



Submission to Parliamentary Joint Committee on Human Rights Inquiry into Free Speech in Australia

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About ANTaR

ANTaR is the pre-eminent non-Indigenous national organisation dedicated specifically to supporting the realisation of Justice, Rights and Respect for Aboriginal and Torres Strait Islander people.

ANTaR focuses on the education and engagement of the broader community so that the rights and cultures of Aboriginal and Torres Strait Islander people are respected and affirmed across all sections of society. Approximately 40,000 Australians are direct supporters of our work.

ANTaR seeks to persuade governments to show genuine leadership and build cross-party commitment to Aboriginal and Torres Strait Islander policy.

ANTaR works to generate in Australia a moral and legal recognition of, and respect for, the distinctive status of Aboriginal and Torres Strait Islander Australians as First Peoples.

ANTaR is a non-government, not-for-profit, community-based organisation.

ANTaR works on key issues including incarceration and family violence, health equality, Aboriginal and Torres Strait Islander policy approaches, constitutional recognition, racism and other significant issues.

ANTaR has been working with Aboriginal and Torres Strait Islander organisations and leaders on rights and reconciliation issues since 1997.

ANTaR believes that it is self evident that Aboriginal and Torres Strait Islander Peoples are entitled to the full realisation of their rights as articulated in relevant human rights treaties, including the Universal Declaration of Human Rights and specifically the United Nations Declaration on the Rights of Indigenous Peoples.

Summary responses to the Terms of Reference

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 how, ss. 18C and 18D should be reformed.

No.

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:

- the appropriate treatment of:
 - trivial or vexatious complaints; and
 - complaints which have no reasonable prospect of ultimate success;
- ensuring that persons who are the subject of such complaints are afforded natural justice;
- ensuring that such complaints are dealt with in an open and transparent manner;
- ensuring that such complaints are dealt with without unreasonable delay;
- 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;
- the relationship between the Commission’s complaint handling processes and applications to the Court arising from the same facts.

No, unless a specific request is made by the Australian Human Rights Commission.

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.

No. Promotion of the role of the Australian Human Rights Commission, and educating Australians about what they can do if they experience racial discrimination, is appropriate and consistent with the mandate of the Australian Human Rights Commission.

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.

No.

Recommendations

Recommendation 1: That the Inquiry consider the preservation of national unity, and what, if anything, has changed in that regard since 2014 with regard to weakening protections against racial discrimination in the Racial Discrimination Act.

Recommendation 2: That the Inquiry include a full list of legislative restrictions, including from Federal, State and Territory governments, on freedom of speech beyond those contained in the Racial Discrimination Act in its report, and scrutinise them to the same extent as the Racial Discrimination Act.

Recommendation 3: That the Inquiry recommend no change to the Racial Discrimination Act.

Recommendation 4: That the Inquiry recommend no change to the complaints handling process of the Australian Human Rights Commission unless such change is specifically recommended by the Australian Human Rights Commission.

Recommendation 5: That the Inquiry commend the Australian Human Rights Commission on the extraordinary 94% satisfaction levels of participants in the complaint handling process, and the efficient average time of 3.8 months to complete complaints.

Recommendation 6: That the Inquiry consider and report on the harm to health and wellbeing caused by racial discrimination.

Recommendation 7: That the Inquiry consider and report on how weakening protections against racial discrimination will impact on government's stated commitments to close the health equality gap between Aboriginal and Torres Strait Islander people and other Australians.

Recommendation 8: That the Inquiry consider and report on the economic costs of racial discrimination to the Australian economy.

Recommendation 9: That the Inquiry consider and report on the statements from the UN Special Rapporteur on Racism

Background

1. ANTaR welcomes the opportunity to make a submission to the Joint Committee on Human Rights (Joint Committee).
2. ANTaR notes that the right to live free from discrimination is a fundamental right of all people, and that many minority groups experience racial discrimination as part of everyday life.
3. ANTaR's experience, and therefore the main focus of this submission, is on the experiences and impact of racial discrimination on Aboriginal and Torres Strait Islander people. This is not to exclude or downplay the very significant impact that racial discrimination has on many minorities in Australia. In standing with Aboriginal and Torres Strait Islander people for their right to live free from racial discrimination, we also stand with the many other groups that experience racism on a regular basis.
4. ANTaR notes that the Inquiry into Free Speech (Inquiry) appears to replicate discussions and consultations held in 2014 in relation to the exposure draft Bill on proposed changes to the racial hatred provisions of the Racial Discrimination Act 1975 (Cth) (RDA).
5. Australians made clear their views on that proposed legislation to wind back race hate protections including in relation to the proposed major changes to section 18C of the RDA in 2014.
6. In dropping the proposed changes then, the former Prime Minister Tony Abbott stated¹:

"Leadership is about preserving national unity on the essentials and that is why I have taken this position."
7. ANTaR is deeply concerned that in proposing this Inquiry, national unity is no longer a priority of the government.

Recommendation 1: That the Inquiry consider the preservation of national unity, and what, if anything, has changed in that regard since 2014 with regard to weakening protections against racial discrimination in the Racial Discrimination Act.

8. We are also concerned that the terms of reference of the current Inquiry appear to question the proper enforcement of the RDA, with the potential effect of undermining the rule of law and statutory role of the Australian Human Rights Commission (AHRC).
9. We therefore regard this Inquiry as unnecessary and misconceived. It gives the message that the government does not support the protection of vulnerable minorities from the effects of race hate speech, but instead wishes to protect those who engage in such speech.

¹ *Tony Abbott Dumps Controversial Changes to 18C Racial Discrimination Laws*, SMH, August 5, 2014
<http://www.smh.com.au/federal-politics/political-news/tony-abbott-dumps-controversial-changes-to-18c-racial-discrimination-laws-20140805-3d651.html#18c-racial-discrimination-laws-20140805-3d651.html>

Freedom of speech: not an unfettered right

10. Contrary to the alarmist commentary from some in parliament and the media, it is highly misleading to portray an otherwise unfettered right to free speech beyond the RDA.
11. Some limitations on freedom of speech have existed for centuries and were inherited from English law in 1788, while others are new and have been imposed by parliaments in response to various social and political changes.
12. Perhaps the most widely known and widespread restriction to freedom of speech is the law of Defamation which protects a person from damage to their reputation by allowing them to seek judicial redress for statements or publications which identify them and which would be likely to lead an ordinary reasonable person to think less of the person.
13. Further restrictions on freedom of speech can be found in Secrecy Laws (ASIO Act, Australian Border Force Act, Restrictions on Speech of Commonwealth Officers), Criminal Laws (NSW Crime Commission, Criminal Code – Incitement, use of Postal Service to Harass), Terrorism Laws (Criminal Code), and Laws to Protect Reputation, Decency and the Operation of the Justice System (Media Laws, Defamation, Obscenity, and Contempt).
14. ANTaR therefore notes that restrictions on freedom of speech are widespread, extend across various areas of public life in Australia, and have existed, in many cases, for decades.
15. These laws should have same level of scrutiny, if not more, given the serious impact racism has on health and wellbeing of many groups in Australia, that the Inquiry will give to section 18C of the Racial Discrimination Act.

Recommendation 2: That the Inquiry include a full list of legislative restrictions, including from Federal, State and Territory governments, on freedom of speech beyond those contained in the Racial Discrimination Act in its report, and scrutinise them to the same extent as the Racial Discrimination Act.

16. ANTaR believes that the current Inquiry is not only a misnomer (as the Terms of Reference focus centrally on the Racial Discrimination Act to the exclusion of other restrictions of free speech), but is mischievous and dishonest in the manner in which it associates restrictions on freedom of speech with the RDA.
17. As indicated above, freedom of expression is not, and never has been, an absolute right in Australia.
18. In fact, restricting freedom of speech to prevent harm is consistent with our obligations under the *International Covenant on Civil and Political Rights* and the *International Convention on the Elimination of All Forms of Racial Discrimination*.

Racial Discrimination Act and complaints under it

19. All people, including Aboriginal and Torres Strait Islander People, have the right to live their lives free from racial discrimination.
20. 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.²

Recommendation 3: That the Inquiry recommend no change to the Racial Discrimination Act.

21. ANTaR notes that this principle, established in international law, is one that Australia has formally adopted through ratifying the *Convention on the Elimination of All Forms of Racial Discrimination*. The Federal Parliament passed the Racial Discrimination Act, which brings that Convention to life in Australia, in 1976.
22. In 1995, the Racial Discrimination Act was amended by the Racial Hatred Act 1995 which introduced Sections 18C and 18D (among others) and provides for a process for complaints under the RDA to be made to Australian Human Rights Commission (Commission).
23. Upon receipt of a complaint in writing alleging a racially discriminatory act, under the Act the Commission must investigate the facts and attempt to conciliate the matter.³
24. ANTaR draws the attention of the Inquiry to the fact that the Commission neither initiates nor prosecutes a complaint.
25. The complaints process involves the Commission enquiring into the complaint and attempting to resolve it by conciliation. If the complaint is not resolved through conciliation, the complainant can apply for the allegations to be heard and determined by the Federal Court of Australia or Federal Circuit Court of Australia. The focus of the Commission is to resolve disputes so parties can avoid court proceedings.⁴
26. This conciliation process has operated effectively for the last 20 years. For example, in 2015, 76% of complaints were successfully resolved, 94% of participants in the complaints handling process were satisfied with the Commission's service, and the average complaint took 3.8 months to finalise.⁵

Recommendation 4: That the Inquiry recommend no change to the complaints handling process of the Australian Human Rights Commission unless such change is specifically recommended by the Australian Human Rights Commission.

27. ANTaR believes that this is an extraordinary satisfaction rate, a highly efficient and successful process, and one that ought to be commended by the Government. ANTaR urges the Inquiry to provide such commendation.

Recommendation 5: That the Inquiry commend the Australian Human Rights Commission on the extraordinary 94% satisfaction levels of participants in the complaint handling process, and the efficient average time of 3.8 months to complete complaints.

² Protection of the RDA was considered important enough to 4,493 of our supporters who, over a two week period in November signed a petition stating that "I support the Racial Discrimination Act remaining unchanged and continuing to operate effectively as it has since 1975".

³ Australian Human Rights Commission, Racial Discrimination Complaints, available: <https://www.humanrights.gov.au/news/stories/racial-discrimination-complaints>

⁴ *ibid*

⁵ Racial Discrimination Complaints, Australian Human Rights Commission, available: <https://www.humanrights.gov.au/news/stories/racial-discrimination-complaints>

Harm caused to Aboriginal and Torres Strait Islander people by racial discrimination

28. Racial vilification causes harm at many levels. ANTaR is unwavering in its support for protecting people from that harm. Protection from such harm should be a central objective of government legislation.
29. Aboriginal and Torres Strait Islander people experience racial discrimination all the time. The State of Reconciliation report released earlier this year found that 1 in 3 Aboriginal and Torres Strait Islander people had experienced verbal racial abuse in the six months before the survey.⁶
30. Far from being a theoretical discussion, racial discrimination has a very real impact on health and wellbeing for First Peoples.

‘[...] racism has had and continues to have a real and damaging impact on the health of Aboriginal and Torres Strait Islander people. [It is] embodied in dubious practices, disparities in access and subtle variations in effort within health and other institutions and programs [and] it is clear that full health equity cannot be achieved until racism [...] can be overcome.’⁷

31. The Australian Indigenous Doctors Association (AIDA), the peak body for Aboriginal and Torres Strait Islander doctors and medical students, further points out adverse impacts of racism on Aboriginal and Torres Strait Islander people:

‘Healthcare provider racism can lead to poorer self-reported health status, lower perceived quality of care, underutilisation of health services, delays in seeking care, failure to follow recommendations, societal distrust, interruptions in care, mistrust of providers and avoidance of health care systems.’⁸

32. The Close the Gap Campaign for Aboriginal and Torres Strait Islander health equality, of which ANTaR is a foundational member, highlighted a study in its 2016 Progress and Priorities Report that found that of the Aboriginal and Torres Strait Islander people 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, some reporting that they avoided seeking health care because of it.⁹

Recommendation 6: That the Inquiry consider and report on the harm to health and wellbeing, including to Aboriginal and Torres Strait Islander people, caused by racial discrimination.

33. ANTaR notes that the Government has committed to closing the gap in Aboriginal and Torres Strait Islander health equality by 2030. Protections and initiatives that help limit incidences of racial discrimination are therefore consistent with government commitments and policy designed to meet those

⁶ State of Reconciliation Report, Reconciliation Australia, 2016, available https://www.reconciliation.org.au/wp-content/uploads/2016/02/State-of-Reconciliation-Report_SUMMARY.pdf

⁷ Arabena, K. 2013, ‘Future initiatives to improve the health and wellbeing of Aboriginal and Torres Strait Islander peoples’, Medical Journal of Australia, vol. 199, no. 1, p. 22, viewed 17/08/2016, available <https://www.mja.com.au/journal/2013/199/1/future-initiatives-improve-health-and-wellbeing-aboriginal-and-torresstrait>.

⁸ Policy Statement on Racism in Australia’s Health System, 2016, AIDA, available: https://www.aida.org.au/wp-content/uploads/2015/03/Racism-in-Australias-health-system-AIDA-policy-statement_v1.pdf

⁹ Progress and Priorities Report, 2016, Close the Gap Campaign, available <https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/close-gap-progress>

commitments.

34. For Aboriginal and Torres Strait Islander people, protections against racial discrimination are therefore vital for their health and wellbeing. Such protections are also necessary if the government is to meet its commitment to close the gap in health equality by 2030.

Recommendation 7: That the Inquiry consider and report on how weakening protections against racial discrimination will impact on government's stated commitments to close the health equality gap between Aboriginal and Torres Strait Islander people and other Australians.

35. There is emerging evidence of an economic cost of racial discrimination in Australia. In releasing a recent study on the economic cost of racism on the Australian economy, the CEO of Vic Health noted:

"Race-based discrimination is a human rights violation that has negative impacts on the health and mental wellbeing of a person and can result in reduced opportunities for education and employment, reduced self-esteem, increased drug and alcohol use, self-harm and detrimental effects on cultural identity".¹⁰

36. The economic impact of racism noted in the above mentioned report calculated an estimated cost to the Australian economy of racial discrimination to be \$44.9 billion or 3.6% of GDP. The report's author, Dr Amanuel Elias noted:

"Racial discrimination costs society in both a microeconomic sense, such as indirect costs related to the labour market; and a macroeconomic sense, such as intangibles related to negative physical and mental health".¹¹

Recommendation 8: That the Inquiry consider and report on the economic costs of racial discrimination to the Australian economy.

37. Given the multiple and widespread legislative limitations on freedom of speech for a range of issues, the harm caused by racial discrimination, the commitments Australia has made to uphold human rights under various human rights conventions, and the economic cost of racial discrimination, it is not only reasonable, but absolutely essential, to limit free speech to protect people against racial discrimination.
38. The current Inquiry may like to consider that if it is reasonable to prevent harm to reputation by limiting free speech, as per defamation laws, why it is not reasonable to prevent harm that impacts on health and wellbeing - harm which significantly impacts on the Australian economy, and which is a breach of human rights.
39. On a recent official visit to Australia, the UN Special Rapporteur on Racism under the UN Human Rights Council made an appeal to the Australian government not

¹⁰ VicHealth/Deakin University, *The cost of racial discrimination has had a dollar figure placed on it for the first time thanks to landmark research by Deakin University funded by VicHealth and the Australian Human Rights Commission*,

Media Release available: <https://www.vichealth.vic.gov.au/media-and-resources/media-releases/counting-the-billion-dollar-cost-of-racism-in-australia> Release is based on a report by Dr Amanuel Elias, *Measuring the Economic Consequences of Racial Discrimination in Australia*, Deakin University, 2015, Available: <http://dro.deakin.edu.au/view/DU:30079135>

¹¹ Ibid

to remove protections against racial discrimination under S18C of the RDA:¹²

"Removing this provision would undermine the efforts taken by the various levels of government for an inclusive Australia and open the door to racist and xenophobic hate speech, which has been quite limited thanks to this provision," Mr Ruteere said.

40. The Rapporteur expressed his concern that racism was increasing in Australia noting that:

"That's a threat not just for Australia but all open multicultural societies. This is something open democratic states need to be aware about and to take pre-emptive action against".¹³

Recommendation 9: That the Inquiry consider and report on the statements from the UN Special Rapporteur on Racism.

41. ANTaR is deeply concerned that the Government is seeking to weaken protections against racial discrimination at a time when it may be increasing, and threatening what Australia prides itself on – a vibrant and open multicultural society.

¹² *UN expert says Australians (and their leaders) have a big racism problem*, SMH December 5 2016, Available: <http://www.smh.com.au/federal-politics/political-news/un-expert-says-australians-and-their-leaders-have-a-big-racism-problem-20161205-gt481p.html>

¹³ *ibid*