

**SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S PORTFOLIO**

Program: Australian Human Rights Commission

Question No. SBE16/041

Senator Fawcett asked the following question at the hearing on 18 October 2016:

Senator FAWCETT: So there are two questions that follow from that point: 18D gives some very clear exemptions so that things like the Leak cartoon—that is the current issue of the day—and any number of defences in terms of genuinely held belief, work of art, political comment et cetera, are very clear defences. If that is there, and it is within your remit to put to bed straight away the fact that, yes, we have to consider it but it clearly falls foul of 18D, surely that is a very strong statement to the Australian public about freedom of speech and about the opportunity to make genuinely-held political comment and where that stands in the equation. The longer this drags on, the more doubt it casts in people's minds as to where they may stand in the future. Is there any reason why you have not applied 18D to this already?

Prof. Triggs: As I have explained, I cannot comment on that case or any other case that is ongoing before the commission at the moment. But you are quite right in pointing out that 18D is one of the clearest legislative expressions of the right to freedom of speech in Australia. Those cases that the Federal Court has considered in the past, with regard to cartoons that might be seen as offensive by some on the grounds of race in the public arena, will not fall foul of 18C because they are covered by 18D which sets out a very wide range of bases on which the act will be protected by the right to freedom of speech.

Your question, I think, is going to the time—again, I am not commenting on that particular case. In the early days or weeks of a complaint coming to us, we will usually try to get a clear understanding both from the complainant and, in appropriate time, the respondent to understand whether, on its face, 18C might appear to apply. On the facts available to the commission, 18D might be exculpatory or, at least, a defence to the right of freedom of speech. So, while I cannot comment on the particular matter, I can say that we try to reach that point as quickly as we can. There is no point in spending the resources of the commission on a matter that is going to fall within the jurisprudence of the Federal Court that would allow even quite strong cartoons—particularly a Western Australian decision, and I can give you all of these cases where cartoons might be seen as offensive by some—which are protected by 18D as being in good faith, based on accurate information, fair comment or artistic works, which may cover a cartoon.

The answer to the honourable senator's question is as follows:

The leading case on the application of sections 18C and 18D of the *Racial Discrimination Act 1975* (Cth) (RDA) to cartoons is *Bropho v Human Rights and Equal Opportunity Commission*.¹ The case related to a cartoon published in The West Australian newspaper on 6 September 1997. The cartoon dealt with the return from the United Kingdom of the head of an Aboriginal warrior, Yagan, who had been killed by settlers in 1833. There was debate within the Aboriginal community about who had the appropriate cultural claims, by descent, to bring the remains back to Western Australia.

¹ (2004) 135 FCR 105.

The Nyungar Circle of Elders had lodged a complaint with the Commission about the cartoon. The Commission dismissed the complaint.² When the case came before the Federal Court, Justice French noted that the cartoon:³

- reflected upon the mixed ancestry of some of the Aboriginal people involved;
- implied an unseemly desire on the part of some of them to travel to England on public money;
- suggested that their conduct had caused disunity among the Nyungar people of the Perth area;
- showed a frivolous use by an Aboriginal leader of a dreamtime serpent to frighten a child who was sceptical about the trip; and
- showed Yagan's head in a cardboard box expressing a desire to go back to England.

The Commission had found that the cartoon was reasonably likely to be offensive to a Nyungar person or to an Aboriginal person more generally. There was little doubt that at least one of the reasons for the publication of the cartoon was the Aboriginality of the people involved.

However, the Commission found that the cartoon was an artistic work and that the newspaper had published it reasonably and in good faith. As such, it came within the exemption in section 18D(a) of the RDA. The Commission also found that the cartoon came within the exemption in section 18D(b) because it was a publication for a genuine purpose in the public interest, namely discussion or debate about the return of Yagan's head to Australia.

The appeal against the Commission's decision was unsuccessful.

² Note that this case was heard by the Commission at a time when it had the power to conduct hearings and make determinations about whether or not there had been unlawful discrimination. This process changed in two sets of legislative amendments: the first in 1995, and the second in the *Human Rights Legislation Amendment Act (No. 1) 1999* (Cth) which took effect from 13 April 2000.

³ (2004) 135 FCR 105, [2].