

**AUSTRALIA DEFENCE ASSOCIATION**

**PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS  
INQUIRY INTO FREEDOM OF SPEECH IN AUSTRALIA**

**Introduction**

1. This submission to the Parliamentary Joint Committee on Human Rights, by the Australia Defence Association (ADA), relates to the committee's inquiry into the freedom of speech in Australia with particular reference to whether Part IIA of the Racial Discrimination Act, 1975 (the RDA), imposes unreasonable restrictions on such freedom of speech.
2. The ADA has long been a strong proponent of the machinery-of-government oversight and accountability mechanisms provided by parliamentary committees and we appreciate the opportunity to offer a submission to the inquiry.
3. Why the ADA is making a submission may be found on pages 1-2.
4. A summary of the historical and conceptual background leading to our stance on the issue is at pages 3-4.
5. Detailed discussion of key issue may be found on pages 5-8, with our conclusions and recommendations beginning at pages 8 and 9 respectively.

**ADA's national role**

6. The issues addressed in this inquiry naturally fall within the ADA's area of interest as Australia's independent, community-based, non-partisan, national public-interest watchdog organisation for strategic security, defence and wider national security issues.
7. Since our foundation in Perth in 1975 the ADA has long advocated that Australia needs:
  - a. an integrated and whole-of-government approach to our strategic and domestic security; and
  - b. the informed and active participation of the whole Australian community in these efforts.
8. The ADA's public-interest guardianship remit and our accountability-advocacy activities have long primarily focused on the capabilities, tasking and operations of the Australian Defence Force, Australia's six intelligence and security agencies, and the Australian Federal Police in the exercise of the AFP's national security (as opposed to general crime-fighting) responsibilities. But our public-interest watchdog role also requires us to focus on the broader elements of national power that are necessary to secure Australia's sovereignty, freedom-of-action and liberty over the long term.

9. We base our public-interest guardianship activities on three key principles concerning Australia's strategic and domestic security:

- Our strategic security, common defence and sovereign freedom-of-action as a nation-state constitute the first responsibility of every Australian government.
- Ensuring our external and domestic security is also a universal civic responsibility of all Australians. All Australians have reciprocal citizenship obligations and responsibilities to this end. This includes responsibilities to those fellow Australians our government lawfully deploys overseas, on behalf of us all, for representational, military, law enforcement or other national-strategic purposes.
- National unity, economic strength, free speech, informed and robust public debate – and capable and adaptable defence and other strategic capabilities – are essential and inter-linked components of Australia's national security, liberal-democratic system and whole way of life.

10. To assist informed public debate the ADA maintains a comprehensive website at [www.ada.asn.au](http://www.ada.asn.au) and publishes discussion papers, study papers and a national bulletin, *Defence Brief*. We regularly contribute to public, academic and professional debates on strategic security, defence and wider national security matters. The ADA is also often consulted by the media seeking background information or other sectionally-neutral commentary across the range of such issues.

11. As a community-based, non-partisan, national public-interest watchdog organisation — with an independent and long-term perspective — the ADA therefore seeks the development and implementation of national security structures, processes and policies encompassing:

- a. an accountable, integrated, responsive and flexible structure for making strategic security, defence and wider national security decisions over the long term;
- b. a practical and effective balance between potentially competing needs for civil liberties, community security and short-term budgetary priorities;
- c. intellectually and professionally robust means of continually assessing Australia's strategic and domestic security situations;
- d. the sustained allocation of adequate national resources to all our strategic security, defence and wider national security needs according to such means (rather than tailoring supposed "assessments" to the funding levels, partisan policies or bureaucratic fashions thought to be acceptable politically);

- e. integrated and deterrent national security strategies based on the protection and support of our national sovereignty, strategic freedom-of-action and other enduring national interests;
- f. the development and maintenance of an adequate defence force and other security and intelligence agencies capable of executing such a national strategy across all aspects of national security; and
- g. the development and maintenance of manufacturing and service industries capable of developing and sustaining defence force capabilities and operations.

12. Objective 11b directly relates to the key issue of this inquiry into freedom of speech and the balancing of this matter with the other national requirements involved.

13. Objectives 11a, 11c and 11d also relate to this inquiry directly. They involve the informed participation of Australians in key national decision-making, with this in turn necessarily dependent on vibrant and informed public debate sustained by free speech.

14. Objectives 11e, 11f and 11g – concerning prudent and effective management by any government of the effective resourcing and maintenance of national defence capabilities – relate indirectly to the subject of this inquiry as they are necessarily dependent on the informed and free debate needed.

## **BACKGROUND**

### **The big picture**

15. In geo-strategic terms, Australia has the major advantage of being an island-continent and the only continent entirely occupied by one country, one polity and one citizenship. The contribution that this uniquely fortunate mix of geography, sovereignty and history has made to Australia's strategic security and our whole way-of-life is immeasurable.

16. Australia is also one of the world's oldest liberal democracies and the oldest one in both our near and wider region. Indeed, except for Canada and the USA, we are the oldest liberal democracy across the whole Asia-Pacific region at its broadest geographic and strategic definition. Only New Zealand comes close to our record.

17. Australia's sovereignty over our entire continent is acknowledged by all other countries. As a founder-member of the United Nations in 1945, as a mature and leading liberal democracy and as a country almost wholly dependent on maritime trade,<sup>1</sup> Australia has an enduring national interest in the survival and success of a rules-based international system governing the relations between countries and their commerce.

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1 99.7 per cent by volume and 76 per cent by value travel in a ship.

18. Most Australians, however, now tend to take our favourable geo-strategic and geo-political situations – and the undivided citizenship and national unity advantages involved – for granted. A number of factors contribute to this:

- a. It has been 75 years since the last direct, existential-level, strategic threat to Australian sovereignty and liberty ended at the Battle of Midway in June 1942.
- b. 25 years have elapsed since indirect existential threats, such as global nuclear war, were much reduced by the end of the Cold War and the collapse of the USSR over 1989-91.
- c. Mass immigration to Australia since 1946 has added ethnic and cultural diversity to the Australian population. It has also substantially diluted the national unity previously based on predominantly British ethnicity and shared constitutional and “Old Commonwealth” factors. While this has nominally been replaced by concepts of Australian citizenship based on legal or shared-value terms, there has been substantial downgrading of the concept of national unity as a cultural norm and a community advantage. The increased diversity of Australia’s population has also included a substantial loss of community knowledge and understanding about Australia’s strategic-security history and its enduring lessons.
- d. Community understanding of the importance of national unity for national security – in the international and grand-strategic sense – is now either largely non-existent, or sublimated to the perceived advantages of “diversity” as just a domestically-centric social or cultural end in itself.
- e. Three generations of Australians – including those foreign-born and the descendants of post-war immigrants – have come to believe, incorrectly, that Australia’s currently stable and largely favourable strategic, economic and social situation, and the current rules-based international system they depend on, are “normal”. Most Australians now also seem to believe that this “normality” will somehow continue forever without the need for prudent national planning and preparations in case it does not.

### **National power requires national unity**

19. Over the long term (out over a half-century or more), and in the necessary grand-strategic context that prudent planning and preparations require, Australia’s strategic security and sovereign freedom-of-action as a liberal democracy continues to depend on developing and maintaining integrated elements of national power.

20. A key element of any country’s national power, in both its hard and soft forms, is the genuine national unity, and consequent national will and community resilience, of its population.

21. Australia is a continental-sized country with a nominally very low population density, but with this population largely concentrated in a small number of coastal cities. It is also one of the few nation-states with a diverse national community stemming from mass immigration from many other countries over a relatively short period historically.

22. Australia has therefore long faced particular (and in global terms, rare) problems with sustaining the geographic, social and cultural national unity essential for national security over the long term.

23. Effective national unity requires a truly shared commitment based on informed understandings and a willingness to put the need for such unity above individual, majority or minority tendencies. National unity cannot be maintained by purely legal edifices (such as citizenship oaths), nor by lip service to either such unity, or indeed “community diversity”, undertaken merely for electoral or other political advantage.

24. The above-politics, and long-term strategic, need for a sufficient degree of national unity to help underwrite our sovereignty and liberty over the long term is now coming under significant pressure from shorter-term and lower national priorities. Chiefly driven by a combination of the general strategic security complacency discussed above allowing a range of political, social and cultural beliefs to become widespread without reference to any grand strategic context.

25. One example is the growing tendency in Australian society to believe that investment in national defence infrastructure is somehow discretionary, rather than each generation having a responsibility to help sustain such capacity over the very long term. Indeed, at present, the biggest inter-generational inequity in Australia is the gambling with the strategic security and revenue base of our children, grand children and great grandchildren, by the failure to pay our fair share of the sustained long-term investment required in national defence capabilities.

26. In terms of this present inquiry into the Racial Discrimination Act and its effect on freedom of speech, another example is undue emphasis on “multiculturalism” policies. Particularly where belief in the perceived benefits of multiculturalism becomes an end in itself. Rather than such policies being considered in a grand-strategic context, and especially how they need to fit within the broader requirements of the overall national unity needed to sustain our long-term national security and prosperity.

27. Vibrant and informed public debate greatly contributes to the capacity of Australian society to defend itself from external strategic risks and domestic subversion.

28. In the case of subversion, this can be sponsored by external entities, as with communism in the past and now with Islamist extremism. Subversion of national unity may also arise within the Australian community independent of foreign interference. This includes ethnic chauvinism, and extreme beliefs in

religious exceptionalism leading to self-isolation from the broader community and, now, even to terrorist attacks on fellow Australians.

29. As with any country, and especially any liberal democracy, strong national unity is as an essential element of the national power needed to secure Australia over the long term.

### **RDA uniformity with treachery laws: Offering a way forward?**

30. In 2002, following the 2001 capture and detention as per the Laws of Armed Conflict of David Hicks in Afghanistan, Australia reformed our treachery laws. Among other amendments these finally closed the Burchett Loophole, whereby traitors had been escaping prosecution because the wars in which they served with the enemy could no longer be “declared”.<sup>2</sup>

31. But even the very serious crime of treachery still requires committal of an intentional act,<sup>3</sup> rather than just a treacherous belief or thought about committing treachery.

32. In terms of helping preserve national unity through, in part, community harmony, there are obvious parallels with Part IIA of the Racial Discrimination Act, 1975. Not least in that an intentional act of racial discrimination, rather than just a racist belief, should surely be necessary.

33. Moreover, the distinction between outright treachery and legitimate dissent concerning a government decision can be a fine one. Hence, for a criminal offence of this severity, the high threshold of an intentional act is necessary for the offence to be committed.

34. Similarly, the distinction between alleged or real racist thoughts and legitimate dissent about, for example, the effectiveness of multicultural or indigenous policies, can be a fine one too. As with treachery, prohibition of racial discrimination should surely be focused on identifiable acts, not thoughts or even language not leading to a serious act.

35. The distinction between discussion of racial issues and committal of an act of racial discrimination also needs a high, objectively measureable and publicly sustainable threshold. Not least to preserve the commensurate degree of free speech our liberal democracy, and our national unity, depend on.

### **Thresholds for intention or result**

36. Another perspective on the deficiencies of Part IIA of the RDA is to consider the likely intention and intended result of the language used. If the intention, for example, is intimidatory or inciting an act of violence, or vilifies

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2 National “declarations of war: having been effectively ended by the UN Charter in 1945.

3 In other parliamentary inquiry submissions the ADA has argued that, to bolster informed rather than uninformed public debate, negligent acts of treachery should also be an offence as this would have no effect on the practice of legitimate dissent.

on racial grounds such that acts of violence could reasonably occur then or later, the speech used could generally not (depending on the exact circumstances) be reasonably categorised as a legitimate exercise of free speech.

37. On the other hand, language that might be perceived as merely insulting or offensive to the recipient – particularly where no truly objective test is applied as to the reasonableness of the recipient’s perception (as in Section 18C of the RDA) – should not be prohibited as a matter of principle. Not least because this surely limits the legitimate exercise of free speech unreasonably.

38. Australia is now a diverse society ethnically, culturally and religiously. Even excluding misunderstandings as to the actual language used and its context and meaning, most and probably all ethnic or social groupings (majority and minority) include individuals, or groups, quick to take perceived “offence” in even the most benign conversation or circumstances.

39. Degrees of unreasonable subjectivity in this regard can stem from a range of factors including educational standards, deep-seated ethnocentric outlooks, other cultural viewpoints and prejudices stemming from overseas experiences, and ideological or political convictions.

40. They can also even at times even stem from the racial or religious bigotry of a recipient of remarks made. Or where psychological conditions affecting those purportedly offended mean they are prone to see themselves unreasonably as being a victim in most or all the circumstances of their lives.

41. In terms of racially-based remarks there can be bigots on both sides of an allegedly insulting or offensive interchange. Without a truly objective test of reasonableness in the circumstances there is no protection against “insult” or “offence” being unreasonably “taken” by a bigot.

### **Current low threshold is counter-productive**

42. By its nature and degree, the current imposition on free speech by aspects of Part IIA of the RDA (particularly Section 18C) is needlessly too strict and undermines the broad national unity necessary for preserving our national security over the long run.

43. The current wording of Part IIA particularly fails to differentiate the quite different gravity, and effects, between language that reasonably and objectively challenges the social, cultural, political, religious or other views of a recipient – and speech that acts to incite violence or racial hatred through vilification, both of which are objectively measurable.

44. Furthermore, in terms of the intention behind the RDA itself, such unnecessary impositions on free speech also directly contradict the non-discriminatory intention of the Act. Not least because the current wording in Section 18C in particular can divisively encourage the types of community disharmony (and national disunity) that the Act seeks to discourage.

## Sackville proposals

45. For all the above reasons the ADA supports amendment of Part IIA of the RDA along the general lines proposed by former NSW Supreme Court and Federal Court judge, Ron Sackville, AO, QC in his *Australian Law Journal* article *Anti-Semitism, Hate Speech and Part IIA of the Racial Discrimination Act*.<sup>4</sup>

46. In summary he proposes removing the words “insult” and “offend”, and increasing the threshold for judging racially discriminatory language by replacing these two broad terms with language intended to produce objectively measureable actions: “degrades, intimidates or incites hatred or contempt”.

47. The latter two terms (“intimidates” and “incites”) also constitute objectively identifiable acts likely to threaten or cause violence at that or a later juncture.

## Conclusions

48. At the grand-strategic level the international environment is a tough one and, based on historical examples and current indications, likely to get tougher over the next half-century or more. The survival of the rules-based system of international relations that Australia thrives under is not assured and we must plan and prepare for this appropriately.

49. Australia’s national capacity, resilience and adaptability for protecting our way-of-life and sovereign freedom-of-action will inevitably be tested again, perhaps severely. A key element of any country’s national power in this regard is the national unity of its population.

50. Another key element of our national power is vibrant and informed public debate unhindered by unrealistic or counter-productive impositions on free speech.

51. National unity and freedom-of-speech are also inter-dependent components of Australia’s national power. Both are also higher national priorities than the quest for multiculturalism and diversity as socio-cultural or political ends in themselves.

52. Public discussion of Part IIA of the RDA has to date been generally marred by a serious context error. The grand-strategic, above-politics, national security requirements for national unity, and free speech as a component of vibrant public debate, have been largely ignored or discounted.

53. Discussion has also often incorrectly assumed that, as with consideration of multiculturalism policies and their effects generally, differing viewpoints on reform of Part IIA of the RDA are just the result of political or ideological beliefs. As a consequence, many of the opinions expressed have

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<sup>4</sup> *Australian Law Journal*, Volume 90, Part 9, August 2016

assumed this is solely a political issue and have divided reflexively and simplistically along Left or Right-wing lines.

54. Contributions to public debate by ethnic-based pressure groups have generally ignored that the current wording of Part IIA, particularly regarding the low threshold applied without any objectivity test, is counter-productive to the intention of the legislation. Especially in that it is now causing the very community disharmony through encouraging the divisiveness or racial discrimination the RDA ostensibly seeks to eradicate.

55. In any event, the concerns expressed by representatives from some ethnic groups that their groups need statutory protection from insult and offence must be balanced with the clearly higher priority need for national unity and freedom-of-speech. Especially if the RDA is amended to clearly delineate the difference in language and its intent between what might be regarded by some as insulting or offensive, and what constitutes an objectively identifiable act of intimidation, incitement or discrimination.

56. If the terms “insult” and “offend” are to be retained in Sections 18C (even as mitigated by Section 18D), there must be an objective test of whether the language used was reasonable, or not, in the circumstances. Such an objective test must be based on general community standards, not just the perception of the person or group allegedly insulted or offended.

57. To appropriately balance civil liberties with community security, the current wording of Part IIA of the RDA requires amendment, along the lines proposed by Ron Sackville, AO, QC.

58. Australia needs to re-establish the long-term importance and priority of national unity, and unhindered free speech, over short-term and lower-level political or socio-cultural criteria at any one time.

## **Recommendations**

59. The grand-strategic importance of national unity – as a key contributor to Australia’s national power and to our strategic and domestic security over the long term – be duly reflected in the committee’s report and recommendations.

60. The grand-strategic importance of free speech enabling vibrant public debate – as a key contributor to Australia’s national power and to our strategic and domestic security over the long term – be duly reflected in the committee’s report and recommendations.

61. The current wording of Part IIA of the RDA be amended, along the general lines proposed by Ron Sackville, AO, QC, in order to raise the threshold applying to racially discriminatory language such that the Act’s current unreasonable limitations to the exercise of free speech are eliminated or minimised appropriately.