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23 December 2016

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

By email: 18Cinquiry@aph.gov.au

Dear Committee Secretary,

Submission on Freedom of Speech and the Racial Discrimination Act

Liberty Victoria is grateful for the opportunity to make this submission on Freedom of Speech and the Racial Discrimination Act to the Parliamentary Joint Committee on Human Rights.

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty is actively involved in the development and revision of Australia's laws and systems of government. Further information on our activities may be found at www.libertyvictoria.org.au.

Introduction

There are two fundamental reasons why Liberty is committed to the value of freedom of speech. First, we believe that freedom of speech is essential for the maintenance of democracy and effective participation in it. Citizens cannot participate effectively in democracy unless

they have a reasonable understanding of political issues and problems. So, open debate about political and governmental affairs is essential.

Secondly, freedom of speech is crucial to the pursuit of truth. Society will more effectively ascertain accurate facts and valuable opinions in an atmosphere of free and uninhibited discussion, criticism and debate.

It is also well accepted, however, that freedom of expression should, in certain circumstances, be limited. So, as the jurisprudence around freedom of speech has developed, a number of reasonable limits have been identified. Freedom of speech may be limited, for example, in the interests of national security, public order, for the proper enforcement of the law, public health and public morality.

It is generally accepted that expression may be constrained to protect the rights or reputation of others, for reasons of privacy, and for the protection of fair trial. In each of these instances, the political and social value of freedom speech must be weighed in the balance against other competing and compelling public interests.

There are no general rules that enable us to adjudicate these competing claims. Decisions as to balance will always be influenced by the specific circumstances in which the competition takes place.

What we can say, however, is that *political speech* should be relatively immune from restriction because it constitutes a dialogue between members of the electorate and between the government and the governed. It is speech that is conducive to the effectiveness of constitutional democracy. So, a special place should be reserved for speech that is of public or political concern. Limits to it should be kept to a minimum.

The position is different, however, for speech that has only a tenuous connection to democratic deliberation. Racially hateful or discriminatory speech is speech of that kind. This is because racial hatred is, fundamentally, an attack on tolerant society and the right of everyone to equal respect and concern. Limits to it may more easily be justified.

It is considerations like these that should govern our contemporary discussion concerning the balance that should be struck between freedom of expression, on the one hand, and the provisions of the *Racial Discrimination Act 1975 (Cth)* (RDA) on the other.

It is regrettable, in our view, that over the last four years debate about the reach and limits of s.18C of the RDA has become ideologically driven, focused on personality and essentially pugilistic in nature. Because it has taken on that character, the legislature has lost an important opportunity to make a modest, yet constructive, set of reforms to the RDA.

The adoption of a limited set of reforms may, well before this, have created a more just, reasoned and sensible balance between the right to freedom of speech and the right of people of racial minorities to be free from racial discrimination than presently exists. Liberty hopes that current parliamentary inquiry will make an important and defensible contribution to the establishment of this better equilibrium.

The Section 18C matter

In a considered speech auspiced by the Australian Human Rights Commission, the former Chief Justice of New South Wales, Jim Spigelman, made two significant observations about the current debate in Australia with respect to freedom of speech and its relationship to s.18 of the RDA. He observed that the debate should not be confined to a consideration of the rights and wrongs of the Andrew Bolt case. Its terms must, necessarily, be deeper and wider than that. At the same time, however, serious consideration needs to be given to whether in Australia, the giving of offence or insult should be the subject of legal sanction. In Spigelman's view, there should be no right 'not to be offended'.

In this submission, Liberty addresses these two observations in turn. We then consider the proposal for reform of s.18C presented in 2014 by the Attorney-General Senator Brandis. We do this because the proposal was an object lesson in how not to formulate a reasonable answer to the question that s.18C presents. We look then at two recent cases brought under s.18C to determine whether and in what way lessons learned from those cases may inform the Committee's current inquiry. These are the QUT case and the Bill Leak cartoon case. Finally, we make some suggestions for the incremental reform of the Australian Human Rights Commission's (AHRC) present investigatory powers and procedures.

The Andrew Bolt Case

In extensive political and media commentary concerning the Andrew Bolt case, two matters have become tangled. The first is the content of Justice Bromberg's judgment in the case. The second is the desirability or undesirability of the racial prejudice provisions of the RDA that the judge had to apply. It's important to untangle them.

Justice Bromberg was required to interpret and apply the provisions of the RDA as written. In this respect his judgment was exemplary. It's worth examining closely.

The judge found that the following imputations were contained in the articles that Bolt wrote.

- The applicants were not genuinely aboriginal.
- Fair skin colour is sufficient to demonstrate that a person is not sufficiently aboriginal.
- The applicants, who had fair skin, had chosen falsely to identify as aboriginal.
- They had used their assumed aboriginal identity to advance their careers or political ambitions.
- They had deprived other people who were genuinely aboriginal of opportunities to which they may otherwise have been entitled.

In the case of the applicants, the judge found that every one of these imputations was incorrect. The question then was whether the imputations were reasonably likely to 'offend, insult, humiliate or intimidate' a person.

Having heard the evidence provided by the applicants, he concluded that an ordinary and reasonable person in their position was likely to be injured in some or all of the ways specified. Further, the harms concerned had been inflicted by virtue of the applicants' race. For these reasons, the judge concluded that a case of racially discriminatory conduct had been made out.

Some commentators have criticised the judgment because, in their view, the test for injury should have been whether an ordinary member of the public would have been offended or intimidated in the same or similar circumstances. It would be unfair, however, to use such a test.

An ordinary member of the public could in no way be expected to experience the harm caused by the wrongful denial of a person's racial identity in the way that the applicants, as members of the particular race and with their particular skin colour, had done.

The next question was whether Bolt could claim an exemption on the grounds that his articles constituted fair comment on a matter of public interest. To qualify for the exemption, under

s.18D, he had to demonstrate that he had acted ‘reasonably and in good faith’. Justice Bromberg determined that he had not.

This was because:

- the articles in question had contained multiple and serious errors of fact.
- They had distorted the truth.
- They were founded on inadequate and careless research.
- They had been written in a manner heedless of their racially prejudicial character.
- They had been expressed in inflammatory, provocative and derisory language.

In these circumstances Bolt could not be regarded as having behaved either reasonably or in good faith. The exemption could not be claimed.

Several commentators have suggested that in drawing these conclusions, Justice Bromberg had placed too great an emphasis on the style of language used. The argument has been that it should be open to opinion writers to express their views forcefully and provocatively as the means of making their point. There is considerable merit in this.

Just because an article is written in inflammatory or derisory tone should not, in and of itself, be sufficient to demonstrate an absence of reasonableness or good faith. Journalists and their editors should be free to determine the manner in which their editorial opinions should be expressed. Judges should not be looking over their shoulders to determine whether the form of an argument, as opposed to its content, is in all the circumstances appropriate.

Quite apart from this, some commentators critical of the RDA have gone further and suggested that Justice Bromberg’s decision itself delivered a substantial blow to freedom of speech. This is not so.

The judge was at pains to point out that nothing in his extensive reasons placed any restriction on future discussion of matters of relevance to racial identification. This included discussion of an individual or group’s identification as members of a particular race. The problem with Bolt’s opinion pieces was not that. It was that Bolt had been mistaken with the facts, careless in his research and consequently had distorted the truth.

Reforming S.18C of the Racial Discrimination Act

The second, significant issue is whether the RDA itself requires reform in the interests of maintaining freedom of speech. Two matters are particularly relevant here. The first is whether it should be unlawful, in the terms of the statute, to 'offend, insult, humiliate or intimidate' a person because of their race.

In Liberty's opinion, this formulation constitutes too great an incursion on free expression. It does so because in a free and democratic society we ought to be able to accommodate speech that 'offends and insults', even on racial and religious grounds. We may disagree with and be concerned by such speech but the solution is to combat it in the marketplace of ideas rather than to prohibit it.

However, the situation is different with respect to speech that humiliates and/or intimidates. Even more so with speech that vilifies or incites hatred. Here, the measure of the hurt, the gravity of the discrimination and potential social disruption are plainly sufficient reasons to justify a legal limitation.

Ever since the Andrew Bolt case, the RDA'S limits on freedom of speech have been the subject of lively debate. The Attorney-General, George Brandis, promised to wind back the limits as one of his first legislative acts.

This position, however, met intense opposition from an array of organisations whose members have, from time to time, suffered racial vilification. They want the RDA's restrictions on racially prejudiced speech retained.

The two sides have powerful backers. Those opposing any change include umbrella organisations representing people from Indigenous, Chinese, Vietnamese, Lebanese, Islamic and Jewish backgrounds. They have received influential support from the Race Discrimination Commissioner, Tim Soutphommasane.

Those advocating change form an unlikely coalition. It consists of conservative think tanks, including the Institute of Public Affairs (IPA); legal bodies such as the Law Council of Australia and civil liberties organisations like Liberty Victoria. Senator Brandis courted further controversy by appointing the IPA's Tim Wilson as Freedom Commissioner.

Despite intense interest in the freedom of speech debate, in our view quite a bit of it has resembled tilting at windmills. This is because each side has misinterpreted the intentions of the other.

The best place to begin an evaluation of the competing views is to examine the terms of the Racial Discrimination Act itself. The relevant provision is s.18C.

This provides that it is unlawful for a person to do an act if it is reasonably likely to 'offend, insult, humiliate or intimidate' another person and the act is done because of the person's race. The provision appears in a part of the RDA headed 'racial vilification.'

It can be seen immediately, however, that the terms of the section relate only very loosely to the idea of racial vilification. Vilification carries with it a sense of extreme abuse and even hatred of its object. Vilification can provoke hostile and even violent responses. The words of s.18C do not convey this meaning.

Unlike several States and the ACT, the Commonwealth does not have a civil law sanctioning racial hatred or vilification. There was an attempt to introduce such a law in 1995 as a companion provision to ss. 18C and 18D but the Bill was defeated by the coalition of conservative parties in the Senate.

So, in Liberty's view, the first step in overcoming the present disagreement the Government should consider outlawing hate speech. Section 18C of the Racial Discrimination Act is inadequate because it makes no direct reference to hate speech. It concerns less injurious forms of expression. Further, as a matter of principle, it seems reasonable to impose a limit on racially hateful utterances given their propensity to incite or provoke vengeful and violent responses.

Community organisations that have opposed any change to the legislation sometimes misconceive this proposal. As the joint group's statement says, 'we view with growing concern that the Federal Government has plans to remove or water down protections against racial vilification which presently extend to Australians of all backgrounds.'

We should maintain such protections, but the RDA does not contain them. If real protection against racial hatred is desired, then racial hatred, serious ridicule and serious contempt should be named and made subject to civil law sanction.

Should this be done, the intensity of the opposition to proposed changes to S.18C of the RDA may recede. Then one could look more dispassionately at the terms of the Act's limits on freedom of speech and determine whether and to what extent they might give way to the desirability of protecting free public and political communication.

In that pursuit, however, some advocates of untrammeled free speech go too far. Free speech extremists, such as those in the IPA, have argued that s.18C should be eliminated altogether. That would mean that prejudicial speech that insulted, offended, humiliated or intimidated members of a racial or ethnic group would be regarded as permissible.

Here, the Soutphommasane side has a point. As it argues, to remove any sanction for speech of this character would send a signal that racism is acceptable. We should not do that. However, the question of what might best be discarded and what should be kept remains.

S.18C limits four different kinds of speech. The first is speech that intimidates a person on racial grounds. Intimidatory behaviour is threatening behaviour. It is behaviour that is calculated to place an individual or group in fear.

However much one might value freedom of expression, to allow racially threatening behaviour to pass without civil sanction does not seem desirable. People of different racial and ethnic backgrounds should be enabled to take their place in society without others inducing in them a real fear of being injured or silenced.

Secondly, there is speech that humiliates. Speech of this kind is an attack on a person's self esteem and belief. And it is an attack on a ground that the person cannot change. To say, for example, that a person is black and therefore something less than human is to cut a person's sense of self to the quick. The injury here is psychological but no less severe for that. Racial humiliation also requires civil penalty.

Next there is speech that insults. Insult is aggravated by its connection to race. However undesirable such invective may be, room needs to be made in the political realm for language that is impetuous or callous. Not to provide that space would substantially constrain the manner in which people habitually speak and relate. One might not like insult but it should be tolerated in the interests of free expression.

Finally the RDA restrains speech that offends. The problem is that it is difficult to predict when offence will be taken. The definition of offence is so wide and the circumstances in which it may be inflicted are so numerous that those wishing to put their views strongly on

matters that bear on race enter upon very uncertain legal territory. The unpredictability can produce a silencing effect that impinges too invasively upon open communication.

If the terms of S.18C are to be amended, therefore, consistent with the views of Justice Spigelman it should retain restrictions on speech that humiliates and intimidates but abandon limits on speech that insults or offends. In this context, we note the words of the Chief Justice of the High Court in *Bropho v HREOC,* (2004) 135 FCR 105, 124:

> "The lower registers of the preceding definitions [in 18C] and in particular those of 'offence' and 'insult' seem a long way removed from the mischief to which Article 4 of the Convention on the Elimination of Racial Discrimination is directed. They also seem a long way from some of the evils to which Part IIA of the RDA is directed as described in the Second Reading Speech. But as Allsop J said in *Toben v Jones,* Part IIA encompasses conduct extending beyond expressions of 'racial hatred', and is intended to pursue a policy of eliminating race discrimination and promoting understanding among races – an objective to which States Parties to CERD are committed."

Freedom of Speech and its Limits: The Brandis Proposal

Late in 2013, the UN treaty committee responsible for monitoring national compliance with the UN convention against racism (CERD) issued a new general comment. The comment dealt with freedom of speech and legitimate limits that may be placed upon it in the interests of protecting individuals from serious forms of racial discrimination. It makes a good starting point for looking with fresh eyes at the present fractious debate on the same subject in Australia.

Echoing the convention, the committee makes it clear that freedom of expression may be limited in only two circumstances. These are to respect the rights or reputations of others, or for the protection of national security or public order. A restriction on these grounds may not, however, endanger the right. Freedom of expression is primary and must not be overwhelmed by limits imposed upon it.

The committee argues that freedom of expression and one's entitlement to be free from damaging racial discrimination are complementary. This is because racial vilification is calculated to damage the right of those vilified to freely express their opinions and beliefs. The right and restriction are best seen, therefore, as mutually supportive rather than oppositional.

Because freedom of speech is primary, the committee observes that restrictions upon it must be the minimum necessary to ensure that racially hateful expression does not diminish either the equality of others before the law or their enjoyment of other fundamental rights. Restrictions on free speech, therefore, should attack only serious incursions on other's rights. Less serious instances of racial prejudice should be addressed by persuasion and education not by law.

The kind of expression that the law should sanction is speech that rejects the core values of human dignity and equality and instead seeks to denigrate and degrade the standing of individuals and groups of an identifiable race in the wider community's estimation.

Senator George Brandis' proposal for the reform of s.18 of the Racial Discrimination Act should be assessed against these standards.

In seeking to penalise racial vilification and intimidation, the Senator's proposal met a first test. It was concerned with serious attacks on people on racial grounds and not with slights. The problem, however, was that that missed swathes of serious racially prejudicial speech in between these poles, rendering its prescriptions seriously inadequate.

The Brandis plan defined vilification and intimidation in terms far more limited than their generally accepted meaning. Racial vilification is defined as racial hatred alone. The Shorter Oxford Dictionary definition is 'to deprecate or disparage with abusive or slanderous language; to defame, revile or despise'.

Racial intimidation is defined as speech that threatens physical harm to a person or to their property. The Oxford defines it as to force or deter someone from an action by threats or to terrify, overawe or cow. Significantly, the Dictionary notes that intimidation is now commonly associated with action designed to interfere with others' free exercise of political and social rights.

No one should disagree that racial vilification and intimidation should be sanctioned. But to fully realise this objective, the two words should be made to say what they mean. To confine them legislatively, particularly for political ends, has an Orwellian feel to it.

The UN committee sets down the kind of speech that should be restricted by law. It comprises incitement to hatred, contempt and discrimination against members of a group on the grounds of their race, colour or ethnic origin. This embraces much more than just racial

hatred and threats of physical harm. Such serious incursions upon the rights of racial and ethnic groups should also have been included in the Brandis list, not defined out of it.

The UN committee is also clear that racial insult, offence or slight does not qualify for legal restriction. It will qualify only if prejudicial speech amounts to hatred, serious contempt or serious discrimination. The Attorney-General was right, therefore, to advocate the exclusion of insult and offence from the prohibitions contained in S.18C of the Racial Discrimination Act.

However, humiliation is a form of speech that constitutes serious contempt for others and for that reason should remain the subject of sanction. The statutory retention of a limit on intimidatory speech is appropriate but intimidation should be defined properly.

The UN committee is clear that limits to free speech must be necessary and proportionate. Consequently, the more important that the kind of speech is the less likely it is that a restriction will be regarded as legitimate.

By way of example, the committee observes that speech that relates to political or academic communication concerning matters of public interest should be given substantially free rein. Speech advocating the protection of human rights should not be subject to criminal or civil sanction. Expressions of opinion about contested historical facts should not be penalised.

Because of this, the existing Racial Discrimination Act provides a defence to a charge of racially prejudicial speech if, nevertheless, it is fair comment on public and political affairs and is made in good faith and reasonably. This exemption applies only if the comments are 'reasonable and made in good faith'. Courts are frequently required to determine whether a statement is made in good faith. There is no problem there, although in the context of the RDA a formulation founded instead on making an exemption available where there is an 'absence of malice' might be preferable and more easily applied.

The requirement of 'reasonableness', however, does present difficulty. Reasonableness is not a requirement of the fair comment defence in defamation law and neither should it be here. The defamation defence requires that the comment must be fair, in the sense that it should be founded on proper material. It need not, however, be balanced or temperate. In Liberty's view, the same test should apply under the RDA. Judges should not be second guessing editorial and journalistic discretion in the expression of public and political opinion, however provocative.

Regrettably, the Brandis plan went far beyond these limited reforms to the RDA provision and in doing so almost completely negated the plan's stated objective of proscribing serious vilification. It did this by extending the reach of the defence to almost every imaginable form of public communication.

Under the plan, racial vilification and intimidation would have become permissible if expressed in public discussion about matters of a political, social, cultural, academic, artistic or scientific nature. The breadth of this defence is so great as to be ridiculous. And the sensible constraint of good faith is also wiped from the statute book. The expanded defence provided carte blanche for racial prejudice.

The QUT and Bill Leak cases

The facts of these cases are well known. So we provide only the briefest summary here. In the first, an indigenous staff member at the Queensland University of Technology (QUT) alleged that she had been the subject of offence and humiliation on the grounds of her race, following from certain Facebook posts by five students ridiculing her decision to exclude them from an indigenous-only computer laboratory. In the second, two indigenous men complained that a cartoon by Bill Leak, the resident political cartoonist at The Australian, had been offensive and racist. The cartoon had depicted a police officer handing over a young teenager to his father for discipline. The father, however, was depicted as drunk and derelict, the implication being that parental dereliction was the primary cause of teenage misbehavior.

The legal problem with the complaints was that although hotly contested, under s.18C they were borderline at best. The political problem with them was that they were brought pursuant to a statutory provision, s.18C, that was itself the subject of fierce political contestation.

Nevertheless, the AHRC gave both complaints serious consideration. In the process, however, the defendants suffered significant stress and reputational damage. And a different consequence was that Professor Triggs and the Commission were subject to damning political attack.

In Liberty's view, neither case met the standard of proof required by s.18C and its companion provision, s.18D. Neither would have been successful if litigated and, in fact, the QUT case was dismissed recently by the Federal Circuit Court. In the QUT case this was because the student's Facebook posts would not have met the level of seriousness set down by the Federal Court in interpreting s.18C. In *Creek v Cairns Post* Justice Kiefel determined that the relevant

words in s.18C referred to 'profound and serious effects, not to be likened to mere slights'[1]. The section has been interpreted as referring to consequences that are more serious than mere personal hurt, harm or fear. Section 18C does not protect hurt feelings.

In the QUT case it was not reasonably likely that the Facebook posts in question would have been regarded as containing words having profound and serious effects. And, in fact, this was one of the primary reasons why the case was dismissed recently by the Federal Circuit Court as having no reasonable prospect of success.[2]

In the Bill Leak case, it may be generally accepted that the cartoon could legitimately have been considered offensive by large segments of the Australian Indigenous community. Nevertheless, the defences available to the respondent in s.18D would have protected him. It is arguable that the cartoon was likely to have been created reasonably and in good faith. And, the terms of the provision, it could properly be considered as 'a fair comment on an event or matter of public interest, if the comment is an expression of genuine belief held by the person making the comment'.

We note with deep concern, in this context, the swinging attacks that have been levelled at the President of the Human Rights Commission's for the conduct by the Commission of its investigations into these two matters. In large part, these attacks appear to have been motivated not by a considered examination of the reality of the investigative procedures undertaken by the AHRC but rather by a desire, seemingly for ideological reasons, to remove the President of the Commission from office.

Three principal criticisms have been made. First it was said, by the Prime Minister among others, that the Commission should never have initiated the action against the QUT students in the Federal Circuit Court. Even a cursory reading of the Commission's governing statute, however, reveals that the Commission has no power to initiate court action. And it didn't. The Federal Circuit Court action under s.18C was brought by the applicant QUT staff member herself.

Secondly, it was said that the Commission behaved improperly by not informing the students that the complaint had been investigated for many months, until three days before a conciliation hearing was scheduled. In fact, as the Vice-Chancellor recently acknowledged, the delay occurred as a result of QUT's wish to try and settle the matter and thereby to protect

[1] *Creek v Cairns Post* (2001) 112 FCR 352, 356, per Kiefel J.
[2] *Prior v Queensland University of Technology* [2016] FCCA 2853.

the students from unnecessary anxiety. It had requested the Commission not to contact the students and the Commission had agreed, again in the students' interests. The delay, such as it was, was caused principally by the achingly slow and bureaucratic nature of the University's legal and administrative processes.

Thirdly, Professor Triggs was attacked on the ground that she should have dismissed both complaints at an early stage given that both were unlikely to succeed. She would thereby have avoided a lot of heartache for the respondents.

Here again it would have helped if the critics had read the relevant legislation. The Commission's Act requires it to investigate any substantive complaint that is made and then to endeavour to conciliate it. It may dismiss a complaint at an early stage if it is trivial, vexatious or lacking in substance. But neither of these two cases fell within those categories.

It is important to understand here, that 'lacking in substance' and 'having no reasonable prospect of success' are two very different things. The Commission has the power under its statute to dismiss a case early if it is lacking in substance. That is, for example, if on the papers no act constituting racial discrimination has been revealed. But only a Court can make a ruling that a complaint has no reasonable prospect of success.

This is because the Commission has no determinative powers. Its role is to conciliate complaints. It does not stand in the shoes of a judge who may make final decisions on a matter. Only a judge can decide, on the basis of all the evidence provided to him or her in court, that the evidence for a complaint is weak and, therefore, that a complaint ought to be dismissed.

Here again, therefore, the criticism of the President of the Commission on this ground, made by some politicians and zealously in the pages of 'The Australian' is entirely misdirected.

Even so, the Prime Minister has announced that Professor Triggs will not be appointed to a second term as President of the Commission. If what has been said above constitutes even part of the reason for that decision, it is mistaken and deeply regrettable.

Erroneous and ideologically founded attacks should never form the basis for the non-reappointment or resignation of very highly regarded holders of independent statutory offices. The similar cases of the resignations of the former Australian Information Commissioner and Solicitor-General only add heavier weight to that dispiriting conclusion.

Recommendations

1. *That the words 'offend' and 'insult' be removed from S.18C of the Racial Discrimination Act 1975.*
2. *That in S.18D, the words 'public comment done reasonably and in good faith' be replaced with the words 'in good faith and the absence of malice'.*
3. *That a new offence be created within Part II of the RDA to the effect that it will be 'an offence for a person to engage in speech that constitutes racial hatred, ridicule or contempt against a person or group on the ground of their race'.*

The AHRC's investigative powers and procedures

The remaining terms of reference of the Inquiry are concerned with the AHRC's investigative powers and procedures, and whether the Commission ought to be reformed in order to better protect freedom of speech.

The second term of reference in this respect is concerned with whether the handling of complaints made to the Commission should be reformed in relation to: the Commission's treatment of trivial and vexatious complaints; the affording of natural justice to persons who are the subject of complaints; ensuring complaints are dealt with openly and transparently; ensuring complaints are dealt with without unreasonable delay and costs to the Commission and persons the subject of complaints; and the relationship between the Commission's complaint handling and applications to the Court arising from the same facts.

Submissions are also invited in relation to whether the practice of soliciting complaints to the Commission has an adverse impact on freedom of speech or constitutes an abuse of the Commission's powers; and whether the Commission can otherwise be reformed in order to better protect freedom of speech.

Liberty is of the view fundamental reform of the Commission's complaint handling procedures is not needed and that the Commission as a statutory office, in its operations and through the exercise of its statutorily mandated powers, does not pose a threat to the protection of freedom of speech in Australia. Rather it is of the view that the Commission has and continues to play an important role in ensuring access to justice for people who have experienced discrimination or harassment, and in protecting freedom of speech in Australia.

The Commission's complaint handling process

Liberty believes that the Commission plays an important role in addressing the concerns of individuals who allege that their human rights have been breached and that the Commission's handling of complaints has successfully done this.

The achievements of the Commission are not insignificant. For the year 2015 – 2106, the Commission received 16,836 enquiries and conducted 1,308 conciliations. Of these complaints received, 989 or 76% of these were successfully resolved, with only 3% of all complaints finalised by the Commission proceeding to court.

There are high levels of satisfaction among complainants and respondents who were surveyed about service of the Commission. 94% reported that the service they received was very good or excellent.

One benefit of conciliation is that, if it is successful, it reduces the likelihood of the parties having to engage in potentially time consuming and expensive litigation. On this measure the complaint handling processes of the Commission have the benefit of mitigating against unreasonable delay and costs to individuals who otherwise may find themselves forced to resolve matters in court.

The Commission's treatment of trivial and vexatious complaints

The Commission's power to dismiss trivial or vexatious complaints is provided for under s 46PH of the *Australian Human Rights Commission Act 1986 (*"AHRC Act"). Liberty believes this section of the AHRC Act should be amended so that the Commission can more effectively deal with complaints that are trivial, vexatious or lacking in substance.

Liberty believes that the threshold for lodging a complaint is too low and that complainants should provide sufficient preliminary detail as to how an allegedly unlawful discriminatory act contravenes the provisions of the AHRC legislation.

Raising the threshold for lodging complaints has the obvious benefit of freeing up the Commission's limited resources to deal with those complaints that have an arguable foundation. Another benefit of this would be that persons the subject of trivial or vexatious complaints would be spared the inconvenience of having to participate in proceedings that are minor, misconceived or lacking in substance. For these reasons Liberty asks the Committee to advise the Parliament as follows:

1. *Section 46P of the Act should be amended to provide that a complaint must be in writing. In the complaint, a complainant should be required to set down the relevant facts upon which it is alleged that an act of unlawful discrimination has occurred.*
2. *Section 46P of the Act should be amended to provide that, prior to being accepted by the Commission, a written complaint must state facts with respect to an alleged act of discrimination that, in the opinion of the President of the Commission or his or her authorised delegate, are sufficient to found a prima facie case of discrimination.*
3. *Section 46PO of the Act should be amended to provide that if a complaint has been dismissed by the President, or his or her authorised delegate, on the grounds set down in s.46PH(1)(a)–(g), an application for review of the decision may not proceed in the Federal Court or the Federal Circuit Court without the Court's leave.*

Ensuring that persons who are the subject of complaints are afforded natural justice

There are number of bases on which individuals can seek redress if they believe they have not been afforded natural justice by the Commission.

Individuals can seek judicial review of decisions made by the Commission and they can make a complaint to the Executive of the Commission if they are unhappy with the Commission's processes and procedures.

The Commission also publishes a Charter of Service which sets out its standards of service. These standards are consistent with the principles of natural justice. Breaches of the Charter of Service are a sound basis for lodging a complaint.

Liberty believes there is little or no evidence to show respondents are not afforded natural justice by the Commission and that there are appropriate safeguards in place where complaints, made on grounds of denial of natural justice, are made.

Ensuring complaints are dealt with in an open and transparent manner

A distinction must be drawn between information about the activities of the Commission and the importance of confidentiality in relation to individual conciliations and complaints lodged with the Commission.

Liberty would oppose the opening of individual conciliation matters to public scrutiny. Conciliation is a private process. In order for conciliation to be successful it is important that

the goodwill of the parties be preserved throughout the conciliation process and that they can participate freely with the knowledge that matters the subject of conciliation are confidential. Public access to matters that otherwise ought to be treated as confidential is likely to not only inhibit parties from resolving issues in dispute but has the potential to cause serious reputational harm to those who are the subject of a complaint.

Liberty supports the continuing publication of information by the Commission about how it handles complaints and service statistics. Publication of complaint statistics promotes openness, transparency and accountability about the Commission in relation to its operations, purpose and the outcomes of its activities.

Unreasonable delay

Complainants, persons the subject of complaints and the Commission obtain no benefit from delay in the handling of complaints that are made.

Resource constraints are often a factor in determining an organisation's capacity to respond to and manage demand for their services. Liberty is mindful that the Commission's budget has been reduced by $5 million over three years beginning in 2015 – 2016. It can come as no surprise to anyone that Federal Government imposed budget cuts have had a very severe impact on the speed with which complaints can be handled and that this would directly affect the rights of both complainants and respondents. Justice delayed is justice denied and the greater part of the responsibility for delays in investigative and conciliatory proceedings within the Commission rests with the present Federal Government.

Liberty recommends that budget cuts to the Commission between 2014 - 2016 be immediately reversed to reduce unacceptable delays in complaint processing.

Unreasonable costs

The Commission's service is free for complainants and respondents and there is no cost for complainants to lodge a complaint. Respondents and complainants are free however to engage lawyers if participating in conciliation should they wish to do so.

It is unclear how reform of the Commission, in relation to the issue of costs incurred by respondents, is of benefit to anyone as the costs respondents incur is something over which the Commission has no control.

The relationship between the Commission's complaint handling process and applications to the Court arising from the same facts

The purpose of this reference is unclear.

The Commission plays no role in relation to a complainant's decision to go to court once a complaint has been lodged and it has been terminated.

In relation to the issue applications to the Federal Court or Federal Circuit Court arising from the same facts, s 46PO of the AHRC Act provides that the unlawful discrimination alleged in the court application must be the same as (or the same in substance as) the unlawful discrimination that was the subject of the terminated complaint; or must arise out of the same (or substantially the same) acts, omissions or practices that were the subject of the terminated complaint.

As noted previously, it may be that this term of reference was included as a result of a misunderstanding of the circumstances of the QUT case. There, it will be recalled that contrary to certain opinions espoused by politicians and editorial writers in The Australian newspaper, it was not the Commission that initiated action in the Federal Circuit Court in the QUT case. The Federal Circuit Court proceedings were initiated by the complainant in the case, Ms Prior. Under its statute, the Commission has no power to initiate such proceedings nor should it be afforded any such power.

Reform with respect to the Commission's complaint handling processes, in relation to the operation of statute over which it has no control, would appear otiose.

The soliciting of complaints to the Commission

It is an entirely appropriate function of the Commission that it publish and make available information about its purpose, functions and operations and this is consistent with the duties of the Commission under the AHRC Act.

Advising the public of their right to lodge complaints under anti-discrimination laws is an important role of the Commission. Failing or declining to advise the public of their statutory right to lodge a complaint with the Commission whose function is the handling of such complaints is akin to a parliamentary inquiry seeking submissions but not advising the public that submissions were being sought. Advice and information concerning the duties and

functions of a statutory body does not amount to the calling for or solicitation of complaints from the public. To suggest it is, is a mischief.

Liberty believes there is no basis for reforms to the Commission because of the alleged solicitation of complaints by the Commission.

Other reforms to the Commission to better protect freedom of speech

Liberty believes there is no case to answer that reform is needed to the Commission so as to better protect freedom of speech in Australia.

We refer to the Commission's submission in relation to freedom of speech as evidence to the contrary that the Commission in its activities inhibits the protection of freedom of speech in this country. This is a grave, and in the present, ideologically driven political environment, damaging error.

Conclusion

Freedom of expression is a primary value. But as the UN Committee's general comment constantly emphasises, one should speak not only of the freedom of those who may vilify but also and equally the freedom of those subject to racial attack. Vilification silences them.

The Committee should not easily fall into the trap of preferring speakers' rights to victims' freedoms. To do so will lessen the sum total of free speech rather than augment it.

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Recommendations

1. ***That the words 'offend' and 'insult' be removed from S.18C of the Racial Discrimination Act 1975.***

2. ***That in S.18D, the words 'public comment done reasonably and in good faith' be replaced with the words 'in good faith and the absence of malice'.***

3. ***That a new offence be created within Part II of the RDA to the effect that it will be 'an offence for a person to engage in speech that constitutes racial hatred, ridicule or contempt against a person or group on the ground of their race'.***

4. ***Section 46P of the Act should be amended to provide that a complaint must be in writing. In the complaint, a complainant should be required to set down the relevant facts upon which it is alleged that an act of unlawful discrimination has occurred.***

5. ***Section 46P of the Act should be amended to provide that, prior to being accepted by the Commission, a written complaint must state facts with respect to an alleged act of discrimination that, in the opinion of the President of the Commission or his or her authorised delegate, are sufficient to found a prima facie case of discrimination.***

6. ***Section 46PO of the Act should be amended to provide that if a complaint has been dismissed by the President, or his or her authorised delegate, on the grounds set down in s.46PH(1)(a)–(g), an application for review of the decision may not proceed in the Federal Court or the Federal Circuit Court without the Court's leave.***

7. ***To avoid further instances of unjust and indefensible delays in the Commission's investigative and conciliation processes, the budget cuts made to the AHRC in the Federal Budgets in 2014-2016, should be reversed.***

Thank you for the opportunity to make this submission and for the extension of time granted to do so. Please contact Liberty Victoria President Jessie Taylor or Liberty Past President Prof. Spencer Zifcak if we can provide any further information or assistance. This is a public submission and is not confidential.

Yours sincerely

Jessie Taylor

President, Liberty Victoria