



public interest
ADVOCACY CENTRE LTD

Reasonable limitations on the right to freedom of expression

Submission to the Parliamentary Joint Committee on Human Rights, Inquiry into Freedom of Speech

21 December 2016

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Summary of recommendations

Recommendation 1

The Committee should affirm that Part IIA of the RDA provides important protection from racist hate speech while striking an appropriate balance with the right to freedom of speech.

Recommendation 2

If section 46PO of the AHRC Act is amended to require the granting of leave to commence proceedings after termination on particular grounds, this should be limited to those grounds set out in section 46PH(1)(b), (c), (d), or (f).

1 Introduction

The Public Interest Advocacy Centre (PIAC) makes this submission to the Parliamentary Joint Committee on Human Rights (PJCHR) in its inquiry into freedom of speech.

PIAC's view is that Part IIA of the *Racial Discrimination Act 1975* (Cth) (RDA) does not require amendment. The evidence from 21 years of operation of this law is that it provides protection against racist hate speech, is an important normative statement of the right to live free of racial discrimination and strikes an appropriate balance with the right to freedom of speech.

PIAC recognizes there may be a case for amending complaint handling provisions to require leave from a court where the President of the Australian Human Rights Commission has found a complaint to be clearly lacking in merit, have already been dealt with or have been unduly delayed. However, such an additional hurdle should only be placed in the way of a complainant in clear cases.

1.1 The Public Interest Advocacy Centre

Established in 1982, PIAC is an independent, non-profit legal centre that protects the public interest through legal assistance, strategic litigation, policy development and training.

PIAC has a long history of advocacy to protect the right of freedom of expression as well as providing legal assistance to people who are the victims of racial discrimination.

PIAC has also contributed to previous inquiries that engaged with the issue of freedom of speech. This has included providing feedback regarding the Exposure Draft - Freedom of Speech (Repeal of s18C) Bill 2014,¹ and providing submissions to the Australian Law Reform Commission inquiry into Traditional Rights and Freedoms² and the Australian Human Rights Commission's inquiry into Rights and Responsibilities.³ PIAC has also provided submissions on regulating racial vilification in NSW.⁴ We will not attempt to repeat those submissions here.

¹ Jessica Roth and Edward Santow, Public Interest Advocacy Centre, 'Protecting people from racism AND ensuring freedom of speech', *Submission in relation to Exposure Draft of Freedom of Speech (Repeal of s18C) Bill 2014 (Cth)*, available at [http://www.piac.asn.au/sites/default/files/publications/extras/protecting people from racism and ensuring freedom of speech.pdf](http://www.piac.asn.au/sites/default/files/publications/extras/protecting%20people%20from%20racism%20and%20ensuring%20freedom%20of%20speech.pdf) (accessed 15 November 2016).

² Sophie Farthing and Edward Santow, Public Interest Advocacy Centre, *Submission to the Australian Law Reform Commission inquiry, Traditional Rights and Freedoms – Encroachment by Commonwealth laws* (3 March 2015) available at http://www.piac.asn.au/sites/default/files/publications/extras/15.03.03_piac_submission_to_alrc_rights_freedoms_ip_46.pdf (accessed 16 November 2016); see also Sophie Farthing and Edward Santow, *Submission to the Australian Law Reform Commission, Traditional Rights and Freedoms – Encroachments by Commonwealth laws Interim Report* (29 September 2015) available at http://www.piac.asn.au/sites/default/files/publications/extras/15.9.29_piac_sub_alrc_interim_report_rights_freedoms.pdf (accessed 16 November 2016).

³ Sophie Farthing and Edward Santow, Public Interest Advocacy Centre, *Rights and Responsibilities 2014, Submission to the Australian Human Rights Commission Discussion Paper* (31 October 2014), available at http://www.piac.asn.au/sites/default/files/publications/extras/14.10.31_rights_responsibilities_2014_submission_to_the_australian_human_rights_commission_discussion_paper.pdf (accessed 16 November 2016).

⁴ Camilla Pandolfini and Edward Santow, *Regulating racial vilification in NSW, Submission to the Legislative Council Standing Committee on Law and Justice Inquiry into Racial Vilification Law in NSW* (March 2013), available at <http://www.piac.asn.au/publication/2013/03/regulating-racial-vilification-nsw> (accessed 16 November 2016).

2. Striking the right balance

PIAC recognises that the right to freedom of expression is critically important to the effective functioning of a healthy democracy. It is a fundamental human right.

In asking whether the restrictions on freedom of speech imposed by Part IIA of the RDA are ‘unreasonable’, this Inquiry nevertheless recognises that free speech is not absolute. It is already subject to legitimate regulation in many civil (e.g. defamation) and criminal (e.g. offensive language, promotion of terrorism) contexts.

The overwhelming evidence is that racist speech also warrants regulation. It is harmful to individuals and our society.⁵ People experiencing racism face poorer social and health outcomes, including higher suicide risk in young people.⁶ Racist speech also silences its victims and impacts upon their ability to enjoy basic freedoms.⁷ The right to live free of racial discrimination is also a fundamental human right.

Writing in the American context, Mari Matsuda observes:

As much as one may try to resist a piece of hate propaganda, the effect on one’s self-esteem and sense of personal security is devastating. To be hated, despised, and alone is the ultimate fear for all human beings. However irrational racist speech may be, it rights right at the emotional place where we feel the most pain. The aloneness comes not only from the hate message itself, but also from the government response of tolerance.⁸

In Australia since 1995, the ‘government response’ to racist speech has *not* been tolerance. In Part IIA of the *Racial Discrimination Act*, the Australian Parliament has rejected racist speech and sought to ensure it is regulated to limit the harm it causes, while recognising the importance of free speech and robust debate.

Important to the balance struck by Part IIA is both the existence of s 18D, which provides for strong free-speech protections, and the careful approach that courts have taken to the threshold that must be reached for s 18C to be engaged: it is now well-established the harm must be ‘profound and serious’ and more than simply ‘personal hurt’.⁹

Despite controversy surrounding the use of the law in a small number of recent cases, the need for change is not made out. After 21 years of operation, the best evidence in relation to Part IIA of

⁵ See Katharine Gelber and Luke McNamara, ‘Evidencing the harms of hate speech’, (2016) 22(3) *Social Identities*, 324-341.

⁶ See Niyi Awefeso, ‘Racism: A major impediment to optimal Indigenous health and health care in Australia’, (2011) 11(3) *Australian Indigenous Health Bulletin* available at <https://pdfs.semanticscholar.org/06ef/72366b4af348b35891219b1dd39cf3af7d74.pdf> (accessed 25 November 2016); Naomi C Priest, Yin C Paradies, Wendy Gunthorpe, Sheree J Cairney, Sue M Sayers, ‘Racism as a determinant of social and emotional wellbeing for Aboriginal Australian youth’, (2011) 194(10) *Medical Journal of Australia* at 546, available at https://www.mja.com.au/system/files/issues/194_10_160511/pri10947_fm.pdf (accessed 25 November 2016); Ann Larson, Marisa Gillies, Peter J. Howard, Juli Coffin, ‘It’s enough to make you sick: the impact of racism on the health of Aboriginal Australians’, (2007) 31(4) *Australia and New Zealand Journal of Public Health* 322 – 329, available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1753-6405.2007.00079.x/full> (accessed 25 November 2016).

⁷ See, for example, Mari Matsuda, ‘Public Response to Racist Speech: Considering the Victim’s Story’ (1989) 87 *Michigan Law Review* 2320 – 2381, 2337.

⁸ *Ibid.*

⁹ *Eatock v Bolt* [2011] 197 FCR 261, [263]-[268].

the RDA is that the law is working to offer protection from race hate speech, without having a 'chilling effect' on free speech.¹⁰ The law has protected the freedom of speech of comedians,¹¹ cartoonists,¹² playwrights,¹³ politicians¹⁴ and journalists¹⁵ who have acted reasonably and in good faith. The robust public debate that has surrounded Part IIA is itself instructive.

Recommendation 1

The Committee should affirm that Part IIA of the RDA provides important protection from racist hate speech while striking an appropriate balance with the right to freedom of speech.

3. AHRC complaint handling process

PIAC comments on just one aspect of the Committee's terms of reference relating to the powers of the AHRC, namely the relationship between the AHRC's complaint handling processes and applications to the Court arising from the same facts (Terms of Reference, 2(f)).

PIAC notes the AHRC's submission to this Inquiry recommends

that section 46PO of the AHRC Act be amended to provide that if the President terminates a complaint on any of the grounds set out in section 46PH(1)(a) to (g), then an application cannot be made to the Federal Court or the Federal Circuit Court unless that court grants leave.¹⁶

PIAC recognises the merit in some restriction on the right to commence proceedings that have already been through a statutory investigation and conciliation process. However, we believe that this recommendation goes beyond what is necessary and appropriate to ensure that clearly unmeritorious claims are not taken to court.

There is a balance to be struck between efficient and timely processes and protecting the rights of people with claims of discrimination. It is important that in seeking to resolve complaints quickly (as the AHRC rightly does), without a full ventilation of the issues and potential arguments, complainants are not then faced with the additional hurdle of seeking leave to commence proceedings unless their complaints are clearly without merit, have already been dealt with or have been unduly delayed. The AHRC's role in discrimination complaints is not, as it points out, an adjudicative/determinative one.

In PIAC's view, the need to seek leave to commence proceedings should therefore be limited to complaints that have been terminated on the grounds set out in s 46PH(1)(b), (c), (d) and (f). In other words, only where

¹⁰ Katharine Gelber and Luke McNamara, 'The Effects of Civil Hate Speech Laws: Lessons from Australia,' (2015) 49(3) *Law & Society Review* 631.

¹¹ *Kelly-Country v Beers* (2004) 207 ALR 421.

¹² *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105.

¹³ *Bryl v Nowra* [1999] HREOCA 11.

¹⁴ *Walsh v Hanson* [2000] HREOCA 8.

¹⁵ *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352.

¹⁶ Australian Human Rights Commission, *Inquiry into freedom of speech, Australian Human Rights Commission Submission to the Parliamentary Joint Committee on Human Rights* (9 December 2016), Recommendation 3, at 9, available at <http://www.aph.gov.au/DocumentStore.ashx?id=08970eb0-8390-4ef2-8501-26e197135219&subId=461226> (accessed 20 December 2016).

- (b) the complaint was lodged more than 12 months after the alleged unlawful discrimination took place
- (c) the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance
- (d) in a case where some other remedy has been sought in relation to the subject matter of the complaint--the President is satisfied that the subject matter of the complaint has been adequately dealt with
- (f) in a case where the subject matter of the complaint has already been dealt with by the Commission or by another statutory authority--the President is satisfied that the subject matter of the complaint has been adequately dealt with.

In PIAC's view, it is not necessary or appropriate to impose the additional procedural hurdle of requiring leave when a complaint is terminated on the basis that the President is 'satisfied that the alleged unlawful discrimination is not unlawful discrimination' (s 46PH(1)(a)). Cases falling within this ground may well remain arguable ones that a person should be entitled to take to court in the ordinary course.

Similarly, the President's view as to the appropriateness or availability of other potential remedies (s 46PH(e), (g)) should not require a complainant to seek leave before commencing proceedings in relation to what may otherwise be a complaint with merit.

Recommendation 2

If section 46PO of the AHRC Act is amended to require the granting of leave to commence proceedings after termination on particular grounds, this should be limited to those grounds set out in section 46PH(1)(b), (c), (d), or (f).