



23 March 2017

Ms Toni Matulick
Committee Secretary
Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Ms Matulick,

Human Rights Legislation Amendment Bill 2017

I refer to the above Bill which has been referred to the Senate Legal and Constitutional Affairs Legislation Committee today for inquiry and report by 28 March 2017.

This letter refers briefly to Schedule 1 of the Bill, dealing with amendments to section 18C of the *Racial Discrimination Act 1975* (Cth) (RDA), and in some more detail to Schedule 2 of the Bill, dealing with the amendments to the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).

At the outset, I note that the time given to this Committee to report is extremely short. This is disappointing given that the proposed changes will impact on the thousands of complainants and respondents who use the Commission's complaint handling services each year.

The Commission welcomes the majority of the proposed amendments in Schedule 2. Many of these are based on recommendations made by the Commission to the Parliamentary Joint Committee on Human Rights (PJCHR) during its inquiry into *Freedom of Speech in Australia*, and other recommendations the Commission has previously made to Government. Of the 59 items in Schedule 2, the Commission supports 50 of them.

This letter sets out the Commission's key concerns about the remaining nine items. In general terms, the Commission is concerned that these nine items do not adequately reflect the recommendations of the PJCHR following its recent inquiry (in particular recommendations 5, 9 and 18), would result in additional red tape for the Commission, would be likely to cause additional delay and added costs for parties to complaints, and would impede access to justice in relation to meritorious complaints.

Proposed amendments to the *Racial Discrimination Act*

As the Commission said in its submission to the Parliamentary Joint Committee on Human Rights, any proposal to amend the RDA should involve extensive public consultation as it has the capacity to affect the human rights of all Australians. In particular, there should be consultation with those communities whose members are most vulnerable to experiencing racial discrimination.

The amendments proposed in Schedule 1 of the Bill have only been made in the last two days and should be subject to proper consultation.

In relation to the proposed amendment to s 18C(1)(a), the Commission considers that Part IIA of the RDA as it has been interpreted by the courts strikes an appropriate balance between freedom of speech and freedom from racial vilification.

Proposed s 18C(2A), would introduce a requirement that:

the question of whether an act is reasonably likely, in all the circumstances, to have the effect mentioned in paragraph (1)(a) is to be determined by the standards of a reasonable member of the Australian community.

The current test under s 18C to determine whether conduct is reasonably likely to offend, insult, humiliate or intimidate is an objective one.¹ The court does not simply rely on how a particular person or group of people subjectively felt about or reacted to the doing of the act complained of.² Rather, the court assesses whether, objectively, the act complained of was reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people.

Evidence that a member of a particular racial group was in fact offended by the conduct in question, is admissible on, but not determinative of, the issue of contravention.³

The Commission considers that the way in which courts have applied the test of whether an act is 'reasonably likely, in all the circumstances' to have the relevant effect is an appropriate one. Courts take into account the relevant context, namely the fact that racial vilification is directed towards people of a particular race, in assessing whether it is reasonably likely that that group would be offended, insulted, humiliated or intimidated.

The Commission does not support the proposed s 18C(2A).

¹ *McGlade v Lightfoot* (2002) 124 FCR 106 at 116 [42] (citing with approval *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615, *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 at 355 [12], and *Jones v Scully* (2002) 120 FCR 243, 268-269 [98]-[100]); *Eatock v Bolt* (2011) 197 FCR 261 at [242]; *Clarke v Nationwide News Pty Ltd trading as The Sunday Times* (2012) 201 FCR 389 at [46]. See also the Explanatory Memorandum to the Racial Hatred Bill 1994 (Cth) p 10, dealing with the analogous position under the *Sex Discrimination Act 1984* (Cth).

² *Clarke v Nationwide News Pty Ltd trading as The Sunday Times* (2012) 201 FCR 389 at [46].

³ *Jones v Scully* (2002) 120 FCR 243 at [99]; *McGlade v Lightfoot* (2002) 124 FCR 106 at [44]-[45].

Proposed amendments to the *Australian Human Rights Commission Act*

Main issues

The most substantial issues in relation to Schedule 2 relate to items 31, 36 and 43.

Item 31

This item introduces a mandatory accept/reject phase into the Commission's process for dealing with complaints of unlawful discrimination. A similar process is currently in place in Tasmania for complaints that are made to Equal Opportunity Tasmania.

The Commission submits that this item should be removed from the Bill. The Tasmanian Anti-Discrimination Commissioner strongly recommended against introducing a mandatory accept/reject phase into the AHRC Act based on her own experience. Evidence given by the Commissioner to the PJCHR was that:

the inclusion of an accept/reject stage early in the complaints process does not expedite proceedings. Rather, it opens up the preliminary stages of the complaints process to more costly review procedures and delays the capacity to engage in dispute-resolution as early as possible in the life of the complaint.⁴

In her oral evidence before the Committee, the Commissioner again emphasised that in Tasmania a mandatory accept/reject phase caused additional delay and added costs for parties because it encouraged them to litigate decisions made during the conciliation phase of complaint handling.⁵

Item 36

There are a number of issues that the Commission has identified with item 36.

First, the Commission considers that the wording in Recommendation 5 of the PJCHR's report is preferable to that in proposed s 46PF(7) and (8).

Recommendation 5 of the PJCHR was in the following form:

The committee recommends that the *Australian Human Rights Commission Act 1986* be amended to provide that when there is more than one respondent to a complaint, the Australian Human Rights Commission must use its best endeavours to notify, or

⁴ Equal Opportunity Tasmania, *Submission to the Parliamentary Joint Committee on Human Rights Inquiry into Freedom of Speech*, submission 167, 23 December 2016, p 40. At <http://www.aph.gov.au/DocumentStore.ashx?id=beb0ee58-4f5f-48dd-a53f-85f149dd0d06&subId=462714> (viewed 14 February 2017).

⁵ Evidence to the Parliamentary Joint Committee on Human Rights, *Inquiry into Freedom of Speech in Australia*, Hobart, 30 January 2017, pp 10 and 12 (Ms Robin Banks, Anti-Discrimination Commissioner, Equal Opportunity Tasmania). At <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Fcommjnt%2F7676cbb9-3001-44ed-99ea-dc49e62d202a%2F0001;query=Id%3A%22committees%2Fcommjnt%2F7676cbb9-3001-44ed-99ea-dc49e62d202a%2F0000%22> (viewed 14 February 2017).

ensure and confirm the notification of, each of the respondents to the complaint at or around the same time.

In making this recommendation, the PJCHR adopted a recommendation that had been made by the Commission.⁶ One of the reasons why the Commission made a recommendation in this form is because in some situations a complainant decides not to proceed with a complaint after receiving initial feedback from the Commission and asks for their complaint to be withdrawn. In those cases, a requirement for notification of respondents would be an additional, unnecessary step.

Secondly, the Commission submits that proposed s 46PF(9)(a) should be removed from the Bill. The obligation to notify a person who is not a respondent but who is 'the subject of an adverse allegation' is likely to be onerous in many cases and appears to be unnecessary. It is not needed, for example, to address the concerns that have been raised about the Commission's handling of the QUT complaint. Those concerns are addressed by Recommendation 5 of the PJCHR.

If this amendment is retained, then the Commission submits that three changes should be made:

- there should be a definition of 'adverse allegation' to make clear that it involves an allegation that a person engaged in conduct that amounts to unlawful discrimination;
- there should be a discretion not to notify a person if the President is satisfied that notification is not warranted or appropriate in the circumstances;
- it should be made clear that any notification would not occur until after the preliminary consideration by the President referred to in item 31 about whether to inquire into the complaint (assuming that item 31 is retained).

Thirdly, it appears that proposed s 46PF(6) and (10) should be subject to the same conditions as appear in items 10 and 15 with respect to proposed s 20(11) and (12) and s 32(6) and (7). These conditions provide that:

- the relevant subsections do not impose a duty on the Commission that is enforceable in court
- the relevant subsections do not affect a legally enforceable obligation to observe the rules of natural justice.

There seems to be no obvious reason why these conditions have been omitted from item 36 when they are included in items 10 and 15.

⁶ Australian Human Rights Commission, *Supplementary submission to the Parliamentary Joint Committee on Human Rights Inquiry into Freedom of Speech*, submission 13.1, 15 February 2017, pp 11-13 (AHRRC Recommendation 8). At <http://www.aph.gov.au/DocumentStore.ashx?id=1a996271-e850-48c7-89e4-53219b38eaf5&subId=461226> (viewed 23 March 2017).

Item 43

For the reasons given in relation to item 31 above, the Commission submits that mandatory termination provisions are not appropriate and proposed s 46PH(1B)-(1D) should be removed from the Bill.

The Commission submits that the ground of termination in proposed s 46PH(1B)(a) should remain in s 46PH(1) as a discretionary ground. This ground allows the President to terminate a complaint on the ground that he or she is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance.

As the Commission has submitted to the PJCHR, the Commission uses this ground in cases where it is appropriate. However, by converting this ground into a mandatory requirement, Parliament would be encouraging parties to a complaint to engage in judicial review of a decision to terminate or not to terminate on this ground during the complaint handling stage. As has been the case in Tasmania, this would be likely to lead to additional delay and added costs for parties to complaints.

The Commission is unclear what is meant by a complaint being 'resolved in favour of the complainant' and how this would be assessed. This language is also used in items 9 and 14 of Schedule 2. The Commission submits that this ground of termination in each of items 9, 14 and 43 be removed from the Bill. Section 46PH(1) of the AHRC Act already permits the President to terminate a complaint on the basis that there is no reasonable prospect of the matter being settled by conciliation.

Other issues

There are also a few other issues that the Commission has identified in the limited time it has had to review the Bill.

Item 27

The Commission considers that the wording in Recommendation 9 of the PJCHR's report is preferable to that in proposed s 46P(1B).

Recommendation 9 of the PJCHR was relevantly in the following form:

The committee recommends that section 46P of the *Australian Human Rights Commission Act 1986* be amended with the following effect: ...

- a written complaint be required 'to set out details of the alleged unlawful discrimination' sufficiently to demonstrate an alleged contravention of the relevant act.

Again, this recommendation by the PJCHR adopted a recommendation that was made by the Commission.⁷

⁷ Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Human Rights Inquiry into Freedom of Speech*, submission 13, 9 December 2016, pp 41-44 (AHRC Recommendation 2). At <http://www.aph.gov.au/DocumentStore.ashx?id=d42f430a-869c-4706-9414-bf0cba934162&subId=461226> (viewed 23 March 2017).

The proposed s 46P(1B), by contrast, requires ‘**the** details of the alleged acts, omissions or practices’ to be set out in a complaint. On one view, this would require *all* of the details of a complaint to be set out in the initial written complaint to the Commission. In many cases such a requirement is likely to be impracticable.

This issue could be addressed by either:

- deleting the word ‘the’ identified in bold above; or
- adopting the wording in Recommendation 9 of the PJCHR report.

Item 53

The Commission considers that proposed s 46PO(3A)(b) should be amended to include a reference to s 46PH(1)(i).

This would be consistent with Recommendation 18 of the PJCHR. Recommendation 18 was relevantly in the following form:

The committee recommends that section 46PO of the Australian Human Rights Commission Act 1986 be amended to require that if the Parliament terminates a complaint on any ground set out in section 46PH(1)(a) to (g), then an application cannot be made to the Federal Court or the Federal Circuit Court unless that court grants leave.

Again, this recommendation by the PJCHR adopted a recommendation that was made by the Commission.⁸

It is important that the termination ground in s 46PH(1)(i) is not subject to an additional leave requirement. Under that section, the President may terminate a complaint on the ground that he or she is satisfied that there is no reasonable prospect of the matter being settled by conciliation. The fact that a conciliated outcome could not be reached does not say anything about the merits of the complaint. There is no reason to subject complaints terminated on this ground to the additional hurdle of requiring leave of the court before proceedings can be commenced. If this proposed section remains as it is, it would have the potential to impede access to justice in relation to meritorious complaints.

Items 49 and 57

The Commission considers that proposed ss 46PKA(2) and 46PSA are inconsistent with one of the key aspects of the alternative dispute resolution service offered by the Commission, namely, that matters discussed during conciliation should remain confidential.

The importance of the confidentiality of conciliation is reflected in existing s 46PS(2) of the AHRC Act which provides that any report provided by the President to the Federal

⁸ Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Human Rights Inquiry into Freedom of Speech*, submission 13, 9 December 2016, pp 44-49 (AHRC Recommendation 3). At <http://www.aph.gov.au/DocumentStore.ashx?id=d42f430a-869c-4706-9414-bf0cba934162&subId=461226> (viewed 23 March 2017).

Court or the Federal Circuit Court on a terminated complaint must not set out or describe anything said or done in the course of conciliation proceedings under Part IIB (including anything said or done at a conciliation conference).

In order to be successful, conciliation relies on the goodwill of each of the parties. That in turn depends on the conciliator having the trust of the parties. An important aspect of conciliation which builds the trust of the parties and allows them to participate freely is the agreement of the parties that what occurs during conciliation is confidential.⁹

The Commission considers privacy and confidentiality to be fundamental requirements of the successful operation of its conciliation function. Privacy and confidentiality of the conciliation process at the Commission encourages voluntary participation in the process and allows the parties to:

- a. engage meaningfully in conciliation
- b. have frank and honest discussions and come up with creative solutions to the issues
- c. reach agreement in relation to longer term educative and systemic responses to discrimination and breaches of human rights
- d. resolve complaints without the need to go to court.

If the parties were aware that any offer they may make or receive during the course of a conciliation conference could be later tendered in legal proceedings on the question of costs, they would be less likely to engage meaningfully in the Commission's conciliation process.

These amendments are also unnecessary because it would be open to any party to make a formal offer under the standard *Calderbank* principles (or statutory equivalents) if any legal proceedings were eventually commenced. This would provide parties with precisely the same protection in relation to costs.

Finally, the Commission notes that this provision relates only to offers made by respondents. If, contrary to the Commission's primary position, these amendments are retained, s 46PSA should apply to offers made by either a complainant or a respondent.

Yours sincerely,

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⁹ K Brown, 'Confidentiality in mediation: Status and implications' (1991) 2 *Journal of Dispute Resolution* 307 at 310.