

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

By email: 18Cinquiry@aph.gov.au

Dear Committee,

RE: Parliamentary Inquiry into Freedom of Speech

Thank you for the opportunity to make a submission to the Parliamentary Joint Committee on Human Rights in relation to its Inquiry into Freedom of Speech in Australia, which was announced by the Attorney -General on 8 November 2016,

Background

The Northern Territory Anti-Discrimination Commission (NT ADC) administers the *NT Anti-Discrimination Act*. We are a very small office charged with promoting the recognition of equality of opportunity in the Northern Territory (NT).

The NT is the only State or Territory that does not have its own legislative provisions covering race hate speech or race vilification. Therefore, any changes to the *Racial Discrimination Act 1975 (Cth) (the RDA)* will have significant local impact.

1. Whether the operation of Part IIA of the *Racial Discrimination Act 1975 (Cth)* imposes unreasonable restrictions upon freedom of speech, and in particular whether and if so, ss18 C and 18 D should be reformed.

Based on our strong relationships with NT communities, the NT ADC firmly believes the *RDA* does not require amendment and must be retained to ensure all Australians have a voice. At present, the right balance is struck by the current sections. Section 18C has been interpreted strictly, with conduct needing to be 'profound and serious' in its effects, rather than causing 'mere slights'.¹ Furthermore, section 18D provides

¹ Australian Human Rights Commission, *At a glance: racial vilification under 18C and 18D of the Racial Discrimination Act 1975 (Cth)* (2013) Australian Human Rights Commission
<<https://www.humanrights.gov.au/our-work/race-discrimination/projects/glance-racial-vilification-under-sections-18c-and-18d-racial>> and *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) at 268.

numerous exemptions on the bases of artistic expression, academic and scientific inquiry, fairness, accuracy and comments in the public interest, among others.

The framing of the sections adequately reflects the balance required of Australia by its international obligations to protect freedom of speech but also to protect its citizens from hate speech and more broadly race discrimination. The NT ADC is firmly of the view that section 18C and 18D do not unreasonably restrict free speech in Australia

Hate speech

NT ADC advocates for sections 18C and 18D to be strengthened to ensure hate speech in mainstream media, social media and on the streets of the NT does not silence the voices of communities who are most frequently vilified in these places. These include Indigenous communities, multicultural communities, new arrivals and members of Muslim and Jewish faiths.

An overwhelming body of recent research has clearly linked experiences of racial discrimination and racism with physical and mental harm. In 2015, a national survey of culturally and linguistically diverse (CALD) groups in Australia found strong connections between racism and negative health outcomes. BMC Public Health found experiences of racial discrimination were common for many CALD communities, and is associated with increased psychological distress, risk of mental illness and long-term health problems. It causes higher incidences of a range of mental health illnesses, including anxiety and depression.² Physically, there are connections to chronically elevated cortisol levels, high blood pressure and chronic stress.³ It can further cause hypertension, nightmares, post-traumatic stress disorder, psychosis and even suicide.⁴

The impacts of racial discrimination and racism are multi-faceted. Often, on a daily basis, members of CALD groups and Indigenous community are confronted with material which demonises, belittles and stigmatises them by perpetuating negative stereotypes. This functions to alienate them from society and inhibit their full participation. The flow-on effect for general society may, contribute to disharmony and prejudice.

² Ferdinand, A, Paradies, Y and Kelaher, M, *Mental health impacts of racial discrimination in Australian culturally and linguistically diverse communities: a cross-sectional survey* (2015) BMC Public Health 2015: 15: 401 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4412110/>>.

³ Berger, M and Sarnyai Z, *More than Skin Deep – stress neurobiology and mental health consequences of racial discrimination* (2014) The International Journal on the Biology of Stress Vol 18 2015 1 <<http://www.tandfonline.com/doi/abs/10.3109/10253890.2014.989204>>.

⁴ Jules, P et al, *Multiple Pathways Linking Racism to Health Outcomes* (2011) DuBois Review: Social Science Research on Race vol 8 issue 1 <<https://www.cambridge.org/core/journals/du-bois-review-social-science-research-on-race/issue/journal-dbr-volume-8-issue-1/8FE3880B9A76C3E535D65AA51A552700>> and Matsuda, M, *Public response to racist speech: Considering the victim's story* (1989) Michigan Law Review 87 (8) 2320-23381 <<https://www.jstor.org/stable/1289306>>.

Older legislation in other States and Territories in Australia utilises the incitement test, requiring a third party to be induced to take racially discriminatory action.⁵ This test does not cover a range of the common racially motivated hate speech and conduct which is seen on social media, main stream media and in public life. For example, the taunting of Indigenous AFL player Eddie Betts by a fan throwing a banana on the field⁶ would not be covered by the incitement test, even though the racially motivated elements of this behaviour are clear.

Community consultations

Due to the limitations of our small office and very short time frame for this Inquiry, we have not been able to discuss this Inquiry in-depth with local peak Indigenous bodies and multicultural groups. However during our limited consultations both in Darwin and Alice Springs with multicultural community and Indigenous peak no-one representing these groups believed the sections should be watered down or amended.

Many people had not heard of the Inquiry or the time frame to comment. To enable full consultation across the breadth of the NT a time frame much longer than two months is required.

2. 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 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 persons who are the subject of such complaints;**

⁵ Australian Human Rights Commission, *A quick guide to Australian discrimination laws* (2016) Australian Human Rights Commission <<https://www.humanrights.gov.au/employers/good-practice-good-business-factsheets/quick-guide-australian-discrimination-laws>>.

⁶ ABC News, *Football fan banned over banana thrown at Indigenous AFL star Eddie Betts* (21 August 2016) ABC news <<http://www.abc.net.au/news/2016-08-21/fan-banned-banana-thrown-at-eddie-betts-port/7769766>>.

Broad impacts of potential reform

In considering potential reform to complaint handling processes of the Australian Human Rights Commission (AHRC), the Joint Committee must consider the range of flow-on changes to other protected attributes, such as disability, sex, age and others. As stated in their submission to this inquiry, on average over the last five years, the AHRC has received 2,282 complaints per year. Around 5% of these complaints, or 117, are under section 18C.⁷ In 2015-2016, the AHRC received 77 racial discrimination complaints, compared to 1384 for disability, 421 for sex discrimination and 152 for age-based discrimination.⁸ Any changes to the process for racial vilification will change the process for all these groups. The scope of this inquiry has not sought the views of relevant stakeholder organisations and affected communities in this regard.

Challenges for the NT

In 2015-16, the AHRC received 3%⁹ of its complaints from the NT. The NT has unique challenges for people to complain about racial vilification because of its physical size, population dispersion and high levels of diversity. The NT is the third largest jurisdiction but has the smallest population at 244,900.¹⁰ The result is a population density of 0.2 people per square kilometre – the lowest in the nation.¹¹ For comparison, the average population density in New South Wales is 9.1 people per square kilometre.¹²

The NT is one of Australia's most culturally diverse regions. Our small population supports over 100 nationalities and some 50 social, cultural and religious organisations.¹³ Approximately 30% of our population is Indigenous, which is the highest proportion of any state or territory.¹⁴ Local pearling and fishing industries have

⁷ Australian Human Rights Commission, *Inquiry into Freedom of Speech* (2016) Australian Human Rights Commission 4 <<https://www.humanrights.gov.au/submissions/inquiry-freedom-speech>>.

⁸ Professor Triggs, G, *Annual Report 2015-16* (2016) Australian Human Rights Commission <<https://www.humanrights.gov.au/our-work/commission-general/publications/annual-report-2015-2016>>.

⁹ *Ibid.*

¹⁰ Australian Bureau of Statistics, *1462.7 Regional Statistics Northern Territory March 2011* (2011) Australian Bureau of Statistics <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/1362.7Feature%20Article1Mar%202011?opendocument#Aboriginal>>.

¹¹ Australian Bureau of Statistics, *3218.0 - Regional Population Growth Australia 2012-13* (2013) Australian Bureau of Statistics <<http://www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/3218.0Main%20Features102012-13?opendocument&tabname=Summary&prodno=3218.0&issue=2012-13&num=&view=>>>.

¹² Australian Bureau of Statistics, *3218.0 Regional Population Growth Australia 2011-12* (2012) Australian Bureau of Statistics <<http://www.abs.gov.au/ausstats/abs@.nsf/Products/3218.0~2011-12~Main+Features~New+South+Wales?OpenDocument>>.

¹³ NT Government, *Australia's Northern Territory – Multiculturalism* (2016) NT Government <<http://www.australiasnorthernterritory.com.au/living/pages/multicultural.aspx>>.

¹⁴ Australian Bureau of Statistics, *1462.7 Regional Statistics Northern Territory March 2011* (2011) Australian Bureau of Statistics <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/1362.7Feature%20Article1Mar%202011?opendocument#Aboriginal>>.

historically attracted many Malay, Filipino and Japanese workers, whilst the pastoral industry has been heavily supported by European labour. Migrations waves from Greece and China in the early days of our establishment as a city have all contributed to a deeply multicultural society.

People living in the Northern Territory seeking to complain about racial vilification may face the following barriers:

- language;
- literacy;
- access to technology;
- access to relevant accessible information;
- cultural barriers; and
- access to legal or other support services.

A fair and balanced complaint process must facilitate the barriers people in the NT and elsewhere in Australia can face in making a complaint. This is especially important as the NT has no racial vilification laws of its own. The AHRC is the only avenue by which this type of complaint can be made. This avenue is already very difficult for an Indigenous Territorians who may live 500-600km away from a small regional centre, whose first language is not English.

In our experience of complaint handling, Respondents are less likely to face the same systemic barriers as Complainants. They are often educated, articulate and may have access to legal or other support to address allegations made against them. The Joint Committee should be cautious in making recommendations aimed at addressing Respondent's needs and concerns without an appreciation of the impact this might have on potential complainants, particularly from the NT.

Racial vilification is a significant issue for Indigenous Territorians and the broader multicultural community. Feedback received by NT ADC is that if reforms are required, it should be to better ensure compliance with the *RDA*. Members of multicultural communities have told NT ADC they often feel they cannot complain for fear of repercussion. There have been particular concerns raised in regard to vilification at work, particularly for newly arrived migrants or people on working visas.

a. the appropriate treatment of:

- i. trivial or vexatious complaints; and**
- ii. complaints which have no reasonable prospect of ultimate success;**

Section 78 of the *Human Rights Commission Act (1986)* already provides for complaints to be closed because they are frivolous, vexatious or not made honestly. No further reform is required.

The case of *Prior v QUT & Ors*¹⁵ demonstrates that Respondents have the option to make an application for a summary dismissal if a matter does not resolve by conciliation. The test at this stage is whether the matter has a reasonable prospect of success. This is the right and appropriate place for this assessment in the complaints process. In this case, there was a delay of 14 months, but it is clear from the AHRC statistics that this is highly unusual. It would set an extremely concerning precedent to introduce wholesale changes because of one matter.

An assessment about the reasonable prospect of a matter succeeding cannot be taken at the time a complaint is filed without considerable delay and cost for both parties and the AHRC. This delay would inevitably prevent early conciliation and, in the NT ADC's experience, would reduce settlement of complaints, which is where the AHRC's expertise and focus should be. To replace the early conciliation process with a litigious process would undermine the objects and purposes of the establishment of the AHRC. It would also potentially silence members of the general community who feel they have grounds to complain but are intimidated by such a litigious initial test.

If recommendations are made to incorporate a test of this nature, adequate funding would need to be provided to the AHRC to provide free legal and advocacy services to redress the harshness of this change for individuals wanting to complain. It is suggested that financially this would not be a cost effective option.

b. ensuring that persons who are the subject of such complaints are afforded natural justice;

The NT ADC agrees all complaints should be afforded natural justice and has no reason to believe that this is not currently occurring. The Joint Committee should be satisfied that there is evidence of systemic failure before reforms are made that might reduce the flexibility of the process and cause unnecessary delay.

c. ensuring that such complaints are dealt with in an open and transparent manner;

The complaints process is confidential and it is important that it remains so. Within these constraints, the process should be open and transparent. The NT ADC has no reason to believe complaints are not handled in this manner. Again, the Joint Committee should be satisfied there is evidence of a systemic failure before introducing reforms with unclear ramifications.

d. ensuring that such complaints are dealt with without unreasonable delay;

The NT ADC agrees it is important that complaints are dealt with expeditiously, as early resolution of matters often produces the best outcomes for parties. However, we note that delay can occur because parties are seeking to resolve a complaint; caution should be exercised in viewing this as unreasonable delay.

¹⁵ *Prior v Queensland University of Technology & Ors* [2016] FCCA 2853.

Conciliation should be viewed as an educative opportunity in which parties can better communicate and seek genuine resolution of their dispute without being required to understand and tell their individual accounts through a legal lens. The process can be a vehicle for people to walk away with a better understanding of each person's view on what was said or done. This is in line with the objectives of the *RDA* and better aimed at changing societal views and fostering a more harmonious community. It is a safe setting for individuals to speak freely in an appropriately managed forum.

- e. **ensuring that such complaints are dealt with fairly and without unreasonable cost being incurred either by the Commission or persons who are the subject of such complaints;**

The NT ADC supports this proposition and believes the current complaint handling model of the AHRC reflects this objective in the majority of the complaints it handles.

- f. **the relationship between the Commission's complaint handling processes and applications to the Court arising from the same facts.**

The NT ADC believes the current relationship between the Commission's complaint handling process and the Court is an effective one. In their submission to this inquiry, the AHRC states that on average over the past five years, fewer than four complainants elected to take their matter to court under section 18C.¹⁶ This clearly indicates that the complaints process is an effective resolution model for a large number of complaints. This should be acknowledged and welcomed.

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.**

The NT ADC's submission on this matter is the term "soliciting" carries negative connotations which are not reflected in the activities of the AHRC or its various Commissioners as they go about their daily work of letting the Australian public know of their rights and obligations under various pieces of legislation.

All Commissioners promote a proactive preventive approach, whether the subject matter is racial discrimination, or age and disability-based discrimination. Relevantly also Commissioners have no role in the complaint handling process of the ACHRC, and the President is solely responsible for oversight of this function.

The AHRC provides an array of information to the public via reports, social media, presentations, talks to the community, and from people or organisations contacting the AHRC. The value of this contact is not only to provide information to people who may ultimately make a complaint but also to provide information to potential Complainants

¹⁶ Australian Human Rights Commission, *Inquiry into Freedom of Speech* (2016) Australian Human Rights Commission 4 <<https://www.humanrights.gov.au/submissions/inquiry-freedom-speech>>.

who clearly do not have standing. Contact outside the complaint handling process can also be a vehicle to resolve issues before a formal complaint is lodged.

Free information is also provided to potential Respondents on how to meet their obligations, so they can avoid complaints or be better positioned to respond to them. The AHRC has developed a number of very useful and practical guides to support potential respondents.

However, the continuum of this public education and awareness of rights and obligations is that there is, at the end of the day, legislation and a complaints process that exists if preventive measures do not work. The person cannot always resolve the matter themselves; this is the hard outer limit of the continuum.

It is entirely appropriate to advise when the public raises a matter of concern with a Commissioner or their staff for them to be referred to the complaints process of the AHRC. It is also essential that members of the general community can contact the AHRC for free and can be informed about the process and the general operation of the Act. The decision to make a complaint rests with the person but they have a right to know what their options are.

Feedback from the NT multicultural community is that education about racial vilification rates very highly as a means to addressing acts of racial vilification in the community. The framework provided by the *RDA* and the associated complaint process under the *Human Rights Commission Act 2005 (Cth)* provides the AHRC and its interstate counterparts with a vehicle to provide this education to the broader community.

The provision of information by the AHRC should be encouraged as it enables suitable referral, informed complainants and respondents and can be used to shorten the process¹⁷ or avoid the process all together.

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.

In its role in promoting Australia's human rights obligations and anti-discrimination, the NT ADC shares the views of the AHRC in arguing that freedom of speech, like all human rights, is never absolute.

Traditionally, the conception of human rights has always been reciprocal. In doctrinal legal thinking, there are both negative and positive freedoms – 'freedom from' and 'freedom to'.¹⁸ Human rights operate in concert – none are absolute and there is no

¹⁷ By getting all the necessary information from a Complainant early, or by providing an option for resolution before a complaint even gets lodged.

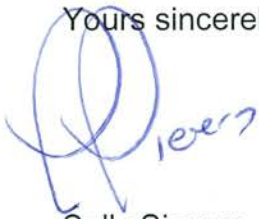
¹⁸ Carter, I, *Positive and Negative Liberty* (2016) Stanford Encyclopaedia of Liberty <<https://plato.stanford.edu/entries/liberty-positive-negative/>> and Berlin, I, *Four Essays on Liberty – Two*

hierarchy of freedoms. In this way, freedom of expression and freedom from racial vilification are inter-twined obligations.

The AHRC as set out in their submission has worked tirelessly to promote both freedom of expression and freedom from racial vilification as is expected of a National Human Rights Institution.

For the reasons set out above, the NT ADC advocates that there is no need to reform the AHRC complaint process or amend Part IIA of the *Racial Discrimination Act 1975* (Cth).

Yours sincerely,



Sally Sievers

Anti-Discrimination Commissioner

Northern Territory Anti-Discrimination Commission

23 December 2016

