



15 March 2018

Senator Jane Hume
Chair, Economics Legislation Committee
Deputy Chair, Economics References Committee
PO Box 6100 Senate
Parliament House
Canberra ACT 2600

By email: senator.hume@aph.gov.au
CC: Economics.Sen@aph.gov.au

Dear Senator Hume

Senate Economics Legislation Committee: Inquiry into Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017

I write in response to the questions on notice provided to me on 5 March 2018, in relation to the Economics Legislation Committee's Inquiry into Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (the inquiry).

I am not in a position to comment on the exact provisions of the bill, but have sought instead to reflect on the Australian Human Rights Commission's experience in relation to sexual harassment and complaint handling, as well as commentary we have provided on whistleblowers in other contexts.

In relation to questions 1 to 3 that you have sought a response on, I draw the Committee's attention to the Commission's submissions regarding the protections that should be afforded to whistleblowers in the context of secrecy laws enacted for national security purposes.¹

In response to questions 4 to 8, I provide the following general response, which is limited to the context of individual complaints received by the Commission under the *Sex Discrimination Act 1984* (Cth) (SDA) and the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act), and the importance of confidentiality in maintaining the effectiveness and integrity of the Commission's complaints process.

The Commission's complaints process — confidentiality

Two of the major functions of the Commission are to:

- inquire into, and attempt to conciliate, complaints in relation to unlawful discrimination and breaches of human rights (complaint function); and

- to promote an understanding and acceptance, and the public discussion, of human rights and equality of opportunity and treatment in employment and occupation in Australia (educative function).

The Commission considers privacy and confidentiality to be a fundamental requirement of, and absolutely essential to, the successful operation of its complaint function.

Privacy and confidentiality encourage voluntary participation in the complaint process and allow the parties to:

- engage meaningfully in conciliation
- have frank and honest discussions and come up with creative solutions to the issues
- reach agreement in relation to longer term educative and systemic responses to discrimination and breaches of human rights
- voluntarily provide information and documents so that the Commission does not have to rely on its powers to compel production (and incur the associated costs in seeking the enforcement of any Notice)
- resolve complaints without the need to report to Parliament or go to court.

Complainants are aware that when complaints are lodged, they will be treated with total confidentiality by the Commission. This removes the potential deterrent of adverse publicity, which might otherwise deter complainants from approaching the Commission.

Representations are also made to respondents that any information and documents provided as part of the complaint process will not be disclosed by the Commission, save as required by law.

For many respondents, participation in the complaint function is the only exposure that they have to discrimination and human rights issues and it is therefore a key opportunity for the Commission to increase understanding and encourage respondents to undertake training and make policy changes to enhance human rights understanding and protections.

That confidentiality is an important aspect of the complaint function is clear from the AHRC Act. For instance, s 46PK(2) provides that conciliation conferences are to be conducted in private. Section 46PKA provides that anything said or done in the course of the conciliation of a complaint is not admissible in any proceedings relating to those acts. Under s 46PS, the President cannot include details of anything said or done in the course of conciliation proceedings in any report provided to a court under that section. Under s 49, staff of the Commission must not divulge information about persons gathered in the course of the Commission exercising its functions, save to the extent required by law; and s 49(2) provides that members of the Commission or Commission staff cannot be compelled to produce such information or documents in Court.

The Commission considers that disclosure of documents and information the subject of a complaint before the Commission would impede the willingness of individuals to make complaints to the Commission and the willingness of respondents to voluntarily

participate in the complaint process (including importantly, the conciliation process). This would, in turn, significantly reduce the number of complaints that are resolved and reduce the opportunity to use the complaint process to promote an understanding and acceptance, and the public discussion, of human rights and equality of opportunity and treatment in employment and occupation in Australia.

It would also mean an increase in the number of complainants that will be required to take their matters to court in order to have them resolved. This will have significant costs implications for both those complainants and the respondents to the complaint. Without the access to confidential complaint handling, the prospect of court adjudication may discourage complainants altogether.

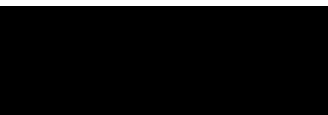
Workplace sexual harassment policies

The Commission has developed resources for employers to understand and meet their legal obligations under the SDA. It also provides practical guidance on how employers can prevent sexual harassment and how to respond effectively when it occurs.²

Specifically, the guide identifies a number of key elements that should be included in any workplace sexual harassment policy, which includes ensuring that complaints of sexual harassment are treated in a sensitive, fair, timely and confidential manner.

I hope this information is of assistance to the inquiry.

Yours sincerely



Kate Jenkins
Sex Discrimination Commissioner



¹ Australian Human Rights Commission, *Submission to Inquiry into the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (24 January 2018). At: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Espionage/Interference/Submissions; Australian Human Rights Commission, *Submission to Inquiry into the National Security Legislation Amendment Bill (No.1) 2014* (21 August 2014). At: <https://www.humanrights.gov.au/submissions/submission-inquiry-national-security-legislation-amendment-bill-no-1-2014>

² Australian Human Rights Commission, *Ending workplace sexual harassment: A resource for small, medium and large employers* (2014). At: <https://www.humanrights.gov.au/our-work/sex-discrimination/publications/ending-workplace-sexual-harassment-resource-small-medium>