Law Council
OF AUSTRALIA

Human Rights Legislation Amendment Bill 2017

Senate Legal and Constitutional Affairs Committee

27 March 2017

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Executive Summary

1. Thank you for the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee (**the Committee**) in relation to the Human Rights Legislation Amendment Bill 2017 (**the Bill**).

2. The Bill would amend section 18C of the *Racial Discrimination Act 1975* (Cth) (**RDA**) and the complaints handling processes of the Australian Human Rights Commission under the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**). In particular, it would redefine conduct prohibited by section 18C of the RDA. The conduct defined to encompass the notion of racial vilification is proposed to be amended by removing the words 'offend, insult, humiliate' from paragraph 18C(1)(a) of the RDA and replacing them with 'harass'.

3. The Bill would also introduce the 'the reasonable member of the Australian community' as the objective standard by which contravention of section 18C should be judged, rather than by the standard of a hypothetical representative member of a particular group.

4. Further, the Bill would amend the AHRC Act to ensure that unmeritorious complaints are discouraged or dismissed at each stage of the complaints handling process, from lodgement to inquiry to proceeding to the Federal Court or Federal Circuit Court.

5. The Law Council notes that the Committee's time for inquiry and report is extremely short and inadequate. Any proposal to amend the RDA should be subject to extensive public consultation, particularly with vulnerable communities that may be subject to racial discrimination that the legislation is designed to protect. Further, the proposed changes to the processes of the Australian Human Rights Commission (**AHRC**) have the potential to impact on many Australians who may use the AHRC's complaint handling mechanisms and should therefore be subject to adequate processes of consultation.

6. The Law Council maintains the view, first expressed in its submission in 2014, that sections 18 and 18D of the RDA, as interpreted by the Courts, strike an appropriate balance between freedom of expression and protection from racial vilification, and should not be amended. If amendments are to be made, the changes must be the subject of careful scrutiny to avoid unintended consequences and uncertainty. The Law Council thus makes the following recommendations in relation to the proposed amendments to sections 18C and 18D:

    - The word 'harass' in proposed paragraph 18C(1)(a) should be reconsidered on the basis that it gives rise to legal uncertainty; and

    - The proposed 'reasonable member of the Australian community' test is also uncertain.

7. The Law Council makes the following further recommendations in relation to the proposed amendments to the AHRC Act:

    - Proposed subsection 46P(1A) should be amended to avoid uncertainty arising from the term 'reasonably arguable';

- Proposed subsection 46P(1B) should be amended to require the complainant to set out the details **to the best of the complainant's knowledge** of the alleged acts, omissions or practices;

- Item 31 should be removed from the Bill;

- Proposed subsections 46PF(7) and (8) should be amended to take into account circumstances where a complainant decides not to proceed with a complaint and withdraws a complaint making notification to respondents unnecessary;

- Proposed subsection 46PF(9) should be removed from the Bill or amended to:

    - define 'adverse allegation' to involve an allegation of unlawful discrimination;

    - provide the President of the AHRC with a discretion not to notify if it is not appropriate in the circumstances; and

    - require notification after a decision has been made by the AHRC to inquire into the complaint;

- Given the uncertainty in relation to the meaning of 'needs' of the complainants or respondents in proposed paragraphs 46PF(10)(a)(ii) and (iii), it would be preferable to require the President the act expeditiously where the rules of natural justice apply in a manner that is consistent with Items 10 and 15 of the Bill;

- Item 39 of Schedule 2 of the Bill, which shortens the time after which the President may terminate a complaint, will have no practical effect and should be removed;

- Proposed paragraph 46PH(1B)(b), which mandates termination of a complaint where there is no reasonable prospect that the complaint will be resolved in favour of the complainant(s), would appear to be covered by paragraph 46PH(1B)(a) and should be removed;

- Item 47 of Schedule 2 of the Bill, which would require a statement explaining that the Court may award costs be sent along with a notice, should be removed from the Bill;

- Advice should be sought from the Solicitor-General in relation to the validity of proposed subsection 46PH(1C);

- In the absence of evidence to suggest the necessity of proposed subsection 46PJ(7), which provides that a person is entitled to be paid reasonable expenses for attending a conference, the subsection should be removed;

- The leave requirement in proposed paragraph 46PO(3A)(a) should apply to paragraph 46PH(1)(c) 'the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance' but not beyond that; and

- Proposed section 46PSA relating to costs should be removed from the Bill, as a consequence, so should proposed subsection 46PKA(2).

Racial Discrimination Act proposed amendments

8. The Law Council maintains the view, first expressed in its submission in 2014, that sections 18C and 18D of the RDA, as interpreted by the Courts, strike an appropriate balance between freedom of expression and protection from racial vilification, and should not be amended.

9. We are guided by the objects of the RDA and the judicial interpretation of the meaning of the provisions in case law.

10. Part IIA of the RDA, including sections 18C and 18D, give effect to important international obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* 1969 (**CERD**) that commits all state Parties to:

> *Prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, within distinction as to race, color, or national or ethnic origin, to equality before the law, to personal security and to all civil political, economic, social and cultural rights.*

11. This is well-recognised in the judicial authorities. In particular, as Allsop J (as his Honour then was) remarked in *Toben v Jones* (2003) 129 FCR 515 at [129], Part IIA of the RDA provides for the balancing of free speech with 'legal protection to victims of racist behaviour', 'the strengthening of social cohesion and preventing the undermining of tolerance in the Australian community' and the 'removal of fear because of race, colour, national or ethnic origin'.

12. The Law Council supports a proportionality approach in recognising both the right to freedom from racial discrimination and vilification, and the right to freedom of speech and expression. The Law Council considers that the inquiry would be misdirected if it were to focus narrowly on whether one of these important rights strongly trumps the other.

13. The courts have construed the provisions in a conservative manner to the protection of the important right to freedom of speech and expression, and have found contraventions of section 18C of the RDA only in cases of 'profound and serious effects' and not in cases involving 'mere slights'.

14. The Law Council has previously submitted that any amendment to, let alone repeal of any of the provisions of Pt IIA (sections 18B to 18D) should be preceded by a rigorous and comprehensive review of their operation.[1] In relation to the exposure draft of the *Freedom of Speech (Repeal of s.18C) Bill 2014*, the Law Council noted that it was not aware of any evidence that the existing provisions have had or are having anything in the nature of a 'chilling effect' on freedom of speech or freedom of expression in Australia.[2] This remains the case. In weighing amendment to any of the language of

[1] Law Council of Australia, Submission to the Attorney-General's Department, Exposure Draft Reforms to the Racial Discrimination Act 1975 (Cth), 2 May 2014. Available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2818_-_Exposure_Draft_-_Freedom_of_Speech_Repeal_of_S.18C_Bill_2014.pdf. See also, Law Council of Australia, Policy Statement: Consolidation of Commonwealth Anti-Discrimination Laws, March 2011. Available at: https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementDiscriminationLaws.pdf.

[2] Law Council of Australia, Submission to the Attorney-General's Department, Exposure Draft Reforms to the Racial Discrimination Act 1975 (Cth), 2 May 2014. Available at:

the currently enacted text of sections 18C and 18D of the RDA, the Committee should consider the impact of the provisions on the enjoyment of human rights, both in terms of the promotions of, as well as interference in the enjoyment of, human rights.

15. Against that background, the Law Council makes the following comments in relation to the Bill.

Harass

16. Item 3 of Schedule 1 of the Bill would amend paragraph 18C(1)(a) of the RDA by omitting 'offend, insult, humiliate' and substituting 'harass.'

17. In the Law Council's view, there may be a number of difficulties with the use of the word 'harass'. First, 'harass' may assume a direct personal relationship. It may have the effect of carving out media or publications where the author has no person in mind to 'harass.' The ultimate effect may be to limit the scope of the provision to interpersonal interaction, notwithstanding that the harassment may be directed at a group of people.[3]

18. Second, it may be the case that conduct which is currently covered by section 18C of the RDA would fall outside the scope of that section as amended. For example, if it is the case that 'harassment' necessarily requires conduct directed at particular person(s), then a situation such as that in *Toben v Jones*[4] may fall outside the scope of the provision: Mr Toben published material on a website that purported to cast doubt on the Holocaust. The material was not directed to any person or group of people; Mr Toben was, in effect, setting out his views to the world at large. The Court found that the publishing of this material was unlawful under section 18C. In the Law Council's view, it is not at all clear that such conduct would fall within the scope of the term 'harass'; one might think that the material was more 'offensive', 'insulting' or 'humiliating' than 'harassing.' Similar concerns would apply to the factual matrix in *Clarke v Nationwide News Pty Ltd*.[5]

19. Third, there is little if any judicial interpretation of the word 'harass' in the Australian authorities. Further, there appears to be a conflict between the ordinary meaning of 'harass', the judicial interpretation of the word' harass', and the scope of the term 'harass' as proposed in the Bill. Proposed paragraph 18C(2A)(a) would make it clear that 'harass' could be a single act for the purposes of section 18C. However, the *Macquarie Dictionary* defines 'harass' as 'to trouble by repeated attacks; to disturb persistently'. Moreover, Hayne J in *Monis v the Queen* held that 'harassing' in the context of section 471.12 of the *Criminal Code 1995* (Cth) means 'troubling or vexing by repeated attacks."[6] This conflict between the proposed scope of 'harass' and the ordinary meaning of 'harass' may give rise to further interpretive difficulties.

20. The introduction of the term harassment could also potentially result in a circular definition being introduced into section 18C. It would ultimately depend on how a Court would construe such a provision in the context of the Act. The Second Reading Speeches would not assist in the interpretation of the section.

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http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2818_-_Exposure_Draft_-_Freedom_of_Speech_Repeal_of_S.18C_Bill_2014.pdf.

[3] *Racial Discrimination Act 1975* (Cth), s 18C(1)(a).

[4] (2003) 129 FCR 515.

[5] [2012] FCA 307. The defendant published readers' comments on The Sunday Times perthnow.com.au website which cast aspersions on four young Aboriginal boys and the Aboriginal community generally.

[6] [2013] HCA 4, at [154].

21. It could also reintroduce into the legislation the very words which the Parliament is seeking to exclude because when determining whether somebody has been harassed, the text which is ordinarily applied in the context of section 28A of the *Sex Discrimination Act 1984* (Cth), is whether a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated. The Law Council notes that the *Disability Discrimination Act 1992* (Cth) does not include a definition of 'harass'. Further, in the *Equal Opportunity Act 1984* (WA) racial harassment can include threating, abusing, insulting, or taunting another person.[7] Accepting that the Western Australian definition is a statutory definition, and that 'harass' is not otherwise defined in the proposed amendments, it may be that 'harass' covers conduct that was intended to be removed from section 18C.

22. Accordingly, the Law Council is concerned that the proposed amendment may create uncertainty where there presently is none in relation to the judicial interpretation of the current provision. Such uncertainty in the law is counter-productive and may lead to needless litigation.

23. The Law Council recommends therefore that the term 'harass' in proposed paragraph 18C(1)(a) requires further consideration by the Parliament. Ultimately, whatever words are adopted in any amendments, they should be consistent with the prevention of harm and the social cohesion aspects of the RDA.

Reasonable member of the Australian community

24. Proposed section 18C(2A) would provide that, for the purposes subsection (1), 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 Law Council's view is that adopting the 'reasonable member of the Australian community' test is apt to create uncertainty. It is suggested that the proposed test is vague and that it is not clear what the 'Australian community' amounts to for the purposes of applying it as part of a legal standard.

Single Act/Course of Conduct

25. Proposed subsection 18C(2B), which makes it clear that an 'act' can be a single isolated act, should remain in the Bill if Schedule 1 proceeds.

Proposed amendments to the AHRC Act

26. To the extent that the amendments tighten up the complaint handling process and ensure complaints are dealt with fairly and expeditiously in the circumstances, the Law Council supports them (subject to the concerns raised above). Such amendments include the requirement to notify the respondent of a complaint (proposed subsection 46PF(7)) and that the President must use the President' best endeavours to finalise a complaint within 12 months of referral (proposed paragraph 46PF(10)(b)).

27. However, the Law Council considers that a number of proposed amendments are problematic.

[7] *Equal Opportunity Act 1984* (WA), s 49A(3).

Item 27

28. Proposed subsection 46P(1A), which stipulates that it must be reasonably arguable that the alleged acts, omissions or practices are unlawful discrimination, is problematic. From a practical perspective, it is not clear what 'reasonably arguable' means. Further, it is not clear whether this has to be independently verified and indeed who would determine whether an allegation is reasonably arguable. This should be amended to avoid uncertainty.

29. It is suggested that proposed subsection 46P(1B) should be amended to require the complainant to set out the details to the best of the complainant's knowledge of the alleged acts, omissions or practices.

Item 31

30. Item 31 of the Bill would introduce a mandatory accept/reject phase into the AHRC's complaints process for unlawful discrimination. On the basis of Tasmanian experience, the Law Council is concerned that a mandatory accept/reject phase may cause additional undue delay and add costs for parties by encouraging litigation of decisions made during the conciliation phase of complaint handling.[8] Item 31 should be removed from the Bill.

Item 36

31. This item is problematic in a number of respects.

32. First, proposed subsections 46PF(7) and (8) should be amended to take into account circumstances where a complainant decides not to proceed with a complaint and withdraws a complaint making notification to respondents unnecessary. This could be achieved by adopting language similar to that in Recommendation 5 of the Parliamentary Joint Committee on Human Rights *Freedom of Speech in Australia* Report, namely:

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

33. Secondly, proposed subsection 46PF(9) is problematic, since:

- Individuals may not be identified by name or by another other means that might identify the person;
- An adverse allegation in a complaint may not involve any allegation of 'unlawful discrimination';
- The allegation may be misconceived; or
- The allegation may not be relied on as the matter is investigated.

34. Proposed subsection 46PF(9) should be removed from the Bill or amended to:

[8] Equal Opportunity Tasmania, *Submission to the Parliamentary Joint Committee on Human Rights Inquiry into Freedom of Speech*, submission 167, 23 December 2016, 40 at http://www.aph.gov.au/DocumentStore.ashx?id=beb0ee58-4f5f-48dd-a53f-85f149dd0d06&subId=462714

- define 'adverse allegation' to involve an allegation of unlawful discrimination;
- provide the President of the AHRC with a discretion not to notify if it is not appropriate in the circumstances; and
- require notification after a decision has been made by the AHRC to inquire into the complaint.

35. Thirdly, in relation to proposed subparagraphs 46PF(10)(a)(ii) and (iii), is not clear what the 'needs' of the complainant or respondent might mean. It would appear to be preferable to require the President the act expeditiously where the rules of natural justice apply in a manner that is consistent with Items 10 and 15 of the Bill. These items do not impose a duty on the AHRC that is enforceable in court. However, this does not affect a legally enforceable obligation to observe the rules of natural justice.

Item 39

36. Proposed paragraph 46PH(1)(b) (omitting 12 months and substituting 6 months) is, it is suggested, ineffectual. It will make little difference to what claims can be commences in the Federal Court and it is suggested that the amendment will have no practical effect and should not be pursued.

Item 43

37. Proposed paragraph46PH(1B)(b), which mandates termination of a complaint where there is no reasonable prospect that the complaint will be resolved in favour of the complainant(s), would appear to be unnecessary in light of paragraph (a), which provides that a complain must be terminated, inter alia, if it is lacking in substance. As such, paragraph (b) ought to be removed. It is also not clear how the AHRC would assess that a matter is 'resolved in favour of the complainant'. This ground of termination in Items 9, 14 and 43 should be removed from the Bill, noting that subsection 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.

38. It is suggested that proposed subsection 46PH(1C), which requires the President to terminate a complaint where the President is satisfied there would be no reasonable prospect that the Federal Court or Federal Circuit Court would be satisfied that the alleged acts, omissions or practices, are unlawful discrimination, may be open to constitutional challenge. The provision appears to misunderstand the distinction between the President's 'administrative' power and the Courts' judicial power. The Law Council recommends that advice be sought from the Solicitor-General with respect to this issue.

Item 47

39. Proposed subsection 46PH(2A) may also be problematic if it purports to direct the Court's discretion as to costs. Even if it does not seek to interference with the Court's discretion as to costs, it should not be included.

Item 49

40. Proposed paragraph 46PJ(2)(b), which provides that the President may invite any other person to a conference in certain circumstances, may be problematic on a practical level and in terms of who may have access to confidential information. Further, in the absence of evidence to suggest the necessity of proposed subsection 46PJ(7), the subsection should be removed.

41. Proposed section 46PKA (things said in conciliation are not admissible in evidence in certain proceedings) would be needed if the Bill is to proceed in its current form. However, the Law Council opposes the introduction of proposed section 46PSA (see below) and, as such, proposed subsection 46PKA(2) should be removed from the Bill.

Item 53

42. It is suggested that proposed paragraph 46PO(3A)(a), concerning when an application may be made, is too broad and not consistent with the scope of the grounds under section 46PH.

43. If a leave requirement is to be included in the Bill, the Law Council recommends that the leave requirement in proposed paragraph 46PO(3A)(a) should apply to paragraph 46PH(1)(c) 'the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance' but not beyond that.

Item 57

44. Proposed section 46PSA may be unnecessary in light of the Court's existing discretion with respect to costs and that the Court's discretion should not be fettered. It is suggested that this section be removed from the Bill.