justice;
 - complaints are dealt with in an open and transparent manner;
 - complaints are dealt with without unreasonable delay;
 - 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 What is meant by "soliciting complaints to the Commission"? Does it mean people speaking about the Commission's functions and encouraging those who believe their relevant rights have been infringed to seek the Commission's assistance? If so, we strongly support such behaviour. That is the whole point of having the Commission. Certainly such behaviours should not be prohibited or limited.

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 Nor is it in the least clear 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. Whose free speech would be "impacted"? What speech would be discouraged? Why do the terms of reference maintain an implicit argument that free speech is a superior human right? 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.

- 6.3 Why do the terms of reference evince no similar concern about discussing human rights abuses in the area of discrimination against women, for example? No one has suggested that to encourage women who are discriminated against to pursue their legal rights amounts to a restriction on free speech. How could it? The same reasoning must apply here.

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 It is extraordinary that the Attorney General's 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. We trust that we have misunderstood the question but cannot find any other meaning in it.
- 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 Nor is it 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. Is the implication that lawyers should not be able to give advice, or advertise that they can give advice, about legal avenues of redress in relation to racial vilification? That would be an outrageous restriction on the free speech of lawyers, the rule of law and lawyers' ultimate and supreme duty to the court, which would completely undermine the objects and administration of the RDA and leave victims of racial vilification without legal assistance. If this is not the meaning of the terms of reference, who are the "third parties" referred to?
- 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.

Such a position has no basis in international law, which clearly establishes human rights as interdependent, interrelated, indivisible and entailing both rights and obligations.

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 believe that any weakening of the RDA would be a step back in Australia's reconciliation journey, and will hinder efforts to close the gaps in health and other outcomes between Aboriginal and Torres Strait Islander peoples and other Australians, particularly given that:

- A recent VicHealth Report [Mental health impacts of racial discrimination in Victorian Aboriginal communities](#) found that the vast majority of Aboriginal Victorians experience racism regularly in shops, at school, at work or on public transport. The research found a strong correlation between these experiences and peoples' level of psychological distress, which in turn can impact their health, education, employment and other areas of their lives.
- According to Reconciliation Australia's [State of Reconciliation Report](#), released in early 2016, one in three 3 Aboriginal and Torres Strait Islander people reported experiencing racial abuse in the last 6 months.
- According to Close The Gap's 2016 [Progress and Priorities Report](#), of those that reported experiencing racial discrimination, 20% reported being treated in a racially discriminatory way by doctors, nurses and other staff in hospitals or doctors surgeries, and some reporting that they avoided seeking health care because of this.
- The [Mapping Social Cohesion 2016 Report](#) found that the overall number of people experiencing racism rose from 15% last year to 20% this year.
- In December 2016 Mission Australia released its [Annual Youth Survey results](#) revealing that racial discrimination was one of the most significant issues concerning young people in Australia. The report shows one in five Aboriginal and Torres Strait Islander young people reported experiencing discrimination on the basis of race or cultural background. Half the young people surveyed had witnessed someone else being unfairly treated or discriminated against in the last twelve months. 58% of these identified that the discrimination they witnessed was on the basis of race/cultural background.

Any weakening of Section 18C would open the door for a greater acceptance of racism in the community. Given that we have observed a sharp increase in the frequency and intensity of racist attacks and campaigns in recent years, what we need is a stronger stance to stamp out racism.

Please contact Reconciliation Victoria's Project Officer, Damian O'Keefe, if there is any area of this submission as to which we can provide further assistance.

Yours faithfully,




Belinda Duarte and Michelle Isles
Co-Chairs