Supplementary Submission to the Parliamentary Joint Committee on Human Rights on Freedom of Speech in Australia

Joshua Forrester,* Dr Augusto Zimmermann,** and Lorraine Finlay***

During our evidence before the Parliamentary Joint Committee on Human Rights regarding Freedom of Speech in Australia, we undertook to provide further written submissions concerning the complaints-handling procedures of the Australian Human Rights Commission ('AHRC') and whether these should be reformed.

These further submissions are outlined below. Our views on the processes and structure of the AHRC were also outlined in our original submission at pages 86–97.[1] In summary, we believe that the AHRC's handling of recent cases concerning complaints under s 18C of the *Racial Discrimination Act 1975* (Cth) ('RDA') has highlighted the urgent need for reforms to both AHRC structures and processes. There are four key reforms that we recommend to the Joint Committee – the first structural, and the remaining procedural:

(1) The key structural reform that we propose is to separate the existing complaints, investigation and conciliation functions performed by the AHRC from its educative and advocacy functions so that these two distinct roles are performed by separate entities;

(2) Introducing a statutory obligation to directly notify all respondents of a complaint immediately following that complaint being lodged;

* BA (Hons) (Murd), LLB (Hons) (UWA), PhD Candidate (Murdoch).
** LLB (Hons), LLM *cum laude*, PhD (Mon), Director of Postgraduate Research, Murdoch Law School; Law Reform Commissioner, Law Reform Commission of Western Australia; Professor of Law (Adjunct), University of Notre Dame Australia, Sydney.
*** BA (UWA), LLB (UWA), LLM (NUS), LLM (NYU), Lecturer in Constitutional Law, Murdoch Law School.

[1] Joshua Forrester, Dr Augusto Zimmermann & Lorraine Finlay, Submission 181 to the Parliamentary Joint Committee on Human Rights, Inquiry into Freedom of Speech in Australia, 23 December 2016.

(3) Strengthening the ability of the AHRC to terminate unmeritorious complaints at an early stage; and

(4) Introducing a costs recovery mechanism to provide either the AHRC with the discretionary power to order a complainant to pay costs where complaints are terminated, or introducing a power for the courts to order the AHRC to pay costs where it has failed to terminate an unmeritorious complaint at the complaints stage and the complaint is subsequently summarily dismissed.

1. Separating the AHRC Functions

At present, the functions of the AHRC include inquiring into and attempting to conciliate complaints of unlawful discrimination,[2] promoting an understanding and acceptance of human rights in Australia[3] and undertaking research and educational programs for the purpose of promoting human rights.[4] Examples such as the recent Bill Leak case demonstrate the difficulties that may arise from this mix of functions.

In evidence given before this Joint Committee, the Race Discrimination Commissioner, Dr Soutphommasane, highlighted the importance of the educational role played by the Race Discrimination Commissioner:

> There is a clear function attached to the Office of Race Discrimination Commissioner that is about promoting understanding and acceptance of and compliance with the Racial Discrimination Act. That function naturally extends to informing members of the Australian community about how they can access the law under the Racial Discrimination Act, including how they can lodge a complaint if they believe they have experienced racial discrimination or

[2] *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act') s 11(1)(aa).
[3] AHRC Act s 11(1)(g).
[4] AHRC Act s 11(1)(h).

> racial hatred. I certainly consider that an important part of my role and that it is an educative and informational role … .[5]

In the Bill Leak case the Race Discrimination Commissioner posted the following commentary (together with Mr Leak's cartoon) on his Facebook page the same day that the cartoon was first published in *The Australian* newspaper:

> We shouldn't accept or endorse racial stereotyping of Aboriginal Australians, or of any other racial group. If there are Aboriginal Australians who have been racially offended, insulted, humiliated or intimidated, they can consider lodging a complaint under the Racial Discrimination Act with the Commission. It should be noted that section 18D of the Act does protect artistic expression and public comment, provided they were done reasonably and in good faith.[6]

This serves to highlight the potential conflict between the current functions of the AHRC. In evidence given before this Joint Committee Dr Soutphommasane has rejected the suggestion that the public comments outlined above could be characterised as 'calling for or soliciting complaints',[7] and instead characterised the remarks as educative. Others have taken a markedly different view with, for example, the lawyers for the respondents in the Bill Leak case suggesting that Dr Soutphommasane 'prejudged the factual and legal basis for a complaint' giving rise to (at the very least) a reasonable apprehension of bias.[8]

While the Race Discrimination Commissioner himself plays no direct role in investigating or conciliating complaints, he does hold a senior position within the body that is responsible for

---

5 Evidence to the Parliamentary Joint Committee on Human Rights, Canberra, 12 December 2016, 17 (Tim Soutphommasane).

6 Tim Soutphommasane, *Facebook* (online), 4 August 2016 <https://www.facebook.com/permalink.pho?story_fbid=1219825684746926&id=653778944684939>.

7 Evidence to the Parliamentary Joint Committee on Human Rights, Canberra, 12 December 2016, 17 (Tim Soutphommasane).

8 Letter from Mr Justin Quill (Principal, MacPherson Kelley) to Ms Jodie Ball (Delegate of the President, Australian Human Rights Commission), 21 October 2016 <https://theaustralianatnewscorpau.files.wordpress.com/2016/10/ahrc-letter-5708670.pdf>.

doing this. At the very least, 'the Race Discrimination Commissioner is in a position where the public perception is that he has that influence and speaks on behalf of the AHRC'.[9] Given that the test for bias does not focus on actual bias but asks instead 'whether the relevant circumstances are such as would give rise, in the mind of a fair-minded and informed member of the public, to a reasonable apprehension of a lack of impartiality on the part of the decision-maker'[10] there is an arguable claim of bias on the AHRC's part following the public comments by the Race Discrimination Commissioner in relation to the Bill Leak cartoon.

This is an example of why the educative and advocacy functions of the AHRC should be split from the complaints, investigation and conciliation functions. As we noted in our original submission:

> 'This [existing] structure is unsustainable, as the AHRC's advocacy function risks giving rise to the appearance of bias when it engages in its investigation and conciliation function. The advocacy function should be legislatively and physically separate from the investigative and conciliation function. Hence, the present AHRC should be split into two new entities that have different enabling statutes and occupy separate premises. One entity should be dedicated to advocacy concerning human rights issues; the other should handle complaints made under the Commonwealth's various human rights statutes. Provided officers in each of these new entities understand their roles and the importance of procedural fairness, the proposed structure should avoid the perception of bias'.[11]

2. A Statutory Obligation to Notify

Section 46PJ(3) of the AHRC Act provides that 'If the President decides to hold a conference, the President must, by notice in writing, direct each complainant and each

[9] Joshua Forrester, Dr Augusto Zimmermann & Lorraine Finlay, Submission 181 to the Parliamentary Joint Committee on Human Rights, Inquiry into Freedom of Speech in Australia, 23 December 2016, 94.
[10] Ibid.
[11] Ibid 95.

respondent to attend the conference'. Whilst there is clearly a statutory obligation to notify each respondent when it is decided to hold a conciliation conference, this is not an obligation that has always been fully complied with. This can be seen in the example of *Prior v Queensland University of Technology* ('QUT Case')[12] where the individual students who were the subject of a complaint were not notified that a complaint had been made against them until a mere three days before the conciliation conference, and at that point were notified by an email from QUT rather than the AHRC.[13]

The AHRC has confirmed that this is not an isolated incident:

> The AHRC has not commented on the [QUT Case] directly but says respondents are sometimes not notified in situations where it is not clear if the complainant wishes to continue with the proceedings against them, so as to not cause the respondent unnecessary concern.[14]

The obligation to notify is obviously important in terms of procedural fairness, and the current failure of the AHRC – which should be a model organisation in terms of human rights compliance – to comply with its statutory obligations is troubling. We would go one step further, and recommend strengthening the existing statutory obligations to include an obligation to notify each respondent directly upon a complaint being made against them. This goes beyond the present requirement to notify respondents after making a decision to hold a conciliation conference by requiring respondents to be routinely notified at the earliest possible stage, namely as soon as a complaint is filed (and before any consideration is given to its merits or any investigation is undertaken).

---

12 *Prior v Queensland University of Technology* [2016] FCCA 2853.

13 See Calum M Thwaites, Submission 190 to the Parliamentary Joint Committee on Human Rights, Inquiry into Freedom of Speech in Australia, 6, 9.

14 Hedley Thomas, 'Watchdog kept 18C respondent in the dark about QUT complaint', *The Australian* (online), 8 February 2016 <http://www.theaustralian.com.au/national-affairs/indigenous/watchdog-kept-18c-respondent-in-the-dark-about-qut-complaint/news-story/b5aa4706ba62548bd20353bd1682f31b>.

This is both a matter of basic fairness and also enhances the intended educative effect of the RDA (and related human rights legislation). In terms of basic fairness, just as everybody should have the right to make a complaint, everybody should have the right to know when a complaint has been made against them. This is especially important considering the nature of the complaints made to the AHRC, particularly complaints under s 18C of the RDA. Being alleged to have engaged in racist behaviour is an allegation that carries a considerable stigma in Australia. Being unable to defend yourself against such an allegation because you are unaware the allegation has even been made is entirely unconscionable.

Again, recent cases have highlighted the importance of this reform. In the QUT Case it took 428 days from the time that the initial s 18C complaint was filed with the AHRC (on 27 May 2014) for the individual students concerned to be advised that a complaint had been made against them.[15] In the case of Bill Leak it took two months (from 4 August 2016 to 4 October 2016) for him to be advised of the complaint that was lodged against him by Melissa Dinnison.[16] These significant delays deny the individuals concerned the opportunity to respond to allegations that have been made against them, and falls well short of the standards of procedural fairness that the AHRC should epitomise.

Basic fairness also requires that each individual respondent be notified individually. This is important as the interests of each individual respondent may not be identical and they may well take significantly different approaches to the complaint. The QUT Case highlighted this issue. It appears that the AHRC left it to QUT to notify the individual student respondents

[15] Calum M Thwaites, Submission 190 to the Parliamentary Joint Committee on Human Rights, Inquiry into Freedom of Speech in Australia.

[16] See Mr Justin Quill (Principal, Macpherson Kelley), Letter to Jodie Ball (Delegate of the President, Australian Human Rights Commission), 21 October 2016 <https://theaustralianatnewscorpau.files.wordpress.com/2016/10/ahrc-letter-5708670.pdf>.

about the complaint and upcoming conciliation conference.[17] This was obviously problematic given that the students did not find out about the conciliation conference until just days before it was due to occur. Delegating its statutory obligation in this case was particularly problematic given that the interests of the various respondents were likely to differ sharply, which will often be the case when the respondents include an employer and their individual employees.

A statutory requirement for routine notifications at an early stage will also enhance the educative function of the complaints process. If a respondent is unaware that their behaviour has led to a complaint, what incentive is there for them to change that behaviour? Early notification ensures that individuals are aware that their behaviour is alleged to be unlawful and provides them with the earliest possible opportunity to address the issues raised by the complaint and, if appropriate, to moderate their behaviour. This is consistent with an approach that aims to promote understanding and conciliation, rather than litigation.

As a final point, there will be situations where the complainant cannot provide details about a respondent's name or address. In these situations, the AHRC should use its power to obtain information under s 46PI of the AHRC Act to find out these details and then notify the respondent as soon as possible. For example, a complainant may wish to lodge a complaint against a particular employee of a company. However, the complainant is uncertain about the employee's name and address. In this case, the AHRC should use its statutory powers to obtain this information from the company. It should then contact the employee as soon as possible.

[17] Hedley Thomas, 'QUT students demand apology from Human Rights Commissioner in race case', *The Australian* (online), 30 April 2016 <http://www.theaustralian.com.au/higher-education/qut-students-demand-apology-from-human-rights-commission-in-race-case/news-story/6afd0c478acd990050a663e7cd746c0f>.

3. Terminating Unmeritorious Complaints

The AHRC Act presently provides that the AHRC President may terminate a complaint if satisfied that (amongst other things) either:

(a) The alleged unlawful discrimination is not unlawful discrimination (noting that a complaint under s 18C falls within the definition of unlawful discrimination);[18] or

(b) The complaint was trivial, vexatious, misconceived or lacking in substance.[19]

While there is clearly a statutory power to terminate complaints at an early stage on various grounds, the AHRC have themselves acknowledged that this 'is a pretty low bar to get over' and 'it is a lower threshold than reasonable prospects of success'.[20] Complaints with limited legal merit do not seem to be terminated at an early stage, despite the broad discretionary powers available to the AHRC President under s 46PH(1) of the AHRC Act. This can be clearly seen in the QUT Case where on 4 November 2016 Judge Jarrett upheld summary dismissal applications on behalf of a number of individual respondents.[21] Had the AHRC been required to consider whether the complaint in the QUT Case had reasonable prospects of success if it were to proceed to court, it may have resulted in the matter being terminated at a much earlier stage and may have prevented it from reaching court at all by providing the complainant with a realistic assessment of the potential legal merits of the claim (or lack thereof).

---

[18] AHRC Act s 46PH(1)(a).
[19] AHRC Act s 46PH(1)(c).
[20] Evidence to the Parliamentary Joint Committee on Human Rights, Canberra, 12 December 2016, 16 (Graeme Edgerton).
[21] *Prior v Queensland University of Technology & Ors* [2016] FCCA 2853.

Indeed, we would submit that the existing power to terminate is not being used effectively to filter out unmeritorious cases. This has been a growing issue in recent years, as highlighted by Nick Cater:

> Of the 979 complaints finalised by the commission between 2001 and 2005 almost three in 10 were declared trivial, vexatious, frivolous, misconceived or lacking in substance. In the same period 10 years later, under presidents Catherine Branson and [Gillian] Triggs, the proportion dismissed as insubstantial was less than one in 20.[22]

Again, the Bill Leak case highlights the difficulties with this. Despite the first complaint being made in what could only be described as a less than comprehensive manner (with, for example, the complainant writing 'yes' in answer to the question, 'How do you think this complaint could be resolved'?),[23] the subsequent two complaints appearing to have been encouraged and procured to a significant degree by lawyers,[24] and it being widely acknowledged that s 18D would very likely apply in this case in any event, none of the complaints were terminated by the AHRC. Instead, Bill Leak has had to endure months of uncertainty and stress until the complaints were ultimately withdrawn by the complainants themselves. The failure of the ALRC to terminate a complaint such as this at an early stage highlights the need for reform in this area.

The importance of terminating unmeritorious complaints at an early stage is two-fold. First, it is obviously important to minimise the negative impact that such a complaint can have on an individual, which the testimony before the Joint Committee of individuals such as Bill

---

[22] Nick Cater, 'Tim Soutphommasane's 'grievance industry' sees bigots everywhere', *The Australian* (online), 23 August 2016 <http://www.theaustralian.com.au/opinion/columnists/nick-cater/tim-soutphommasanes-grievance-industry-sees-bigots-everywhere/news-story/bfd5162bff06cf8dd86bc06059ff1e80>.

[23] See Bill Leak, Submission 169 to the Parliamentary Joint Committee on Human Rights, Inquiry into Freedom of Speech in Australia, 8 December 2016, 8.

[24] Ibid. See also Paige Taylor and Hedley Thomas, 'White lawyers behind complaint', *The Australian* (online), 5 November 2016, <http://www.theaustralian.com.au/news/nation/white-lawyers-behind-complaint/news-story/72c50d424a5524d204895d3d22dc73e4>.

Leak and Calum Thwaites and Alex Wood has highlighted may be significant and long-term. As we have previously noted, 'the process itself is the punishment',[25] and these cases have shown that defending a s 18C complaint is a significant punishment in and of itself.

Second, and more broadly, ensuring that unmeritorious complaints are terminated at an early stage is essential if we are to minimise the chilling effect that this legislation has on freedom of speech. When the fact of a complaint becomes public knowledge this invariably results in a 'chilling effect' on public discourse on related topics. Where an unmeritorious complaint is allowed to remain on foot for an extended period the 'chilling effect' is magnified, even though it may well be the case that the complaint actually has no reasonable prospects of success if it were to proceed to court. Again, the Bill Leak cartoon exemplifies this point, with Warren Mundine highlighting the risk that national debate on an important subject like child abuse has been potentially stifled through the use of s 18C in this case:

> 'We're looking at freedom of speech in this country, looking at being able to debate serious issues like the Bill Leak cartoon which, yes, was in your face. It was meant to be in your face. But it was about raising a very serious issue about child abuse. If people are going to be hauled before tribunals or courts over these very issues, it is going to stifle debate. It is going to stop freedom of speech and I believe it has to be reformed'.[26]

In our view, there has been (for whatever reason) an interpretation of s 46PH(1)(a) of the AHRC Act that excessively narrows the scope of the words used in this provision. To avoid any doubt, and to strengthen the power to terminate complaints, we would recommend inserting into s 46PH of the AHRC Act an additional requirement that the President *must* consider whether a complaint 'has reasonable prospects of success' and *must* terminate the

---

[25] Joshua Forrester, Augusto Zimmermann & Lorraine Finlay, 'QUT discrimination case exposes Human Rights Commission failings', *The Conversation* (online), 7 November 2016. <https://theconversation.com/qut-discrimination-case-exposes-human-rights-commission-failings-68235>.

[26] Joe Kelly, 'Warren Mundine: 18C puts freedom of speech at risk', *The Australian* (online), 30 October 2016 <http://www.theaustralian.com.au/national-affairs/warren-mundine-18c-puts-freedom-of-speech-at-risk/news-story/76a7f6f710b52873d80b93918a3e2cdf>.

complaint if it does not. This would effectively strengthen the filtering function that the existing s 46PH(1) is intended to fulfil, but which does not seem to be occurring at present.

4. Awarding Costs

On its web-site the AHRC highlights that its complaint process 'is simple, free and flexible'.[27] This may be the case for complainants, but it is certainly not an experience shared by individuals responding to a complaint that has been filed against them under s 18C. This point about disparate experiences was made persuasively by Mr Bill Leak in his written submission to this inquiry, where he observed that the first complainant who lodged a s 18C complaint against him 'had never met me and didn't have to justify anything she did. No one asked her any questions and it didn't cost her a cent.' This contrasts to his own experience in responding to the complaint where he notes that 'I was fortunate enough to have News Corp backing me legally. If I had had to pay the legal bills myself, the investigation would have left me financially ruined.'[28] In considering these contrasting experiences it is important to note that at the particular point being described all that had been made was an untested allegation – there had been no findings and certainly no conclusions of any wrongdoing against the respondent.

The AHRC complaints process is designed to be more accessible and affordable for complainants than judicial proceedings. This is a significant consideration as it is important to ensure that all potential complainants have access to remedies when they have a legitimate complaint. It is also important, however, to ensure that the process is accessible and affordable for **all** parties involved, and that respondents are not entirely forgotten in this equation. At present, the system places virtually all of the risk and burden on respondents, at

---

[27] Australian Human Rights Commission, *The Complaints Process* (online), <https://www.humanrights.gov.au/complaints/complaint-guides/complaint-process>.

[28] Bill Leak, Submission 169 to the Parliamentary Joint Committee on Human Rights, Inquiry into Freedom of Speech in Australia, 8 December 2016, 8.

a point where only mere allegations have been made. This is antithetical to both the presumption of innocence and the rule of law.

Not only does this result in a significant burden being placed on respondents trying to defend themselves against a complaint, but it also encourages respondents to consider settlement payments at an early stage regardless of the actual legal merits of the complaint made against them. For example, we know that three students in the QUT case accepted confidential settlement offers and made payments of $5,000 to ensure the discontinuation of the complaint against them.[29] This is both unfair on the individual respondents, and also concerning in that it potentially encourages unmeritorious complaints. Encouraging parties to conciliate rather than litigate is an important feature of the complaints process, but when this results in respondents choosing to settle unmeritorious complaints rather than engaging in a process they see as being stacked against them, this suggests that a better balance needs to be struck.

At present, there is no provision allowing for costs to be awarded specifically in relation to the AHRC complaints process. While we do not consider that routine costs orders would be appropriate in these cases, there should be provision for the AHRC President to exercise their discretion and award costs against a complainant in certain circumstances. One example might be where a complaint is terminated on the grounds that it 'was trivial, vexatious, misconceived or lacking in substance'.[30] Another option would be to allow for a costs order to be made against the AHRC in circumstances where a complaint was not terminated by the AHRC President but was later summarily dismissed by a court as having no reasonable prospects of success. The advantage of this latter option is that it would continue to ensure that the complaints process is affordable to all Australians, but would encourage the AHRC

[29] Calum M Thwaites, Submission 190 to the Parliamentary Joint Committee on Human Rights, Inquiry into Freedom of Speech in Australia, 6.
[30] AHRC Act, s 46PH(1)(c).

to be more focused and rigorous in exercising its powers of termination at an early stage in appropriate cases.

5. Conclusion

The reforms outlined above would, in our view, be a significant step forward in terms of improving the operations of the AHRC to ensure that all persons involved in a complaint are afforded natural justice and that all complaints are dealt with fairly. In particular, they would address the clear deficiency in AHRC processes that have been highlighted by recent cases involving s 18C complaints. However, as we noted in our evidence before the Joint Committee, reforming the complaints process will not be a sufficient step in itself. It must also be accompanied by reforms to the substantive legislation, namely ss 18C and 18D of the RDA. Reforming either the law or the process may be good step on its own, but both steps need to be taken to better protect freedom of speech in Australia and to avoid some of the problems that have been highlighted by the recent cases referred to in this supplementary submission.