PO Box 291, Margate TAS 7054
E ceo@natsiwa.org.au
www.natsiwa.org.au
ABN 27 732 591 422 Inc:7849

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NATIONAL ABORIGINAL AND TORRES STRAIT ISLANDER WOMEN'S ALLIANCE

SUBMISSION

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Freedom of Speech in Australia Inquiry

9th December 2016

CONTACT	
Name	Ms Tracey Currie-Dillon
Designation	Chief Executive Officer
Email	ceo@natsiwa.org.au

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

Email to
18Cinquiry@aph.gov.au.

ABOUT NATSIWA

The National Aboriginal and Torres Strait Islander Women's Alliance is one of five National Women's Alliances, with funding from the Commonwealth Prime Minister and Cabinet's Office for Women.

Established in 2009, and incorporated in March 2013, the National Aboriginal and Torres Strait Islander Women's Alliance (NATSIWA) proudly works to empower Aboriginal and Torres Strait Islander women to have a strong and effective voice in the domestic and international policy advocacy process.

NATSIWA's vision is as follows:

'To protect the health, human rights and fundamental freedoms that is significant to Aboriginal & Torres Strait Islander Women and Children, through cultural preservation, health education and coalition building'.

Since incorporation NATSIWA's Membership now includes 524 individual Aboriginal & Torres Strait Islander Women and 14 Aboriginal Organisations across Australia.

Our following Guiding Principles are cognisant of the needs, heath, wellbeing and development, and aspirations of Aboriginal and Torres Strait Islander Women and Children. They are as follows:

- Aboriginal & Torres Strait Islander strengths;
- Recognition of the centrality of kinship;
- The need for cultural understanding;
- The impact of history in trauma and loss;
- The impact of racism and stigma;
- Recognition of different needs of communities;
- The recognition of human rights and social justice;
- Universal access to basic health care, housing and education; &
- Equitable needs based funding.

Please visit www.natsiwa.org.au to download NATSIWA's Strategic Framework.

It is with much pleasure that NATSIWA provide the Parliamentary Joint Committee on Human Rights with this submission.

Terms of Reference

To inquire, and report to the Parliament by 28 February 2017, on the following matters:

1. Whether the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) imposes unreasonable restrictions upon freedom of speech, and in particular whether, and if so how, ss. 18C and 18D should be reformed.
2. Whether the handling of complaints made to the Australian Human Rights Commission ("the Commission") under the Australian Human Rights Commission Act 1986 (Cth) should be reformed, in particular, in relation to:
    a. the appropriate treatment of:
        i. trivial or vexatious complaints; and
        ii. complaints which have no reasonable prospect of ultimate success;
    b. ensuring that persons who are the subject of such complaints are afforded natural justice;
    c. ensuring that such complaints are dealt with in an open and transparent manner;
    d. ensuring that such complaints are dealt with without unreasonable delay;
    e. ensuring that such complaints are dealt with fairly and without unreasonable cost being incurred either by the Commission or by persons who are the subject of such complaints;
    f. the relationship between the Commission's complaint handling processes and applications to the Court arising from the same facts.
3. Whether the practice of soliciting complaints to the Commission (whether by officers of the Commission or by third parties) has had an adverse impact upon freedom of speech or constituted an abuse of the powers and functions of the Commission, and whether any such practice should be prohibited or limited.
4. Whether the operation of the Commission should be otherwise reformed in order better to protect freedom of speech and, if so, what those reforms should be.

The Committee is asked, in particular, to consider the recommendations of the Australian Law Reform Commission in its *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* [ALRC Report 129 – December 2015], in particular Chapter 4 – "Freedom of Speech".

In this reference, "freedom of speech" includes, but is not limited to, freedom of public discussion, freedom of conscience, academic freedom, artistic freedom, freedom of religious worship and freedom of the press.

BACKGROUND

Before the Racial Discrimination Act there were no laws which protected any person or group from being subjected to racial discrimination. There was no right of reply or protection under the law or the right to legal recourse. Criminal codes only dealt with issues pertaining but not limited to physical violence, theft, fraud and common law dealt with contracts such as marriage and employment. A legislative Act was required to provide protection from racial discrimination

Research that was conducted in 2008 and 2011 identified that racial issues were still current. 'The Challenging Racism research [(1)] found:

- approximately 85% of respondents believe that racism is a current issue in Australia
- approximately 20% of respondents had experienced forms of race-hate talk (verbal abuse, name-calling, racial slurs, offensive gestures etc)
- approximately 11% of respondents identified as having experienced race-based exclusion from their workplaces and/or social activities
- 7% of respondents identified as having experienced unfair treatment based on their race
- 6% of respondents reported that they had experienced physical attacks based on their race [(1)],

The Racial Discrimination Act endeavored to ensure that Australians would be treated equally regardless of their ethnic background/race. Landlords for example could not discriminate on the grounds of race. The Act identifies that it is unlawful to insult, humiliate or offend persons because of their race. The Act also protects people on internet and social media.

The Racial Discrimination Act has provided the wider Australian community with a moral compass, as it holds people and organisations accountable for acts of racial discrimination and vilification.

Since its inception the Act has been debated and challenged in parliament and in more recent times by media. The argument is that it stifles the freedom of speech, but as a society and a country that values tolerance and freedom from racial oppression, we need to ensure we maintain our moral compass.

NATSIWA will address the first two question raised in the Terms of Reference for this Submission. NATSIWA does not feel qualified nor have we consulted with our members to enable us to be in a position to provide considered views or recommendations on the third and fourth questions.

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

   NATSIWA believes that the Racial Discrimination Act, and in particular 18C and 18D, do not impose unreasonable restrictions upon freedom of speech. These sections were not intended nor do they restrict freedom of speech, 18C was implemented to protect the minority, the vulnerable and marginalised.

   'Australia has a population of 23.13 million people. HREOC received 2388 complaints under the Racial Discrimination ACT; that equates to 001% of the population making a complaint. 90% of that 001% was resolved at the HREOC level. The remaining 10% were not resolved. To change section 18C within the ACT to appease those 10% of cases that were not resolved is incomprehensible, and it will remove all protection and revert to those without social conscience to once again oppress the oppressed.'[(2)]

   Freedom of Speech and individuals are equally protected under these current clauses of the ACT. Very recently in WA, a mother who tragically lost three sons in a vehicle accident had to also suffer the vitriolic highly offensive comments made in relation to inferences to her son's race and their past behavior. The publisher attempted to use 18D in order to get an exemption from the court that the material offered to and by the public was in done in good faith and with genuine public interest. The judge hearing the case made a point that it was not only offensive to the mother of the boys but also would also be offensive to Aboriginal people in the wider community.

   We must not sacrifice nor jeopardise current Acts that protect the minority and marginalised members of Australian Society because of the push by a few that it deemed to hinder their freedom of speech.

'Worryingly, and despite valid objections to the proposed changes to the RDA, the de-valuing of freedom of speech and its relevance to a healthy democracy in the furor has had the unfortunate effect of invigorating calls for a tightening of laws and increased regulation of media content across the board. In other words, rather than having a reasoned debate about the pros and cons of increasing regulation in the complex media ecology emerging in an era of convergence, the debate has been reduced to one where freedom of speech is equated with the right to be a bigot whilst media censorship is hailed as the only remaining measure to protect our civic rights and freedoms. In thinking through these issues, media and platform specificity is crucial.'[(3)]

Social Media

It is hard if not impossible at times to police blogs posted in social media that have been lifted from media sources and posted with comment and that is deemed as factual. There is no validation of the content and many believe the items to be factual. One can only speculate the reason behind these false items, but one can assume that it's for purpose of martyrdom of the subject in order to obtain some self proclaimed noteworthy status. Some of the most insidious violence/bullying and racial vitriol spills out aggressively through social media. Perpetrators use the social media medium obsessively to promote a particular distorted view of actual facts. This can, and does, invite comment both welcome and unwelcomed.

After it had been brought to Facebook administrators that a page that violated Australia's racial discrimination laws and was particularly grossly offensive to Aboriginal and Torres Strait Islander people, did the administrator add the words 'Controversial Humor' to the title as if that then made the content ok. Facebook ignored requests to take the page down. Another page was set up in opposition to the page seeking over 18,000 signatories and support to shut it down. The offending page changed slightly but was still as deeply offensive. It has since disappeared and one cannot be sure whether this was closed down by Facebook or simply removed by the creator.

Many individuals have also experienced cyber bullying and racial vilification on social networks. Children and youth are particularly at risk of cyber bulling. The Office of Children's eSafety Commissioner was developed to educate and address children and youth to be proactive and report Cyber bullying. The Office of Children's eSafety Commissioner Website offers useful advice informs the user of their rights and the steps they can take to stay safe or if necessary make a complaint.

It beggars belief and is a total contradiction, that the government and would see fit to implement the Office of Children's eSafety Commissioner on one hand and then remove the safe guard of 18C albeit with its limitations. To remove 18C would exacerbate bullying over social media of all Aboriginal and Torres Strait men, women, children and communities.

Racial Vilification in Sport

There have been very recent examples of racial vilification in sport. Aboriginal players Adam Goodes and Eddie Betts both were racially vilified. The AFL and the identified clubs were quick to respond and press releases condemned the racial abuse. Adam Goodes in a press interview the day following on from the first incident, asked not for retribution but instead for education of individuals and the community. He became the Ambassador for the Australian Human Rights 'Racism-It Stops with Me' campaign. The AFL have continued to campaign for the right of their Indigenous players, and the clubs will not tolerate racial abuse or discrimination.

The AFL has developed a Football Club Vilification and Discrimination Tolerance Policy and all clubs are encouraged to sign up. Without 18C there will be no recourse for Aboriginal and Torres Strait Islander sportsmen and women or sporting associations such as the AFL and clubs to respond to acts that are racially discriminative.

The introduction and promotion of 18C holds the supporter's and clubs accountable. Sporting leagues such as the AFL are in the ideal position to help educate the public about racial tolerance. The Racial Discrimination Act and in particular 18C are the foundation for all policies, programs and promotions that protect our Aboriginal and Torres Strait Islander men and women in the sporting arenas.

Freedom of speech within sports has not been hindered in anyway due to 18C.

Negative Stereotyping and the effects on DV

It is well recognised that there has been stereotyping of different races. Much of this stereotyping has been negative and this has been true for Aboriginal and Torres Strait Islander people. Many myths have been accepted as factual. We have all heard statements for example that refugees are paid more than our aged pensioners.

It is the writers past experience to hear members of the police force say, when called to a domestic, ‘it’s only that Aboriginal family’. The writer experienced Aboriginal women being told there were no houses to rent, only to find moments later a non Indigenous women being afford several to consider by the same real estate. It was also common practice for Aboriginal women seeking assistance for emergency assistance from church charities to be asked a myriad of questions as to the minimal questions asked of a non Indigenous woman in the same situation.

There have always been limited Aboriginal and Torres Strait Island specific services for women, so our women have faced additional shame by having to tell their stories to workers in mainstream services. Aboriginal and Torres Strait Islander women in crisis, escaping domestic violence, were further traumatised by the treatment they received by many services not just the few mentioned here.

In time women, and their support workers, became more familiar of their rights under the Racial Discrimination Act. Because of the Act many of these services were challenged and called to account for their practices. A complaint regarding one of the real estate agency mentioned herein was taken to HREOC and other services were held accountable for their delivery of services to our women.

It is a very real concern that if we were to abolish 18C to appease a few members of society, thus resulting in uncensored freedom of speech without social conscience or consequence, the repercussions for hundreds of Aboriginal and Torres Strait Island women and children escaping domestic violence will be additional trauma.

The introduction of paperless arrests without charge in the NT has highlighted the negative stereotyping. ABC news reported;

‘Collins’s agency has launched a High Court challenge to the law. The Human Rights Law Centre, a non-government organisation involved in the challenge says the law was used more than 700 times in the first three months, with three-quarters of paperless arrests applied to Indigenous people. Even before the new law came into effect, young Indigenous people comprised 96 per cent of those aged between ten and seventeen in detention in the Northern Territory, according to Amnesty, more than double their proportion of that age group’s population.’[(4)]

Former policeman John Elferink, the NT attorney-general, argued that the new arrest law relieves a “burden on our police officers.” He told the ABC, “Unfortunately paperwork, and excessive amounts of paperwork, does affect our police.” Elferink blamed high rates of Indigenous incarceration on what he called the “lifestyles” of Aboriginal people.

Our country has high ranking persons, not only in the NT, such as John Elferink stereotyping a race, under the guise of the law; this will become more common if we abandon 18C.

Reconciliation

There has long been debate regarding the word reconciliation. It implies that there is or was a relationship that has deteriorated and needs to been restored. The Oxford Dictionary definition is ‘restore friendly relations’. One could argue that history has clearly demonstrated that a friendly relationship on a broad basis between Aboriginal and Torres Strait Islander people and the dominant Anglo-Saxon community has never existed.

Having said that it is understood the Reconciliation is aimed to unite the two cultures. Since colonisation Aboriginal and Torres Strait Islander rights restoration have been painstaking slow. Laws have provided some protection from racism, but have not eliminated it. Numerous ethnic minorities as well as Aboriginal and Torres Strait Islander people are impacted by racism every day.

Many organisations are showing good faith by implementing a Reconciliation Action Plan (RAP). It has been documented that Aboriginal and Torres Strait Islander people have far more trust in organisations that have a RAP and those who work in such organisations felt they have mutual respect amongst work colleagues. The basis of many of these RAP’s is non discrimination, and acceptance of culture.

Reconciliation is building relationships that are about mutual respect and trust. Proposed changes to 18C, does not support the notion of a fair and equitable Australia. Changes to 18c under the pretext of Freedom of Speech is unacceptable as it effects negatively the already maginalised people of the country, thus there will be no equity.

Racism has profound effects on Aboriginal and Torres Strait Islander people, their mental and physical health, and career and life opportunities. Government is always researching and investigating ways forward and we are at a loss as to understand why the government would consider taking this backward step. Media campaigns like 'Racism-It Stops with Me' and the protection offered by 18C, even with its limitations, are ways forward to achieve an educated, informed and united nation.

2. **Whether the handling of complaints made to the Australian Human Rights Commission ("the Commission") under the Australian Human Rights Commission Act 1986 (Cth) should be reformed, in particular, in relation to:**
    a. **the appropriate treatment of:**
        i. **trivial or vexatious complaints; and**
        ii. **complaints which have no reasonable prospect of ultimate success;**

    b. **ensuring that persons who are the subject of such complaints are afforded natural justice;**
    c. **ensuring that such complaints are dealt with in an open and transparent manner;**
    d. **ensuring that such complaints are dealt with without unreasonable delay;**
    e. **ensuring that such complaints are dealt with fairly and without unreasonable cost being incurred either by the Commission or by persons who are the subject of such complaints;**
    f. **the relationship between the Commission's complaint handling processes and applications to the Court arising from the same facts.**

The reform of the Australian Human Rights Commission must only occur with very careful consideration. The commission has worked well since its inception and has a Board made up of experts who are passionate about Human Rights. Any restructure of the role of the Australian Human Rights Commission must be conducted in consultation with the Board and the Commissioner.

The Commission has a limited range of judiciary power, and this in with keeping of its role and the ACT which is to investigate and conciliate.

HREOC resolved all but 10% of the complaints that were received last year. Those that went to court were noted as deeply offensive, humiliating and/or intimidating, while perpetuating prejudice and negative stereotypes.

It has been noted that the process undertaking complaints by HREOC is far more expedient than that of our legal system. Tribunals and mediation were introduced as an alternate to the judiciary process, and in attempt to reconcile and educate.

Only after investigation can one conclude that a complaint is trivial, vexatious or has no reasonable prospect of success. Australian Human Rights Commission is the appropriate body to deal with such complaints and consider all aspects and how to proceed. The Commission also ensures that complaints are heard in a timely manner.

As for open and transparency, while the process needs to be open and transparent, many legal issues between individuals are dealt with in a private manner. Those that come to the attention of the public are complaints that involve a very public act of discrimination.
The Commission process while dealing with complaints has the flow on effect of education and public awareness.

We have news and media coverage and entertainment that have the freedom of speech to inform the public on issues, and events without the need to offend or insult individuals on the basis of their race.

Summary/Recommendation

18D provides the opportunity for exemption from 18C if the comments are made in good faith. If it is in the course of discussion or debate, for genuine academic purpose, fair comment in the public interest and so on. So the freedom of speech is not restricted in any way for majority of Australian citizens. As stated by Benjamin Law who said words to the effect "Changes to this Act is not about ordinary Australians it's about powerful men and powerful organisations being called out for racist comments and vilification." [(5)]

NATSIWA recommends that no changes are made to 18C or 18D.

The NATSIWA Submission is supported by AWAVA (Australian Women Against Violence Alliance and ERA (Equality Rights Alliance):

[(1)] Challenging Racism Project.
At: http://www.uws.edu.au/social_sciences/soss/research/challenging_racism/findings_by_region (viewed 27 November 2011). The project was based on random phone interviews with 12,500 people.
Kevin Dunn et al, Challenging Racism: the anti-racism research project, 2008 Attitudes to cultural diversity, old racisms and recognition of racism, state level comparisons (opens in new window), 4Rs Conference (University of Technology, Sydney) 30 Sept - 3 Oct 2008.

[(2)] Nakkiah Lui quoted HREOC figures on the recent Q & A

[(3)] Social Media Conflict: Platforms for Racial Vilification, or Acts of Provocation and Citizenship? Amelia Johns, Centre for Citizenship and Globalisation, Deakin University, Anthony McCosker, Swinburne University

[(4)] http://www.abc.net.au/news/2015-03-31/northern-territorypaperless-arrests-regime-challenged-high-court/6363294

[(5)] Benjamin Law Q & A - ABC