

# Aboriginal Peak Organisations Northern Territory

An alliance of the CLC, NLC, CAALAS, NAAJA and AMSANT

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

Via email: [18Cinquiry@aph.gov.au](mailto:18Cinquiry@aph.gov.au)

Friday 23<sup>rd</sup> December 2016

Dear Committee Secretary,

**RE: Submission to the Parliamentary Joint Committee Inquiry into the operation of the Racial Discrimination Act 1975 (Cth) and the Australian Human Rights Commission**

The Aboriginal Peak Organisations of the Northern Territory (APO NT) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Human Rights with respect to the Racial Discrimination Act 1975 (Cth) and the Australian Human Rights Commission. APO NT is also grateful to the Committee for granting an extension.

APO NT is an alliance comprising the Central Land Council (CLC), Northern Land Council (NLC), Central Australian Aboriginal Legal Aid Service (CAALAS), North Australian Aboriginal Justice Agency (NAAJA) and the Aboriginal Medical Services Alliance of the NT (AMSANT). Since its establishment in 2010, APO NT has been working to develop constructive policies on critical issues facing Aboriginal people in the Northern Territory and to influence the work of the Australian and Northern Territory Governments. As representatives from peak organisations in the Northern Territory, we share the aim of protecting and advancing the wellbeing and rights of Aboriginal people and communities.

APO NT refers the Committee to an open letter '*Australia needs to maintain strong protections against racial hatred and an independent and accessible Human Rights Commission*' as addressed to Malcolm Turnbull, George Brandis and Ian Goodenough on 30 November 2016 and emphasises that we do not support amendments to the *Racial Discrimination Act 1975* (Cth) or a reform of the Australian Human Rights Commission. This letter is attached to this submission and is marked as **Attachment A**.

If you wish to discuss any of the above in further detail, please contact Brionee Noonan by phone on (08) 8944 6672 or via e-mail to [researchofficer.apont@amsant.org.au](mailto:researchofficer.apont@amsant.org.au).

Yours sincerely,



Dr. David Cooper  
Acting CEO, AMSANT

*On behalf of the Aboriginal Peak Organisations NT*

David Ross Director CLC	Joe Morrison CEO NLC	John Paterson CEO AMSANT	Eileen Van Iersel CEO CAALAS	Priscilla Collins CEO NAAJA
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# **Aboriginal Peak Organisations Northern Territory**

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## **APO NT Submission to the Parliamentary Joint Committee Inquiry into the operation of the *Racial Discrimination Act 1975 (Cth)* and the Australian Human Rights Commission**

**December 23 2016**

## Background

Australia has obligations under international law to implement protections against racial hatred, discrimination and violence.<sup>1</sup> These obligations were first incorporated into domestic law when the *Racial Discrimination Act* (Cth) was passed in 1975.

In 1995 ss18C and 18D were introduced as part of a regime that was intended to protect the victims of racism.

*“In response to recommendations of major inquiries including the National Inquiry into Racist Violence and the Royal Commission into Aboriginal Deaths in Custody. These inquiries found that racial hatred and vilification can cause emotional and psychological harm to their targets, and reinforce other forms of discrimination and exclusion. They found that seemingly low-level behaviour can soften the environment for more severe acts of harassment, intimidation or violence by impliedly condoning such acts.”*<sup>2</sup>

In his second reading speech regarding Part IIA, the then Attorney General Michael Lavarch stated that ss18C and 18D were “intended to close a gap in legal protection available to the victims of extreme racist behaviour” and that “no Australian should live in fear because of his or her race, colour or national or ethnic origin”.<sup>3</sup>

In 2014, amendments were proposed by then Attorney-General George Brandis in the *Freedom of Speech (Repeal of s 18C) Bill 2014*. The bill proposed to remove “offend”, “insult” and “humiliate” and insert “vilify” and “intimidate”. These proposed amendments were later withdrawn in August 2014, following widespread public concern and criticism including from Aboriginal and Torres Strait Islander and multicultural communities, lawyers, human rights advocates, public health experts and psychologists.<sup>4</sup>

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<sup>1</sup> See, Article 20 of the International Covenant on Civil and Political Rights (ICCPR) ratified by Australia in 1980 and Article 4 of the International Convention on the Elimination of all forms of Racial Discrimination (CERD) ratified by Australia in 1975.

<sup>2</sup> Australian Human Rights Commission, *‘At a glance: Racial vilification under sections 18C and 18D of the Racial Discrimination Act 1975 (Cth)’*, 2013, <https://www.humanrights.gov.au/sites/default/files/18C%20%26%20D%20FactsheetFINAL.pdf> (accessed 30 November 2016)

<sup>3</sup> Amnesty International submission to Attorney General’s Department on Proposed Amendments to the Racial Discrimination Act 1975 pg. 4 <https://static.amnesty.org.au/wp-content/uploads/2016/09/Submission-on-RDA-24-Apr-2014.pdf> citing Hansard (No. 198, Tuesday, 15 November 1994), p. 3336 (Mr Lavarch, Racial Hatred Bill 1994).

<sup>4</sup> See Soutphommasane, *I’m Not Racist But...*, esp. Chapter 3. In its submission to the Attorney General’s Department in April 2014, the Commission observed that it did not believe the exposure draft should proceed as a bill <https://www.humanrights.gov.au/submissions/amendments-part-ii-a-racialdiscrimination-act-1975>.

Throughout 2014, the Race Discrimination Commissioner also outlined detailed concerns about the proposed changes, see example <https://www.humanrights.gov.au/news/speeches/racism-moral-issue>, <https://www.humanrights.gov.au/news/speeches/defence-racial-tolerance>, [www.theage.com.au/comment/the-age-editorial/are-we-to-favour-bigotry-over-the-right-to-live-unaffected-by-it-20140328-zqo0t](http://www.theage.com.au/comment/the-age-editorial/are-we-to-favour-bigotry-over-the-right-to-live-unaffected-by-it-20140328-zqo0t), <http://www.abc.net.au/news/2014-04-29/soutphommasane-no-case-for-changing-race-laws/5417076> as cited in Australian Human Rights Commission “Freedom from Discrimination: Report on the 40th anniversary of the Racial Discrimination Act: National Consultation Report” (2015) [https://www.humanrights.gov.au/sites/default/files/document/publication/RDA40\\_report\\_2015\\_AHRC.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/RDA40_report_2015_AHRC.pdf)

More recently, in light of the media attention surrounding *QUT v Prior* and a cartoon published in *The Australian* by Bill Leak, critics have again sought to amend or repeal ss18C and 18D. It has been argued that the legislation lacks precision and clarity, making the threshold of unlawfulness so low that the provisions unjustifiably interfere with freedom of speech by extending to expression that is reasonably likely to 'offend' or 'insult'.<sup>5</sup>

APO NT submits that this position is unfounded both in law and in practice and that there is no clear rationale for the calling of the Committee's Inquiry into the *Racial Discrimination Act 1975* (Cth) or the Australian Human Rights Commission.

APO NT submits that the calling of this inquiry suggests that the Australian Government:

- (a) does not support the protection of vulnerable minorities from the effects of racial discrimination, particularly Aboriginal and Torres Strait Islander people;
- (b) sees personal freedom of speech as superior to other human rights including freedom from discrimination, the individual and collective right to the enjoyment of social and cultural rights and the right to be free from fear;
- (c) does not support the rights of Aboriginal and Torres Strait Islander people to live free from racial discrimination, hate and violence;
- (d) does not support the independence of the Human Rights Commission; and
- (e) does not recognise the importance of having easy, accessible and supported avenues for the resolution of rights based claims and grievances generally, and racially motivated discrimination specifically.

### **An appropriate balance between freedom of speech and freedom from racial discrimination**

APO NT refers to term of reference (1) which asks 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.

APO NT submits that Part IAA of the *Racial Discrimination Act 1975* (Cth) strikes an appropriate balance between the right to freedom of speech and the right to be free from racial discrimination. Further, APO NT submits that the limits on freedom of speech imposed by Part IIA are reasonable and proportionate to the legitimate aim of protecting minorities from racial vilification.

### **A justifiable limit on freedom of speech**

Section 18C currently makes it unlawful for a person to do a public act that is reasonably likely to offend, insult, humiliate or intimidate a person or group where the act is done because of their race, colour or national or ethnic origin.<sup>6</sup>

Section 18D contains free speech exemptions for otherwise unlawful speech under s18C where that expression was done reasonably and in good faith:

- in the performance or distribution of an artistic work;

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<sup>5</sup> *Australian Law Reform Commission* Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws [ALRC Report 129 – December 2015] pg. 113

<sup>6</sup> *Racial Discrimination Act 1975* (Cth) s18C

- in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest;
- in the making or publishing of a fair and accurate report of any event or matter of public interest;
- in the making or publishing of a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.<sup>7</sup>

There is a common misconception among sections of the Australian media, which is shared by a number of politicians that s18C protects against “hurt feelings”. This is not the case. As the courts have made clear, 18C (which is given a narrow meaning) must be interpreted in the context of the exemptions in 18D (which have been given a broad meaning).<sup>8</sup>

Article 19(3) of the International Covenant on Civil and Political Rights recognises that the right to freedom of speech is not absolute and may be subject to certain restrictions, including where necessary to respect the rights and reputations of others. Without Part IIA of *Racial Discrimination Act 1975* (Cth) Aboriginal people may be exposed to increasing racism both on an individual and systemic basis, which will have serious implications for Indigenous ill health.<sup>9</sup>

The experience of racism and racial abuse alienates individuals and communities from society, feeding a sense of disillusion and disempowerment and contributing to the effects of emotional trauma.

Trauma can alter a person’s perception of whether they feel safe in the world and with the people around them.<sup>10</sup> Trauma can particularly impact people who are living in and /or working in environments, which are strongly related to trauma. This includes Aboriginal communities, which have been affected by dispossession, loss of land, poverty, poor health, grief and premature death.<sup>11</sup> Racism permeates people’s lives in Australia and is reported to be frequently experienced by some groups of people including Aboriginal people.<sup>12</sup> For example, results of the National Australian Aboriginal and Torres Strait Islander Health Survey show:

- 16% of respondents reported being ‘treated badly because they are Aboriginal/ Torres Strait Islander’ in the previous 12 months.
- Of this cohort, 8% reported this occurred 2–3 times per week and 5% reported this was a daily occurrence

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<sup>7</sup> *Racial Discrimination Act 1975* (Cth) s18D

<sup>8</sup> *Bropho v Human Rights and Equal Opportunity Commission* [2002] FCA 1510

<sup>9</sup> Paradies, Y, Harris, R & Anderson, I.(2008) *The Impact of Racism on Indigenous Health in Australia and Aotearoa: Towards a Research Agenda*, Discussion Paper No. 4, Cooperative Research Centre for Aboriginal Health, Darwin

<sup>10</sup> Grant, R. G, 2007, *Complicated Trauma (Diagnosis and Treatment)* Robert Grant, Oakland, California, 94619.

<sup>11</sup> Ibid.

<sup>12</sup> Ziersch, A. M., Gallaher, G., Baum, F., & Bentley, M. (2011). Responding to racism: Insights on how racism can damage health from an urban study of Australian Aboriginal people. Pp 1045 – 1053. *Social Science and Medicine*, 73. doi: 10.1016/j.socscimed.2011.06.058; Krieger, N. (1999). Embodying inequality: a review of concepts, measures and methods for studying health consequences of discrimination. Pp 295 – 352. *International Journal of Health Services*, 29(2).

- The most common situation of racially discriminatory behaviour or racism was by members of the public (45%) and applying for work or while at work (29%).<sup>13</sup>

Discrimination and racism directly affect health with the impact increasing with increasing frequency of the experiences of discrimination. The unpredictable and anxiety-provoking nature of the racial discriminatory experiences, (which may be dismissed by others as trivial or not important), may lead a person to feeling as if there is something wrong with them.<sup>14</sup> Chronic and ongoing concerns of these experiences may lead to a person being vigilant to being avoidant of such experiences.<sup>15</sup> Over time this may extend to further re-traumatisation.<sup>16</sup> Thus it is not surprising that, there is a consistent association between racism and poorer mental health outcomes.<sup>17</sup>

Studies have indicated that racism accounts for one-third of the prevalence of depression and poor self-assessed health status among Aboriginal Australians, as well as having a significant association with psychological distress, diabetes, smoking and substance use.<sup>18</sup> The demonstrable effects of racism warrant the proportionate and appropriate limitations that 18C and 18D place on freedom of speech.

### 18C in Practice

As noted by the Australian Law Reform Commission,<sup>19</sup> critics who are concerned about the scope of 18C often fail to recognise how the section has been interpreted by the courts and how the law applies in practice, particularly that Australian courts have consistently favoured a narrow interpretation of “offend”.

For example, in *Creek v Cairns Post Pty Ltd*, Kiefel J held that the section requires the offence to have ‘profound and serious effects not to be likened to mere slights’.<sup>20</sup> In *Eatock v Bolt*, Justice Bromberg cited and agreed with the conclusions reached in previous Federal Court decisions,<sup>21</sup> noting that:

*“18C is concerned with mischief that extends to the public dimension. A mischief that is not merely injurious to the individual, but is injurious to the public interest and relevantly, the public’s interest in a socially cohesive society.”<sup>22</sup>*

<sup>13</sup> Australian Bureau of Statistics, Australian Aboriginal and Torres Strait Islander Health Survey: First Results, Australia, 2012-13 (2013) as cited in Close the Gap Campaign Steering Committee, Progress and Priorities Report 2016 (2016),

<sup>14</sup> Williams, M. T. (2015) The Link Between Racism and PTSD. Viewed online on 22.12.2016 at

<https://www.psychologytoday.com/blog/culturally-speaking/201509/the-link-between-racism-and-ptsd>

<sup>15</sup> Ibid, n 12.

<sup>16</sup> Carter, R. T. (2007) Racism and psychological and emotional injury: Reognising and assessing race-based traumatic stress. pp.13 - 105. The Counselling Psychologist, doi: 10.1177/0011000006292033.

<sup>17</sup> Paradies, Y. (2007) A systematic review of empirical research on self-reported racism and health. *International Journal of Epidemiology*, pp 888 – 901. doi: 10.1093/ije/dyl056

<sup>18</sup> Paradies, Y, Harris, R & Anderson, I 2008, *The Impact of Racism on Indigenous Health in Australia and Aotearoa: Towards a Research Agenda*, Discussion Paper No. 4, Cooperative Research Centre for Aboriginal Health, Darwin

<sup>19</sup> *Australian Law Reform Commission Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* [ALRC Report 129 – December 2015] pg. 115

<sup>20</sup> *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, [16]

<sup>21</sup> *Eatock v Bolt* [2011] FCA 1103, [268]

<sup>22</sup> *Eatock v Bolt* [2011] FCA 1103, [263]

This threshold was applied by the Court in *QUT v Prior* in dismissing a claim made under 18C.<sup>23</sup>

### **Australian Human Rights Commission**

APO NT refers to the terms of the reference (2), (3) and (4) and submits that the complaints handling process of the Australian Human Rights Commission is not in need of reform. APO NT also submits that the calling of this inquiry constitutes a deplorable and underhanded attack on the independence of the Human Rights Commission by the Government.

APO NT submits that the work of the Australian Human Rights Commission is crucial, both in terms of complaint resolution and a society wide approach to the endemic effects of racism and racial discrimination.

APO NT submits that the Australian Human Rights Commission offers a broad educative and institutional model that is easily accessible and should be retained.

### **Complaint Resolution**

APO NT submits that the complaint handling process for the Australian Human Rights Commission should not be subject to reform that may compromise its ability to provide an easily accessible process for the resolution of rights based complaints and grievances.

Under the *Australian Human Rights Commission Act* the Commission has the power to investigate and conciliate complaints.<sup>24</sup> When the Commission receives a complaint that is within the scope of the Act the President of the Commission or a delegate thereof has the power to investigate, seeking resolution. Where appropriate the Commission will invite the parties to participate in the informal process of conciliation. If a complaint is not resolved or it is discontinued for another reason, the complainant will be issued with documentation which permits a further application to be made to the Federal Court of Australia or the Federal Circuit Court.

Contrary to popular opinion, the Commission's role is limited to conciliating complaints: the Commission is not a court, it cannot determine whether unlawful discrimination has occurred. Similarly, an unlawful act under the legislation is a civil offence, it is not a criminal offence and it does not attract penalties.

The majority of complaints made by Aboriginal and Torres Strait Islander peoples in 2014-15 and 2015-16 were about racial discrimination.<sup>25</sup> The complaints mechanisms of the Commission and their interaction with the *Racial Discrimination Act* are particularly important for Aboriginal people as they provide a key avenue of redress for racially motivated rights based claims.

- Complaints Generally: *"In 2015–16, the Commission received 2,013 complaints of alleged discrimination and breaches of human rights and finalised 1,982 complaints. Approximately*

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<sup>23</sup> *Prior v Queensland University of Technology & Ors (No.2)* [2016] FCCA 2853 [57]

<sup>24</sup> Section 11(1)(aa) of the Australian Human Rights Commission Act 1986 (Cth).

<sup>25</sup> Australian Human Rights Commission "Social Justice and Native Title Report 2016"

[https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC\\_SJNTR\\_2016.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_SJNTR_2016.pdf) pg. 172

*1,308 conciliation processes were conducted of which 989 complaints (76%) were successfully resolved. This is the highest conciliation success rate on record.”<sup>26</sup>*

- 18C specific complaints: *“In 2015-16, the Commission received 77 complaints under section 18C, and 52% of racial vilification complaints were resolved at conciliation. During this year, 12% of complaints were withdrawn and only one complaint of racial hatred proceeded to court.”<sup>27</sup>*

Given these figures it would be a gross overreaction to reform the processes of the Commission based on unfounded comment to a subset of claims under the *Racial Discrimination Act 1975* (Cth). Noting that the claims in *QUT v Prior* were summarily dismissed by the Federal Court and a claim against Bill Leak’s cartoon would constitute an exemption under s18D.

As noted by Katharine Gelber, a Professor of Politics and Public Policy at The University of Queensland, and Luke McNamara, a Professor of Law at UNSW University:

*“Is there any other area of the law in which three controversial decisions in over 20 years would be regarded as a reason for a parliamentary inquiry?”<sup>28</sup>*

It is crucial that the complaints process of the Australian Human Rights Commission remains as easily accessible as possible. Accessible remedies include those that are free and allow people to resolve their disputes outside the courts. Court based remedies are expensive, time consuming and in many cases re-traumatising. This is particularly important for those who are bringing a claim for racial discrimination as they are often from minority or disadvantaged communities. Without a clear and accessible process the costs and unfamiliarity of redress for racial discrimination claims inhibits Aboriginal and Torres Strait Islander people’s access to justice and their free participation in society.

### **The value of the Australian Human Rights Commission to Aboriginal and Torres Strait Islander People**

Whilst the legislation itself provides a clear mechanism for the making and resolution of complaints about racial discrimination, the positive value of the Act is not confined to resolved complaints. The *Racial Discrimination Act 1975* (Cth) is a tool of advocacy and education extending more broadly to issues of social cohesion and social harmony, fulfilling a symbolic as well as a practical function.

The legislation serves to set a standard of conduct that is acceptable in Australian society. The symbolism associated with a repeal or amendment of 18C could have far reaching consequences for the treatment of minorities in broader society. It is imperative in the current political climate where xenophobic and racist ideologies are receiving increasing support from mainstream politicians and news media outlets that the same protections are seen to be afforded equally to all members of society.

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<sup>26</sup><https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC%20Annual%20Report%202015-2016.pdf> pg. 26

<sup>27</sup>[http://www.humanrights.gov.au/sites/default/files/AHRC\\_RDA\\_Explainer\\_2016.pdf](http://www.humanrights.gov.au/sites/default/files/AHRC_RDA_Explainer_2016.pdf) pg. 2

<sup>28</sup><http://theconversation.com/change-section-18c-critics-should-do-this-crash-course-first-68354>



Reform of the *Racial Discrimination Act 1975* (Cth) or the Australian Human Rights Commission that decreases the protections available for minority groups and makes it more difficult than it is currently to bring a claim for racial discrimination

*“would send a troubling symbolic message to the communities that section 18C is supposed to protect: that the government feels they should bear the burden of more harm so that others can have free speech. Could there be a more wrong message to send at this time in our history?”<sup>29</sup>*

**APO NT Recommends:**

- No change to the operation of the Racial Discrimination Act 1975 (Cth) and the Australian Human Rights Commission.

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<sup>29</sup> [Ibid.](#)