



**Australian
Human Rights
Commission**

Our ref: 2016-15875

23 November 2016

Mr Bernard Gaynor

By email only: personal@bernardgaynor.com.au

Dear Mr Gaynor

Preliminary Assessment

The Commission has received a complaint from you and a number of other people against Ms Linda Burney alleging racial hatred under the *Racial Discrimination Act 1975* (Cth) (RDA).

Single inquiry

Section 46PF(2) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRCA) states that if the President thinks that 2 or more complaints arise out of the same or substantially the same circumstances or subject, the President may hold a single inquiry in relation to those complaints.

As the complaints by you and a number of others all arise out of a comment that is reported to have been made by Ms Burney and all claim racial hatred in relation to this comment, I have decided to hold a single inquiry into these complaints.

All of the information that has been provided to the Commission to date in relation to these complaints has been reviewed. I am writing to advise you of the current assessment of these complaints and provide you with the opportunity to provide further information in support of your complaint, if you wish to do so.

The complaints

The complainants in this matter are all male and have individually described themselves in various ways including, white, fair skin, Caucasian, Anglo Saxon, Anglo Celtic, Celtic, Australian, Welsh, Maltese, German, British, European Jewish, Italian, Polish, European, Irish, Greek and Austrian.

The complainants allege that Ms Burney has engaged in an act of racial hatred by making the following comment to reporters on 9 November 2016 which has been

published in a number of media outlets, including in The Australian, Daily Mail Australia and www.news.com.au:

“It astounds me that the people that are advocating for the removal of 18C are basically white men of a certain age that have never experienced racial discrimination in their life.”

It is also alleged that Ms Burney made the same comment on Radio 2GB on 10 November 2016.

The complainants variously state that they were offended, insulted, humiliated and/or intimidated by the comment and that they considered themselves to be of the age group referred to in the comment. Some complainants also state that they have been critical of 18C. A number of the complainants assert that they have experienced discrimination in their life.

Current assessment

Section 46PH(1)(c) of the AHRCA says that the President may decide to terminate a complaint if she is satisfied that the complaint is lacking in substance/and or misconceived.

On the basis of the information before the Commission at this time, the President’s Delegate may consider terminating the complaint under section 46PH(1)(c) of the AHRCA. The reasons for this assessment are explained below.

Reasons for current assessment

Section 18C of the RDA covers offensive behaviour because of race, colour or national or ethnic origin and as you are aware provides that:

- (1) It is unlawful for a person to do an act, otherwise than in private, if:
 - (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
 - (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.
- (2) For the purposes of subsection (1), an act is taken not to be done in private if it:
 - (a) causes words, sounds, images or writing to be communicated to the public; or
 - (b) is done in a public place; or
 - (c) is done in the sight or hearing of people who are in a public place.
- (3) In this section:

“public place” includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

The RDA aims to strike a balance between the right to live free from racial hatred and the right to communicate freely ('freedom of speech'). Therefore, section 18D of the RDA says an act will not be against the law if it is 'done reasonably and in good faith':

- in an artistic work or performance;
- in a statement, publication, discussion or debate made for genuine academic artistic or scientific purpose or any other genuine purpose in the public interest;
- in making or publishing a fair and accurate report on a matter of public interest; or
- in making or publishing a fair comment if the comment is an expression of the person's genuine belief.

It appears that the 'act' being complained about is the comment reportedly made by Ms Burney to journalists which was then published or broadcast by various media outlets on 9 November 2016 and 10 November 2016 respectively. It appears that this act was done otherwise than in private.

The objective test

A key issue to consider is whether there is any information to support a contention that the comment reportedly made by Ms Burney is reasonably likely in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people (s 18C(1)(a) of the RDA).

The test of whether an act is reasonably likely to offend, insult, humiliate or intimidate a person or group of people is an objective one. That is, if a matter proceeded to court the question to be considered is not whether the person making the complaint was offended, insulted, humiliated or intimidated, but rather, whether the acts complained of were reasonably likely to have that effect on the person making the complaint or the relevant group of people.

A key case which considered this objective test is *Creek v Cairns Post Pty Ltd (Creek)*.¹ In *Creek*, the court determined that the act in question must have 'profound and serious effects, not to be likened to mere slights'.² In the case of *Bryant v Queensland Newspaper Pty Ltd*,³ Sir Ronald Wilson stated that 'the notion of "hatred", although not used in s 18C itself, suggests that the section allows a fair degree of journalistic licence, including the use of flamboyant or colloquial language'. Sir Ronald stated that words could convey racial hatred if they were 'plainly malicious or scurrilous, designed to foster hatred or antipathy in the reader'.

I understand that the complainants state that they were offended by the comment in question. However, it is not at all clear, given the way in which section 18C has been interpreted, how the published and/or broadcast comment by Ms Burney would meet

¹ (2001) 112 FCR 352.

² (2001) 112 FCR 352, 356-357 [16].

³ [1997] HREOCA 23.

the objective test of being 'reasonably likely to offend, insult, humiliate or intimidate' in all the circumstances.

Less than two thirds of complainants said that they were people who had experienced discrimination themselves. It is difficult to see how the remainder of complainants could reasonably claim to be part of a group that would be reasonably likely to be offended, insulted, humiliated or intimidated by the comments.

Of the group who claimed to have experienced discrimination, only around a third said that they were critical of section 18C. Only one complainant said that he had advocated for the repeal of section 18C and had experienced discrimination himself. Even in relation to this person, the most that could be said is that he considered that Ms Burney was wrong in thinking that a group of people of which he was a part had never experienced discrimination.

It may be very difficult to argue that the comment in question would have profound and serious effects on this man or on other white men who are part of that particular group.

Other issues

Even if it is possible to establish that Ms Burney's comment was reasonably likely to offend, insult, humiliate or intimidate a relevant group, potentially a group comprising white men of a certain age who were advocating for the removal of section 18C and who had experienced discrimination themselves, the comment may still come within the defences in section 18D.

The exemption in section 18D would apply for example if Ms Burney's comment was made reasonably and in good faith in the course of a discussion or debate held for a genuine purpose in the public interest. Similarly, the exemption would apply if Ms Burney's comment was made reasonably and in good faith in the course of making or publishing a fair comment on a matter of public interest and if the comment was an expression of a genuine belief held by her.

The Commission has not formed a concluded view on these issues under section 18D in relation to these complaints at this time as it appears that the complaints do not meet the requirements of section 18C.

Possible next steps

If you want to continue with your complaint

If after reviewing this letter you want to continue with your complaint, please confirm this by contacting me by Friday, 9 December 2016. If you want to provide further information in support of your complaint you should also do so by Friday, 9 December 2016.

Any additional information you provide will be considered and the President's Delegate will then make a decision about your complaint.

If your complaint is terminated under section 46PH(1)(c) of the AHRCA you or the person on whose behalf you lodged the complaint may apply to the Federal Circuit Court or the Federal Court of Australia to have the allegations decided by the court.

If you do not contact the Commission

If I do not hear from you by Friday, 9 December 2016, the President's Delegate may decide to close your complaint on the basis that she is satisfied you do not want to continue with the complaint. If your complaint is closed on this basis, you will not be able to make an application to have the allegations decided by the court.

Who should you contact?

If you have any questions about this letter, please contact me on the numbers/email below.

Yours sincerely

A handwritten signature in black ink, appearing to read 'HJ Lee', with a small dot above the 'i'.

HJ Lee
A/Principal Investigator/Conciliator

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