

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Human Rights Legislation Amendment Bill 2017

Senator Xenophon asked the following question at the hearing on 24 March 2017:

Senator XENOPHON: Professor Triggs, this is a matter that has not been canvassed in the joint standing committee inquiry, and excuse my ignorance, because I do not know this: when a complaint is before the commission, is there a requirement for it remain confidential, or can one party break the confidence of that? I am thinking of cases where there may be a frivolous or vexatious complaint and if the complainant discloses the name of the respondent—and vice versa, for that matter—that could cause unnecessary distress.

Prof. Triggs: I do not believe this was discussed and I am grateful for the question. There is no binding legal obligation on the parties to maintain confidentiality. That reflects the fact that this is an entirely voluntary process. If the parties do not want to be part of it, they do not need to be. However, all conciliation processes really depend for their effectiveness upon confidentiality. In 99.9 per cent of cases—probably more than that—parties do not go into the public arena, but in rare cases they choose to put their argument in particular segments of the media. That is their privilege. They are entitled to do that if they choose to do so, but we strongly encourage parties not to do so, because the moment that one-sided allegations are made and reported in the media then you have pretty much lost any possibility of conciliation.

Senator XENOPHON: I am considering whether there ought to be a further amendment to the bill. You may want to take this on notice. What would the view of the commission be if there were a requirement that confidentiality be maintained up until the end of the conciliation stage, so that it would be prohibited for people to disclose the fact that a complaint had been made or who the complainant or respondent was? Sometimes simply being subject to a complaint, even if it is not meritorious—or particularly if it is not meritorious—could cause great distress to the respondent.

The answer to the honourable senator's question is as follows:

The Commission considers privacy and confidentiality to be a fundamental requirement 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.

As the Senator has noted, there may also be reputational risks for a person being identified as a complainant or a respondent to a complaint while it is before the Commission.

The Commission and its staff are bound by non-disclosure obligations in section 49 of the *Australian Human Rights Commission Act 1986* (Cth). These obligations prohibit the disclosure of information about the affairs of a person that staff of the Commission have acquired by reason of their position. However, these non-disclosure obligations do not extend to parties to complaints.

There is currently no obligation on parties to the Commission's processes not to disclose either the fact that a complaint has been made or the details of the complaint. Some parties do decide to publish the fact that a complaint has been made and the details of the complaint. In general, increased publicity in relation to a complaint tends to make it more difficult for the parties to achieve a conciliated outcome through the Commission's processes.

For this reason, the Commission's usual practice is to inform the parties that the documents the Commission passes between the parties, such as the complaint and any response to the complaint, are provided for the purposes of the Commission's investigation and conciliation function and that it is expected that parties will not publish or use the information apart from this purpose while the complaint is before the Commission.

The Commission considers that there is a potential benefit in the Senator's proposal that confidentiality be maintained up until the end of the conciliation stage.

The Commission has also recommended that proposed sections 46PKA(2) and 46PSA be removed from the Bill so that anything said or done during the course of the conciliation of a complaint is not admissible in any proceedings relating to the allegations.

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Senator Fawcett asked the following question at the hearing on 24 March 2017:

Senator FAWCETT: On notice, could you give the committee an indication of the level of consultation around the process reforms that occurred between the government and the department and the commission?

The answer to the honourable senator's question is as follows:

The following consultation between the Government, the Attorney-General's Department and the Commission occurred prior to the Bill being introduced into Parliament:

On 3 March 2017 at approximately 11.00am, staff of the Commission met with staff of the Attorney-General's Department to discuss recommendations relating to reforms to the Commission's process that were contained in the report of the Parliamentary Joint Committee on Human Rights (PJCHR) of its inquiry into *Freedom of Speech in Australia*.

On 3 March 2017 at approximately 1.00pm the President of the Commission and some of her staff met with the Attorney-General and staff from his office and his Department at Sydney Airport to discuss recommendations of the PJCHR relating to reforms to the Commission's process.

On 21 March 2017 at approximately 5.30pm, the President of the Commission and some of her staff had a video-conference with the Attorney-General and staff from his office and his Department. The Attorney-General notified the President that a Bill had been drafted.

On 21 March 2017 at approximately 9.30pm, the Attorney-General's Department provided the Commission with a draft copy of the Bill and the Explanatory Memorandum on a confidential basis.

On 22 March 2017 at approximately 10.00am, the President of the Commission and some of her staff had a telephone call with the Attorney-General and some of his staff and provided an initial response to the Bill.

On 22 March 2017 at approximately 4.50pm, the Attorney-General introduced the Bill into Parliament.

On 22 March 2017 at approximately 5.20pm, the President of the Commission wrote to the Attorney-General, with a copy to his Department, setting out in more detail the Commission's views on the proposed reforms to the Commission's process.